

U.S. House of Representatives

Committee on the Judiciary

Washington, DC 20515-6216

One Hundred Fifteenth Congress

June 2, 2017

Donald F. McGahn II
Office of White House Legal Counsel
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. McGahn,

As you know, James Comey, former director of the Federal Bureau of Investigation, is scheduled to testify before the Senate Select Committee on Intelligence next Thursday. He has been requested to testify before the House as well. We do not know what Mr. Comey plans to say—but we expect he will shed light on the circumstances of his dismissal, as well as on reports that President Trump asked Mr. Comey to declare his loyalty¹ and to drop the case against former National Security Advisor Michael Flynn.² It is critical that the American public hears this testimony.

This morning, in a televised interview, White House adviser Kellyanne Conway acknowledged that Mr. Comey's testimony will provide a "clarifying moment," but refused to rule out the possibility that President Trump would invoke executive privilege in an attempt to block his appearance.³ This afternoon, White House Press Secretary Sean Spicer conveyed similar sentiments, arguing that the question of privilege has "got to be reviewed."

We write to remind you that any such assertion of privilege is almost certainly baseless, particularly given that Mr. Comey is no longer employed by the Trump Administration. We urge you in the strongest possible terms to counsel the President accordingly. Any assertion of privilege by the President would be seen as an effort to obstruct the truth from both Congress and the American people.

Executive privilege is a judicial doctrine designed, in certain narrow cases, to protect the separation of powers and to prevent interference in the internal decision-making process at the

¹ Michael S. Schmidt, *In a Private Dinner, Trump Demanded Loyalty. Comey Demurred.*, N.Y. TIMES, May 11, 2017.

² Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES, May 16, 2017.

³ Courtney Connley, *Trump counselor Kellyanne Conway won't say whether president believes global warming is a hoax*, ABC NEWS, June 2, 2017.

White House. Two types of executive privilege are potentially applicable under relevant court decisions.

The “deliberative process privilege” protects pre-decisional material that would reveal “advisory opinions, recommendations, and has been read to protect certain deliberations comprising part of a process by which governmental decisions and policies are formulated.”⁴ The deliberative process privilege is not absolute. Congress can overcome it by a sufficient showing of need.⁵ For example, the D.C. Circuit Court of Appeals has held the privilege is overcome “where there is reason to believe the documents sought may shed light on government misconduct.”⁶

The Court has also recognized a general privilege for the President’s high-level communications—often called the “presidential communications privilege.”⁷ “A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way may would be unwilling to express except privately.”⁸ But this privilege is also not absolute. “[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications . . . can sustain an absolute, unqualified Presidential immunity privilege of immunity.”⁹

In the case of Mr. Comey, neither aspect of executive privilege would likely apply. Each of the relevant and ongoing investigations has focused on the question of collusion between President Trump’s campaign and the Russian government. Given the manner in which Mr. Comey was dismissed, that inquiry has expanded to include questions of obstruction of justice. Mr. Comey’s testimony may shed light on government misconduct. The deliberative process privilege would not survive these circumstances.

Similarly, given the seriousness of the official investigation, the Nixon White House was forced to “yield to the demonstrated, specific need for evidence in a criminal trial.”¹⁰ Today’s

⁴ *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff’d*, 384 F.2d 979 (D.C. Cir. 1967).

⁵ *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d. 630 (D.C. Cir. 1992).

⁶ *In re: Sealed Case*, No. 96-3124 (D.C. Cir. 1997).

⁷ *U.S. v. Nixon*, 418 U.S. 683 (1974).

⁸ *Id.* at 709.


⁹ *Id.* at 705.

¹⁰ *Id.* at 714.


Congress has a demonstrated, specific need for Mr. Comey's testimony—and any invocation of the presidential communications privilege would likely fail as well.¹¹

In short, use of executive privilege to block Mr. Comey's testimony would be a mistake. We caution you that it would fail on the merits. We also warn you that the public would likely—and perhaps rightly—view the decision as additional evidence of obstruction of justice.

Sincerely,



John Conyers, Jr.
Ranking Member
Committee on the Judiciary



Jerrold Nadler
Ranking Member
Subcommittee on Courts, Intellectual
Property, and the Internet



Zoe Lofgren
Ranking Member
Subcommittee on Immigration and
Border Security



Sheila Jackson Lee
Ranking Member
Subcommittee on Crime, Terrorism,
Homeland Security, and Investigations

¹¹ There may be other factors that complicate President Trump's use of the presidential communications privilege in this case, including but not limited to his decision to terminate Mr. Comey despite any advice he may have received from the FBI Director over time. The President has also made various public comments about certain conversations he may have had with Mr. Comey, which may have the effect of waiving the privilege altogether with respect to those communications



Steve Cohen

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Subcommittee on the Constitution and
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David N. Cicilline

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Subcommittee on Regulatory Reform,
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Jamie Raskin

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