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Subpoenas and the Exercise of "Executive Privilege"

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We all stand on the shoulders of giants. And few giants loom larger in the study of "executive prerogatives" than Arthur Schlesinger Jr., that great American historian--and that great American--who recently and sadly passed away.

Let's pause and ponder for a moment what Schlesinger has to say about this notion of "executive privilege" in his magnum opus *The Imperial Presidency*, and what this means for the subpoenas just authorized (but not issued) today by the Senate Judiciary Committee against Karl Rove and other presidential advisors.

According to Schlesinger--and I am unaware of anyone who has proved him wrong--the term "executive privilege" can be dated to precisely 1958, when a new Attorney General William P. Rogers used the term for the first time in American history. As Schlesinger explains at pp. 156-59 of the Mariner Books edition: "What had been for a century and a half sporadic executive practice employed in very unusual circumstances was now in a brief decade hypostatized into sacred constitutional principle."

What light does Schlesinger's wisdom cast on today's subpoenas and the looming Congressional battle over information, especially concerning what went on within the White House?

Notice that Schlesinger does not say that it was unknown for presidents to keep information from Congress, or to claim that they could information from Congress. Presidents from George Washington have claimed the power to do so. Their claims have, however, rarely been tested in a court of law. Rather, as several commentators have noted, they are played out in the court of political contest between the branches.

In fact, presidents' power to keep information from Congress is more uncertain than the President's supporters claim. There are few definitive judicial opinions on the matter. And, for the most part, courts have bent over backward to avoid any definite solution to the conflict. In the most recent high-profile case, the challenge to the Vice President's secretive "energy taskforce" (remember when that was the most scandalous thing about this Administration ?!), the Supreme Court expressly declined the Government's invitation to dismiss out of hand the effort to cast sunlight on the task force. Certainly, the Court showed great deference to the Administration, but there was no suggestion that courts have no role in determining the balance of secrecy--or that the say-so of the President or a close colleague is sufficient to end the story.

But the judicial opinions that do exist are fairly clear on a couple of points.

First, presidents can invoke a presumption that some documents can be kept secret, and this presumption is especially strong in case involving advice being given to the President. This is the principle the President relied on in his speech this week.

Second, even when these documents involve communications from the president himself (or perhaps one day, herself), this privilege dissipates when the need on the other side of the ledger is sufficiently great. And there is no requirement of an absolute privilege short of allegations of criminality. (To the contrary, the Supreme Court in 2004
eschewed such an absolute rule in favor of the executive branch, explicitly declining to dismiss a civil suit against Cheney for information).

What does this mean for any subpoenas that may be issued by Leahy, or, for that matter Conyers?

For a start, it is far from clear here that there has been no criminal conduct here, as explained by Marty Lederman here. Certainly, there is sufficient to justify the kind of careful probing both Conyers and Leahy suggest. Whether there is enough to warrant appointment of a Special Prosecutor is a separate and harder question.

Even if there were no suspicion of possible criminal conduct, there is still reason to query whether the protection of advice to the President really does justify an absolute privilege against Congress.

Without question, we want executive branch advisors to be candid. But we also want executive branch advisors to remain within the law. And we want everyone on the federal payroll to feel some loyalty not only to the Administration of the day, but to the vision and values of the U.S. Constitution.

It is, moreover, simply not the case that a presidential advisor has be assured that his or her counsel will never come to light. No one can absolutely control the documentation that they provide while working in the federal government. Criminal investigations can result in the disclosure of presidential communications. And as the Supreme Court held
in 1977, even former Presidents do not yield an unfettered veto over what happens to their non-personal papers. That means that advisors in fact must - and indeed should - operate according to the principle that their words might one day filter into the public domain.

In fact, the President's justification of executive privilege--which is the standard justification that the executive branch has given for fifty years--is surprisingly weak. Perhaps, in other words, we ought to be recalling Schlesinger's advice, and asking whether we indeed need this "sacred constitutional principle," or whether we are better of with more ad hoc and finely tuned devices to manage the flow of information between the President and Congress.

* * *

Incidentally, in the "is-it-funny or scary" category, I note that President Bush in his address commented that U.S. attorneys are "decent people. They serve at our
pleasure." Having just finished a book arguing that this Administration has unhealthy inclinations toward the less savory habits of the British royals, I'm tickled to see Mr. Bush confirm his monarchical identity.

Now all we need are some corgis.

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