Sally Yates, Russia Testimony & Executive Privilege in the Trump Era

by Andy Wright
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This week has shed light on the Trump administration's aggressive approach to executive privilege, but it has also cast doubt over President Donald Trump's ability to assert it successfully over the longer term. We watched this play out when the Justice Department warned former Acting Attorney General Sally Yates that she needed White House clearance to testify before the House intelligence committee due to issues of executive privilege. Executive privilege is an umbrella concept by which a president may seek to shield executive branch confidences from disclosure, even in the face of judicial or congressional subpoenas. It includes a number of categories such as presidential communications, deliberative processes, open investigative files, and state secrets. But the issue became moot, at least for now, when Devin Nunes (R-Calif.), the committee's chairman, abruptly cancelled the public hearing where Yates was scheduled to appear. As a former White House lawyer who advised presidents and vice presidents on matters of executive privilege, these events increase my concern that important institutional interests served by executive privilege will suffer under Trump.

Yates's testimony is critical to one of the major lines of investigation: former National Security Advisor Mike Flynn's ties to Russia. In January, Yates warned White House Counsel Don McGahn that Flynn's public denials that he had discussed sanctions with the Russian ambassador to the US during the transition were false. By that time, Flynn's assertion had been parroted by senior White House officials including Vice President Mike Pence. Ultimately, once Flynn's dishonesty became public, Trump fired him. By then, Trump had also fired Yates because of her noisy refusal to allow the Justice Department to defend Trump's travel ban on her watch. Because of her central role in reporting Flynn's misconduct to the White House, Chairman Nunes and Ranking Member Adam Schiff (D-Calif.) invited Yates to testify on Tuesday, March 28.

The executive privilege debate first played out in an exchange of letters between Yates's attorney David O'Neil and Associate Deputy Attorney General Scott Schools. Then, on March 23, O'Neil wrote to Acting Assistant Attorney General Samuel Ramer to inform the Justice Department that Yates intended to appear before the committee voluntarily. He assured Ramer that Yates "will not disclose any classified information, nor will she provide any information that she believes could interfere with any ongoing criminal or intelligence investigations." O'Neil notes a previous interaction in which the Department had advised it "believes there are further constraints" on Yates's testimony because there are "client confidences that she may not disclose absent written consent of the Department." In his letter, O'Neil objected to that position as "overbroad, incorrect, and inconsistent with the Department's historical approach to the congressional testimony of current and former senior officials." He argued that the Justice Department position is "particularly untenable given that multiple senior administration officials have publicly described the same events." O'Neil concluded his letter by asking that the Justice Department articulate any confidentiality interests it maintains still exist.

Scott Schools, Associate Deputy Attorney General, responded to O'Neil's letter the next day. Schools asserted that Yates's testimony about "communications she and a senior Department official had with the Office of Counsel to the President" would likely be "covered by the presidential communications privilege and possibly the deliberative process privilege." Because the "President owns those privileges," Schools argued Yates "needs consent" and must therefore "consult with the White House." Later that day, O'Neil wrote to White House Counsel McGahn to advise the White House that Yates intends to testify. O'Neil questioned whether either privilege could apply to the testimony at issue and further asserted that "any claim of privilege has been waived" due to previous public comments made by senior White House officials. He concluded: "If I do not receive a response by Monday, March 27, at 10 am EDT, I will conclude that the White House does not assert executive privilege over these matters with respect to the hearing or other settings."

The White House never granted express permission for Yates to testify, but it also did not respond to O'Neil by his stated deadline. But the issue never came to a head because Nunes canceled the hearing the same day O'Neil sent McGahn the letter. Schiff cried foul, charging that Nunes canceled the hearing to protect Trump. All of this played out during a week of bizarre behavior by Nunes, during which he met a confidential intelligence source at the White House, briefed the President on lawful incidental intelligence

collection of conversations (unrelated to Russia) involving Trump transition team members, refused to brief his intelligence committee colleagues before briefing the President, and continues to refuse to divulge his intelligence source to those colleagues.

On Tuesday, White House Press Secretary Sean Spicer denied the White House pressured Nunes to cancel the Yates hearing. He also denied that the White House made any move to block Yates's testimony: "The White House did not respond [to O'Neil's letter] and took no action that prevented Ms. Yates from testifying...I hope she testifies. I look forward to it." Spicer also flatly denied that White House Counsel "ever" considered invoking executive privilege over Yates's testimony. He also falsely asserted that everyone – Democrats and Republicans – briefed on the Russia investigation has concluded there was no collusion between the Trump team and Russian officials. The investigation is far from complete, and just last week, Schiff said there is "more than circumstantial" evidence that the Trump campaign may have colluded with Russian efforts to disrupt the election.

This episode raises many questions about the Trump administration's handling of executive branch legal doctrine.

The Trump administration is probably correct that Yates's testimony would touch on conversations traditionally covered by the presidential communications component of executive privilege. *United States v. Nixon* is most famous for ordering production of the Nixon tapes and hastening Nixon's resignation. But the Supreme Court held that presidential communications are subject to claims of executive privilege that flow from the very structure of the Constitution.

> In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Here, we have the Acting Attorney General advising the White House Counsel about the National Security Advisor's dishonesty and potential criminal liability. This information was surely intended to reach the President to initiate provision of legal, political, and administrative advice. As an initial matter, that type of communication between the President and his most senior advisors and cabinet officials is at the doctrinal core of the privilege.

The Schools letter also accurately recites executive branch doctrine that the privileges belong to the President. That view derives from *Nixon*'s rationale: Presidential communications privilege is designed to protect the President's decisionmaking and information flow. As the D.C. Circuit noted in *In re Sealed Case (Espy)*: "Since the Constitution assigns these responsibilities to the President alone, arguably the privilege of confidentiality that derives from it also should be the President's alone." Moreover, the executive branch restricts assertion of the privilege to the President alone in order to deter overuse and ensure political accountability. As a practical matter, this means that congressional fights usually start out between Hill staff and agency officials over confidentiality interests. Under modern practice, the president does not formally invoke privilege in the face of a congressional request or even subpoena. Rather, the president invokes privilege only once Congress schedules a vote of contempt against the executive branch official under subpoena.

Per Spicer, the White House does not seek to preclude Yates's testimony on executive privilege grounds. However, if they did, for practical and legal reasons, the Department's asserted confidentiality interests represent the beginning, not the end, of the analysis of executive privilege in the Yates's anticipated testimony in the Russia investigation. As *Nixon* notes, it is a qualified privilege that can be overcome under certain circumstances by greater investigative need or waived by a course of conduct sufficiently inconsistent with safeguarding that information as protected. Moreover, disputes over executive privilege are largely resolved in light of the prevailing political contexts.

First, the White House does not have effective control of Yates now that she is a private citizen. Therefore, at least with respect to unclassified information, no one can stop Yates from cooperating with the FBI, a congressional committee, or the press. In a post titled "Bob Gates, Disclosure & Executive Privilege," I lamented the lack of control a president has on former advisors who unilaterally decide to publish Oval Office or Situation Room conversations without seeking permission from the president they served. Moreover, Trump unceremoniously fired Yates. Had he replaced her as Acting Attorney General but kept her on in the Department of Justice, he might have been holding better cards in his hand now. If so, he could order her, as his subordinate, not to appear before the committee in connection with an anticipated formal assertion of privilege.

Second, even if the White House had effective control over Yates, it would have a difficult time holding the line in the face of a determined committee chair. Politics largely determine whether the White House can resist compelled congressional testimony by a subordinate. The Trump administration has been poisoning the political environment in a way that will make it very difficult for a White House defense from here.

Constitutional conflict looms when a President asserts executive privilege in response to congressional requests for information. A process of accommodation between the White House and Congress has traditionally helped to avert constitutional crisis, and such disputes only rarely reach a court. Congress only rarely turns to the judiciary to enforce its subpoenas against claims of executive privilege, as it did in *Judiciary Committee v. Miers* and *Oversight Committee v. Holder / Lynch*. My law review article *Constitutional Conflict and Congressional Oversight* discusses that process, and the irreconcilable

institutional views of Congress and the White House. Ultimately, White House success in withholding documents and testimony is largely a function of how strong its political position is to withstand congressional outrage.

The more grave the issue under investigation, the harder it is to withhold the information. Because it related to an epic national tragedy, the 9/11 Commission was able to obtain a number of Presidential Daily Briefs on intelligence matters leading up to the attack. These are largely considered the crown jewel of executive privilege. The more credible the charge of obstruction or cover up, the more likely a congressional committee will prevail, or court will rule, against the White House. Watergate is a good example. The worse the process facts are for the White House, the more likely the White House will have to yield. For example, the State Department had a much harder time defending claims of privilege under the Freedom of Information Act once it was revealed that Hillary Clinton used a private server to conduct official business while she served as Secretary of State.

Here, we have an investigation into alleged foreign interference in our presidential election, fueled in part by intelligence leaks, that contemplates the possibility that people associated with Trump colluded with Russian interlopers. Moreover, many of our normal investigation institutions contain leaders who must operate under intense political pressure and navigate numerous potential conflicts of interests. In some cases, these officials may be fact witnesses to some of the underlying lines of inquiry. This context is not conducive to a stalwart Trump administration posture on executive privilege.

Third, Trump has disadvantaged legitimate executive branch interests by calling on Congress to investigate the executive branch he leads. For a number of practical, political, and legal reasons, presidents do not ask Congress to investigate their own administrations. On at least two separate occasions now, the President has done just that. In January, as president-elect, Trump tweeted asking "the chairs of the House and Senate committees to investigate top secret intelligence shared with NBC prior to me seeing it." At the time, I wrote that his request was "astonishing as a matter of separation of powers, institutional function, and historical precedent." After Trump administration officials were failing to substantiate Trump's false accusation that President Barack Obama had wiretapped Trump Tower, Spicer issued a statement that "President Donald J. Trump is requesting that as part of their investigation into Russian activity, the

congressional intelligence committees exercise their oversight authority to determine whether executive branch investigative powers were abused in 2016." Yesterday, Spicer reiterated the view that Nunes "is running an investigation which we asked for."

Trump threatens to undermine his own White House's defenses against all manner of allegations and investigations, and threatens to undermine longstanding executive branch legal doctrines. How can the White House effectively defend resistance to cooperation with an investigation the president requested? That will become a defining narrative in the public debate surrounding any separation-of-powers conflict, which will shape the context in which committee chairs or judges act. The executive branch has law enforcement and, where more appropriate due to conflict-of-interest concerns, inspectors general and special prosecutors may be made available to conduct investigations of administration misconduct without jeopardizing executive branch institutional interests. He should use them.

Fourth, O'Neil raises a substantial question of waiver. As a White House lawyer, I worked with O'Neil when he was a senior lawyer in the Justice Department under President Obama. He is a capable attorney who is well-versed in executive privilege doctrine. As a matter of substance, he is probably correct that executive privilege has been waived as to this set of publicly reported and addressed communications. As a process matter, it is a bit disconcerting that O'Neil, in his capacity as counsel to Yates, could be the final decision-maker as to a claim of waiver rather than the president as advised by the White House Counsel, Acting Deputy Attorney General (due to Jeff Sessions' recusal and Rod Rosenstein's pending nomination status), and Office of Legal Counsel. To be fair, O'Neil provided the White House an opportunity to pursue its privilege claim, which became moot for the time being. But O'Neil's role here is elevated by the lack of the White House's practical control over former officials.

One last point: this issue is not resolved. O'Neil's letter sends a clear signal to the Senate intelligence committee that Yates is likely willing to testify over White House objections. His exploding deadline for a White House response specifically indicated he would construe silence as a decision not to pursue privilege before the House intelligence committee "or other settings." As of yesterday, the White House Press Secretary is now on record saying that he "looks forward to" Yates's testimony. I would anticipate an announcement by the Senate that Yates will testify as early as today.

Image: Pete Marovich/Getty.