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The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you again for the opportunity to express my views at the Judiciary Committee hearing on January 29, 2015, about the nomination of Loretta Lynch to be Attorney General of the United States.

As you requested in your letter of February 5, I write to respond to your written follow-up questions. I note that your questions primarily concern the Administration's assertion of executive privilege with regard to certain documents related to the Fast and Furious inquiry—a topic that I did not address in my testimony and that I have never addressed in my scholarship. I therefore offer only tentative answers to your questions. I have reproduced the questions below, and after each question I have written my answer.

SENATOR GRASSLEY: The Department has argued in the Fast and Furious litigation that executive privilege is more than just a Presidential privilege, but that it also establishes a Constitutional shield for the “deliberative process” of lower level agency officials. However, the deliberative process privilege is traditionally a common law doctrine and one of the exemptions in the Freedom of Information Act—not a Constitutional privilege of equal standing with the inherent Constitutional power of Congress to conduct oversight inquiries. Deliberative process also traditionally applies only to content that is deliberative and pre-decisional.¹ It does not shield material created after a decision is made, or that is purely factual material.

Moreover, the Attorney General has sought to use this exceedingly broad notion of privilege to justify withholding documents that he has stated *are not privileged*. On November 15, 2013, the Attorney General acknowledged in the Fast and Furious litigation that he was withholding documents responsive to the House subpoena that “do

¹ *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

not . . . contain material that would be considered deliberative under common law or statutory standards.”² Furthermore, the OLC opinion on the President’s assertion of executive privilege suggests that the privilege even applies to a document, “regardless of whether a given document contains deliberative material.”³

Yet, the Department *did* produce deliberative, pre-decisional material prior to the Feb. 4, 2011 gunwalking denial letter to me, despite its claim now that such material is privileged. The Department conceded that Congress had a clear interest in finding out whether officials knew before it was sent that the Feb. 4th letter was false. Thus, it provided pre-Feb. 4th material—even though it was pre-decisional and deliberative. However, the Department still refuses to concede that Congress has an interest in discovering how officials learned that the letter was false *after it was sent*.

Thus, it refused to provide post-Feb. 4th material—even though it is post-decisional and factual in nature. The Department categorically withheld *all* records from after the Feb. 4th letter until Election Day 2014. Only then, after a court order, did it finally produce to the House Committee post-Feb. 4th documents that contained purely factual, post-decisional material.

- **QUESTION 1(a):** *What is the scope of executive privilege, particularly over agency documents unrelated to the President?*

ANSWER:

Article II of the Constitution provides that “[t]he executive Power shall be vested in a President,”⁴ and that “he shall take Care that the Laws be faithfully executed.”⁵ He is, of course, not required to execute all the laws personally; that would be impossible. Execution of the laws may be delegated. But the duty to “*take Care* that the Laws be faithfully executed”⁶ is the President’s alone. Implicit, then, in his duty to “take Care” is the premise of candid communication between the President and his officers and advisors.

The rationale for executive privilege is, above all, “[t]he President’s need for complete candor and objectivity.”⁷ The Court has emphasized that there is a “public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.”⁸ The reason is simple. “A President and those who assist him must be

² Def.’s Mot. For Certification of Sept. 30, 2013 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 8-9, *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*, 1:12-cv-1332 (D.D.C. Nov. 15, 2013).

³ 36 Op. O.L.C. 1, 3 (June 19, 2012).

⁴ U.S. CONST. art. II, §1.

⁵ *Id.* at § 3.

⁶ *Id.* (emphasis added).

⁷ *United States v. Nixon*, 418 U.S. 683, 706 (1974).

⁸ *Id.* at 708.

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.”⁹

This rationale perhaps applies to some communications among executive officers other than the President, for example communications among presidential advisors in preparation for giving advice to the President. But, at some point, executive branch communications are too far removed from the President himself for the rationale to apply.

You ask whether executive privilege applies to “agency documents unrelated to the President”; the answer, in theory, is “no.” But, on the other hand, it may be hard to say that any agency document is entirely “unrelated to the President,” because, again, “[t]he executive Power shall be vested in a President”¹⁰—personally, solely—and “he shall take Care that the Laws be faithfully executed.”¹¹

The question, then, is how far from the President does the privilege extend, and that question is still unsettled. Prior presidents have maintained that the privilege extends beyond the President himself to lower executive officials.¹² But it is safe to say that the further removed from the President himself, the more attenuated is the rationale for the privilege.

- **QUESTION 1(b):** *Does the President have an executive privilege to withhold documents subpoenaed by Congress that have nothing to do with advice or communications involving the White House? If so, what is the legal basis for that claim?*

ANSWER:

There is no settled answer to this question. “[T]he Justice Department—under Administrations of both political parties—has concluded repeatedly that the privilege may be invoked to protect Executive Branch deliberations against congressional subpoenas.”¹³ But most such assertions of executive privilege apparently concerned

⁹ *Id.*

¹⁰ U.S. CONST. art. II, § 1.

¹¹ *Id.* at § 3.

¹² *See, e.g.*, Assertion of Executive Privilege Over Communications Regarding EPA’s Ozone Air Quality Standards and California’s Greenhouse Gas Waiver Request (“EPA Letter”) (Michael Mukasey to George W. Bush) (June 19, 2008), 2008 WL 5506397 (O.L.C.) at *2 (“The doctrine of executive privilege also encompasses Executive Branch deliberative communications that do not implicate presidential decisionmaking.”); Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff (Michael Mukasey to George W. Bush) (July 15, 2008), 2008 WL 5458939 (O.L.C.) at *2 (“Executive privilege also extends to all Executive Branch deliberations, even when the deliberations do not directly implicate presidential decisionmaking.”); Assertion of Executive Privilege with Respect to Clemency Decision (Janet Reno to William Jefferson Clinton) (September 16, 1999), 1999 WL 33490208 at *2 (“It is thus well established that not only does executive privilege apply to confidential communications to the President, but also to ‘communications between high Government officials and those who advise and assist them in the performance of their manifold duties.’”) (quoting *Nixon*, 418 U.S. at 705).

¹³ EPA Letter at *2.

communications to or from the White House, at least indirectly. It is safe to say that communications within an executive agency that have nothing whatsoever to do with advice or communications to the White House would be quite far removed from the core rationale for the privilege. Assertion of executive privilege in such circumstances may well be overbroad.

- **QUESTION 1(c):** *Congress created a statutory deliberative process exception for documents subject to Freedom of Information Act requests. Do you think a similar exception applies to congressional subpoenas, or are requests from Congress entitled to more weight?*

ANSWER:

The U.S. Court of Appeals for the D.C. Circuit has recognized the existence of a deliberative process component to the executive privilege,¹⁴ and it was probably right to do so. But the privilege is not absolute, and the legitimate interest of Congress in access to necessary information is entitled to substantial weight. The Freedom of Information Act exception may be instructive, but the scope of the privilege against a congressional subpoena is not necessarily the same as the scope of the FOIA exception.

- **QUESTION 1(d):** *Are deliberative documents just as immune from Congressional scrutiny as they are from FOIA requestors?*

ANSWER:

Again, the FOIA regime may be instructive, but it does not necessarily reflect the proper balance vis-à-vis a congressional subpoena.

- **QUESTION 1(e):** *Can the President assert executive privilege over deliberative material, as the Office of Legal Counsel opinion suggested, “regardless of whether a given document contains deliberative content,” and even where the material is post-decisional?*

ANSWER:

According to the U.S. Court of Appeals for the D.C. Circuit, “[t]he deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.”¹⁵ It is hard to see how a document that contains no deliberative content whatsoever could be covered by the deliberative-process component of executive privilege. To the extent that the Office of

¹⁴ See *In re Sealed Case*, 121 F.3d at 737.

¹⁵ *Id.* at 737.

Legal Counsel advises the President to assert executive privilege “regardless of whether a given document contains deliberative content,”¹⁶ its claim is probably overbroad.

- **QUESTION 1(f):** *The OLC opinion also claims that providing Congress with non-deliberative or purely factual agency documents would raise “significant separation of powers concerns.” Do you agree, and if so, why?*

ANSWER:

The Office of Legal Counsel seems to suggest that “significant separation of powers concerns” require a distinct executive privilege for documents generated in the course of responding to a congressional inquiry, “regardless of whether a given document contains deliberative content.”¹⁷ This appears to be a novel claim. The sources cited by OLC do not appear to support it, and it would seem to go well beyond the traditional rationale of executive privilege.

- **QUESTION 1(g):** *Given that non-deliberative, purely factual agency documents are clearly not considered part of any protected “deliberative process” under common law or statute, what is the legal justification for withholding such documents under Congressional subpoena?*

ANSWER:

Again, to the extent that the Office of Legal Counsel requests an assertion of executive privilege “regardless of whether a given document contains deliberative content,”¹⁸ its claim appears to be distinctly overbroad.

SENATOR GRASSLEY: In the Fast and Furious litigation, the Department has relied on an extremely broad notion of executive privilege in its refusal to produce non-deliberative, post-decisional documents that would help Congress understand when and how the Department came to know that its Feb. 4, 2011 letter to me denying gunwalking was false. Specifically, the Department categorically refused, until Election Day last year, to produce *64,000 documents*—even though the Attorney General recognized that at least some of those documents “[did] not . . . contain material that would be considered deliberative under common law or statutory standards.”¹⁹ The OLC opinion on the matter

¹⁶ Assertion of Executive Privilege Over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious (“Fast and Furious Letter”) (Eric Holder to Barack Obama) (June 19, 2012), 2012 WL 2869615 (O.L.C.) at *3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Def.’s Mot. For Certification of Sept. 30, 2013 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 8-9, *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*, 1:12-cv-1332 (D.D.C. Nov. 15, 2013).

suggests that assertion of privilege is proper “regardless of whether a given document contains deliberative material.”²⁰

The Department relied on this overbroad view of executive privilege when it declined to bring the congressional contempt citation of Attorney General Holder before a grand jury.²¹ The Department sent this denial letter to the Speaker of the House before the contempt citation even reached the U.S. Attorney.²² The U.S. Attorney failed to answer my questions seeking an explanation of the facts and circumstances sufficient for Congress to determine whether he made an independent judgment regarding the refusal to present the citation.²³

The law states that it is the “*duty*” of the U.S. Attorney “to bring the matter before the grand jury for its action.”²⁴

- **QUESTION 2(a):** *What does it mean for the U.S. Attorney to have a “duty” to present a congressional contempt citation to a grand jury?*

ANSWER:

In 1984, the Department of Justice considered this question and reached the following conclusion:

First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President’s claim of executive privilege in this context.²⁵

This analysis seems dubious as a matter of statutory interpretation; after all, the word “duty” is quite clear. But it does seem sound as a matter of separation of powers. It is doubtful that Congress can compel a grand jury referral under such circumstances. And,

²⁰ 36 Op. O.L.C. 1, 3 (Jun 19, 2012).

²¹ Letter from Senator Charles E. Grassley to U.S. Attorney Ronald Machen (June 29, 2012), at 2.

²² *Id.* at 1.

²³ *Id.* at 1-2.

²⁴ 2 U.S.C. § 194 (emphasis added).

²⁵ Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege (“Prosecution for Contempt of Congress”) (Theodore Olson to Ronald Reagan), 8 Op. O.L.C. 101, 102 (1984).

of course, even if Congress could compel a prosecution in such circumstances, the President could always pardon the accused.²⁶

- **QUESTION 2(b):** *If the U.S. Attorney has any discretion in cases where there is a claim of Executive Privilege, does he also have an obligation to make an independent evaluation of such a claim? If not, please explain why not.*

ANSWER:

No. Federal prosecutorial discretion ultimately lies with the President. The Constitution provides that “[t]he executive Power shall be vested in a President of the United States,”²⁷ and “if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”²⁸ It is the President’s personal duty to “take Care that the Laws be faithfully executed,”²⁹ and he does so by giving instructions to those who actually execute the laws. It follows that the U.S. Attorney may rely on the President’s determination—and, indeed, must yield to the President’s control—in assessing the validity of a claim of privilege.

- **QUESTION 2(c):** *Under the Department’s interpretation of the statute, what is left of the Congressional contempt power against any agency able to convince the President to assert executive privilege?*

ANSWER:

Under the Department of Justice’s interpretation of the statute, the “duty” of the U.S. Attorney is discretionary, and so it is very unlikely that a U.S. Attorney will ever prosecute a case for contempt of Congress where the “contempt” derives from a presidential assertion of executive privilege. However, this interpretation does not quite render the contempt power a dead letter. First, a subsequent President might conceivably order a prosecution, even where a prior President has asserted executive privilege. Second, in an extreme case, Congress may conclude that contempt of Congress is a high crime or misdemeanor sufficient to impeach.

- **QUESTION 2(d):** *Under the Department’s interpretation of the statute, what safeguards against a President’s improper claims of executive privilege if not the independent legal judgment of the U.S. Attorney charged by statute with presenting the contempt citation to a grand jury?*

²⁶ See U.S. CONST. art. II, §2.

²⁷ U.S. CONST. art II, §1.

²⁸ James Madison, 1 *Annals of Congress* 481 (1789).

²⁹ U.S. CONST. art. II, §3.

ANSWER:

One safeguard may be judicial review. “Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena.”³⁰

- **QUESTION 2(e):** *The Department relies on its own OLC opinions, which claim, among other things, that the Department should not prosecute officials for contempt at least in part because Congress can resort to civil litigation to enforce its subpoenas. However, it is clear from the delays in the Fast and Furious litigation that this enforcement tool is insufficient to ensure that Congress has adequate access to information to carry out its oversight responsibilities. The House Committee has had to re-issue the subpoena twice to avoid the case being mooted at the beginning of each new Congress. This gives the impression that the Department is delaying the process in hopes that political events may allow it to avoid a judicial resolution. What actions would you advise Congress to take in order resolve the dispute or vindicate its interests in obtaining the documents in a more timely way in a civil suit filed after a contempt citation?*

ANSWER:

Congress might consider changing the rules governing any such civil litigation. It is almost certainly within Congress’s power to require expedited procedures and timely rulings in such cases.

- **QUESTION 2(f):** *Do you believe that, if confirmed, the nominee should re-evaluate the Department’s litigation strategy, the merits of its positions, and refusal to settle the case up to this point?*

ANSWER:

Yes. As discussed above, the assertion of executive privilege “regardless of whether a given document contains deliberative content”³¹ seems to be novel and overbroad. The new Attorney General should reconsider this position.

I hope that you find these answers responsive and useful. Please let me know if the Committee has any additional questions.

Sincerely,

Nicholas Quinn Rosenkranz

³⁰ Prosecution for Contempt of Congress, 8 Op. O.L.C. at 137.

³¹ Fast and Furious Letter at *3.