"Executive privilege" claim in US attorneys' case

White House asserts sweeping power to defy the law

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The Bush administration has claimed virtually unlimited power to defy Congress and federal law in its rejection of congressional attempts to secure information related to the politically motivated firing of nine US attorneys.

The *Washington Post* reported Friday that officials in the administration have insisted that "the Justice Department will never be allowed to pursue contempt charges initiated by Congress against White House officials once the president has invoked executive privilege."

The report came one day after a House judiciary panel indicated that it is moving closer to bringing contempt charges against White House chief of staff Joshua Bolten over his refusal to turn over subpoenaed documents sought in the probe of the federal prosecutors' purge.

The House subcommittee voted 7-to-3 to reject the White House contention that Bolten's stonewalling is legitimized by Bush's assertion of executive privilege. The Bush administration has made the sweeping claim that virtually all communications involving decision-making within the administration are protected as confidential discussions involving the US president.

Similar claims have been made by the administration in rebuffing subpoenas issued by the Senate Judiciary Committee demanding documents from the Vice President Dick Cheney's office, the Justice Department and the National Security Council regarding the National Security Agency's secret and illegal domestic spying operation.

In addition, the White House has instructed Bush's former White House Counsel Harriet Miers to refuse to respond to a congressional subpoena to testify before the House Judiciary Committee on the attorney firings. It was Miers who initiated the process that led to the firings of the nine prosecutors, when she proposed that all 93 US attorneys be dismissed after Bush's reelection in 2004.

The administration and the Republican right have advanced a thesis known as the "unitary executive," under which all executive branch officials, including the US attorneys, are to be considered extensions of the president's personal power. This means that Congress cannot mandate an executive agency or department to carry out actions opposed by the president—such as initiating the prosecution of a top official for contempt of Congress.

"Those claims are not legally valid," the House panel's chairwoman, Linda Sanchez, a California Democrat, said after Thursday's vote. "We are hopeful that the White House will come to the conclusion that is better for them to cooperate than continue this confrontation."

Sanchez's claims were substantiated in a confidential report drawn up by the Congressional Research Service, Congress's non-partisan research arm, dated July 5 and entitled "Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments."

The document, while not issued publicly, was posted earlier this week on the web site of the Federation of American Scientists Project on Government Secrecy.

The report states in part that "recent appellate court rulings cast considerable doubt on the broad claims of privilege posited by the OLC (the Justice Department's Office of Legal Counsel) in the past and now by the Clement Memo." The document to which the report refers is a memorandum issued June 27 by Paul D. Clement, the Solicitor General and Acting Attorney General in matters dealing with the fired prosecutors, claiming virtual blanket immunity under executive privilege and baldly asserting that "congressional interest in investigating the replacement of US attorneys clearly falls outside its core constitutional responsibilities."

The document, drafted by the CRS's specialist in American public law, Morton Rosenberg, went on to cite two court rulings against the Clinton administration, the *Espy* and *Judicial Watch* cases, asserting that they "arguably have effected important qualifications and restraints on the nature, scope and reach of the presidential communications privilege."

In particular, Rosenberg insisted that these cases found that "the unavailability of the information elsewhere by an appropriate investigating authority" trumps an assertion of executive privilege.

The response of the Bush administration to such findings is to assert even greater extra-constitutional powers, essentially declaring that once executive privilege is claimed, the White House is answerable to neither the Congress nor the courts. It has made it clear that it is prepared to openly defy the law in order to impose this interpretation.

Under federal law, once the House or Senate issues a contempt citation against an administration official, it is submitted to the US attorney for the District of Columbia, "whose duty it shall be to

bring the matter before the grand jury for its action."

According to the *Post*, administration officials have made it clear that they intend to block this legally defined process.

"A US attorney would not be permitted to bring contempt charges or convene a grand jury in an executive privilege case," a "senior official" told the *Post*, affirming that his position was that of the administration. "And a US attorney wouldn't be permitted to argue against the reasoned legal opinion that the Justice Department provided. No one should expect that to happen."

The official added that the "constitutional prerogatives of the president would make it a futile and purely political act for Congress to refer contempt citations to US attorneys."

An "astonishing" assertion of presidential power

The *Post* article quoted George Mason University professor of public policy Mark J. Rozell, an expert on executive privilege, describing the administration's position as "astonishing" and a "breathtakingly broad view of the president's role in this system of separation of powers."

"What this statement is saying is the president's claim of executive privilege trumps all," Rozell added.

California Democratic Congressman Henry Waxman, chairman of the House Oversight and Government Reform Committee, the principal investigative committee of the House, told the newspaper that the administration's position "makes a mockery of the ideal that no one is above the law." Waxman added, "I suppose the next step would be just disbanding the Justice Department."

In fact, the White House position is of a piece with the federal prosecutors' firings to begin with. The purpose of the purge was to secure the transformation of the Justice Department into little more than a political agency of the White House and the Republican National Committee, using its police powers to influence the outcome of the 2006 and 2008 elections.

Ample evidence has already emerged from the investigation into the purge of US attorneys that those fired were targeted either for prosecuting corrupt Republican elected officials or for resisting Republican demands that they mount politically motivated investigations of Democratic candidates and pro-Democratic organizations on trumped-up vote fraud charges.

The only precedent that White House officials cited in their sweeping claims for executive privilege is a 1984 opinion issued by the right-wing lawyer Theodore Olson, who headed the Justice Department's Office of Legal Counsel under the Reagan administration and then served Bush as solicitor general between 2001 and 2004.

The case involved the refusal of then Environmental Protection Agency chief Anne Gorsuch Burford to turn over documents relating to a scandal over the Reagan administration's failure to enforce toxic waste cleanup statutes.

The document asserted: "The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual."

This extra-constitutional assertion was never tested in court, as the Reagan administration ended up turning over the documents and Burford, who was found in contempt of Congress, resigned.

Given the administration's blanket refusal to comply with federal law, recourse is left to Congress in the form of "inherent contempt." This statutory procedure, enacted by Congress in 1857, allows either the House or Senate to issue a contempt citation and then have the individual cited arrested by the body's sergeant-at-arms to be brought to the floor of the chamber for trial.

This authority was used only once, in 1934, when the Senate tried and convicted a former Postmaster, sentencing him to 10 days in jail. The action was subsequently upheld as constitutional by the US Supreme Court.

If there was ever an occasion for utilizing such a statute, it is manifestly presented by the Bush administration's brazen contempt for the law. There is little chance, however, that either the Senate or the House will invoke this power. Just as the Democratic leadership in both chambers refuses to employ the congressional "power of the purse" to stop funding the war in Iraq, so too it has no stomach for aggressively pursuing a constitutional confrontation with the White House.

The extraordinary assertion by the White House of quasi-dictatorial powers takes place in the context of public support for Bush and his administration having fallen to near record lows, with less than a third of the population expressing support for their policies, and with particularly bitter opposition to the war in Iraq.

Bush's claims might appear delusional in the light of his dwindling political support. But given the passivity and continuous capitulation of the ostensible political opposition in the Democratic Party, and cover-up of the constitutional implications by the media, the assertion by the White House of supra-legal powers assumes far more ominous significance.