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Executive Privilege and Congressional Oversight

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“Executive Privilege and Congressional Oversight”

House Committee on the Judiciary

Wednesday, May 15, 2019

Testimony of Kate Shaw

Professor of Law, Benjamin N. Cardozo School of Law

Chairman Nadler, Ranking Member Collins, and Distinguished Members of the Committee:

Thank you for the opportunity to testify today regarding the nature and scope of executive privilege. My name is Kate Shaw, and I am a Professor of Law at Cardozo Law School, where my work focuses, among other things, on executive power and questions of constitutionalism outside the courts. Before I began teaching, I worked as an Associate Counsel in the Obama White House Counsel’s Office, from 2009–2011.

I understand that the purpose of today’s hearing is to contextualize and assess the White House’s recent “protective” assertion of executive privilege over the entirety of the unredacted “Report on the Investigation into Russian Interference in the 2016 Presidential Election,” prepared by Special Counsel Robert S. Mueller, III, and underlying materials sought by this Committee, as well as the ongoing exchanges between this Committee and the executive branch regarding requests for documents and testimony from former White House Counsel Donald McGahn. Accordingly, my testimony will offer some brief background on executive privilege, both generally and in the context of Congress’s exercise of its oversight authority. It will then address more specifically the legal questions presented by recent events involving Committee requests for documents and testimony, subpoenas, and the formal assertion (and the more informal suggestions) of executive privilege.

In this statement, I will draw on legal authority from both courts and the political branches. As a general matter, the judicial authority in this area is sparse. That’s no accident: historically, the overwhelming majority of disputes between Congress and the President over access to information have been resolved internally, within the political branches. So, while I will address the handful of court cases that grapple with the contours of executive privilege, and the subset of those that arose in the context of congressional requests for information, I think equally important is the extra-judicial history—the principles and practices that for decades have guided the political branches in their approach to executive privilege.

In brief, the history I canvass here makes clear that blanket invocations of the privilege over wide swaths of executive-branch material are without substantial support in either case law or executive-branch practice; moreover, they are unsupported by the principles that underlie the privilege. That

said, as to many of the individual documents at issue, there may be viable claims of privilege; if the executive-branch wishes to achieve a resolution that allows it to protect individual communications without risking erosion of the privilege in court, it would be well-advised to reconsider its approach in favor of one that better comports with long-standing practice.

JUDICIAL AUTHORITY

The Nature & Scope of Executive Privilege

The term “executive privilege” does not appear in the Constitution. But the power to withhold certain information from the courts and Congress is today broadly understood as an important, if bounded, privilege enjoyed by the president. The Supreme Court confirmed the existence of a constitutionally grounded executive privilege in *United States v. Nixon*, where it found that some form of executive privilege was both “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”¹ But the *Nixon* Court also held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications” could “sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”²

The executive privilege identified in *Nixon*, then, was presumptive and qualified, not absolute. And the Court went on to reject President Nixon’s assertion that the privilege shielded him from compelled production of tapes and documents sought by the Watergate Special Prosecutor.³

Nixon remains the single most important case on the nature and scope of executive privilege, but it left many questions unanswered. In the years since *Nixon*, the D.C. Circuit has decided several significant cases that create additional executive-privilege doctrine. First, in *In re Sealed Case (Espy)*,⁴ a case involving an Office of Independent Counsel investigation into Agriculture Secretary Mike Espy, the D.C. Circuit identified several distinct strains of executive privilege: first, a deliberative process privilege; and second, a privilege that attached to presidential communications. As to both, the court held that when evaluating a claim of privilege, “courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the

¹ *United States v. Nixon*, 418 U.S. 683, 708 (1974). Although the first formal judicial recognition of executive privilege did not appear until 1974, presidents since Washington have been asserting the prerogative to withhold some communications from both Congress and the courts. Some suggest that judicial recognition of executive privilege is traceable to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), where in addition to announcing the power of judicial review, Chief Justice Marshall also suggested a need for courts to avoid “intrud[ing] into the cabinet, and intermeddl[ing] with the prerogatives of the executive.” See also MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 37–38 (1994) (discussing President Jefferson’s attempts to keep from Congress certain documents related to Aaron Burr’s involvement in a secessionist conspiracy).

² *Nixon*, 418 U.S. at 706.

³ *Id.* at 713.

⁴ 121 F.3d 729 (D.C. Cir. 1997).

need of the party seeking privileged evidence.”⁵ Applying that balancing, the court found that the Independent Counsel had made out a sufficiently strong showing to overcome the presidential communications privilege as to some of the requested documents.⁶

In 2004, the D.C. Circuit decided *Judicial Watch v. Department of Justice*, a case involving a FOIA request for DOJ documents in the offices of the Pardon Attorney and the Deputy Attorney General. Describing the case as “call[ing] upon the court to strike a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President’s ability to obtain candid, informed advice,”⁷ the court rejected the invitation to extend the presidential communications privilege identified in *Espy* to encompass documents created outside of the White House and that “never make their way to the Office of the President.”⁸ In both of these D.C. Circuit cases, then, presidents have been unsuccessful in their attempts to expand the scope of the judicially recognized privilege for presidential communications.

Executive Privilege and Congressional Oversight

Nixon involved a grand jury subpoena, and much of the Court’s discussion was grounded in, and at times expressly limited to, the criminal context; *Espy* arose in the context of an Independent Counsel investigation; *Judicial Watch* involved FOIA litigation. So none of these cases addressed clashes between claims of executive privilege and requests for information in the context of congressional oversight.⁹

Like executive privilege, Congress’s oversight power is nowhere to be found in the text of the Constitution. But like executive privilege, its existence today is beyond serious dispute—an accepted extension of, and incident to, Congress’s enumerated powers. The Supreme Court made explicit in the 1927 case *McGrain v. Daugherty* that the “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”¹⁰ The *McGrain* Court continued: “the houses of Congress have the power, through their own processes, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the constitution.”¹¹ Later cases have elaborated

⁵ *Id.* at 746.

⁶ *Id.* at 761–62.

⁷ *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004).

⁸ *Id.* at 1116–17.

⁹ Indeed, *Nixon* itself was noncommittal about its applicability to congressional oversight, *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (“We are not here concerned with the balance between the President’s generalized interest in confidentiality and . . . congressional demands for information.”).

¹⁰ 273 U.S. at 177. As with *Nixon* and executive privilege, *McGrain* in many ways merely represented judicial confirmation of a practice the political branches had long understood to have constitutional foundations.

¹¹ *Id.* at 160.

on the mechanics of this function, explaining that the “[i]ssuance of subpoenas” is “a legitimate use by Congress of its power to investigate.”¹²

The Court has also identified prerequisites to the exercise of the power of inquiry, explaining that congressional investigation must be “related to and in furtherance of, a legitimate task of the Congress.”¹³ So long as these prerequisites are satisfied, however, the power of inquiry is broad: “The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”¹⁴

Only a handful of cases directly address congressional requests for executive-branch information. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, the D.C. Circuit declined to enforce a Senate committee subpoena for the tapes that would eventually be obtained by the Watergate Special Prosecutor; pointing to the House Judiciary Committee’s presidential impeachment inquiry, the court held that “the Select Committee’s immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees.”¹⁵

Two relatively recent district court opinions address congressional demands for information and executive resistance to those demands. In *Committee on Judiciary v. Miers*, a case involving a subpoena for testimony from White House officials in conjunction with an investigation into the firing of nine U.S. Attorneys, the district court “reject[ed] the Executive’s claim of absolute immunity for senior presidential aides.”¹⁶ And *Committee on Oversight and Government Reform v. Holder*, while not addressing the merits of the dispute over access to documents sought as part of a committee investigation into the “Fast and Furious” firearm purchase and transfer operation, firmly rejected the Department of Justice’s argument that “because the executive is seeking to shield records from the legislature, another co-equal political body, the law forbids the Court from getting involved.”¹⁷

In both of these recent disputes, then, the executive branch pressed in the courts expansive notions of the scope or unreviewability of executive privilege, and in both instances it was unsuccessful. But the congressional victories came too late for meaningful oversight of the presidencies at issue; accordingly, while generally reinforcing legislative authority, these cases are viewed by some scholars as cautionary tales about the limits of courts’ ability to resolve legislative oversight disputes.

POLITICAL-BRANCH PRACTICE AND AUTHORITY

¹² *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975).

¹³ *Id.* at 505.

¹⁴ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

¹⁵ *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

¹⁶ 558 F. Supp. 2d 53, 99 (D.D.C. 2008).

¹⁷ *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 12 (D.D.C. 2013).

The cases discussed above represent the key judicial authority on these questions. But this limited *judicial* authority does not mean there is no other legal authority on the contours of congressional entitlement to information from the executive branch.¹⁸ Indeed, a rich body of executive-branch legal authority reflects a strong vision of executive power to protect information from disclosure, but also appears to accept the legitimacy of Congress’s constitutional entitlement to access some executive-branch information.¹⁹ These writings also set forth a cooperative vision of information exchange that should provide a roadmap for the next steps in the present dispute.

Not surprisingly, Memoranda from the Office of Legal Counsel and opinions or letters by senior executive-branch officials describe a strong executive privilege. For one thing, they identify categories of privileged information beyond the “presidential communications privilege” and “deliberative process privilege” endorsed by the D.C. Circuit. A 1989 opinion by then-Assistant Attorney General William Barr, for example, describes three categories of executive privilege: “state secrets, law enforcement, and deliberative process.”²⁰

These executive-branch writings, however, also appear to accept the principle that under some circumstances, Congress has a legitimate entitlement to executive-branch information. As Attorney General William French Smith wrote in 1981, “In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each Branch to accommodate the legitimate needs of the other . . . The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each Branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other Branch.”²¹ A Memorandum issued by President Ronald Reagan explained that “The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch. . . . executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that the assertion of privilege is necessary.”²² And in 2000, OLA head Robert Raben reiterated that basic position: “In implementing the longstanding policy of the Executive Branch

¹⁸ JOSH CHAFETZ, CONGRESS’S CONSTITUTION 14 (2017) (“[A]t its heart, the American constitutional separation of powers focuses on the creation of . . . conflict between branches of government without an overarching adjudicator to resolve the conflict in a principled, binding, and lasting way.”).

¹⁹ Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 496 (2007) (“Beginning with the Eisenhower administration, some Presidents have articulated explicit policies on executive privilege through letters, public statements, and memoranda”).

²⁰ Cong. Requests for Confidential Exec. Branch Info., 13 U.S. Op. Off. Legal Counsel 153, 154 (1989). *See also* Memorandum for the Attorney General Re: Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. O.L.C. 481, 484-90 (1982).

²¹ 43 U.S. Op. Atty. Gen. 327, 332 (1981).

²² Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982), <https://www.documentcloud.org/documents/3864882-1982-Reagan-Memo-re-procedures-governing.html>.

to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch, the Department's goal in all cases is to satisfy legitimate legislative interests while protecting Executive Branch confidentiality interests."²³

Authority from Congress, not surprisingly, centers on congressional prerogatives and entitlement to information from the executive branch; but it too recognizes the legitimacy of some form of executive privilege.²⁴ An oversight manual produced by the Congressional Research Service, for example, explains that "while the congressional power of inquiry is broad, it is not unlimited. . . . the power to investigate may be exercised only 'in aid of the legislative function' and cannot be used to expose for the sake of exposure alone."²⁵ The same report acknowledges that executive privilege is "a doctrine which, like Congress' powers to investigate and cite for contempt, has constitutional roots."²⁶ Another CRS report approvingly cites a judicial statement that "the Framers relied 'on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.'"²⁷

What forms have these methods of compromise and accommodation taken over the years? At times congressional committees have narrowed requests, and the executive branch has provided documents pursuant to more narrowly drawn requests. On other occasions, the executive has given access to sensitive documents to a subset of committee members and staff, or has provided summaries rather than documents themselves, or access but not the ability to retain documents. Sometimes these processes are protracted. Professor Peter Shane describes several episodes in the 1980s; each began with "initial informal demand, negotiation, subpoena, further negotiation, a subcommittee vote, further negotiation, a committee vote," and in one instance "further negotiation, a House vote, and still further negotiation."²⁸ And in general executive privilege assertions are rare, carefully considered, and made only after genuine attempts at pursuing available alternatives.

²³ Letter from Robert Raben, Assistant Att'y Gen., to John Linder, House Subcomm. on Rules & Org. of the House 2–3 (Jan. 27, 2000). *See also* Andrew McCauley Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 922–23 (2014).

²⁴ MORTON ROSENBERG CONG. RESEARCH SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995).

²⁵ *Id.* at 2 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

²⁶ *Id.* at 14.

²⁷ CONG. RESEARCH SERV., CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE-BRANCH COMPLIANCE 1 n. 7 (Mar. 27, 2019) (quoting *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977)).

²⁸ Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 515 (1987). *See also* Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal--Do Nothing*, 48 ADMIN. L. REV. 109, 125 (1996) ("Rather than having the executive unconditionally turn over all requested information to Congress or having the Congress withdraw its request for information altogether, information access disputes are typically worked out through one of several intermediate options").

This history of compromise and mutual accommodation is relevant in itself; these practices structure and order the legal obligations by which actors within the political branches understand themselves to be bound. It is additionally relevant because courts are particularly attentive to past practice when they render decisions in separation-of-powers disputes. Justice Frankfurter’s famous concurring opinion in *Youngstown* explained that “It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them,”²⁹ and courts today routinely invoke practice between and among the branches in separation-of-powers cases.³⁰

LIMITS ON EXECUTIVE PRIVILEGE

As the materials discussed above suggest, the proper balance between congressional need for information and executive-branch confidentiality interests is highly contextual and fact-specific. So it is somewhat hazardous to offer any categorical pronouncements in this sphere. But three broad principles that relate to limits on executive privilege merit brief discussion: the impact of allegations of misconduct on the availability of the privilege; the operation of waiver when it comes to executive privilege; and the need for a nexus between communications subject to a privilege (at least the presidential communications privilege), the performance of some legitimate presidential function, and presidential duty.

Misconduct

Some courts have held that allegations of misconduct erode if not vitiate at least some forms of executive privilege. The *Espy* court directly addressed this issue, dividing its misconduct analysis between the two forms of privilege it identified. The deliberative process privilege, the court held, “disappears altogether when there is any reason to believe government misconduct occurred.”³¹ The court found that the presidential communications privilege, a stronger privilege, did not disappear on a suggestion of official misconduct; rather, a “party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials . . .”³² Presumably, however, in the face of such a showing of need, allegations of misconduct would tilt the balance strongly in favor of the congressional requester.³³

²⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (Frankfurter, J., concurring).

³⁰ *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (stating that because the Recess Appointments Clause concerns the separation of elected powers, “in interpreting the Clause, we put significant weight upon historical practice” (emphasis omitted)). For discussions of “gloss” analysis, see generally Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV L. REV. 411, 479 (2012).

³¹ *In re Sealed Case (Espy)*, 121 F.3d 729, 746 (D.C. Cir. 1997).

³² *Id.*

³³ See also *Mobil Oil Corp. v. Dep’t of Energy*, 520 F. Supp. 414, 419 (N.D.N.Y. 1981) (in case involving subpoena issued in civil litigation, describing the “duty of a court . . . to balance the competing interests of the parties with respect to the release of the disputed information,” and identifying “the public interest in the proper functioning of its governmental

Several district court cases have followed *Espy*. In one case, the district court held that “as a legal matter . . . the deliberative process privilege does not apply if there is a discrete factual basis for the belief that ‘the deliberative information sought may shed light on government misconduct.’”³⁴ The court continued: “if there is ‘any reason’ to believe the information sought may shed light on government misconduct, public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative.”³⁵ And courts in two FOIA cases have addressed the impact of alleged misconduct on attempts to withhold deliberative material. In one, the court held that the deliberative process privilege did not apply to memoranda that demonstrated that the Nixon White House considered using the IRS “in a selective and discriminatory fashion” because the memoranda were “no more part of the legitimate governmental process intended to be protected by [FOIA] Exemption 5 than would be memoranda discussing the possibility of using a government agency to deliberately harass an opposition political party.”³⁶ In the second, the court held that the misconduct exception did not apply, cautioning that “[i]f every hint of marginal misconduct sufficed to erase the privilege, the exception would swallow the rule,” and explaining that “[i]n the rare cases that have actually applied the exception, the ‘policy discussions’ sought to be protected with the deliberative process privilege were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.”³⁷

Executive branch practice generally takes a broader view of the power of credible allegations of misconduct to vitiate claims of privilege. As a general matter, lawyers within the executive branch have historically operated within a strong culture in which documents that reveal governmental misconduct are not viewed as candidates for a potential assertion of executive privilege.

So what must “misconduct” consist of in order to pierce the privilege? And how much of a threshold showing of misconduct should be required to undermine a claim of privilege? Neither courts nor executive-branch practice have made this clear; but it is unlikely that the “misconduct” would need to be chargeable criminal conduct, or the privilege could function as a shield to conceal wrongdoing and evade accountability.

Waiver

Any privilege can be waived. The D.C. Circuit in *Espy* made clear that “release of a document . . . waives these privileges for the document or information specifically released,”³⁸ but declined to go

agencies” in a case in which “the DOE has been accused . . . of mismanaging a billion dollar governmental program that has far-reaching effects on the American public.”)

³⁴ *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

³⁵ *Id.*

³⁶ *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976).

³⁷ *ICM Registry, LLC v. U.S. Dep’t of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008).

³⁸ *In re Sealed Case (Espy)*, 121 F.3d 729, 741 (D.C. Cir. 1997).

further—that is, to find that the executive privilege, like the attorney-client privilege, would be deemed waived whenever documents were disclosed to third parties. Waiver in the context of executive privilege, then, is subject to a fact-intensive inquiry, which I discuss further below.

Nexus to Presidential Function / Presidential Duty

Finally, there is some authority suggesting that in order to qualify for the privilege (at least the presidential communications privilege), the communications at issue must have some nexus to the performance of some presidential function, and must be consistent with presidential duty.

The D.C. Circuit, in both *Espy* and *Judicial Watch*, emphasized that the purpose of protecting presidential communications is to “ensure that the President would receive full and frank advice with regard to . . . non-delegable . . . power[s]”³⁹--appointment and removal in *Espy*; the pardon power in *Judicial Watch*. These are core Article II powers, of course, and thus must be discharged consistent with Article II’s Oath and Take Care clauses.⁴⁰ So there is an argument, rooted in Article II, that the privilege cannot be used to shield from disclosure communications that do not have a nexus to core presidential functions, or that reveal bad-faith or corrupt exercises of presidential power, or conduct inconsistent with the President’s obligations.⁴¹

CURRENT DISPUTES OVER SPECIAL COUNSEL REPORT, RELATED DOCUMENTS, AND MCGAHN DOCUMENTS AND TESTIMONY

Turning to the present disputes between the Committee and the executive branch, I will make several points related to what I understand to be the respective actions and positions taken over the course of this inquiry.

“Protective” Privilege Assertion over Mueller Report and Related Documents

The sequence of events set forth in the Committee Report⁴² suggests that the executive branch response to the Committee has not been consistent with the practices and principles laid out above.

³⁹ *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1116 (D.C. Cir. 2004).

⁴⁰ U.S. CONST. art II § 3, 1.

⁴¹ See Andrew Kent, Ethan Leib, & Jed Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593 (arguing that the President’s duty of “faithful execution” requires the President to be “true, honest, diligent, due, skillful, careful, good faith, and impartial” in execution of law, and to avoid self-dealing and other self-interested conduct.).

⁴² I should note here that I have no independent knowledge of these events, so my comments are based on the facts as laid out in the report, as well as the exchange of letters between the Committee and the executive branch. H. COMM. ON THE JUDICIARY, 116TH CONG., COMMITTEE REPORT FOR RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND WILLIAM P. BARR, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY (Comm. Print 2019), <https://docs.house.gov/meetings/JU/JU00/20190508/109451/HRPT-116-ResolutionRecommendingthattheHouseofRepresentativesFindWilliamPBarrAttorneyGeneralU.pdf>.

Here it seems critical to distinguish between *document-specific* invocations of the privilege, which may well be legitimate, and the sorts of categorical invocations that the administration has sought to make, which are without substantial support in either case law or executive-branch practice. The facts suggest that the executive branch's approach to the documents sought by the Committee has not involved careful analysis of individual documents and categories of documents, conducted against a background of acceptance of the Committee's legitimate oversight authority, but rather rests on a strategy to deny the Committee any access at all.

This course of conduct is reflected in the "protective" assertion of executive privilege over all of the subpoenaed materials, communicated to the Committee via letter from Assistant Attorney General Stephen Boyd.⁴³

For several reasons, this assertion is untenable. First, the vast majority of the Mueller Report is already in the public domain, so it is no longer subject to a potential privilege assertion—that it, the privilege has been waived as to those public portions of the document.

Second, the White House has not identified what particular strains of executive privilege might attach to individual portions of the still-redacted portions of the report, or non-public underlying materials; some, like personal privacy and ongoing investigations, have at best shaky support in the case law, even if executive-branch practice is generally to avoid public disclosure. And, as discussed above, where some of the documents at issue involve documented allegations of misconduct, this should minimize the President's legitimate Article II interest in protecting them, and increase congressional authority to obtain them.

Third, the Department of Justice rests its protective assertion of executive privilege on a 1996 opinion by then-Attorney General Janet Reno. But that opinion involved facts quite different from those at issue here. First, all of the documents at issue were (a) White House documents that were (b) indisputably predecisional and deliberative, primarily involving legal analysis prepared by White House lawyers in response to ongoing investigations by Independent Counsel Ken Starr. Second, none of the materials sought by Congress had been made public.⁴⁴

That said, one of the categories of information presently sought by the Committee appears so broad as to put the executive-branch officials to a nearly impossible task. The third item on the Committee's subpoena consists of "All documents obtained and investigative materials created by the Special Counsel's Office."⁴⁵ We know from the Special Counsel's Report that the investigation involved more than 2,800 subpoenas, 500 warrants, 230 communications records orders, and over

⁴³ Letter from Stephen E. Boyd, Assistant Att'y Gen., to Jerrold Nadler, Chairman of the House Comm. on the Judiciary, 116th Cong. (May 8, 2019), <https://assets.documentcloud.org/documents/5993531/5-8-19-Boyd-Letter-Nadler.pdf>.

⁴⁴ Assertion of Executive Privilege Regarding White House Counsel's Office Documents, 20 Op. O.L.C. (1996).

⁴⁵ Subpoena to the Honorable William P. Barr (April 18, 2019), <https://assets.documentcloud.org/documents/5993566/1-4-KgVnkm9Muaz7AAKgh3w.pdf>.

500 witnesses.⁴⁶ In light of this volume, the Committee cannot in good faith expect compliance; accordingly, the burden is on the Committee to substantially narrow this aspect of its request.

The Committee appears to believe that the executive branch has essentially withdrawn from the process of negotiation,⁴⁷ providing affirmative authorization for Congress to do the same by moving quickly to a subpoena and then contempt vote. These developments do not, however, relieve the Committee of its obligation to continue to negotiate—to frame requests with specificity and care, and where possible narrowly—both to potentially achieve some sort of resolution outside the courts, and to allow the courts to adjudicate a narrow dispute if and when one party invokes their jurisdiction.

Documents and Testimony from Former White House Counsel Donald McGahn

The White House has suggested that the documents sought by the Committee from former White House Counsel Don McGahn “implicate significant Executive Branch confidentiality interests and executive privilege,”⁴⁸ but to my knowledge has not moved to formally invoke executive privilege. For at least three reasons, the White House lacks a strong foundation for an assertion of executive privilege over all of the documents in the possession of former WH Counsel McGahn. First, the White House did not assert any privilege with respect to McGahn’s provision of information to the Special Counsel’s Office, nor did it object on the basis of privilege to the release of the largely unredacted report. This may not constitute a waiver as to all of the documents in McGahn’s possession, but as to those materials that were incorporated into the now-public report, there is no longer any strong claim of privilege.

Second, the President has made numerous public statements, as recently as this week, to put before the public his version of his conversations with Don McGahn. On April 25, the President tweeted that he “never told the White House Counsel Don McGahn to fire Robert Mueller.”⁴⁹ On May 11, he tweeted that “I was NOT going to fire Bob Mueller, and did not fire Bob Mueller. In fact, he was allowed to finish his Report with unprecedented help from the Trump Administration. Actually, lawyer Don McGahn had a much better chance of being fired than Mueller. Never a

⁴⁶ 1 SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 13 (2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/f5fe536c-81bb-45be-86e5-a9fee9794664/note/a8d336ef-e98d-4a08-987d-b4c154b22700.pdf>.

⁴⁷ Charlie Savage, *Trump Vows Stonewall of “All” House Subpoenas*, N.Y. TIMES, Apr. 24, 2019.

⁴⁸ Letter from Pat A. Cipollone, Counsel to the President, to Jerrold Nadler, Chairman of the House Committee on the Judiciary, 116th Cong. (May 7, 2019), <https://int.nyt.com/data/documenthelper/812-cipollone-letter-mcghahn/6500f55136eae0eebaf3/optimized/full.pdf>.

⁴⁹ Donald J. Trump (@realdonaldtrump), Twitter (April 25, 2019, 4:47 AM), <https://twitter.com/realDonaldTrump/status/1121380133137461248>.

big fan!”⁵⁰ Although there is no direct judicial authority on the impact of such statements on a privilege claim, there is some analogous authority: courts’ treatment of public statements in the context of FOIA litigation in which the government attempts to shield certain information from disclosure. One such case involved a request for CIA records on the use of drones in targeted killings. The CIA provided a “*Glomar*” response,” in which an agency refuses to confirm or deny the existence of responsive records on the grounds of national security. The D.C. Circuit held that statements by the President and other executive-branch officials effectively confirmed the existence of a drone program, such that the CIA could not invoke *Glomar*.⁵¹ And the Second Circuit reached a similar conclusion in a case seeking access to OLC documents on targeted killings; that court similarly cited statements by executive-branch officials in concluding that the executive branch had waived its right to claim that the documents at issue were exempt from disclosure.⁵²

Third, there is strong evidence, detailed in the Mueller Report, that the exchanges between the President and Don McGahn contain evidence of misconduct⁵³—something both the courts and the executive-branch itself have suggested is an impermissible use of the privilege.

CONCLUSION

A strong executive privilege and strong congressional oversight authority are both important principles. For decades, it has been possible to give expression to both.

The sequence of events set forth in the House Committee Report and related letters suggests that the conduct of the WH poses risks to both: first, it threatens Congress’s ability to conduct meaningful investigation and oversight; second, if the White House continues on this path and a court ultimately renders a decision on the dispute, these events could result in judicial curtailing of the privilege—ultimately weakening the executive branch’s ability to protect certain legitimate categories of information. At the same time, Congress has an independent obligation to continue to participate in the accommodations process, including by continuing to narrow the requests it has issued.

⁵⁰ Donald J. Trump (@realdonaldtrump), Twitter (May 11, 2019, 3:39 PM), <https://twitter.com/realDonaldTrump/status/1127342552745762816>.

⁵¹ *Am. Civil Liberties Union v. C.I.A.*, 710 F.3d 422, 429 (D.C. Cir. 2013) (“The President of the United States has himself publicly acknowledged that the United States uses drone strikes against al Qaeda.”).

⁵² *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100, 114, 116 (2d Cir. 2014) (citing “the numerous statements of senior Government officials discussing the lawfulness of targeted killing of suspected terrorists, which the [district] court characterized as ‘an extensive public relations campaign to convince the public that [the Administration’s] conclusions . . . are correct’” in concluding that “waiver of secrecy and privilege . . . has occurred”). For more on these disputes, see Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 113 (2017).

⁵³ II SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 80-90 (2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/f5fe536c-81bb-45be-86e5-a9fee9794664/note/a8d336ef-e98d-4a08-987d-b4c154b22700.pdf>.