

Please Don't Pick This Fight

Congress should not want its subpoena dispute with President Bush to go to the courts.

BY HORACE COOPER

Many Congress watchers assumed that the fight between the House Judiciary Committee and the White House over subpoenas to former White House Counsel Harriet Miers and current White House Chief of Staff Joshua Bolten would end when Attorney General Alberto Gonzales resigned.

But John Conyers Jr. (D-Mich.), chairman of the committee, not only doesn't think the fight is over, he reportedly is urging House leaders to move quickly to schedule a full vote soon on a resolution to hold Miers and Bolten in criminal contempt of Congress. The two aides were subpoenaed as part of the congressional investigation into whether the Justice Department or the White House let partisan politics unduly influence the hiring and firing of U.S. attorneys.

But a criminal contempt resolution is the wrong course. Passing the resolution will set up a destructive constitutional showdown with the White House and, because the Supreme Court will most likely resolve it in favor of the executive branch, the result ultimately could diminish Congress' authority. The fallout could mean that future presidents will be emboldened to invoke executive privilege rather than cooperate with congressional investigations.

A PRESIDENT'S PRIVILEGE

Executive privilege lets the president resist warrants, subpoenas, and some other interventions by the legislative and judicial branches. Although not explicitly in the Constitution, it has been invoked by presidents since George Washington.

Acknowledged by the Supreme Court in *United States v. Nixon* (1974), this privilege is not an all-encompassing free pass for every staff member of the executive branch. It is instead a conditional privilege. Its assertion is strongest outside the context of a criminal investigation, and it is at its height when invoked to cover the advice and deliberations of the president's key policy-making aides and advisers.

With internal White House deliberations in particular, executive privilege lets the president receive the most able advice from his aides. The potential for disclosure threatens the willingness of advisers to offer candid advice, whereas protection from disclosure lets aides be more zealous in their assistance.

The congressional authority to investigate and compel testimony is likewise not explicit in the Constitution, but it is an inherent part of the legislative power and springs from Congress' need to have an informed basis for legislating. In *McGrain v. Daugherty* (1927), the Supreme Court explicitly upheld this authority, declaring that "the power of [congressional] inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function." This power is very broad and comprehensive, and it covers inquiries about the executive's administration of existing laws as well as inquiries related to proposed or potential legislation.

Some Washington insiders may deride congressional hearings, but the decision to hold a hearing is one of the most significant decisions a committee chairman makes. Hearings provide public attention to the subject matter being examined, they give a rationale or public record for why the legislature took action, and they provide a forum for the public to evaluate the legislators themselves.

Most witnesses who testify in congressional investigations do so willingly, but what happens when witnesses are unwilling to testify or produce evidence? In most instances the legislature must have the authority to compel this testimony or document production. But, like executive privilege, this authority is not absolute. As the courts have determined, the authority must be appropriately delegated to committees by the Congress; it must be rooted in a legitimate legislative purpose; and, finally, it is constrained by the Bill of Rights and other constitutional limitations, including executive privilege.

AN UNSETTLING PRECEDENT

Thus, the impending battle pits Congress' right to conduct oversight—in this case, over the hiring and firing of U.S. attorneys—against the president's right to candid discus-

sions and advice from key assistants. It is a conflict that—unless avoided—courts ultimately will have to resolve.

Some argue that because many invocations of executive privilege have not succeeded—*United States v. Nixon* being a notable example—the Bush administration is using the claim of privilege as a time-delaying bargaining tool to fight off this congressional inquiry.

But imagine the administration's perspective. Its supporters argue that the left-wing bloggers and their sympathizers on Capitol Hill reportedly saw the Democratic takeover of Congress last November as a green light to stymie the Bush administration's agenda, using Congress' power of investigation. Thus the major stink over the White House's fairly broad authority to dismiss U.S. attorneys does appear somewhat like a pretext to the Bush administration and its supporters, who therefore argue the president should refuse to cooperate. And unlike most instances involving congressional investigations of the White House, President George W. Bush's supporters believe they can apply just as much political pressure to Congress as it can apply to the White House.

Therein lies the rub. Because the White House doesn't feel any need to capitulate, this issue must ultimately be resolved in federal court. Yet if this case actually goes before the courts, the White House is likely to win. Here's why: First, both the official and unofficial statements by the House Judiciary Committee demonstrate that there are no particular targets for criminal prosecution for this inquiry, nor are there any substantiated allegations of specific illegality by any individual. This is the classic case of a fishing expedition.

Second, subpoenas targeting the former White House counsel and current chief of staff go to the core of the inner operations of the executive branch. Broadly speaking, executive privilege is strongest when a key adviser such as the White House lawyer is subpoenaed and Congress can show no specific and compelling need for the testimony.

Congress thus is likely to lose this particular fight, and that failure could have repercussions years from now when different leaders are in the White House and Congress. Executive branch officials are the most frequent witnesses on Capitol Hill. Any restriction by the executive branch on their testimony before Congress, potentially authorized by the precedent created by this conflict, could greatly diminish Congress' pool of information.

One also could imagine a rogue president—using the ultimate Supreme Court case resulting from this conflict—hiding behind privilege to prevent a future Congress from getting evidence of his wrongdoing.

It is the long-term consequences of this conflict that should matter most. Information gathering is essential for legislation, but when it would conflict with the successful invocation of executive privilege, Congress should re-evaluate. It's better for the institution to walk away from a fight than to lose decisively.

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