To: [redacted]

From: *Aziz Huq*

Re: *Varieties of Executive Privilege*

Date: *January 31, 2007*

"'Executive privilege' refers to a wide variety of evidentiary and substantive privileges."[1] Despite its importance, executive privilege has never been conclusively defined by Congress[2] or the executive branch. An executive order issued on November 1, 2001, however, catalogues the most important species of executive privilege claims:

> The President's constitutionally based privileges subsume privileges for records that reflect: [1] military, diplomatic, or national security secrets (the state secrets privilege); [2] communications of the President or his advisors (the presidential communications privilege); [3] legal advice or legal work (the attorney-client or attorney work product privileges); and [4] the deliberative processes of the President or his advisors.[3]

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[1] *In re Sealed Case*, 121 F.3d 729, 735 n.2 (D.C. Cir. 1997)

[2] Congress has acknowledged executive privilege's existence without defining it. *See, e.g.*, 44 U.S.C. § 2204(c)(2) (2007) ("Nothing in [the Presidential Records Act of 1978] shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."). While the executive branch has long exercised the privilege aggressively, it has not provided a comprehensive definition. In the eighteenth, nineteenth, and early twentieth century, the executive branch made claims to secrecy, but did not clearly define the privilege being claimed or distinguish different grounds for lodging the privilege. *See* Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy and Accountability* 29-39 (2d ed. 2002). Tellingly, it was not until the Eisenhower Administration that the phrase "executive privilege" was used and stable doctrinal frameworks began to emerge. *Id.* at 39.

[3] Executive Order No. 13, 233, reproduced at 44 U.S.C. §2204 note (2007); *see also* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L. J. 845, 845 n.3 (1990) (listing in more detail privileges, and adding the privilege for the identity of confidential informants; information subject to a statutory prohibition against disclosure; information that, if disclosed, would significantly diminish the executive's ability to engage in a planned transaction; and information that has been communicated under promises or expectations of confidentiality).

The most extensive discussion of these varieties of executive privilege is found in federal case law. (When Congress and the executive have clashed over privilege issues, their resolutions of the conflicts have not yielded precise formulations.[4] Congress tends to use blunt instruments, such as the purse power or confirmation authority, to extract concessions from the executive.[5] The infrequent executive-legislative conflicts that have reached the courts ended inconclusively.[6]) Courts treat executive privilege claims with greater deference than Congress because of the two branches' different institutional competences.[7] Hence, the judicial scope of executive privilege may be larger than the doctrine's application to the congressional context.

This memo first describes the "presidential communications privilege" and the "deliberative process privilege" before turning to the attorney-client privilege and claims of secrecy on national security grounds.

1. The presidential communication privilege

The "presidential communications privilege" protects from disclosure any communications that are either by the President directly or by "his immediate advisors in the Office of the President" to the President.[8] The Supreme Court recognized this privilege in *Nixon v. United States*[9] and *Nixon v. Administrator of General Services.*[10] The Court grounded the privilege in the need for candor in executive branch decision-making and in "the supremacy of each branch within its own assigned area of constitutional duties."[11]

In the *Nixon* cases, the Supreme Court applied the presidential communication solely to communications involving the President. In 1997, the Court of Appeals for the District of Columbia Circuit extended the privilege to include "communications made by presidential advisors in the course of preparing advice for the President ... even when these

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[4] "Congress's legal understanding of executive privilege is more difficult to divine than that of the courts because relevant statutes address the issue only obliquely and because other than statutes, conventional formats for expressing congressional legal opinion are not well established." Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 Minn. L. Rev. 461, 477 (1987).

[5] Rozell, *Executive Privilege, supra* note at 2, at 160-61.

[6] These cases nevertheless strongly suggest that executive-legislative disputes about information are justiciable. *See, e.g., United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977) (rejecting argument that such disputes are political questions, and setting forth incremental procedures for resolving disputes); *United States v. AT&T*, 551 F.2d 384, 394 (D.C. Cir. 1976) (recognizing courts' power to resolve such disputes but "paus[ing] to allow for further settlement"); *Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (rejecting a subcommittee's subpoena as "merely cumulative" when a different congressional committee had already secured the documents being sought). They also suggest courts properly adopt a "staged decisional structure" to adjudicate these claims." *Select Comm. on Presidential Campaign Activities*, 498 F.2d at 730.

[7] *In re Sealed Case*, 121 F.3d at 752; *accord* Norman Dorsen & John Shattuck, *Executive Privilege, the Congress and the Courts*, 35 Ohio St. L.J. 1, 16-22, 24-33 (1974).

[8] *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1124 (D.C. Cir. 2004).

[9] 418 U.S. 683 (1974) ("*Nixon I*") (holding that President Nixon was obliged to submit to a subpoena duces tecum for tape recordings and documents in the context of a criminal proceeding).

[10] 433 U.S. 425, 446-55 (1977) ("*Nixon II*") (upholding the "limited intrusion into executive confidentiality" affected by the Presidential Records Act).

[11] *Nixon I*, 418 U.S. at 705.

communications are not made directly to the President."[12] For example, "communications authored and received in response to a solicitation by a member of a presidential advisor's staff" fall within the privilege.[13]

The D.C. Circuit cautioned, however, that not every communication with a presidential advisor would be protected: "[T]he privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff *who have broad and significant responsibility for investigating and formulating the advice to be given to the President in the particular matter to which the communications relate.*"[14] Hence, communications by advisors when they act in non-advisory capacity are unprotected.[15] But it seems that vice-presidential communications that implicate policy-making do fall within the privilege's bounds.[16] In a later case, the D.C. Circuit also declined to grant the privilege to "persons in the Justice Department who are at least twice removed from the President," but who aid the President in the exercise of his presidential pardon responsibilities.[17]

Once properly asserted by a qualified person, the presidential communications privilege "applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones."[18] Critically, it covers any factual matter contained in a communications, and in this regard sweeps broader than the deliberative process privilege described below. Hence, Vice President Cheney has invoked the privilege to refuse disclosure of "factual information such as the names of people present at meetings and the cost of those meetings."[19]

Nevertheless, the presidential communications privilege "can be overcome by a sufficient showing of need."[20] Indeed, in one of the first judicial recognitions of an

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[12] *In re Sealed Case*, 121 F.3d at 751-52; *accord Judicial Watch*, 365 F.3d at 1114. But, thereafter, courts give the President "an opportunity to raise more particularized claims of privilege." *In re Sealed Case*, 121 F.3d at 745.

[13] *In re Sealed Case*, 121 F.3d at 752. *But see Case Note: Constitutional Law—Executive Privilege*, 111 Harv. L. Rev. 861 (1998) (criticizing the D.C. Circuit's decision to "needlessly expan[d] the secrecy afforded the executive branch").

[14] *In re Sealed Case*, 121 F.3d at 752 (emphasis added); *cf. Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) (application of the Federal Advisory Committee Act to a taskforce that reported directly to the President might be an unconstitutional infringement on the presidential communications privilege).

[15] *In re Sealed Case*, 121 F.3d at 752.

[16] *Cheney v. U.S. Dist. Court for the Dist. Of Columbia*, 542 U.S. 367, 385 (2004) (noting that the "special considerations [that] control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated" also apply in cases involving the Vice President). The Supreme Court in *Cheney* implicitly recognized that the Vice President's privilege was not absolute and was subject to judicial policing when it remanded the case rather than dismissing it. *Id.* at 392.

[17] *Judicial Watch*, 365 F.3d at 1117.

[18] *Judicial Watch*, 365 F.3d at 1114 (emphasis added and quotation marks and citation omitted).

[19] Rozell, *Executive Privilege, supra* note 2, at 155. While this is not a novel use of the privilege, Vice President Cheney is the first vice president to assert the privilege independently.

[20] *Ibid.*; *Nixon I*, 418 U.S. at 707 ("[T]he legitimate needs of the judicial process may outweigh Presidential privilege."); *accord Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc) (holding that presidential invocation of privilege against a criminal subpoena "must fail in the face of the uniquely powerful showing made by the Special Prosecutor [Archibold Cox] in this case"). The privilege can also be overcome in the civil litigation context. *See Dellums v. Powell*, 642 F.2d 1351, 1354, 1364 (D.C. Cir. 1981); Sun Oil Co. v. United States, 206 Ct. Cl. 742, 514 F.2d 1020, 1024 (1975).

executive branch secrecy claim, Chief Justice John Marshall endorsed the idea that the privilege is defeasibility.[21] In other words, however well-established the privilege may be, it has never been absolute. Explaining what must be shown to overcome the privilege, the D.C. Circuit has held a litigant must demonstrate that a document contains important evidence and "this evidence is not available with due diligence elsewhere."[22]

The Supreme Court also strongly suggested the presidential communications privilege must yield whenever a coordinate branch's constitutional role is at stake. *Nixon I* concluded that President Nixon had to yield to a subpoena to preserve "the function of the courts under Article III,"[23] and *Nixon II* held that Congress could roll back a former president's privilege in light of "the scope of Congress' broad investigative power."[24] Thus, Congress ought to be able to overcome the presidential communications privilege in any instance that it exercises its constitutional powers to legislate and conduct oversight.

II. The deliberative process privilege

The "deliberative process privilege" is "distinct and ... different" from the presidential communications privilege.[25] It protects executive branch officials' communications that are "predecisional"[26] and a "direct part of the deliberative process"[27] A document is predecisional if was "generated before the adoption of an agency policy" and deliberative if it "reflects the give-and-take of the consultative process."[28] "The underlying rationale is that disclosure of deliberative communications will chill future communications, thus diminishing the effectiveness of executive decision-making and injuring the public interest."[29] This privilege has long been recognized by the Supreme Court,[30] and is the subject of extensive discussion by the D.C. Circuit.[31] And President Bush's first claim of executive privilege, entered on December 12, 2001 regarding Department of Justice

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[21] Paul A. Freund, *Foreword: On Presidential Privilege*, 88 Harv. L. Rev. 13, 30-31 (1974).
[22] *In re Sealed Case*, 121 F.3d at 754.
[23] *Nixon I*, 418 U.S. at 707.
[24] *Nixon II*, 433 U.S. 451, 453 ("The expectation of the confidentiality of executive communications ... has always been limited and subject to erosion over time after an administration leaves office."); *see generally Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961) (describing scope of Congress' investigative power). *Nixon II* noted that a sitting President's claim to determine what the national interest requires by way of non-disclosure is entitled to more deference than the claim of a former president. *Nixon II*, 433 U.S. at 449.
[25] *In re Sealed Case*, 121 F.3d at 745.
[26] Russell L. Weaver and James T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 290 (1989).
[27] *Id.* at 296 (quoting *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987).
[28] *Judicial Watch v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006).
[29] Wetlaufer, supra note 3, at 847.
[30] *See, e.g., Mink v. Env't Protection Agency*, 410 U.S. 73, 86-87 (1973) (citing *Kaiser Aluminum & Chem. Corp. v. United States*, 141 Ctr. Cl. 38, 157 F. Supp. 939 (1958) (Reed, J.)); *United States v. Morgan*, 313 U.S. 409, 409, 421-22 (1941).
[31] *See, e.g., Baker & Hostetler LLP v. U.S. Dep't of Commerce*, -- F.3d --, 2006 WL 3751451, at *8 (D.C. Cir. 2006) (holding that "notes taken by government officials often fall within the deliberative process privilege"); *Judicial Watch v. FDA*, 449 F.3d at 151 (holding that documents may be post-decisional for one purpose and predecisional for another).

prosecutorial records, cited the records' deliberative character to justify the assertion that they were "presumptively privileged."[32]

Properly invoked, the deliberative process privilege is narrower than the presidential communications privilege "primarily because the deliberative process privilege does not extend to purely factual material"[33] unless "it is inextricably intertwined with policy-making processes."[34] It is a "common law privilege," not a constitutional one; hence, it is more susceptible to "congressional or judicial negation" than the presidential communications privilege.[35] Further, "the privilege disappears although when there is *any reason to believe* government misconduct occurred."[36] Indeed, as a historical matter, [c]orruption and mismanagement have repeatedly come to light over strenuous executive opposition only because of congressional investigation."[37] The history of successful congressional investigations confirms Congress's need for an override of the privilege when violations of the law are at issue.

III. The attorney-client privilege

Federal courts have assumed that governmental entities have the same attorney-client protection as private corporate entities.[38] Courts have justified this privilege based on the assumption that the "need of the governmental client for assurances of confidentiality [is] equivalent to a corporation's need for confidential advice."[39] A governmental attorney-client privilege claim, however, cannot be sustained in the face of accusations of criminal wrongdoing.[40]

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[32] Mark J. Rozell, *Executive Privilege Revived? Secrecy and Conflict During the Bush Presidency*, 52 Duke L. J. 403, 413-19 (2002) (citation omitted). The Justice Department also claimed vaguely that "congressional access to these documents would be contrary to the national interest." *Ibid.* (citation omitted).

[33] *In re Sealed Case*, 121 F.3d at 750.

[34] *Judicial Watch*, 365 F.3d at 1121 (quoting *Soucie v. David*, 448 F.2d 1067, 1071 (D.C. Cir. 1971); quotation marks omitted).

[35] *In re Sealed Case*, 121 F.3d at 745. The executive has not always agreed. In late 1981, Attorney General William French Smith issued a formal opinion enumerating forms of executive privilege on which the-Secretary of the Interior James Watt could rely in resisting congressional document requests. Smith cited the executive's power to protect "quintessentially deliberative, predecisional documents" and argued that "the congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances." Shane, *supra* note 4, at 503-04 (footnotes and citations omitted); *see id.* at 510-11 (describing Smith's similar claims during the 1982 controversy about Anne Gorsuch's claims of executive privilege).

[36] *In re Sealed Case*, 121 F.3d at 746. In 1982, Attorney General Smith indicated that even privilege claims related to open law enforcement files "will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review." Shane, *supra* note 4, at 511.

[37] Raoul Berger, *Executive Privilege v. Congressional Inquiry*. 12 UCLA L. Rev. 1044, 1049-50 (1964-65) (listing cases).

[38] *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980)

[39] Note, *Attorney-Client Privileges for the Government Entity*, 97 Yale L.J. 1725, 1734 (1988).

[40] "[A] government attorney, even one holding the title Deputy White House Counsel, may not assert an attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible criminal violations." *In re Lindsey*, 148 F.3d 1100, 1110 (D.C. Cir. 1998); the *Lindsey* Court recognized, however, a possible exception for military secrets. *Id.* at 1112, n.8; *see also In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (discussing at length the broader privilege claim and rejecting it).

IV. National security-related privilege

Courts have distinguished issues of national security from other species of presidential privilege and granted the executive considerably more discretion with regard to such claims.[41] The Supreme Court, indeed, locates the President's right of non-disclosure of security-related information not only in statutory commands, but also in the Commander-in-Chief clause of Article II of the Constitution.[42] Congress too has recognized the executive branch's primacy in gathering and sifting sensitive intelligence,[43] while also asserting its authority to receive national security information.[44]

In practice, the congressional position is nuanced. On the one hand, "as the head of the executive branch, the President generally is acknowledged to be 'the owner' of practical intelligence."[45] At the same time, "Congress, through its congressional intelligence committees, has asserted in principle a legal authority for unrestricted access to intelligence information," with the executive preserving power to determine how that information is shared.[46]

According to commentary, Congress has authority to resist a national security-related privilege claim.[47] History supports this claim, with two instances warranting highlighting. First, one of the earliest invocations of executive privilege, by President George Washington, concerned a congressional inquiry into a failed November 1791 military expedition. Under persisting congressional pressure, Washington eventually gave the information up, even though he insisted on his right to withhold information.[48] As a matter of custom therefore, disclosure rather than secrecy has been the default position since the early Republic.

Second, in November 1975, the House Select Committee on Intelligence issued a subpoena to then-Secretary of State Henry Kissinger compelling him to provide documents on covert actions, and then voted to hold him in contempt for failure to disclosure those

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[41] *See, e.g., Nixon I*, 418 U.S. at 706 ("Absent a claim of need to protect military, diplomatic, or sensitive national security secrets [executive privilege is not absolute.]). This is dicta, but oft repeated. *See, e.g., In re Lindsey*, 148 F.3d at 1112, n.8. The first Supreme Court recognition of the state secrets privilege came in *United States v. Reynolds*, 345 U.S. 1 (1953). It is instructive that the privilege claim in *Reynolds* turned out to shield evidence of tortuous government negligence, and not *de facto* state secrets. See Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case* 166-68 (2006).

[42] *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The authority to protect such [sensitive] information falls on the President as head of the Executive Branch and as Commander in Chief.").

[43] *See* 50 U.S.C. § 435 (2007) (delegating to the President power to "establish procedures to govern access to classified information).

[44] *See, e.g.*, 50 U.S.C. § 413(a)(1) (2007) (requiring that "the congressional intelligence committees [be] kept fully and currently informed of the intelligence activities of the United States"); 50 U.S.C. § 403-1(a)(1)(D) (2007) (requiring the Director of National Intelligence to provide "national intelligence" to "to the Senate and House of Representatives and the committees thereof").

[45] Alfred Cummings, *Congress as a Consumer of Intelligence Information*, Cong. Research Serv., Dec. 14, 2005, at 2.

[46] *Ibid.*

[47] Dorsen and Shattuck, *supra* note 7, at 12.

[48] Rozell, *Executive Privilege, supra* note 2, at 29-30. Indeed, Washington subsequently refused to give to the House documents concerning the Jay Treaty, even though the same documents had been transmitted to the Senate. Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 Wm. & Mary Bill of Rights J. 583, 588-92 (2000).

document. Under the pressure of the contempt sanction, the Ford Administration agreed to have an aide read verbatim from the documents into the transcript, hence de-escalating the conflict.[49]

In sum, privilege claims based on national security grounds are no more immune from careful congressional pressure and scrutiny than other forms of executive privilege. Recent experience suggests, moreover, that privilege claims based on national security concerns may hide violations of the law, malfeasance, and inefficiencies as much as any other privilege claim.

[49] Louis Fisher, *The Politics of Executive Privilege* 247-49 (2004)