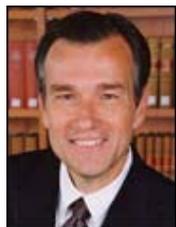




http://writ.lp.findlaw.com/commentary/20080714_kmiec.html

[FILE /includes/writ/writ.lp.findlaw.com/includes/breadcrumb.shtml NOT FOUND]



The Use of Executive Privilege Must Be Reined In: Problematic Claims of Privilege Regarding the U.S. Attorney Firings and Torture Policies

By [DOUGLAS KMEIC](#)

Monday, Jul. 14, 2008

Last Thursday, July 10, former White House Chief of Staff Karl Rove refused to honor the subpoena of a House subcommittee looking into whether or not wrongful pressure was brought upon U.S. Attorneys in connection with the prosecution of a former Democratic governor of Arkansas. The subcommittee had subpoenaed Rove in May to explore what, if any role, he played in the prosecution of former Alabama Governor Don Siegelman or in the unexplained dismissal of US Attorneys. In spurning the subpoena, Rove indicated that he was following the instruction of the White House not to appear before the committee on the grounds that this would interfere with the president's internal communications. The full committee and ultimately the full House must now decide whether to hold Mr. Rove in contempt.

Late last month, in a related inquiry being litigated in the District Court in Washington, D.C., Judge John D. Bates heard vigorous argument from the Bush White House in defense of its refusal to supply documents to Congress or to allow the Congressional testimony of former White House Counsel Harriet Miers and Chief of Staff Joshua Bolten regarding the controversial dismissal of a series of U.S. Attorneys. Here too, Congress is investigating based on suspicion that the dismissals were politically-motivated; and, as in the case of Mr. Rove, the Bush Administration has blocked its inquiry by asserting executive privilege.

It is smugly assumed by the Bush administration that the awkwardness and difficulty of resolving an inter-branch dispute over executive privilege will mean that the case will linger past the national election and the next January when the matter can be declared moot. The rule of law deserves better.

In an appropriate context, executive privilege preserves the constitutional separation of powers. In the present matter, asserting the privilege merely confirms that the Bush presidency seems determined to go out in a blaze of executive overreaching. Immediately after 9/11, there was good reason to defend the aggressive use of executive authority to ascertain the nature of the attack and devise an appropriate response. The Congress thus gave the President wide latitude to use his office's inherent authority and augmented that latitude with considerable explicit power, as in the Authorization to Use Military Force. But there are limits to executive power – and this administration is well past them.

The Bush Administration Should Exercise Self-Restraint

Now, in fairness, the boundaries of executive power are less than clear. Consider, for example, how the Supreme Court has seemed to be of two minds regarding the limits on broad executive authority. On one hand, in [Hamdi v. U.S.](#), the Court allowed the use of hearsay and gave the government a presumption of correctness in the detention of a U.S. citizen. On the other hand, in [Boumediene v. Bush](#), the Court extended the writ of Habeas Corpus to noncitizens held at Guantanamo Bay.

Yet even – no, especially – in the face of judicial unclarity, we should be able to expect our President to have some appreciation for the limits of executive power and to exercise self-restraint. We don't expect the President to engage in sharp dealing, but to manifest comity toward a co-equal branch. After all, in his concurrence in [*Youngstown Sheet & Tube Co. v. Sawyer*](#), a seminal case on presidential power, Justice Jackson wisely and long ago reminded those who would hold the presidential office that:

“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.”

With respect, it is against the backdrop of Justice Jackson's wise teaching that Judge Bates should decide the U.S. attorney subpoenas/testimony dispute. Judge Bates expressed some exasperation about being caught between the political branches, worrying that he will disrupt the constitutional system whichever way he rules. Ultimately, though, Judge Bates has little reason to worry. In this particular clash between the branches, it's clear that a ruling in favor of Congressional document access and testimony will vindicate the Constitution, not subvert it.

Executive Privilege, as Originally Understood and as Now Invoked

The doctrine of executive privilege has grown well beyond its original understanding. To the surprise of most scholars, Chief Justice Warren Burger first declared the privilege to have a constitutional foundation in [*U.S. v. Nixon*](#) in 1974. Unfortunately, this claim says more about Chief Justice Burger's tendency to write with a broad-tipped pen than about the historical record.

Fortunately, the careful research of the late Archibald Cox reveals the true state of things regarding the thin constitutional underpinnings of executive privilege:

“Over a period of a century and a half thirteen Presidents found a total of twenty occasions on which to refuse to turn over information demanded by an arm of Congress. . . .If one looks at what was done and confines the words to the events, nothing appears which even approaches a solid historical practice of recognizing claims of executive privilege based upon an undifferentiated need for preserving the secrecy of internal communications within the Executive Branch.”

The current scope of the privilege is also unjustified on pragmatic grounds. President Reagan once issued a memorandum reminding his subordinates that the privilege was to be rarely asserted, yet today, threats to assert executive privilege have become all too frequent -- driven more by the desire to defend Burger's generous precedent than the actual needs of the presidency.

The Harms that Occurs When the Executive Is Over-Privileged

This modern trend has had baleful consequences.

First, it has inspired an overly adversarial relationship between the branches, turning routine requests for information into constitutional fistfights. These brawls waste time and obscure the purpose of the original substantive inquiry.

Second, advisement of the president rarely depends upon the existence of executive privilege. Its defenders claim that, without the privilege, executive officials won't give candid advice to the president or to their superiors who answer to the president. (The jurisprudence that has grown up in the District of Columbia federal courts over how far down the food chain the privilege should apply is opaque, to say the least.) Yet this claim is simply untrue, based on my own experience giving counsel to two presidents and the experience of others in like position. Advisors afraid to have their policy judgments held up to the light of day probably ought to rethink public service. In the U.S.

Attorney inquiry, in particular, so long as any ongoing investigation or prosecution is safeguarded, revealing the reasoning behind the unprecedented, selective dismissal of eight U.S. Attorneys mid-term should advance good government and the interests of justice, not undermine it.

In reality, fighting to keep secret the considerations that went into policy formation usually has little to do with encouraging candor, and much more to do with hiding those special interest voices that paid by contribution for special "access." Who needs to perpetuate that? In the U.S. Attorney matter, for similar reason, it is important for the rule of law to demonstrate that proper charging criteria, and not political affiliation, determined the exercise of prosecutorial discretion.

Third, while the executive almost always starts out by asserting that the privilege is near absolute, most privilege disputes ultimately lead the executive to supply the desired documentation on some face-saving rationale or upon a condition that limits the taking of notes or the presence of legislative aides who don't need to be involved. Let's cut to the chase.

Judge Bates Has a Precious Opportunity to Narrow and Clarify the Privilege

As a legal matter, Judge Bates could do the system a favor by narrowing the scope of the privilege to the one genuine separation of powers concern that was identified by Burger in *US v. Nixon* -- namely, national security, rigorously defined. In addition, as I suggested above, the privilege does have a role as a legitimate response to attempted congressional micromanagement of law enforcement decisions that would undermine the integrity of an open criminal investigation.

Of course, nothing said here should be taken as oversimplification. Even if Judge Bates were to carve out these two legitimate spheres of privilege -- national security and interference in an ongoing criminal investigation -- it can be difficult enough for judges to figure out which cases fall within them.

Even Limited to Its Proper Domain, Executive Privilege Still Can Be Quite Hard to Control

To illustrate the point of how difficult it is to limit executive (and other) privilege assertions, it's worth looking briefly at some recent testimony unrelated to the U.S. Attorney scandal. In recent weeks, David Addington, under subpoena, and Professor John Yoo, voluntarily, testified before a subcommittee of the House Judiciary Committee about legal advice given on interrogation techniques, including most prominently torture.

Addington was uncooperative, and it was far from clear whether there was any executive privilege basis justifying his hostility. After all, under Mr. Addington's view -- which is an intriguing, if somewhat academic, puzzler -- the Vice-President, for whom he works, is constitutionally outside the executive branch, suggesting he and his aides have no executive privilege to assert.

In relation to Abu Ghraib questions, Professor Yoo declined to answer partly out of concern for classified information (a proper concern to be sure, but one which an executive session of the committee presumably could handle). Professor Yoo also raised attorney-client privilege, which, on closer examination, does not match the institutional setting. Yoo was a Deputy in the Office of Legal Counsel, not the personal counsel of the President. OLC is understood as "the lawyer for the Presidency," as it exists over time. Since OLC's advice is for the institution not the person, attorney-client privilege is inapplicable; presidential office privilege claims are all best analyzed as pertaining only to executive privilege, or confusion follows.

The point is this: When the contours of applicable privileges are loosely defined, they often end up misapplied, especially vis-a-vis Congress, and the bickering over them displaces the substantive focus of governing.

In the context of the subcommittee hearing, for example, the House members' assumed focus is the adequacy or inadequacy of existing law at the time Professor Yoo authored the so-called "torture memorandum." Going forward,

the legislative objective is to have the United States faithfully adhere to its international and related domestic obligations. Professor Yoo believes those were observed on his watch. Others disagree. Professor Marty Lederman, for example, contends that the statutes and precedents defining "torture" in laws governing removal of aliens and asylum applications were more relevant. Would these laws have been preferable to the "organ failure, impairment of bodily function and death" guidance that Professor Yoo derived from health-related statutes and that Professor Jack Goldsmith has so roundly criticized? That should be the true subject of the hearings – not the spurious claims of privilege that have been put forth in an attempt to avoid these issues of national and international integrity.

The U.S. Attorney Inquiry: With Neither National Security At Issue Nor an Ongoing Investigation in Jeopardy, Claims of Executive Privilege Should Be Rejected

Returning to the matter of the U.S. Attorneys and Congress' subpoenas for the testimony of Miers and Bolten, it clear that their circumstances offer no genuine basis for the assertion of executive privilege.

If the court turns away the Administration's overly-broad claim of executive privilege here, it jeopardizes no national security interest or ongoing investigation. The question presented is simply whether existing laws are adequate to avert the apparent or actual politicization of major charging and subsidiary prosecutorial judgments by the mid-term dismissals of U.S. Attorneys and to ensure going forward that the dismissal of presidential appointees is not fobbed off on unaccountable staff assistants. In the present matter, neither the President nor the then-Attorney General claimed to have supervised the dismissals closely and that can be reasonably argued to be either the highest form of near-impeachable maladministration by two individuals in the highest governmental offices, or a systemic failure of the law. Either way, the Congress has a fully legitimate legislative interest.

Finally, even if Judge Bates is reluctant to re-examine the scope of executive privilege, there is a simple and well-established principle that should foreclose a successful privilege claim: the dismissals represent past, not ongoing, decision-making. The late Attorney General William French Smith reflected that legislative oversight "can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached."

Indeed, the historic defender of the presidential office, the Office of Legal Counsel, has written that "[t]he courts have held that the 'deliberative process' privilege does not protect documents which reflect final opinions, statements of reasons supplying the bases for decisions, or policies actually adopted, or documents that otherwise constitute the 'working law' of the agency."

For these reasons, the subpoenas for Miers's and Bolten's testimony, as well as for relevant documents, should be enforced. Better yet, the President should take the high ground and send his aides to the Hill with their relevant papers without compulsory process. Doing so would affirm that cooperating with legislative objectives can be, in the American Republic, another way to defend and enhance the body politic's respect for the office of the Presidency.

*Douglas Kmiec is Chair & Professor of Constitutional Law, Pepperdine University. Previously, he was Head of the Office of Legal Counsel in the administrations of Presidents Reagan and George H.W. Bush. For more discussion of the role of the Office of Legal Counsel in relation to the "torture" interrogation policies and internal executive discussions that may give rise to privilege claims, interested readers may consult Professor Kmiec's recent article *Yoo's Labours Lost*, 31 *Harv. J. of L. & Pub Pol'y* 795 (2008).*

[FILE /includes/writ/writ.lp.findlaw.com/includes/right.shtml NOT FOUND]



[Help](#) | [Site Map](#) | [Contact Us](#) | [About Us](#) | [Media Kit](#) | [FindLaw Local](#) | [Disclaimer](#) | [Privacy](#)
Copyright © 1994-2008 [FindLaw](#), a Thomson business