A Costly Victory for Congress: Executive Privilege after *Committee on Oversight and Government Reform v. Lynch*

By Chris Armstrong

Note from the Editor:

This article explores the executive privilege to withhold records in congressional investigations in light of a recent D.C. District Court opinion construing the privilege.

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"[A] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both…. [P]eople who mean to be their own Governors, must arm themselves with the power which knowledge gives." —James Madison[1]

On January 19, 2016, D.C. District Court Judge Amy Berman Jackson ordered the Department of Justice (the Department) to turn over thousands of pages of documents to the House Committee on Oversight and Government Reform (the Committee), despite the Attorney General's claims that they were subject to executive privilege. While the outcome in *Committee on Oversight and Government Reform, United States House of Representatives v. Loretta E. Lynch* (*OGR v. Lynch*)[2] was a win for the Committee, it may prove to be a Pyrrhic victory. Judge Berman Jackson found for the Committee based on narrow factual circumstances while laying out a vision of an expansive deliberative process privilege that—if it stands—may diminish Congress's powers to investigate the Executive Branch.

I. The Operation Fast and Furious Investigation

In January 2011, Senator Charles Grassley began investigating the death of Customs and Border Patrol Agent Brian Terry and its connection to a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) operation called "Project Gunrunner."[3] Senator Grassley wrote to the acting head of the ATF, detailing whistleblower allegations that the ATF had sanctioned the sale of hundreds of weapons to straw purchasers, who then transported the weapons throughout the southwestern border area and into Mexico, in an action that would come to be known as "Operation Fast and Furious." The letter also questioned whether two of these weapons were used in the firefight that resulted in Agent Terry's killing.

In a February 4, 2011 response, the Department called the allegations "false" and "incorrect."[4] The following month, as Senator Grassley continued his investigation, Committee Chairman Darrell Issa opened his own investigation on the matter. In December of that year, the Department withdrew the February 4 letter and acknowledged that it presented "inaccurate information" about both the operation and the Department's knowledge of ATF's actions.[5] In the meantime, the Committee investigation had focused on the Department's misstatements and the long

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1 Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 Writings of James Madison 103 (Gaillard Hunt, ed. 1910).

2 Committee on Oversight and Government Reform v. Loretta E. Lynch, No. 12-1332, Mem. Op. and Order (Jan. 19, 2016).

3 Letter from Ranking Member Charles Grassley to Acting Director Kenneth E. Melson (Jan. 27, 2011).

4 Letter from Assistant Attorney General Ronald Weich to Ranking Member Charles Grassley (Feb. 4, 2011).

5 Letter from Deputy Attorney General James Cole to Chairman Darrell Issa and Ranking Member Charles Grassley (Dec. 2, 2011).

delay in correcting the record. In October 2011, the Committee issued a subpoena to then-Attorney General Eric Holder for records related to Operation Fast and Furious, including records related to the February 4 letter and subsequent communication to Congress.

After producing a subset of those records, and on the eve of a Committee meeting to consider a resolution citing the Attorney General for contempt over the October subpoena, on June 20, 2012, Deputy Attorney General James M. Cole asserted executive privilege and refused to produce documents dated after February 4, 2011 because:

> . . . the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would… inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight.[6]

The following week, the House of Representatives voted to hold the Attorney General in contempt over the continued refusal to turn over the subpoenaed documents. The House of Representatives also authorized a lawsuit against the Justice Department, leading to the latest of surprisingly infrequent privilege fights between the legislative and executive branches in the federal courts. The question before the court in *OGR v. Lynch* was whether records of a federal agency's internal deliberations over how to respond to congressional inquiries fall under the protection of the deliberative process privilege.

II. The Scope of Congress's Investigative Power

Congressional investigations are a critical part of our constitutional order. At the Constitutional Convention, George Mason argued that members of Congress would be "not only Legislators but they possess inquisitorial power. They must meet frequently to inspect the Conduct of the public offices."[7] After the Constitutional Convention, James Wilson wrote that the "house of representatives, for instance, form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things."[8] Yet Congress's powers of investigation do not exist in a vacuum, and it has met resistance throughout American history when it has used them against the Executive Branch.

The oldest means of Executive Branch resistance—first used by President George Washington—has been the presidential claim of executive privilege to withhold records from Congress.[9] Though they are both as old as the country itself, neither Congress's investigatory power nor the executive privilege to withhold are specifically mentioned in the text of the Constitution. Given the negotiated nature of congressional investigations, political pressures on both branches to resolve disputes, and the Judicial Branch's reluctance to interfere in political disputes, questions of executive privilege related to congressional investigations have rarely reached the courts. This has left little legal guidance on how the President's privileges and Congress's investigative powers interact. As one commentator put it, the "scope and limitation of congressional oversight are borne of conflict,"[10] and given the limited number of legislative-executive disputes that have reached the courts in this area, much remains unsettled.

Despite this lack of judicial guidance, the branches all agree that Congress has broad powers to investigate nearly any question.[11] The Constitution vests Congress with "all legislative Powers herein granted."[12] It is firmly settled that the Constitution's grant of legislative power contains a corollary power to investigate any matter subject to existing or potential legislation.[13] As the Supreme Court held in *Barenblatt v. U.S.*, "the scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[14]

III. Defining the Scope of Executive Privilege: Presidential Communications and the Deliberative Process

The earliest judicial mention of executive privilege interests came from Chief Justice Marshall in *Marbury v. Madison*, when he noted that the Court's incursion "into the secrets of the cabinet" would appear to be interfering "with the prerogatives of the executive."[15] As courts understand it today, executive privilege consists of two distinct privileges: the presidential communication privilege (PCP) and the deliberative process privilege (DPP). These concepts are both only relatively recently defined—our understanding of PCP comes principally from the Supreme Court's Watergate-era jurisprudence, while the Court of Appeals for the D.C. Circuit has articulated the more common but less clear DPP in the course of adjudicating over a half-century of Freedom of Information Act (FOIA) litigation.

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6 Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Chairman Darrell E. Issa, Committee on Oversight and Government Reform, U.S. House of Representatives (June 20, 2012).

7 2 The Records of the Constitutional Convention of 1787, at 206 (Max Farrand, ed., 1966).

8 The Works of the Honourable James Wilson, LLD, at 146 (1804).

9 In 1792, the House of Representatives established a special committee to investigate the failure of the northwestern expedition of Major General St. Clair. *See* M. Nelson McGeary, *Congressional Investigations: Historical Development* 18 U. Chi. L. Rev. 425 (1951). Interestingly, President Washington made the first invocation of executive privilege, withholding papers he believed to be in the public interest, though he later supplied them to the Committee. Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1391-92 (1974).

10 Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 Marq. L. Rev. 881, 897 (2014).

11 For a more complete discussion of the branches' differing views on Congress's authority, see *id*.

12 U.S. Const. Art. I, § 1.

13 "The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." McGrain v. Daugherty, 273 U.S. 135, 174 (1927); "It is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws…" Scope of Cong. Oversight and Investigative Power With Respect to the Exec. Branch, 9 Op. O.L.C. 60 (1985).

14 360 U.S. 109, 111 (1959).

15 5 U.S. (1 Cranch) 137, 170 (1803).

a. Presidential Communication Privilege

While presidents have fought to withhold records from opposing branches since the Washington Administration, it was not until *U.S. v. Nixon* that the Supreme Court articulated the modern doctrine of executive privilege. In *Nixon*, which involved a judicial rather than congressional subpoena, the Court described PCP as ". . . fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[16] The Court elaborated:

> [T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.[17]

The Court defined PCP narrowly, limiting it to communications made "in performance of [a President's] responsibilities," and "in the process of shaping policies and making decisions."[18] The Court also immediately recognized the qualified nature of the privilege, stating that the President's "generalized interest in confidentiality,"[19] failed against the judicial branch's "demonstrated, specific need for evidence in a pending criminal trial."[20]

Beyond *Nixon*, much of our understanding of PCP comes from the D.C. Circuit's decision in *In re Sealed Case (Espy)*, which concerned an Office of Independent Counsel subpoena for records accumulated in the preparation of a White House Counsel's Office report to the President.[21] The court in *Espy* recognized the President's ability to invoke PCP when asked to produce records that 1) reflect presidential decisionmaking and deliberations and 2) the President believes should remain confidential, at which point they become presumptively privileged.[22] The privilege can only be applied to records revealing the President's deliberations or those of advisors with operational proximity to the President,[23] applies to records "in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones."[24]

b. Deliberative Process Privilege

DPP is generally viewed as a common law privilege, rather than one arising from the Constitution, and it is a fairly recent creation in American history.[25] Broader than PCP, DPP can be invoked to withhold records that would reveal deliberations and recommendations that are part of the process by which Executive Branch decisions and policies are made.[26] To be privileged, records must be both predecisional and deliberative because, as the Court in *Espy* pointed out, of the privilege's "ultimate purpose[, which] is to prevent injury to the quality of agency decisions by allowing government officials freedom to debate alternative approaches in private."[27]

While both PCP and DPP are qualified, and require a balancing of the public interest at stake and the needs of the party seeking records, there is a clear presumption toward the Executive Branch in the case of PCP.[28] DPP, on the other hand, is more "ad hoc," and the "privilege disappears altogether when there is any reason to believe government misconduct occurred."[29] It can be overcome by a sufficient showing of need by the party seeking the records, forcing courts to consider "factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees."[30]

The Executive Branch, recognizing the limits of PCP, has sought to expand DPP from its origins—covering predecisional deliberations—toward a hybrid deliberative-communication privilege that can be invoked against producing nearly any record the President chooses. As Todd Garvey and Alissa M. Dolan of the Congressional Research Service have pointed out, Attorney General Eric Holder made this argument in a letter to President Obama concerning the Fast and Furious investigation.[31] He wrote that it is "well established that the 'doctrine of executive privilege . . . encompasses Executive Branch deliberative communications,'" without making a distinction between DPP and PCP.[32]

IV. Fast and Furious Investigation Reaches the D.C. District Court

At its core, *OGR v. Lynch* is a subpoena enforcement case that rests on whether the President can assert DPP to withhold records reflecting, not the development of policy, but the development of responses to Congress and the media. This poses two

16 United States v. Nixon, 418 U.S. 683, 708 (1974).

17 *Id.* at 705-706.

18 *Id.* at 711, 708.

19 *Id.* at 713.

20 *Id.*

21 121 F.3d 729 (D.C. Cir. 1997).

22 *Id.* at 744-745.

23 *Id.* at 752.

24 *Id.* at 745.

25 Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 320 (1989) ("of relatively recent origin"); Edward J. Imwinkelried, *The Government's Increasing Reliance On-And Abuse of-The Deliberative Process Evidentiary Privilege*, 83 Miss. L.J. 509, 513 (2014).

26 *Espy*, 121 F.3d at 737, quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (internal quotation marks omitted).

27 *Id.* (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C.1966), aff'd, 384 F.2d 979 (D.C. Cir. 1967) (internal quotation marks omitted)).

28 *Id.* at 746.

29 *Id.*

30 *Id.* at 737 (quoting In re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992) (internal quotation marks omitted)).

31 Todd Garvey and Alissa M. Dolan, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments,* Cong. Research Serv. (Dec. 15, 2014).

32 Letter from Attorney General Eric Holder to President Barack Obama (June 19, 2012) (interestingly, quoting Letter from Attorney General Michael B. Mukasey to President George W. Bush (June 19, 2008)).

separate questions, for which previous cases provide little guidance: 1) May the Executive Branch assert DPP in response to a congressional subpoena? And 2) if so, can the privilege shield records beyond policy deliberations, such as deliberations over how to respond to congressional and media requests?

After the Committee filed its suit against the Department on August 13, 2012,[33] the Department filed a Motion to Dismiss on the grounds that the court lacked jurisdiction over the matter, and that even if it did have jurisdiction, it should decline to exercise it over a political dispute and that judicial intervention in the matter would threaten the Constitution's balance of powers. The court disagreed, citing *Marbury v. Madison* and *U.S. v. Nixon* for the proposition that "it [i]s the province and duty of the Court to say what the law is with respect to the claim of executive privilege . . . [and] any other conclusion would be contrary to the basic concept of separation of powers and checks and balances that flow from the scheme of a tripartite government."[34]

Following dismissal of the Department's motion, the Committee moved for summary judgement on the grounds that, unlike PCP, DPP has a common law rather than constitutional foundations and therefore could not be invoked in response to a congressional subpoena. Citing *Espy*, the court denied summary judgment on the grounds that there is a constitutional dimension of DPP that, when invoked correctly, could shield records from a congressional subpoena.

The court also found the Department's blanket assertion of privilege to be insufficient, and ordered it to review the records, identify which were both predecisional and deliberative, produce those which were not, and create a list of all records still withheld under the privilege. The Department subsequently produced 10,104 new records that had previously been withheld, along with several lists of records it deemed privileged in whole or in part[35] (which the Committee claimed omitted a body of material). The final list itemized 5,342 records that were withheld under DPP, along with several thousand that were withheld as law enforcement sensitive, private, or on other grounds.[36]

The Committee then moved to compel the production of all records in the case, on the grounds that 1) none were deliberative and 2) even if they were, they Committee's need for the records outweighed the privilege. As the Committee's Motion to Compel sought the same relief as the lawsuit itself (the production of documents responsive to the October 2011 subpoena), the court's January 19, 2016 decision was the court's final ruling in the case.

The Court found that DPP could in fact be invoked in defense against a congressional subpoena, and that it could be invoked to shield records of an agency's internal deliberations over how to respond to congressional and media inquiries.[37] The opinion did not entertain the claim that DPP should not apply against a congressional subpoena, and rested largely on cases brought by private parties under FOIA.[38] Citing the FOIA case law, the Court wrote, "internal deliberations about public relations efforts are not simply routine operational decisions: they are deliberations about policy, even if they involve massaging the agency's public image."[39] On the basis of these cases, the Court held that "documents . . . that reveal the Department's internal deliberations about how to respond to press and Congressional inquiries . . . are protected by the deliberative process privilege."[40]

Having determined that DPP applies to the records in question, the court then turned to the next step of the analysis: the case-by-case, ad hoc balancing of the public interests in question and the need of the party seeking the privileged records. This step requires the court to:

> [B]alance the competing interests on a flexible, case by case, ad hoc basis, considering such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation or investigation, the harm that could flow from disclosure, the possibility of future timidity by government employees, and whether there is reason to believe that the documents would shed light on government misconduct, all through the lens of what would advance the public's—as well as the parties'—interests.[41]

Noting "the principles that caution against judicial intervention in a dispute between the two other branches," the court seemed hesitant to enter the fray between the Committee and the Department.[42] Referring back to *Espy*, the court explained:

> One factor the *Espy* opinion directs the balancing judge to consider is whether the government is a party to the litigation, and in this case, the "government" is on both sides of the dispute. Under those circumstances, the necessary "ad hoc" balancing could give rise to the very concerns that prompted the Attorney General to argue that the case should be dismissed on prudential grounds . . . .[43]

The court noted that the Department had, in the course of the dispute, 1) acknowledged both the seriousness and legitimacy of the investigation and 2) already suffered public disclosure of related, sensitive information through an Inspector General's

33 The suit was filed by the Committee and the full U.S. House of Representatives through the Office of General Counsel. For ease of reference, the plaintiff is referred to as "the Committee."

34 Committee on Oversight and Government Reform v. Eric H. Holder, No. 12-1332, Mem. Op. on Mot. To Dismiss, at 17-18 (Sept. 30, 2013) (internal citations and quotation marks omitted).

35 *Lynch*, *supra* note 2 at 10.

36 *Id.*

37 *Id.* at 17.

38 Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993); Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 575 F.2d 932, 935 (D.C. Cir. 1978); ICM Registry, LLC v. Dep't of Commerce, 538 F.Supp.2d 130 (D.D.C. 2008); Judicial Watch v. Dep't of Homeland Sec., 736 F.Supp.2d 202, 208 (D.D.C. 2010); Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Labor, 478 F.Supp.2d 77, 83 (D.D.C. 2007).

39 *Lynch*, *supra* note 2 at 16 (quoting ICM Registry, LLC v. Dep't of Commerce, 538 F.Supp.2d 130 (D.D.C. 2008)).

40 *Id.* at 17.

41 *Id.* at 18.

42 *Id.*

43 *Id.*

report.[44] Under these "specific and unique circumstances," the court found that "the qualified privilege invoked to shield material that the Department has already disclosed has been outweighed by a legitimate need that the Department does not dispute, and therefore, the records must be produced."[45] The Committee filed a notice of appeal on April 8, 2016 in an effort to seek Department documents that are being withheld for other reasons.

V. The Deliberative Process Privilege Now: Remaining Questions and Problems for Future Congressional Investigations

Media reports have portrayed the ruling as a win for Congress and a loss for the Executive Branch, with headlines claiming "Federal Judge Rules against Obama on Executive Privilege for 'Fast and Furious,'"[46] and "Judge rejects Obama's executive privilege claim over Fast and Furious records."[47] While it is true that the Department lost its battle to keep 5,342 documents from the Committee nearly five years after they were first requested, that outcome rested on a narrow decision and a unique fact pattern unlikely to be repeated. Beyond that fact pattern, the court's reasoning hints at an expansion of executive privilege in what could be a long-term win for the Executive Branch.

The Department won in establishing that the privilege—articulated in *Espy* as protecting the decisionmaking and policy process—can be used to shield deliberations on responding to Congress and the media. The application of the privilege to shield these deliberations is especially problematic for Congress because it raises the question of what Executive Branch records—short of public documents—could not also be subject to a claim of DPP.

The decision works against Congress is other ways as well. The Court noted that one of the "specific and unique circumstances" leading to the order that the Department turn over documents was that it has acknowledged the "seriousness and legitimacy" of the Committee's investigation. Should the Executive Branch view such acknowledgements as a factor that will weigh against it if the dispute gets to the federal courts, it may be more likely to challenge the basis of congressional investigations from the outset. This, in turn, may work against the good faith back-and-forth negotiation through which most disputes between the legislative and executive branches are resolved.

The court's decision also set aside the Committee's allegations of Department wrongdoing, specifically noting that the ruling was "not predicated on a finding that the withholding was intended to cloak wrongdoing on the part of government officials or that the withholding itself was improper."[48] This swept aside the rule as stated in *Espy*, that DPP "disappears altogether when there is any reason to believe government misconduct occurred."[49] Though the definition of "government misconduct" remains unclear, the Committee's claims against the Department are substantially centered on whether the Department intentionally misled Congress in its February 2011 letter to Senator Grassley. During the course of the investigation, the Committee alleges the Department engaged in misrepresentations, stonewalling, and other misconduct.[50] Whether this activity is sufficient to preclude DPP under *Espy* is uncertain, but the court explicitly did not consider the question, which could signal to the Executive Branch that the activity is acceptable within what is otherwise considered good faith negotiation.

Regardless of one's reading of the proper balance of power between Congress and the President in the course of congressional investigations, it is likely that federal courts will have more opportunities to consider these questions in the future. In recent months, there appear to have been a marked increase in DPP claims across agencies and to a wide range of congressional committees conducting active investigations. With continued difficulties in the relationship between congressional committee chairs and the President, we may be entering an era in which fewer disputes are resolved through good faith negotiation and the federal judiciary becomes the primary venue for settling these disputes. If *OGR v. Lynch* is indicative of the jurisprudence to come, that may not bode well for Congress.

44 *Id.* at 19-21.

45 *Id.* at 22.

46 Aaron Kliegman, Wash. Free Beacon (Jan. 19, 2016).

47 Josh Gerstein, Politico.com (Jan. 19, 2016).

48 *Lynch*, *supra* note 2 at 22.

49 *Espy*, 121 F.3d at 746.

50 Committee on Oversight & Government Reform, Flash Memorandum to Republican Members (April 14, 2016).