

Executive Privilege: The Bush Record and Legacy

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President George W. Bush has adopted an expansive view of presidential powers that has had a profound impact on the nation's governing system. In the area of government secrecy Bush has used executive privilege to withhold information from Congress, the courts, and the public under the guise of protecting the deliberative process. This article describes and analyzes the major executive privilege controversies during President Bush's administration. It looks also at a number of lesser battles and threats of executive privilege and provides an overall assessment of the Bush presidency and its implications for future presidents.

President George W. Bush has engaged in a number of battles over executive privilege—the constitutional principle that recognizes the right of presidents and high-level staff to withhold information from Congress, the courts, and ultimately the public. Presidents going back to the earliest years of the republic have asserted the right to conceal various forms of information. The phrase “executive privilege” itself was never used by any presidential administration until the 1950s, but the same power effectively has existed since the Washington administration.

Executive privilege became highly contentious during the Richard Nixon presidency primarily because of the Watergate scandal. Nixon's efforts to use the privilege to conceal evidence of White House crimes fueled a negative perception of that presidential power. Executive privilege seemed forever linked to Watergate and the abuse of presidential power. As a consequence Nixon's immediate successors were reluctant to make secrecy claims. Presidents Gerald Ford and Jimmy Carter generally avoided using executive privilege as did Presidents Ronald Reagan and George H.W. Bush. It was not until the presidency of Bill Clinton that a post-Watergate administration showed little or no reluctance in claiming executive privilege. The trouble was, Clinton's best-known use of that power was in a personal scandal that did not provide for the type of circumstance to create a favorable view of executive privilege.

President Bush has adopted a very expansive view of presidential powers. Many attribute his aggressive use of his powers to the tragedy of September 11, 2001 and to the subsequent War on Terror (Crotty 2003; Yoo 2005; Suskind 2006). Advocates of Bush's broad exercises of authority

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maintain that his actions were driven by necessity. Nonetheless, Bush's efforts to enlarge the powers of the presidency pre-dated September 11, 2001, and he clearly had an agenda to regain what he considered lost or declining powers of the presidency. Given this context, the president put aside conciliation and compromise in favor of pushing battles to the brink in order to win favorable outcomes for the executive branch whether Democrats or Republicans controlled Congress. This approach has done little to reestablish the stature of executive privilege, and it has probably done further harm to the future standing of this principle.

In this essay we describe and analyze the major executive privilege controversies during the George W. Bush presidency. These incidents range from the White House refusal to disclose decades old DOJ material to withholding of testimony and documents regarding the firing of several U.S. attorneys. Although there have been a number of lesser battles and threats of executive privilege, the controversies addressed here offer a comprehensive overview of the Bush administration's major uses of this power. We conclude with an assessment of the implications of the Bush presidency and the continued use of executive privilege.

Department of Justice Documents and Congressional Oversight

On December 12, 2001, President Bush made his first formal claim of executive privilege in response to a congressional subpoena for prosecutorial records from the Department of Justice (DOJ). The House Government Reform Committee, then chaired by Representative Dan Burton, was investigating two separate matters that concerned DOJ decision making: First, the decision by former Attorney General Janet Reno, who refused to appoint an independent counsel to investigate allegations of campaign finance abuses in the 1996 Clinton-Gore campaign; second, allegations of FBI corruption in its Boston office handling of organized crime in the 1960s and 1970s. The committee stated that it was not requesting DOJ documents or other materials pertaining to any ongoing criminal investigations.

At the core of this battle was a dispute over whether an administration could withhold documents that involve prosecutorial matters, even if those matters are officially closed. Burton and other members of the committee challenged the Bush administration's effort to expand the scope of its authority to withhold information from Congress by refusing documents from terminated DOJ investigations. They were also troubled with the DOJ decision to declare that the unfinished investigation of the 1996 campaign finance controversy would be closed. Burton penned a strongly worded letter to Attorney General John Ashcroft protesting the administration's "inflexible adherence to the position" that all deliberative materials from the DOJ

be routinely withheld from Congress. Burton said that the administration had not made a valid claim of executive privilege and therefore had no right to withhold the documents (Burton 2001a).

White House Counsel Alberto R. Gonzales recommended that the president needed to assert executive privilege in response to any congressional subpoena for the documents or testimony from Ashcroft. The committee subpoenaed the documents and called Ashcroft to appear at a hearing on September 13, 2001. Because of the terrorist attacks two days before the scheduled hearing, Ashcroft's appearance was delayed. A new hearing was scheduled for December 13, 2001. Bush instructed Attorney General Ashcroft not to comply with the congressional request for any deliberative documents from DOJ (Bush 2001a, 1783).

At the hearing (Ashcroft was not present), the Department of Justice Criminal Division Chief of Staff issued the administration's statement before the committee which claimed that revealing information about DOJ investigations would have a "chilling effect" on Department deliberations in the future. Nonetheless, during the hearing the witness, Michael Horowitz, allowed that although the administration had adopted the policy that Congress should never receive access to deliberative documents, in the future the DOJ could conduct a case-by-case analysis of the validity of congressional requests for such documents (U.S. House 2001a). This statement indicated for the first time that there was some flexibility on the administration's part with regard to the principle of withholding deliberative materials.

DOJ followed with a letter to Burton that emphasized the president's assertion of executive privilege over the subpoenaed documents and expressed a desire to reach some accommodation. Assistant Attorney General Daniel Bryant announced the unwillingness of the DOJ to release certain memoranda that pertained to former Attorney General Janet Reno's decision not to appoint a Special Counsel to investigate allegations of campaign improprieties. Regarding the investigation of allegations of FBI corruption, he expressed DOJ's willingness to "work together" with the committee to provide "additional information without compromising the principles maintained by the executive branch" (Bryant 2001). Burton responded that this offer was meaningless because ultimately the administration remained unwilling to allow the committee to review the most crucial documents (Burton 2001b). Gonzales followed that the administration did not have a "bright-line policy" of withholding all deliberative documents from Congress. Yet he asserted that "the Executive Branch has traditionally protected those highly sensitive deliberative documents against public and congressional disclosure," a characterization that Burton strongly rejected (Gonzales 2001a; Burton 2001c).

It seems puzzling that President Bush took his first executive privilege stand over materials concerning closed DOJ investigations if one does not keep in mind that he entered office intending to regain the lost ground of executive privilege after the years of Clinton scandals and misuses of that power. Yet he chose to take his stand in a circumstance in which there appeared little justification for the exercise of that power. There were no national security implications or any public interest at stake; and the claim of privilege did not even fall into the category of protecting the integrity of an ongoing criminal investigation.

The dispute between the branches became especially heated when news stories reported that the FBI had abused its authority when it investigated organized crime in the 1960s and 1970s. There was credible evidence that the FBI had caused the wrongful imprisonment of at least one person while it protected a government witness who committed multiple murders even while he was in protection. Burton demanded access to ten key DOJ documents, which were on average 22 years old, in order to investigate the allegations of wrongful conduct by the FBI (Burton 2002). The administration refused to turn over these documents and Burton threatened to take this controversy to the courts.

Burton had the complete support of the committee, as evidenced by a February 6, 2002 hearing at which all the members, Republican and Democrat alike, joined in lambasting the administration's actions and declared their intention to carry the fight for the documents as far as necessary (U.S. House 2002). The unanimity of the committee was remarkable, especially given that the administration—during a period of war and with extraordinary high levels of public approval—had made direct appeals for support to GOP members on the eve of the hearing.

The administration witness at the hearing, Assistant Attorney General Bryant, asserted the position that all prosecutorial documents are “presumptively privileged” and never available for congressional inspection. This claim ran counter to a long history of congressional access to DOJ prosecutorial documents, especially in cases of closed investigations where the need for secrecy has disappeared. It also appeared to run counter to earlier administration policy clarifications that there was no blanket policy of withholding such materials from Congress. Bryant stated that the administration was willing to give an oral summary of the disputed documents to members of the committee, but not to allow the members to actually see the documents. This offer only brought more comments of disdain from committee members.

On March 1, 2002, the two sides reached an accommodation in which the committee would be permitted to openly view six of the ten disputed documents. Both sides declared victory. The committee claimed that it had

won the right to access the most important documents that were necessary for its investigation of the Boston FBI office scandal. The administration took the view that it had allowed access only to a narrow category of documents—in this case, those that concerned an indicted FBI agent were considered necessary to Congress's oversight function. The administration continued to insist that it did not have to give Congress access to deliberative documents. The committee accepted this agreement because of a lack of a consensus that members should continue to push for all ten documents.

The Presidential Records Act of 1978 and Executive Order 13223

The next effort by the Bush administration to invoke executive privilege stemmed from the Presidential Records Act, which Congress passed in 1978 to establish procedures for the public release of the papers of presidential administrations. Initially the Act allowed for the public release of presidential papers twelve years after an administration had left office. The principle was that these presidential records ultimately belong to the public and should be made available for inspection within a reasonable period of time. Section 2206 of the Act gave responsibility for implementing this principle to the National Archives and Records Administration (NARA). The Act retained the public disclosure exemptions of the Freedom of Information Act (FOIA) that required certain materials involving national security or state secrets could be withheld from public view for longer than the twelve years period.

The only major change from 1978 until the Bush administration occurred on January 18, 1989, when President Ronald Reagan issued Executive Order 12267 that expanded certain implementation regulations of NARA. The executive order identified three areas in which records could be withheld: national security, law enforcement, and the deliberative process privilege (Section 1g). In addition, it gave a sitting president primary authority to assert privilege over the records of a former president. Although the executive order recognized that a former president has the right to claim executive privilege over his administration's papers, the Archivist of the United States did not have to abide by his claim. The incumbent president could override the Archivist with his own assertion of executive privilege, but that had to occur within a period of thirty days after the decision of the Archivist. After that period, absent a formal claim of executive privilege, the documents were to be automatically released.

On November 1, 2001, President Bush issued Executive Order 13223 to override portions of Reagan's 1989 order and to vastly expand the scope of privileges available to current and former presidents. Bush's executive order dropped the law enforcement category and added two others: the

presidential communications privilege and the attorney-client or attorney work product privilege. Under the new EO, former presidents may assert executive privilege over their own papers, even if the incumbent president disagrees. Bush's executive order also gives a sitting president the power to assert executive privilege over a past administration's papers, even if the former president disagrees. The Bush standard therefore allows any claim of privilege over old documents by an incumbent or past president to stand (Gonzales 2001b). Furthermore, the order requires anyone seeking to overcome constitutionally based privileges to have a "demonstrated, specific need" for presidential records (Section 2c). The Presidential Records Act of 1978 did not contain such a high obstacle for those seeking access to presidential documents to overcome. Thus, under Bush's executive order, the presumption always is in favor of secrecy, whereas previously the general presumption was in favor of openness.

President Bush's action set off challenges by public advocacy groups, academic professional organizations, press groups, and some members of Congress. All were concerned that his executive order vastly expanded the scope of governmental secrecy in a way that was damaging to democratic institutions. Several groups, including the American Historical Association, the Organization of American Historians, the American Political Science Association, and Public Citizen, initiated a lawsuit to have it overturned. In October 2007, the D.C. district court struck down the provision of Bush's E.O. that had allowed a former president indefinitely to withhold the release of records from his administration (*Am. Historical Ass'n v. National Archives and Records Admin.* 2007). Although at this writing in 2008 the administration has not challenged this ruling, it is clear that Bush overstepped his authority in trying to modify congressional policy and attempted to expand executive privilege far beyond the traditional standards for the exercise of that power. A number of problems with the executive order stand out:

First, governance of presidential papers should be handled by statute, not executive order. Presidential papers are public documents that are part of our national records and are paid for by public funds. These materials should not be treated merely as private papers that any president or former president can order hidden from congressional and public view. Ultimately they provide detail and understanding into important events in our nation's history.

Second, there is precedent for allowing an ex-president to assert executive privilege (Exec. Order No. 12,267, 54 Fed. Reg. 3,403 [Jan. 18, 1989]). Yet the standard for allowing such a claim is very high and executive privilege cannot stand merely because an ex-president has some personal or political interest in preserving secrecy. A former president's interest in maintaining confidentiality begins to erode substantially from the day he leaves office and it continues to erode even further over time. Bush's executive

order does not acknowledge any such limitation on a former president's interest in confidentiality.

Third, the executive order makes it easy for such claims by former presidents to stand and almost impossible for those challenging the claims to get information in a timely and useful way. The legal constraints will effectively delay requests for information for years as these matters are fought out in the courts. These obstacles alone will settle the issue in favor of former presidents because many with an interest in access to information will conclude that they do not have the ability or the resources to stake a viable challenge. The burden shifts then from those who must justify withholding information to those who have made a claim for access to information.

Fourth, executive privilege may actually be frivolous in this case because there are already other secrecy protections in place for national security purposes. For instance, sensitive Central Intelligence Agency information is not only protected by certain exemptions in FIOA but also by other statutes that shield "intelligence sources and methods" from disclosure (50 U.S.C. § 403(d)(3) [2006]). Furthermore, a general interest in confidentiality is not enough to sustain a privilege claim over old documents that may go back as far as twenty years (U.S. House 2001b).

The Energy Task Force Controversy

The Bush administration has also been aggressive in its efforts to defend and expand what it considers constitutionally based presidential prerogatives through judicial rulings. A primary advocate for an expanded view of presidential power has been Vice President Richard Cheney who, with the backing of the president, led an effort to protect, and even enhance, executive powers in a controversy over internal discussions of national energy policy that resulted in an expansive view of presidential independence by the Supreme Court.

A few weeks into his first term, President Bush announced the creation of the National Energy Policy Development Group, better known as the energy task force, which was charged with developing a national energy policy (Bush 2001b, 236-237; GAO 2001). Bush appointed various federal officials to the task force with Vice President Cheney as chairman (GAO 2001, 8). The task force held a total of 10 sessions between January and May of 2001, with group members and staff conducting numerous supplemental meetings "to collect individual views" for future energy policy decision-making (GAO 2001, 9; Addington 2001). These meetings included "non-federal energy stakeholders, principally petroleum, coal, nuclear, natural gas, and electricity industry representatives and lobbyists" and, to "a more limited degree . . . academic experts, policy organizations, environmental

advocacy groups, and private citizens” (GAO 2001, 5). The task force issued its final report on May 16, 2001 and the group formally disbanded on September 30, 2001 (Bush 2001c; Department of Energy 2005).

From the beginning the Bush Administration resisted efforts by members of Congress and outside interest groups to reveal information about the task force meetings. This struggle developed into a full-blown legal controversy and ultimately a Supreme Court decision that addressed broader issues pertaining to presidential secrecy, protecting the deliberative process, and separation of powers. Congressional challenges to task force secrecy focused on obtaining documents and records through the Federal Advisory Committee Act (FACA), which mandates that executive branch advisory committees adhere to various openness requirements such as making available to the public their minutes, records, reports, and other documents (5 U.S.C.A. app. § 2 [2006]). The administration denied these requests and declared that “the FACA does not apply to” the task force because section 3(2) of the Act exempts “any committee that is composed wholly of” federal employees (Dingell and Waxman 2001; Addington 2001a).

The Government Accountability Office, at the urging of Democratic members of Congress, also tried unsuccessfully to obtain task force documents through its investigatory powers and even sued in federal court (Addington 2001b; *Walker v. Cheney* 2002). Soon after, Judicial Watch, Inc. and the Sierra Club filed separate suits, later consolidated, against the energy task force (*Judicial Watch, Inc. v. Nat’l Energy Pol’y Dev. Group* 2002a, 25-27). The two groups alleged that the task force gave significant roles to private individuals, which resulted in FACA violations (5 U.S.C.A. app. 2 § 1 [2006]). They sought the release of documents relating to task force meetings to determine the extent of the allegedly illegal nature of the group.

In July 2002, D.C. district court Judge Emmet G. Sullivan granted the groups’ request for discovery arguing that the terms of FACA create “substantive requirements to which the government must adhere” (*Judicial Watch, Inc. v. Nat’l Energy Pol’y Dev. Group* 2002a, 30, 56-57). Judge Sullivan did not address the administration’s separation of powers argument that asserted that the application of FACA in this circumstance “interferes with the President’s constitutionally protected ability to receive confidential advice from his advisors, even when those advisors include private individuals.” The court merely noted that a resolution to this question was “premature” (*Judicial Watch, Inc. v. Nat’l Energy Pol’y Dev. Group* 2002a, 44-45). After the court denied the administration’s request for a stay of the proceedings (*Judicial Watch, Inc. v. Nat’l Energy Pol’y Dev. Group* 2002b, 15), Cheney filed an interlocutory appeal in which he asked for review of the complex and serious constitutional issues raised. Both the D.C. district court and circuit court dismissed the appeal. However, the Supreme Court granted

certiorari to decide whether the discovery was constitutional and if the appeals court had the power to stop it (*Judicial Watch, Inc. v. Nat'l Energy Pol'y Dev. Group* 2002c, 23; *In re Cheney* 2003, 1101; *Cheney v. U.S. Dist. Court for Dist. of Columbia* 2003).

The Supreme Court vacated the judgment of the D.C. appeals court and remanded the case for rehearing (*Cheney v. U.S. Dist. Court for Dist. of Columbia* 2004, 378). Speaking for the Court, Justice Anthony Kennedy declared that the lower courts must “give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties” (382). The Court held these concerns are even greater when considering civil litigation. Rejecting the appeals court’s claim that *U.S. v. Nixon* stood as an absolute barrier against discovery protection, Kennedy asserted that the need for information in civil cases “does not share the urgency or significance of” a criminal subpoena request (384). The failure to disclose information in a civil case, he reasoned, “does not hamper another branch’s ability to perform its ‘essential functions’ in quite the same way” (384). Addressing the application of FACA, Kennedy argued that even if the Court declared that the Act “embodie[d] important congressional objectives, the only consequence from respondents’ inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress policy objectives under FACA” (384-385).

Kennedy then turned to executive privilege and held that due to “the breadth of the discovery requests in this case compared to the narrow subpoena orders in *United States v. Nixon*, our precedent provides no support for the proposition that the Executive Branch ‘shall bear the burden’ of invoking executive privilege with sufficient specificity and of making particularized objections” (388). The fact is that “*Nixon* does not leave them the sole option of inviting the Executive Branch to invoke executive privilege while remaining otherwise powerless to modify a party’s overly broad discovery requests.” Once executive privilege is invoked, the judicial branch “is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive’s Article II prerogatives” (389). Kennedy thus ordered the appeals court to give due consideration to “the weighty separation-of-powers objections” when reconsidering the appeal and addressing the discovery issue (391).

Not only had most of the lower courts’ arguments been refuted, but the High Court had handed a significant victory to the administration. The Supreme Court accepted the administration’s assertion that forcing disclosure would have a negative impact on the President’s ability to carry out his responsibilities under Article II of the Constitution. As such, the decision

established a rather high standard of judicial deference to executive authority.

Acting on the Supreme Court's clarifications, the D.C. appeals court had no other choice but to rule for Cheney and issue a writ of mandamus ordering the district court to dismiss the Judicial Watch and Sierra Club's complaints (*In re Cheney* 2005, 731). Circuit Judge A. Raymond Randolph wrote that FACA must be interpreted "strictly" in light of the "severe" separation of powers concerns. He reasoned that Congress could not have intended FACA coverage to include presidential advisory committees (which are normally exempt from FACA if comprised of federal employees) when private citizens merely participate in "meetings or activities." Raymond stated that although a private citizen might influence a committee's decisions, "having neither a vote nor a veto over the advice the committee renders to the President, he is no more a member of the committee than the aides who accompany Congressmen or cabinet officers to committee meetings." Raymond concluded that "[s]eparation-of-powers concerns strongly support this interpretation of FACA." Therefore, in "making decisions on personnel and policy, and in formulating legislative proposals, the President must be free to seek confidential information from many sources, both inside the government and outside" (*In re Cheney* 2005, 728).

The appeals court's decision largely sided with Cheney's argument by enhancing the administration's ability to block the disclosure of information. The Supreme Court's opinion validates the White House's argument that it has the right to withhold from the public and the Congress information dealing with public policy discussions with private parties. No doubt the Court is correct that one should be mindful of the vexing constitutional issues at stake. However, there are also important tradeoffs between transparency and secrecy that must be considered and resolved. The disclosure of information is one of the primary ways to combat fraud and abuse in government. On the other hand, there needs to be some level of confidentiality at the executive level where a President has the ability to discuss public policy matters in confidence. Such conflicts thus involve a balancing test to determine under the circumstances which branch's interests are more compelling. Here the Supreme Court appears to have gone out of its way to protect the executive branch in a dispute where it was capable of defending itself.

The problem with the judiciary's answer to this controversy is that it provided far too much protection to the executive branch at the cost of openness and accountability. The solution, in essence, offset the balance of power between the president and Congress. What the judiciary ended up endorsing was immunity from disclosure for the White House which precludes any type of nuanced approach that could recognize tradeoffs and political accommodations that seek to balance the interests of the two branches.

The U.S. Attorneys Firings

The Bush administration pushed the bounds of secrecy in another major controversy where multiple claims of executive privilege were made to conceal White House documents and to prevent current and former presidential aides from testifying before Congress about the contentious decision to force the resignations of a number of U.S. attorneys. White House stonewalling led to Congress issuing several subpoenas; a contempt resolution; and, finally a lawsuit to force the executive branch to comply with a committee investigation.

Discussion of removing U.S. attorneys and appointing those who would better serve the President's agenda began early in Bush's second term. Nearly two years later, after extensive deliberations between the Justice Department and White House, the administration decided to remove seven U.S. attorneys on December 7, 2006. Although the formal list of dismissals only included these seven, the Justice Department had removed several other individuals (Rozell and Sollenberger 2008, 319-20).

The House and Senate Judiciary Committees launched investigations that remain ongoing as of this writing. In early 2007, the White House and Department of Justice failed to turn over a number of documents to the committees and several White House officials refused to testify about the U.S. attorney controversy. In March 2007, after repeated requests for documents and testimony, the House and Senate Judiciary Committees approved, but did not issue, subpoenas for White House Deputy Chief of Staff Karl Rove, Justice Department Chief of Staff D. Kyle Sampson, White House Counsel Harriet Miers, Deputy White House Counsel William Kelley, and special assistant to the president in the Office of Public Affairs J. Scott Jennings. The next month, the House Judiciary Committee served the first subpoena for documents and ordered that Gonzales turn over all information relating to the removals of U.S. attorneys. In May the Senate Judiciary Committee also subpoenaed Gonzales and demanded that he turn over all the relevant emails (Rozell and Sollenberger 2008, 320-22).

In June the Senate and House Judiciary Committees issued subpoenas to Miers and the former deputy assistant to the president and director of political affairs Sara Taylor. White House Counsel Fred Fielding responded by claiming executive privilege on the request to handover additional documents (Fielding 2007a). Less than two weeks later Fielding again wrote Conyers and Leahy and this time asserted executive privilege regarding the testimony of Miers and Taylor. He claimed that the White House had acted "to protect a fundamental interest of the Presidency" by not revealing internal decision-making processes (Fielding 2007b).

At a July 11 Senate Judiciary Committee oversight hearing Taylor testified, but refused to answer questions that she considered protected by executive privilege. Miers followed Bush's request and did not appear before the committee. In an Office of Legal Counsel memorandum issued July 10, the administration argued that Miers "is immune from compelled congressional testimony about matters that arose during her tenure as Counsel to the President. . . ." (Bradbury 2007). Because of this open defiance of a request for testimony and the White House Chief of Staff Joshua Bolten's failure to produce documents, the House Judiciary Committee voted 22-17 on July 25, 2007 to cite Miers and Bolten for contempt of Congress (Lewis 2007, A13).

The following day Leahy issued subpoenas for Rove and Jennings to appear before the Senate Judiciary Committee at an August 2 hearing. On August 1, Bush invoked executive privilege for a third time in this controversy within a month, this time to prevent Rove from testifying. In December 2007, the Senate Judiciary Committee voted to hold Bolten and Rove in contempt of Congress (Rozell and Sollenberger 2008, 324).

Nearly a month into the second session of the 110th Congress, the House voted 223 to 32 to issue contempt citations against Miers and Bolten (Kane 2008, A4). The White House again stood its ground and responded: "This action is unprecedented, and it is outrageous. . . . It is also an incredible waste of time—time the House should spend doing the American people's legislative business" (Schmitt 2008, A13). The resolution calls on the U.S. attorney for the District of Columbia to enforce the contempt charges. However, if no action is forthcoming then the chairman of the Judiciary Committee can seek in federal court a declaratory judgment "affirming the duty of any individual to comply with any subpoena" of the House (H. Res. 980 [2008]). Soon after issuing the contempt resolution, Attorney General Mukasey said that Miers and Bolton's noncompliance to the subpoenas does "not constitute a crime" and as such the Justice Department will not act on the contempt citations (Mukasey 2008a). House Democrats disagreed. "There is no authority," House Speaker Pelosi declared "by which persons may wholly ignore a subpoena and fail to appear as directed because a President unilaterally instructs them to do so" (Pelosi 2008).

On March 10, the House Judiciary Committee filed suit in the D.C. district court against Miers and Bolten (*Committee on the Judiciary v. Miers et al.* 2008). The suit requested the court to declare that Miers is not immune from testifying before a congressional committee and also sought the disclosure of documents not produced by Miers and Bolten during prior congressional subpoenas. At the heart of this suit was the claim of absolute immunity that was articulated by Principal Deputy Assistant Attorney General Stephen Bradbury in his OLC July 10 memorandum. He declared that

“Since at least the 1940s, Administrations of both political parties have taken the position that ‘the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee’” which “‘may not be overborne by competing congressional interests’” (Bradbury 2007). Continuing, Bradbury articulated the rationale that the “separation of powers principle” not only makes the president himself immune to testimony, but it also applies “to senior presidential advisers.” Bradbury even broadened the absolute immunity claim to include former presidential aides such as Miers when Congress seeks “testimony about official matters that occurred during their time” in office (Bradbury 2007).

The memorandum offers a broadly expansive rationale for executive branch immunity to congressional testimony that contradicts constitutional principles and history. A president’s independence from Congress is not threatened by having cabinet members or White House officials testify. Similar arguments were used in Miers’ memorandum to the D.C. court (Defendant’s Memorandum 2008, 47). The separation of powers principle was never intended to inoculate executive branch officials from congressional oversight. In *U.S. v. Nixon*, the Supreme Court refuted such an argument: “neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances” (*United States v. Nixon* 1974, 706).

As for additional support for his executive branch immunity assertion Bradbury cites Attorney General Janet Reno’s 1999 memorandum on executive privilege. Reno largely provides the same legal rationale as Bradbury but also claims that the courts would gladly defer to the president over Congress in a subpoena conflict: “[g]iven the close working relationship that the President must have with his immediate advisors as he discharges his constitutionally assigned duties, I believe that a court would recognize that the immunity such advisers enjoy from testimonial compulsion by a congressional committee is absolute and may not be overborne by competing congressional interests” (Reno 1999). Of course the congressional interest in pursuing its legislative and oversight functions has traditionally meant that executive branch officials testify on policies and projects passed by Congress. In the context of the current debate, congressional oversight regarding U.S. attorneys presents a “demonstrated, specific need for evidence . . .” (*United States v. Nixon* 1974, 713). In addition, the D.C. circuit court has recognized “where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve ‘the public interest in honest, effective government’” (*In re Sealed Case* 1997, 737-38).

Aside from relying on misguided constitutional principles, Bradbury's memorandum is also limited by the history behind it. For example, Reno's 1999 opinion argued in favor of President Clinton's executive privilege claim on documents and testimony that were sought by a congressional committee as part of its investigation into offers of clemency to members of a terrorist group known as the FALN (Armed Forces of Puerto Rican National Liberation). Although Clinton claimed executive privilege, the administration was not immune from congressional pressure for documents and testimony. As Louis Fisher noted "Congress conducted considerable oversight . . . and received thousands of pages of documents related to the decision. Several senior administration officials testified, including Deputy Attorney General [Eric] Holder and Pardon Attorney [Roger] Adams" (Fisher 2004, 216).

Bradbury's memorandum asserts that administrations since "at least the 1940s" have claimed an absolute immunity to congressional testimony. This statement falsely implies that administrations have successfully defended against congressional pressure for testimony and documents even in the face of subpoenas. As the House Judiciary Committee notes: "White House aides, in the past, have appeared before congressional committees in overwhelming numbers—both voluntarily and pursuant to subpoenas. Since World War II, close presidential advisers—including former Counsels and Special Assistants—have appeared before congressional committees to offer their testimony on more than *seventy* occasions" (Plaintiff's Motion 2008, 32).

Miers' memorandum also fails to grasp the historical novelty of the current controversy by remarking that no one has identified a single case in U.S. history "in which a senior presidential adviser has been forced to testify as the result of a congressional subpoena by an Article III court" (Defendant's Memorandum 2008, 54). A better point to make is that no administration has pushed a congressional investigation so far. History has shown that the executive and legislative branches have usually reached an accommodation and thus prevented a standoff of this magnitude. The problem is not the lack of evidence, but the efforts of a White House to heavily tilt the balance of powers to instill greater institutional strength in one branch.

On July 31, 2008 the D.C. district court thoroughly rejected the administration's position that presidential aides have absolute immunity. Judge John D. Bates left no doubt of the legal weakness of the administration's argument: "The Executive's current claim of absolute immunity from compelled congressional process for senior presidential aides is without any support in the case law" (*Committee on the Judiciary v. Harriet Miers et al.* 2008a, 3). In fact, Bates pointed out that even the president himself "may not be absolutely immune from compulsory process" (84). On August 26 Bates

dismissed a White House request to delay testimony by Miers and the House Judiciary Committee reacted by scheduling a hearing.

At this writing the D.C. Court of Appeals has granted the Bush Administration's appeal of Bates's decision and issued a temporary stay in the case. However, the court decided not to grant an expedited briefing and oral argument schedule which most likely means that a hearing will not be held until early 2009. In its *per curium* opinion, the court noted that this dispute "is of potentially great significance for the balance of power between the Legislative and Executive Branches." Even if expedited, the case would not be resolved by the end of the present Congress on January 3, 2009 because of the likelihood of "rehearing by this court en banc and by the Supreme Court." The court suggested that the case would become moot because the subpoenas issued by the House Judiciary Committee would expire at the end of Congress therefore giving "the new President and the new House an opportunity to express their views on the merits of the lawsuit" (*Committee on the Judiciary v. Harriet Miers et al.* 2008b, 3-4).

The flaw in the court's opinion is that it never addressed the standards of review for granting a stay which Judge Bates had previously answered when he rejected the White House's motion. Instead the court bypassed the issue altogether and focused on a mootness concern. The case will almost certainly be litigated again at the start of the next Congress. Judge David S. Tatel agreed. In his concurring opinion, Tatel stated that he believed the case would "survive this Congress" and therefore would "be capable of repetition yet evading review" which is the traditional way courts have overcome the issue of mootness (6). Nonetheless, the ruling is not a victory for the Bush administration, for it said nothing about the merits of an absolute immunity claim and thus only delayed a future hearing.

Executive Privilege and the Bush Legacy

The Bush presidency has sparked substantial debate over the limits of executive power and the proper balance between accountability and secrecy. The president advanced an expansive view of executive powers that greatly impacted our governing order and will comprise a key part of his legacy. Bush perceived his actions as necessary to restore what he considered to be the proper balance between the presidency and Congress but, by and large, he pushed the boundaries of executive privilege too far. His claims have been inherently flawed and have likely contributed to a further downgrading of the stature of this constitutional principle. Thus, Bush's actions may make claiming executive privilege politically difficult for his successors and some recent legal rebukes of the administration's actions may also dissuade future presidents from posing legal challenges to protect the principle.

Most recently President Bush invoked executive privilege on documents relating to a House Oversight and Government Reform Committee investigation into the Environmental Protection Agency's (EPA) decision to deny the state of California the authorization to regulate the greenhouse gas emissions of vehicles (Bliley 2008). In a letter to Chairman Henry Waxman, Associate Administrator Christopher P. Bliley remarked that "The documents or portions of documents over which the President is asserting executive privilege identify communications or meetings between senior EPA staff and White House personnel, or otherwise evidence information solicited or received by senior White House advisors" (Bliley 2008).

Attorney General Michael Mukasey supplied the legal justifications for this claim of privilege. Citing *In re Sealed Case*, Reno's 1999 OLC opinion, and *United States v. Nixon*, Mukasey declared that the "[d]ocuments generated for the purpose of assisting the President in making a decision are protected by the doctrine of executive privilege." Continuing, the "doctrine of executive privilege also encompasses Executive Branch deliberative communications that do not implicate presidential decisionmaking." The privilege therefore can "protect Executive Branch deliberations against congressional subpoenas." Mukasey finally reasoned that the "subpoenaed [EPA] documents implicate both the presidential communications and deliberative process components of executive privilege" (Mukasey 2008b).

At this writing, the EPA case is still ongoing, however, the initial reasons given by the administration to claim executive privilege have followed similar patterns as previous incidents. President Bush is willing to make a privilege claim that goes far beyond the deliberation process between himself and his immediate staff. Besides the dubious notion that there is now an absolute immunity for former presidential staff, the administration has moved executive privilege protection to include "deliberative communications that do not implicate presidential decisionmaking." In addition, the administration has been able to close off certain FACA challenges to its executive branch deliberations with the assistance of the Supreme Court.

Not surprisingly the administration used the Supreme Court's *Cheney* decision to bolster the claim of absolute immunity in the Miers case. Referencing Kennedy's opinion, Miers' brief announces that "repeated invocations of Executive Privilege signals the presence, not the absence, of acute separation-of-powers concerns." Therefore "serious concerns" are raised if a committee is permitted to compel senior officials to testify even if they can assert executive privilege "on a question-by-question basis" (Defendant's Memorandum 2008, 55). Although Kennedy appears to give Miers support in her immunity contention, there is an important distinction between the two cases. In *Cheney*, the Supreme Court was dealing with a lawsuit brought by several interest groups, not another branch of government.

There are many dangers of allowing the executive branch to make unreasonable arguments to expand the use of executive privilege based on separation of powers and other constitutional principles. To be sure, executive privilege has already suffered a bad reputation due to the misuse of that power by previous presidents. Presidents need to be cautious in claiming executive privilege by making clear and limited justifications for its use. The problem is that Bush's use of executive privilege has not risen to the level of protecting some broad national interest. Many of his claims appear to be attempts to conceal department and agency decision-making processes, not high level presidential deliberations on issues of national importance. The latest example of an executive privilege claim has little direct connection to the president since the EPA decision in question rests with the administrator of that agency.

One should be mindful not to leave the executive branch unprotected by weakening executive privilege to the point where all presidential deliberations become public almost instantly. Still, executive privilege, when taken too far, can hinder congressional investigations into policymaking endeavors, corruption cases, and other important matters. By expanding executive privilege into all White House, departmental, and agency affairs, presidents do great harm to one of the most fundamental aspects of our government—the need for proper checks and balances. Throughout Bush's presidency the executive branch has attempted to prevent Congress from viewing documents and material that relate to key aspects of the interworkings of government. Ensuring that public officials are not corrupted and finding a workable national energy policy are not just the goals of the executive branch. These concerns should be primarily initiated by Congress, which has the responsibilities of oversight and passing laws. Creating a closed door policy where the executive branch alone decides these important issues removes Congress from the process and does much to encumber our constitutional form of government.

NOTES

Rozell and Sollenberger filed an amicus brief in the case of *Committee on the Judiciary v. Harriet Miers et al.* with Thomas E. Mann and Norman J. Ornstein arguing against Miers' absolute immunity claim.

REFERENCES

Addington, David S. 2001a. Letter to W.J. "Billy" Tauzin, Dan Burton, John Dingell, and Henry Waxman. May 4. <http://oversight.house.gov/Documents/20040831095650-29059.pdf> [accessed July 9, 2008].

- Addington, David S. 2001b. Letter to Anthony Gamboa, May 16, <http://oversight.house.gov/Documents/20040831095214-51332.pdf> [accessed July 9, 2008].
- Am. Historical Ass'n v. National Archives and Records Admin.* 2007. 516 F.Supp.2d 90 (D.D.C.)
- Bliley, Christopher P. 2008. Letter to Henry A. Waxman. June 20. <http://oversight.house.gov/documents/20080620114653.pdf> [accessed July 6, 2008].
- Bradbury, Stephen G. 2007. Immunity of Former Counsel to the President from Compelled Congressional Testimony. Office of Legal Counsel. July 10, <http://www.usdoj.gov/olc/2007/miers-immunity-Opinion071007.pdf> [accessed July 9, 2008].
- Bryant, Daniel J. 2001. Letter to Dan Burton. Dec. 19 (on file with co-author, Mark J. Rozell).
- Burton, Dan. 2001a. Letter to John Ashcroft. Aug. 29 (on file with co-author, Mark J. Rozell).
- Burton, Dan. 2001b. Letter to John Ashcroft. Jan. 3 (on file with co-author, Mark J. Rozell).
- Burton, Dan. 2001c. Letter to Alberto R. Gonzales. Jan. 11 (on file with co-author, Mark J. Rozell).
- Burton, Dan. 2002. Letter to John Ashcroft. Feb. 4 (on file with co-author, Mark J. Rozell).
- Bush, George W. 2001a. Memorandum on the Congressional Subpoena for Executive Branch Documents. *Weekly Compilation of Presidential Documents*, vol. 37, Dec. 12.
- Bush, George W. 2001b. Remarks Prior to a Meeting with the Energy Policy Development Group and an Exchange with Reporters. *Weekly Compilation of Presidential Documents*, vol. 37, Jan. 29.
- Bush, George W. 2001c. Report of the National Energy Policy Development Group. National Energy Policy. <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf> [accessed July 9, 2008].
- Cheney v. U.S. Dist. Court for Dist. of Columbia.* 2003. 540 U.S. 1088.
- Cheney v. U.S. Dist. Court for Dist. of Columbia.* 2004. 542 U.S. 367.
- Civiletti, Benjamin R. 1993. Justice Unbalanced: Congress and Prosecutorial Discretion. Heritage Lecture No. 472. Aug. 19.
- Committee on the Judiciary v. Miers et al.* 2008a, Civil No. 1:08-cv-00409 (D.D.C.).
- Committee on the Judiciary v. Miers et al.* 2008b, No. 08-5357 (D.C. Cir.).
- Crotty, William. 2003. Presidential Policymaking in Crisis Situations: 9/11 and Its Aftermath. *Policy Studies Journal* 31:451-464.
- Defendant's Memorandum. 2008. *Committee on the Judiciary v. Miers et al.* 2008, Civil No. 1:08-cv-00409 (D.D.C.).
- Department of Energy. 2005. National Energy Policy Status Report on Implementation of NEP Recommendations. http://www.energy.gov/media/NEP_Implementation_Report.pdf [accessed July 9, 2008].
- Dingell, John, and Henry Waxman. 2001. Letter to Andrew Lundquist. April 19. <http://oversight.house.gov/Documents/20040831095838-21952.pdf> [accessed July 9, 2008].
- Fielding, Fred F. 2007. Letter to John Conyers and Patrick Leahy. June 28, <http://www.whitehouse.gov/news/releases/2007/06/LetterfromCounseltothePresident06282007.pdf> [accessed July 9, 2008].

- Fielding, Fred F. 2007b. Letter to John Conyers and Patrick Leahy. July 9, http://www.whitehouse.gov/news/releases/2007/07/Memo_070907.pdf [accessed July 9, 2008].
- Fisher, Louis. 2004. *The Politics of Executive Privilege*. Durham, NC: Carolina Academic Press.
- GAO. 2001. Energy Task Force: Process Used to Develop the National Energy Policy. GAO-03-894, <http://www.gao.gov/new.items/d03894.pdf> [accessed July 9, 2008].
- Gonzales, Alberto R. 2001a. Letter to Dan Burton. Jan. 10 (on file with co-author, Mark J. Rozell).
- Gonzales, Alberto R. 2001b. Letter to Stephen Horn. Nov. 2 (on file with co-author, Mark J. Rozell).
- In re Cheney*. 2003. 334 F.3d 1096 (D.C. Cir.).
- In re Cheney*. 2005. 406 F.3d 723 (D.C. Cir.).
- In re Sealed Case*. 1997. 121 F.3d 729 (D.C. Cir.).
- Judicial Watch, Inc. v. Nat'l Energy Pol'y Dev. Group*. 2002a. 219 F.Supp.2d 20 (D.D.C.).
- Judicial Watch, Inc. v. Nat'l Energy Pol'y Dev. Group*. 2002b. 230 F.Supp.2d 12 (D.D.C.).
- Judicial Watch, Inc. v. Nat'l Energy Pol'y Dev. Group*. 2002c. 233 F.Supp.2d 16 (D.D.C.).
- Kane, Paul. 2007. Rove, Bolten Found in Contempt of Congress; Senate Committee Cites Top Bush Advisers in Probe of U.S. Attorney Firings. *Washington Post*, Dec. 14.
- Kane, Paul. 2008. West Wing Aides Cited for Contempt. *Washington Post*, Feb. 15.
- Lewis, Neil A. 2007. Panel Votes to Hold Two in Contempt of Congress. *New York Times*, July 25.
- Mukasey, Michael B. 2008a. Letter to Nancy Pelosi. Feb. 29. <http://judiciary.house.gov/Media/PDFS/Mukasey080229.pdf> [accessed July 6, 2008].
- Mukasey, Michael B. 2008b. Letter to George W. Bush. June 19. <http://oversight.house.gov/documents/20080620114653.pdf> [accessed July 6, 2008]
- Nakashima, Ellen. 2001. Bush Invokes Executive Privilege on Hill. *Washington Post*, Dec. 14.
- Pelosi, Nancy. 2008. Letter to Michael B. Mukasey. Feb. 28, <http://www.house.gov/pelosi/press/releases/Feb08/mukasey.html> [accessed July 6, 2008].
- Plaintiff's Motion for Partial Summary Judgment [Plaintiff's Motion]. 2008. *Committee on the Judiciary v. Miers et al.* 2008, Civil No. 1:08-cv-00409 (D.D.C.).
- Reno, Janet. 1999. Assertion of Executive Privilege With Respect To Clemency Decision. Office of Legal Counsel. Sept. 16, <http://www.usdoj.gov/olc/falnpotus.htm> [accessed July 5, 2008].
- Rozell, Mark J., and Mitchel A. Sollenberger. 2008. Executive Privilege and the U.S. Attorneys Firings. *Presidential Studies Quarterly* 32:315-328.
- Schmitt, Richard B. 2008. House OKs Contempt Citations for Bush Aides. *Los Angeles Times*, Feb. 15.
- Suskind, Ron. 2006. *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11*. New York: Simon & Schuster.
- U.S. House, Committee on Government Reform. 2001a. Investigation into Allegations of Justice Department Misconduct in New England: Hearings Before the H. Comm. on Government Reform. 107th Cong. 1st sess., H. Rept. 383.
- U.S. House, Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform. 2001b. Hearings on the Presidential Records Act, 107th Cong., 1st sess.

United States v. Nixon. 1974. 418 U.S. 683.

Walker v. Cheney. 2002. 230 F.Supp.2d 51 (D.D.C.).

Yoo, John. 2005. *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*. Chicago: University of Chicago Press.