Statement of Noel J. Francisco
Partner, Jones Day

Before

The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives

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on

"Ensuring Executive Branch Accountability"

Madame Chairman, Ranking Member, and Members of the Subcommittee:

My name is Noel John Francisco. I am a partner at the law firm of Jones Day. I served as Associate Counsel to President George W. Bush from 2001 to 2003, and Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel from 2003 to 2005. It is an honor to appear before you to discuss the important issue of Executive Privilege.

"If there is a principle in our Constitution . . . more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Cong. 581 (Joseph Gales ed., 1834) (remarks of James Madison). Our Founding Fathers recognized that the division of power among three separate branches of government was essential to the preservation of liberty. As Alexander Hamilton explained, this separation of powers ensures "the two greatest securities [the people] can have for the faithful exercise of any delegated power"—"the restraints of public opinion" and "the opportunity of discovering with facility and clearness the misconduct of the persons they trust." *The Federalist* No. 70. In short, by locating power in separate and distinct branches of government, the People know who is responsible for its exercise and accountable for its abuse.

The present inquiry into the President's decision not to reappoint eight United States Attorneys threatens a constitutional confrontation that would undermine our constitutional structure and the liberties it protects. In that system of separated powers subject to limited checks and balances, it is the President's exclusive prerogative to appoint and remove United States Attorneys. That non-

delegable power of the President is not shared with the Legislative Branch; nor is the confidential advice of the President's closest advisors concerning whom to appoint or remove from these positions subject to congressional review. The President has a constitutional privilege over those discussions—recognized by the Supreme Court as falling within his Executive Privilege. *See United States v. Nixon*, 418 U.S. 683, 705-06 (1974). No one would tolerate a demand by the President that a Member divulge the confidential advice he receives from senior staff members on whether to vote for or against a bill (or in the Senate, for or against a nominee). By the same token, no one should tolerate a demand that the President divulge the confidential advice he receives on whom to appoint or remove from the position of United States Attorney. The President and Congress's role in this regard is both constitutionally prescribed and constitutionally limited. These constitutional strictures protect the Branches from each other; but more importantly, the balance that they create protects the liberty of the citizenry by spreading and diluting governmental power.

It is understandable that this body would have less sympathy for the President's point of view. Congress is, after all, a co-equal branch of our government, with its own vital role and constitutional duties. Our constitutional structure, however, is not designed to protect the President or the Congress. It is designed to protect the People. As Justice Kennedy has elegantly stated, "[w]hen structure fails, liberty is always in peril." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment). The Constitution thus also recognizes the danger of Executive or Judicial encroachment on Congress's ability to carry out its functions—a recognition embodied in, among other places, the Speech and Debate Clause.

Requiring the President to divulge confidential advice would be particularly inappropriate in light of the information that the President has agreed to provide. It is my understanding that the President has agreed to produce the following:

- Department of Justice officials, who will testify to their role in the removal of the eight United States Attorneys and their conversations with the White House;

- Department of Justice e-mails and memoranda related to this issue, including e-mails and memoranda exchanged between the Department of Justice and the White House;

- White House e-mails and memoranda exchanged with any outside entity, including the Department of Justice and Members of Congress;

- Non-public interviews of specified senior White House advisers about their communications with outside entities, including the Department of Justice and Members of Congress.

I understand that the only information that the President has not agreed to provide pertains to internal White House communications, including the public, sworn testimony of certain White House advisors. Thus, the present dispute appears to be limited to this last category of information.

The incremental information that the President has not agreed to provide is precisely the information for which Executive Privilege provides the strongest protection. Unlike members of the Cabinet or other agency employees, the White House Staff has no operational authority. It cannot prosecute criminals. It cannot issue binding rules and regulations. It cannot sign an Executive Order. Instead, its sole function is to provide the President with advice in order to assist the President in the execution of *his* constitutional duties and responsibilities. Thus, demanding the sworn testimony of these senior White House advisors is tantamount to demanding the sworn testimony of the President himself. It necessarily follows that the importance of confidentiality with respect to this small group of presidential advisers is particularly acute. This is why the historical view of the Executive Branch is that "the few individuals whose sole duty is to advise the President should never be required to testify because all of their duties are protected by executive privilege." CRS Report for Congress, *Presidential Advisers' Testimony Before Congressional Committees: An Overview* (April 14, 2004), at p. 27.

This is not a partisan issue. To be sure, presidential administrations have differed somewhat as to the outer contours of Executive Privilege. For example, according to the Congressional Research Service, President Eisenhower, a Republican, "took the most expansive approach [to Executive Privilege], arguing that the privilege applied broadly to advice on official matters among employees of the executive branch." CRS Report for Congress, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* (Sept. 21, 1999), at p. 11. The Congressional Research Service reports that the Clinton administration likewise took the "expansive position that all communications within the White House and any federal department and agency [were] presumptively privileged." *Id.* In contrast, "[t]he Reagan Justice Department appears to have taken a slightly

narrower view of the scope of the privilege." *Id.* But regardless of the outer boundaries, presidents of both political parties have consistently maintained that the privilege is at its strongest with respect to the President's senior White House advisors—"the few individuals whose sole duty is to advise the President." *Presidential Advisers' Testimony Before Congressional Committees, supra*. As the late Chief Justice Rehnquist explained while serving in the Department of Justice, such individuals "should not be required to appear [before Congress] at all." U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Separation of Powers, *Executive Privilege: The Withholding of Information by the Executive*, hearings, 92nd Cong., 1st sess. (Washington: GPO, 1971), p. 427. "[T]he aim," said the Chief Justice, "is not for secrecy of the end product—the ultimate Presidential decision is and ought to be a subject of the fullest discussion and debate, for which the President must assume undivided responsibility. But few would doubt that the Presidential decision will be a sounder one if the President is able to call upon his advisers for completely candid and frequently conflicting advice with respect to a given question." *Id.* at 425.

This view has also been validated by the few court cases addressing claims of Executive Privilege. Understandably, the federal judiciary has been reluctant to resolve inherently "political" disputes between the President and Congress—including disputes over information held by one of the branches. *See, e.g., United States v. AT&T*, 551 F.2d 384, 395-96 (D.C. Cir. 1976); *United States v. The House of Representatives of the United States*, 556 F.Supp. 150, 152-53 (D.D.C. 1983). But in the only instance in which a federal court did resolve such a dispute, it held that Congress's "asserted power to investigate and inform" was, standing alone, insufficient to overcome a claim of privilege and so refused to enforce the congressional subpoena. *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731-32 (D.C. Cir. 1974). Other cases, which have generally arisen in the context of criminal investigations and prosecutions, have likewise recognized that internal White House communications are at the core of the protections of Executive Privilege. *See, e.g., In re Sealed*, 121 F.3d at 752 (the privilege encompasses "communications authored or solicited and received by those member's of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate"); *see also Association of American Physicians and Surgeons v. Clinton (AAPS)*, 997 F.2d 898, 909 (D.C. Cir. 1993) (the "Article II right to confidential communications attaches . . . to discussions between [the President's] senior advisors," because "Department Secretaries and White House aides must be able to hold meetings to discuss advice they secretly will render to the President").

Finally, it bears re-emphasizing that the issue here—the appointment and removal of United States Attorneys—is a "quintessential and non-delegable Presidential power." *In re Sealed*, 121 F.3d at 753. United States Attorneys are political appointees who may be removed by the President for any reason—good or bad—or for no reason at all. They exercise extraordinary power. The decisions of United States Attorneys can deprive individuals of their liberty and, in some cases, their lives. Ultimately, it is not the unelected United States Attorneys who are accountable for these decisions, but the President, who alone in the Executive Branch is answerable to the People. Indeed, the only way that United States Attorneys may be held democratically accountable for their decisions (short of impeachment) is through the President. This is why "confidentiality is particularly critical in the appointment and removal context; without it, accurate assessments of candidates and information on official misconduct may not be forthcoming." *In re Sealed*, 121 F.3d at 753. Indeed, Executive Privilege is at its zenith when it applies to the President's decisions regarding his appointment power. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 466-67 (1988); *id.* at 468-69 (Kennedy, J., concurring in the judgment).

Here, the question of Executive Privilege is a narrow one: Does Congress's power to conduct oversight entitle it to demand that the President divulge the advice of his closest advisors on a "quintessential and non-delegable Presidential power"? With all due respect, I believe that the question answers itself. Indeed, in my view, it is arguable that Congress can *never* require that the President divulge these confidential communications, as the Executive Branch has consistently maintained.

At a minimum, however, Congress would need to exhaust all other avenues for obtaining this information and then demonstrate why it needs the information withheld. *Cf. Cheney v. United States District Court*, 542 U.S. 367, 388 (2004). Thus, Congress would first have to examine the extensive information that the President has made available to it—testimony from Department of Justice officials, communications within the Department of Justice and between the Department of Justice and the White House, and non-public interviews of White House officials. It would then have to specifically identify why it needs the information that it does not have. And finally, it would have to establish that the incremental information it seeks—information at the core of Executive Privilege—is "demonstrably critical to the responsible fulfillment of [its] functions." *Senate Committee*, 498 F.2d at 731-32. At this early stage of the proceedings, however, there is no such record, in the absence of which Congress could not, in my view, possibly overcome the

privilege that presumptively attaches to these core, internal White House communications.

In the end, however, it is doubtful whether such a confrontation between Congress and the President will be in either's interest. Historically, the President has not asserted Executive Privilege over the full range of privileged information. Instead, as a matter of comity between the branches, the President typically has attempted to accommodate Congress's legitimate need for information with the President's equally legitimate need to safeguard confidential communications. That is what the President appears to be doing here, where he has agreed to provide Congress with all relevant information save a limited amount relating to his closest, most confidential advisors. And even with respect to these individuals, the President stands ready to provide Congress with informal, non-public interviews. This seems to me to be an eminently reasonable offer, and one which provides the framework in which the present controversy may be resolved without provoking a constitutional confrontation involving all three branches of our government. Speaking as a citizen and as someone who has devoted much of my professional career to the respective roles of the President, Congress, and the Judiciary, it is the way that I for one would hope that this matter would be resolved.

This concludes my prepared statement. I would be happy to answer any questions that you may have.