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Executive Privilege and Compelled Testimony of Presidential Advisers: Don McGahn's Dilemma

By **Jonathan Shaub** Friday, May 3, 2019, 10:04 AM

The release of the redacted Mueller report focused the spotlight squarely on former White House Counsel Don McGahn, whose testimony to the special counsel featured prominently in the report's discussion of obstruction of justice. Indeed, the first questions to Attorney General William Barr from Sen. Dianne Feinstein during Barr's May 1 testimony exclusively addressed the events described in McGahn's testimony.

Soon after the release of the special counsel's report, House judiciary committee Chairman Jerrold Nadler, issued a subpoena requiring that McGahn produce all documents in his possession and testify before the committee about the 33 subjects listed in the subpoena's schedule, including, among other things, the investigation into National Security Adviser Michael Flynn; the firing of FBI Director James Comey; Attorney General Jeff Sessions's recusal from the Russia investigation; the resignation or termination, "whether contemplated or actual," of Sessions, Deputy Attorney General Rod Rosenstein, and Special Counsel Robert Mueller; the infamous Trump Tower meeting; other figures such as Paul Manafort, Roger Stone and Rick Gates; as well as information about the handling of the investigations into President Trump and his various companies and organizations by prosecutors in the U.S. Attorney's Office for the Southern District of New York.

Early reports indicated, and Trump confirmed last night, that the administration plans to "fight" the subpoena issued to McGahn and to oppose other requests for testimony from current and former White House aides. McGahn thus faces a dilemma. As "one person close to McGahn" told the Washington Post, "He's not eager to testify. He's not reluctant. He got a subpoena. It compels him to testify. But there are some countervailing legal reasons that might prevent that."

The only "countervailing legal reason" identified is executive privilege, which the administration reportedly plans to invoke over McGahn's testimony. McGahn's dilemma raises several interesting legal questions about executive privilege and the compelled congressional testimony of senior presidential advisers that the courts have only seldom, if ever, addressed.

I worked on a few similar disputes as a career attorney in the Office of Legal Counsel (OLC) during the Obama administration, and it is impossible to understand the full extent of the dilemma and McGahn's possible options without a complete understanding of the executive branch doctrine on which McGahn and the White House will undoubtedly rely. The executive branch's expansive view of its constitutional prerogatives in the context of oversight, the seeds for which were planted long ago—including during Barr's previous service in the Department of Justice—is as much to blame for the present oversight disputes and comparative congressional weakness as is any decision by this particular administration.

McGahn's Choice

First, no matter how McGahn, Congress or the press frames the issue, the choice of what to do will ultimately be McGahn's. Reports suggest he "has expressed frustration" about the situation, and his attorney is "trying to help him navigate the difficult situation of being pulled by two branches of government."

There is no doubt that he will be asked to testify about his personal interactions and conversations with the president—communications that the Supreme Court has expressly recognized as protected by executive privilege. If the White House decides to object to his testimony on the basis of executive privilege (or to his attendance on the basis of immunity, as described below), it could take one of two actions. It could direct McGahn not to answer questions or, if

immunity is the claim, not to attend the hearing. Or it could indicate that there are executive privilege issues the president is still considering and request that McGahn refrain from answering any question that may implicate confidential information until the president has had an opportunity to decide whether to assert privilege. After President George W. Bush asserted executive privilege in the U.S. attorney matter, for example, the White House directed former Counsel Harriet Miers and aide Sara Taylor not to comply with congressional subpoenas. When former Deputy Attorney General Sally Yates was set to testify about her communications to the White House regarding Michael Flynn, the Justice Department responded to her letter seeking "authorization" to testify by noting that the "President owns" the privilege and indicating that she would "need[] to consult with the White House" before disclosing any privileged information.

As former White House and congressional lawyer Andy Wright ably explained with respect to the dispute between Sally Yates and the administration, "the White House does not have effective control" of former officials who are set to testify. The administration faced the same problem when former FBI Director Comey agreed to testify voluntarily. And a similar principle applies when former officials decide to write books or go on talk shows. Former officials are not formally subject to the direction of the president or other superior executive branch officials, nor are they are subject to termination for defiance of a superior's order. As a result, it is not at all clear that the executive branch has authority to control their speech, particularly considering the potential First Amendment implications. Moreover, when testimony is not voluntary but compelled by a subpoena, the former official may feel obligated to respond because the official lacks a countermanding direction by a superior officer not to comply. Because of this, subpoenas to third parties who are not subject to executive branch control are a particularly effective oversight tool for gaining access to otherwise confidential information. Most contractual confidentiality agreements and provider terms of service allow for disclosure of confidential information if compelled by subpoena.

The executive branch can thus cite the privileges and even purport to direct a former official to adhere to them. And, in its view, it has the authority to issue such directions. But compliance is not assured. Nor is the direction certain to hold up in any subsequent judicial proceedings.

The executive branch's legal authority is even weaker if the president has not invoked his constitutional authority expressly by asserting executive privilege or claiming immunity. The only real way to ensure compliance by a former official would be to ask a court to enjoin the testimony. The Department of Justice has taken this approach only once, when Congress attempted to get national security information from AT&T: The department sued AT&T asking the court to enter an injunction against AT&T prohibiting compliance with the subpoena., and the House intervened to argue AT&T had to comply with the subpoena. But the Justice Department has not filed such an action since, certainly not against an individual. And the cause of action in the AT&T suit ultimately rested on the enforcement of a nondisclosure provision in the contract with AT&T. It is not clear if a similar nondisclosure agreement exists here between McGahn and the White House or, if there is, whether such an agreement between the government and an official would be enforceable.

In the end, then, McGahn will decide what to do, not the White House. As a former White House counsel, he may feel obligated, as Harriet Miers and Sara Taylor did, to follow the direction of the White House on privilege or immunity, out of a desire to protect the institution of the presidency and the institutional confidentiality interests of the executive branch, out of what he feels his ethical obligations are to the White House as an attorney and former official, or simply out of a desire to avoid further testimony on these issues—particularly the kind of highly publicized testimony that would occur here. Certainly, if he chooses not to appear or chooses to invoke executive privilege, he will incur the wrath of the committee. How he and the White House would justify such a decision as a constitutional matter depends on the course they adopt. And, undoubtedly, they will attempt to rely on executive branch doctrine.

Has Executive Privilege Been Waived?

The administration's reported reliance on executive privilege to block McGahn's testimony resulted in a spate of commentary suggesting that any executive privilege claim had been waived, perhaps even twice. Aaron Blake, for the Washington Post, reported that "[e]xperts say the White House may have already shot itself in the foot on this one" and

waived executive privilege *twice* because it had first allowed McGahn to give testimony to the special counsel and then had not objected to the release of the Mueller report. One of the experts, law professor Heidi Kitrosser, is quoted as saying, "Given all of this, it seems to me that Trump cannot claim 'backsies—i.e., un-waive the privilege—simply because he doesn't like the way that things are unfolding." Professor Ross Garber, by contrast, tweeted that the McGahn interview was "not a waiver" and that the release of the report did not waive executive privilege.

Who is right? The answer is not settled given the scarcity of judicial decisions and no firm guidance from the Supreme Court. But, as Garber noted, the administration has a strong case based on historical practice and judicial precedent that it has not waived its ability to assert executive privilege entirely.

First 'Waiver': Allowing McGahn to Testify

In a memorandum Trump's personal attorneys sent to Mueller on Jan. 29, 2018, they indicated the president would "waive[] the obviously applicable privileges where appropriate" and allow the special counsel's office to interview close presidential advisers in the course of its obstruction investigation. They did so, it appears, in order to bolster their legal argument that Trump himself need not testify because any information he could convey would now be "practically available from another source." Accordingly, Trump allowed McGahn to testify for over 30 hours about confidential conversations, "waiving" any potential executive privilege.

"Waiver" in this context, however, means only that the president allowed McGahn to talk to the special counsel. As the head of the executive branch, the president already has the authority to direct McGahn and other executive branch officials who serve at the pleasure of the president to take particular actions. An invocation of executive privilege is neither necessary nor relevant to intrabranch disclosures. As Douglas Letter, counsel to the House of Representatives, has recognized in the context of the Mueller report, "it simply makes no sense to speak of invocations by the President of executive privilege or any other litigation privilege against his own Attorney General." The same is true for an "invocation" that would have prevented McGahn from speaking to the special counsel. The president did not need to "invoke" executive privilege; he simply could have directed McGahn not to testify or not to provide particular information. The special counsel could have then sought a grand jury subpoena for the information, setting up a court battle. And because presidents do not have the authority to issue directives to the judiciary, the president would have had to assert executive privilege to justify his refusal to allow McGahn to testify.

Does Trump's decision not to prevent McGahn from testifying "waive" his ability to assert executive privilege later? In other circumstances, the answer would be yes; the voluntarily disclosure of privileged information to an outside party serves to "waive" the privilege entirely, meaning the privilege holders may no longer claim the privilege to prevent its disclosure. For example, disclosure to an outside party of information protected by attorney-client privilege waives the privilege for not only the information disclosed but also "to all other communications relating to the same subject." And an individual who begins to answer questions on a particular subject without invoking her Fifth Amendment right against self-incrimination may waive her ability to claim the privilege in response to questions on that subject matter.

But such a broad waiver doctrine has never been applied to information protected by executive privilege; instead, it has been repeatedly rejected in this context, both by past administrations and by the judiciary. As an initial matter, there likely has been no waiver because McGahn did not disclose information to an "outside party"; his was an intrabranch disclosure. Under the executive branch's understanding of executive privilege, the president maintains control of the dissemination of this information, both within and outside of, the executive branch. Thus, even if the president allowed McGahn to disclose to the special counsel information that falls within the scope of executive privilege, the president retains the constitutional authority, discussed below, to prevent that material from being disclosed further or released to Congress.

OLC previously addressed a similar situation, concluding that the president could assert executive privilege over information gathered by Special Counsel Patrick Fitzgerald in the course of his investigation into the disclosure of Valerie Plame Wilson's identity. Vice President Dick Cheney and other White House officials had voluntarily cooperated with the special counsel, just as McGahn has here. The OLC opinion argues that "[w]ere future presidents, vice

presidents or White House staff to perceive that such voluntary cooperation would create records that would likely be made available to Congress (and then possibly disclosed publicly outside of judicial proceedings such as a trial), there would be an unacceptable risk that such knowledge could adversely impact their willingness to cooperate fully and candidly in a voluntary interview." In a later suit filed under the Freedom of Information Act seeking the special counsel's records of his interview of Cheney, a court agreed with the Justice Department that "the discussion between Fitzgerald and Vice President Cheney is more appropriately considered a protected inter-agency disclosure" as opposed to a disclosure to an outside party that would have waived privilege. Moreover, the court noted that the vice president's "failure to invoke any executive privileges" before the special counsel "did not preclude the White House's future reliance on those privilege."

One note of caution, however. An intraagency disclosure *could* in effect "waive" executive privilege by undermining the executive branch's interest in confidentiality. Executive privilege is a qualified privilege, and each attorney general opinion justifying the assertion of the privilege balances the executive branch's need for confidentiality against Congress's need for the information. If a disclosure is so extensive that it destroys the confidentiality of information, then the executive branch's constitutional interests protected by executive privilege are no longer applicable and the balance favors disclosure to Congress. In other words, executive privilege only protects confidential information; once the information has been disclosed widely, it is no longer a candidate for an assertion of executive privilege. As preeminent constitutional law scholar Alexander Bickel put it during the Watergate controversy, "the issue is not whether the President has waived his privilege ... if a document or a tape is no longer confidential because it has been made public, it would be nonsense to claim that it is privileged."

Here, however, there is no indication that McGahn's testimony was distributed beyond the special counsel's office and other select officials at the Department of Justice. Nor would have the administration expected wide disclosure of his testimony at the time. Prior to the release of the report, there were reports of what McGahn had said, but the testimony remained confidential.

Second 'Waiver': Disclosure of the Mueller Report

At Barr's press conference just prior to the release of the Mueller report on April 18, Barr said that "the President confirmed that, in the interests of transparency and full disclosure to the American people, he would not assert privilege over the Special Counsel's report.... Accordingly, the public report I am releasing today contains redactions only for the four categories that I previously outlined, and no material has been redacted based on executive privilege." One scholar called the president's decision "unprecedented for a modern presidency," but others have argued that any attempt to prevent the public release of the report by asserting executive privilege would be unsuccessful.

Two things are particularly important about Barr's statement. One, Barr states that the president was not asserting privilege over the "report"; he did not make any statements about the underlying information collected by the special counsel but not included in the report. Two, he noted that no material had been redacted "based on executive privilege." The Justice Department has long taken the position, spelled out in a 1989 memo issued by Barr when he was the head of OLC, that the president need not assert executive privilege "except in response to a lawful subpoena." Because the Justice Department voluntarily released the redacted report and has offered to allow certain members of Congress to read the report with redaction of only the grand jury material, an assertion of executive privilege has not yet become necessary. The fact that no redactions were "based on executive privilege" at the time Barr made the report public does not mean the president has "waived" his ability to assert executive privilege over the material that has not yet become public. In the executive branch's view, when Barr released the redacted report, executive privilege had not yet become relevant for the redacted material because Congress had not yet subpoenaed that material—and the executive branch generally will not decide whether or not to assert executive privilege until a contempt vote for noncompliance with the subpoena has been scheduled.. At least two categories of the material that is redacted—sensitive intelligence and information related to ongoing investigations—are certainly considered by the executive branch to be components of executive privilege. Now that Barr has refused to comply with the House judiciary committee's subpoena for the full unredacted report and underlying materials, the committee may consider contempt. If they do, an assertion of executive privilege remains viable under executive branch doctrine.

With respect to the redacted report that was provided to Congress and has been released publicly, the disclosure constitutes a disclosure to an outside party. Moreover, the public release of any material, no matter how sensitive, eliminates—or "waives"—any potential executive privilege claim because the executive branch can no longer claim any legitimate interest in maintaining its confidentiality; nor, of course, would a subpoena that would force an executive privilege claim be necessary if the material is publicly available.

But unlike the disclosure to an outside party of attorney-client information, the disclosure of *some* information protected by executive privilege does *not* waive the privilege for related materials. The most forceful statement of this position occurs in an opinion by the U.S. Court of Appeals for the D.C. Circuit addressing whether the now defunct office of the independent counsel could enforce a subpoena seeking documents from the White House counsel's office. Similar to what has occurred here, the White House counsel had released a final report about its investigation into former Agriculture Secretary Mike Espy, but claimed that the documents generated in the course of producing that report remained privileged. The court agreed, distinguishing the waiver doctrine applicable to attorney-client privilege and opining that such an "all-or-nothing approach has not been adopted with regard to executive privileges generally." Instead, "release of a document only waives these privileges for the document or information specifically released, and not for related materials."

During the Watergate disputes, the D.C. Circuit reached a similar conclusion, holding that President Nixon had not waived his ability to assert executive privilege over the tape recordings of his conversations with advisers even though he had stated explicitly, as did the White House here, that executive privilege would not be invoked to prevent their testimony to the special counsel. And OLC has also reiterated that position, relying on those cases and others, in the context of an executive privilege claim. During the dispute over information related to the firing of several U.S. attorneys, the Department of Justice had disclosed its emails reflecting communications between the White House and the Justice Department. But Acting Attorney General Paul Clement reasoned that the disclosures did not result in a waiver that would preclude the White House from asserting privilege over its records of those communications or related testimony.

In short, substantial precedent—both judicial and from past administrations—establishes that a disclosure of material to Congress or to the public "waives" executive privilege only as to that specific information disclosed. The public release of the report thus likely waived executive privilege only as to the specific aspects of McGahn's testimony explicitly contained in the report. Additional context for or further details about the testimony he provided or the events he described to the special counsel's office would remain protected by executive privilege, assuming the information fits within the scope of the privilege. According to the D.C. Circuit, waivers of executive privilege "should not be lightly inferred," in part, because doing so would discourage the government from disclosing *any* information for fear of waiving potential privilege claims over related information. Or, as Clement put it, "If the Department's provision of documents and information to Congress, as part of the accommodation process, eliminated the President's ability to assert privilege over White House documents and information concerning those same communications, then the Executive Branch would be hampered, if not prevented, from engaging in future accommodations."

Presumably, the administration would adopt this same position with respect to the parts of the report it offered to let select members of Congress view but not copy. Although that disclosure would constitute a "disclosure" to an outside party, the executive branch view is that limiting the disclosure and maintaining custody of the information itself sufficiently maintains its confidentiality to preserve the president's authority to assert executive privilege and prevent further dissemination. In its view, holding that an accommodation allowing members of Congress to see material waives executive privilege would discourage, or eliminate, the practice and undermine the ability of the two branches to reach accommodations that further both Congress's informational needs and the executive branch's confidentiality interests.

In fact, according to executive branch doctrine, and contrary to the suggestion of some of the reporting on McGahn, the disclosure of *some* information does not weaken a later assertion of executive privilege over related information but *strengthens* it. Giving Congress some information, such as the redacted Mueller report, arguably satisfies its informational needs, at least for the most part. Because executive privilege is a qualified privilege, that disclosure in

turn makes it more difficult for Congress to demonstrate that it still has a legitimate need for the specific information not released and that any such need is sufficiently important to outweigh the executive branch's need to preserve confidentiality.

In the New York Times, Charlie Savage suggests that any claim of executive privilege over McGahn's claim may have been waived, pointing to two cases. The first is the same 1997 D.C. Circuit decision discussed above, which in fact construes waiver very narrowly. Savage notes that the court found the privilege waived because information had been shared with a third party, an official's personal lawyer, but he under-emphasizes the importance of the court's ruling that privilege had been waived only for the single document that had been shared with the personal lawyer and only for precise words that had been shared. The court found privilege had not been waived for the other documents, and, with respect to the document that had been shared, even held that handwritten notes on the document that had not been included in the version sent to the personal lawyer remained subject to privilege. Applying that principle here, the only information disclosed to a third party is the precise information in the Mueller report. Everything else remains subject to privilege.

The second case Savage cites is the 2016 district court decision in the Fast & Furious matter. But that decision does not address waiver at all. In conducting the balancing test for executive privilege, that court held that Congress's need for the documents outweighed the executive branch's confidentiality interests because the publicly released inspector general's report had undermined those confidentiality interests. The Department of Justice disagreed with that method of analysis, which it felt would undermine the presumption against waiver established by the 1997 decision—and, in any event, is not bound to follow it, because it is a nonprecedential district court decision and one from which an appeal is still pending.

If Executive Privilege Has Not Been Waived, Can McGahn Refuse to Appear?

Based on the above precedent, McGahn and his attorney could reasonably agree with the White House that at least some aspects of his testimony continue to be protected by executive privilege under existing executive branch doctrine. Specifically, any otherwise privileged information that is not expressly disclosed in the report remains subject to an assertion of executive privilege.

But could they then conclude—based on that fact alone—that he does not have to show up for the hearing at all? Probably not. If the only issue is executive privilege, then the traditional practice would be to attend the hearing but decline to respond to any questions that implicate executive privilege. Sara Taylor, a former aide to President George W. Bush, took that approach in 2007, indicating her willingness as a private citizen to answer questions but also testifying that she would follow the president's direction not to testify about information covered by his executive privilege claim. And declining to show up at all in defiance of the subpoena would not advance any constitutional interest in confidentiality that could not also be protected by appearing and invoking privilege. As I discussed with respect to the administration's refusal to allow executive branch officials to comply with deposition subpoenas without agency counsel present, any defense to noncompliance with a valid congressional subpoena would need to be grounded in the Constitution's separation of powers. And it's difficult to see a constitutional argument that former officials can ignore subpoenas requiring their attendance entirely any time the requested testimony will likely implicate information protected by executive privilege, rather than attend and decline to answer specific questions on privilege grounds.

Perhaps McGahn or the administration will seek to argue that noncompliance here would be acceptable because *all* of the subject areas potentially implicate executive privilege. But that would be a novel position, and one that would be difficult to defend. The breadth of the subject matters listed in the subpoena, and the amount of information about those subjects that has already been released—effectively mooting executive privilege for that specific information—makes it quite possible to imagine a number of questions to which he could respond, consistent with executive privilege. Indeed, in the last Congress, the House oversight committee referred Bryan Pagliano, who had helped Hillary Clinton set up her email server, to the Justice Department for contempt of Congress for taking a similar action. Pagliano had already asserted his constitutional Fifth Amendment right against self-incrimination, and he

refused to comply with the subpoena because he insisted its only purpose was to require him to "appear in a public session where [Pagliano's] further and repeated assertion of his constitutional right not to testify can be videotaped and broadcast." The Republican-controlled committee did not accept that refusal.

Executive privilege is not the only doctrine relevant, here, however. A related doctrine—the immunity of senior presidential advisers—could provide McGahn with a legal rationale and historical precedent for refusing to comply with the subpoena. Barr appeared to reference this doctrine in his testimony before the Senate Judiciary Committee, asserting he would object to McGahn testifying because McGahn is a "close adviser to the president," but that the decision was ultimately the president's to make.

On at least three occasions, the Justice Department has opined publicly that the counsel to the president is immune from compelled congressional testimony—two opinions during the Clinton administration and another during the George W. Bush administration. The third opinion, addressing a subpoena to Harriet Miers, concluded that Miers's status as a *former* counsel did not alter the analysis. And, although the 1996 opinion describes this immunity as a facet of executive privilege—"We believe that *executive privilege* would be assertable on the basis that you serve as an immediate adviser to the President and are therefore immune from compelled congressional testimony."— immunity is clearly addressed as a separate doctrine in later opinions and even analyzed according to different procedures. Claims of executive privilege are accompanied by an opinion of the attorney general, while immunity claims have been justified in opinions by the head of OLC—unless the claim is a part of a larger executive privilege assertion.

The foundation of the doctrine of immunity is a statement by then-Assistant Attorney General William Rehnquist: "The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee." Initially, the doctrine was justified as a matter of comity. As Assistant Attorney General Theodore Olson explained in 1982, "The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President." The executive branch found support for that statement in the Supreme Court's conclusion that the immunity provided to members of Congress by the Speech and Debate Clause of the Constitution also provides immunity to congressional aides because those aides are the "alter egos" of the members. Because Congress may not compel the president to provide testimony, in the executive branch's view, the same analysis applies to compelled testimony of presidential advisers.

Over time, the executive branch has expanded that position and explained more fully the basis for its immunity position. The most extensive public explication of the doctrine is in the 2014 OLC opinion concluding that David Simas, a senior adviser to President Obama, was immune from compliance with the House oversight committee's subpoena. Although some have questioned whether the Obama administration took this position, the OLC opinion and the letter from White House Counsel Neil Eggleston to the committee make it clear that the administration believed "Mr. Simas is immune from congressional compulsion to testify on matters relating to his officials duties" and, accordingly, would not appear as the subpoena required.

The fact that this position has been asserted by administrations of both parties does not, of course, make it valid. Indeed, the only court to have addressed a claim of presidential adviser immunity has resoundingly rejected both the claimed absolute immunity *and* a qualified immunity. But the 2014 OLC opinion makes it clear the executive branch does not accept the analysis in that nonprecedential decision. Thus, the administration and McGahn may decide to claim immunity, particularly given the unlikelihood that the resulting court dispute, and its appeals, would be resolved quickly.

What is the basis for this immunity? The 2014 OLC opinion explains that "[t]he Executive Branch's longstanding position, reaffirmed by Administrations of both political parties, is that the President's immediate advisors are absolutely immune from congressional testimonial process." The opinion, collecting past executive branch precedent, makes three principal arguments. One, senior presidential advisers are "altar egos" of the president and share his

immunity; otherwise, the separation-of-powers principles underlying the president's immunity would be damaged. Two, if Congress can compel senior presidential advisers to testify, that authority would "interfere with the President's discharge of his constitutional functions" by threatening his independence and autonomy. Utilizing that authority, Congress could "wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain." Third, such authority would "threaten executive branch confidentiality," a euphemism for executive privilege. The opinion recognizes that the "President's advisers could invoke executive privilege to decline to answer specific questions" but concludes that immunity is necessary because advisers could reveal confidential information on accident or be pressured by the committee to reveal protected information. The opinion also explains at length why its position is "consistent with relevant Supreme Court case law" and rejects the district court's conclusion, in the subsequent litigation over Harriet Miers's immunity, that the 2008 OLC opinion was incorrect. The 2014 OLC opinion does not address the applicability of its analysis to a *former* official, but it cites the 2008 opinion favorably.

The White House thus does have a path—and one based on precedents from administrations of both parties—to instruct McGahn not to appear at all before the House committee. Immunity was the difference between Harriet Miers and Sara Taylor when they were subpoenaed to testify about the firing of U.S. attorneys: Miers did not appear at all in accordance with the 2008 OLC opinion and the White House's instruction on immunity. But Taylor *did* appear, as required by the subpoena, and simply declined to answer numerous questions, citing the White House's direction on executive privilege.

Asserting immunity here may also establish a precedent for the coming oversight battles between the House and the administration, including the White House's decision to deny the House oversight committee's request that Stephen Miller testify. A subsequent subpoena for his testimony would likely bring the executive branch's immunity doctrine into the spotlight.

Whether such an immunity claim would withstand judicial scrutiny is not clear. As noted, one court has already rejected it. And it seems somewhat unlikely that the courts would accept an *absolute* privilege of immunity given that even executive privilege itself is only a qualified privilege. The 2014 OLC opinion acknowledges this possibility, concluding that Simas enjoyed immunity that is "absolute and may not be overborne by [the Committee's] competing interest," but also including a second section concluding that Simas would be immune "[e]ven if Mr. Simas were only entitled to qualified immunity, which could be overcome by a sufficient showing of compelling need." But the bipartisan executive branch precedent is there on which to base such a claim and no precedential judicial opinion has rejected it.

As I and a number of others have explained in recent days, the chances of this or other congressional oversight subpoena disputes being resolved by an appellate court before the next election are slim. So the executive branch view may again prevail by default. Whether McGahn's dilemma is resolved in this way or another, it further illustrates the current imbalance of power between the branches. And, despite some suggestions to the contrary, that is not wholly the result of decisions by this particular administration. It has been evolving over a much longer period of time.

Editor's note: This piece has been edited to incorporate Charlie Savage's analysis of executive privilege issues in the New York Times.

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