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Hearing on Executive Privilege and Congressional Oversight
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It is an honor to be asked to testify before this Committee on the subject of executive privilege and congressional oversight. In this statement, I will provide a brief overview of the constitutional foundations for Congress' authority to conduct investigations and oversight and the use of subpoenas to enforce that authority, as well as the President's authority to assert executive privilege. I will then apply these precepts to some of the current privilege disputes Between this Committee and the Executive Branch.

I. Constitutional Background

The Legislative Power of Inquiry. The Congress has long been understood to have a wide-ranging authority to conduct investigations and oversight. That power allows Congress to make reasoned and considered judgments regarding how to use its legislative powers. As the Supreme Court has put it:

> "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. 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."[1]

Indeed, the Supreme Court has specifically elaborated on the power of inquiry, holding that it extends to investigation into the abuse of power within the executive branch: the power of inquiry "includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."[2]

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* Affiliation is listed for identification purposes only. The views expressed are the author's own and do not reflect the position of Georgia State University.

[1] *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

[2] *United States v. Watkins*, 354 U.S. 178, 187 (1957). Professor William Marshall has offered an important rationale for this use of the power of inquiry:

> Congress's power to investigate plays a critical role in the checks and balances of U.S. democracy. Congressional investigations serve as a deterrent to wrongdoing. Without some outside check on the Executive Branch, there would be little to discourage unscrupulous officials from acting in their own, and not in the nation's, best interests.

William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. Ill. L. Rev. 781, 798.

To make this power effective, the Supreme Court has recognized that Congress may issue subpoenas to compel witnesses to testify or to submit documents and records.[3] As a means of enforcing this power, Congress holds inherent authority to hold in contempt anyone who defies its compulsory process.[4]

Executive Privilege. Over the course of our constitutional history, Presidents have from time to time asserted executive privilege against this inherent legislative power of inquiry. It is somewhat misleading to refer to executive privilege as if it were a discrete legal doctrine. It is more accurate to think of executive privilege as a collection of doctrines justifying the executive in withholding information from the other branches of the federal government – both Congress and the Judiciary. These include privileges relating to military and national security secrets, and likely diplomatic communications, as well.[5] In addition, the executive has asserted a general presidential communications privilege, asserting that all communications with the President are privileged, and a deliberative process privilege that extends beyond direct communications with the President.[6]

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[3] *See Watkins*, 354 U.S. at 187-97; *McGrain v. Dougherty*, 273 U.S. 135 (1927). The Supreme Court, in *Barenblatt*, cautioned against reading this power of inquiry too broadly:

> Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action ….

360 U.S. at 111-112. As discussed below, however, Congress has pervading interests in this matter (including its legislative authority over federal elections and its impeachment power) such that the concern about invading spheres of authority from which Congress is excluded is inapposite.

[4] *Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204 (1821).

[5] *See United States v. Nixon*, 418 U.S. 684, 706 (1974); *see also United States v. Reynolds*, 345 U.S. 1 ((1953)*; Totten v. United States*, 92 U.S. 105 (1875).

[6] "[T]he deliberative process privilege reaches beyond conversations with the President to protect other communications among executive branch officials 'crucial to fulfillment of the unique role and responsibilities of the executive branch.' [*In re: Sealed Case (Espy)*, 121 F.3d 729, 7-36-37 (D.C. Cir. 1997)]. This privilege 'allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' *Id.* at 737." *Committee on Oversight and Government Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016).

The Constitution does not expressly grant any privilege or immunity[7] to the President. The Supreme Court nevertheless has interpreted the constitutional doctrine of separation of powers as implicitly ordaining executive privilege, including a general privilege respecting communications between the President and his or her close advisors.[8] This general communications privilege is designed to protect the legitimate executive branch interest in securing for the President the ability to receive candid, unvarnished advice. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[9] The deliberative process privilege also enjoys broad judicial acceptance.[10]

Synthesis. The Supreme Court has held that the general presidential communications privilege is qualified rather than absolute.[11] This means the Court will balance the President's need to maintain confidentiality against the constitutional interests and need of the institution seeking disclosure.[12] The same is true of assertions of deliberative process privilege.[13] As the D.C. Circuit has formulated the inquiry, "This need determination is to be made flexibly on a case-by-case, ad hoc basis. 'Each time [privilege] is asserted the district court must undertake a fresh balancing of the competing interests ….'"[14] Given this emphasis on ad hoc, case-by-case determination, it is not surprising that there is very little in the way of governing precedent that dictates that either disclosure or confidentiality is compelled or prohibited. Instead, the courts

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[7] Presidents have been held absolutely immune from civil liability for actions taken within the scope of their office, at least absent legislation to the contrary. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Presidents are not immune from civil suit in federal court for liabilities arising from activities undertaken before becoming President. *See Clinton v. Jones*, 520 U.S. 681 (1997). There is no judicial ruling regarding the President's liability to criminal prosecution while in office. The Department of Justice has taken the position that a President may not be criminally indicted or prosecuted while in office. *See A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000).

[8] *See United States v. Nixon*, 418 U.S. 684 (1974).

[9] *Id.* at 705.

[10] *See, e.g.*, cases cited *supra* note 5.

[11] *See Nixon*, 418 U.S. at 707-713.

[12] In *Nixon*, the Court considered the interests of the judiciary in enforcing a subpoena in the context of a criminal proceeding. The President's privilege claim is also qualified and subject to balancing in the face of a congressional subpoena. *See, e.g., Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974)(en banc).

[13] *See In re: Sealed Case (Espy)*, 121 F.3d at 737.

[14] *Id.* at 737-38 (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992). The same balance governs in the context of law enforcement investigations as well. *See Tuite v. Henry*, 98 F.3d 1411 (D.C. Cir. 1996). Even outside the context of privilege assertions, the Supreme Court has noted the pragmatic approach it takes to Congress' power of inquiry: "The congressional power of inquiry, its range and scope, and an individual's duty in relation to it, must be viewed in proper perspective…. The power and the right of resistance to it are to be judged in the concrete, not on the basis of abstractions." *Barenblatt*, 360 U.S. at 112.

have mostly emphasized that each branch has a constitutional duty to negotiate in good faith and to accommodate the legitimate constitutional interests of the other branch.[15]

II. Application to Congressional Subpoena for the Unredacted Mueller Report and Supporting Documents

A. The Process of Negotiation and Accommodation

On March 22, 2019, Attorney General Barr notified, as required by regulation,[16] the House and Senate Judiciary Committees that he has received Special Counsel Mueller's report entitled, "Report on the Investigation into Russian Interference in the 2016 Presidential Election."[17] On April 18, 2019, the Attorney General released a redacted copy of the Muller Report to Congress and the public. Prior to this date, the Chairman of the House Judiciary Committee joined with the chairs of several other congressional committees addressed a number of communications to the Attorney General to express their interest in receiving the full report with no redactions except those required by law. These communications expressed Congress' willingness to accommodate the executive's legitimate in maintaining the confidentiality of this material. At the time the Mueller Report was publicly released, the Attorney General and the Assistant Attorney General for Legislative Affairs offered to allow a select group of members of Congress to view a less redacted, but still not full, copy of the Mueller Report under fairly tight restrictions.[18] On April 19, 2019 the House Judiciary Committee issued a subpoena for "(1) the full Mueller Report, including any exhibits or attachments; (2) all materials referenced in the Mueller Report; and (3) all materials obtained or produced by the Special Counsel's office."[19]

On April 22, 2019, the House Judiciary Committee issued a subpoena to former White House Counsel Donald F. McGahn II. The subpoena lists 36 categories of documents to be produced to the Committee by May 7, 2019. The subpoena also requires McGahn to appear and testify on May 21, 2019. On May 7, 2019, the current White House Counsel Pat Cipollone submitted a letter to Judiciary Committee Chairman Nadler declaring that "White House records remain legally protected from disclosure under longstanding constitutional principles, because they implicate significant Executive Branch confidentiality interests and executive privilege." The

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[15] In this connection, the President's recent declaration of a blanket intention to "oppose all the subpoenas" is unprecedented and contrary to the process that the courts have regarded as the constitutional duty of the executive and Congress. As the Supreme Court has stated

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.

Watkins, 354 U.S. at 187-188.

[16] 28 CFR 600.9(a)(3).

[17] Hereinafter, The Mueller Report.

[18] *See* Amendment in the Nature of a Substitute to the Committee Report for the Resolution Recommending that the House of Representatives Find William P. Barr in Contempt of Congress, at 15.

[19] *Id.*

letter also asserts that "Mr. McGahn does not have the legal right to disclose these documents to third parties …."

B. Balancing the Interests of Congress and the President

Congress' Interest. Congress' interest in receiving the subpoenaed documents is of the highest order. The redacted Mueller Report shows that the Russian government interfered extensively in the 2016 presidential election. Specifically, the Russian government "carried out a social media campaign" and "conducted computer-intrusion operations" designed to benefit "presidential candidate Donald J. Trump and disparage[] presidential candidate Hillary Clinton."[20] In addition, "the investigation established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the [Trump] Campaign expected it would benefit electorally from information stolen and released through Russian efforts."[21] The Mueller Report also establishes the extensive efforts President Trump undertook to obstruct the investigation into Russian interference in the 2016 election.[22]

Congress' interest in this matter is of elemental importance. The possibility that a foreign power might interfere with a presidential election poses an existential threat to our democracy. The Russian scheme to manipulate our elections is real and continuing.[23] Assessing Congress' interest, as the Supreme Court has urged, in the concrete rather than in the abstract, it is clear that Congress has several legislative interests of the most compelling nature. First, Congress must consider how to safeguard upcoming elections from Russian interference. In order to devise an effective legislative response to the threat of Russian interference, it must know the full extent and details of Russia's operations—which appears to be the subject of many of the redactions in Part I of the Mueller Report.

Second, Congress has a compelling interest in responding to the President's attempts to obstruct the investigation into Russian interference with the 2016 presidential election. Based on the redacted Mueller Report alone, it is clear that the President has engaged in conduct that satisfies the predicate for impeachment. At the outset, I want to be clear that even though President Trump's obstruction is impeach*able* it does not necessarily follow that the House should undertake to impeach him. That step, as I discuss below, is a momentous one that involves sensitive discretionary considerations. Congress's interest in access to all the information that might assist in its exercise of that discretion is of the highest ordr.

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[20] Mueller Report, vol. I, at 1.
[21] *Id.* at 1-2.
[22] *Id.* vol. II.
[23] Martin Matishak, *Intelligence Heads Warn of More Aggressive Meddling in 2020*, Politico (Jan. 29, 2019), available at https://www.politico.com/story/2019/01/29/dan-coats-2020-election-foreign-interference-1126077; Karen Yourish & Troy Griggs, *8 U.S. Intelligence Groups Blame Russia for Meddling, but Trump Keeps Clouding the Picture*, New York Times (Aug. 2, 2018), available at https://www.nytimes.com/interactive/2018/07/16/us/elections/russian-interference-statements-comments.html.

The Constitution authorizes the House of Representatives to impeach the President (or any civil officer) for committing "treason, bribery, or other crimes and misdemeanors."[24] The Constitution does not define this phrase and, indeed, it is clear that the phrase is not meant to refer to specifically codified crimes. Rather, the predicate for impeachment is the commission of an act that that threatens public harm on the order of treason or bribery regardless of whether the act satisfies each technical element of a codified crime.[25] The framers understood and meant for impeachment to serve as a political remedy for official misconduct that inflicts severe harm to the nation. As such, the Constitution, by vesting the impeachment power in the House, enjoins upon the House the duty not only to determine whether the President or any civil officer has engaged in serious misconduct, but to make a political judgment as to whether the misconduct is such that the officer should be removed. The delicacy and solemnity of this judgment is magnified when, as here, the officer in question is the President. The President is alone the head of the Executive branch, constitutionally vested with "the executive power."[26] Moreover, the President is the only civil officer (other than the Vice President) who takes office by virtue of election. To contemplate impeaching the President implicates unparalleled disruption of the functioning of the government and supplanting the will of the electorate, as filtered through the electoral college.

With respect to President Trump, Congress' interest in possible impeachment is serious and imminent. The Mueller Report details the measures President Trump took to obstruct and undermine the Special Counsel's investigation into Russian interference with the 2016 election. Because the Department of Justice holds the position that a sitting President may not be indicted or prosecuted, Mueller did not make a formal conclusion. It is worth noting, nonetheless, that over 700 former federal prosecutors have concluded that the Mueller Report establishes sufficient evidence to conclude beyond a reasonable doubt that President Trump committed the crime of obstruction of justice.[27] Indeed, the Mueller Report itself identifies as one reason for not prosecuting a sitting President that doing so would "potentially preempt constitutional processes for addressing presidential misconduct."[28] A footnote identifies that constitutional process as "impeachment."[29] The Mueller Report establishes a powerful record of impeachable conduct. Whether to take that step involves, as discussed above, the exercise of a delicate and solemn political judgment. As the Department of Justice's Office of Legal Counsel has pointed out, the Constitution deliberately vests the exercise of that judgment in Congress because it is politically accountable. In order for Congress to fulfill its constitutional role, it must have access to all relevant information.

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[24] U.S. Const. art. II, sec. 4.
[25] *See* Neil Kinkopf, *The Scope of the Impeachment Power: What Are "High Crimes and Misdemeanors"?*, available at https://constitutioncenter.org/interactive-constitution/articles/article-ii/the-scope-of-the-impeachment-power/clause/49.
[26] U.S. Const. art. II, sec. 1, cl. 1.
[27] *See* Statement by Former Federal Prosecutors (May 6, 2019), available at https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1
[28] *Id.* vol. II, at 1.
[29] *Id* at 1 n.2.

Even if the House declines to pursue impeachment, it has a legitimate interest informing the public of the Trump Administration's extraordinary abuses of power. As President Woodrow Wilson once wrote:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees . . . . Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of government, the country must be helpless to learn how it is being served . . . and must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function . . . . [T]he only really self-governing people is that people which discusses and interrogates its administration.[30]

The President's Interest. The President has made a protective assertion of executive privilege in response to the committee's subpoena for the unredacted Mueller Report and accompanying documents. Such protective assertions are legitimate where a congressional demand for information is made in a manner so precipitous that the executive branch does not have sufficient time to make more specific and targeted privilege determinations.[31] The validity of such an assertion depends on a good faith assessment of the facts and circumstances surrounding it. It bears noting that such an assertion is valid only as a brief, temporary measure to allow the executive branch to review the subject documents for privilege. For example, the protective assertion made in 1996 was followed by the production of a detailed and specific privilege log just fifteen days later.[32]

Balance. In this instance, Congress has a compelling and urgent interest in the documents it has subpoenaed. A good faith protective assertion of privilege might serve to justify deferring the demand for a very brief period. It is not clear, however, that the blanket assertion of privilege is justified in this instance. The Department of Justice has been in possession of the Mueller Report for months and has carefully analyzed every word in order to make decisions regarding redactions. It is difficult to fathom that the Department needs additional time to identify which redacted portions might be the subject of a privilege claim. With respect to the underlying documents – those cited in the Mueller Report or produced by the Special Counsel's office – the claim of need for time to review may be reasonable. Under Department of Justice practice, this review should be completed within a very short time frame, along the lines of the fifteen days it took the Department to review the documents at issue in the 1996 precedent. Delay beyond fifteen days would not appear to be justified in light of Congress' compelling and urgent interest in the subpoenaed materials.

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[30] Woodrow Wilson, Congressional Government 303 (1913).

[31] *See, e.g.*, *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996).

[32] *See Assertion of Executive Privilege Regarding White House Counsel's Documents* (May 23, 1996), available at https://www.justice.gov/file/20031/download

III. Subpoena for Testimony and Document Production by Don McGahn

The subpoena to Mr. McGahn implicates the same compelling legislative interests as the subpoena for the Mueller Report and related documents. The President has a legitimate, constitutionally-based interest in the confidence of his communications with his closest aides and advisors. The D.C. Circuit has, however, rejected an absolute privilege with respect to the White House Counsel.[33] Given the extraordinary weight of the Judiciary Committee's interest in the matter, the precedent of the D.C. Circuit squarely supports the Committee's authority to compel the testimony of Mr. McGahn.

With respect to the demand for the production of documents, it is difficult to know what to make of the May 7 Cipollone letter. The letter itself does not purport to assert executive privilege. Instead, it objects to the production of documents because "they implicate … executive privilege." First, it is basic law in this area that only the President may assert executive privilege. Nothing in the letter purports to be communicating a determination that the President has made. Second, the indefinite category of records that implicate executive privilege would appear to be much broader than the category of documents that actually are privileged. Third, the document makes no attempt to identify which responsive documents are privileged (or even implicate privilege) or to set forth the basis for the assertion specific to each document. Finally, it is possible that any privilege that might pertain has been waived by providing the documents to Mr. McGahn's private attorney.[34] On the basis of the bare one-page Cipollone letter, it is difficult to assess, much less credit, the legal basis for withholding the documents from the Committee.

Conclusion

Congress' power of inquiry is fundamental to our constitutional system. That system also comprehends that the President's legitimate confidentiality interests be accommodated. In order for that accommodation to occur, the Constitution requires Congress to articulate its need for information and requires the President to specifically assert his reasons for maintaining confidentiality. With respect the Mueller Report and related documents and with respect to its subpoena to Donald F. McGahn, Congress holds the most compelling of constitutional interests. The President has failed to articulate countervailing interests. In this setting, it is straightforwardly clear that Congress is entitled to the documents and testimony it seeks.

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[33] *Committee on Judiciary v. Miers*, 542 F.3d 909 (D.C. Cir. 2008); *cf. In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

[34] The D.C. Circuit held in *In re Sealed Case (Espy)* that the White House had waived executive privilege with respect to a document that it provided to Espy's outside counsel. *See* 121 F.3d at 740.