

TIME FOR REPUBLICAN PARTY TO STOP DELAYING ON CAMPAIGN FINANCE REFORM

(Ms. DELAURO asked and was given permission to address the House for 1 minute and to revise and extend her remarks.)

Ms. DELAURO. Mr. Speaker, the Republicans are up to their old tricks again, "Doolittle" and "DeLay." Despite his famous handshake with President Clinton in the summer of 1995, Speaker GINGRICH has done little to pass real campaign finance reform. In fact, what he has said is that we need more money in our political system. He supports the bill of the gentleman from California (Mr. DOOLITTLE) to remove what limits there already are in place on campaign contributions.

Meanwhile, the Republican leadership has delayed a vote on real reform in this House. They initially promised a full and fair vote in March. It is now May, and we are still waiting. Meanwhile, the Republican Whip, the gentleman from Texas (Mr. TOM DELAY), third ranking member in this body, he is leading the effort to kill real reform.

I think it is time for the Republican party to stop delaying and to please do something about campaign finance reform. Stop listening to the wealthy and to the special interests. Start listening to average working Americans in this country. Vote for real campaign finance reform. Vote for the bipartisan Meehan-Shays bill.

ANNOUNCEMENT OF PROCEDURES AND DEADLINE FOR PRINTING OF AMENDMENTS ON BUDGET RESOLUTION FOR FISCAL YEAR 1999

(Mr. SOLOMON asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. SOLOMON. Mr. Speaker, the Committee on Rules is planning to meet the week of June 1 to grant a rule which will limit the amendment process for consideration of the budget resolution for fiscal year 1999. The Committee on the Budget ordered the budget resolution reported last night and is expected to file its committee report sometime over the next few days.

Any Member wishing to offer an amendment should submit 55 copies and a brief explanation of the amendment by 2 o'clock on Tuesday, June 2, to the Committee on Rules in Room 312 of the Capitol.

As has been the common practice in recent years, the Committee on Rules strongly suggests that the Members wishing to offer amendments, that they offer those amendments as complete substitute amendments that keep the Federal budget in balance. I do not intend to put out a rule that is going to put on the floor a budget that is not in balance.

Members should also use the Office of Legislative Counsel and the Congress-

sional Budget Office to ensure that their amendments are properly drafted and scored and should check with the Office of the Parliamentarian to be certain their amendments comply with the rules of the House.

Mr. MOAKLEY. Mr. Speaker, will the gentleman yield?

Mr. SOLOMON. I yield to the gentleman from Massachusetts.

Mr. MOAKLEY. Mr. Speaker, it is my understanding that we are not going to have any votes until Wednesday at 5, and there will be very few Members back in the Chamber Tuesday. Could the gentleman from New York (Mr. SOLOMON) make that at 2 o'clock Wednesday instead of 2 o'clock Tuesday, because we do have an extra day, then?

Mr. SOLOMON. Mr. Speaker, the gentleman makes a point, but it is going to be difficult to make sure that the full Members of the House and the media and the public are going to be able to see those substitutes.

As the gentleman knows, because there is a Memorial Day recess and work period back home, there are no scheduled votes until 5 o'clock on Wednesday. It is just imperative that the gentleman and I, and the gentleman is the ranking member of that committee, that the gentleman and I be able to see those amendments for at least 24 hours.

Let me make a concession and move it up to, instead of 2 o'clock, to 5 o'clock on Tuesday. Our staffers are going to be here working all during next week.

Mr. MOAKLEY. Mr. Chairman, if the gentleman will yield further, as the gentleman well knows, most of the Members will not be back until Wednesday, because it is the Memorial Day weekend and they have other things in their district. So I would hope that just one more day would not make much difference as far as the media goes, or the gentleman's ability to look over the amendments, or my ability to look over the amendments. I think it would be fairer to those who will be spending all the time back in their districts.

Mr. SOLOMON. As the gentleman from Massachusetts (Mr. MOAKLEY) knows, when the gentleman was the chairman of the committee and I was the ranking member, I used to complain that we were not given enough notice to be able to look at what we were going to act on.

It is imperative that we put out the rule on Wednesday because of the timeliness of the budget, as the gentleman knows. It is important that the gentleman and I and our committee act on it Wednesday night, and to give them that extra day, the gentleman and I would not even have a chance to look through these voluminous budgets. So I am just doing what the gentleman has done in the past.

Mr. MOAKLEY. If the gentleman will continue to yield, Mr. Speaker, it is just as recent as few days ago he has

given us amendments 10 minutes before we are going to vote on them. If we have the capacity to digest them in that short period of time, I am sure the gentleman would have the same opportunity.

Mr. SOLOMON. The gentleman knows that the gentleman from New York (Mr. JERRY SOLOMON) has pledged to be more fair than the Democrats ever were to us, and I have lived up to that for 4 years now. We are going to continue to do that.

Mr. MOAKLEY. Is the gentleman saying that the Committee on Rules is going to meet on Wednesday to discuss the budget amendments?

Mr. SOLOMON. Yes. That is right.

Mr. MOAKLEY. We are going to meet on Wednesday?

Mr. SOLOMON. Yes, sir. We have to.

Mr. MOAKLEY. In that case, I withdraw my request.

Mr. SOLOMON. The gentleman now understands why he should have at least 24 hours to be prepared.

Mr. MOAKLEY. I am sorry, I thought we were not going to meet on this until Thursday. But if we are going to meet on it Wednesday, then we should do that.

Mr. SOLOMON. We have to meet on Wednesday because the bill has to be on the floor on Thursday, and it is the most important legislation to come before the body.

Mr. MOAKLEY. I understand. I thought the gentleman was not going to take it up until Thursday.

Mr. SOLOMON. The gentleman has always been so understanding, and he has not changed a bit.

Mr. MOAKLEY. Sometimes.

Mr. SOLOMON. I thank the gentleman.

PROVIDING FOR CONSIDERATION OF HOUSE RESOLUTION 432, SENSE OF HOUSE CONCERNING PRESIDENT'S ASSERTION OF EXECUTIVE PRIVILEGE, AND HOUSE RESOLUTION 433, CALLING UPON THE PRESIDENT TO URGE FULL COOPERATION BY FORMER POLITICAL APPOINTEES, FRIENDS, AND THEIR ASSOCIATES WITH CONGRESSIONAL INVESTIGATIONS

Mr. SOLOMON. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 436 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. RES. 436

*Resolved*, That upon the adoption of this resolution it shall be in order to consider in the House the resolution (H. Res. 432) expressing the sense of the House of Representatives concerning the President's assertions of executive privilege. The resolution shall be considered as read for amendment. The resolution shall be debatable for one hour equally divided and controlled by the Majority Leader or his designee and a Member opposed to the resolution. The previous question shall be considered as ordered on the resolution to final adoption without intervening motion.

SEC. 2. After disposition of or postponement of further proceedings on House Resolution 432, it shall be in order to consider in the House the resolution (H. Res. 433) calling upon the President of the United States to urge full cooperation by his former political appointees and friends and their associates with congressional investigations. The resolution shall be considered as read for amendment. The resolution shall be debatable for one hour equally divided and controlled by the Majority Leader or his designee and a Member opposed to the resolution. The previous question shall be considered as ordered on the resolution to final adoption without intervening motion.

The SPEAKER pro tempore (Mr. BONILLA). The gentleman from New York (Mr. SOLOMON) is recognized for 1 hour.

Mr. SOLOMON. Mr. Speaker, for purposes of debate only, I yield half our time to my good friend, the gentleman from Massachusetts (Mr. MOAKLEY), pending which I yield myself such time as I may consume. During consideration of the resolution, all time yielded is for purposes of debate only.

Mr. Speaker, House Resolution 436 is a rule providing for consideration of two House resolutions. The first of these is House Resolution 432, expressing the sense of the House of Representatives concerning the President's assertion of executive privilege introduced by the gentleman from Texas (Mr. DELAY), the Majority Whip.

Second is House Resolution 433, calling upon the President of the United States to urge full cooperation by his former political appointees and friends and their associates with congressional investigations. That resolution is introduced by myself.

Mr. Speaker, the rules provide that House Resolution 432 concerning executive privilege shall be debatable in the House for 1 hour, equally divided and controlled by the majority leader and his designee, and an opponent.

The rule further provides that House Resolution 433 relating to the cooperation of witnesses before congressional investigations shall be debatable in the House for 1 hour, equally divided and controlled by the majority leader and his designee and an opponent.

Mr. Speaker, over the last several days this House has undertaken an effort to broaden the discussions of ethics in the Nation's Capital from one of internal House committee procedures to criminal procedures generally, and the rule of law. Members on both sides of the aisle have been troubled by personal attacks, as I have.

We can take the personalities away and the efforts to engage in personalities on the floor, but the questions that trouble our constitutional system of government are not going to go away. Every day we are seeing more of it in the papers across the country.

Tuesday, we voted overwhelmingly, 402 to zero, to express that the House should immunize and should hear testimony from four witnesses whose testimony has been blocked by the minority of the Committee on Government Reform and Oversight. We have had sev-

eral hours of debate yesterday and votes on a number of amendments to the defense authorization bill expressing the House's position on transfers of sophisticated satellite technology in China.

Those votes passed 417 to 7, 414 to 4, 412 to 6, and 364 to 54, that was overwhelming bipartisan support, opposing the President's actions of turning over missile technology to a potential enemy of the United States that will, in the near future, have their weapons of mass destruction trained on the children of this Nation.

Mr. Speaker, the House should proceed to consider these two resolutions and fulfill our constitutional obligations to press for answers to the severe questions raised by this technology transfer to Communist China.

Mr. Speaker, the first resolution this rule allows the House to debate concerns the President's assertion of executive privilege.

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We should all pay attention. Many of us have been here for a long time, my good friend the gentleman from Massachusetts (Mr. MOAKLEY) even longer than I, and I have been here for two decades.

Mr. Speaker, the President has invoked executive privileges in three congressional inquiries and two court proceedings prior to his current assertions before a Washington, D.C. grand jury in a criminal investigation. Executive privilege, as Members are aware, is rarely invoked by Presidents, if ever invoked at all. It has only happened twice in the history of this Nation, once by a President named Nixon and now by a President named Clinton.

President Reagan's counsel has recently written that President Reagan insisted the White House would not assert executive privilege over any materials even in the controversial Iran Contra investigation. The Reagan White House staff honored that pledge. That information was turned over to this Congress. President Clinton's own counsel has advised a similar approach to executive privilege, but it would seem that the Clintons have not followed that advice. Mr. Speaker, something is wrong.

Former White House counsel Lloyd Cutler, if Members are back in their offices, I want them to listen to this, former White House counsel Lloyd Cutler, a very respected gentleman, wrote a special memorandum to the executive departments and agencies in 1994, stating that in circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.

Mr. Speaker, the case law is strongest in favor of a President's claim of executive privilege over matters relating to national security and diplomatic issues, but the law is skeptical of a

general claim of executive privilege. Courts typically must balance the assertion of executive privilege by a President with the public's right to know.

Mr. Speaker, press accounts have indicated that the President has asserted executive privilege before the independent counsel in regard to conversations with staff and with the First Lady over the appropriate political response to allegations of perjury and obstruction of justice in the White House. The media has further reported that a Federal judge has rejected this claim and an appeal is being contemplated by the White House. The decision itself is under seal. In addition, many prominent news organizations have filed briefs to make the proceedings regarding executive privilege public so that the American people can see for themselves.

Mr. Speaker, I think it is eminently reasonable to protect grand jury testimony and presume the innocence of the individuals impacted by this investigation. However, an assertion of executive privilege which has no relation to national security whatsoever, and which is the subject of a great debate in law schools and on the editorial pages around this country right today, should be discussed on the floor of this House.

Mr. Speaker, the second resolution this rule will allow the House to consider, my legislation, relates to the President's former political appointees and friends who have failed to cooperate with congressional investigations. Over 90 witnesses, Mr. Speaker, 90 witnesses in the campaign finance investigation have fled this country or have taken the Fifth Amendment privilege before the committee.

Mr. Speaker, this is a level of non-compliance that the highly regarded director of the FBI, Louis Freeh, who we all have great respect for, has compared to an organized crime case.

Mr. Speaker, that is just terrible.

Mr. Speaker, last year the House voted to empower the Committee on Government Reform and Oversight with additional procedural tools to enhance its ability to gather evidence at home and overseas. I put that out of the Committee on Rules. The House has spoken on one occasion and endorsed the importance of this inquiry by granting authorities beyond what is available in the House rules today.

Mr. Speaker, all Members should support the mechanisms needed to allow the truth to be aired in this scandal. We are talking about breaches of national security that affect the strategic interests and the future of this great democracy of ours.

The minority on the Committee on Government Reform and Oversight has opposed on two occasions the granting of immunity to four witnesses, which the Department of Justice has approved before the committee. Perhaps the minority will come to regret their two votes against immunity in the

coming weeks, especially when we see what has been taking place now on the front pages and in the editorials of this Nation across this country, when it looks like that we have literally sold this country down the drain by giving away the kind of missile technology, again, which is going to allow a potential enemy of the United States to train long range missiles of mass destruction against this country.

Press accounts on a daily basis are reporting that the Justice Department is investigating whether the White House decision to export commercial satellite technology to China was based on campaign contributions. We need to know, Mr. Speaker. If that is true, that is truly, truly outrageous.

Johnny Chung, we have all heard his name mentioned all across the headlines now for months, a Democrat fundraiser who pled guilty in the campaign finance probe in March, has reportedly told the Justice Department that he received \$300,000 from a senior executive in a State-run Chinese aerospace firm to give to the Democrat party. Chung then contributed approximately \$366,000 thousand to the Democratic National Committee for the 1996 election cycle.

Mr. Speaker, two of the witnesses whom the Democrats have blocked immunity for in the Committee on Government Reform and Oversight were coworkers of Johnny Chung. Think about that. They were coworkers of Johnny Chung.

Consideration, Mr. Speaker, of House Resolution 433 will give the House an opportunity to express its support for returning these individuals to the United States and obtaining the necessary testimony so that Americans can have some confidence that the United States foreign policy and security interests were not sold to the highest bidder. We need to debate that on the floor of this House.

When the number of unavailable witnesses in a legitimate congressional inquiry into the executive branch reaches the level of an organized crime probe, which is what Louis Freeh said, something is terribly wrong in the Nation's Capital and we need to get to the bottom of it.

Mr. Speaker, it is troubling that the highest level officials at the White House refuse to even confirm if a sweeping, precedent-setting assertion of executive privilege has been made. I believe that a conspiracy of silence has descended over this town, and it is time for the House to debate this issue. If Members believe that they have a right to know as constitutional officers of this body and the public has a right to know, then they should vote for this rule. If they want to have a discussion on the House floor of how personal ethics, the rule of law and the public interest intersect in this town, come over here and vote for this rule.

Mr. Speaker, I reserve the balance of my time.

Mr. MOAKLEY. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I thank my dear friend, my chairman, the gentleman from New York (Mr. SOLOMON), for yielding me the customary half hour.

Mr. Speaker, both of the resolutions we are considering here today were created as nothing more than an unfortunate form of political retaliation. Last Thursday the gentleman from New York (Mr. SOLOMON) announced we would be considering these resolutions because of the action of the Democratic House leadership. In case that statement was ambiguous, this Monday's Roll Call newspaper quoted a Republican leader as saying, "This is retaliation, this is war."

I do not think it could be any clearer, Mr. Speaker. These resolutions are intended to punish House Democrats for asserting their rights on the House floor. They are to attack the President because of the perceived refusal of his friends and employees to cooperate with the many congressional allegations and investigations.

Mr. Speaker, I do not think I need to remind anybody that retaliation is really not a very good reason for legislation. Improving our Nation's schools is a great reason for legislation. Cleaning up our air, cleaning up our water is a great reason for legislation. Creating jobs for American workers is a great reason for legislation. Punishing political opponents is not a good reason for legislation.

Mr. Speaker, that is exactly what my Republican colleagues are doing here today, under their own admission. Mr. Speaker, they are not doing it very well. Last Thursday the Committee on Rules was scheduled to meet at 3:00 for the defense authorization bill. At 3 minutes before 3:00 I got a call saying the Committee on Rules would be adding an emergency matter to the defense meeting.

Given the subject matter, Mr. Speaker, I think it is a stretch to call these partisan resolutions emergencies. I hope that last-minute additions of this nature do not become a regular practice of the committee. Up until now we have got great notice, we have got ample notice so that we are adequately prepared when we go into that committee room, but 3 minutes before the meeting we were given these resolutions.

And lest anyone gets too serious about these resolutions, I would remind my colleagues that they are simply resolutions expressing the opinion of the majority of the House. They carry no legislative weight, and I think at this time they are just a waste of time.

Given the enormous number of partisan investigations taking place in the House these days, and if anybody has to be reminded, there are over 40 investigations going on currently in the House of Representatives, taking up the time of 12 of the 20 standing committees. Given the hundreds of people who have been subpoenaed, it is no wonder a few of them have declined to

cooperate. I do not remember the victims of the Salem witchcraft trials running to be burned at the stake. The last time I looked, they had not changed the Fifth Amendment protection which grants a person the right to refuse to testify.

The other resolution dealing with executive privilege is so poorly written, I am not sure exactly what they are after. The resolution calls for all documents relating to the claims of executive privilege. Now, does that mean legal documents asserting the right to executive privilege, which are currently sealed in the courts, or does that mean documents dealing with the subject matter the President is privileged to keep to himself?

Mr. Speaker, as my Republican colleagues know, it does not matter because as legally binding documents, these resolutions are not worth the paper they are written on. To make matters worse, they are being brought up under a closed rule which not even allows the Democrats a motion to recommit.

Now, if we had brought such a rule 3 minutes before the committee scheduled to meet, my Republican colleague, my able Republican colleague would be 8 feet off the floor screaming and hollering, what has happened to our democratic process? But now, Mr. Speaker, they are in the majority so they are somewhat less indignant at the loss of minority rights than they were just a few years ago.

So I urge my colleagues to oppose this rule and these partisan resolutions. I feel the American people are just sick and tired of their representatives using the power of the Congress to attack Members of the other party.

Mr. Speaker, my dear friend and colleague said that President Reagan never invoked executive privilege. I will include in the RECORD the CRS study on the history of executive privilege where it shows President Reagan used the executive privilege three times and President Bush also used it one time.

Mr. Speaker, I include for the RECORD the following:

FACT SHEET ON PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: BACKGROUND, HISTORY, CASE LAW, RECENT INVOCATIONS, AND PROCESS FOR CLAIMS—MARCH 27, 1998

#### I. INTRODUCTION

Within the last year the Supreme Court and federal appeals courts have ruled upon presidential claims of the executive privilege (In re Sealed Case) attorney-client and work product privileges (In re Grand Jury Subpoena, In re Sealed Case), and temporary immunity from civil suit for unofficial acts (Clinton v. Jones). While none of the rulings directly involved congressional demands for testimony or documents, their rationales potentially impact the conduct of current and future committee investigations. This fact sheet outlines the background of the development of presidential executive privilege, including the nature of the conflicting interests of Congress and the Executive, the role of the courts and the existing case law, and the history of recent presidential invocations of the privilege and the process of such invocations.

II. CONGRESSIONAL CHALLENGES TO  
PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE

A. *Understanding the nature of interbranch conflict*

Congressional challenges to presidential claims of executive privilege do not represent a breakdown in our scheme of separated powers but rather are part of the dynamic of conflict built into the constitutional scheme to achieve workable accommodations which will preclude the exercise of arbitrary power. The framers, rather than attempting to define and allocate all governmental power in minute detail, relied on the expectation that were conflicts in scope of authority arose between the political branches, a spirit of a mutual accommodation would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Thus, the coordinate branches are not to be seen as existing in an exclusively adversarial relationship to one another when a conflict in authority arises. Instead, each branch is enjoined to take cognizance of the implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. The essence of that dynamic was captured by Mr. Justice Jackson in the *Steel Seizure Case*:

"While the Constitution diffuses power the better to secure liberty, it also contemplates that the practices will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but independence, autonomy but reciprocity."

Despite the notoriety of Watergate and more recent clashes over invocation of the privilege, history indicates that such confrontations are rare and that the implicit constitutional injunction to accommodate has been honored in almost all instances of notoriety.

B. *Conflicting interests of Congress and the President and their supporting constitutional powers*

(1) Congress needs information—

(a) for the formulation and enactment of legislation;

(b) to ensure executive compliance with legislative intent;

(c) to inform the public;

(d) to evaluate program performance;

(e) to protect the integrity, dignity, reputation and prerogatives of the institutions;

(f) to investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse, waste, fraud, corruption and unethical conduct; and

(g) to protect individual rights and liberties.

(2) The President needs to withhold information—

(a) to meet the challenges and requirements of modern national security, military and diplomatic policy decisionmaking which often demand rapid, decisive and secret decisions and responses to protect the integrity of the decisional process;

(b) to secure accurate, frank and robust advice and information from subordinates, particularly from close advisors, in order to perform his constitutional functions;

(c) to protect the integrity of its law enforcement function which would be undermined by revelation of prosecution strategies, legal analysis, potential witnesses, and settlement considerations; and

(d) to protect presidential privacy.

(3) To gain access to information congressional committees may—

(a) initiate formal investigations;

(b) issue subpoenas to compel production of documents and testimony;

(c) find an executive officer in contempt and seek a criminal indictment of the official;

(d) threaten and withhold appropriations for executive programs;

(e) fail to act on presidential legislative initiatives and on nominations;

(f) call for the appointment of an independent counsel;

(g) file a civil suit to enforce compliance with subpoenas; and

(h) threaten and seek impeachment of the official refusing to comply.

(4) The President may resist by—

(a) delaying compliance until the congressional need is ended;

(b) order subpoenaed officers to claim privilege;

(c) direct the United States attorney not to bring a contempt before a grand jury;

(d) challenge an indictment on appropriate privilege grounds;

(e) negotiate a disclosure that does the least damage to executive interests; and

(f) utilize the "bully pulpit" of the presidency to convince the public that Congress is overreaching.

C. *The role of the courts*

The courts have been exceedingly reluctant to become involved in resolving the merits of presidential privilege claims against information demands of the coordinate branches. The Supreme Court has recognized the constitutional basis for a qualified claim of privilege for presidential communications but in that instance held that the privilege was outweighed by the need of the judiciary for the information in a criminal prosecution. Most recently, a federal appeals court made the most extensive examination to date of the nature, scope and operation of the privilege, determining how far down the line of command from the President the presidential privilege extends, and what kind of demonstration of need must be shown to justify release of materials that qualify for such a privilege.

(1) *United States v. Reynolds*, 345 U.S. 1 (1952) (recognition of absolute privilege to withhold national security matters from a private party in a civil case).

(2) *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (presumptive privilege for confidential presidential conversations overcome by showing a need for evidence by grand jury).

(3) *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (upholding presidential claim of privilege because committee had failed to demonstrate that sought-after information was "critical" to its function, emphasizing that the committee's investigation substantially overlapped that of the House impeachment committee which already has access to the subject tapes).

(4) *United States v. Nixon*, 418 U.S. 683 (1974) (recognizing constitutional basis of a qualified claim of privilege but holding that it was outweighed by need of judiciary for the information in a criminal prosecution).

(5) *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976); 567 F.2d 121 (D.C. Cir. 1977 (court twice declines to decide merits, ordering further attempts at resolution by the parties).

(6) *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983) (dismissing suit to enjoin certification to U.S. Attorney of contempt of Congress citation).

(7) *In re Sealed Case*, 116 F.3d 550 (D.C. Cir. 1997) (holding that presidential communications privilege extended to communications authored by or solicited and received by presidential advisers which involved information regarding governmental operations that ultimately call for direct decision-making by the President, but that the independent counsel had overcome the privilege by a demonstration that each discrete group of subpoenaed materials likely contained important evidence, and that the evidence was not available with due diligence elsewhere).

D. *History of and process for Presidential invocations of privilege*

(1) Early Confrontations

(a) Washington

(b) Adams

(c) Jefferson

(d) Jackson

(2) Expansion of the Privilege

(a) Truman

(b) Eisenhower

(3) Watergate and Post-Watergate Confrontations

(a) Nixon

i. Assertion of privilege at direction of President by Attorney General Mitchell to withhold FBI reports (1970)

ii. Assertion of privileges by Secretary of State Roger at direction of President to withhold information on military assistance programs (1971)

iii. Claim of privilege asserted to prevent White House advisor from testifying on IT&T settlement during consideration of Kleindienst nomination for Attorney General (1972)

iv. Claim of privilege as Watergate tapes (1973)

(b) Ford and Carter

i. President Ford directed Secretary of State Kissinger to withhold documents relating to State Department recommendations to National Security Council to conduct covert activities (1975)

ii. President Carter directed Energy Secretary Duncan to claim privilege for documents relating to development and implementation of a policy to impose a petroleum import fees (1980)

(c) Reagan

i. James Watt/Canadian Land Leases (1981-1982)

ii. Ann Burford/EPA Superfund Enforcement (1982-1983)

William Rehnquist nomination/OLC Memos (1986)

(d) Bush

i. President Bush ordered Defense Secretary Cheney not to comply with a subpoena for a document related to a subcommittee's investigation of cost overruns in a Navy aircraft program (1991)

(e) Clinton

i. Kennedy Notes (1995) (executive privilege initially raised but never formally asserted)

ii. White House Counsel Jack Quinn/Travelgate (1996)

iii. FBI-DEA Drug Enforcement Memo (1996)

iv. Haiti/Political Assassinations Documents (1996)

v. *In re grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), cert denied, 117 S.Ct. 2482 (1997) (executive privilege claimed and then withdrawn at district court. Appeal court rejected applicability of common interest doctrine to communications with White House counsel's office attorneys and private attorneys for the First Lady)

vi. *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (Espy case) (executive privilege asserted but overcome with respect to documents revealing false statements)

(4) The Process for Presidential Invocations of Privilege

(a) Eisenhower—Broad authority given to Executive Branch officers and employees to claim presidential privilege in the face of congressional information demands.

(b) Kennedy and Johnson—Informal agreements with Congress that privilege would only be invoked by the President himself.

(c) Nixon—Established first formal procedure for invocation of privilege: agency head advises Attorney General of potential claim. If both agree on need to invoke privilege, the Counsel to the President is informed. If President approves, the agency head informs Congress.

(d) Reagan—Memorandum to all department and agency heads of November 4, 1982. No invocation without presidential authorization. Pinpoints national security, deliberative communications that form part of the decisionmaking process, and other information important to discharge of Executive Branch constitutional responsibilities, as subject to privilege. If the head of an agency, with the advise of agency counsel, decides that a substantial question is raised by a congressional demand, the Attorney General, through the Office of Legal Counsel, and the White House Counsel's Office, to be promptly notified and consulted. If one or more of the presidential advisors deemed the issue substantial, the President is informed and decides and the decision is communicated to by the agency head to the Congress.

(e) Clinton—Memorandum of September 28, 1994, from White House Counsel Lloyd Cutler to all department and agency general counsels modified the Reagan policy by requiring the agency head to directly notify the White House Counsel of any congressional request for "any document created in the White House . . . or in a department or agency, that contains deliberations of, or advice to or from, the White House" which may raise privilege issues. The White House Counsel is to seek an accommodation and if that does not succeed, he is to consult of the Attorney General to determine whether to recommend invocation of privilege to the President. The President then determines whether to claim privilege, which is then communicated to the Congress by the White House Counsel.

### III. IMPLICATIONS OF IN RE SEALED CASE FOR CONGRESSIONAL INVESTIGATIONS

A. The court distinguished between a "presidential communications privilege" which is constitutionally based and applies only to direct presidential decisionmaking and which may be overcome by a substantial showing that the subpoenaed materials contain important evidence, and that the evidence is not available elsewhere; and "the deliberative process privilege," which is a common law privilege that applies to executive officials generally and whose negation by courts or congressional committees is subject to less demanding scrutiny, and "disappears altogether when there is any reason to believe government misconduct occurred."

(1) Court's limitation of communications privilege to "direct presidential decision making," and utilizing President's need for information to exercise his appointment and removal power as its example in the decision, may indicated that only core presidential powers are within the protection of the privilege. thus decisions vested in an agency by Congress, such as rulemaking, environmental policy, or procurement, which do not implicate foreign affairs, military or national security functions would not be covered.

(2) Court's recognition of the deliberative process privilege as a common law privilege when claimed by executive department and agency official's, which is easily overcome, and which "disappears" upon the reasonable belief by an investigating body that government misconduct has occurred, may severely limit the common law claims of agencies against congressional investigative demands. A demonstration of need of a jurisdictional committee would appear to be sufficient, and a plausible showing of fraud waste, abuse or maladministration would be conclusive. Moreover, the diminished status of common law claims would certainly apply to others, such as the attorney-client and work product privileges.

(3) The *In re Sealed Case* Court's intent was to limit how far down the chain of com-

mand the cloak of the President's communication privilege could extend. However, the case involved only White House officers and employees tasked (or sub-tasked) to advise the President about the Espy matter. It did not involve department or agency officers or employees. The question left open is whether, and how far, the privilege would extend if the President seeks the advice of a cabinet member. If the rationale of the court is in fact to limit the breath of the privilege, then much will depend on how future courts construe the term "direct presidential decisionmaking." If it is limited to so-called "core" presidential prerogatives decisions which Congress has committed by law solely to the President, it will not serve to cloak the assistance an agency head gets from his subordinates if it involves a non-core function. Example: communications between the Environmental Protection Agency (EPA) and the White House with respect to the final shape of its Clear Air Act rule. Environmental rulemaking is committed by law to the Administrator of EPA and thus there is no "direct" decisionmaking required by the President.

(4) The *In re Sealed Case* court expressly reserved the question whether the same balancing test (substantial showing that materials contain important evidence and evidence is not available with due diligence elsewhere) applied to determine if a grand jury subpoena overcame privilege claim would also apply to congressional compulsory process. It is significant, however, that the court found that independent counsel had met his burden and ordered production of all withheld documents that contained evidence of false statements.

Mr. Speaker, I reserve the balance of my time.

Mr. SOLOMON. Mr. Speaker, I yield myself such time as I may consume.

The gentleman has just brought up President Reagan. Of course, everyone knows he was my hero and what a great President he was, and we can all be so proud of what he accomplished on a bipartisan basis, working with a Democrat-controlled Congress and vetoing fewer bills than any other President I remember, because he taught me and others the art of compromise, the fact you could not have it all your own way and that to accomplish something you had to work together. That was Ronald Reagan.

Here is a letter that appeared on May 4, 1998 in the Washington Post, a letter to the editor.

#### PRESIDENT REAGAN DID NOT INVOKE EXECUTIVE PRIVILEGE

In the April 5 Outlook section, Stephen E. Ambrose wrote that in the Iran-contra case the Reagan administration "dared" to withhold evidence from congressional committees and/or a special prosecutor and to invoke the doctrine of executive privilege. His statement is wrong.

In November 1986, when the Reagan White House voluntarily disclosed the so-called diversion of funds from the Iranian arms sales to support the Nicaraguan Democratic Resistance, President Reagan called for the appointment of an independent counsel, pledged cooperation with the independent counsel and congressional committees, and stated that he would not assert the attorney-client privilege and executive privilege with respect to the Iran-contra matter. The Reagan White House honored that pledge.

The only controversy I recall, as White House counsel from March 1987 through the end of the Reagan administration, was that

the White House initially rejected suggestions that the select committees be provided a "computer dump" of all electronic mail generated by certain former senior National Security Council officials, whether or not the electronic messages were relevant to the investigation. The committees' computer consultant believed that such a "dump" might retrieve electronic mail previously deleted. That controversy was resolved by the Reagan White House's directing its computer consultant to create a program to retrieve any deleted electronic mail generated by those NSC officials. The relevant material produced by that search was produced to Congress and to the independent counsel.

I also am unaware of any serious suggestion that the Reagan White House "dared" to withhold evidence from congressional committees or the independent counsel. When, during the 1989 criminal trial of Oliver North, seven documents were introduced that allegedly had not been produced in 1987 to the congressional committees, this matter was investigated by both Congress and the independent counsel. The simple explanations were human error (one NSC file with three relevant documents inadvertently was not searched in 1987, and three other documents apparently were overlooked by FBI agents working for the independent counsel who searched hundreds of sensitive NSC files), confusion (the White House had a signed receipt for one document that Congress could not find two years later) and new searches had yielded new material (Mr. North obtained discovery of executive branch documents broader in scope than that agreed to by Congress and the independent counsel which required White House files to be searched yet again after the congressional investigation had ended).

The far more important points are (1) that the Reagan White House never asserted executive privilege and voluntarily produced to Congress and to the independent counsel many documents that were far more interesting and potentially damaging to President Reagan than the seven documents introduced at the North trial and (2) that none of those seven documents challenged the president's repeated assertion that he was unaware of the diversion of funds from the Iranian arms sales to the Nicaraguan Democratic Resistance.

ARTHUR B. CULVAHOUSE, Jr.,  
Alexandria.

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"President Reagan did not invoke executive privilege." Goes on to site that, "In November of 1986, when the Reagan White House voluntarily disclosed the so-called diversions of funds from the Iranian arms sales to support the Nicaraguan democratic resistance," which by the way we should have been supporting because we stopped communism dead in its tracks in this hemisphere, "to support the Nicaraguan democratic resistance, President Reagan called for the appointment of an independent counsel himself, pledged cooperation with the independent counsel and congressional committees, and stated that he would not assert the attorney-client privilege and executive privilege with respect to the Iran Contra," and I will supply that, Mr. Speaker, for the RECORD.

The gentleman has gone on at length to say that he does not know what we are after. Well, let me tell the gentleman that what we are after, and

first of all, let us say who we are, we are the American people, the American people want the truth. The bill he is referring to, the executive privilege bill, let me just go back and repeat something I said in my opening remarks.

Lloyd N. Cutler, who was special counsel to President Carter, and one of the most respected lawyers in this town, in a memorandum to the general counsels in 1994 of all executive departments and agencies wrote, "In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege either in judicial proceedings or in congressional investigations and hearings."

Now, that is one of the whereas's. Look at the next whereas. It says, "Whereas President Clinton is the first President since President Nixon and the second in the history of the United States to withhold information under claims of executive privilege," and it goes on.

Now, the gentleman has said he is not sure what we are after. Let me just read what we are after in the resolve of this legislation. It says: "Resolved, that it is the sense of this Congress." And the gentleman is right, it is only a sense of Congress. Perhaps we should bring something that has more teeth to it, but this is a sense of Congress, meaning this is how this Congress feels.

"It is the sense of the House of Representatives that in the interest of full disclosure, consistent with principles of openness in government operations, all records or documents, including legal memoranda, briefs and motions relating to any claims of executive privilege asserted by the President, should be immediately made publicly available."

Now, my good friend the gentleman from Massachusetts (Mr. MOAKLEY) is saying we cannot do that, that the President has the right to keep that closed. Yes, he does. But is he not the President of the United States of America? What has he to hide? Why can he not just come out here, come into this well, as a matter of fact, and tell the American people? Instead, all he says is, well, there is no evidence. He did not say he did not do this or he did not do that. He simply says there is no evidence that I did this or that.

So I do not know if we should get into this until we really get into the debate on the resolution, but the truth of the matter is we should bring this to the floor, and we should have an intelligent, honest and sincere debate, without getting upset with each other about getting the truth out on this issue.

Mr. DELAY. Mr. Speaker, will the gentleman yield?

Mr. SOLOMON. I yield to the gentleman from Texas, the majority whip and sponsor of the executive privilege legislation.

Mr. DELAY. Mr. Speaker, I appreciate the chairman yielding, and I ran

up here to answer the question why we are doing this.

In my mind, and from my perspective, because I have one of the resolutions in this rule, the reason we are doing this is this has been 4½, almost 5 years; 4½, almost 5 years of the American people not being able to get to the truth. And the reason they have not been able to get to the truth is that the President of the United States has used executive privilege. He has hidden behind his lawyers, he has hidden behind the courts, he has hidden behind hiding documents, documents are slow to come, they are redacted when they come, time and time again.

We know what the strategy here is, and the strategy is to get past the next election. And now we find, if we look at what has happened in the other body and what has happened in this body, some in the party on the other side of the aisle are participating in this process of dragging their feet, using procedures to hide behind, to make sure that the American people do not get to the truth.

It is time. It is about time that this House starts debating and looking at what has been going on for 4½ years, and that is the reason that we brought this rule to the floor, and that is the reason that I want to present my resolution to the body.

Mr. SOLOMON. Mr. Speaker, I reserve the balance of my time.

Mr. MOAKLEY. Mr. Speaker, I yield myself such time as I may consume, and I thank my dear friend, the majority whip, for the explanation, but all I am doing is restating what appeared in Roll Call that said the Republicans said this was retaliation for the House Democrats' action on the floor and this is war.

Now, my dear friend from New York, and he is my dear friend, brought up President Reagan first. I did not bring him up. And he may quote from the Washington Post saying that President Reagan never exerted executive privilege, but I think the Congressional Research Service, who did the study on it, is much more authority than The Washington Post, and it cites three separate and distinct times that the President exerted executive privilege.

And I say this because I know the gentleman from New York reveres President Reagan as an idol. And I just wanted to show him that if President Reagan thought it was proper to use executive privilege, then other Presidents probably followed his role.

Mr. Speaker, I yield 5 minutes to the gentlewoman from Connecticut (Ms. DELAURO).

Ms. DELAURO. Mr. Speaker, I rise to congratulate my Republican colleagues on the speed with which they have brought these two resolutions to the floor of the House. Clearly, investigations of wrongdoing are serious matters and ones which this House ought to consider, to be very serious about, to debate thoroughly, and no one questions that. No one questions that in

this body because it, in fact, is our responsibility as public officials.

Let me just mention to my colleagues that there are a number of issues, serious issues, which the Republican leadership in this House has stalled on, refused to bring to this floor. Now, as we are prepared to recess, to go off for the Memorial Day holiday, and we will leave here tomorrow afternoon, I join with the American people, with Americans across this country in wondering and conjecturing why this House has not addressed and voted on the critical issue of campaign finance reform.

The chairman of the Committee on Rules has cited various transgressions of campaign financing. If that is the case, why does this body not have the time to vote to fix up a broken-down campaign finance system? If we are genuine about wanting to reform that system and to prevent transgressions, then we would be voting on that issue today.

Why does the Republican leadership not bring up the Patient Bill of Rights to this floor with equal speed? Millions of Americans are crying out for protection from unscrupulous health insurance companies, and every single day patients are denied, they are denied, the information and the health care that they have paid their insurance companies to give out to them.

What the American people support is congressional action to protect the doctor's ability to make medical decisions along with patients without interference from insurance companies, bureaucrats and accountants. Why has that bill not been brought to this House when there is tremendous bipartisan support for that legislation in this body? That is what we should be voting on today.

We have other health issues to debate. My Breast Cancer Patient Protection Act has 218 votes, enough to pass this House. This would say that women cannot be treated as outpatients for a mastectomy. Women today in this country are going home less than 24 hours after a mastectomy, with drainage tubes, groggy from anesthesia. We have the votes in this House to pass that bill, and they refuse to allow it to be brought to the floor. That is what we should be passing today in this body.

Why are we not doing something about child care legislation so that working families today will have the opportunity to go to work but to feel that they have affordable, safe child care in which their kids can thrive and be ready for the future?

Why have we not done anything about education and passing a modernization bill that says that what we are going to do is to make class sizes smaller; have better and tougher standards? Why can we not have education legislation in this House that, in fact, says let us reduce the size of our classes? Let us make it a better atmosphere, with tougher standards for more

opportunity and a better environment for our kids to learn? That is what we should be debating in this House today. That is what we should be passing on. That is what parents are concerned about, and rightly so.

And, in fact, why are we not debating in this House tobacco legislation? They are doing that in the other body today. Why do we not want to prevent underage kids from being able to smoke and a tobacco industry that has targeted 12 years old? An R. J. Reynolds report in 1984 says that 12 years old are replacement smokers. They are the new revenue stream.

Three thousand of our kids take up smoking every single day; 1,000 of them will die from a tobacco-related illness. That is what this body ought to be debating, is how we prevent our children from smoking and how we prevent the tobacco industry from targeting our young people. That is what our obligation is. That is what our responsibility is.

But this House is too busy. This House is too busy to consider all of this legislation. Let me just say that these resolutions have been brought up in an instant. That is the prerogative of the majority in this body, to bring up legislation, to schedule it, to get it passed. The majority in this body has decided to bring up an investigation.

And we should investigate. Again, I said at the outset no one questions our need to investigate. But the American people are crying out for a Congress, for a House of Representatives that says do something about my living standard, do something about my ability to get my kids to school, do something about my health insurance and my retirement security, do something about preventing my kids from using tobacco and illness and potentially death. That is what our obligation is here today. We should take it seriously and be true public servants.

Mr. SOLOMON. Mr. Speaker, I yield myself such time as I may consume, and I will try to expedite matters, because I know there are some church services that are going to be starting soon.

Before yielding time to the majority whip, I would like to say that I wish the same people who come to this floor and criticize tobacco would at the same time take this floor in outrage, in outrage, over the illegal use of marijuana and other drugs that are literally killing, killing our young children today. Think about that, folks, because that is ten times more important than tobacco.

The gentlewoman from Connecticut just spoke about campaign finance transgressions that we are bringing up, and, yes, we are bringing it up. We will be debating today campaign finance reform on this floor and for several days to come, and it will be the fairest and most comprehensive debate ever held on this floor on campaign finance reform or probably anything else. But before we start debating on campaign fi-

nance reform, we want to find out why existing campaign laws have been criminally broken.

Should we not wonder why these existing laws have been broken? That is what this debate is all about today.

Mr. Speaker, I yield what time he may consume to the gentleman from Texas (Mr. DELAY), the majority whip.

Mr. DELAY. Mr. Speaker, let me just say, in evaluating what we just witnessed from the gentlewoman from Connecticut, that I appreciate her passion for the issues that she thinks are important that we should bring to the floor.

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And we will carry out our obligations. Our committees are working. They are putting out legislation. We marked up a budget just this week. We will have the budget on the floor in a couple of weeks. Our appropriations process is working. The House is doing the people's business.

But what we are seeing by what we just witnessed was an effort, a concerted effort, by Democrats of this House to change the subject. They do not want to talk about this subject. They will do anything to change the subject. They are very upset that we are bringing this to the floor and saying, what is the reason for bringing this to the floor?

I say to my good friend, and I do have the utmost respect for the ranking member of the Committee on Rules, that when he cited that President Reagan invoked executive privilege three times, he is right, but mostly for national security reasons. But what he did not invoke executive privilege for was to withhold information under claims of executive privilege from a grand jury investigating allegations of personal wrongdoing and possible crimes in the White House. That is what we are talking about here.

Another reason we want to bring this resolution to the floor, and I hope Members will vote for the rule, is that the President is hiding behind the courts, as I said earlier, and he knows very well that the courts are not going to uphold his claim of executive privilege to withhold information of personal wrongdoing. But if he engages in enough appeals process, we might get past November's election and he will think he will be home free because he will have only 2 years left of his term.

But we want the next court that hears the appeal of the President's executive privilege claim to know how the people's House feel about executive privilege, and that is the reason I am bringing my resolution.

The next court could be the Court of Appeals or the Supreme Court. But they ought to know how the people's House feels about a President that invokes executive privilege for himself, the First Lady and his staff in order to withhold information from a grand jury investigating allegations of personal wrongdoing and possible crimes in the White House.

Mr. SOLOMON. Mr. Speaker, I yield myself such time as I may consume.

I would say to my good friend, there are church services starting. We need to determine whether or not there is going to be a vote. So I will not entertain any other speakers besides myself to briefly close, if the gentleman would like to yield back his time.

Mr. MOAKLEY. Mr. Speaker, I yield myself such time as I may consume to make one statement.

My dear friend, the Majority Whip, said that President Reagan used executive privilege because of national defense things. Well, the three occasions I have, and maybe the gentleman from Texas (Mr. DELAY) has others, but one time he used it because of James Watts' connection with the Canadian land leases, which is not national defense. Another one was with superfund enforcement, which was not national security. And the other one was with the William Rehnquist nomination.

Maybe he did use some other national security, but these were the three I was referring to.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. SOLOMON. Mr. Speaker, I yield myself the balance of the time.

Let me again just say that the rule we are debating here will bring to the floor in a few minutes the DeLay resolution, which urges the President to immediately make public any claims of executive privilege and documentation or records pertaining to them so that the American people can know.

My own resolution will follow that, which urges the President that he should use all legal means to compel all people who left the country or have taken the fifth, many of them are his associates or friends or friends of friends, to return to this country and to honestly come forth and let the American people know what is going on.

Mr. Speaker, I yield back the balance of my time, and I move the previous question on the resolution.

The previous question was ordered.

The resolution was agreed to.

A motion to reconsider was laid on the table.

#### SENSE OF HOUSE CONCERNING PRESIDENT'S ASSERTIONS OF EXECUTIVE PRIVILEGE

Mr. ARMEY. Mr. Speaker, pursuant to House resolution 436, I call up the resolution (H. Res. 432) expressing the sense of the House of Representatives concerning the President's assertions of executive order, and I ask for its immediate consideration.

The Clerk read the title of the resolution.

The text of House Resolution 432 is as follows:

#### H. RES 432

Whereas a unanimous Supreme Court held in *United States v. Nixon* that "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets,