EXECUTIVE PRIVILEGE IN A HYPER-PARTISAN ERA

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INTRODUCTION

Congressional oversight investigations of the executive branch, especially those concerning the possibility of presidential or cabinet-level malfeasance, not infrequently encounter claims of executive privilege.[1] Those dedicated to preserving the essential oversight role that Congress properly plays in monitoring the executive branch are therefore well

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1. *See, e.g.*, Emily Berman, *Lincoln's Legacy: Enduring Lessons of Executive Power: Executive Privilege Disputes Between Congress and the President: A Legislative Proposal*, 3 ALB. GOV'T L. REV. 741, 743–49 (2010) (discussing varying instances of executive privilege).

advised to consider the obstacle executive privilege might become to carrying out this core Article I function. Here, as in so many contexts, one focus of such reflection ought to be the lessons taught by history.

We hope to make a modest contribution to that effort in this Article, which briefly recounts the instances of presidential invocation of "executive privilege" as a basis for withholding information from committees or members of Congress in the years between Richard Nixon's resignation and the end of Barack Obama's second term. At the outset, we acknowledge that one of the difficulties of this project is that Presidents post-Nixon have often withheld requested documents or testimony, claiming that they are protected, but without specifying a privilege, executive or otherwise.[2] In an effort to make our own inquiry manageable and sufficiently succinct for the symposium format, we limit our project to explicit claims of executive privilege, used to invoke protection for presidential communications or deliberative process, to resist information requests from Congress originating in the context of congressional oversight investigations.[3] Even within that limited set, we exercise the prerogative of treating some episodes in greater depth than others. This study aims to be qualitative but makes no claim to rigorous quantitative analysis.

We hope that gathering these vignettes together in one place may itself be of some value in simplifying future inquiry. In addition, our review of these relatively recent events has impressed upon us one

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2. As one commentator has observed:

> Negative connotations associated with the term "executive privilege" still linger from Watergate. As a result, Presidents sometimes attempt to achieve the same results by other means—instead of asserting executive privilege, they refer to "internal deliberations" to withhold communications between officials, or to a "secret opinions" policy to avoid disclosure of OLC opinions justifying executive policies. . . . By avoiding explicit assertions of executive privilege, the executive is able to shield from disclosure information properly in Congress's possession without paying the political cost associated with the term "executive privilege.

Id. at 771.

3. Accordingly, we do not treat claims of executive privilege asserted in FOIA litigation, grand jury subpoenas, independent counsel investigations, or other litigation. Similarly, for expositional simplicity, we do not treat other species of privilege invoked by the President that are sometimes grouped under the umbrella of executive privilege, including, for example, state secrets or national security. We acknowledge the possibility that limiting our inquiry to formal invocations of executive privilege may introduce a systematic selection bias in that formal invocations may be more likely to occur in the face of bipartisan congressional investigatory action. (We also thank Morgan Frankel for making this point). We can only plead that a broader study would raise perhaps insurmountable practical challenges and in any event would far exceed the scope of our humble efforts in a symposium article.

observation above all others. In assessing the likely outcome of an inter-branch executive privilege dispute, perhaps as (if not more) important than the kinds of categorical questions lawyers tend to ask about privilege claims (*i.e.*, whether the President has actually seen or been familiarized with the allegedly privileged matter, or whether the presidential privilege encompasses documents developed by officers and employees outside the Executive Office of the President[4]) is the extent to which the underlying congressional investigation can be characterized as bipartisan. We draw upon the insightful rubric for assessing an investigation's degree of bipartisanship supplied by Senator Levin and Elise Bean in their contribution to this symposium.[5] Our focus on those considerations, to the extent we have been able to ascertain them from public record, suggests that, all other things being equal (which of course they never are), claims of executive privilege are more likely to become sustained impediments to the satisfactory conclusion of a congressional investigation when the investigation bears the indicia of partisanship. Alternatively, executive privilege claims are significantly less likely to be an impediment if the investigation is bipartisan.

Part I of this Article briefly treats *United States v. Nixon*, the seminal Supreme Court case on executive privilege.[6] This Article next examines the instances of explicit presidential invocation of executive privilege in congressional investigations during the administrations of Presidents Ford and Obama, and all those in between. Finally, Part III offers some succinct observations about the overall significance of this history for future congressional oversight of the executive branch, while at the same time sketching avenues for future research.

I. EXECUTIVE PRIVILEGE IN THE WATERGATE ERA

Presidential resistance to congressional requests for confidential executive branch information has been traced to Washington's first term.[7] It was not until 1974, however, that the Supreme Court considered the claim that the Constitution's structure implied an "executive

4. *See, e.g.*, MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30319, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 2 (2007) (listing the questions paraphrased in the text, among others).

5. *See* Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring its Effectiveness*, 64 WAYNE L. REV. (forthcoming 2018).

6. United States v. Nixon, 418 U.S. 683 (1974).

7. *See* MARK ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 34–36 (1994).

privilege"[8] to prevent the disclosure of information when the President had determined that its revelation would be harmful to the public interest.[9]

In that year, the multi-year, multi-special-prosecutor investigation into the bungled burglary of the Watergate office complex had finally wound its way to the oval office.[10] Special prosecutor Leon Jaworski had obtained from the investigating grand jury a subpoena for audio tapes of specified oval office conversations that were expected to (and did) reveal Nixon's participation in a conspiracy to obstruct justice.[11] Facing bipartisan congressional demands for his resignation,[12] Nixon in a last gasp had resisted the subpoena in court, asserting a constitutionally implied privilege to withhold the tapes.[13]

Chief Justice Burger, writing for a unanimous Court of eight Justices,[14] acknowledged an executive privilege implied from the Constitution's structure.[15] Executive independence from the coordinate branches of the federal government required at least a presumptive ability to preserve the confidentiality of some "Presidential communications."[16] Pragmatic recognition of a "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" buttressed theoretical considerations.[17] Chief Justice Burger declared that "the importance of this confidentiality is too plain to require further

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8. Professor Mark Rozell traces the term "executive privilege" to its origin in the Eisenhower Administration. *See* Mark Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1069 (1999).

9. *Id.*

10. *See generally Nixon*, 418 U.S. 683 (1974).

11. *Id.* at 686–89.

12. *See, e.g.*, *GOP Leaders Favor Stepdown*, THE STANFORD DAILY (May 10, 1974) at 10.

13. Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 1360 (1999) ("Nixon had [] gone, hat in hand, to the judiciary, asking for its help in resisting the subpoena."). Earlier in the year, the subpoena for the tapes issued by the Senate's Select Committee culminated in an executive privilege ruling by the D.C. Circuit. *See* Senate Select on Presidential Campaign Activities v. Nixon, 489 F.2d 725 (D.C. Cir. 1974). The Court of Appeals declined to enforce the subpoena, largely on the ground that the Senate Committee's "immediate oversight need for the subpoenaed tapes [was], from a congressional perspective, merely cumulative," given that the House Judiciary Committee, then considering articles of impeachment, already possessed the relevant recordings. *Id.* at 732.

14. Justice Rehnquist did not participate in the case. *Nixon*, 418 U.S. at 716.

15. *Id.* at 706.

16. *Id.* at 708.

17. *Id.* at 705.

discussion."[18] Then he discussed it further, explaining that "[h]uman 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 decision-making process."[19]

These considerations required that, once the lower court was confronted with a President's conclusion "that compliance with a subpoena would be injurious to the public interest," followed by an invocation of executive privilege, the court must "treat the subpoenaed material as presumptively privileged and to require" a demonstration that "that the Presidential material was essential to the justice of the (pending criminal) case."[20] Chief Justice Burger emphasized that, in the instant case, no claim had been made that the subpoena threatened disclosure of military or diplomatic secrets.[21] Without elaboration, and in a footnote, his opinion for the Court implied that the need for Presidential compliance with a subpoena might be less pressing in the context of civil litigation or a legislative investigation,[22] as though it were obvious that convicting burglars was an objective paramount to congressional oversight.

The Supreme Court decided *United States v. Nixon* on July 24, 1974.[23] Just over two weeks later, Nixon resigned the presidency,[24] elevating Gerald Ford to that high office. For present purposes, the significance of the *Nixon* ruling is twofold; it placed the long-assumed privilege on a clearer constitutional foundation, while at the same time infusing it with a decidedly disagreeable political aroma.

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18. *Id.*

19. *Id.* The Court subsequently elaborated on their rationale, stating:

> President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Id. at 708.

20. *Nixon*, 418 U.S. at 713.

21. *Id.* at 710.

22. *Id.* at 712 n.19. Our focus is patently more on the history than the doctrine. For a thorough treatment and recitation of the latter, see *In re Sealed Case*, 116 F.3d 550 (D.C. Cir. 1997) (arising out the investigation of Secretary of Agriculture Mike Espy), which has informed our thinking on the strength and weakness of the assertions of the executive we recount herein.

23. *Id.* at 683.

24. Anthony J. Gaughan, *Watergate, Judge Sirica, and the Rule of Law*, 42 MCGEORGE L. REV. 343, 345 (2011).

II. FROM GERALD FORD TO BARACK OBAMA

A. The Ford Administration

Gerald Ford ascended to the presidency upon the resignation of a man who, as one of his last and most consequential decisions as President, had pressed a claim of executive privilege in a vain effort to withhold incriminating evidence from public scrutiny. Not surprisingly, President Ford was exceedingly reticent to make an executive privilege claim on behalf of his administration.[25] In fact, the surviving documentary evidence reveals a Ford White House that treated the words "executive privilege" as radioactive.[26]

The Administration's deep reluctance to invoke the privilege would eventually be overcome, however, when the House Permanent Select Committee on Intelligence, then under the leadership of Representative Otis Pike (D-NY), issued a subpoena to Secretary of State Henry Kissinger, seeking the production of documents relating to State Department recommendations to the National Security for covert actions.[27] The House sibling to the more renowned Church Committee in the Senate, the Pike Committee, was likewise charged with a broad mandate to investigate the intelligence gathering activities of the U.S. government.[28] Both committees' inquiries had been spurred into being by a series of troubling media reports of CIA abuses both abroad and at home.[29] The Pike Committee launched its investigation in the summer of 1975, amidst exemplary declarations of bipartisan dedication to professionalism and truth-seeking, wherever such inquires might lead.[30] By November, when the Committee issued the above-mentioned subpoena to Kissinger, that bipartisanship had begun to noticeably fray.[31] President Ford directed his Secretary of State to assert executive privilege, contending that production of the documents sought would

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25. *See* Rozell, *supra* note 8, at 1075–76.

26. *Id.*

27. U.S. Intelligence Agencies and Activities: Hearing Before the H. Select Comm. on Intelligence, 94th Cong. 1383 (1975) (statement of Chairman Pike describing outstanding subpoenas).

28. *Id.* at 1–2 (statement of Chairman Pike describing the committee's mandate).

29. *See, e.g.*, Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at 1.

30. *U.S. Intelligence Agencies and Activities: Hearing Before the H. Select Comm. on Intelligence*, 94th Cong. 2–3 (1975) (statement of Robert McClory, Ranking Minority Member of the Committee, "in full support" of the Chairman's proposed approach to the investigation).

31. *Id.* at 1384 (Representatives Pike and McClory sparring over the propriety of the Ford Administration's failure to comply with a committee subpoena).

improperly disclose both sensitive foreign affairs assessments and the consultation processes of several predecessor administrations.[32]

At least on its face, this claim of executive privilege appeared to go to the very core of the protection the Supreme Court had recognized, albeit in dicta, in *Nixon*.[33] Nevertheless, the Committee persisted, voting 10-2 in favor of a resolution that the full House find Kissinger to be in contempt of Congress for his "contumacious conduct" in refusing to comply with the committee's subpoena.[34] Ultimately, the Ford Administration compromised, agreeing to brief committee members and staff on the content of the subpoenaed documents in exchange for the committee abandoning its effort to have Kissinger held in contempt.[35]

What is striking about this forty-odd-year-old episode is the Pike Committee's success in obtaining information so near the core of the privilege's protection (indeed at the intersection of the privilege's foreign affairs and presidential deliberations vectors). We recognize that it would be overplaying our hand to attribute the committee's leverage solely or even primarily to the bipartisanship that characterized the initiation of its investigation. Not only was that bipartisanship strained in the context of the Ford Administration's specific invocation of the privilege, but more importantly, the political context placed any invocation of executive privilege at a decided disadvantage. Still, we believe that the committee's position was significantly strengthened, albeit in a degree difficult to measure precisely, by the atmosphere of constitutional legitimacy conferred on its investigation by the fact that its inquiry had received full throated support from both sides of the aisle.

B. The Reagan Administration

The fourth, and first female, Administrator of the Environmental Protection Agency ("EPA"), Anne Gorsuch Burford, found herself at the center of one of the most contentious, post-Watergate, White House-Congress executive privilege disputes.[36] The controversy arose out of

32. *See* Rozell, *supra* note 8, at 1080.

33. United States v. Nixon, 418 U.S. 683, 706 (1974).

34. *U.S. Intelligence Agencies and Activities: Hearing Before the H. Select Comm. on Intelligence*, 94th Cong. 1390 (1975) (text of resolution). The Republican members of the committee split 2-2 on the motion, with Ranking Minority Member McClory opposing it. *Id.* at 1395–96.

35. *See* Rozell, *supra* note 8, at 1080.

36. *See* Ronald L Claveloux, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1334–46 (1983). The Burford dispute followed on the heels of a remarkably similar dust up involving Secretary of the Interior James Watt that met a similar end. For an overview, see Rozell, *supra* note 8, at 1095–96.

multiple congressional investigations into allegedly insufficiently zealous EPA efforts to enforce the then-recently enacted Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[37] In the fall of 1982, investigation subcommittees of both the House Committee on Public Works and Transportation and the House Committee on Energy and Commerce issued subpoenas seeking EPA files on cases concerning the $1.6 billion "superfund" created by CERCLA to bankroll some of the enormous costs associated with decontamination of hazardous waste sites.[38] At the written direction of President Reagan, Burford invoked executive privilege, first via correspondence, and then, more dramatically, at a December 2nd subcommittee hearing, as the basis for withholding selected documents concerning pending agency investigations and litigation.[39] The subcommittee demurred and, by a 9-2 vote, approved a contempt citation against Burford.[40] After the full committee affirmed the citation, the House approved the resolution in a bipartisan floor vote.[41] After a district court turned away the executive branch's suit for a declaratory judgment validating Burford's privilege claim (the court explicitly predicated dismissal of the suit on a preference for the political branches to continue efforts in search of a mutually tolerable accommodation),[42] the White House relented and released the documents.[43] Though causation in such matters invariably remains obscure, there can be little doubt that the bipartisan support at every level of the House proceedings for the decision to cite a cabinet-level official for contempt brought enormous political pressure to bear on the Reagan Administration. Further White House recalcitrance risked a conspicuous appearance of concealing wrongdoing.

Perhaps an equally portentous consequence of this clash over executive privilege is that it drove Anne Gorsuch Burford from public life.[44] One might speculate that the episode may have left her and even her family somewhat embittered about the causalities of cavalier

37. *See* Claveloux, *supra* note 36; Rozell, *supra* note 8, at 1096.

38. *See* Claveloux, *supra* note 36, at 1335–37.

39. *Id.*.

40. *See* H.R. REP. NO. 968, 97th Cong., 2d Sess. 20 (1982).

41. Fifty-five Republicans joined 204 Democrats to vote for the contempt citation; four Democrats joined 101 Republicans in opposing the citation. *See* Philip Shabecoff, *House Charges Head of E.P.A. with Contempt*, N.Y. TIMES, Dec. 17, 1982, at A1.

42. *See* United States v. House of Representatives, 556 F. Supp. 150, 153 (D.D.C. 1983) ("Compromise and cooperation, rather than confrontation, should be the aim of the parties.").

43. *See* Burford Resigns as Administrator of Embattled EPA: White House Plans to Give Congress Super Fund Papers, TOLEDO BLADE, Mar. 10, 1983, at 1.

44. *Id.*

congressional oversight. Such a person might then wonder whether, and if so how, this potentially traumatic experience will one day influence her high-achieving son, were he to be called upon to cast a vote in a future constitutional confrontation.

C. The George H.W. Bush Administration

George H.W. Bush formally asserted executive privilege only once during his term, justifying it on the need for candor in communications between himself, in his role as Commander-in-Chief, and his senior officials in the Department of Defense.[45] The background giving rise to this claim involved a cancelled contract between the Department of Defense ("DOD") and the McDonnell Douglas and General Dynamics Corporation ("McDonnell Douglas").[46] The DOD had prepaid McDonnell Douglas $1.3 billion to build an A-12 Navy Aircraft.[47] After cancelling the contract, the DOD deferred repayment of the $1.3 billion for two years.[48]

A subcommittee under the House Committee on Oversight and Government Reform (then known as the House Committee on Government Operations), responding to reports that the repayment deferral was, in fact, a secret bailout of a company experiencing financial instability, requested a memorandum from then-Secretary of Defense Richard Cheney that reportedly explained why the DOD had granted the repayment deferral.[49] In response to a subpoena issued by the subcommittee requiring Cheney to produce the document or otherwise respond, Bush instructed Cheney to assert executive privilege. In his formal invocation of the privilege, Bush wrote:

> It is my decision that you should not release this document. Compelled release to Congress of documents containing confidential communications among senior Department officials would inhibit the candor necessary to the effectiveness of the deliberative process by which the Department makes decisions and recommendations concerning national defense, including recommendations to me as Commander-in-Chief. In my judgment, the release of the memorandum would be contrary to

45. CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 25 (2014); Berman *supra* note 1, at 745–46.

46. Berman, *supra* note 1, at 745–46.

47. *Id.*

48. *Id.*

49. *Id.*

> the national interest because it would discourage the candor that is essential to the Department's decision-making process. Therefore, I am compelled to assert executive privilege with respect to this memorandum and to instruct you not to release it to the subcommittee.[50]

Faced with what was arguably an invalid claim of executive privilege—given that the investigation at issue concerned potential spending waste, and not national security—the subcommittee could have proceeded with a contempt action against Cheney.[51] Although the Democrats controlled the House, the subcommittee's Chair, John Conyers, Jr., did not proceed with a contempt action because the Republican minority, apparently in response to lobbying by Bush, opposed doing so.[52] Thus, at the most critical juncture of the accommodations phase of the congressional investigation, the minority party bowed out of what seems to have been, until that point, a bipartisan fact-finding effort. Accordingly, though it remains unclear why the majority did not proceed on its own, Bush prevailed in his assertion of executive privilege, and the memorandum remained out of reach of congressional investigators.[53]

D. The Clinton Administration

In marked contrast to the George H.W. Bush presidency, the William J. Clinton presidency saw numerous instances of executive privilege invocation in refusing requests by Congress for information.[54] The formal invocations in response to congressional investigations not implicating national security include: a request for the notes of White House Counsel John Quinn regarding the circumstances surrounding the firing of employees working for the White House Travel Office (commonly known as "Travelgate"); a request for a memorandum written by FBI Director Louis Freeh that reportedly criticized the effectiveness of Clinton's anti-drug policy ("FBI-DEA Drug Enforcement Memo"); and a request for all relevant paperwork concerning Clinton's grant of clemency to several members of the

50. Rozell, *supra* note 8, at 1110–11 (1999) (quoting Memorandum from President George Bush to Richard Cheney, Secretary of Defense (Aug. 8, 1991)).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Introduction*, 8 WM. & MARY BILL RTS. J. 535, 537–38 (2000) (listing assertions of executive privilege by Clinton Administration).

Armed Forces of National Liberation, known as "FALN", a Puerto Rican terrorist organization ("FALN Clemency").[55]

1. Travelgate

The circumstances surrounding the firing of several employees of the White House Travel Office under Clinton in 1993 sparked a congressional investigation by the Republican-led House Government Reform and Oversight Committee amid allegations that the reasons for the terminations were rooted in political patronage rather than, as Clinton had stated, mismanagement of Travel Office business.[56] Although Clinton claimed that he had no substantive involvement in the dismissal decisions, Congress initiated an investigation, which included, among other inquiries, whether the White House had wrongfully engaged the Internal Revenue Service and the Federal Bureau of Investigation to investigate Travel Office employees as part of an effort to hide political cronyism as the driving force behind the firings.[57]

The Committee requested and received documents from the Department of Justice and other federal agencies, but the White House withheld several hundred documents and informed the Committee that Clinton was considering asserting executive privilege as grounds for refusing.[58] The Committee responded by issuing subpoenas for all documents related to the firings, including notes taken by White House Counsel John M. ("Jack") Quinn.[59] By this time, the number of documents that Clinton sought to withhold had grown to approximately 3,000.[60] In May 1996, Quinn conveyed to Congress Clinton's formal assertion of executive privilege over those documents.[61]

The Committee's reaction was swift and decisive. On the same day that it received the claim of executive privilege, the Committee voted along party lines to hold Quinn, along with two other White House

55. *Id.* at 537–38.

56. Randall K. Miller, Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege, 81 MINN. L. REV. 631, 664–65 (1997).

57. *Id.*

58. Louis Fisher, Congressional Access to Information: Using Legislative Will and Leverage, 52 DUKE L.J. 323, 357–58 (2002).

59. Miller, *supra* note 56, at 664–68.

60. *Id.* at 665.

61. *Id.* Quinn's notes had been created as Clinton prepared his responses to both the congressional investigation and a separate investigation into the Travel Office firings being undertaken by Independent Counsel Kenneth Starr. *Id.*

officials, in contempt.[62] The Committee's minority members registered strong disapproval, claiming that the majority had not consulted with the minority members on the contempt resolution before scheduling it and contending that the majority's motivations were rooted in political considerations.[63] By contrast, the Committee Chair, Representative William F. Clinger, Jr., faulted Clinton for invoking "a Watergate legal loophole to prevent legitimate oversight by Congress."[64]

Despite the celerity with which the Committee held its contempt vote, Clinger delayed the floor vote on the contempt resolution in the full House to allow more time to reach an accommodation.[65] Within a few hours before the House vote,[66] the White House relented and produced hundreds of the documents it had claimed were privileged, along with a privilege log for the remaining documents for which it still claimed executive privilege.[67] Information contained in the produced documents revealed that the Clinton administration had indeed secured a confidential report from the FBI on one of the fired Travel Office employees.[68] Clinton issued an apology and claimed that the FBI records requests, which, as it turned out, also included hundreds of former employees from the Reagan and Bush administrations, were simply the result of bureaucratic error, not intentional malfeasance.[69] In light of this development, the Committee majority, along with other Republican members of Congress intensified their efforts to obtain the documents listed in the privilege log, and eventually, Clinton abandoned his claim of executive privilege over those documents.[70]

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62. The Committee voted to hold in contempt former White House Director of Administration David Watkins and his aide, Matthew Moore. H.R. REP. NO. 104-598 (1996).

63. *Id.*

64. *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. Clinger suggested that executive privilege should be reserved for more momentous occasions, such a national security matter, than the firing of White House staff. *News Conference to Discuss the Investigation into the Firings at the White House Travel Office*, FEDERAL DOCUMENT CLEARING HOUSE (May 29, 1996), 1996 WL 283709.

65. Miller, *supra* note 56, at 664–68; Fisher, *supra* note 58, at 357–58.

66. Fisher, *supra* note 58, at 358.

67. Miller, *supra* note 56, at 666.

68. *Id.*

69. *Id.* at 667 (citing Brian McGrory, *Clinton Apologizes for FBI Files Error*, BOSTON GLOBE, June 13, 1996, at A14; Paul Richter & Ronald J. Ostrow, *Clinton Apologizes for FBI Files on GOP*, L.A. TIMES, June 13, 1996, at A15).

70. Rather than turning over the documents themselves, however, the White House instead allowed for secure review by Committee members and their staff, who were limited to taking notes, unless the documents related to the FBI files, in which case, the documents could be copied. Miller, *supra* note 56, at 667–68.

Although the Travelgate congressional investigation was highly partisan, it did result in the President's eventual and nearly complete capitulation on his claims of executive privilege. One possible explanation for why Clinton ultimately provided Congress with all of the requested information, even absent pressure to do so from his own party, is that the claim of privilege lacked merit.[71] Another is that Clinton preferred not to prolong the battle going into the 1996 elections. The most likely explanation, however, might be that the investigating committee was willing to proceed with a contempt action in order to preserve its oversight prerogatives, even without minority support.

2. FBI-DEA Drug Enforcement Memo

The 1996 election year was also witness to two additional claims of executive privilege, one of which is relevant to our discussion: the claim involving the FBI-DEA Drug Enforcement Memo.[72] Clinton had received an April 1995 memorandum from FBI Director Louis J. Freeh and DEA Chief Thomas A. Constantine, criticizing the Clinton administration's approach to combating drug trafficking by dividing responsibilities among various federal law enforcement entities.[73] The Republican-majority House Judiciary Committee, which had been conducting standard oversight investigations on drug law enforcement, requested the FBI-DEA Memo.[74] Clinton asserted executive privilege on October 1, 1996, and withheld the memo from congressional investigators.[75] Clinton's claim of executive privilege in this instance rested upon the Presidential communications prong of the privilege, which is justified by the need for candid and confidential advice from close advisors.[76]

Although some have postulated that the memo request by congressional Republicans was primarily (or perhaps even purely)

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71. *See* Rozell, *supra* note 8, at 1118–19 (pointing to conclusion by Kevin Sabo, General Counsel to the House Committee on Oversight and Government Reform, that Clinton's executive privilege claims lacked merit).

72. The other involved national security, and we therefore exclude it from our analysis.

73. Miller, *supra* note 56, at 669 n. 204 (citing Charles Tiefer, *The Fight's the Thing; Why Congress and Clinton Rush to Battles With Subpoena and Executive Privilege*, LEGAL TIMES, Oct. 14, 1996, at 25).

74. Rozell, *supra* note 8, at 1121; TODD GARVEY, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 25 (2014).

75. Miller, *supra* note 56, at 669 n. 2014.

76. Dawn E. Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1131 (1999).

politically motivated,[77] Congress adjourned before taking any further action, and the assertion of executive privilege was allowed to stand unchallenged.[78]

3. Fuerzas Armadas de Liberacion Nacional Puertorriguena (FALN) Clemency

During his final year in office, Clinton invoked executive privilege one last time, when he declined, in response to a congressional subpoena, to produce documentation surrounding his decision to grant clemency to members of FALN.[79] Clinton's decision to grant clemency to FALN members was controversial for at least three reasons. First, the members of FALN, a Puerto Rican nationalist terrorist organization, had been convicted on sedition and weapons charges, relating to their participation in a number of bombings between 1974 and 1983 designed to bring attention to the organization's goal of securing Puerto Rican independence.[80] Second, the victims and law enforcement opposed clemency.[81] Finally, many in Congress and among the public believed that Clinton had granted clemency to curry favor with New York's Puerto Rican population to assist then-First Lady Hillary Clinton's Senate campaign.[82] Indeed, the decision was so unpopular in Congress that the House passed a bipartisan resolution condemning it.[83] Bipartisan support for a similar resolution in the Senate was even stronger.[84]

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77. *Id.*; Rozell, *supra* note 8.

78. Miller, *supra* note 56, at 669 n. 204 (noting that "[a]djournment of Congress averted an election year constitutional battle").

79. TODD GARVEY, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 26 (2014).

80. BBC NEWS, *Clinton Fuels Puerto Rican Row*, (Sept. 17, 1999, 1:16 UK); Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1667 (2001).

81. H.R. REP. NO. 106-488 (1999); CNN, *11 Puerto Rican Nationalists Freed From Prison: Hearings in Congress Next Week on Clinton Clemency Offer* (Sept. 10, 1999) (hereinafter "Puerto Rican Nationalists"), http://www.cnn.com/US/9909/10/faln.clemency.02/index.html.

82. Krent, *supra* note 80, at 1667.

83. "The decision by Clinton to release the convicted FALN members has sparked strong criticism from law enforcement officials and political leaders. The U.S. House approved a resolution opposing the clemency offer on a 311-41 vote, with 93 Democrats crossing party lines to oppose Clinton." CNN, "Puerto Rican Nationalists," *supra* note 81.

84. "By a 95-2 vote, the Senate passed a resolution of condemnation, joining the House in publicly criticizing the president for the clemency offer." CNN, *Senate Condemns Clinton for FALN Clemency* (Sept. 14, 1999, 6:09 PM), http://www.cnn.com/ALLPOLITICS/stories/1999/09/14/senate.faln/.

Unsurprisingly, then, congressional committees wanted to know more about the reasons why Clinton decided to grant clemency, particularly in light of their belief that Clinton's own top law enforcement officials opposed granting clemency.[85] Accordingly, the Republican-majority House Committee on Oversight and Government Reform issued several subpoenas seeking documents and testimony relating to the decision.[86] Although Clinton agreed to release approximately 10,000 related documents not covered by executive privilege,[87] he asserted executive privilege over, and refused to provide, the remaining requested documents.[88] Both the House and the Senate committees investigating Clinton's FALN clemency decision threatened to proceed with a contempt action, but no charges were ever referred to the DOJ or brought internally.[89]

The clemency decision was wildly unpopular, and in some ways it is surprising that no congressional committee proceeded with a contempt charge. On the other hand, the minority members of the House Committee on Oversight and Government Reform refused to lend their support to the majority's efforts to pressure Clinton to produce the requested documents and provide the requested testimony. In the final Committee report on the matter, the minority members offered the following criticism of the majority:

> Although many Democrats oppose the President's decision, the [Committee] majority made no attempt to find consensus with the Committee's minority members. Instead, the majority report appears to be designed to score political points, not reach the truth. It is based on unsubstantiated allegations and innuendo, not the facts and evidence before the Committee.[90]

Democrats on the Senate Judiciary Committee seemed more supportive of that committee majority's efforts to obtain the requested

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85. Jonathan Karl, *Clinton's decision to invoke executive privilege stirs controversy*, CNN (Sept. 17, 1999, 3:27 PM), https://www.cnn.com/ALLPOLITICS/stories/1999/09/17/karl.faln/.

86. Assertion of Executive Privilege with Respect to Clemency Decision, 23 Op. Att'y Gen. 1 (1999).

87. BBC NEWS, *supra* note 80.

88. Katharine Q. Seelye, *Clinton Asserts Executive Privilege in Clemency*, N.Y. TIMES (Sept. 17, 1999), http://partners.nytimes.com/library/politics/091799clinton-clemency.html.

89. BBC NEWS, *supra* note 80.

90. H.R. REP. No. 106-488.

documents, but their support does not appear to have yielded any practical effect.

As with the FBI-DEA memo, Clinton's assertion of executive privilege apparently erected a sufficient barrier to Congress's investigative will. It remains unclear why. Congress did hold hearings on the matter, receiving testimony on aspects of the clemency decision that did not implicate Clinton's executive privilege claim, and, as noted above, Clinton did release thousands of relevant documents. Perhaps Congress believed that evidence provided sufficient information to reach meaningful conclusions about the decision, or perhaps Congress concluded that it was more likely to lose the legal battle than to win it, and decided not to pursue production for that reason. Perhaps, like the claim of executive privilege by George H.W. Bush, the majority members of the House Committee did not want to prosecute a contempt claim without the support of the minority members of the committee (though this does not explain why the Senate Judiciary Committee did not proceed). Regardless, the executive branch prevailed on its assertion of executive privilege.[91]

Clinton's multiple and unabashed assertions of executive privilege have been the subject of much criticism.[92] At the time, some congressional investigators opined that Clinton misused executive privilege as a shield against revelations that would be personally embarrassing, politically damaging, or perhaps even criminally inculpating.[93] Scholars have argued that Clinton overused claims of executive privilege to such an extent that the privilege itself had been needlessly weakened—to the detriment of its ongoing validity.[94]

E. The George W. Bush Administration

George W. Bush, like his immediate predecessor, was not shy about formally invoking executive privilege in response to congressional investigative requests for information. Five such instances are relevant for our purposes. The first involved documents relating to allegations of

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91. BBC NEWS, *supra* note 80.

92. "Clinton came under scrutiny for what many saw as a misuse of executive privilege to protect him and his aides form embarrassment when no national security or other public interest was at stake." Kyle Blaine, *Top Uses of Executive Privilege: Washington, Nixon, Obama*, ABC NEWS (June 20, 2012), http://abcnews.go.com/Politics/fast-furious-executive-privilege-george-washington-barack-obama/story?id=16613606#1.

93. Miller, *supra* note 56, at 669.

94. *See, e.g.*, Jonathan Turley, Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege, 60 MD. L. REV. 205 (2001).

corruption in the FBI's Boston regional office ("FBI Corruption"); the second concerned documents relating to former Attorney General Janet Reno's decision not to appoint a Special Counsel to investigate alleged campaign finance abuses by the 1996 Clinton/Gore presidential campaign; the third pertained to documents underlying a decision by the Environmental Protection Agency to deny California the power to regulate greenhouse gases within the state; the fourth involved documents surrounding the outing of Central Intelligence Agency employee Valerie Plame; and the fifth involved information about the reasons underlying the Bush administration's decision to remove and replace several United States Attorneys.

1. Re: FBI Corruption

As part of its investigation into allegations of corruption regarding the FBI Boston regional office's handling of organized crime cases during the 1960s and 1970s, the House Government Reform Committee issued a subpoena to the Bush Department of Justice (DOJ) for documents that were part of cases long since officially closed.[95] Without invoking executive privilege over particular documents, the Bush administration had taken a hardline position that all deliberative materials in the DOJ, even those from cases no longer under investigation, should be withheld from Congress as a general rule.[96] The Republican Chair, Dan Burton, pushed back, pointing out that Bush's position represented an unwarranted effort to keep documents and information from Congress and the public, and that, moreover, the Bush administration had no authority to withhold the documents because Bush had not invoked executive privilege.[97]

Subsequently, Attorney General John Ashcroft, acting at Bush's behest, informed Congress that Bush was asserting executive privilege and would not produce or make available for review any deliberative documents from the Department of Justice.[98] A claim of executive privilege over closed prosecutorial files represented an expansion of the privilege, and one that even the Republican-led House Committee was unwilling to accept.[99] After a hearing, at which Burton reminded the DOJ representative testifying that Congress has a legitimate oversight role in

95. Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 J. L. & POL. 1, 3–5 (2008).

96. *Id.* at 3.

97. *Id.* at 3–4.

98. *Id.* at 4.

99. *Id.*

ensuring that the executive branch is free from corruption, the DOJ sent Burton a letter re-asserting executive privilege over the subpoenaed documents, but stating that the White House wanted to work with the Committee to reach an accommodation.[100]

Burton continued to protect congressional oversight prerogatives by responding that the administration's pledge to seek an accommodated solution was meaningless because the administration had already stated that the most important documents needed for the investigation would be placed beyond congressional reach.[101] Burton and the administration continued to exchange letters, and the exchanges continued to pit congressional power against executive power. Only after Burton threatened to end the impasse by seeking judicial intercession did the White House and Congress reach an accommodation. The Committee was permitted to review six of the ten disputed documents.[102]

Notably, Burton had near unanimous, bipartisan Committee support for his efforts to avoid ceding congressional oversight power to executive privilege claims.[103] It is reasonable to question whether a similar outcome would have resulted if Republicans on the Committee had not backed him, or whether Republicans would have backed the Chair if Democrats had held the majority. Nevertheless, for preserving congressional prerogatives, this episode serves as an important reminder of the need for both bipartisan support and perseverance in congressional investigations in which the President asserts executive privilege to prevent disclosing information or producing documents.

2. Clinton/Gore Campaign Finance Abuses

A similar dynamic played out simultaneously in the congressional investigation of former Attorney General Janet Reno's decision to close the investigation into alleged financial wrongdoing by the 1996 Clinton/Gore campaign instead of appointing Special Counsel to investigate.[104] The same Committee investigating the alleged FBI

100. *Id.* at 4–5.

101. Rozell & Sollenberger, *supra* note 95, at 5.

102. *Id.* at 6–7.

103. *Id.* at 6.

104. *Id.* at 5. This congressional investigation was an offshoot of previous congressional investigations that had begun in 1997 into alleged campaign finance improprieties by the 1996 Clinton/Gore presidential campaign. *See, e.g.*, H. REP. NO. 106-1027 (2000). The offshoot investigation appears to have come about because of Chairman Burton's dissatisfaction with the level of disclosure that the prior investigations had yielded, and, as he had stated in the previous investigations, his determination to prove wrongdoing by Clinton and Reno. *See* Eric Kleefeld, *Great Moments in Dan*

corruption was, at the same time, investigating the DOJ's termination of the alleged Clinton/Gore campaign finance improprieties.[105] The written exchanges between the White House and the House Government Reform Committee were the same ones that shaped the inter-branch dispute about the FBI Corruption documents.[106] Accordingly, the arguments on both sides were also the same: the President claimed that executive privilege covered all deliberative documents but nevertheless the DOJ would work with Congress to find an accommodation; and the Committee Chair claimed that the invocation of executive privilege was overly broad and therefore imposed an invalid restraint on congressional investigative prerogatives.[107]

In this dispute, however, the DOJ successfully resisted producing or making available three critical documents,[108] which may have effectively prevented adequate fact-finding. One key difference between the outcome of this dispute and that of the FBI Corruption dispute is the lack of backing by all of the Democrats on the Committee to pressure the DOJ to release the three documents.[109] The weaker effort by Committee Democrats to press vigorously for disclosure may have been the factor that allowed the President's claim of executive privilege over the three key documents to prevail.[110] If so, that outcome may have been politically expedient, but it may also have come at the cost of more robust congressional oversight.

3. EPA GHG Emissions

Another instance in which the Bush administration attempted to expand executive privilege over documents and information requested by a congressional committee occurred when Congress sought documents relating to the administration's decision to deny a request by California for exemption from federal preemption limitations so as to enable the state to impose more restrictive regulations governing motor vehicle greenhouse gas emissions.[111] As part of that investigation, the

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Burton History, TALKING POINTS MEMO (Jan. 31, 2012), https://talkingpointsmemo.com/election2012/great-moments-in-dan-burton-history.

105. *Id.* at 7.

106. *Id.*

107. Rozell & Sollenberger, *supra* note 95, at 7–8.

108. *Id.* at 7.

109. *Id.*

110. *Id.* at 7–8.

111. Garvey, *supra* note 74, at 27; Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege: Bush Record and Legacy*, 29 AM. REV. POL. 215, 230 (2008) (hereinafter "*Bush Record*").

Democratic-led House Oversight and Government Reform Committee issued subpoenas to two agencies, the Environmental Protection Agency and the Office of Information and Regulatory Affairs of the Office of Management and Budget.[112] The subpoenas sought documents and communications relating to the EPA's promulgation of regulations covering ozone standards and the EPA's decision to deny California's exemption petition.[113]

Of the documents falling within the scope of the subpoena, twenty-five were, according to Bush's Attorney General Michael Mukasey, protected by executive privilege.[114] Accordingly, at Bush's direction, the EPA informed Committee Chair Henry Waxman that Bush was withholding these documents under a claim of executive privilege.[115] In addition to asserting executive privilege over documents pursuant to the judicially sanctioned categories of deliberative process and presidential communications, Bush claimed executive privilege for "deliberative communications that do not implicate presidential decision-making."[116] Although this claim represented an expansion of executive privilege, Congress did not push back against the claim and did not pursue a contempt action, thereby allowing the assertion of a more expansive executive privilege to stand.[117]

4. Re: Disclosure of Identity of Valerie Plame as Covert CIA Agent

Similarly, Bush pressed an unprecedented application of executive privilege in the congressional investigation into the public disclosure by White House officials of the identity of covert CIA operative Valerie Plame.[118] After several media outlets, relying on leaks from the White House, reported the identity of Valerie Plame as a covert CIA agent, the Democratic-led House Committee on Oversight and Government Reform

112. Garvey, *supra* note 74, at 27.

113. *Id.*

114. *Id.*

115. Rozell & Sollenberger, *Bush Record*, *supra* note 111; Garvey, *supra* note 74, at 27.

116. *Id.*

117. *Id.*

118. Mark J. Rozell & Mitchel A. Sollenberger, *The Unitary Executive Theory and the Bush Legacy*, *in* TAKING THE MEASURE: THE PRESIDENCY OF GEORGE W. BUSH 43 (Donald R. Kelley & Todd G. Shields, eds., 2013) (hereinafter *Unitary Executive Theory*); Michael Isikoff, *Plame Probe Stymied by Bush Privilege Claim*, NEWSWEEK (July 15, 2008), http://www.newsweek.com/plame-probe-stymied-bush-privilege-claim-92565; *White House Procedures for Safeguarding Classified Information: Hearing on H.R. 110-28 Before the H. Comm. on Oversight and Government Reform*, 110th Cong. (2007) (Opening Statements of Henry A. Waxman).

opened an investigation.[119] During the course of that investigation, the Committee requested, among other information, the transcript from an interview that the FBI had conducted with Vice President Richard Cheney and several reports that the FBI had written during the course of its investigation into the leaks.[120] The Department of Justice, citing "serious separation of powers and heightened confidentiality concerns," informed the Committee that the requested items would be withheld.[121]

In response, the Committee issued a subpoena requiring Mukasey to produce the requested documents. After some back and forth, Mukasey informed the Committee in writing that the DOJ would not be turning over the subpoenaed documents, and that Bush was asserting executive privilege as the basis for the DOJ's refusal.[122] According to Mukasey, the subpoenaed materials were protected by executive privilege because they implicated the administration's deliberative communications relating to foreign policy and national security, law enforcement investigations, and separation of powers concerns.[123]

In an effort to evaluate the validity of the executive privilege claim, the Committee requested a detailed privilege log for the documents for which the administration was asserting executive privilege.[124] The administration appears to have wholly ignored that request.[125]

The Democratic majority on the Committee deemed the invocation of executive privilege invalid, describing it as "legally unprecedented" and "inappropriate."[126] Although the Democratic majority on the Committee deemed the claimed executive privilege to be invalid, and therefore grounds for proceeding with a contempt action against Mukasey, the Republican minority supported Bush's assertion of the privilege.[127] Perhaps in part because the investigation lacked minority

119. Garvey, *supra* note 74, at 27.

120. Rozell & Sollenberger, *Unitary Executive Theory*, *supra* note 118.

121. H.R. Rep. Regarding President Bush's Assertion of Executive Privilege in Response to the Committee Subpoena to Attorney General Michael B. Mukasey, at 5 (2008) (quoting Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Henry A. Waxman, June 11, 2008).

122. H.R. REP., *supra* note 121, at 5.

123. Rozell & Sollenberger, *Unitary Exectuive Theory*, *supra* note 118, at 43.

124. The Committee asked the administration to provide "a specific description of the documents being withheld from production on the basis of executive privilege, including the type of document, subject matter of the document, the date, author, and addressee, and the relationship of the author and addressee to each other." H.R. REP., *supra* note 121, at 6.

125. *Id.*; Garvey, supra note 74, at 27.

126. H.R. REP., *supra* note 121, at 7.

127. *Id.* at 9.

support, the Committee Chair elected to allow the claim of executive privilege to stand, notwithstanding concerns about its validity.[128]

5. Forced Resignation of US Attorneys

The Bush administration continued to press for expanded use of executive privilege in congressional investigations when it resisted disclosure of documents and testimony regarding the forced resignations of a number of United States Attorneys.[129] Although the White House claimed that the forced resignations were performance related, the Democratic-led Judiciary Committees of both the House and the Senate, acting on several reports that the terminations were politically motivated, opened oversight investigations.[130] As part of those investigations, Congress sought several White House documents, as well as testimony from current and former administration officials.[131] Both Committees issued subpoenas to former White House Counsel Harriet Miers and Chief of Staff Joshua B. Bolten for related documents and testimony.[132] At Bush's direction, White House Counsel Fred F. Fielding informed the Committees that Bush was invoking executive privilege for all documents and testimony and instructed Miers and Bolten not to comply with the subpoenas.[133] According to the Bush White House, the claims of executive privilege were justified by the need "to protect fundamental interests of the Presidency" and that releasing the subpoenaed documents

128. *Id.* Rozell and Sollenberger offer a particularly pointed critique of the Bush administration's invocation of executive privilege in response to congressional oversight investigations. Regarding the Valerie Plame disclosure, they write, in part:

> What the Bush administration tried to do in this case is expand executive privilege to protect the attorney general from disclosing nonpresidential documents to a congressional committee.
>
> ***
>
> The refusal to release the interview and other information was an attempt to provide increased protection of the vice president and the executive branch. Case law on executive privilege and its many precedents do not provide support for such an expansive definition of this power. Congress has the authority to conduct oversight over all areas of the executive branch including the president and vice president's offices. Nothing in the Constitution, case law, or interbranch practice counters that point.

Rozell & Sollenberger, *Unitary Executive Theory*, *supra* note 118, at 44–45.

129. *Id.* at 42.

130. *Id.*

131. *Id.*

132. Garvey, *supra* note 74, at 26.

133. *Id.*

or allowing the subpoenaed testimony would jeopardize those interests by disclosing internal decision-making processes.[134]

When multiple efforts at accommodation failed, the House Judiciary Committee, followed by the House as a whole, voted to hold Miers and Bolten in contempt of Congress,[135] after which the Speaker of the House transmitted the contempt citation to the Department of Justice for presentation to the grand jury.[136] The Attorney General elected not to proceed with contempt charges and directed the responsible United States Attorney not to present the contempt citation to the grand jury.[137]

Accordingly, the House Judiciary Committee filed a civil suit seeking to compel the testimony of Miers and the production of the relevant documents withheld by Bolten.[138] Among the primary issues in dispute was whether, as the Bush administration claims, the principle of separation of powers empowered a President to claim absolute immunity from congressional testimony, both for himself and for his senior advisors, and former presidential aides.[139] The district court unequivocally rejected the administration's position, stating that, "[t]he Executive's current claim of absolute immunity from compelled congressional process for senior precedential aides is without any support in the case law."[140] Indeed, the court took pains to emphasize that the executive branch had been unable to point to "a single judicial opinion that recognizes absolute immunity for senior presidential advisers in this or any other context. That simple yet critical fact bears repeating: the asserted absolute immunity claim here is entirely unsupported by existing case law."[141] The district court proceeded to hold that, pursuant to the issuance of a valid congressional subpoena, Miers was legally required to testify.[142] In addition, the court ordered Miers and Bolten to produce all subpoenaed nonprivileged documents and ordered the administration to identify and describe more fulsomely

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134. Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the U.S. Attorneys Firings*, 32 PRES. STUD. Q. 315, 323 (2008).

135. Rozell & Sollenberger, *Unitary Executive Theory*, *supra* note 118, at 42.

136. Garvey, *supra* note 74, at 26.

137. Rozell & Sollenberger, *Unitary Executive Theory*, *supra* note 118, at 42; Garvey, *supra* note 74, at 26..

138. *See* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008); Rozell & Sollenberger, *Unitary Executive Theory*, *supra* note 118, at 42; Garvey, *supra* note 74, at 26.

139. *Miers*, 558 F. Supp. at 56; *see also* Rozell & Sollenberger, *Unitary Executive Theory*, *supra* note 118, at 42–43; Garvey, *supra* note 74, at 26.

140. *Miers*, 558 F. Supp. at 56.

141. *Id.* at 99.

142. *Id.* at 106.

all documents that the President was withholding under a claim of executive privilege.[143]

On appeal, the United State Court of Appeals for the District of Columbia granted a temporary stay of the district court order.[144] In granting the stay, the appellate court even noted that the dispute was likely to be mooted before the court could consider and rule on the merits because the subpoenas would expire automatically at the end of that Congress.[145] The court seemed to cast an approving eye on that possibility, noting that "the new President and the new House [would have] an opportunity to express their views on the merits of the lawsuit."[146] Indeed, that is precisely what happened. The 110th Congress ended, and when the Barack Obama Administration began the following January, the parties agreed on an accommodation.[147]

Some scholars have lamented the decision by the D.C. Circuit because it effectively offers future Presidents a roadmap for how to evade congressional oversight by delaying accommodation or compliance through the use of "baseless constitutional and legal theories," thus ensuring that executive branch actions remain hidden from congressional oversight and public view.[148] At stake was more than simply a single administration's aggressive use and unprecedented expansion of executive privilege. The existential ability of Congress to conduct oversight and hold the executive branch accountable was arguably at risk.[149]

And it is this understanding of Bush's use of executive privilege that underscores the importance of congressional bipartisanship and persistence in pursuing contempt actions when Congress engages in its

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143. *Id.* at 107.

144. Comm. on the Judiciary, U.S. House of Representatives v. Miers, 542 F.3d 909 (D.C. Cir. 2008).

145. *Id.* at 911.

146. *Id.*

147. Garvey, *supra* note 74, at 27. More specifically, the White House produced some of the subpoenaed documents to the Committee, and the Committee allowed Miers to testify in a closed hearing but under oath and transcribed. *Id.*

148. *See, e.g.*, Rozell & Sollenberger, *Unitary Executive Theory*, *supra* note 118, at 43.

149. "[T]he Bush-era claims of executive privilege and rationales reached far beyond the customary exercises of that power. The administration, under the guidance of unitary executive theory, sought to vastly expand and combine the traditional categories of executive privilege in ways that, if successful, would have ultimately walled off the executive branch from any system of accountability. Such efforts, had they succeeded, could have had profound long-term consequences for the delicate system of balances built into the Constitution." *Id.* at 45. *But see* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017) (arguing that, among other things, the power of the purse and the contempt power give Congress leverage over the executive branch when conflicts arise between them).

oversight function. Bush vigorously fought congressional oversight, regardless of whether the investigating committees were led by his own party or the opposition party. Although Bush's formal invocations of executive privilege in response to congressional investigations increased sharply during the last two years of his presidency, when the Democrats held both Houses of Congress, partisanship seems not to have been much of a driver of his use of executive privilege.[150] Instead, Bush's resistance to congressional inquiries was rooted in an ethos of extreme executive power: "Whether Congress was controlled by Republicans or by Democrats, the president adopted an approach that put aside conciliation and compromise in favor of pushing battles to the brink in order to win favorable outcomes for the executive branch."[151] Thus, even when congressional investigations could fairly be characterized as bipartisan—as they were, for the most part, during the FBI Corruption and the Clinton/Gore campaign finance investigations—they were met with equally strong resistance from the White House as when the investigations were colored more thoroughly with partisanship.

F. The Obama Administration

Observers who were concerned that the Bush years would lead immediately to a dramatic uptick in the number and a concerted expansion in the reach of executive privilege claims may have been relieved during the first term of the Barack Obama administration. Not until 2012 did Obama formally assert the privilege in response to a

150. *See, e.g.*, Carolyn Bingham Kello, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOK. L. REV. 345, 364 (2003); Rozell & Sollenberger, *supra* note 95. In related congressional proceedings investigating the forced resignations of U.S. Attorneys, undertaken contemporaneously with those involving Miers and Bolten, former White House Deputy Chief of Staff Karl Rove, who had also claimed absolute immunity from testifying before Congress in response to a subpoena issued by the House Judiciary Committee's Subcommittee on Commercial and Administrative Law, and whose refusal was the subject of a Subcommittee vote to proceed with a contempt action, was similarly permitted to testify under the Miers/Bolten accommodation reached between Congress and the Obama administration. Garvey, *supra* note 74, at 27.

151. Rozell & Sollenberger, *supra* note 98, at 2. Indeed, Bush's assertions of executive prerogative to shield information from congressional review and public scrutiny extended to past administrations' communications. Bingham Kello, *supra* note 150, at 364 (citing Pam M. Holt, *Steady the Privilege Pendulum*, CHRISTIAN SCI. MONITOR, Apr. 4, 2002 (discussing Bush's "protection of his administration's communications regarding the national energy policy and homeland security, as well extension of protection for his father's papers, which may include details of Iran-Contra activities, and sought-after Clinton-era papers")).

congressional investigation,[152] but when he did do so, a Republican-led Congress fought it vigorously and, ultimately, successfully.[153]

The genesis for Obama's assertion of executive privilege was a program run by the Bureau of Alcohol, Tobacco and Firearms (ATF) that was designed to track the flow of illegal gun sales from "straw buyers" (individuals who buy guns for others) to firearms traffickers and Mexican gun cartels.[154] Called "Operation Fast and Furious," the program continued to encounter problems tracking guns once they left the hands of the straw buyers. Tragically, two of the guns that the ATF was unable to follow were eventually used in a firefight that killed a United States Customs and Border Patrol agent along the southwestern U.S. border with Mexico.[155]

During this period, the Senate was under the control of Democrats, and the House was under the control of Republicans. Ranking member of the Senate Judiciary Committee Chuck Grassley initiated inquiries with the Department of Justice and sought the production of relevant documents.[156] The House Oversight and Government Reform Committee, led by Republican Chair Darrell E. Issa, opened its own investigation,[157] but the Democratic minority declined to lend its support.[158]

The House Oversight Committee requested a number of documents relating to Operation Fast and Furious, followed by a number of

152. Louis Fisher, Obama's Executive Privilege and Holder's Contempt: "Operation Fast and Furious," 43 PRES. STUD. Q. 167 (2013).

153. *See* Comm. on Oversight and Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2012). The Obama administration did not appeal the district court's decision.

154. Fisher, *supra* note 152, at 167. The program was initiated by the George W. Bush administration, which also terminated it after the ATF concluded that the agency lacked the ability to follow sufficiently the transfer of the firearms allowed to be sold under the program. The Obama administration reinstituted the program. *Id.*

155. *Id.* at 168. After the border patrol agent's death, Attorney General Eric Holder terminated Operation Fast and Furious and ordered the Department of Justice Inspector General to conduct an investigation. *Id.* at 169.

156. *Id.* at 167, 175. The Democratic majority did not support Senator Grassley in these efforts. *Id.* at 183. After the midterm elections, when the Republicans regained control of the Senate, Senator Grassley assumed the Chairmanship of the Senate Judiciary Committee and launched a full investigation by the body into Operation Fast and Furious.

157. *Id.* at 175 (noting that Issa stated his belief that an internal Office of Inspector General investigation needed to be supplemented by a full congressional investigation to restore public confidence in the ATF (citing Darrell E. Issa Letter to Kenneth E. Melson, Acting Director, Bureau of Alcohol, Tobacco Firearms and Explosives, March 16, 2011)).

158. *Id.* at 183.

subpoenas demanding documents and testimony.[159] After some accommodation concerning document review and testimony of potential witnesses in ongoing criminal investigations, the Department of Justice released or made available for Committee review more than three thousand pages of records. In addition, Acting Director Kenneth E. Melson and a number of ATF agents were interviewed or testified before Congress.[160] Nevertheless, Assistant Attorney General Ronald Weich informed the Committee that, based upon the principle of separation of powers, the Department of Justice was withholding certain documents involving internal communications about investigations and prosecutions.[161]

The House Oversight Committee rejected the DOJ's position and demanded that Attorney General Eric Holder produce all of the withheld documents by a designated deadline or be found in contempt of Congress by the Committee.[162] When the deadline came and went, Issa simultaneously continued to seek an accommodation and to prepare a contempt citation for the Committee's consideration.[163] Eventually, accommodation negotiations broke down and, on a party-line vote, the Committee found Holder in contempt.[164] Before the contempt action proceeded to a full House vote, Deputy Attorney General James M. Cole, at Obama's direction, informed the House Committee that Obama was formally invoking executive privilege over the remaining withheld documents and that the DOJ would therefore not be producing them.[165] At this stage of the accommodations process, the only documents that continued to be withheld on the grounds of executive privilege were those that had been created by the DOJ after the congressional investigation was underway and in intra-branch response to that investigation.[166] In support of Obama's prerogative to assert executive privilege, Holder advised the President that disclosing the disputed documents would "inhibit the candor of . . . Executive Branch [deliberative communications.]"[167]

Obama's invocation of executive privilege did not end the Committee's efforts to obtain the subpoenaed documents. The full House

159. *Id.* at 175.

160. Fisher, *supra* note 152, at 175–77.

161. *Id.* at 177 (citing Ronald Weich Letter to Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform, October 11, 2011).

162. *Id.* at 178.

163. *Id.*

164. *Id.*

165. *Id.* at 179; Garvey, *supra* note 74, at 28.

166. Garvey, *supra* note 74, at 28.

167. *Id.* at 28 (quoting Eric Holder Letter to President Barack Obama, June 19, 2012).

followed the lead of the Oversight Committee and voted to proceed with a criminal contempt action against Holder.[168] On the same day, the House passed a resolution authorizing the House to file a civil suit against Holder in the event that the DOJ declined to present the criminal contempt citation to the grand jury.[169] In fact, the DOJ elected not to proceed with the criminal contempt action because, in the DOJ's view, the assertion of executive privilege provided a legal excuse for Holder's refusal to produce the subpoenaed documents.[170] In response, the House filed suit seeking the enforcement of the subpoena and the production of the documents being withheld under the claim of executive privilege.[171] In its complaint, the House argued that the executive branch's position on the breadth of executive privilege would effectively hamstring congressional oversight of executive branch action and that crippling congressional prerogatives in the way advocated by the executive branch would be "to the very great detriment of . . . our constitutional structure."[172]

In a Solomonic approach, the court, having previously rejected the absolutist positions of both sides on motions for summary judgment,[173] reiterated that neither side was entitled to its interpretation of the scope of the privilege and held, consistent with *Espy*,[174] that the executive branch was entitled to a qualified privilege that could be overcome by an adequate showing by Congress of the need for the subpoenaed material.[175] The court continued that it need not consider whether Congress had made an adequate showing in this case because by its own conduct, the executive branch had "already publicly revealed the sum and substance of the very material it is now seeking to withhold."[176] Accordingly, the court ordered the executive branch to disclose the subpoenaed material that it had been withholding on a claim of executive privilege.[177]

The Fast and Furious episode displays a Congress determined to obtain documents that it believed (or at least purported to believe) were

168. Fisher, *supra* note 152, at 179; Garvey, *supra* note 74, at 28.
169. Fisher, *supra* note 152, at 181–82.
170. *Id.* at 181.
171. *Id.* at 182.
172. *Id.* (quoting Comm. on Oversight and Gov't Reform v. Holder, 156 F.Supp.3d 101 (D.D.C. 2012)).
173. Comm. on Oversight and Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104 (D.D.C. 2012).
174. *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).
175. *Lynch*, 156 F. Supp. at 105.
176. *Id.* at 106.
177. *Id.*

necessary to complete an investigation into executive branch conduct. The partisanship dynamic seems to have shifted shape between the time the investigation began and the time the full House voted on the criminal contempt resolution. Neither the House nor the Senate Democrats exhibited much appetite for investigating the Obama Administration's Fast and Furious program when the congressional inquiries began. But at least by the time the full House voted on the contempt resolution, the Democrats also did not seem particularly interested in registering public opposition to, or displeasure with, the Republican-led investigation.[178] In other words, the investigation was not what one could reasonably characterize as bipartisan, but the Obama administration was also not heavily defended by Democrats, even in the face of dogged efforts by Republicans to defeat Obama's assertion of executive privilege.

III. LESSONS LEARNED?

We hope that our recounting of these episodes will provide those tasked with future congressional oversight investigations of the executive branch with a more thorough understanding of the role that executive privilege claims have played in such investigations in the relatively recent past. In addition, we here add a few observations we have gleaned from our own study of this history.

First and foremost, a congressional investigation bearing the indicia of genuine bipartisanship is, holding all other considerations constant, less likely than an investigation perceived as partisan to be stymied by an enduring and successful executive privilege claim. Time and again, Presidents or their subordinates have withdrawn or compromised executive privilege claims made in the context of congressional investigations with demonstrable support from both major political parties.[179] It is not at all difficult to imagine the reasons giving rise to this

178. In the full House vote, more than 100 members exited the Chamber and did not vote; of the 255 to vote in favor of a criminal contempt citation, seventeen were Democrats who were preparing to defend their seats in hotly contested races and believed that siding with Obama did not serve them politically. Fisher, *supra* note 152, at 179.

179. *See, e.g.*, *supra* notes 27–44, 95–103 and accompanying text (discussing specific instances). Whether one House of Congress might be more likely institutionally than the other to seek judicial enforcement of an oversight subpoena to exercise institutional prerogatives when a President is from the same party as the majority party of the investigating committee is a question meriting attention and one which, given the scope of our subject matter, we leave for future inquiry. We are grateful to Senator Levin for drawing this question to our attention, and we note, for the present, that differences in procedural rules between the House and the Senate may help to explain divergences, if any, in the approaches taken by each House to judicial enforcement of oversight subpoenas.

correlation. One the one hand, an administration faced with a congressional inquiry lacking in indicia of bipartisanship can always seek to discredit it, or rely on allies to discredit it, by characterizing the investigations as an abuse of the oversight function driven by an improper desire for short-term political injury to the administration and corresponding gain for the opposing political party. In short, the investigation can itself be demeaned as a partisan "witch-hunt." And it must be acknowledged that American history includes at least its fair share of such legislator misconduct, some of it as salient in the public mind as any executive branch wrongdoing.[180] McCarthy did for oversight what Nixon did for executive privilege.

To the extent that efforts to undermine the legitimacy of a congressional investigation succeed, assertions of executive privilege become politically sustainable. Invocations of the privilege, when made by a President credibly claiming to be bravely fending off the congressional equivalent of a star chamber, are likely to be met with public, and perhaps even judicial, sympathy. In these circumstances, Presidential claims that public disclosure, or even limited sharing, of sensitive information threaten the long-term public interest, are more likely to be credited.

On the opposite side of the ledger, the legitimacy of a congressional investigation is more difficult to undermine to the extent that it qualifies as bipartisan.[181] An investigation's bipartisanship protects it from dismissal as a squalid effort to inflict partisan injury. To be a partisan "witch hunt," the inquiry must first be partisan. Given the indeterminacy of the sparse case law concerning the scope and contours of the privilege as well as the malodorous circumstances of its reception into the U.S. reports,[182] the ultimate resolution of an executive privilege dispute will frequently turn on the strength of the claim made in support of the need for the information the executive branch seeks to maintain as confidential. Bipartisanship rightly endows a congressional investigation with a patina of objectivity and gravity that makes such claims of need more credible and compelling. It also affords an investigation the institutional will and support necessary for persistent pursuit of the truth in the face of legal hurdles and delays.

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180. *See generally* Robert Griffith, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE (1970). It is also possible, of course, that bipartisanship may correlate with but not cause the success of a congressional investigation. When members of Congress perceive that an investigation enjoys popular support and media attention, they may be more likely to join the bandwagon.

181. The term "bipartisan" is usefully unpacked by the contribution Senator Levin and Elise Bean have made to this symposium. *See* Levin & Bean *supra* note 5.

182. *See supra* notes 14–26 and accompanying text.

Such observations as these may seem obvious, as they no doubt are to the veterans of Capitol Hill's trenches. But lawyers lacking that experience might be improperly inclined to dismiss consideration of an investigation's apparent bipartisanship as a tawdry or even illicit concern beneath law's majesty. To many sturdy solicitors, law aspires to superiority over, and freedom from the taint of, mere politics. Those so inclined might be invited to recall that, from its very inception in Washington's cabinet to its recognition by the Supreme Court almost two centuries later, executive privilege has always been grounded in the notion that information ought not be shared when to do so would harm the public interest. And few could contest the relevance of bipartisanship to an assessment of the countervailing public interest served by a particular exercise of Congress's oversight function. At the very least, that elected officials from both major parties support a congressional investigation serves as strong evidence that the inquiry serves purposes other than partisan gamesmanship.