

Responses From Professor Jonathan Turley
Questions for the Record
From Senator Grassley, Chairman

1. EXECUTIVE PRIVILEGE QUESTIONS

General remarks: As I testified at the hearing, the Administration has radically overstated executive privilege to a point that threatens core constitutional functions and principles. Because the term does not appear in the Constitution, “executive privilege” is entirely defined by court decisions. There remain good-faith disagreements over the scope of this privilege. Of course, most agree that some privilege is inherent to the functioning of Article II. The Administration, however, has taken this once narrow privilege and expanded it to the point that it has effectively displaced critical legislative powers to investigate actions of the Executive Branch. The use of the deliberative process privilege to obstruct investigations by Congress has magnified these concerns. The Administration has advanced claims that are unprecedented in their scope and deeply troubling in their implications for our system. Indeed, many of these claims appear litigation-driven, opportunistic, and shortsighted. The advancement of clearly unfounded claims by this Administration has undermined the integrity of the Department and has magnified an already serious crisis over the separation of powers.

a. What is the scope of executive privilege, particularly over agency documents unrelated to the President?

The scope of executive privilege has been unmoored from its original position within Article II. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court defined inherent executive privilege in terms of communications with presidents, and protecting advice from close presidential advisers. The extension of this privilege to agency documents is a corruption of the original purpose of executive privilege, and turns a narrowly defined privilege into an all-encompassing exemption from legislative oversight. The Supreme Court, referring to communications of *or* with a president, stated: “The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making.” *Nixon*, 418 U.S. at 708. As soon as this decision was released, the Justice Department began an unrelenting campaign to expand the privilege to afford administrations a constructive immunity to disclosures demanded from Congress or the courts. What is remarkable is not that the Executive Branch has advanced this extreme interpretation, but that the Legislative and Judicial Branches have largely acquiesced in the face of such arguments.

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?

In my view, the Administration does not have a basis to withhold documents under executive privilege that are not part of the advice and communications with the White House. While lower courts have extended the privilege to communications of advisers (and not directly

with a president) in cases like *In re Sealed Case* and *Cheney v. U.S. District Court for the District of Columbia*, the functional element of the privilege remains the protection of communications tied to White House deliberations and communications. While some academics favor a broader interpretation of the scope of the privilege, I hold to the original basis laid out by the Supreme Court as the most consistent with the countervailing powers underlying the vesting clauses. Obviously, federal courts can expand on the scope of legitimate assertions, but I believe that the assertions made by the Obama Administration lack any meaningful limiting principles, or a firm foundation in existing precedent.

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?

No. There has been a concerted effort by the Justice Department and other agencies to effectively conflate the deliberative process exception under the Freedom of Information Act ("FOIA") with executive privilege, in order to create an over-arching exemption from disclosures. Exemption 5 under 5 U.S.C. §552(b)(5) was designed to exclude some "inter-agency or intra-agency memorandums or letters" that would not be discoverable in litigation, including attorney work-product and "deliberative process" privilege. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). The statutory exception serves a different purpose and is based on a different rationale from the executive privilege originally fashioned by the Supreme Court. Clearly, when Congress seeks documents as part of its Article I powers, those demands are given more weight than a FOIA request. Congressional investigations are a critical part of the separation of powers and the balance of the branches in the tripartite system. Such disclosures concern more than advancing the interests of transparency in our government. Disclosure (and exemption) of information to citizens required a statute defining the scope and process for disclosure because it is not mandated under the Constitution. No such statutory authority, however, is needed for Congress to demand information from the Executive Branch. When the Executive Branch defies valid congressional subpoenas, it is challenging the ability of Congress to exercise its constitutionally mandated role of investigation and oversight.

d. Are deliberative documents just as immune from Congressional scrutiny as they are from FOIA requestors?

No. The legal basis for withholding documents under the deliberative process exemption is materially different from claims of executive privilege. To conflate the two areas would effectively negate much of the ability of congressional committees to exercise meaningful oversight over federal agencies. In my view, Congress is not barred from demanding documents labeled as privileged under FOIA's deliberative process privilege.

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?

As I stated in my testimony, I consider the position of the Obama Administration in the Fast and Furious investigation to lack a good-faith basis for withholding documents. Indeed, the

position of the Office of Legal Counsel (“OLC”) in the case fuels growing concerns over the decline in both the independence and quality of legal analysis at the OLC. Not only has the Administration sought to conflate the deliberative process exemption with executive privilege claims, but has also sought to erase even the lower requirements of the deliberative process claims in withholding documents from Congress. The Justice Department would staunchly oppose such expansive interpretations from another branch. For example, Congress can reasonably claim that the Speech and Debate Clause affords absolute immunity not only to members engaged in legislative business but also to staffers working as part of that legislative process. This application of immunity is supported by cases like *Doe v. McMillan*, 412 U.S. 306 (1973). However, Congress would not be able then to claim that absolute immunity protects employees or members who are not engaged in the legislative process. Here, the Administration is claiming the deliberative process privilege for documents that do not contain deliberative elements. Disconnected from the underlying rationale, the privilege would effectively become absolute immunity if the Administration were able to fashion a non-deliberative deliberative process claim.

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

No. While I would not rule out such concerns being raised in some abusive, undefined demand from Congress, this is not such an extreme case. As I stated in my testimony, the Fast and Furious operation was a classic matter for congressional scrutiny. The demand for non-deliberative, or purely factual agency documents, is far afield from the core challenges to the separation of powers. Indeed, such demands reinforce such separation and balance in the system. They do not significantly intrude upon executive branch powers. It is only when you adopt an expansive view of executive power (and an equally minimalist view of legislative power) that you can seriously entertain this type of argument. The OLC has repeatedly undermined its analysis by adopting such outcome determinative threshold assumptions about executive power. This is one such example.

- 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?**

I know of no cognizable legal justification for withholding such documents for non-deliberative or purely factual agency documents in the case of a valid congressional subpoena. If the Administration is allowed to exercise such discretion in what non-deliberative or factual material will be released to Congress, the oversight authority of Article I becomes purely discretionary for a president to allow or deny at his whim. A president is not allowed to dictate the facts that will be considered in a congressional investigation of his actions, or those of his subordinates.

2. FAST AND FURIOUS QUESTIONS

General remarks: As discussed in my testimony, I consider the refusal to submit contempt charges to the Grand Jury in recent cases to be a fundamental breach of the understanding reached between the branches on the use of statutory contempt rather than “inherent contempt” authority. Congress has the inherent right to find officials in “inherent contempt.” Indeed, an inherent contempt proceeding was held as recently as 1934. The Justice Department long bristled at the notion of contempt proceedings handled by the legislative branch and supported the use of the criminal contempt process created in 1857 under 2 U.S.C. § 194 (2000). The actions taken by the Administration with regard to Attorney General Holder not only violated the foundational understanding of the branches, but magnified the conflicts of interest that are evident in the handling of the controversy by the Justice Department. As the Supreme Court has stressed, “[t]he power of the Congress to conduct investigations is inherent in the legislative process.” *Watkins v. United States*, 354 U.S. 178, 187 (1957). The obstruction of efforts to punish contemptuous witnesses or parties is tantamount to the denial of the inherent ability of the Congress to carry out this core function. Otherwise, as the Court noted in *Anderson v. Dunn*, 19 U.S. 204, 228 (1821), Congress would be “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it.” One can certainly argue that the Court’s warning proved prophetic given what occurred in the controversy over the Fast and Furious operation.

a. What does it mean for the U.S. Attorney to have a “duty” to present a congressional contempt citation to a Grand Jury?

The statute uses mandatory language stating that it is the U.S. Attorney’s “duty . . . to bring the matter before the Grand Jury for its action.” 2 U.S.C. § 194. This language reflects the understanding of Congress that the U.S. Attorney would be a faithful agent of the congressional contempt process in lieu of Congress acting unilaterally to prosecute such individuals under its inherent authority. When such a referral is made, an investigatory process has already occurred in the legislative branch, resulting in a vote taken by the legislative body. In that sense, the referrals come to the U.S. Attorney after a special legitimating process and not simply a bare allegation. That formal process of referral is precisely why the statute was written with the presumption of a submittal to a Grand Jury. The statute only requires the submission of the matter and does not control ultimate prosecutorial decisions. Notably, prosecutors have the discretion later to drop criminal charges or secure plea agreements after any indictment. They also have considerable power over Grand Juries. Frankly, it is an easy thing for a prosecutor to effectively “poison the well” of an indictment in presenting it to a grand jury. Those dangers cannot be avoided by this statute and allow prosecutors ample flexibility in presenting, and ultimately, prosecuting a case. The statute only requires the submission of the citation to the grand jury and does not confine the prosecutors further in their decisions regarding the presentation or advancement of the case.

While I believe that these citations should be presented to the Grand Jury as contemplated in the statute, there is a good-faith argument that such language should be read to include some recognition of the inherent discretion exercised by prosecutors in criminal cases. That admittedly interesting debate, however, is less compelling in this situation. First, this is not a conventional criminal case, but rather a formal referral under a statutory provision of a legislative contempt

citation. Even if prosecutorial discretion applies, it should be exercised in a more abridged fashion when the underlying charges are brought by a vote of Congress. Second, absent a baseless or abusive charge, it is hard to see the legitimate basis for prosecutorial discretion in blocking consideration of the allegations by the Grand Jury. The contempt citation against Attorney General Holder was well-based and well-documented. It may not be enough for a Grand Jury, but it was clearly enough to submit to a Grand Jury. As a criminal defense attorney, I have seen far more speculative and illusory claims submitted to federal Grand Juries. Indeed, the Justice Department is often accused of using Grand Juries as “perjury traps” and “fishing expeditions,” as the threshold appears so low as to be indiscernible for submission of allegations to a Grand Jury. Even if the Administration did not consider the submission to be a mandatory duty, it clearly should feel compelled to do so absent a showing of facial invalidity or abuse.

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.

I believe that he does. Indeed, one of my greatest concerns is the appearance of a conflict of interest in a direct subordinate of the Attorney General barring the consideration of charges *against* the Attorney General. At a minimum, even if the U.S. Attorney was going to make such a decision against the head of his own agency, he should have made this decision independently after a full consideration of the underlying allegation. This includes creating a formal separation from Main Justice in dealing with the referral.

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?

As discussed in my testimony, I believe that the Justice Department has effectively gutted the power of Congress to hold Administration officials in contempt and, by extension, has denied a fundamental element of legislative power. Congress retains its inherent contempt authority, albeit unused for 80 years. There were good reasons, however, to continue to use the statutory contempt process with the understanding that these citations would be given to the grand jury. Yet, absent the commitment of the Justice Department to fulfill its obligation to submit these matters to the Grand Jury, the contempt power remains under the ultimate control of the Executive Branch. While prosecutors can ultimately plead out, or even drop charges, the submission to the Grand Jury is an important element in maintaining the deterrent force of congressional action. An indictment carries the judgment of a group of independent citizens and makes it more difficult for an administration to scuttle a case, particularly against one of its top officials in the Executive Branch. After the actions of the Justice Department, the contempt power remains little more than paper tiger that will hardly concentrate the mind of a contemptuous official. Attorney General Holder’s case reinforces the view that the Justice Department protects its own by obstructing proceedings in both the Legislative and Judicial Branches. Congress must either revive its inherent contempt authority or explore new legislation to force the Justice Department to handle these referrals in an independent and consistent manner.

- 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?**

Clearly, absent independent review, the U.S. Attorney is only replicating the earlier decision of the Administration. The absence of an independent review makes the contempt referral entirely meaningless, since the Justice Department will only enforce its earlier position through a subordinate official. Indeed, if Main Justice dictated the rejection of the referral, the action only deepens the concerns over the contempt and obstruction of Congress in the controversy.

- 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?**

First and foremost, the Justice Department does not get to choose the best course for Congress. To the extent that Congress has both a civil and a criminal option, it alone determines which option should be pursued. Neither the Constitution nor the statute gives the Justice Department the discretion to dictate the best practices for the Legislative Branch. Indeed, the Justice Department itself chooses between civil or criminal options in a variety of areas while jealously protecting its sole authority to make such judgments. Thus, the Justice Department can pursue someone for civil contempt and then bring a criminal contempt charge. The same choices are made in a variety of forfeiture, environmental, and regulatory areas. Second, the Justice Department's obstruction of the civil process provides ample reason why Congress should be leery of pursuing that route. Civil proceedings are notoriously slow and easy to delay. Moreover, they lack the stigma of criminal contempt referrals that indicates the seriousness of these actions for our system.

As to other ways to vindicate the authority of Congress, there are options. First, Congress can consider a revival of inherent contempt powers as previously discussed. No one sees the old congressional prosecutions as ideal, but the Justice Department's obstruction may leave no alternative. There is no indication that the Justice Department is willing to guarantee submission of these referrals. Absent such a guarantee, Congress has to find a way to enforce its contempt

powers if it is going to be able to function fully in its oversight role. Second, the obstruction of both the congressional investigation, and then a Grand Jury investigation, may create, in some cases, a legitimate basis for the impeachment of Administration officials. While impeachment should always be viewed as an extreme and generally disfavored option, some acts of obstruction may raise legitimate grounds for the removal from office. Many people wrongly assume that impeachment is only a device for removing presidents and judges. To the contrary, other officials, including Attorneys General, can be impeached.¹ If an Attorney General has steadfastly and unjustifiably blocked investigations in both the Legislative and Judicial branches, Congress may consider the option of removal from office. Third, Congress can explore additional legislation that requires independent counsel to handle contempt citations against Administration officials, particularly in cases involving Justice Department officials. What is clear is that, regardless of which of these courses Congress may take, it should commit itself to taking action. The current situation is untenable for Congress. The Legislative Branch cannot allow the Justice Department effectively to strip this institution of the ability to hold officials accountable for obstruction and contempt of its investigations. With the expansion of executive power in recent years, this institution can ill-afford the loss of such a basic component of legislative authority. Congress must act if Article I is to be more than a paper tiger in the constitutional balance of powers.

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?

Indeed, I do. In fact, I believe that Senators are within their right to demand answers to these basic questions as a condition for confirmation. Many of these questions are not contextual, but threshold legal judgments. For example, the use of the deliberative process privilege as akin to executive privilege, is a straightforward issue that any nominee should be prepared to answer. As I discussed in my testimony, I have long advocated the use of confirmation hearings to reinforce congressional authority over agencies and check the increasing independence and dominance of the Executive Branch. Confirmation hearings take on added importance during such constitutional crises. Confirmation hearings necessarily raise not just the credentials, but also the policies to be pursued by a nominee. Assuming that Ms. Lynch is confirmed without answering these questions, she should commit herself to a review of these cases and, more importantly, the underlying positions taken by the Justice Department. Attorney General Holder has left the interbranch relations with Congress in tatters. If those relations are to be repaired, the new Attorney General must speak clearly and candidly to Congress. That does not mean that she will agree with Congress, but she should at least afford this body the courtesy of clarity as to the approach of the Department in cases of contempt, privilege assertions, and other core issues.

¹ See generally Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 Duke L.J. 1, 44-57 (1999); Jonathan Turley, *The Executive Function Theory, The Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. Rev. 1791, 1819-20 (1999).