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PRIVILEGE CLAIMS: Eric Holder Jr., right, advised Barack Obama that documents subpoenaed by the House were subject to the deliberative-process privilege. William French Smith, below left, gave similar advice to Ronald Reagan in 1981.

An overbroad executive privilege claim

Like the legal opinion by William French Smith on which it relies, Obama's invocation of privilege is poorly reasoned.

BY LOUIS FISHER

In a June 19 letter, Attorney General Eric Holder Jr. asked President Obama to deny documents to the House Committee on Oversight and Government Reform regarding the Fast and Furious gun-running program. A day later, Obama invoked executive privilege. On that same day, the committee voted Holder in contempt, and the full House held him in contempt on June 28.

The June 19 letter relies heavily on a Justice Department legal opinion issued in 1981, involving a strikingly similar dispute. After a House oversight subcommittee subpoenaed the administration for documents, Attorney General William French Smith provided legal and constitutional reasons why President Reagan should invoke executive privilege. He did so. Like Obama, it was Reagan's first claim of execu-



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tive privilege. The subcommittee proceeded to hold Secretary of the Interior James Watt in contempt.

Smith's opinion was poorly reasoned throughout, politically and legally. He justified executive privilege because the documents related to "sensitive foreign policy considerations." Foreign policy is not an

exclusive power of the president or the executive branch. The dispute in 1981 involved a reciprocity provision in the Mineral Lands Leasing Act, in this case affecting Canada. Article I of the Constitution assigns foreign commerce expressly to Congress. The Justice Department should have been able to figure that out.

Smith claimed the documents needed to be withheld from the subcommittee in order to protect the deliberative process, especially "predecisional, deliberative memoranda." Holder advised Obama that the documents subpoenaed by the House committee "were generated in the course of the deliberative process." Congress often gains access to predecisional, deliberative memorandums in the executive branch. Both Smith and Holder gave such documents to congressional committees and were prepared to surrender others to reach an accommodation. Holder told Obama that

the committee had received “all documents” that involved the preparation of a February 4, 2011, letter to Congress. Writing to Chairman Darrell Issa (R-Calif.) of the House Oversight and Government Reform Committee on June 20, 2012, Deputy Attorney General James Cole said the department had given his committee “1,364 pages of deliberative documents.” When committees receive some deliberative documents but not others, they wonder if the materials withheld are embarrassing or incriminating.

As a final point, Smith argued that Congress is more entitled to documents if it is part of a “legislative task” and less entitled if “for oversight purposes.” He said congressional oversight “is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws.” Similarly, Holder relied on the supposed distinction between “a legislative function” and legislative oversight. The first major investigation by Congress (General Arthur St. Clair’s military defeat in 1792) was not conducted for the purpose of legislation. It was oversight. The House received all the documents it requested. The U.S. Supreme Court in *Watkins v. U.S.* (1957) recognized that the power of Congress to conduct investigations is not restricted to legislative tasks. It includes “probes into departments of the Federal Government to expose corruption, inefficiency, or waste.” Congress could easily neutralize the Smith/Holder theory by introducing a bill whenever it wants to conduct oversight.

In response to Smith’s legal position, the subcommittee prepared a contempt citation against Watt. On February 9, 1982, it voted, 11-6, to hold him in contempt. By that time, all but seven of the 31 subpoenaed documents had been given to the subcommittee. On February 25, the parent House Committee on Energy and Commerce voted, 23-19, for contempt. White House Counsel Fred Fielding offered to brief committee members on the seven documents, but they rejected his offer.

Although Watt announced dramatically he would rather go to jail than surrender the remaining materials, those documents were reviewed by subcommittee members. They were given four hours to examine the docu-

ments and take notes. Marc L. Marks, ranking Republican on the subcommittee, found “nothing sensitive” in the documents and believed Watt would have shared them with lawmakers had the White House not intervened. Marks attributed the impasse to “an irrational decision made by the White House, put into effect by a President who I cannot believe understood the ramifications of what he was doing.”

Holder advised Obama that releasing certain Fast and Furious documents to the committee would “inhibit the candor” required for executive branch deliberations. This popular argument is vastly overplayed. Nothing prevents executive officials from speaking frankly and honestly to the president and agency heads. The problem is usually the opposite: a calculated decision to withhold candor in favor of being a “team player.” President Lyndon B. Johnson esca-

about Bush and one on Obama, letting us know what is said in the highly confidential Situation Room about presidential decisions to commit troops to Iraq and Afghanistan. He gained access to classified documents, “secure” phone conversations and “secure” videos. Moreover, a recent three-page article in *The New York Times* on May 29 provides a front-row seat on how Obama decides which suspected terrorists to kill with armed drones.

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lated the ruinous war in Vietnam without pushback from his subordinates. No one used candor to tell Obama that signing an executive order on his second day in office to close the detention center in Guantánamo Bay, Cuba, was likely to backfire and cost him politically.

The deliberative-process privilege, always of questionable merit, has even less credibility in recent years. Presidents, including George W. Bush and Barack Obama, work closely with the press to explain how decisions on national security and domestic policy are reached. Bob Woodward wrote three books