

## Written Statement

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*“Executive Privilege and Congressional Oversight”*

**Rayburn House Office Building  
United States House of Representatives  
Committee on the Judiciary**

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### **I. Introduction**

Chairman Nadler, Ranking Member Collins, and members of the Committee, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss executive privilege and congressional oversight in the context of our current controversies following the release of the Special Counsel Report.

At the outset, I come to disputes of this kind with a well-known bias as a Madisonian scholar and frequent defender of the legislative branch and its powers under Article I.<sup>1</sup> My academic work on the Separation of Powers has been critical of the expansion of executive powers and privileges.<sup>2</sup> My prior testimony before both the

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<sup>1</sup> I have been asked to include some of my prior relevant academic publications,  
<sup>2</sup> See United States Senate, *Confirmation Hearing For Judge Neil M. Gorsuch To Be Associate Justice of the United States*, United States Senate Committee on the Judiciary, March 21, 2017 (testimony of Professor Jonathan Turley); United States House of Representatives, House Committee on Science, Space, and Technology, *“Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas,”* September 14, 2016 (testimony and prepared statement of Jonathan Turley); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, *“Examining The Allegations of Misconduct of IRS Commissioner John Koskinen”* June 22, 2016 (testimony and prepared statement of Jonathan Turley); United States Senate, Committee on Homeland Security and Governmental Affairs, *“The Administrative State: An Examination of Federal Rulemaking,”* April 20, 2016 (testimony and prepared statement of Jonathan Turley); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, *“The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies,”* March 15, 2016 (testimony and prepared statement of Jonathan Turley); *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong.

Senate and the House of Representatives has warned of increasing executive encroachment on legislative authority and asserted the need for Congress to be more aggressive in defending its Article I authority—particularly in its appropriation and oversight functions. Indeed, I have served as legal counsel for members of this body—including the House of Representatives as a whole—in defending its inherent powers from executive overreach and excess. With the shifting fortunes of politics, the commitment to the separation of powers tends to wane with control of the White House, as discussed below. Yet, I hope that all members of this Committee share the institutional interest in protecting existing precedent on congressional authority and jurisdiction.

In my view, President Trump would serve this country and his office best by waiving executive privilege to the underlying documents, information, and witnesses referenced in the Special Counsel Report to the fullest extent possible. With the exception of grand jury information, material under court seal, or intelligence information, our nation needs the greatest possible transparency in all of these investigations.

Of course, while I have long been a critic of executive privilege assertions, I have been called not to discuss my personal views but rather the view of the courts on the scope of both executive privilege and congressional oversight. The President has a right to assert executive privilege and the Attorney General is expected to defend such assertions. The current conflict is remarkable in the breadth of material claimed under executive privilege. In the resulting litigation involving multiple committees, courts will face a long spectrum of demands for tax records, bank records, internal deliberative material, grand jury material, and other information. The calculus for this body is to pick its fights wisely to match strong legal precedent with strong oversight needs. In doing so, the House must weigh carefully the costs and benefits of a legal action. The precedent supporting legislative authority has always been fiercely defended by this institution. Prior Congresses have understood that bad cases make for bad law. That has meant making judicious decisions on when to fight and when to compromise.

The current conflicts between Congress and the White House constitute some of the most serious in modern history. President Donald Trump has refused to comply with a wide array of subpoenas and oversight demands. Congress is correct in asserting oversight authority over much of this information. Though the challenges are likely to bog down Congress in court, it is likely to prevail in seeking material. However, there are also challenges that are likely to fail and, more importantly, undermine or eliminate

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(2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law); *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley); see also *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley). Parts of my testimony today is taken from this prior work.

key judicial rulings. The most precarious course is the one taken by this Committee concerning Attorney General William Barr.<sup>3</sup>

Congress has an undeniable and legitimate interest in much of this information. However, oversight jurisdiction is not enough in the balancing tests employed by the courts. There must be both a showing of need and, more importantly, purpose. The House has decided not to pursue this information in the course of an impeachment process, where its position would be strongest, but instead as part of a more general exercise of conventional oversight authority. In so doing, it must articulate a purpose other than a desire simply to investigate. Absent a clear nexus between jurisdiction and purpose, investigations can appear more vindictive than jurisdictional for a court. With political passions at their apex, some demands can easily become recreational for an opposing party before an upcoming national election.

There has been considerable commentary about how President Trump clearly waived all executive privilege over material disclosed to the Special Counsel in the course of his investigation. Various members of Congress have echoed this view. I know of no case to support such a sweeping claim. To the contrary, the White House has a viable argument that such disclosures were made within the Executive Branch and do not constitute such a waiver. That does not mean that the White House will prevail on its blanket assertion but it does likely mean that it will prevail on critical elements. Moreover, this Committee has maintained that “neither Rule 6(e) nor any applicable privilege barred disclosure of these materials to Congress.”<sup>4</sup> As I have stated before, that assertion is not true. I was counsel in one of the largest Rule 6(e) cases in history. In the “Rocky Flats Grand Jury” case, I represented a Special Grand Jury in seeking the release of a grand jury report accusing the government of wrongdoing. We lost after years of

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<sup>3</sup> Jonathan Turley, *A Question of Contempt: Why The Barr Vote Could Prove Costly To Congress*, May 10, 2019 (available at <https://jonathanturley.org/2019/05/10/first-do-no-harm-why-the-barr-contempt-vote-could-prove-costly-for-congress/>). For the purposes of full disclosure, I previously testified at the confirmation hearing of Attorney General Bill Barr and I previously represented him with other former Attorneys General of the United States. *Confirmation Hearing For Attorney General Nominee William Barr*, January 16, 2019, United States Senate Committee on the Judiciary, January 29, 2015 (testimony of Professor Jonathan Turley). I also testified at the confirmation hearing of Attorney General Loretta Lynch. United States Senate, *Confirmation Hearing For Attorney General Nominee Loretta Lynch*, United States Senate Committee on the Judiciary, January 29, 2015 (testimony of Professor Jonathan Turley).

<sup>4</sup> In March, the House voted 420-0 to have the report made public. H. Con. Res. 24 (available at <https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/24/text>). The resolution was narrower than the later position of the Judiciary Committee after the report was released. The resolution called for the public release of the report “except to the extent the public disclosure of any thereof is expressly prohibited by law.” However, it still demanded the release of “the full release to Congress of any report, including findings, Special Counsel Mueller provides to the Attorney General” with no exception for Rule 6(e) material. This would still violate controlling case precedent.

litigation despite a strong argument that the Justice Department was protecting itself in its use of Rule 6(e) to bury the report. Thus, as with executive privilege, I oppose the long-standing view of the Justice Department on such conflicts, but the law (written by this body) contradicts the position of the Committee in both its subpoena and its contempt sanction against General Barr.

In the written testimony that follows, I would like first to address the legal bases underlying these dueling claims of legislative oversight and executive privilege. As noted below, Congress and the White House have both asserted legitimate claims (though both are also problematic in scope). After that threshold determination, the legal inquiry must then proceed to the issue of waiver and a balancing of the rivaling positions of the two branches. As will become evident, I believe that any blanket assertions of executive privilege would be unsustainable, though the White House has indicated that its initial assertion is “preventative” to allow for the review of the underlying material. But I also believe that the Committee’s sweeping subpoenas are equally unsustainable. Accordingly, I encourage the House leadership to adopt a more tailored litigation strategy to minimize its risk of damaging judicial decisions while maximizing its chances of prevailing on these challenges. Flailing around in every direction is not a constitutional strategy; it is a political impulse. Impulsive litigation will only endanger vital precedent and guarantee both delay and conflicted results in its current struggle with the White House.

## **II. Congress Has Stated Sufficient Grounds for Issuing Subpoenas in the Mueller Investigation**

The subject of today’s hearing falls on the convergent boundary between the branches of our government. Just as convergent tectonic plates in geology cause earthquakes, the same is true in the convergence of two constitutional plates. The courts must then decide how these conflicts are resolved and what will give between executive privilege and congressional oversight. With co-equal branches of government, the result is often dictated by a balancing of interests.

Madison believed that the separation of powers, as a structure, could defeat the natural tendency to aggrandize power that tended toward tyranny and oppression. In Madison’s view, “the interior structure of the government”<sup>5</sup> distributed the pressures and destabilizing elements of nature in the form of factions<sup>6</sup> and unjust concentration of power.<sup>7</sup> He envisioned what he described as a “compound” rather than a “single” structure republic and suggested it was superior because it could bear the pressures of a large pluralistic state. Alexander Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the “distribution of power into distinct departments” and for the republican government to function in a stable and optimal

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<sup>5</sup> THE FEDERALIST NO. 51, at 320 (James Madison).

<sup>6</sup> See THE FEDERALIST NO. 10, at 79 (James Madison) (noting that the “causes of faction” are “sown in the nature of man.”).

<sup>7</sup> See THE FEDERALIST NO. 51, *supra* note 5, at 320 (James Madison); see also Douglass Adair, “*That Politics May Be Reduced to a Science*”: David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343, 348–57 (1957).

fashion.<sup>8</sup>

Oversight authority is the key moving part in this system of checks and balances. The subpoena authority of Congress is an implied rather than express power within Article I of the Constitution. Nevertheless, it is a power that is essential to the functioning of any legislative body based on representative democratic values. Indeed, John Stuart Mill famously wrote:

[T]he proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts: to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust ... to expel them from office, and either expressly or virtually appoint their successors.<sup>9</sup>

Legislative authority means nothing without the ability to understand, and at times uncover, the insular actions of the institutions and organizations that influence public policies and programs. It is for that reason that the Supreme Court readily recognized that the scope of legislative investigatory powers must be commensurate with the scope of legislative jurisdiction. Thus, in *McGrain v. Daugherty*,<sup>10</sup> the Supreme Court was faced with a dispute rising from the Teapot Dome scandal under President Warren Harding. The scandal was a classic matter of legislative investigation. Secretary of the Interior Albert Bacon Fall stood accused of bribery after he leased Navy petroleum reserves at Teapot Dome in Wyoming and two other locations at bargain rates and did not put up the leases for competitive bidding. During this period, Congress pursued a wider range of alleged fraud and exercised oversight over the failure of the Administration to prosecute powerful figures and companies for violations under the Sherman and Clayton Acts. That investigation ultimately turned to the role of Attorney General Harry M. Daugherty and his brother (and Ohio bank president) Mally S. Daugherty. Mally Daugherty refused to comply with a subpoena to testify and was arrested. In referencing the “ample warrant for thinking, as we do,”<sup>11</sup> the Supreme Court issued a resounding defense of congressional investigative authority, including compelling testimony from individuals and companies. The Court held that “the power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function.”<sup>12</sup> The Court emphasized that congressional authority to compel disclosures is necessary for committees to have a complete understanding of “the conditions which the legislation is intended to affect or change.”<sup>13</sup>

The limiting principle for this power was set by the scope of legislative jurisdiction. However, even on this limiting principle, the Supreme Court has recognized a minimal threshold test: exercise of oversight power must be undertaken with some

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<sup>8</sup> THE FEDERALIST NO. 9, at 72 (Alexander Hamilton).

<sup>9</sup> John Stuart Mill, *Considerations on Representative Government*, 42 (1861).

<sup>10</sup> See generally *McGrain v. Daugherty*, 273 U.S. 135 (1927).

<sup>11</sup> *Id.* at 175

<sup>12</sup> *Id.* at 174

<sup>13</sup> *Id.* at 175.

“valid legislative purpose” in mind.”<sup>14</sup> Indeed, even with the questionable uses of subpoena authority as during the Red Scare period, the Court maintained that it would not assume bad motivations in the exercise of congressional power.

Thus, in *Wilkinson v. United States*,<sup>15</sup> the Court faced what was in my view an abusive use of congressional authority in pursuit of political dissidents and civil libertarians. In that case, the target was a Frank Wilkinson who (like Carl Braden) was a civil libertarian and campaigned against the work of the House Committee on Un-American Activities. It is clear that the men were targeted for the exercise of their free speech. The Court, however, separated the question of the motivation from the means of congressional investigations. It decided both *Wilkinson v. United States* and *Braden v. United States*<sup>1</sup> on the same day in 1961. It dismissed the free speech elements in the cases and affirmed the congressional authority to demand such testimony. In *McGrain*, the Court noted that Congress is often seeking to force information from opposing or reluctant parties but that such information is essential to determining what, if any, legislative actions is needed:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information-which not infrequently is true-recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate-indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.<sup>16</sup>

In so holding, the Court not only reaffirmed the power of Congress to compel testimony but also rejected the notion that it would evaluate the motivations or wisdom of the use of that inherent power. The *Wilkinson* Court saw the matter of whether Congress could compel testimony in the area and held:

[I]t is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As was said in *Watkins*, supra, “a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being

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<sup>14</sup> *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

<sup>15</sup> See generally *Wilkinson v. United States*, 365 U.S. 399 (1961).

<sup>16</sup> *McGrain*, 273 U.S. at 175.

served.”<sup>17</sup>

That position is in line with other holdings, including *Braden*.<sup>18</sup> Thus, the analysis turns on the scope of congressional jurisdiction, not congressional motivation, in these cases.<sup>19</sup>

As discussed above, the Court continues to decline inquiries into the motivation as opposed to the means of congressional investigations—the same position that it has applied in other areas such as police stops.<sup>20</sup> The *Wilkinson* factors continue to guide this analysis. The Court established a standard for whether the congressional investigatory authority is properly used: (1) whether the Committee’s investigation of the broad subject matter area is authorized by Congress, (2) whether the investigation is pursuant to “a valid legislative purpose,” and (3) whether the specific inquiries involved are pertinent to the broad subject matter areas which have been authorized by Congress.<sup>21</sup> Before addressing whether there exists some fundamental barrier to congressional investigations of state agencies, it is useful to first address the *Wilkinson* factors as to the authority of Congress to issue any subpoenas in this area—the core inquiry in past federal cases.

#### A. Authorized Subject Matter Jurisdiction

The first inquiry is whether the Judiciary Committee is exercising sufficiently broad authorized subject matter jurisdiction over the area in question. In my view, the Committee has such authorization in seeking the documents underlying the Special Counsel investigation as well as the testimony of material witnesses relevant to the oversight investigation. As a standing Committee, this Committee possesses, under House Rule X(1) both legislative and oversight authority over “judicial proceedings, civil and criminal”; “criminal law enforcement”; the “application, administration, execution, and effectiveness of laws and programs addressing subjects within its jurisdiction”; the “operation of Federal agencies and entities having responsibilities for the administration

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<sup>17</sup> *Wilkinson*, 365 U.S. at 412.

<sup>18</sup> *See generally Braden v. United States*, 365 U.S. 431 (1961).

<sup>19</sup> I have previously expressed my unease with these decisions from the McCarthy period. United States House of Representatives, House Committee on Science, Space, and Technology, “*Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*,” September 14, 2016 (testimony and prepared statement of Jonathan Turley). The Supreme Court at the time had a narrower view of free speech protections and indeed reaffirmed the authority to pursue communists simply because of their beliefs (though, as discussed below, the Court did limit some congressional actions). In *Barenblatt*, the Court described the crackdown on communists as a public policy that was “hardly debatable.” The Court’s acquiescence to such crackdowns on free speech is of course highly “debatable” and in my view reprehensible. It was one of the lowest points in the Court’s history.

<sup>20</sup> *See, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) (“We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

<sup>21</sup> *Wilkinson*, 365 U.S. at 409.

and execution of laws and programs addressing subjects within its jurisdiction”; and any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing subjects within its jurisdiction.” This also includes the authority to exercise subpoena authority to guarantee the appearance of witnesses and production of evidence.

The serious allegations of obstruction and abuse of power are certainly relevant to both the Committee’s legislative and oversight authority. While the Committee has declined to initiate impeachment proceedings, it also may claim an investigative interest in any possible high crimes and misdemeanors allegedly committed by the President.

## B. Valid Legislative Purpose

The most obvious attack under the *Wilkinson* factors would likely be over the final two categories, starting with the valid legislative purpose element.

Even on the array of demands from other committees, the purpose element is often difficult to contest without exploring the motivations of the Committee. For example, President Trump has objected that efforts to secure his tax and other records are motivated by an effort to embarrass or undermine him. Congressional investigations will often produce negative collateral consequences for witnesses that can range from job terminations to divorces to criminal charges. The Court, however, has been consistent in not treating consequences or motivations as the determinative factors. For example, in *Sinclair v. United States*,<sup>22</sup> the Senate pursued testimony from Harry F. Sinclair who refused to answer because he was facing a criminal trial on the allegations, stating “I shall reserve any evidence I may be able to give for those courts.”<sup>23</sup> His counsel objected that the Senate was trying to elicit testimony and evidence outside of the court system. The concern was a legitimate one for a criminal defense. However, it is not a legitimate objection to a subpoena, though invoking the privilege against self-incrimination would have been available absent a grant of immunity. The Court considered the collateral consequences to the trial as entirely immaterial because lawsuits or trials do not “operate[] to divest the Senate or the committee of power further to investigate the actual administration of the land laws.”<sup>24</sup> The Court has spoken honestly about its disinclination to judge the propriety or wisdom of broad committee functions:

It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected. An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a

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<sup>22</sup> See generally *Sinclair v. United States*, 279 U.S. 263 (1929).

<sup>23</sup> *Id.* at 270.

<sup>24</sup> *Id.* at 272.



situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures.<sup>25</sup>

The current argument that Congress should be presumed to have an illegitimate or purely partisan motivation is, ironically, the same type of argument that the Trump Administration has been opposing in various courts. The Trump Administration argued that lower courts wrongly assigned a discriminatory intent in reviewing his travel ban. He also continues to argue that Congress is wrong to assume a “corrupt intent” on obstruction when non-criminal motivations were detailed in the Special Counsel Report. Yet, it is now asking the court to presume the same ill-motive in rejecting any legitimate purpose behind the exercise of oversight authority.

Some of us have expressed skepticism about the purpose of the subpoena fight, which will serve to delay any impeachment proceeding over a public report that was over 92 percent unredacted and a non-public report to select members that was 98 percent unredacted.<sup>26</sup> However, the desire to see the full report or underlying evidence can be justified as related to the need to ascertain the evidence of criminal acts. Some of the demands of Congress (like multiple years of tax and transactional evidence)<sup>27</sup> could present more challenging arguments on a legislative purpose, but the Judiciary Committee’s demand for evidence underlying the Mueller report should be viewed as squarely within a legislative purpose.

### C. Pertinence

The final prong under *Wilkinson* is that the congressional demand for testimony or documents is pertinent and reasonably related to the matter under investigation. The demands linked to the underlying evidence of the Special Counsel are likely to satisfy the pertinence element. That could be more challenging, again, under some of the demands of other committees like the prior tax records.

This factor will also apply to the scope of witness testimony. Pertinence is a standard component for reviewing the obligation of witnesses and was articulated by the Supreme Court in *Watkins v. United States*:

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<sup>25</sup> *Watkins v. United States*, 354 U.S. 178, 205-06 (1957).

<sup>26</sup> See e.g., Jonathan Turley, *Impeachment or Investigation? Democrats Send Mixed Message*, The Hill, May 11, 2019 (available at <https://thehill.com/opinion/white-house/443237-impeachment-or-investigation-democrats-send-mixed-signals>).

<sup>27</sup> The demand for multiple years of tax returns have only been defended as vaguely relevant to a legislative purpose. However, even on such an ambiguous purpose, a district court is likely to uphold the scope of a subpoena given past cases in favor of Congress. The danger is when that limited record will then be tested on appeal. Andrew Duehren, *Court Hearing Over Trump’s Accounting Firm Will Have Long-Lasting Consequences*, The Wall Street Journal, May 14, 2019.

[C]ommittees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority.<sup>28</sup>

Thus, if questions are unconnected to the underlying investigation, it could be challenged. In *Watkins*<sup>29</sup>, the Court reversed a conviction of a witness who refused to give testimony before the House Committee on Un-American Activities. The Committee's purpose was to investigate the Communist infiltration of organized labor. However, roughly one-quarter of the individuals that labor leader John Thomas Watkins was asked about were unconnected to labor. The questions that he refused to answer were outside of the legislative purpose stated by the Committee. The same result occurred in *Sacher v. United States*,<sup>30</sup> where the Court ordered the dismissal of an indictment by a witness who refused to answer questions that were not pertinent to the authorized subject matter of the Subcommittee on Internal Security of the Senate Judiciary Committee.

While expressing great deference to congressional investigation within proper authorizations, the Court in *Watkins* stressed that "broad as is this power of inquiry, it is not unlimited."<sup>31</sup> As important as those limitations are, however, they are generally stated and relatively easily satisfied for any good-faith investigation. The Court has stressed that Congress has "no general authority to expose private affairs of individuals without justification in terms of the functions of the Congress." Moreover, "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."<sup>32</sup> Thus, specific questions can be objected to as outside of the subject matter<sup>33</sup> or fatally ambiguous in a congressional order.<sup>34</sup> However, the Court has also recognized that:

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<sup>28</sup> *Watkins*, 354 U.S. at 206.

<sup>29</sup> *See generally id.*

<sup>30</sup> *See generally Sacher v. United States*, 356 U.S. 576 (1958); *see also Knowles v. United States*, 280 F.2d 696, 696 (D.C. Cir. 1960) (finding subcommittee failed to establish pertinency of the questions for the witness); *Bowers v. United States*, 202 F.2d 447, 447 (D.C. Cir. 1953) (lack of demonstrated pertinency to sustain charge).

<sup>31</sup> *Watkins*, 354 U.S. at 187.

<sup>32</sup> *Id.*

<sup>33</sup> *Russell v. United States*, 369 U.S. 749, 767-78 (1962) (finding indictment invalid for failure to clearly state the subject matter of the questions) ("It is difficult to imagine a case in which an indictment's insufficiency resulted so clearly in the indictment's failure to fulfill its primary office—to inform the defendant of the nature of the accusation against him. Price refused to answer some questions of a Senate subcommittee. He was not told at the time what subject the subcommittee was investigating.")

<sup>34</sup> *Flaxer v. United States*, 358 U.S. 147, 151 (1958) (overturning the conviction based on ambiguity of the order to turn over list containing names and addresses to

“The wisdom of congressional approach or methodology is not open to judicial veto. . . . Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function - like any research - is that it takes the searchers up some ‘blind alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.”<sup>35</sup>

The Court has distinguished cases like *Watkins* on the basis that they involved prior violations that resulted in criminal prosecutions. The *Watkins* conditions are met so long as there is continuity between the stated and legitimate purpose of the hearing and the questions posed to witnesses.<sup>36</sup>

### **III. The White House Has Sufficient Grounds For Claiming Executive Privilege**

The question next turns to whether the White House has asserted a proper claim of executive privilege. I have been critical of the Trump Administration’s instructions for witnesses not to answer questions on the possible basis of executive privilege. Congress was correct in objecting that such assertions need to be made through a proper declaration to Congress. I was equally critical of such refusals in prior administrations, including the Obama Administration. In relation to the Judiciary Committee demands, however, the Trump Administration has issued a formal assertion. Like the Committee subpoena, it is sweeping and unlikely to be upheld in its full scope. However, courts should recognize that much of the material and testimony falls within recognized areas of protected presidential communications and other privileges.

#### **A. A Brief History of Executive Privilege**

While not mentioned in the Constitution, executive privilege in some form can be traced back to George Washington.<sup>37</sup> Tensions between the chief executive and the judicial and legislative branches began almost immediately in the newly-created

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Senate Committee) (“We stated in *Watkins v. United States*, . . . in reference to prosecutions for contempt under this Act that ‘the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases.’”).

<sup>35</sup> *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975).

<sup>36</sup> *Braden v. United States*, 365 U.S. 431, 431 (1961) (upholding Braden’s conviction for refusing to answer questions before subcommittee of the House Un-American Activities Committee); *Barenblatt v. United States*, 360 U.S. 109, 109 (1958) (upholding conviction for contempt of Congress for refusing to answer whether petitioner was or had ever been a member of the Communist Party).

<sup>37</sup> See generally Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege*, 60 MD. L. REV. 205 (2000) (Symposium); See Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* 37-48 (1994).

government. George Washington first invoked the doctrine in 1796 that certain documents relating to the controversial Jay Treaty were outside the legitimate interests of Congress and could be withheld by the president.<sup>38</sup> Invoking the principle of the separation of powers, Washington insisted that “the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request.”<sup>39</sup> Many of the early assertions of executive privilege were excessive and ignored the legitimate oversight authority of Congress. There was a paradigm shift with modern administrations where executive privilege became a central element in an expanding American presidency. President Eisenhower was particularly robust in his use of such claims.<sup>40</sup>

The modern doctrine of executive privilege was the creation of the Supreme Court’s 1974 decision in *United States v. Nixon*,<sup>41</sup> where the Court compelled President Richard Nixon to surrender audio tapes from the White House that were relevant to the Watergate scandal. Notably, there has been a certain ebb and flow to assertions as periods of scandal are followed by periods of restraint. After the Nixon crisis, the next two administrations showed both a notable disinclination for assertions of privilege and a determination not to test the scope of privilege in court. The presidencies of Gerald Ford and Jimmy Carter were called “the open presidencies,” due, in part, to their reluctance to rely on executive privilege.<sup>42</sup> However, the Reagan Administration ramped up such assertions in congressional efforts to investigate the matters from the obstruction of environmental laws to the Iran-Contra affair. Again, those controversies were followed by a period of relative restraint in the Bush Administration, which maintained that it would be used “only if absolutely necessary.”<sup>43</sup>

The pendulum then swung back with a vengeance during the Clinton Administration. Congress was investigating a variety of controversies from firing of employees working for the White House Travel Office to the Clinton's anti-drug programs to Clinton’s grant of clemency to several members of the Armed Forces of National Liberation (FLAN). This included demands for notes from former White House Counsel John Quinn. Much like the controversy of the security clearances ordered by

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<sup>38</sup> Rozell, *supra*, at 35-48.

<sup>39</sup> *Id.* at 35 (quoting 1 James Richardson, *A Compilation of the Messages and Papers of the Presidents 186-87* (1897)).

<sup>40</sup> As I discussed in a prior work on executive privilege, it is notable that some of the most expansive views of privilege have come from former generals. Turley, *supra*; see also Rozell, *supra* note 12, at 32-46 (discussing the use of executive privilege by former generals such as Presidents George Washington, Andrew Jackson, James K. Polk, and Dwight D. Eisenhower). While certainly not an exclusive list, it does suggest a certain cultural predilection toward claims of authority to withhold information for the greater good. In addition to Presidents Washington and Eisenhower, Presidents (and former Generals) Jackson, Polk, and Grant were particularly resistant to congressional demands. *See id.*

<sup>41</sup> 418 U.S. 683 (1974).

<sup>42</sup> Rozell, *supra*, at 83.

<sup>43</sup> *Id.* at 125

President Trump, Travelgate involved allegations of abusive conduct in the White House. Clinton denied any involvement but Congress investigated allegations of the abusive use of the Internal Revenue Service and the Federal Bureau of Investigation to investigate Travel Office employees. In May 1996, Quinn conveyed Clinton's formal assertion of executive privilege over those documents. Like Trump's recent claim that House investigations depart from areas of legitimate congressional concern, Clinton asserted that this was simply a matter not worthy of congressional oversight.<sup>44</sup> It was a facially excessive assertion. Again, over the opposition of the Democratic members, Quinn was held in contempt by the Committee with former White House Director of Administration David Watkins and White House aide Matthew Moore.<sup>45</sup> The White House then released some of the documents and issued a privilege log for material still subject to a privilege assertion. The documents confirmed that Clinton did ask for an FBI investigation into one of the employees—an act for which he later apologized. He also pardoned two former powerful Democratic congressmen, Dan Rostenkowski and Mel Reynolds.

Clinton also invoked executive privilege over the investigation into the FBI-DEA drug policies. He would also invoke over the investigation into the pardoning of the FLAN defendants, a move that critics charged was calculated to help first lady Hillary Clinton in her effort to win the New York Senate seat by appealing to Puerto Rican voters. Congress ultimately held hearings but did not litigate the question. It was notable that this investigation into abuse of the pardon power was followed that year with one of the greatest abuses of pardon authority by a sitting President. On January 20, 2001, Clinton pardoned his own brother, Roger Clinton. He also pardoned Marc Rich, a wealthy Democratic donor who was a fugitive from justice and widely viewed as one of the least worthy recipients of a pardon in history. He also pardoned his former friend, Susan McDougal, who was convicted in the Whitewater scandal involving both Clintons but never implicated them.

George W. Bush joined Clinton in proving, to quote Oscar Wilde, that “nothing succeeds like excess” when it comes to executive privilege. Bush invoked executive privilege repeatedly, including in response to a congressional investigation of the decision of former Attorney General Jane Reno to block the appointment of a Special Counsel to investigate campaign finance violations by the 1996 Clinton presidential campaign. Assertions were also made over corruption allegations in the Boston office of the FBI and decisions of the Environmental Protection Agency on regulating greenhouse gases. Two other controversies are closer to the current conflicts. One was to block material related to the public disclosure of the identity of Central Intelligence Agency Valerie Plame and the investigation of the removal of various United States Attorneys. Notably, on the FBI investigation both Republicans and Democrats opposed the assertions of executive privilege. Eventually, the Committee was allowed to see six of ten documents. On the Plame scandal, the Bush Administration invoked deliberative process privilege but refused to produce even a privilege log. Nevertheless, the Democratic majority allowed the privilege assertion to stand unchallenged in court.

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<sup>44</sup> *Committee to Vote on Contempt of Congress Resolution in Travel Office Matter*, Government Press Releases, FEDERAL DOCUMENT CLEARING HOUSE (May 8, 1996), 1996 WL 8786618.

<sup>45</sup> H.R. REP. NO. 104-598 (1996).

The controversy over the forced resignations of the United States Attorneys involved allegations of political manipulation of the Justice Department—analogueous to some of the allegations being raised in this Administration. Again, the former White House Counsel Harriet Miers was asked to give testimony as well as Chief of Staff Joshua Bolten. Bush invoked executive privilege over all of the evidence to protect the internal deliberations of the Executive Branch and “to protect fundamental interests of the Presidency.”<sup>46</sup> Miers and Bolten were held in contempt and the cases referred to the Justice Department for prosecution. As I have discussed in prior testimony,<sup>47</sup> the Justice Department followed its long and troubling pattern of simply disregarding such referrals and refusing to present them to grand juries.

The Miers/Bolten matter illustrated how presidents can use excessive privilege assertions to run out the clock on Congress. Faced with the refusal of the Administration to submit the case to the grand jury, the House Judiciary Committee filed a civil suit to compel the testimony of Miers and the production of the evidence by Bolten. The Administration lost its claims before the district court which found no support for the Bush assertions of privilege. The Administration then appealed and the D.C. Circuit issued a temporary stay of the district court order to produce the evidence and testimony. It noted that the matter would likely be moot due to the end of that Congress. In doing so, it spared the Bush Administration a major judicial loss. The Administration then reached an accommodation with Congress.

The Obama Administration ramped up executive privilege fights even further over the course of eight years of conflicts with congressional committees. Various oversight committees have objected to the withholding of documents and witnesses in various investigations related to areas ranging from the Internal Revenue Service’s alleged targeting of conservative organizations to the Bergdahl prisoner swap. The most notable and abusive was the decision to withhold evidence in the “Fast and Furious” scandal—a controversy that resulted in Attorney General Eric Holder being held in contempt. Fast and Furious is a prototypical example of a program that is legitimately a focus of congressional oversight authority. A federal agency was responsible for facilitating the acquisition of powerful weapons by criminal gangs, including weapons later used to kill United States Border Patrol Agent Brian Terry in December 2010. Congress has investigated not only the “gunwalking” operation, but also what it saw as concealment and obstruction, by the Administration, in its efforts to investigate the operation. Second, Congress had ample reason to expand its investigation after the Justice Department sent a letter on February 4, 2011 stating categorically that no gunwalking had taken place.<sup>48</sup> It was not until December 2011 that Attorney General

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<sup>46</sup> *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 56 (D.D.C. 2008).

<sup>47</sup> See generally United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*Examining The Allegations of Misconduct of IRS Commissioner John Koskinen*” June 22, 2016 (testimony and prepared statement of Jonathan Turley).

<sup>48</sup> In the letter, Assistant Attorney General Ronald Weich wrote to Senator Grassley: “[T]he allegation . . . that [ATF] ‘sanctioned’ or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico — is false.

Holder informed Congress that it had been given false information and the letter was formally withdrawn. Congress responded by expanding the investigation into the false information and the months of delay in notifying Congress of the misrepresentation of the facts underlying Fast and Furious.

It is worth noting that the Administration in litigation over these claims presented the most extreme possible claims: not only refusing documents to investigatory committees in violation of legitimate legislative authority but contesting that a court can even rule on such a conflict in rejection of judicial authority.<sup>49</sup> As Judge Amy Berman Jackson wrote,

“In the Court’s view, endorsing the proposition that the executive may assert an unreviewable right to withhold materials from the legislature would offend the Constitution more than undertaking to resolve the specific dispute that has been presented here. After all, the Constitution contemplates not only a separation, but a balance, of powers.”<sup>50</sup>

As I have previously testified,<sup>51</sup> Judge Jackson was, if anything, restrained in her reaction. The Justice Department’s position was conflicted and, in my view, incoherent from a constitutional standpoint, particularly after its admission of giving false information to Congress.<sup>52</sup> After the House issued a subpoena for documents generated before and after February 4, 2011 only a partial production of documents was made by the Justice Department. Rather than recognizing the added burden of disclosure

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ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.”

<sup>49</sup> *Comm. on Oversight & Gov’t Reform v. Holder*, 979 F. Supp. 2d 1, 2-3 (D.D.C. 2013). The Department has adopted a position at odds with long-standing and some more recent precedent out of the D.C. Circuit. See *United States v. AT&T*, 551 F.2d 384, 390, 179 U.S. App. D.C. 198 (D.C. Cir. 1976) (“the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict.”); see also *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

<sup>50</sup> *Holder*, 979 F. Supp. 2d at 3.

<sup>51</sup> *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley)

<sup>52</sup> The Administration did prevail in recently in the case of *Electronic Frontier Foundation v. U.S. Department of Justice*, where the D.C. Circuit ruled that the Administration could withhold an OLC Opinion that allegedly authorized the FBI to obtain telephone records from service providers under certain circumstances without a “qualifying emergency.” The D.C. Circuit ruled that, since the FBI did not adopt the recommendation, the opinion was not “working law” that would have to be turned over under the Freedom of Information Act. Yet, under FOIA, agencies must disclose their “working law,” i.e. the “reasons which [supplied] the basis for an agency policy actually adopted.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). However, once again, this is not the same standard that applies to Congress. Moreover, even if the standard were the same, the fights with Congress involved documents that were withheld for months but later recognized to be unprivileged.

following its admitted false statement to Congress, the Department refused to produce clearly relevant documents. Then, in a June 20, 2012 letter, Deputy Attorney General, James M. Cole, informed Congress that the President had asserted executive privilege over documents dated after February 4, 2011. The stated rationale was that their disclosure would reveal the agency's deliberative processes—a clearly overbroad and unsupported assertion over the requested evidence. Indeed, the Justice Department seemed hopelessly or intentionally unclear as to the scope of deliberative privilege, particularly in the distinction between this exception under FOIA and the common law versus its meaning under constitutional law.<sup>53</sup> In his June 20, 2012 letter, Deputy Attorney General Cole stated:

[T]he President, in light of the Committee's decision to hold the contempt vote, has asserted executive privilege over the relevant post-February 4 documents. The legal basis for the President's assertion of executive privilege is set forth in the enclosed letter to the President from the Attorney General. In brief, the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would have significant, damaging consequences. As I explained at our meeting yesterday, it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight. Such compelled disclosure would be inconsistent with the separation of powers established in the Constitution and would potentially create an imbalance in the relationship between these two co-equal branches of the Government.

I remain unclear about what the Justice Department believed is a more troubling “imbalance” than its denial to Congress of clearly material evidence needed for oversight. Congress was investigating the Department's false statement and withholding of clearly unprivileged documents from the oversight committee. The position of the Department was that it could unilaterally withhold material that might incriminate its own conduct and officers through a largely undefined claim of deliberative process.

This confusion deepened further when the Department later admitted that virtually all of the documents withheld for months were unprivileged. On November 15, 2013, the Attorney General stated in court filings that he was withholding documents responsive to the Holder Subpoena that “do not . . . contain material that would be considered deliberative under common law or statutory standards.”<sup>54</sup> The notion of a deliberative process privilege claim over non-deliberative documents was also made in the letter of General Holder to President Obama seeking a sweeping claim of executive privilege: “[b]ecause the documents at issue were generated in the course of the deliberative process concerning the Department's responses to congressional and related media inquiries into Fast and Furious, the need to maintain their confidentiality is heightened.

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<sup>53</sup> 5 U.S.C. § 552(d) (FOIA “is not authority to withhold information from Congress”); *Murphy v. Dep't of the Army*, 613 F.2d 1151 (D.C. Cir. 1979) (holding that deliberative process and FOIA exemptions are inapplicable to Congress).

<sup>54</sup> Def.'s Mot. For Certification of This Ct.'s Sept. 30, 2013 Order for Interlocutory Appeal . . . at 8-9 (Nov. 15, 2013).



Compelled disclosure of such material, *regardless of whether a given document contains deliberative content*, would raise ‘significant separation of powers concerns.’<sup>55</sup>

In addition to a hopelessly confused notion of deliberative process, the Justice Department failed to explain why it was clearly within the authority of Congress to demand production of documents to determine whether officials knew that the Department was giving false information to Congress in the February 4, 2011 letter, but somehow Congress had no such authority to material showing whether and when officials know of the falsehood after February 4, 2011. Both sets of material concerned allegations of lying to Congress as well as the American people. Under the claims advanced by the White House, not only would courts be closed to challenges of presidents withholding evidence but also any material deemed in any way responsive to congressional inquiries would be per se privileged and capable of being withheld at the discretion of the Department.

This history has now culminated with sweeping assertions of executive privilege in the Trump Administration. For those of us who have long been critical of executive privilege assertions, President Trump took a commendable position in waiving executive privilege to the full extent of the public released report. This report was hundreds of pages of potentially privileged material. In doing so, Trump set a high standard for transparency. That high ground however was lost when the White House responded to an array of subpoenas with sweeping privilege assertions. Given this Committee’s recent vote of contempt, I will focus on the demand for evidence related to the Special Counsel’s investigation.

#### B. The Assertion of Privilege Over Undisclosed Material From The Mueller Report

On May 8, 2019, the Trump Administration invoked a “protective assertion of executive privilege” in a letter from Assistant Attorney General Stephen E. Boyd to Judiciary Chairman Jerrold Nadler. The assertion cites the 1996 opinion of Attorney General Janet Reno<sup>56</sup> and states that “this protective assertion of executive privilege ensures the President’s ability to make a final decision whether to assert privilege following a full review of these materials.” The assertion is not to the full Mueller Report as erroneously claimed. The White House has already been waived as to the hundreds of pages in the public report. The protection assertion is only to the “subpoenaed material” which demands redacted and supporting material.

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<sup>55</sup> Letter of Attorney General Eric Holder To President Barack Obama, June 19, 2012 (citing *WHCO Documents Assertion*, 20 Op. O.L.C. at 3) (emphasis added) (available at [http://www.justice.gov/sites/default/files/olc/opinions/2012/06/31/ag-ff-exec-priv\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2012/06/31/ag-ff-exec-priv_0.pdf)) (citing *WHCO Documents Assertion*, 20 Op. O.L.C. at 3). The letter based this view on the claim that such disclosure to Congress would “significantly impair” its “ability to respond independently and effectively to matters under congressional review.” *Id.*

<sup>56</sup> See *Protective Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 1 (1996) (opinion Attorney General Janet Reno).

Courts have long recognized that the President may decline “when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential.”<sup>57</sup> Clearly, much of the evidence gathered by the Special Counsel concerns such presidential communications directly with him or his key advisers. Such key advisers are also covered by the presidential communications privilege.<sup>58</sup> As a threshold matter, the investigation clearly touched on protected areas of communications from Trump’s exchanges with key staff and government officials to memoranda generated as part of the deliberations in the White House and the Executive Branch. As such, a presumptively valid claim exists and courts will ordinarily consider specific communications and documents to weigh the privilege arguments against the value of disclosure.

There are a variety of privileges raised by the Special Counsel investigation, including attorney-client privilege, deliberative process privilege, and presidential communications privilege. Valid claims under all three privileges can be made in this context, but this testimony focused on the latter two privileges as species of executive authority. In the foundational *Nixon* case, there was little distinction evident between the deliberative process privilege and the presidential communications privilege. However, the D.C. Circuit in *Espy* did draw the distinction.<sup>59</sup> The deliberative process privilege is the broadest protection for “decision-making of executive officials generally.” The “presidential communications privilege” is narrower but more readily defended to offer presidents a level of confidentiality for his own decision-making with his aides and staff. *Espy* established that Agriculture Secretary Alphonso Michael Espy should be considered as still part of presidential communications because “the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President.”<sup>60</sup> That would mean that President Trump can invoke privilege for not just his direct communication with aides and other officials but that the communications of aides and officials along themselves can be covered by the presidential communication privilege. However, as shown in *Judicial Watch v. Department of Justice*, the presidential communication privilege can be lost if communications concern officials or offices not in immediate communications with the White House.<sup>61</sup> Those communications may however still be subsumed within the deliberative process privilege so long as the Administration can show that they are pre-decisional and deliberative communications.

As with the basic congressional demand, the privilege assertion by the White House is squarely in line with past cases and practices. The issue therefore becomes whether a waiver has been made and, ultimately, the merits in any balancing of the respective interests of the two branches.

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<sup>57</sup> *In re Sealed Case (Epsy)*, 121 F.3d 729, 744 (D.C. Cir. 1997).

<sup>58</sup> *See, e.g., U.S. Dep’t of Treasury v. Pension Benefit Guar. Corp.*, 249 F. Supp. 3d 206, 209 (D.D.C. 2017).

<sup>59</sup> *Espy* at 737-38.

<sup>60</sup> *Id.* at 751-52.

<sup>61</sup> *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108, 1120 (D.C. Cir. 2004).

#### IV. There Was No Blanket Waiver of Executive Privilege

Various members of Congress and commentators have declared that the White House has already waived executive privilege by allowing White House officials to testify and allowing the Special Counsel to review hundreds of thousands of documents.<sup>62</sup> This argument however might have more foundation if Robert Mueller was an Independent Counsel outside of the Justice Department. He is instead a Special Counsel who is not only part of the Executive Branch but part of the Justice Department subject to the supervision of both the Attorney General and Deputy Attorney General. From the perspective of the White House, revealing information to Mueller was akin to the Executive Branch speaking with itself.

Before the release of the report, I wrote about an emerging privilege strategy where the White House allowed full cooperation with Mueller while opposed disclosures to Congress.<sup>63</sup> I have previously stated that I believe that the White House failed to properly assert privilege in instructing witnesses not to answer congressional questions in anticipation of possible assertions of privilege. However, a clear line was maintained by the White House between disclosures to Mueller as opposed to Congress.

The White House distinction is well-founded in existing precedent. A leading case on this question is again the *Epsy* case. The case has some obvious analogies to the current controversy. There was a public report issued by the White House on its investigation into the alleged wrongdoing by the former Secretary of Agriculture. The underlying evidence supporting the public report was sought by the Office of Independent Counsel. The case resulted in a standard *in camera* review and the court ruled in favor of White House. After an appeal by the OIC alleging a waiver due to the public release of the report, the D.C. Circuit ruled not only in favor of the executive privilege assertion but against the claim of waiver. The Court reaffirmed that “Since executive privilege exists to aid the governmental decision-making process, a waiver should not be lightly inferred.”

A more difficult question is raised with regard to a waiver of some material not because of the disclosure to the Special Counsel but to personal counsel. President Trump is known to have maintained a large array of lawyers with differing functions from White House counsel to personal counsel. This mixing of teams is a dangerous and ill-advised practice, but there appear to have been a few “walls” maintained by the Trump legal team. As a result, an argument can be made that documents reviewed by personal or private counsel constitutes a waiver in the same way that attorney-client privilege can

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<sup>62</sup> Indeed, some commentators like former Gov. Chris Christie and former Clinton Chief of Staff Raoul Emanuel have argued that President Trump was too cooperative and transparent with the Special Counsel. Jonathan Turley, *Christie and Emmanuel: Trump Should Not Have Allowed Staff To Speak Freely With Mueller*, May 13, 2019 (available at <https://jonathanturley.org/2019/05/13/christie-and-emanuel-agree-that-trump-should-not-have-allowed-staff-to-freely-speak-with-mueller/>).

<sup>63</sup> Jonathan Turley, *A Question of Privilege: How Trump Could Still Gut The Mueller Report*, The Hill, March 16, 2019.

be lost with disclosure to third parties.<sup>64</sup>

Once again, *Epsy* is instructive. The D.C. Circuit noted that, while waiver can occur with privileges through third party disclosures, a blanket approach would be inappropriate in the context of executive privilege:

“It is true that voluntary disclosure of privileged material subject to the attorney-client privilege to unnecessary third parties in the attorney-client privilege context ‘waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.’ . . . But this all-or-nothing approach has not been adopted with regard to executive privileges generally, or to the deliberative process privilege in particular. Instead, courts have said that release of a document only waives these privileges for the document or information specifically released, and not for related materials. . . . This limited approach to waiver in the executive privilege context is designed to ensure that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents. . . .”<sup>65</sup>

The court found waiver as to the specific documents shared with third parties but not a general waiver.<sup>66</sup> Of course, there still raises the question of whether a disclosure to one’s own counsel would constitute a waiver to the specific evidence or documents under review. An inquiry into the scope of such a waiver would delve deeply into attorney-client communications, but a court could make such an inquiry *in camera*. Likewise, in *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*,<sup>67</sup> the D.C. District court ruled the office of the Vice President Dick Cheney did not waive executive privilege in disclosing material to a special counsel.

Recently, the U.S. District Court for the District of Columbia explored the waiver of the deliberative process privilege due to an inadvertent disclosure by the D.C. government. It drew a distinction between waiver of privileges tied to the government’s interests (deliberative process privilege) as opposed to that of a person (attorney-client privilege) in ruling against waiver: “Unlike the public release of a document, an inadvertent disclosure does not reflect an intent to abandon a privilege. Making waiver the automatic consequence of such a mistake would undermine the important interests that the deliberative process privilege serves.”<sup>68</sup>

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<sup>64</sup> *In re Sealed Case*, 121 F.3d at 741; see, e.g., *Heffernan v. Azar*, 317 F. Supp. 3d 94, 120 (D.D.C. 2018); *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 890 F. Supp. 2d 35, 46 (D.D.C. 2012).

<sup>65</sup> *In Re Sealed Case*, 121 F.3d at 741.

<sup>66</sup> *United States v. Wells Fargo Bank, NA.*, No 12-ev-7527 (JMF), 2015 U.S. Dist. LEXIS 143814, 2015 WL 6395917, at \*1 (S.D.N.Y. Oct. 22, 2015) (“[C]ourts have overwhelmingly (if not uniformly) held that the release of a document only waives the deliberative process privilege for the document that is specifically released, *and not* for related materials.”).

<sup>67</sup> 658 F. Supp. 2d 217 (D.D.C. 2009).

<sup>68</sup> *Mannina v. District of Columbia*, 2019 U.S. Dist. LEXIS 76260 at 24-25.

A challenge on this issue could well make new law but it is not clear what law Congress would want to make in this regard. The implications of such a waiver would weigh heavily with a court and should weigh heavily with Congress. If such a disclosure to personal counsel constitutes a waiver of executive privilege, would members of Congress be stripped of their privileges in the same way in conferring with private counsel? The material in question is not simply one's individual records or interest. The privilege—and underlying material—rest with the public office. A waiver rule would mean that public officials cannot seek legal advice for their own protection even when private counsel is bound by confidentiality not to release the information. Moreover, we do not know potentially relevant information like whether private counsel signed non-disclosure agreements (NDAs) or other confidentiality agreements with the Executive Branch.

To rule in favor of waiver in this case, no president could discuss underlying evidence in an investigation that has implications for him or her as both an individual and an officeholder. It would create a serious conflict of interest for a president who would have to waive executive privilege in order to protect his own interests. Congressional investigations often raise such dual implications with officials routinely hiring private counsel to assist them in protecting their own rights. Additionally, former officials (like many involved in the current controversies) have lingering liability issues in appearing before Congress and may have to discuss information still held by the Executive Branch as privileged. If any such communications with counsel constitute a waiver, the important protections of the office, highlighted by these courts, would be compromised. Moreover, there is the question of who can waive such privileges in speaking with counsel. The documents secured by the Special Counsel are relevant to a host of officials, including many with private counsel. This would seem the less intrusive option for both members of the legislative and executive branches. There are a variety of government contractors who may have access to a document, but are also subject to confidentiality as is a private attorney. The alternative is to allow confidential disclosure to private counsel under the auspices of the White House Counsel's office. Whatever approach a court chooses, it is likely to adopt the narrowest scope of such waivers. As a result, even if a court finds disclosure to private counsel is a waiver, a court would require document-specific review under current controlling precedent—a detailed review that would require difficult disclosures of attorney-client communications and preparations.

## **V. The Balancing Of Legislative And Executive Interests**

The analysis thus indicates that both Congress and the White House have valid threshold claims and that the White House has the advantage on the issue of waiver. Even if there is a waiver, it would likely be confined as part of a document-specific analysis over the course of a judicial in camera review. That leaves the merits on a balancing of interests between the executive and legislative branches.

As previously noted, the House of Representatives has elected to litigate these issues as a matter of oversight authority rather than the stronger grounds of an impeachment inquiry. In so doing, the House is curiously playing the same hand that it

lost in *Senate Select Committee v. Nixon*.<sup>69</sup> In that case, the United States Senate Select Committee on Presidential Campaign Activities sought to force President Nixon to comply with its subpoena duces tecum, directing him to produce “original electronic tapes” of five conversations between the President and his former Counsel, John W. Dean, III. The district court ruled against the Committee, and the D.C. Circuit upheld the decision. The Committee (like this one) was proceeding under oversight authority, and the D.C. Circuit ruled: “There is a clear difference between Congress’s legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.”

The treatment afforded the House under its impeachment authority was sharply different. The court noted:

“Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source.<sup>38</sup> Moreover, so far as these subpoenaed tapes are concerned, the investigative objectives of the two committees substantially overlap: both are apparently seeking to determine, among other things, the extent, if any, of presidential involvement in the Watergate ‘break-in’ and alleged ‘cover-up.’ And, in fact, the Judiciary Committee now has in its possession copies of each of the tapes subpoenaed by the Select Committee. Thus, the Select Committee’s immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees. We have been shown no evidence indicating that Congress itself attaches any particular value to this interest. In these circumstances, we think the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the Committee’s subpoena.”

The court clearly noted that the request would be cumulative given the disclosure to the House. However, the overall thrust of the opinion was that an oversight demand will be less compelling in a conflict with the executive branch than a demand made as part of an impeachment proceeding. Impeachment proceedings are viewed as having a quasi-judicial element. In *United States v. Nixon (Nixon I)*, the Court upheld a judicial subpoena request by a special prosecutor for the Nixon tapes. The Court determined that “absent a [] need to protect military, diplomatic, or sensitive national security secrets,” the President’s “generalized interest in confidentiality” is outweighed by the “demonstrated, specific need for evidence in a pending criminal trial.”

As an oversight function, the House will have to show that that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the [investigating] Committee’s functions.” At the same time, privilege is not absolute and the position of the White House is diminished in investigations raising criminal or impeachment

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<sup>69</sup> 498 F.2d 725 (D.C. Cir. 1974).

offenses. Of course, there was not a finding of criminal conduct in the Special Counsel Report, though the Special Counsel expressly said that he was not exonerating the President on obstruction and declined to reach a conclusion. As I have previously stated, the Special Counsel's refusal to reach a conclusion (despite being asked to do so by both the Attorney General and Deputy Attorney General) is baffling. While I will not delve into the suggested rationales (including the claim that the Justice Department policy against indicting a sitting president compelled the decision), the decision of the Special Counsel is in my view entirely incomprehensible. Nevertheless, the record stands as rejecting criminal acts by President Trump by the Justice Department. Special Counsel Mueller determined that there was not evidence to support a criminal charge on collusion/conspiracy (Volume I) and both Attorney General Barr and Deputy Attorney General Rosenstein concluded that there was not enough evidence to support a charge of obstruction. Congress may still claim that it is investigating possible criminal conduct, but will do so within the context of this record and without the imprimatur of an impeachment inquiry. It may also pursue evidence related to abusive conduct or actions relevant to legislative reforms.

The House still has a valid interest in much of this evidence. However, it has undermined its position further with some of its initial challenges. I have previously discussed why the contempt sanction against General Barr was a mistake. It conspicuously did not include the oft-repeated and little supported claim of perjury. Instead, it was based on the failure to turn over the full and unredacted report—an act that he could not do as a matter of law. As I stated in the Barr confirmation hearing when members demanded an assurance that the still unfinished report would be publicly released without redactions, such demands are contrary to federal law and unlikely to receive a favorable reception in federal court. If this Committee was serious about bringing a civil contempt action to federal court, it could not take a less promising course of action in the current controversies. Indeed, this is a time where I sincerely hope that the Committee action was never truly intended for a submission to federal court. If the Committee carries out its promise to submit the case to a federal court, it will succeed in playing literally the worst card in a strong hand against the Administration.

#### A. The Grand Jury Material

Since his confirmation hearing, members have demanded that Barr release the “full and unredacted report.” He has declined to do so, citing the federal law prohibiting the release of information from grand juries, which in turn has highlighted a bizarre disconnect between congressional demands and the requirements of federal law. Members of this Committee also demanded the release of the full and unredacted report.

Later in March, the House passed a resolution calling for the public release of the report “except to the extent the public disclosure of any thereof is expressly prohibited by law.”<sup>70</sup> But it too demanded the release of “the full release to Congress of any report, including findings, Special Counsel Mueller provides to the Attorney General”—again with with no exception for Rule 6(e) material in violation federal law. Later, the

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<sup>70</sup> H. Con. Res. 24 (available at <https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/24/text>).

Committee again demanded the release of the full and unredacted report in its subpoena and public statements. This time, it further claimed that that “neither Rule 6(e) nor any applicable privilege barred disclosure of these materials to Congress.”<sup>71</sup>

As the former counsel representing the Rocky Flats Grand Jury, I fought hard to establish that grand jury material could be released in matters of great public significance.<sup>72</sup> We lost after years of litigation. Recently, the D.C. Circuit issued a decision reaffirming the secrecy of grand jury proceedings even in matters of great public interest. In *McKeever v. Barr*,<sup>73</sup> the D.C. Circuit affirmed the denial of a district court in refusing to release grand jury information concerning a 1957 indictment of a federal FBI agent. Despite the passage of time and great public interest, the court rejected the argument that such unsealed of grand jury information fell within the exceptions to Rule 6(e). The court adopted the narrow view of others circuits like the Sixth and Eighth Circuits that the interests of grand jury secrecy outweigh such demands for disclosure in the public interest. See *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991) (“Rule 6(e)(3)(C)(i) is not a rule of convenience; without an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule.”); *United States v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009). In adopting its narrow view of the exceptions, the Court stated:

“That the list of enumerated exceptions is so specific bolsters our conclusion. For example, the first of the five discretionary exceptions in Rule 6(e)(3)(E) permits the court to authorize disclosure of a grand jury matter ‘preliminarily to or in connection with a judicial proceeding.’ Rule 6(e)(3)(E)(i). The second exception allows for disclosure ‘at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.’ Rule 6(e)(3)(E)(ii). The other three exceptions provide that a court may authorize disclosure to certain non-federal officials ‘at the request of the government’ to aid in the enforcement of a criminal law, Rule 6(e)(3)(E)(iii)-(v); those provisions implicitly bar the court from releasing materials to aid in enforcement of civil law. Each of the exceptions can clearly be seen, therefore, as the product of a carefully considered policy judgment by the Supreme Court in its rulemaking capacity, and by the Congress, which in 1977 directly enacted Rule 6(e) in substantially its present form. See *Fund for Constitutional Gov’t*, 656 F.2d at 867. In interpreting what is now Rule 6(e)(3)(E)(i), for example, the Supreme Court stressed that the exception ‘reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for

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<sup>71</sup> This position was repeatedly stated by the Committee including in its resolution to hold General Barr in contempt. See e.g., *Resolution Recommending That The House of Representatives Find William P. Barr, Attorney General, U.S. Department of Justice, In Contempt of Congress for Refusal To Comply With A Subpoena Duly Issued By The Committee On The Judiciary*, 116<sup>th</sup> Cong. 1st. Sess. (available <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/FINAL%20BARR%20Contempt%20Report%20Barr%205.6.19.pdf>)

<sup>72</sup> *In Re Special Grand Jury 89-2*, 2004 U.S. Dist. LEXIS 3942.

<sup>73</sup> *McKeever v. Barr*, 2019 U.S. App. LEXIS 10061at \*6.



breaching grand jury secrecy.’ *United States v. Baggot*, 463 U.S. 476, 480, 103 S. Ct. 3164, 77 L. Ed. 2d 785 (1983).”

This is a narrower view than some other circuits, including a recent decision by the Eleventh Circuit.<sup>74</sup> However, even under the more liberal reading of the rule, General Barr does not possess the authority claimed by the Committee to release grand jury material to Congress.

Notably, the D.C. Circuit in *McKeever* interpreted a key decision on grand jury material from the Watergate period in an equally narrow fashion. In *Haldeman v. Sirica*,<sup>75</sup> the plaintiff was seeking the release as a matter of the inherent discretion of a federal court as opposed to the specific enumerated exceptions. Judge Srinivasan, the dissenting judge in *McKeever*, objected that the majority was reading the decision of Judge Sirica in releasing the grand jury material as based solely on the view that an impeachment proceeding is a quasi-judicial proceeding. Sirica himself referenced the House Judiciary Committee in Watergate as acting as “a body that in this setting acts simply as another grand jury.”<sup>76</sup> The D.C. Circuit however was not clear on the question in the earlier decision. The recent decision would seem to limit any disclosure to the exceptions and that would make the decision of this Committee to proceed as a matter of oversight, rather than impeachment, a potentially determinative choice in any challenge on this issue.

Recently, this Committee acknowledged that such an order may be necessary but insisted that General Barr should ask for the disclosure. Presumably, therefore, any act of contempt does not include the withholding of the estimated two percent of material stemming from grand jury proceedings. Since 98 percent of the report was disclosed to key members, it is assumed that the two percent is Rule 6 (e) material. That would leave just six percent withheld in the public report.

#### B. Evidence of On-Going Investigations or Prosecutions

Most of the redactions in the publicly released report fall into the category of evidence tied to ongoing investigations or prosecutions. This is a standard basis for redaction and, more importantly, is likely to include material under court seal in cases like the prosecution of Roger Stone. Like Rule 6(e) information, this information would require a separate court order if under seal from a federal judge. It is unlikely that another federal judge would rule against General Barr for complying with standing orders of a federal court.

General Barr could indeed seek court orders for the release of this limited material, including Rule 6(e) material. However, there are countervailing interests for the Department that are anchored in long-standing Justice Department policies. Instead of seeking such disclosure, Barr made the disclosures to key members who are in a position to review the relatively small percentage of redactions and raise specific issues of

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<sup>74</sup> *Pitch v. United States*, 915 F.3d 704 (11<sup>th</sup> Cir. 2019).

<sup>75</sup> 501 F.2d 714 (D.C. Cir. 1974).

<sup>76</sup> *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1230 (D.D.C. 1974).

redaction with Barr. That is likely to be viewed as a responsible approach to a federal court. The alternative approach would sweep too broadly. Congress would have to ask the court for a ruling that the Justice Department must release sealed or confidential information in criminal cases upon congressional demand. Since this is not an impeachment proceeding, Congress has already reduced the compelling case for such an exception. It is also worth noting that such a rule could create a slippery slope for courts since Congress could force disclosures related to criminal cases against favored parties outside of the scope of the Rules of Criminal Procedure. If courts decline to order such disclosure of Rule 6(e) and the material linked to ongoing cases, the vast majority of redactions would be upheld and Congress will have succeeded in creating new precedent against itself.

### C. Intelligence Methods and Sources

A third cited category was the standard protection of intelligence methods and sources. This category prompted few redactions but even in criminal cases defendants are often denied such information. Once again, this information appears to have been made available to select members of Congress. If any of this small number of redactions can be contested after review, it seems highly unlikely that such redaction would materially change the conclusions or weight of the evidence of the Report.

It is possible for Congress to prevail on individual redactions after an in-camera review. It is also possible that the Justice Department could “run the table” on these redactions and saddle this Committee with a new and countervailing precedent for future investigations.

### D. Supporting Evidence

A fourth area of demand is for the underlying documents and evidence to be made available to the Special Counsel and his investigators. The deadline for production in my view was unreasonable and I do not expect that a federal court would impose such a schedule on the Justice Department given the representation made to the President in General Barr’s May 8<sup>th</sup> request for a protective assertion of executive privilege: “The Committee . . . demands all of the Special Counsel’s investigative files, which consist of millions of pages of classified and unclassified documents bearing upon more than two dozen criminal cases and investigations, many of which are ongoing.” As noted earlier, privilege reviews normally require document-by-document determinations of privilege. Indeed, General Barr has told Congress that it is impossible to do such privilege reviews on millions of pages in a matter of a couple weeks.

Presumably, the ongoing review by the Justice Department will result in the release of many of these documents in light of the waiver over the hundreds of pages of the Special Counsel Report. Litigation will force such a review to occur in the context of a federal proceeding. That could well slow rather than speed the process. The court is likely to demand a declaration on the scope of the material and eventually an index of all such documents. With an investigation of this length and scope, it will be a massive enterprise and it is unlikely that a court will view the position of the Justice Department as unreasonable given the size of the record. Indeed, going through such a record is like

invading Russia in winter—it is unlikely to be a warm or speedy process for Congress. However, either through the Justice Department review or a court-ordered review, Congress has a strong claim to much of this matter and will likely prevail in getting much of this material in full or redacted form.

#### E. Witnesses

The final area of conflict concerns whether certain key witnesses can be prevented from appearing before Congress. The President has stated publicly that he opposes the appearance of witnesses like Robert Mueller and Don McGahn. For his part, Attorney General Barr has stated that he believes that Mueller should testify. But regardless of the position taken on these witnesses, Congress is again in a strong position to demand their appearance. It would prevail ultimately in any litigation and this is a fight that would be excellent ground for litigation on the part of the legislative branch.

The more difficult issue will be what these witnesses can address in such testimony. There are no compelling grounds to prevent the witnesses from testifying within the scope of previously waived material in the Report. However, Congress is not calling Robert Mueller to read from his report. It will want to ask him questions about what led to certain conclusion and the context for those conclusions. That would necessarily involve reliance on material that was not published in the report, including documents and evidence not included in the Report. As noted earlier, the White House has a valid claim that it did not waive material by simply allowing Mueller and his staff to review it within the Justice Department.

While Congress is likely to prevail on compelling the appearance of witnesses, it could face a mixed result on the scope of the testimony. A court is unlikely to declare that a witness is under no obligation to protect undisclosed executive privileged material. Moreover, a court would not be able to predict questions or answers. In an ordinary case, Congress and the White House would work out areas of interest and core documents to be addressed by witnesses. Both documents and witnesses can then be cleared in advance. There does not appear to be that level of conferral in this case. However, federal courts do not generally offer advisory opinions on future possible conflicts. Rather, witnesses will likely have to appear and a record created on areas of claimed privilege. The Administration could seek some basic protections in such a hearing. At a minimum, it is likely that a court would allow the Justice Department to be present to advise witnesses not to answer questions.

A court is likely to give witnesses like Mueller some “room at the elbows” in answering questions within the scope of the Report. The Report is a massive waiver of privilege and offers a wide berth for testimony. The leeway is likely to be substantially less for witnesses like McGahn whose communications with Trump occurred in the very nucleus of privileged presidential communications. Congress could well argue that the extent of disclosure made in the Special Counsel Report should result in a finding of a general implied waiver. In some civil privilege cases, courts have found a waiver extends to other undisclosed documents.<sup>77</sup> That is highly unlikely in the context of executive

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<sup>77</sup> Under Rule 502(a) of the Federal Rules of Evidence, the disclosure of privileged information or communications in a federal proceeding, or to a federal office or agency,

privilege. First, it would effectively lift protections from millions of pages of evidence. Second, it would create a disincentive in the future for presidents to release information in the public interest. Finally, it would create an artificial construct. The Mueller Report remains relatively focused on the two issues of conspiracy/collusion and obstruction. The documents and potential testimony would likely extend well beyond those confines. For example, many of these documents were generated in the context of other issues or functions but remained material to the Special Counsel investigation. A sweeping general waiver holding is unlikely to occur and even more unlikely to be upheld.

## VI. Conclusion

In *Paradise Lost*, Milton once described a “Serbonian Bog ... where Armies whole have sunk.”<sup>78</sup> Privilege fights represent the same danger for Congress. Even in a strong challenge, these conflicts can get bogged down in a document-by-document process of indexing, redacting, and releasing of evidence. In the worst case, your whole case can sink into the Article II bog if you choose your ground and your fight unwisely.

As a longtime advocate for congressional authority, I am concerned about the current posture of this Committee in pushing forward on issues like the Barr subpoena and contempt fight. There are strong claims to be made and those stronger positions should be given priority. The Judiciary Committee of the 116<sup>th</sup> Congress owes a debt to the Committees that came before it and an obligation to the committees that will come later. As with the Hippocratic oath, your first commitment must be to “do no harm.” Some 230 years since the first Congress, this body is facing new and serious threats of defiance and circumvention. It will need to jealously protect not only its inherent powers but its existing precedent to meet that challenge. Some of these challenges could do real harm to precedent regularly relied upon to compel cooperation and disclosures to Congress.

Given the commendable waiver of executive privilege over the public Special Counsel Report and the redaction of only eight percent of the material (and virtually no redactions in the obstruction material), there would seem to be ample basis for conferral and compromise. Absent such compromise, the Committee should focus on compelling the appearance of key witnesses and establishing the record for any executive privilege claims. That is the high and best ground for litigation. Alternatively, if Congress flails about in every direction in this bog, it will find itself with less progress and even less time to pursue its legitimate oversight concerns.

Thank you again for the honor of testifying before you today. I am happy to answer any questions that you may have.<sup>79</sup>

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constitutes a waiver to the information disclosed. However, such a waiver extends to other undisclosed communications or information only if: “(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.” Thus, there is a general fire stop on implied general waivers that sweep away all privilege in most cases.

<sup>78</sup> John Milton & Isaac Asimov, *Asimov’s Annotated Paradise Lost* 88 (1974).

<sup>79</sup> As discussed above, I have been asked to include some of my relevant scholarship: Jonathan Turley, *A Fox In The Hedges: Vermeule’s Optimizing*

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*Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege*, 60 MD. L. REV. 205 (2000) (Symposium); Jonathan Turley, *"From Pillar to Post": The Prosecution of Sitting Presidents*, 37 AM. CRIM. L. REV. 1049 (2000); Jonathan Turley, *A Crisis of Faith: Congress and The Federal Tobacco Litigation*, 37 HARV. J. ON LEGIS. 433 (2000); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000) (Symposium); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999) (Symposium); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence* 44 HASTINGS L.J. 145 (1992).