With the fourth presidential impeachment hearings in our country’s history underway; the National Law Review thought it timely to look at some of the issues related to impeachment; specifically involving executive privilege and how the Trump administration’s invocation of executive privilege and how presidential immunity fits in historically with other impeachments in recent memory.

Sol Wisenberg, a Deputy Independent Counsel from the Starr Investigation, is a white-collar attorney who was written and spoken about the procedures surrounding impeachment and the constitutional law issues in play. He was generous with his time and spoke with the Lead Writer of the National Law Review, Eilene Spear, on executive privilege, recent litigation related to executive privilege, and the ever-present intersection of public opinion, constitutional law, and politics. Below are excerpts of the conversation, featuring Mr. Wisenberg’s analysis and opinion on the proceedings at hand. This is the second article in this series, the first focusing on comparing and contrasting the Clinton impeachment with the impeachment investigation into President Trump.
ES: Is it appropriate for Democrats to imply that if a witness in the impeachment investigation refuses to testify that they are trying to undermine the impeachment proceedings?

I mean, look, it's their show, they are the majority in the House. Adam Schiff came out and said “if you do not appear, then we'll infer that your testimony would have been favorable to our impeachment inquiry.” Those weren't his exact words, but that was the essence. Is it appropriate? I would say that it depends on the circumstances. Charles M. Kupperman, President Trump’s former deputy national security adviser, was subpoenaed by House Democrats to testify, but the White House, prior to Mr. Kupperman’s House testimony, said that the President had invoked Presidential Immunity, leaving Mr. Kupperman uncertain about how to proceed. Kupperman went to the federal district court and basically said: ‘Hey, I've got Congress issuing a subpoena and telling me I'm going to be in contempt if I don't answer. But I also went to the White House Counsel and he's sent me this letter here saying I'm absolutely forbidden to appear. I want to follow the law. Tell me what to do court.’ I believe he did exactly what you're supposed to do in that situation. Kupperman's lawsuit also raised questions about John Bolton's possible future testimony, as Kupperman's lawyer, Charles Cooper, also represents Bolton, President Trump’s former national security advisor. According to CNN, while it remains to be seen if Kupperman or Bolton will ultimately end up testifying, their actions are widely viewed as intertwined, with one source telling CNN that the two men are "simpatico."

As a purely legal proposition, Adam Schiff’s assertion about inferences to be drawn from refusing to testify or show up is preposterous in Kupperman’s case. The only time a trier of fact is allowed to make a negative inference from the invocation of a privilege is the Fifth Amendment privilege against self-incrimination, and even that is only in a civil proceeding. The Fifth Amendment gives a criminal defendant the right not to testify, and the judge and jurors are not permitted to take this refusal to testify into consideration when deciding whether he or she is guilty See Ohio v. Reiner 532 US 17 (2001). The people who aren't testifying or showing up at the House are not, so far, taking the Fifth. These are people saying, “I've got a constitutional argument or the President does, and that's why I shouldn't appear.” But keep in mind that impeachment is a political remedy. If a majority of the House wants to construe a refusal to appear or testify, even on Constitutional grounds, against the President, they are going to do it.

A Bit of Background:

Executive privilege has been asserted frequently by past presidents, though it’s not explicitly written into the Constitution. George Mason University professor Mark Rozell explained in a 1999 law review article that executive privilege is “the right of the president and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.” This power can be used in two circumstances, he continues: “(1) certain national security needs and (2) protecting the privacy of White House deliberations when it is in the public interest to do so.” It’s the second part that is especially valuable, as it allows presidential advisors to freely speak their minds without the threat of a subpoena. The problem is it’s not
precisely clear who this privilege covers.

In *United States v. Nixon, 418 U.S. 683 (1974)*, the Supreme Court addressed a subpoena *duces tecum* during the Nixon impeachment process to produce documents, including full copies of the Watergate tapes which contained meetings between President Nixon and others indicted in Watergate situation or had ties to the Nixon administration. President Nixon did turn over edited transcripts of some of the conversations included in the subpoena. Before the Supreme Court, Nixon claimed he had an absolute executive privilege to protect communications between "high government officials and those who advise and assist them in carrying out their duties." The Supreme Court held presidential privilege as to materials subpoenaed for use in a criminal trial did not override the needs of the judicial process on the grounds of a generalized interest in confidentiality. The large difference is that the Nixon case involved the subpoena of documents, the Trump impeachment subpoenas addressed above involve subpoenas for live testimony only.

Also, in *U.S. v. Nixon’s* majority opinion, Chief Justice Burger stated, "[n]either the doctrine of *separation of powers*, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances." The immunity claimed by both President Trump and other presidents comes from the position of the executive branch as a co-equal branch alongside the judiciary and legislative branches.

**ES: What do Executive Privilege and Absolute Presidential Immunity cover and do they apply to people other than the president?**

Executive privilege is invoked in the name of the president, but it can cover any executive officer. It is a privilege recognized by the Supreme Court. Presidential immunity purports to cover anyone who works in the White House, or the Executive Office of the president. The theory is that Congress can no more summon a White House employee to appear than it could summon the president. One reason officials like Kupperman are seeking clarification is that executive privilege and presidential immunity in impeachment proceedings are not open and shut issues. Every president *at least since Nixon has claimed immunity*—for himself and his key White House aides—from even having to show up in the House or Senate to answer questions, claiming that White House employees are in the same position as the president and are immune from having to appear. This doctrine makes me shake my head a little, and, as noted, is far from settled law in the courts.

No court has ever accepted the absolute immunity argument, to my knowledge. Only *one court has ruled directly on it*, and that was in the George W. Bush administration. *Committee on Judiciary v. Miers 575 F. Supp. 2d 201 (D.D.C. 2008)* addressed a House Judiciary Committee’s subpoena to Harriet Miers, former Counsel to President Bush, seeking to compel her to produce documents and to appear and testify about the forced resignation of U.S Attorneys, and that court ruled against the White House. In the Harriet Miers case, federal district judge John Bates stated “there is no judicial support whatsoever” that a president’s advisers have absolute
immunity from testimony, and that such a view “would eviscerate Congress’ historical oversight function.” But the case was settled and has no precedential value, except in Bates’ court. I think the opinion is of some significance, however, because Bates was a Bush appointee and in general a strong supporter of executive privilege.

**ES:** Is there any type of immunity from testimony that may apply if executive privilege isn't applicable?

There are other forms of privilege that might come up. I suppose somebody could take the Fifth, you can take the Fifth right in front of the House committee. So that's always available. There's attorney-client privilege. To be precise; this idea that if you work at the White House—and are therefore in the same shoes as the president—you don't even have to show up, that's technically not executive privilege. That is a presidential immunity argument based upon the separation of powers. For example, you could put that to a judge and the judge could throw it out, say there is no such thing, and the court rejects that doctrine. Then the individual could go over to Congress and get asked a question, and he could claim executive privilege and he would be completely within his rights.

The Obama administration took the identical position with David Simas, an employee in the Obama White House, that President Trump did in the case of Kupperman and former White House Counsel Don McGahn. Simas was head of the Office of Political Strategy and Outreach and was subpoenaed in relation to Congressional oversight of Hatch Act compliance. White House Counsel W. Neil Eggleston asserted executive immunity, defying a subpoena from House Oversight and Government Reform Chairman Darrell Issa. His letter referenced the Office of Legal Counsel’s opinion, saying: “The Executive Branch’s longstanding position, reaffirmed by numerous Administrations of both political parties, is that the President’s immediate advisers are absolutely immune from the congressional testimonial process.” There are examples in every administration, and each party wants to find examples where the other party did the same or a more extreme version of what they are trying to do because people forget and people are partisan.

**ES:** That said, how do politics impact the perception of a President’s claim of executive privilege?

Once again, it depends on the circumstances. In the context of an impeachment inquiry with an unpopular President and an opposing party in charge of one or both branches, politics can affect absolutist doctrines fairly quickly. Look at Nixon again. In April 1973, before the Senate Watergate Committee hearings began, he vowed that his aides would not testify. Nixon’s Attorney General, Dick Kleindienst, told Senator Ed Muskie, “You do not have the power to compel me to come up here if the President directs me not to, and even if you would attempt to compel me, I would not come here.” If the Senate didn’t like it, Kleindienst smirked to Senator Sam Ervin, “you have a remedy, all kinds of remedies: cut off appropriations, impeach the President.” That was in April. By May 22, with public opinion starting to move against him, Nixon completely capitulated. Ervin called Nixon’s bluff, referring to his broad claims of Executive privilege as “executive poppycock.” Nixon didn't have
Trump's political power. He had short coattails and both houses of Congress were in Democratic hands. Trump is stronger with his House and Senatorial base, and his party in control of the Senate, so he can pull off that attitude for now. But again, attitudes and public opinion can change quickly, and we've already seen the needle move a little bit in terms of public opinion in the last week alone.

You also have the issue of aides, former aides, and Executive Branch officials who simply ignore Presidential directives not to appear or testify. This happened to Nixon, as people like John Dean and Jeb Magruder finally started telling the truth to DOJ Prosecutor Earl Silbert, and ultimately to Ervin's Watergate Committee. It is happening to Trump now with some State Department and DOD officials—and at least one mid-level OMB employee—talking to the House. I believe this is how Madison and some of the other Framers expected things to play out. It is checks and balances at work. It is one thing to have a nice little formalistic theory of executive privilege or presidential immunity. It is quite another to try to enforce it in the real rough-and-tumble world of politics.

Many thanks again to Mr. Wisenberg for his time, insights and perspective.

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