Ruling on the White House's Claims of Executive Privilege and Immunity Made in Response to Senate Judiciary Committee Subpoenas

Chairman Patrick Leahy
Senate Judiciary Committee

Since the beginning of this Congress, the Senate Judiciary Committee has conducted an investigation into the unprecedented mass firings of federal prosecutors by those in the Administration of the President who appointed them. In the course of this investigation, which has led to the resignations of the Attorney General, the senior leadership of the Justice Department, their staff, and several high-ranking White House political officials, the Committee has uncovered grave threats to the independence of law enforcement from political manipulation. The evidence accumulated from the testimony of nearly 20 current and former Justice Department officials and documents released by the Department shows that the list for firings was compiled based on input from the highest political ranks in the White House, including Karl Rove. The evidence shows that senior officials were apparently focused on the political impact of federal prosecutions and whether federal prosecutors were doing enough to bring partisan voter fraud and corruption cases. It is now apparent that the reasons given for these firings were contrived as part of a cover up.

The Committee's attempts to obtain information from the White House, first requested voluntarily and later legally compelled by subpoenas, have been met with stonewalling. In the process, the White House has asserted blanket claims of executive privilege and novel claims of absolute immunity to block current and former officials from testifying and producing documents in compliance with the Committee's subpoenas. Today, I am ruling on those claims.

I. White House Invoked Blanket Privilege Claims to Avoid Complying with Subpoenas

On June 13 and July 26, I issued Judiciary Committee subpoenas that had been authorized months earlier for White House documents and for documents and testimony from current and former White House officials related to the firings. In response, White House counsel Fred Fielding conveyed President Bush's blanket claim of executive privilege over all information from the White House related to the Committee's investigation. Based on this claim of executive privilege, White House Chief of Staff Joshua Bolten and other current and former White House officials have refused to comply with subpoenas to provide documents and information. In addition, Mr. Fielding has written not only to current White House employees subpoenaed by the Committee and directed them not to testify about the firings, but has reached out to instruct former White House political director Sara M. Taylor not to testify to the best of her knowledge.

Finally, the White House has asserted the novel claim that Karl Rove, subpoenaed by this Committee for testimony and documents, is immune as an "immediate Presidential Advisor" from appearing at all or testifying.

That Mr. Fielding asserts executive privilege on behalf of the President is surprising in light of the significant and uncontroverted evidence that the President had no involvement in these firings. To date, the President has not taken responsibility for the firings and his own statements regarding the firings refer to others making the decisions. The Attorney General's former chief of staff, the former political director at the White House and the Attorney General himself have testified under oath that they did not talk to the President about these firings. Courts analyzing executive privilege claims have made clear that the purpose of the privilege is to protect the President's ability to receive candid advice. The President's lack of involvement in these firings—by his own account and that of many others—calls into question any claim of executive privilege.

The effects of the White House's assertions of privilege and immunity are unmistakable—they are to withhold critical evidence related to the Committee's investigation that the Committee has demonstrated it needs in order to perform its legislative and oversight functions and to explore the veracity of testimony to the Committee.

Selectively citing letters from Mr. Fielding, former employee Ms. Taylor and her former deputy, J. Scott Jennings, refused to answer most of the Committee's questions related to the firings. They produced no documents, despite their obligations to do so pursuant to the Committee's subpoenas. In response to the subpoena to Mr. Rove, the Committee received only a letter from Mr. Fielding. Mr. Rove did not appear to testify and produce documents or even to assert executive privilege in response to questions.

The White House's other blanket assertion is that there was no wrongdoing in the firings. We have asked for the basis for this assertion. None has been provided. In light of the evidence gathered by the Committee showing the significant involvement of White House political officials in improper politicization of law enforcement, the White House is not entitled to withhold key evidence. If the White House has information that led the President and others to discount the evidence of wrongdoing the investigating Committees have gathered so far, then it should be produced. Otherwise, we must conclude that they do not have it and it does not exist.

II. White House Rejected Voluntary Cooperation

I reluctantly moved to issue these subpoenas only after exhausting every avenue seeking voluntary cooperation. Before issuing the subpoenas, I sent nearly a dozen letters seeking voluntary cooperation with the Committee's investigation to the White House and its current and former employees. Despite mounting evidence of significant involvement by White House political officials, the White House did not produced a single document or allow even one White House employee or former employee involved in these matters to be interviewed voluntarily.

Indeed, the White House's only response to our many attempts to work out an accommodation has been to restate an unacceptable "take it or leave it" offer of limited document availability and off-the-record, backroom interviews with no transcript, no oath, and no ability to follow up. The Committee rejected that as unacceptable when it was offered in March and, despite all of our efforts, the White House has been unwilling to work with us on a voluntary basis. When I wrote to the President in August following the suggestion of Senator Specter, the Committee's Ranking Member, to ask the President to sit down with us and work out an accommodation, my offer was flatly rejected. The White House also flatly rejected an additional attempt earlier this month by the House Judiciary Committee to reach an accommodation.

III. White House Failed to Support Privilege Claims

After the White House counsel made a blanket privilege assertion in response to this Committee's subpoenas and subpoenas issued by House Judiciary Chairman Conyers, we gave the White House the opportunity to provide the factual and legal basis for its blanket privilege assertion. A serious assertion of privilege would include an effort to demonstrate to the Committees which documents, and which parts of those documents, are covered by any privilege that is asserted to apply and why. But the White House has ignored these opportunities. In light of the evidence pointing to significant involvement by White House political officials, which had been communicated to the White House multiple times, the White House's refusal to provide a listing of those documents on which it asserts privilege and a specific factual and legal basis for the assertion of executive privilege claims renders its privilege assertions wholly unsupported and invalid.

The complete lack of particularity of the White House claims, including the lack of a privilege log or any specific factual basis for the privilege claims, makes the scope of the claims improper. That is so especially here where there is no indication of presidential involvement. The White House's privilege claim extends to all communications with third parties and the Department of Justice from any White House employee irrespective of the purpose of the communication and despite Mr. Fielding having offered to provide documents showing third party communications if the Committee would agree to terminate its investigation. The extension of this privilege claim to the knowledge of former employees is even more attenuated.

Executive privilege, even when properly asserted, "is qualified, not absolute"[1] and "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."[2]

The White House has fallen well short of providing adequate support for its claims.

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[1] *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).
[2] *United States v. Nixon*, 418 U.S. 683, 706 (1974).

IV. The Committee Has Demonstrated Compelling Congressional Need That Outweighs the Overbroad, Unsubstantiated Executive Privilege Claims

Claims of executive privilege "can be overcome by an adequate showing of need."[3] In contrast to the White House's improperly asserted and unparticularized privilege claims, invoked despite the President's lack of involvement in these firings, the Committee's need for this information has been well-established. Evidence gathered by the investigating Committees of the Senate and House shows that White House political officials played a significant role in originating, developing, coordinating and implementing these unprecedented firings and the Justice Department's response to congressional inquiries about it.

The evidence we have found supports a conclusion that officials from the highest political ranks at the White House, including Mr. Rove, manipulated the Justice Department into its own political arm to pursue a partisan political agenda. We have found evidence of the involvement of White House political officials in pressuring prosecutors to bring partisan cases and seeking retribution against those who refuse to bend to their political will. An example is New Mexico U.S. Attorney David Iglesias, who was fired a few weeks after Karl Rove complained to the Attorney General about the lack of purported "voter fraud" enforcement cases in Mr. Iglesias' jurisdiction.

We have found that at least one Department official, the White House liaison Monica Goodling, who attended political briefings provided by White House political officials, admitted while testifying in the House under a grant of immunity to screening career employees for political loyalty and to wielding undue political influence over key law enforcement decisions and policies. We have found that officials at the White House and the Justice Department were determined to use the Attorney General's new authority enacted as part of the Patriot Act reauthorization to put in place "interim" U.S. Attorneys indefinitely, doing an end-run around the Senate's constitutional and statutory role in the confirmation of U.S. Attorneys.

Along the way, this subversion of the justice system has included lying, misleading, stonewalling and ignoring the Congress in our attempts to determine what happened. It is obvious that the reasons given for these firings were contrived as part of a cover up and that the stonewalling by the White House is part and parcel of that same effort. During his sworn testimony, the Attorney General himself contrasted these politically-motivated firings with the replacement of other United States Attorneys for "legitimate cause."

Another demonstration of this Administration's partisan intervention in federal law enforcement is its threat to block the Justice Department from pursuing congressional contempt citations. This Administration has announced its intentions to interfere with our system of justice by preventing a United States Attorney from fulfilling his or her sworn, constitutional duty faithfully to execute the laws and proceed pursuant to section 194 of title 2 of the United States Code.

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[3] *In re Sealed Case* at 745.

The constitutional powers of Congress and the responsibilities of this Committee to the Senate and the American people overrule the White House's unsupported privilege claims. The Supreme Court has long recognized that Congress has "broad" power to investigate "the administration of existing laws" and to "expose corruption, inefficiency, waste" within the executive branch.[4] The evidence obtained raises concerns about the violation of federal laws, including possible obstruction of justice, laws prohibiting misleading or inaccurate testimony to Congress, and possible violations of laws like the Hatch Act prohibiting retaliation against federal employees for improper political reasons. The Committee has the responsibility to conduct investigations and obtain executive branch information in order to consider legislation within our jurisdiction,[5] including legislation related to the appointment of U.S. Attorneys, and to protect our role in evaluating nominations pursuant to the Senate's constitutional responsibility to provide advice and consent. Indeed, it was in light of this jurisdiction, the confirmation power vested in the Senate, and the jurisdiction of this Committee over the review of U.S. Attorney nominations, that Senator Specter, the Committee's Ranking Member, observed early on that we have "primary" responsibility to investigate this matter.

The White House's privilege claim is particularly inappropriate in light of the evidence suggesting possible wrongdoing by government officials. Not only has the Supreme Court recognized that Congress' "broad investigative power" is necessary to determine whether there was wrongdoing and address it, but previous administrations have recognized that executive privilege should not be invoked to prevent investigations into wrongdoing.

V. No Support for Immunity Claim

Also without support is the White House claim that Mr. Rove is immune from the obligation to appear in response to a Senate subpoena. There is no proper basis for Mr. Rove's refusal to appear, and it flies in the face of legal and historical precedent. Since World War II, 74 presidential advisors, in positions of proximity to the President similar to Mr. Rove, have testified before Congress, many of those compelled by subpoena. Even the President has not been immune from compliance with subpoenas. In support of its novel immunity argument, the White House relies on a July 10 memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General in the Office of Legal Counsel, that amounts to a selective and incomplete collection of untested executive branch memoranda, opinions, presidential letters and speeches—in short, assertions of executive power by the executive branch. Indeed, the White House does not and cannot cite a single court decision in support of its contention.

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[4] *See Watkins v. United States*, 354 U.S. 178, 187 (1957).
[5] *See, e.g., McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

VI. Conclusion: White House Officials Directed to Comply with Subpoenas

I have given the White House's claims of executive privilege and immunity careful consideration. I hereby rule that those claims are not legally valid to excuse current and former White House employees from appearing, testifying and producing documents related to this investigation. Accordingly, I direct Mr. Bolten, Mr. Rove, Ms. Taylor and Mr. Jennings to comply immediately with the Committees' subpoenas by producing documents and testifying.

Issued this 29th day of November, 2007.

PATRICK LEAHY
Chairman
Senate Committee on the Judiciary