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## THE 9/11 COMMISSION AND THE WHITE HOUSE: ISSUES OF EXECUTIVE PRIVILEGE AND SEPARATION OF POWERS

DANIEL MARCUS\*

### INTRODUCTION

The National Commission on Terrorist Attacks upon the United States, popularly known as the 9/11 Commission,<sup>1</sup> came into being at the end of 2002 after a long and tortuous legislative process. The families of the victims of the 9/11 attacks, who felt that their Government failed to protect their family members on 9/11, trusted neither the Executive Branch nor Congress to conduct an investigation of the attacks and their causes.<sup>2</sup> They lobbied Congress persistently for the creation of an independent Commission that would investigate the causes of the 9/11 attacks and assign blame to those in the Government who had failed to prevent the attacks.<sup>3</sup> The Bush Administration, citing the need for national unity and resolve in the aftermath of the attacks and in the new “War on Terrorism,” resisted creation of an independent Commission.<sup>4</sup> Additionally, the Republican leadership in Congress tried to head off legislation by creating, in the spring of 2002, a joint inquiry by the House and Senate Intelligence Committees into the intelligence failures preceding the 9/11 attacks.<sup>5</sup>

This effort did not appease the organizations of 9/11 families, and their constant pressure for an independent investigation eventually paid off. In July 2002 the House, with most Republican

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1 See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* xv (2004) [hereinafter 9/11 Commission Report].

2 See Audrey Hudson, *House Approves Panel on September 11 Attacks*, WASH. TIMES, July 26, 2002, at A14.

3 See *id.*

4 See *id.* (observing that the White House reiterated its support for the ongoing joint inquiry by the House and Senate Intelligence panels while opposing the proposed independent panel).

5 See *id.* (noting that House Speaker Dennis Hastert, Majority Leader Dick Armey, Majority Whip Tom DeLay, and Rep. Porter Goss, chairman of the Select Committee on Intelligence, believed that the newly created Commission would cause a further diversion of essential personnel from the ongoing joint inquiry by the House and Senate intelligence panels).

members in opposition, passed a bill creating the Commission, and Senators McCain and Lieberman pressed a companion bill in the Senate.<sup>6</sup> With the midterm elections approaching, the Administration negotiated a compromise bill with McCain and Lieberman, which was passed by the Senate, was accepted by the House, and became law shortly after the November 2002 elections.<sup>7</sup>

The Commission created by the 2002 legislation was an unusual, hybrid institution that reflected the political compromises made during the legislative process. The President appointed its Chairman, while the Democratic leaders of the House and Senate appointed its Vice Chairman.<sup>8</sup> The Senate and House leadership selected the other eight Commissioners—four by the Republican leaders and four by the Democratic leaders.<sup>9</sup> The legislation also directed the Commission to submit its reports to both the President and Congress.<sup>10</sup> And the legislation specified—fatefully, it turned out—that the Commission was “established in the legislative branch.”<sup>11</sup>

The statute directed Executive Branch agencies to cooperate fully with the Commission and to furnish it with the information it requested.<sup>12</sup> But an unusual provision demanded by the distrustful family organizations granted the 9/11 Commission the power to subpoena witnesses and documents and to bring civil actions in federal district court to enforce those subpoenas.<sup>13</sup> While the Commission proceeded generally by document requests and voluntary interviews of witnesses, it found it necessary to issue subpoenas to Government agencies on three occasions. The *in terrorem* effect of those subpoenas and the specter of additional subpoenas turned out to be an important lever for getting documents and testimony.<sup>14</sup>

Early in the Commission’s existence, the Commissioners and staff concluded that the Commission would need access to a wide range of sensitive (and classified) national security policy memoranda and decisional documents from the Clinton and Bush White Houses. Most of these classified documents were subject to possible claims of executive privilege and were rarely, if ever, made available to Congressional committees. So the Commission’s strategy for obtaining access to these documents, and to testimony by policymaking officials about them, was therefore shaped in the context of executive privilege doctrine.

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6 See Kathy Kiely, *9/11 Widows Win Support for Commission*, USA TODAY, Aug. 2, 2002, at 6A (stating that the main purpose behind creating the 9/11 commission was to assure a broader investigation rather than to stymie current efforts underway in Congress).

7 See David Firestone, *White House Yields on a 9/11 Inquiry Backed by Congress*, N.Y. TIMES, Nov. 15, 2002, available at <http://www.nytimes.com/2002/11/15/politics/15COMM.html?pagewanted=1> (noting the families’ public complaints pressured President Bush to drop his initial opposition to a September 11 commission).

8 Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306 § 603, 116 Stat. 2408 (2002).

9 *Id.*

10 *Id.* § 604.

11 *Id.* § 601.

12 *Id.* § 605.

13 *Id.* § 605.

14 See PHILIP SHENON, *THE COMMISSION: THE UNCENSORED HISTORY OF THE 9/11 INVESTIGATION* 203, 208, 307 (2008) (discussing the Commission’s subpoenas of the Federal Aviation Administration (FAA), the North American Aerospace Defense Command (NORAD), and the City of New York).

## LAW AND LORE ON EXECUTIVE PRIVILEGE

Although there is relatively little “law” on executive privilege, the doctrine has been around for a long time. It has common-law origins, but it also has a constitutional basis in the doctrine of separation of powers.<sup>15</sup> Proponents of the doctrine believe that if the President is to carry out his Article II responsibilities,<sup>16</sup> he needs to be able to receive confidential advice from officials such as his National Security Advisor.<sup>17</sup> The theory underlying executive privilege is the same as for other common-law privileges: Unless such communications are protected from disclosure, the candor necessary for the President (or the lawyer, the doctor, or the priest) to do his job will be fatally impaired.<sup>18</sup> In *Marbury v. Madison*, Chief Justice Marshall recognized, in passing, the need for such a privilege: For a court to intrude into “the secrets of the cabinet,” he wrote, would give the appearance of “intermeddl[ing] with the prerogatives of the executive.”<sup>19</sup>

The only Supreme Court decision to discuss the doctrine of executive privilege in any detail – and the one that certifies its constitutional pedigree—is the Watergate tapes case, *United States v. Nixon*.<sup>20</sup> The Court recognized that separation of powers, and the need of the President for candid and objective advice from those on whom he relies to carry out his Article II powers, imply an executive privilege doctrine.<sup>21</sup> But separation of powers, said Chief Justice Burger for a unanimous Court, also means that the executive privilege is not absolute: The courts under Article III have a constitutional duty to decide cases (and, presumably, Congress under Article I has a similar responsibility to legislate and conduct oversight of the Executive Branch).<sup>22</sup> This means that the President does not have an “absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”<sup>23</sup> Rather, the claim of executive privilege must be balanced against the need of the courts (or Congress) for the information.<sup>24</sup> In the case of the Watergate tapes, the Court held that the need of the criminal justice system for information relevant to the trials of the Watergate defendants<sup>25</sup> outweighed the President’s claim of privilege.<sup>26</sup>

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15 See *United States v. Nixon*, 418 U.S. 683, 708 (1974).

16 U.S. CONST. art. II.

17 See *Nixon*, 418 U.S. at 708.

18 *Id.*

19 *Marbury*, 5 U.S. at 170 (1803).

20 418 U.S. 683 (rejecting Nixon’s claim, with respect to audio tapes of meetings between Nixon and his aides regarding the Watergate burglary, to “an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances”).

21 *Id.* at 708.

22 *Id.* at 704.

23 *Id.* at 706 (finding that absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the important interest in confidentiality of Presidential communications is significantly diminished).

24 *Id.* at 711–12 (stating that the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities must be weighed against the inroads of such a privilege on the fair administration of criminal justice).

25 *Id.* at 714.

26 *Id.* at 706 (characterizing the claim of executive privilege as based on an “undifferentiated claim of public interest in the confidentiality of [the taped Oval Office] conversations”).

Of course, the Nixon tapes contained discussions of politics, enemies' lists, and criminal activities, rather than high policy matters relating to national security. And the Court, in dictum, suggested that executive privilege would weigh much more heavily in the balance were the latter the case.<sup>27</sup>

The *Nixon* dictum about national security was taken very seriously in the leading lower court decision on executive privilege, *In re Sealed Case*.<sup>28</sup> This case involved grand jury subpoenas for White House documents by the Independent Counsel (IC) investigating Secretary of Agriculture Mike Espy for unlawfully accepting gifts from entities regulated by the Department.<sup>29</sup> The White House Counsel's Office had conducted its own investigation of the Espy matter to advise the President on what to do about him, and the IC requested the report and supporting documents from that investigation.<sup>30</sup> After negotiations failed to satisfy the IC, he had the grand jury issue the subpoena, and the President claimed executive privilege as a basis for refusing to comply.<sup>31</sup> Judge Wald, for a unanimous three-judge panel, took the occasion of having to resolve the subpoena issues to write a comprehensive essay on the nature and scope of executive privilege.<sup>32</sup>

Judge Wald found that there are two overlapping privileges—a Presidential communications privilege recognized by the Supreme Court in *Nixon*, flowing from the separation of powers, and a traditional common-law “deliberative process” privilege for all Executive Branch decision-making.<sup>33</sup> She set forth a hierarchical scheme for deciding executive privilege questions, with Presidential communications receiving greater protection than non-Presidential deliberative process communications,<sup>34</sup> and with national security/foreign policy communications receiving greater protection than communications about the kinds of tawdry matters involved in *Nixon* or the Espy investigation. The *Nixon* decision, Judge Wald stated, “implied . . . that particularized claims of privilege for military and state secrets would be close to absolute.”<sup>35</sup> Finally, and significantly for the later 9/11 Commission context, Judge Wald broadly defined “Presidential communications” to include not only communications to or from the President, but also communications to the President's advisors in the White House for the purpose of providing advice to the President.<sup>36</sup> Thus, interviews by the White House Counsel to obtain information for his report to the President on the

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27 *Id.* at 707 (calling for great deference to the President's need for confidentiality in his conversations with his advisors when tied to a claim of need to protect sensitive national security, diplomatic, or military secrets).

28 121 F.3d 729 (D.C. Cir. 1997).

29 *Id.* at 734–35.

30 *Id.* at 734–36 (arguing that the report, which concluded that no further executive action needed to be taken against Espy since he had announced his resignation, contained information which could shed light on governmental misconduct).

31 *Id.* at 735.

32 *Id.* at 742–758.

33 *Id.* at 745 (finding that the first applied to the decision-making of the President specifically, while the other applied to decision-making of executive officials generally).

34 *Id.* at 745–46 (stating that the public-private interest balancing is more ad hoc in the context of the deliberative process privilege, while a party seeking to overcome the presidential privilege must always provide a focused demonstration of need).

35 *Id.* at 743 n. 12.

36 *Id.* at 751–52.

Espy matter were Presidential communications.<sup>37</sup> In the case of such Presidential communications, the court held, a federal prosecutor in a criminal case must show that the evidence sought is directly relevant to the case and is “practically unavailable elsewhere.” Finally, Judge Wald cautioned that the balancing test might be different in the case of Congressional demands for Presidential communications.<sup>38</sup>

Unsurprisingly, the Office of Legal Counsel (OLC) of the Department of Justice, in a series of opinions in recent decades, has taken a broad view of the President’s authority to assert executive privilege to withhold from Congress documents the disclosure of which, in the President’s judgment, would be harmful to national security or foreign relations.<sup>39</sup> OLC has endorsed a process whereby the Executive Branch seeks to negotiate compromise arrangements to “accommodate” Congressional requests or demands for documents, so as to avoid the need for the President to claim executive privilege.<sup>40</sup> But it has held steadfast to the proposition that the President, in the last analysis, has the power to do so. Similarly, OLC has opined that under the separation of powers, Congress may not compel White House officials who advise the President to appear to testify at Congressional hearings—at least on policy matters.<sup>41</sup> These opinions rely not only on executive privilege notions, but also on the need to prevent Congress from impairing the functioning of the Presidency by diverting the President’s advisors from their White House duties.<sup>42</sup>

#### THE 9/11 COMMISSION AND THE WHITE HOUSE

The White House had two major concerns about sensitive policy documents requested by the Commission. The first was that their disclosure to the Commission could lead to a *public* disclosure harmful to national security.<sup>43</sup> In theory, that was not a problem: The sensitive documents were all

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37 *Id.* at 758.

38 *Id.* at 753.

39 *See Assertion for Executive Privilege for Documents Concerning Conduct of Foreign Relations With Respect to Haiti*, 1996 WL 34386606, at 1-2 (O.L.C. 1996) [hereinafter *Haiti*] (referring to then-Assistant Attorney General William Rehnquist’s conclusion that the President can withhold information if in his judgment disclosure would be incompatible with the public interest). *See generally, Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 1984 WL 178358 (1984) (reciting a history of executive privilege claims).

40 *See Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 1996 WL 34386607, at 1 (O.L.C. 1996) [hereinafter *Assertion of Executive Privilege*] (displaying OLC’s concern that any compliance beyond the accommodations reached would compromise the ability of the White House Counsel to assist the President in connection with the pending Committee and Independent Counsel investigations). *See also, Haiti, supra* note 39, at 1.

41 *See Immunity of Former Counsel to the President From Compelled Congressional Testimony*, 2007 WL 5038035, at 1 (O.L.C. 2007) (citing *Assertion of Executive Privilege With Respect to Clemency Decision*, 1999 WL 33490208, at 4 (O.L.C. 1999)) (stating that this immunity is “absolute and may not be overborne by competing congressional interests”).

42 *See* 1996 WL 34386607, at 1 (arguing that White House Counsel’s capacity to serve the President effectively would be significantly impaired if the confidentiality of its communications and work-product is not protected).

43 *See* Letter from Thomas A. Monheim, Associate Counsel to the President, to Daniel Marcus, General Counsel of the 9/11 Commission (Nov. 21, 2003), available at <http://www.scribd.com/White-House-Letter-to-911-Commission-about-Access-to-Notes/d/12992807> [hereinafter *Monheim Letter 1*] (creating rules regarding the documents to protect the constitutional prerogatives of the Presidency).

classified and could not lawfully be publicly disclosed by the Commissioners or staff—in the Commission Report or otherwise—without first being declassified by the Administration. But the White House worried that disclosure of sensitive documents or information to ten Commissioners and additional staff members could lead to unauthorized leaks.<sup>44</sup>

The second and more serious concern was with precedent: The Commission was by statute a “legislative branch entity,”<sup>45</sup> and the White House Counsel’s Office and OLC worried that any disclosures to the Commission would be viewed as a precedent for the White House’s dealings with Congress. The Commission argued that the separation of powers principles that underlie the executive privilege doctrine did not apply to the Commission with the same force they applied to Congress, i.e., to the legislative branch itself. The Commission, obviously, was not the Legislature, and had no continuing power to control or regulate the actions of the Executive Branch. The Commission’s job was to prepare a report for the President as well as Congress.<sup>46</sup> Disclosure to the Commission—a one-time, one-investigation entity—therefore would not undermine the Executive Branch’s long-standing positions vis-à-vis Congress.

The White House strongly resisted this argument until early 2004, when it finally decided to permit some Commissioners and staff to examine Presidential Daily Briefs (top-secret intelligence reports to the President) relevant to the Commission’s investigation, and to allow National Security Advisor Condoleezza Rice to testify under oath at a public hearing of the Commission.<sup>47</sup> At that point, the White House Counsel pivoted 180 degrees and proclaimed publicly that the Commission was a unique entity and that disclosures to it did not constitute a precedent for the White House’s dealings with Congress.

#### DOCUMENT REQUESTS: MATTERS OF PRECEDENT AND STRATEGY

In its initial document requests to the White House, the Commission made a strategic decision, in light of the court precedents discussed above and the strong views of the White House on executive privilege, to stop short of the Oval Office itself. Thus, the Commission requested all relevant National Security Council (NSC) policy documents on counterterrorism matters from within the NSC Directorate of Transnational Threats (headed by the Counterterrorism Coordinator, Richard Clarke) and from Principals and Deputies Meetings of the NSC, as well as communications from Clarke to the National Security Advisor (Samuel Berger in the Clinton Administration and Condo-

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44 See Letter from Thomas A. Monheim, Associate Counsel to the President, to Daniel Marcus, General Counsel of the 9/11 Commission (Jan. 15, 2004), *available at* <http://www.scribd.com/doc/15707930/DM-B7-White-House-2-of-2-Fdr-Document-Request-Responses-429> [hereinafter Monheim Letter 2] (stating that concerns existed regarding the Commission’s ability to protect the documents from unauthorized disclosure and from use for any purpose other than the purpose for which the Commission made the request).

45 See Intelligence Authorization Act § 601.

46 Intelligence Authorization Act at § 603.

47 See Letter from John B. Bellinger III, Senior Associate Counsel to the President, to Daniel Marcus, General Counsel of the 9/11 Commission, *available at* <http://www.scribd.com/doc/15707930/DM-B7-White-House-2-of-2-Fdr-Document-Request-Responses-429>.

leezza Rice in the Bush Administration).<sup>48</sup> But the Commission did not request communications from Berger to Clinton or Rice to Bush, and it agreed not to question witnesses about what was said in conversations with the President.<sup>49</sup>

The White House Counsel's Office remained apprehensive about the scope and sensitivity of the Commission's request, and it took extensive negotiations of a detailed written "treaty" before the Commission could get access to the requested documents. The breakthrough that assured that access occurred when the Commission staff assured the White House lawyers that the Commission would not claim that the nonpublic release of documents to the Commission would constitute a waiver of executive privilege (a debatable proposition), and that the President could still claim the privilege to block the publication of material from these documents in the final Commission report.<sup>50</sup>

In keeping with the longstanding practice of the White House and the Department of Justice in dealing with document requests or subpoenas from Congressional Committees or Independent Counsels, this negotiation explored ways the Administration could accommodate the Commission's document requests to avoid a legal confrontation and the need for the President formally to claim executive privilege. As a result of this negotiation, the Commission gained access to the requested documents, but subject to certain restrictions on time, manner, and place. These included (1) the Commission could not make copies of any documents; (2) the documents could not "leave" the Executive Branch, but had to be reviewed by the Commissioners and a limited number of Commission staff at the White House; (3) while the Commissioners and staff could take notes on all but the most "super-sensitive" documents, notes on some other highly sensitive documents could not be taken back to the Commission's secure offices, but had to be left at the White House (where they could be "visited" as needed); and (4) the notes on other documents, which could be taken back to the Commission's office, could not be verbatim or "effectively recreate" the document (so as to protect condition No. 1). Condition No. 4 led to endless disputes in the implementation.

Similar negotiations and written agreements were necessary to settle the terms for interviews of White House officials (or "meetings," as the White House insisted on calling them to avoid any implication that the White House was submitting to the jurisdiction of the Commission).<sup>51</sup> Those

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48 See Letter from Philip D. Zelikow, Executive Director of the 9/11 Commission, and Daniel Marcus, General Counsel of the 9/11 Commission, to Alberto Gonzales, White House Counsel (Nov. 17, 2003), *available at* <http://www.scribd.com/doc/12992726/Repeat-911-Commission-Request-for-Missing-White-House-Documents> (requesting records from the meetings of the Principals Committee, the Deputies Committee, the "Foreign Policy Team," the "UBL Small Group," the "UBL/Khobar Small Group," the "Planning Group," or the "Restricted CSG").

49 See 9/11 COMMISSION, 9/11 RELEASES INTERIM REPORT: TRANSCRIPT OF PRESS BRIEFING WITH THOMAS H. KEAN, CHAIR, AND LEE H. HAMILTON, VICE CHAIR 9 (July 8, 2003), *available at* [http://govinfo.library.unt.edu/911/archive/2003-07-08\\_press\\_briefing.pdf](http://govinfo.library.unt.edu/911/archive/2003-07-08_press_briefing.pdf).

50 Of course, the documents in question were almost all classified, so that the Commission could not in any event publicly disclose their contents without permission from the White House.

51 See Letter from Thomas A. Monheim, Associate Counsel to the President, to Daniel Marcus, General Counsel to the 9/11 Commission, (Nov. 21, 2003), *available at* <http://www.scribd.com/doc/13279730/White-House-Letter-to-911-Commission-about-Limits-on-Access-to-White-House-Officials> (prescribing certain conditions for access to Executive Office of the President officials).

negotiations resulted in the Commission being able to “meet with” every senior White House official it requested, but, again, subject to a number of restrictions: Only the Chair or Vice Chair of the Commission or the Commission’s Executive Director or General Counsel could conduct the questioning of senior White House officials (or Cabinet officers); the number of staff members who could attend and the time of the meetings were limited (although in practice extended as long as necessary); and the interview-meetings with White House officials—unlike those of other Executive Branch officials, including Cabinet officers—could not be recorded.<sup>52</sup>

The Commission expected, and encountered, particular resistance to the President or Vice President (who never testify before Congressional Committees or submit to informal questioning) “appearing” before the Commission in any meaningful sense. Until the Spring of 2004, the position of both the White House and the Office of the Vice President (which, the Vice President’s Counsel, David Addington, insisted, was not part of the Executive Office of the President and was not represented by the Counsel to the President) was that the President and Vice President would be willing to meet informally only with the Chair and Vice Chair of the Commission—Tom Kean and Lee Hamilton. However, after the public hearing in March 2004 at which Richard Clarke condemned the counterterrorism record of President Bush and his national security advisors before 9/11, the White House abruptly changed its position and informed the Commission that the President and Vice President would hold a joint “meeting” with all ten Commissioners (with one Commission staff member allowed to attend to take notes).<sup>53</sup>

There were two issues as to which the Commission, unhappy with the position the White House was taking in response to its requests, discussed whether to issue a subpoena to the White House; in the case of the first of those issues the Commission came very close to voting to issue a subpoena. As General Counsel, I was dubious about the wisdom of issuing a subpoena for White House records or testimony, for two reasons: (1) I was convinced that the White House would defy any subpoena, requiring the Commission to bring an enforcement action in District Court in which it was almost certain it could not get a favorable final judgment before the Commission’s statutory life expired; and (2) I believed that the issuance of a subpoena would lead the White House to severely limit its cooperation with the Commission across the board, impairing the effectiveness of the Com-

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52 *Id.*

53 See Philip Shenon and David E. Sanger, *Bush and Cheney Tell 9/11 Panel of '01 Warnings*, N.Y. Times, Apr. 30, 2004 (describing the three hour question-and-answer session with the 10 members of the Commission); see also NBC News’ Meet the Press (television broadcast Apr. 4, 2004) (transcript available at <http://www.msnbc.msn.com/id/4663767/#storyContinued>) (explaining the conditions for the interview with President Bush and Vice President Cheney).

mission's remaining investigation and the thoroughness of the Report.<sup>54</sup>

#### PRESIDENTIAL DAILY BRIEFS

The first issue on which the Commission and the White House almost fell off the tightrope concerned the now-famous Presidential Daily Briefs (PDBs)—the highly sensitive daily reports to the President, prepared by the CIA, on the latest intelligence information related to national security.<sup>55</sup> Before 9/11 the existence of the PDBs was not widely known. But shortly after 9/11, rumors began circulating that on August 6, 2001 – a month before the 9/11 attacks—President Bush had received a PDB that contained an explicit warning that al Qaeda was planning an imminent attack on the United States using commercial airplanes as weapons.<sup>56</sup> In an effort to deflate those rumors, National Security Advisor Condoleezza Rice had held a rare press conference on May 16, 2002, where she summarized the August 6 PDB as having presented a purely historical review of al Qaeda threats against the United States.<sup>57</sup> But the Administration refused to make the August 6 PDB public or to turn it over to the Congressional Joint Inquiry that was then pending.<sup>58</sup>

The Commissioners believed that, in order to evaluate the adequacy of the Clinton and Bush Administration's counterterrorism policies and actions, they needed to review not only the August 6 PDB, but all relevant PDBs from both the Clinton and Bush Administrations to see what infor-

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54 The Commission did issue subpoenas to two Executive Branch agencies—the Federal Aviation Administration and the Department of Defense—and to the City of New York after problems arose in document production. The federal agencies complied fully with the subpoenas. New York City, after initially resisting, agreed to a settlement of the Commission's demands on the eve of the return date of the subpoena. At that point, the Department of Justice had prepared papers on behalf of the Commission to file in the U.S. District Court for the Southern District of New York to enforce the subpoena.

Of course, had the Commission needed to enforce a subpoena against the White House or any other federal agency, the Department of Justice could not represent the Commission. While the Commission had pro bono counsel prepared to represent it, it is theoretically possible that the Attorney General could have been able to block the Commission's lawsuit. OLC has long taken the position that, unless Congress by statute provides a government agency—even one outside the Executive Branch—with its own litigating authority, the Attorney General has exclusive authority to decide whether that agency can bring a lawsuit. Politically, however, it would have been difficult, if not impossible for the Justice Department to deny the Commission authority to bring the subpoena enforcement action with private counsel.

55 See Thomas Blanton, *Who's Afraid of the PDB?*, SLATE, Mar. 22, 2004 (citing various sources that described this document as the “most highly sensitized classified document in the government” and to make this available to an outside group is “something that no other president has done in our history”).

56 See 9/11 Commission Report, p.260 (describing the circumstances surrounding the origins of the August 6 PDB); see also Bob Woodward and Dan Eggen, *Aug. Memo Focused On Attacks in U.S.*, WASHINGTON POST, May 19, 2002, at A01 (stating the headline of the PDB was ‘Bin Laden Determined to Strike in U.S.’).

57 See David Johnston and James Risen, *Traces of Terrorism: The Intelligence Reports; Series of Warnings*, NY TIMES, May 17, 2002, available at <http://www.nytimes.com/2002/05/17/us/traces-of-terrorism-the-intelligence-reports-series-of-warnings.html?scp=2&sq=condoleezza+rice&st=nyt>.

58 See THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESS BRIEFING BY ARI FLEISCHER, May 21, 2002, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/05/20020521-9.html> (setting forth the President's views as to why the August 6 PDB had not been released to Congress or made public).

mation about the al Qaeda threat was available to both Presidents.<sup>59</sup> The Commission therefore requested all PDB items (or “articles”) relating to al Qaeda, Osama bin Laden, the Taliban, Afghanistan, Pakistan, and Saudi Arabia from 1998 (the year in which bin Laden issued his *fatwa* calling for *jihad* against Americans and al Qaeda bombed the U.S. embassies in Nairobi and Dar es Salaam) through September 20, 2001.<sup>60</sup>

The White House reported that, while there were more than 300 PDB articles responsive to the Commission’s request, only approximately 20 met the criteria that were important, in their view, to the Commission’s investigation.<sup>61</sup> The initial White House position was that none of the Commissioners or staff could see any of the PDBs—not even the notorious August 6 PDB—because of their sensitive nature. No PDB, they claimed, had ever been shown even to the Chairman of the Senate or House Intelligence Committees (an assertion that, as far as the Commission could determine, was correct). In lieu of producing the documents, they proposed a briefing of Commissioners and senior staff by CIA officials familiar with the PDBs. The Commission agreed to accept the briefing, but without prejudice to its right to pursue the document request if the briefing did not satisfy the Commission’s needs.

When the Commissioners, unanimously, found the briefing unsatisfactory, the Commission staff embarked on a lengthy and ultimately successful negotiation with the White House lawyers, resulting in a compromise deal (grudgingly approved by the Commission) under which the core group of PDBs would be reviewed by a Commission “Review Team” consisting of the Chair, Vice Chair, and one additional Republican and Democratic Commissioner or senior staff official. Two members of this team were allowed to “check” the rest of the 300-plus responsive PDBs to see whether they thought any of them should be added to the core group of PDBs as to which the Review Team would prepare a “concise summary” report that would be made available to the rest of the ten Commissioners and the senior staff.<sup>62</sup> Both the switch of any PDBs from the larger pool to the core group and the summary report to the full Commission on the core group required approval from the White House Counsel—an approval, per the agreement, not to be unreasonably withheld. The White House lawyers, advised by OLC, viewed these negotiations as in the tradition of the process of “accommodation” used by the Executive Branch in seeking to avoid the ultimate need for the President to invoke executive privilege as the basis for refusing to turn over documents to a Congressional committee.<sup>63</sup>

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59 See SHENON, *supra* note 14, at 73–76 (stating that Executive Director Zelikow believed that the Commission must see the PDBs if it was to do its job properly).

60 See *id.* at 388–89 (indicating that Zelikow wanted the information for the final report of the Commission, which was to include a history of al Qaeda and bin Laden’s *fatwa*, the threat reporting records leading up to 9/11, and the attacks themselves).

61 *Id.* at 218.

62 Dan Eggen, *9/11 Panel to Accept Summary of Briefings; Legal Challenge Scrapped; Agreement Angers Some Members, Victims’ Families*, WASHINGTON POST, Feb. 11, 2004 at A08.

63 See *Andy Card on Power and Privilege*, NAT’L JOURNAL, Apr. 28, 2004, available at <http://nationaljournal.com/members/news/2004/04/0428insider.htm> (noting that the White House was cognizant of not eroding too much authority from the Executive Branch by overusing executive privilege).

Twice—first, when it looked as if the agreement just described would not be reached, and second, when major disputes arose in the implementation of the agreement (as to how many PDBs would be “moved” from the 300+ group to the core group, and as to the length and detail of the “concise summary report”)—the Commission seriously considered subpoenaing either the PDBs themselves or the extensive notes that Commissioner Jamie Gorelick and Executive Director Philip Zelikow had taken on the 300+ group of PDBs.<sup>64</sup> Because these disputes were resolved, the Commission did not need to issue such subpoenas and avoided falling into the chasm of total war with the White House.

Both the Commission’s outside counsel, Robert Weiner of Arnold & Porter, and I believed, however, that if the subpoena had been issued, and the matter had proceeded to court, the Commission would have had a good chance of eventually prevailing (although probably not in time to meet the statutory deadline for issuance of the Commission’s report). To be sure, the Administration could argue that the PDBs, by their nature as communications to the President of highly sensitive intelligence about terrorist threats against the United States, fell toward the highly-protected end of the spectrum in terms of the identity of the recipient (the President himself) and subject matter. On the other hand, the Commission could emphasize that (1) the sensitivity of the documents to national security was diminished by the fact that they contained information about past threats, not current ones; (2) they were in the main factual reports rather than deliberative policy documents; (3) they were prepared and delivered, not by senior advisors to the President, but by mid-level CIA analysts; (4) they were delivered, not only to the President, but also to a number of senior officials *outside* the White House (e.g., presumably, the Secretary of State and the Secretary of Defense); and (5) the Commission was not proposing to publicly release the documents (indeed, Commission members could be sent to jail for doing so), but simply to use them in preparing the Report, which itself could not be publicly released until it was reviewed and cleared by the Administration.

#### RICE TESTIMONY

The second instance in which a number of Commissioners advocated a subpoena was to compel the public testimony of Condoleezza Rice, then the National Security Advisor.<sup>65</sup> For months, the White House Counsel had stuck to a simple position on behalf of the President: In line with historical practice in dealing with Congress, the White House would make officials such as Rice, Deputy National Security Advisor Stephen Hadley, and Chief of Staff Andrew Card available for *private* meetings with Commissioners and staff—not under oath—but not for *public* testimony, under oath or otherwise. They relied on the OLC opinions, based on separation of powers and the need of the Chief Executive to have the undivided attention of his staff, that Congress could not compel

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64 See SHENON, *supra* note 14, at 222–224 (indicating that the threat of subpoena became serious enough that the Commission authorized its General Counsel to hire an outside constitutional expert to prepare for a likely legal battle with the White House over a subpoena).

65 See Associated Press, *9/11 Panel Considers Rice Subpoena*, MSNBC.com, Mar. 2, 2004, *available at* <http://www.msnbc.msn.com/id/4401034/> (noting that the first choice of the Commission was to get the White House to reconsider its refusal to allow Rice to testify).

their testimony.<sup>66</sup>

This OLC “law,” however, had never been tested in the courts. And it was developed before the Supreme Court’s remarkable decision in *Clinton v. Jones*, holding that separation of powers does not preclude an Article III court from compelling the testimony of the President himself in a civil lawsuit.<sup>67</sup> To be sure, that case is distinguishable from that of the 9/11 Commission investigation because it involved private rather than official acts of the President.<sup>68</sup> And as to official acts, the Court has held that the President is immune from civil damage suits.<sup>69</sup> Nonetheless, it undermines a central rationale of OLC’s separation-of-powers reasoning with respect to compelled testimony of White House officials. If the Constitution permits a court to require the President himself to divert his time as Chief Executive to testify in a mundane civil damages case, would it really be unconstitutional to require the President to allow his National Security Advisor to testify publicly before a one-time-only independent Commission investigating the most traumatic event in modern American history?<sup>70</sup>

The biggest problem facing the Commission in a judicial action to enforce a subpoena to compel Rice’s testimony—and probably a fatal one—was that it would have been difficult to show that the Commission had a strong need for Rice’s *public* testimony in view of the fact that it had already interviewed her *privately* for almost four hours.<sup>71</sup>

The question of subpoenaing Rice to testify became moot, in any event, when the Administration abruptly changed its position in March 2004, after the Clarke testimony, and requested the opportunity for her to testify—under oath.<sup>72</sup>

#### CONCLUSION

The law of executive privilege evolves slowly, because the White House and Justice Depart-

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66 *Assertion of Executive Privilege*, *supra* note 40.

67 See 520 U.S. 681, 705–706 (1997) (establishing that a sitting President of the United States has no immunity from civil litigation for acts done before taking office and unrelated to the office).

68 See *id.* at 701 (asserting that “whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch”).

69 See *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (emphasizing that the President is not immune from criminal charges stemming from his official (or unofficial) acts while in office).

70 In July 2008, the OLC position on the immunity of senior White House officials was further undermined by a thoughtful opinion by Judge John Bates, upholding the authority of the House Judiciary Committee, in its investigation of the firing of U.S. Attorneys, to require the former Counsel to the President, Harriet Miers, to appear before the Committee for questioning. *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), *stay denied*, 575 F. Supp. 2d 201 (D.D.C. 2008), *stay granted*, 542 F.3d 909 (D.C. Cir. 2008). Miers had been instructed by President Bush, on the grounds of executive privilege and separation of powers, to refuse to appear. The court rejected the claim of absolute immunity for senior White House officials, holding that Miers must appear and claim executive privilege, where appropriate, in response to particular questions. Judge Bates noted, however, that the case did not involve national security or foreign policy. 558 F. Supp. 2d at 106.

71 See SHENON, *supra* note 14, at 290.

72 See Wolf Blitzer, *Condoleezza Rice Testifies Before 9/11 Commission*, CNN, Apr. 8, 2004 (describing Ms. Rice’s testimony during her hearing with the 9/11 Commission).

ment make strenuous and usually successful efforts, through the process of negotiation and accommodation, to reach compromises with Congressional committees (or the 9/11 Commission) to avoid the need for the President ultimately to invoke the privilege as a basis for refusing to comply with a document request or subpoena. Had the Commission found it necessary to issue a subpoena in either of the two instances described above, the law might have been pushed along a bit. For the reasons stated, I think it might well have been pushed along significantly in the case of the PDBs. The Commission's arguments, in both cases, would have been aided by what I perceive as the general trends in the law with respect to both common-law privileges and separation of powers.

I have not studied the area, but I have the impression that the courts are increasingly skeptical of, and unreceptive to, claims of attorney-client privilege and other common-law privileges. As time goes by, and apocalyptic predictions of the chilling effect on confidential communications if privilege claims are rejected prove unfounded, a cycle develops in which courts become less likely to recognize the next claim of privilege. A good example is provided by decisions by the Courts of Appeals for the D.C. Circuit and the Eighth Circuit in the late 1990s, rejecting claims that the attorney-client privilege protected communications between Government lawyers and their Government "clients", including communications between the Deputy Counsel to the President, Bruce Lindsey, and President Clinton.<sup>73</sup> Those decisions occasioned dire predictions as to the devastating impact on the ability of Government lawyers to give confidential advice to the President and agency heads.<sup>74</sup> And so the initial controversial decisions rejecting the claim of privilege become uncontroversial, and the courts are vindicated in their skepticism about the policy claims underlying the assertion of privilege.

I also believe that, in a real sense, the Commission's success in obtaining significant if limited access to the PDBs and Condoleezza Rice's public testimony under oath made some important "law on the ground." The exaggerated mystique of the PDBs was punctured, at least with respect to historical documents. We learned from the 9/11 Commission Report that we could have a public discussion of intelligence information provided to the President in the past without jeopardizing the ability of our intelligence agencies to operate effectively. That lesson was underlined by the subsequent investigation by the WMD Commission (the Silberman-Robb Commission), an Executive Branch entity which had extensive access to PDBs and issued a public report discussing pre-Iraq War intelligence failures.<sup>75</sup>

Similarly, Condoleezza Rice's public testimony before the 9/11 Commission established an

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73 See *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (concluding that an attorney-client privilege could not be applied to White House Counsel as applied to private counsel); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8<sup>th</sup> Cir.), cert. denied, 117 S. Ct. 2482 (1998) (indicating that a public official should speak with a private attorney, not a government attorney if he wants the confidentiality of the communication protected).

74 See Sara Hoffman Jurand, *Second Circuit says Government Lawyers Have Privilege Too*, TRIAL, May 1, 2005, available at [http://www.thefreelibrary.com/Second Circuit says government lawyers have privilege too-a0132536079](http://www.thefreelibrary.com/Second+Circuit+says+government+lawyers+have+privilege+too-a0132536079) (suggesting that officials and agencies may have a genuine interest in seeking advice about whether an action is lawful or not, and that the denial of a privilege may discourage the seeking of such advice).

75 THE COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, Mar. 31, 2005, available at [http://www.gpoaccess.gov/wmd/pdf/full\\_wmd\\_report.pdf](http://www.gpoaccess.gov/wmd/pdf/full_wmd_report.pdf).

important precedent in fact that may well eventually be reflected in OLC opinions and court decisions. It illustrates the changing role of senior White House officials such as the National Security Advisor.<sup>76</sup> As policymaking for the Executive Branch continues to move from a Cabinet Department-centered system to a White House-centered and White House-directed system, it becomes less plausible to regard officials such as the National Security Advisor exclusively as confidential advisors to the President rather than policy-making officials in their own right. Once that perception changes, the argument that such officials should be immune from compelled testimony before Congress or independent Commissions becomes less viable.

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<sup>76</sup> See Dr. I. M. Destler, *The Role of the National Security Advisor*, FOREIGN PRESS CENTER, Mar. 16, 2009, available at <http://fpc.state.gov/120437.htm> (describing how the position of National Security Advisor was created, the key elements of the job, and its changing role in the Obama Administration).