Statement of Beth Nolan

Before the Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
United States House of Representatives

Hearing on "Ensuring Executive Branch Accountability"

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Thank you Madam Chair and members of the Committee. I am Beth Nolan, a litigation partner in the law firm of Crowell & Moring LLP.[1] I served in the White House as Counsel to the President in the Clinton Administration. I also served as Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel, as Associate Counsel to the President, and as a career attorney in the Office of Legal Counsel during the Reagan Administration. For a number of years, I was a constitutional law professor at The George Washington University.

In the course of this Committee's investigation into the Administration's decision to remove eight U.S. Attorneys from office, Congress has heard numerous assertions that it may not compel the testimony of White House officials, or that the testimony of White House officials may be called for only under a special set of circumstances deemed not present here. Too frequently, these claims are made as if there are absolutes in this area, or as if one must be either "for" executive privilege or "against" it, without regard to context.

We have little case law illuminating the contours of executive privilege, but what we do have makes one thing absolutely clear: the President's constitutional authority to assert executive privilege is not absolute, but is instead to be balanced against the legitimate needs of the coordinate branches of government in undertaking their constitutionally assigned responsibilities. The seminal Supreme Court case on executive privilege is, of course, *United States v. Nixon*, in which the Court held that a privilege is a qualified one that may be outweighed by countervailing needs.

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[1] The views expressed in this statement are my own.

As a general matter, I agree with the proposition that the President's White House advisers should not be called to testify before Congress—or even to provide interviews—without careful congressional consideration of the needs justifying such a request. To use one standard we have recently heard much repeated, Congress should not use White House officials to engage in "fishing expeditions." But I can assure you that, despite the impression that some have recently sought to create, the testimony of White House advisers is far from unprecedented. Close advisers to the President have indeed been subpoenaed by congressional committees, testified under oath, had their testimony transcribed and made part of the public record—and been called back for subsequent testimony. As the Congressional Research Service has reported, there have been at least 73 occasions since 1944 when White House advisers have testified before Congress.[2]

I personally testified four times before congressional committees on matters directly related to my White House duties—three times while I was serving in the White House and once soon after President Clinton left office. I was also deposed by congressional committee staff during my service in the White House. My testimony was conducted under oath and in the presence of a stenographer who made a transcript of the proceedings. At least some of those appearances were also made pursuant to subpoena, without even the opportunity to appear voluntarily. On those occasions, the President did not assert a privilege to preclude my testimony.

On another occasion, the President, upon recommendation of the Attorney General, asserted a privilege in response to a subpoena from the Committee on Government Reform and Oversight of the House of Representatives seeking my testimony with respect to pardons the President had decided to grant before I became his Counsel.[3] The Attorney General relied on the longstanding view of the Justice Department's Office of Legal Counsel that "[t]he President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a

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[2] Congressional Research Service Report for Congress, *Presidential Advisers' Testimony Before Congressional Committees: An Overview* (updated April 14, 2004). *See They've Testified Before*, Washington Post B2 (Mar. 25, 2007).

[3] *See* Memorandum to the President from Janet Reno, Attorney General, re *Assertion of Executive Privilege with Respect to Clemency Decision* (September 16, 1999).

congressional committee."[4] Recognizing the absence of judicial precedent for this position, however, the Attorney General appropriately also considered the balance of executive and legislative interests in the particular matter to conclude that my testimony was protected from congressional compulsion under the particular circumstances of that request. I subsequently testified before that same committee with respect to other pardons, after the President waived any privileges he might have asserted with respect to such testimony, just as he had done on prior occasions.

I start with this personal history to make clear that there historically have been no "absolutes" in this arena—and there should be no absolutes. Sometimes it is appropriate for the President to decline to provide his White House advisers for testimony. Other times, it is appropriate to allow them to provide the information requested by Congress, sometimes in a private meeting, other times in an open hearing. Similarly, it is sometimes appropriate for Congress to require the testimony of such advisers, and at other times, Congress should exercise restraint in this area. It is not an evasion but rather a statement of the law and practice in this area, to say that it all depends on the circumstances.

It is for this reason, despite Justice Department precedents that speak in terms of a general immunity from testimony, that the White House has offered a number of advisers for testimony over the years. The executive branch practice recognizes that the privilege must give way to the legitimate needs of Congress in certain investigations or oversight. It is not a failure to protect the privilege, but a recognition of its dynamic quality, to offer White House advisers for testimony in some circumstances.

The view that White House aides may never be compelled to testify before Congress is not only inconsistent with the historical record, but also has never been adopted by a court or, to my knowledge, presented for judicial resolution. What is clear from *United States v. Nixon*[5] is that executive privilege is constitutionally rooted in the separation of powers. The public interest in a President receiving

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[4] *See* Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: *Power of Congressional Committee to Compel Appearance or Testimony of 'White House Staff'* (Feb. 5, 1971). *See also, e.g.*, Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (July 29, 1982).

[5] 418 U.S. 683 (1974). *See also* Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

"candid, objective, and even blunt or harsh opinions" justifies a presumptive privilege for communication with the President or among those who advise and assist the President. The presumptive privilege, however, must be balanced against the competing interests of a coordinate branch of government. In *Nixon*, therefore, the Court recognized the privilege but found that a generalized assertion of the need for confidentiality did not outweigh the judiciary's need for evidence in a criminal proceeding.

The Supreme Court has not addressed how this balancing would be done in the context of a congressional demand for information, although the D.C. Circuit Court of Appeals had applied a balancing approach prior to *Nixon*.[6] That court subsequently affirmed that neither the executive nor legislative branch has an absolute power in this sphere—either to withhold or demand information from the other—and that both have a constitutional duty to respect and accommodate the needs of the other.[7] It also made clear that the court would be reluctant at best to intervene in an executive privilege dispute between the two political branches, finding instead that the Framers expected "that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our government system."[8] This "spirit of dynamic compromise" is an essential part of the constitutional accommodation process that is at the heart of the resolution of executive privilege disputes: "[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."[9]

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[6] Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (congressional committee may overcome executive privilege only if it demonstrates that information is "demonstrably critical to the responsible fulfillment of the Committee's functions").

[7] United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977).

[8] United States v. AT&T, 567 F.2d at 127.

[9] United States v. AT&T, 567 F.2d at 127. *See also* United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) (declining to resolve executive privilege dispute in absence of sufficient compromise and cooperation between the branches).

Negotiation, or what is frequently called the accommodation process, is not merely a possible strategy in these disputes but rather a long-recognized constitutional imperative. "Negotiation between the two branches should . . . be viewed as a dynamic process affirmatively furthering the constitutional scheme."[10] This negotiation is one in which each branch asserts its legitimate constitutional interests but recognizes—and seeks to accommodate—the legitimate constitutional interests of the other branch. Of course, each branch must engage in the accommodation process for it to work properly.

We should expect both the legislative and executive branches to assert vigorously their authorities in our constitutional system, and we can expect that each will resist inappropriate incursions on their powers. We can therefore expect that a President will defend executive power, consistent with the role of the executive in a constitutional system with coordinate branches of government that also have powers that should be exercised. This is just what the Framers expected, that the ambition of one branch would work to counteract the ambition of the other.[11] Nonetheless, while a President should be expected to vigorously argue for presidential prerogatives, he should do so with proper respect for coordinate branches, and not solely to maximize presidential power or withhold relevant information.

President Clinton defended the privilege when it was appropriate. But he also made his advisers available to testify before Congress to answer questions. I am still troubled by how often we received subpoenas as the first indication of congressional interest, a procedure that fails to accord proper respect to the legitimate interests of the executive branch and the importance of the constitutional accommodation process. And I am still troubled by the number of White House advisers who were called to testify on a range of matters, suggesting that Congress may not have always appropriately narrowed its requests to achieve its constitutional objectives in a manner sufficiently respectful of the President's constitutional prerogatives.

But those troubling elements are not present in today's dispute. A presumptive privilege argues for restraint when Congress seeks the testimony of White House

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[10] United States v. AT&T, 567 F.2d at 130.

[11] THE FEDERALIST NO. 51 (Alexander Hamilton and James Madison).

officials, but does not preclude Congress from requiring such testimony in appropriate circumstances. Serving the White House with congressional subpoenas not as a last resort, but as the first contact from Congress on the matter, would in almost all cases be inconsistent with the constitutional responsibilities of Congress, but Congress has not done so here.

As I understand it, the House and Senate Judiciary Committees reached out to Fred Fielding, Counsel to President Bush, by letter, requesting information on these matters. I do not know if there were conversations prior to this letter, but there were subsequent discussions between Members and Mr. Fielding regarding this request, after which Mr. Fielding sent a letter on March 20 offering to provide four White House officials[12] for interviews with a number of conditions. Under Mr. Fielding's conditions, the interviews must be:

- limited to the subject of communications between the White House and persons outside the White House (including Members of Congress) on the subject of the requests for resignations;
- conducted privately, with questioning from a limited number of Members of Congress, who may have committee staff present;
- conducted without an oath;
- conducted without a transcript;
- conducted on agreement that there will be no subsequent subpoenas; and
- conducted in the presence of a representative from the Office of the Counsel to the President, and personal counsel if desired.

Mr. Fielding also offered to provide to the Committees copies of a limited category of documents.[13]

Mr. Fielding's letter makes no reference to executive privilege, but it clearly relies on the principles and language of executive privilege, referring specifically to the "accommodation" process, the "constitutional prerogatives of the Presidency," and the "requirements of the constitutional separation of powers."

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[12] The four are the former Counsel to the President, Harriet Miers; the Deputy Chief of Staff and Senior Advisor Karl Rove; a Deputy Counsel; and a Special Assistant to the President in the Office of Political Affairs.

[13] Letter to The Honorable Patrick Leahy, John Conyers, Arlen Specter, Lamar Smith, and Linda Sanchez from Fred F. Fielding, Counsel to the President (March 20, 2007).

Subsequent to the issuance of this letter, statements from the President and White House officials have made clear that the White House views this offer as the end of the negotiation process.

Mr. Fielding's offer might be sufficient in another situation. But when we consider the interests of each branch here—the President's legitimate interest in receiving confidential advice, which under our constitutional system is deemed to enhance the quality of presidential decisionmaking itself, and Congress's legitimate interests in receiving information relevant to its legislative and oversight functions to enhance its ability to make appropriate judgments in its sphere of responsibility—it appears that Congress's specific interests in this matter call for substantially more accommodation from the White House.

This is not a case in which Congress is merely curious about an appointment decision. Instead, legitimate and serious questions have been raised in at least two areas: whether U.S. Attorneys were replaced to affect the prosecution or non-prosecution of individual cases and whether full and accurate information has been provided to Congress with respect to this matter. Information already provided to Congress from the Justice Department raises significant questions that relate directly to the White House advisers whose testimony is sought in these matters.

Under these circumstances, where the essential principle of impartial prosecutorial discretion has been called into question, Congress has not just a right but indeed a constitutional responsibility to investigate the allegations. Because the constitutional interests of Congress are particularized and strong in this matter, they deserve to be given great weight in the accommodation process. In my view, the current offer on the table from the White House deprives Congress of the cooperation from the Executive Branch to which it is entitled.