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Comey And Executive Privilege — What Could Have Been

By **Todd Presnell**

Law360, New York (June 5, 2017, 6:40 PM EDT) -- Former FBI Director James Comey will testify before the Senate Intelligence Committee on June 8, 2017, as part of the committee's investigation into Russia's influence on the 2016 presidential election. And the committee's inquiry will certainly include questions about Director Comey's conversations with President Donald Trump, including the reported discussion[1] where the president, referring to the FBI's investigation into former National Security Advisor Michael Flynn, told Comey: "I hope you can let this go."



Todd Presnell

The President's Decision on Executive Privilege

As Comey's appearance date neared, several questioned whether President Trump would invoke the "executive privilege" to prevent Comey from testifying about their conversations. Late Friday, June 2, the New York Times, citing unnamed "senior administration officials," reported[2] that the president will not invoke executive privilege to prevent Comey's testimony, but that "Mr. Trump could still move to block the testimony next week." The Wall Street Journal, on the other hand, reported[3] that "President Trump is weighing his legal options" about Comey's upcoming testimony.

On Monday, White House Spokeswoman Sarah Huckabee Sanders announced that, while "[t]he President's power to assert executive privilege is well-established," President Trump would not invoke the privilege to block any of Comey's testimony.[4] Regardless of whether the privilege is "well established," the president's decision certainly avoided a protracted legal battle. But was the president's decision governed more by legal instability of his privilege claim or the political fallout even if the privilege claim ultimately proved successful?

Executive Privilege

Throughout American history, executive-branch officials have asserted the all-encompassing "executive privilege" to resist disclosing information to the legislative and judicial branches. These nondisclosure efforts fell into a variety of privilege categories, such as privileges precluding the disclosure of military secrets, state secrets, law-enforcement investigations, government-informers' identities, presidential communications, and the deliberative communications of executive agencies.

It is widely accepted that executive privileges improve governmental decision-making by permitting executive-branch officials to receive candid advice from subordinates. Subordinates are less likely to freely communicate their advice without the executive privilege's protection.

But this purpose necessarily conflicts with the long-held policy that the public has a right to examine public records. This conflict produces a heightened tension that courts must navigate when deciding whether an executive-privilege subcategory protects government information from disclosure.

The two subcategories of executive privilege potentially pertinent to the Trump-Comey interactions

are the deliberative-process privilege and the presidential-communications privilege. Many confuse or conflate these subcategories of executive privilege, so it is important to know the precise differences.

Although both are subcategories of the executive privilege designed to protect executive-branch decision-making, the deliberative-process privilege protects the decision-making of executive branch officials generally, while the presidential-communications privilege specifically protects the president's decision-making process.

The deliberative-process privilege protects information that is both predecisional, meaning information communicated prior to an official's decision, and deliberative, meaning information shared as part of the give-and-take of the decision-making process. As an example, last year the U.S. District Court for the District of Columbia ruled that the deliberative-process privilege protected some, but not all, of the attorney general's documents related to the "fast and furious" investigation.[5]

Presidential-Communications Privilege

The presidential-communications privilege is the executive-privilege subcategory that would have governed testimony about the Trump-Comey communications. But what is its scope?

As far back as Chief Justice John Marshall's opinions in *Marbury v. Madison* and the treason-related trials of Vice President Aaron Burr, federal courts have recognized that presidential communications deserve some form of protection. The legal debate over the scope of the presidential-communications privilege ripened during the Watergate era.

In 1974, the U.S. Supreme Court, in *United States v. Nixon*,[6] faced the question of whether the privilege protected President Nixon's audiotapes from production in a criminal trial involving several individuals indicted by the Watergate grand jury. The court ruled that there is a presumptive privilege for presidential communications that is "inextricably rooted in the separation of powers under the Constitution." [7] The court limited the privilege's application by holding that the privilege is qualified, not absolute, meaning the privilege protection "must yield to the demonstrated, specific need for evidence." [8]

In an influential decision involving the Office of Independent Counsel's investigation into former Agriculture Secretary Mike Espy, the U.S. Court of Appeals for the D.C. Circuit ruled that, to overcome the presumptively privileged nature of presidential communications, a party must provide a "focused demonstration of need, even when there are allegations of misconduct by high-level officials." [9] This standard means that a party seeking the information must show that the evidence sought (1) likely contains important evidence and (2) is not available without due diligence elsewhere. [10]

So, in sum, the presidential-communications privilege protects from disclosure communications that the president and/or his top advisers made in the performance of the president's responsibilities. The privilege is qualified and may be overcome upon a sufficient demonstration of need and that this evidence is not available from alternative sources.

What About Waiver?

The presidential-communications privilege, like all evidentiary privileges, may be waived by disclosing the putatively protected information to third parties. If a court finds waiver, then it need not go through the demonstration-of-need analysis and will simply allow the testimony to go forward.

The waiver standard is higher for the presidential-communications privilege. And even if the president waives the privilege as to one document or one conversation, that will not result in waiver as to related documents or related conversations. [11]

In the Trump-Comey situation, there is some evidence of waiver regarding their purported conversation. In his letter [12] terminating Comey as FBI director, President Trump stated that he appreciated Comey telling him, "on three separate occasions," that the FBI was not investigating

him. And, in a subsequent interview with NBC News' Lester Holt, the president discussed this conversation in more detail.[13]

Long Legal Process Avoided

If President Trump had invoked the presidential-communications privilege, how would the legal drama have played out? While some suggest that Comey could have ignored the president's privilege assertion and disclosed their conversations, this seems unlikely. The privilege belongs to the president, not Comey, and Comey would likely have refrained from testifying until a court ordered him to do so.

If it wanted to challenge the president's privilege assertion, the Senate Intelligence Committee would have filed an action in the D.C. federal court seeking to compel Comey's testimony. A legal battle would have ensued, with the court determining the committee's need for the testimony relative to its Russian-influence investigation and whether it may obtain similar evidence elsewhere. And with an appeal likely, the ultimate decision would have been delayed for months, if not longer.

Was the President's Decision Legally and Politically Motivated?

Whether President Trump has a legal basis to invoke the privilege is an entirely different question than whether he should invoke the privilege. Lawyers and their clients frequently balance these often conflicting questions when deciding to invoke evidentiary privileges, such as the attorney-client privilege. For example, a corporation may correctly claim that the attorney-client privilege protects its internal investigation, but nevertheless decide not to invoke it and produce the report to a governmental agency.

Here, White House legal advisers could — and maybe did — opine that the president had a good-faith legal basis to invoke the executive privilege over Comey's testimony. But if the president had invoked the privilege, he most certainly would have faced political and public-relations repercussions, with many suggesting that the president's privilege assertion was an attempt to "cover up the truth." As an example, just before the White House announced the decision Monday afternoon, House Minority Leader Nancy Pelosi, D-Calif., said that asserting the privilege "would be very incriminating for the President." [14]

Whether to face these repercussions is a strategic political question, not a legal one. And it is secondary, with the threshold question remaining — whether the president has a legal basis to invoke the privilege.

From a legal perspective, the president certainly could have asserted the executive privilege, but would it hold up in court? The Senate Intelligence Committee would have had a strong argument that it needed the testimony for its investigation, but the more difficult question would have been whether the committee could have obtained the evidence from an alternative source.

If the evidence sought is the president's purported influence over the Flynn investigation, then there is likely no alternative source to that conversation. But if the evidence is Russian influence in a broader sense, then perhaps so.

The court, however, would have never reached these questions if it found that the president waived the privilege by disclosing the content of his discussions with Comey. While waiver of the presidential-communications privilege is more difficult to prove, and limited even if proven, the committee would have had a strong argument that the president waived the privilege at least to his conversation with Comey about the FBI's investigation.

In the end, a certain political firestorm, an unstable legal position, and protracted litigation likely combined to cause the president's decision. But we likely will not know until the memoirs are written.

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[1] https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html?_r=1

[2] <https://www.nytimes.com/2017/06/02/us/politics/trump-comey-russia.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>

[3] <https://www.wsj.com/articles/trump-considers-trying-to-block-comeys-testimony-1496442380>

[4] <https://www.nytimes.com/2017/06/05/us/politics/trump-will-not-block-comey-from-testifying-white-house-says.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region@ion=top-news&WT.nav=top-news>

[5] Committee on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101 (D.D.C. 2016).

[6] 418 U.S. 683 (1974).

[7] *Id.* at 708.

[8] *Id.*

[9] *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

[10] *Id.* at 754.

[11] *Id.* at 740–41.

[12] <https://presnellonprivileges.files.wordpress.com/2017/06/trump-letter-firing-comey.pdf>

[13] You may view the NBC News clip at this link. <https://www.youtube.com/watch?v=jecb7qG8ogI&feature=youtu.be>

[14] <http://www.cnn.com/2017/06/05/politics/nancy-pelosi-james-comey-testimony/index.html>

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