AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Executive Privilege

**Committee on the Judiciary v. Miers, 558 F. Supp. 2d 53** (D.D.C. 2008)

*At the end of 2006, the Department of Justice under President George W. Bush asked for the resignation of a number of U.S. attorneys. The mass firing in the middle of a presidential administration provoked a political furor, and there were accusations that the administration was trying to suppress federal criminal investigations of various political figures. The House Judiciary Committee launched an investigation into the firings. Various Department of Justice officials cooperated with the congressional investigation, and the committee eventually focused its attention on former White House Counsel Harriet Miers. Miers was less cooperative, and eventually the committee issued a subpoena demanding that Miers testify and produce desired documents. The White House responded by asserting executive privilege. When negotiations between the two branches broke down, the House of Representatives voted a resolution to hold Miers in contempt of Congress in February 2008. The House asked the Department of Justice to bring criminal contempt charges against Miers, but the Justice Department declined to do so. The House Judiciary Committee then filed a civil suit in federal district court seeking declaratory relief.*

*The federal district court ruled that White House aides did not have absolute immunity from a congressional subpoena for an oversight hearing. Miers eventually came to an agreement to testify before the committee and made an appearance in 2009.*

JUDGE BATES.

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The Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context. That simple yet critical fact bears repeating: the asserted absolute immunity claim here is entirely unsupported by existing case law. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.

The Committee's primary argument on this point is incredibly straight-forward. Ms. Miers was the recipient of a duly issued congressional subpoena. Hence, she was legally obligated to appear to testify before the Committee on this matter, at which time she could assert legitimate privilege claims to specific questions or subjects. The Supreme Court has made it abundantly clear that compliance with a congressional subpoena is a legal requirement. *United States v. Bryan* (1950). . . .

The Executive maintains that absolute immunity shields Ms. Miers from compelled testimony before Congress. Although the exact reach of this proposed doctrine is not clear, the Executive insists that it applies only to "a very small cadre of senior advisors." The argument starts with the assertion that the President himself is absolutely immune from compelled congressional testimony. There is no case that stands for that exact proposition, but the Executive maintains that the conclusion flows logically from *Nixon v. Fitzgerald* (1982). . . . The Executive then contends that "[those] same principles apply just as clearly to the President's closest advisers." Because senior White House advisers "have no operational authority over government agencies . . . [t]heir sole function is to advise and assist the President in the exercise of his duties." Therefore, they must be regarded as the President's "alter ego." In a similar context, the Supreme Court has extended Speech or Debate Clause immunity to legislative aides who work closely with Members of Congress. *Gravel v. United States* (1972). . . .

Unfortunately for the Executive, this line of argument has been virtually foreclosed by the Supreme Court. *Harlow v. Fitzgerald* (1982). . . . Notwithstanding the absolute immunity extended to legislators, judges, prosecutors, and the President himself, the Court emphasized that "[f]or executive officials in general, however, our cases make plain that qualified immunity represents the norm." Although there can be no doubt regarding "the importance to the President of loyal and efficient subordinates in executing his duties of office, . . . these factors, alone, [are] insufficient to justify absolute immunity."

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. . . [T]he prospect of being hauled in front of Congress -- daunting as it may be -- would not necessarily trigger the chilling effect that the Executive predicts. Senior executive officials often testify before Congress as a normal part of their jobs, and forced testimony before Congress does not implicate the same concern regarding personal financial exposure as does a damages suit. Significantly, the Committee concedes that an executive branch official may assert executive privilege on a question-by-question basis as appropriate. That should serve as an effective check against public disclosure of truly privileged communications, thereby mitigating any adverse impact on the quality of advice that the President receives.

The Executive's concern that "[a]bsent immunity . . . there would be no effective brake on Congress's discretion to compel the testimony of the President's advisers at the highest level of government" is also unfounded. To begin with, the process of negotiation and accommodation will ensure that most disputes over information and testimony are settled informally. Moreover, political considerations -- including situations where Congress or one House of Congress is controlled by the same political party that holds the Presidency -- will surely factor into Congress's decision whether to deploy its compulsory process over the President's objection. In any event, the historical record produced by the Committee reveals that senior advisors to the President have often testified before Congress subject to various subpoenas dating back to 1973. Thus, it would hardly be unprecedented for Ms. Miers to appear before Congress to testify and assert executive privilege where appropriate. Still, it is noteworthy that in an environment where there is no judicial support whatsoever for the Executive's claim of absolute immunity, the historical record also does not reflect the wholesale compulsion by Congress of testimony from senior presidential advisors that the Executive fears.

Significantly, although the Supreme Court has established that the President is absolutely immune from civil suits arising out of his official actions, even the President may not be absolutely immune from compulsory process more generally.   In *United States v. Nixon* (1974), the Supreme Court held that the President is entitled only to a presumptive privilege that can be overcome by the requisite demonstration of need. . . . Congress's use of (and need for vindication of) its subpoena power in this case is no less legitimate or important than was the grand jury's in *United States v. Nixon*. Both involve core functions of a co-equal branch of the federal government, and for the reasons identified in Nixon, the President may only be entitled to a presumptive, rather than an absolute, privilege here. And it is certainly the case that if the President is entitled only to a presumptive privilege, his close advisors cannot hold the superior card of absolute immunity.

. . . . Presidential autonomy, such as it is, cannot mean that the Executive's actions are totally insulated from scrutiny by Congress. That would eviscerate Congress's historical oversight function.

To be sure, the D.C. Circuit [in *Nixon v. Sirica* (D.C. Cir. 1973)] acknowledged that "wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch." That, however, is merely "an argument for recognizing Executive privilege and for according it great weight, not for making the Executive the judge of its own privilege." . . . At bottom, the Executive's interest in "autonomy" rests upon a discredited notion of executive power and privilege. As the D.C. Circuit and the Supreme Court have made abundantly clear, it is the judiciary (and not the executive branch itself) that is the ultimate arbiter of executive privilege. Permitting the Executive to determine the limits of its own privilege would impermissibly transform the presumptive privilege into an absolute one, yet that is what the Executive seeks through its assertion of Ms. Miers's absolute immunity from compulsory process. That proposition is untenable and cannot be justified by appeals to Presidential autonomy.

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The Court once again emphasizes the narrow scope of today's decision. The Court holds only that Ms. Miers (and other senior presidential advisors) do not have absolute immunity from compelled congressional process in the context of this particular subpoena dispute. There may be some instances where absolute (or qualified) immunity is appropriate for such advisors, but this is not one of them. For instance, where national security or foreign affairs form the basis for the Executive's assertion of privilege, it may be that absolute immunity is appropriate. Similarly, this decision applies only to advisors, not to the President. The Court has no occasion to address whether the President can be subject to compelled congressional process . . . .

Clear precedent and persuasive policy reasons confirm that the Executive cannot be the judge of its own privilege and hence Ms. Miers is not entitled to absolute immunity from compelled congressional process. Ms. Miers is not excused from compliance with the Committee's subpoena by virtue of a claim of executive privilege that may ultimately be made. Instead, she must appear before the Committee to provide testimony, and invoke executive privilege where appropriate. And as the Supreme Court has directed, the judiciary remains the ultimate arbiter of an executive privilege claim, since it is the duty of the courts to declare what the law is.

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