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MEMORANDUM

TO: Chairman Patrick Leahy, Senate Judiciary Committee

FROM: American Civil Liberties Union / Washington Legislative Office

RE: Executive Privilege and NSA Wiretapping Subpoenas

DATE: October 1, 2007

I. Introduction

On June 27, 2007 the Senate Judiciary Committee served subpoenas on the White House, the Office of the Vice President, the National Security Council, and the Department of Justice seeking documents related to the legal justification for authorizing the National Security Agency to conduct warrantless domestic surveillance. The deadline for compliance with these subpoenas is August 20, 2007. The President might choose to invoke executive privilege rather than comply with these subpoenas, as he recently has with regard to other congressional subpoenas relating to the 2006 firings of several federal prosecutors. The courts have recognized a limited privilege that allows the President to protect certain confidential documents and discussions from scrutiny by the other branches of government, but Congress can overcome this narrowly construed privilege with a sufficient showing of need, even where issues concerning national security are at stake. Congress has many options in responding to a claim of executive privilege and the purpose of this memorandum is to assist the Committee in understanding the limits of executive privilege and the alternatives available to Congress to compel compliance with the subpoenas.

II. Discussion

A. Overview of the Scope and Limitations of the Executive Privilege Doctrine

The American Civil Liberties Union has a long history of opposing the theory of executive privilege. In *U.S. v. Nixon*[1], the first United States Supreme Court case recognizing the privilege, the ACLU filed the only *amicus* brief in that case and argued that a claim of an "executive privilege" is not supported by the constitution.[2] We later spoke out against President Clinton invoking the privilege, and still believe that the privilege, despite being recognized by the Court, is of suspect legality and is overused to protect information that is not critical to the prerogatives of the Presidency. As the Clinton and Nixon cases demonstrate, executive privilege is often invoked only to protect the Administration from embarrassment or the exposure of government misconduct rather than to protect legitimate interests.

[1] 418 U.S. 683 (1974).

[2] Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the American Civil Liberties Union, U.S. v. Nixon, 418 U.S. 683 (1974) (No. 73-1766), 1974 WL 174856.

In *U.S. v. Nixon*, the U.S. Supreme Court first recognized that the President has an interest in:

> "candid, objective, and even blunt or harsh opinions in Presidential decision-making. 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 many would be unwilling to express except privately."[3]

Thus, the doctrine of executive privilege was confirmed as a valid defense for shielding executive branch documents and conversations from examination by the other branches of government. The Court clearly signaled however that the executive privilege it was recognizing was narrow and rejected an "absolute, unqualified Presidential privilege" as overbroad.[4]

Recent case law has more clearly defined what information is protected, and under what circumstances the executive privilege presumption can be overcome. First, there are two types of privilege: the deliberative process privilege and the presidential communication privilege. The former runs throughout federal agencies and protects the deliberations, advisory opinions and debate within the Executive Branch that result in a decision or change in policy. To be valid and protectable under this deliberative process privilege, the communications must be deliberative and pre-decisional. This deliberative process privilege is narrow in that it does not protect factual information. To the extent that facts or post-decisional information are mixed in with protected material, the facts or post-decisional information should be extracted and turned over to Congress.

The presidential communications privilege, in contrast, only protects the communications of the President himself and his closest White House advisors. It protects pre- and post-decisional communications, and it protects documents in their entirety. It has, however, been continually narrowed so that courts have found it may only be claimed to successfully protect the communications of those who are personally advising, or preparing to personally advise, the President.

Even where these two types of privilege presumptively apply, neither can be invoked to hide wrongdoing on the part of the executive branch, and the President has a competing constitutional obligation to accommodate Congress's need for information.[5] Where executive privilege is invoked to withhold information, Congress may overcome the privilege by demonstrating its need for access to the information before a court.

B. Executive Privilege Claims Cannot Block the Senate Judiciary Committee from Obtaining Documents Subpoenaed on June 27, 2007

As discussed below, we believe that as applied to the subpoenas you issued on June 27, 2007, the privilege does not prevent your Committee from receiving full disclosure of the documents you requested.

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[3] Nixon, 418 U.S. at 708.

[4] *Id.* at 706.

[5] U.S. v. AT&T, 567 F.2d 121, 127 (D.C. Cir. 1977).

First, many of the documents you seek are completely outside of the scope of executive privilege. Second, the privilege, where it might otherwise apply, is eviscerated by the criminal and unconstitutional conduct implicated by the warrantless wiretapping program. Third, your Committee can demonstrate need for the documents paramount to any interest in secrecy the President may assert, which according to case law will overcome claims of privilege. Considering your Committee's vital role in oversight and legislation concerning criminal law, the Constitution and civil liberties, and its shared jurisdiction regarding the Foreign Intelligence Surveillance Act of 1978, your interest in understanding why the Administration believed it could wiretap on American soil in violation of the Fourth Amendment and the Foreign Intelligence Surveillance Act is paramount.

While the majority of executive privilege decisions have not squarely decided the balance of powers between the congressional and executive branches, they do extensively discuss the executive branch's interest in secrecy in the face of competing constitutional claims. In fact, there are only three published opinions discussing congressional subpoenas in face of an executive privilege assertion.[6] Those three cases stand for the proposition that, in general, courts will defer to negotiated settlements between the political branches, but that deference has always been based on good faith negotiations between the other two branches, which are conspicuously absent in this case. You have previously noted that your committee has made no less than nine requests for information,[7] all of which have been categorically rejected without further discussion. Compulsory process, and court enforcement if necessary, is more than appropriate at this time.

Your Committee has not only the congressional authority, but duty, to obtain this information about how American privacy rights have been violated, not only to remedy past violations but to determine how to respond to constant, frenzied, requests to codify the same practices and more.

<u>"Deliberative process" privilege does not apply to most of the documents you requested.</u>

Of the two executive privilege doctrines, the deliberative process is easier to over come. It only applies to documents that are pre-decisional and deliberative.[8] It cannot shield access to documents "that simply state or explain a decision the government has already made or protect material that is purely factual."[9]

Many of the materials your Committee seeks are post–deliberative, in that they would only reflect official policies once they had been made or put into application. For example, your subpoenas request documents that reflect "agreements or understandings" between the Administration and "telecommunications companies, internet service providers, equipment manufacturers, or data processors regarding criminal or civil liability for

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[6] U.S. v. House of Representatives, 556 F.Supp.150 (D.D.C. 1983); U.S. v. AT&T, 567 F.2d 121 (D.D.C. 1977); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) [hereinafter Senate Select].

[7] The Senate Select Intelligence Committee, the House Permanent Select Committee on Intelligence and the House Judiciary Committee have also requested information about past and present surveillance activities and are also being thwarted by the Administration.

[8] In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) [hereinafter Espy].

[9] *Id.*

assisting with or participating in the warrantless electronic surveillance program."[10] These documents, which are agreements and not negotiations, are by definition post-deliberative and post-decisional. Similarly, your subpoenas request the "January 10, 2007 orders of the FISC…authorizing the warrantless surveillance program."[11] The FISC orders do not reflect any deliberations on the part of the executive branch. They in fact represent the final decision of an entirely different branch of government and cannot be argued to fall in the scope of executive privilege in any way.

Just because a document falls within the deliberative process privilege does not mean that Congress is necessarily barred from access to it. Most importantly, "where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest effective government."[12] Here, the Administration authorized warrantless wiretapping in violation of the Fourth Amendment and FISA for over five years. Such extensive and pervasive misconduct renders the executive privilege defense inapplicable.

"Communications" privilege does not apply to the vast majority of documents.

The communications privilege presumptively protects communications of the President and his immediate White House advisors including documents that they author or cause to be authored.[13] It is broader than the deliberative privilege in that it covers documents in their entirety and even if they are post decisional in nature.[14]

The subpoenas for the Attorney General, the National Security Council and the Vice President generally do not fall within this privilege because they do not relate to the communications of the President and his immediate advisors. If the administration argues that the Attorney General was working in a "dual hat" manner regarding certain specific communications— advising the President in addition to running a separate agency— the onus is on the executive to demonstrate this. However, even where such a demonstration can be made, these communications are still subject to the same limitations on executive privilege as any other (see discussion below).

Further, this privilege also "disappears all together when there is any reason to believe government misconduct occurred."[15] Beyond the criminal and unconstitutional acts of warrantless wiretapping, serious questions remain unanswered regarding how such a program was approved and whether misconduct was involved in securing such approvals. For example, your subpoena requests documents relating to the now infamous hospital scene where an incapacitated Attorney General Ashcroft was asked by then-White House counsel

[10] Subpoena of Joshua Bolten, or other Custodian of Records, White House, regarding warrantless surveillance documents, June 27, 2007, Attachment A, at 1, *available at* http://leahy.senate.gov/press/200706/062707a.html.

[11] *Id.* at 3.

[12] Espy, 121 F.3d at 738 (internal quotation marks omitted).

[13] *Id.* at 752.

[14] *Id.* at 746.

[15] *Id.*

Alberto Gonzales to sign off on a surveillance program despite the acting Attorney General's opinion that the program did not meet legal muster. Likewise, your subpoenas ask for documents reflecting the decision to deny security clearances to investigators from the Office of Professional Responsibility, an unprecedented act that may have been intended to thwart a duly authorized investigation.

Even those documents that could arguably fall under one of the privileges are critical to the Committee's work and therefore the privilege fails.

Any residual deliberative privilege can be overcome by a showing of need. While courts will engage in a balancing test for the deliberative privilege, they will demand a more "focused demonstration of need" to overcome the communications privilege. Specifically, the subpoena must be directed at information important to the Committee's duties that cannot be obtained through due diligence elsewhere.[16] Your need for these documents overcomes even the higher standard.

In particular, the subpoenas ask for information essential to your duties as the Committee with primary jurisdiction over criminal and constitutional law. Surely, there can be few things more important that determining the justifications for the Administration's wiretapping of Americans' phones and interception of their e-mails in the absence of a court order as required by FISA and the Fourth Amendment. And, since the Administration is the sole entity with access to these documents, there is simply no other way to obtain them.

C. The Senate Judiciary Committee has Compelling Legislative and Investigative Interests in the Subpoenaed Materials.

The Senate Judiciary Committee has both an investigative and legislative interest in the subjects of the subpoenas, which have been found to be two sides of the same coin, making up what is referred to as the "legitimate legislative sphere:"[17]

> The power to investigate and to do so through compulsory process plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'[18]

The Supreme Court has found Congress' investigative authority to be quite broad:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends

[16] *Id.* at 754.

[17] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

[18] *Id.* at 504 (citing McGrain v. Daugherty, 273 U.S. 135, 175 (1927)).

> probes into departments of the Federal Government to expose corruption, inefficiency or waste.[19]

In *Barenblatt v. United States* the Supreme Court upheld a criminal contempt conviction against an individual who refused to testify before Congress on First Amendment grounds, finding that Congress had extensive powers to investigate matters "in which it may potentially legislate and appropriate."[20] The Administration seized upon language in *Barenblatt* that purported to limit Congress's power to investigate "matters which are within the exclusive province of one of the other branches of the Government," in arguing that it was not required to comply with congressional subpoenas seeking documents and testimony related to the firing of several United States Attorneys in 2006.[21] But the Court made clear that a determination of the limits of Congress's investigative authority "are to be judged in the concrete, not on the basis of abstractions," and the facts and circumstances surrounding the U.S. Attorney firings clearly demonstrate that Congress has a legitimate legislative interest in the information sought.[22] Indeed, the scandal surrounding these dismissals resulted from legislation, when a little-noticed provision extending the term of interim appointments for U.S. Attorneys was snuck into the 2006 Patriot Act Reauthorization, and Congress acted quickly to pass new legislation rescinding this provision once the scandal broke.[23] Congress's legislative interest in this matter is clear.

Your committee has an even more compelling need for the information demanded in your July 27th subpoenas because Congress recently passed temporary legislation rewriting our nation's surveillance laws.[24] This legislation contained a sunset provision that will require Congress to act within the next six months to rein in the unregulated authority given the intelligence community to collect international communications.[25] The nature and scope of this new legislation would be greatly informed by discovering the extent to which the government was spying in violation of the law, and its rationale for doing so. Your Committee cannot possibly evaluate the potential effects of this legislation without understanding how the Administration has interpreted its authority to conduct these warrantless surveillance programs in the first place. Seeking the "predicted consequences" of such legislation has been recognized as a permissible subject of subpoenas,[26] and

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[19] Watkins v. U.S., 354 U.S. 178, 187 (1957).

[20] Barenblatt v. United States, 360 U.S. 109, 111 (1959)

[21] *See* Barenblatt, 360 U.S. 109, 112 (1959); *See also,* Letter from Paul D. Clement, Solicitor General and Acting Attorney General, to The President, dated June 27, 2007 (on file with the author; and available at: http://www.whitehouse.gov/news/releases/2007/06/LetterfromSolicitorGeneral06272007.pdf)

[22] Barenblatt, 360 U.S. at 109.

[23] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §502, 120 Stat. 192 (2006) (current version at 28 U.S.C.A. §546 (West 2007)).

[24] Protect America Act of 2007, S.1927, 110th Cong. (2007) (enacted).

[25] Protect America Act of 2007, S.1927, 110th Cong. §6(c), (2007) (enacted).

[26] Senate Select, 498 F.2d at 732.

is quite apropos here. And indeed, the President acknowledged Congress's legislative interest in foreign intelligence surveillance matters when he proposed these legislative changes to the FISA.[27]

Claims invoking national security do not create an absolute privilege to withhold documents or testimony from Congress.

A number of executive privilege decisions note that national security information requires special attention in deciding whether to enforce a subpoena.[28] This special attention does not, however, preclude enforcement altogether, and considering the limited nature of your request, national security concerns should not prohibit your access to the documents you need.

The D.C. Circuit refuted the claim that executive privilege in national security matters was absolute. In a case with factual circumstances eerily similar to those your committee faces today, *U.S. v. AT&T*, the House of Representatives subpoenaed documents from AT&T, including "national security request letters" sent by the government to the company seeking to compel participation in a warrantless wiretapping scheme. The government intervened to stop disclosure and asserted executive privilege. The Court flatly rejected the argument that executive privilege completely protected national security information: "The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up."[29] The court recognized the "zone of twilight" that exists where the executive and congressional branches overlap in national security authority,[30] and went on to outline a middle path between full compliance with the congressional subpoena and the Administration's counter offer for disclosure. In the present case, your committee has a compelling interest in the documents demanded under these subpoenas, and an administration argument that national security interests should bar compliance with those subpoenas runs counter to their repeated requests for Congress to amend FISA. Surely the administration cannot expect Congress to legislate in the dark.

III. The Committee's Repeated Noncompulsory Requests are a Sufficient Effort at Accommodation. Compulsion is Now Appropriate.

A. Your Committee May Seek Criminal Contempt Charges.

The Supreme Court has long recognized that Congress's power to hold persons in contempt is inherent to its legislative function.[31] Congress first codified this authority in 1857 by enacting a criminal statute and establishing a procedure by which a contempt citation would be enforced.[32] Under the current version of the

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[27] William Ide, "Bush Urges Congress to Modernize Law to Monitor Suspected Terrorists," Voice of America News, July 28, 2007, *available at*: http://www.voanews.com/english/2007-07-28-voa19.cfm

[28] Nixon, 418 U.S. at 706.

[29] U.S. v. AT&T, 567 F.2d 121, 128 (D.C. Cir. 1977).

[30] *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)).

[31] Anderson v. Dunn, 19 U.S. 204 (1821).

[32] Frederick M. Kaiser, et. al., Congressional Oversight Manual, Congressional Research Service Report to Congress, (2007) CRS-37.

statute, the refusal to produce documents or answer questions regarding "any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress" is a misdemeanor punishable by a $100,000 fine and/or 12 months imprisonment.[33] The statute directs the President pro tempore of the Senate or the Speaker of the House to issue a certification under seal and a statement of the facts to the appropriate United States Attorney, "whose duty it shall be to bring the matter before the grand jury for its action."[34] The Congressional Research Service documented ten senior executive branch officials who have been cited for criminal contempt for refusing to produce subpoenaed documents since 1975, but in each case the documents were produced before criminal proceedings began.[35]

While the language of the statute imposes a mandatory "duty" upon the U.S. Attorney to bring the citation to the grand jury, questions remain as to whether and how Congress could compel a U.S. Attorney to present the matter to the grand jury. In 1982 the Justice Department took the position that it would be inappropriate for a U.S. Attorney to prosecute and administration official for following a President's instruction to invoke executive privilege.[36] The issue came about in response to the criminal contempt citation issued against Environmental Protection Agency Administrator Anne M. Gorsuch by the U.S. House of Representatives on December 16, 1982.[37] The Department of Justice brought a civil case seeking a declaratory judgment regarding whether the claim of executive privilege permitted withholding documents from Congress and thereby voided any penalty for contempt.[38] The District Court found the matter was not ripe for judicial intervention and dismissed the case to allow more time for Congress and the administration to find a negotiated solution to the matter,[39] and the administration produced the requested documents as a result of the negotiations.[40]

Stanley Harris, the United States Attorney for the District of Columbia, did not present the citation to the grand jury while the civil action proceeded. In testimony before a congressional committee investigating the delay, U.S. Attorney Harris explained that his hesitation in bringing the contempt citation to the grand jury was the result of an ethical conflict he found himself in once the Department of Justice filed the civil action challenging the citation in his name as the U.S. Attorney, essentially making him the legal counsel for Gorsuch.[41] Harris

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[33] 2 U.S.C. §§192, 194 (2000).

[34] *Id.*

[35] Kaiser, et. al., *supra* note 24, at CRS-37.

[36] H.R. Rep. No. 99-435, vol. 1, at 357 (1985)

[37] United States v. United States House of Representatives, 556 F. Supp. 150, 151 (D.C.C. 1983).

[38] *Id*.

[39] *Id.*

[40] Frederick M. Kaiser, et. al., Congressional Oversight Manual, Congressional Research Service Report to Congress, May 1, 2007, p. CRS-37.

[41] *Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation that was Voted by the Full House of Representatives Against the Then Administrator of the Environmental Protection Agency, Anne Gorsuch Burford*: *Hearing Before the House Comm. on Public Works and Transp.*, 98th Cong. 31 (1984) (testimony of Stanley S. Harris, United States Attorney).

recognized his concurrent duty to prosecute "all offenses against the United States" occurring within his district, but stated that prosecutorial discretion allowed him the leeway to determine "when a matter should be submitted to a grand jury."[42] By the time the civil suit was dismissed and the appeal period tolled, Congress had entered into negotiations to resolve the matter, so Harris chose to wait until he had clear instructions from Congress before deciding whether to bring the matter to the grand jury. During questioning by committee members, U.S. Attorney Harris described his situation as "unique," and denied that this prosecutorial discretion gave a U.S. attorney the right to thwart the will of Congress: "When you are talking about purely a matter of power, that is quite different from having someone arbitrarily minimize the significance of a contempt citation. I think that in 9,999 cases out of 10,000, it would be routinely presented to the grand jury."[43] Harris went so far as to suggest Congress had a remedy for a prosecutor's abuse of their discretion: "If something were to be presented to the U.S. attorney who so abused his discretion in not presenting it to a grand jury, there would always be impeachment or mandamus remedies that could be initiated against him."[44]

Once the administration complied with the subpoenas and the House rescinded the contempt citation, U.S. Attorney Harris did present the totality of the information to a grand jury, which decided not to return an indictment against Administrator Gorsuch.[45] That the U.S. Attorney ultimately presented the citation to the grand jury despite the Department of Justice's original position— and despite the fact that the contempt citation was withdrawn— clearly indicates that the U.S. Attorney acknowledged an obligation under the law to present the original contempt citation to the grand jury, and his action established a precedent that such a duty exists.

In response to the Gorsuch prosecution, the Reagan Department of Justice Office of Legal Counsel issued a 1984 memorandum opinion setting forth the argument that the Congress cannot compel a U.S. Attorney to bring a contempt citation to a grand jury because the executive retains prosecutorial discretion over all matters referred for prosecution, and that for Congress to impose such a duty would unduly burden the President's assertions of executive privilege in violation of the separation of powers doctrine.[46] The Bush administration has signaled that it would reiterate this position in refusing to bring a criminal contempt citation against administration officials who refuse to testify based on the President's assertion of executive privilege to a grand jury.[47]

Upon refusal by a U.S. Attorney to bring a citation to the grand jury as directed by the statute, Congress could appoint an independent counsel to make the presentation. The most recent independent counsel statute, which was part of the Ethics in Government Act of 1978, lapsed in 1999.[48] But the re-enactment of these provisions

[42] *Id*., at 30.

[43] Id., at 50.

[44] *Id*., at 45.

[45] *See* Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 U.S. Op. Off. Legal Counsel 101, at 110 (1984).

[46] Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 U.S. Op. Off. Legal Counsel 101 (1984).

[47] Dan Eggan and Amy Goldstein, Broader Privilege Claimed In Firings, *Washington Post*, p. A1, July 20, 2007.

[48] 28 U.S.C. §591.

would do little to resolve the inter-branch impasse because the mechanisms leading up to the appointment of an independent counsel require the Attorney General to apply to a special three-judge panel of the United States Court of Appeals for the appointment. The AG could refuse to make such an application under the same reasoning that the U.S. Attorney would refuse to bring the citation to a grand jury.

Congress could attempt to appoint a private attorney to bring the matter to a grand jury. While it does not appear that this has been attempted in the context of contempt of Congress, courts have appointed private counsel to prosecute contempt of court cases where the U.S. Attorney refused. In *Young v. United States ex rel. Vuitton et Fils S.A*. the U.S. Supreme Court held that the ability to punish disobedience in judicial orders is essential in ensuring that the judiciary has the means to vindicate its own authority without complete dependence on the other branches of government.[49]

B. Your Committee May Also Seek Inherent Contempt Charges.

The Supreme Court has held that a body of Congress can punish with contempt "where the offending act was of a nature to obstruct the legislative process."[50] According to CRS, this power has been used over 85 times between 1795 and 1934, the last year it was used.[51] Procedurally, the Sergeant at arms arrests the individual, and can imprison him/her for a time definite (punitive) or indefinite (coercive), and then hold a trial before Congress.

Because the Administration has indicated that it will not prosecute those held in contempt of Congress, as required by the criminal contempt statute, Congress instigating this process itself may be the only way for the long-standing tradition of contempt may be effectuated.

C. Civil Court Compulsion is Now Appropriate.

Typically courts are loath to insert themselves into a dispute between the political branches until they have truly reached an impasse. Of the three published opinions deciding executive privilege in regard to a congressional subpoena, two courts refused to enforce the subpoena;[52] and one court ordered release of some information short of complete compliance, but more than offered by the Administration.[53]

The two courts that refused to enforce congressional subpoenas did so on two very different grounds, neither of which apply to your subpoenas.

First, as discussed above, in *U.S. v. House of Representatives*, Congress sought documents held by then-EPA administrator Anne Gorsuch. She refused, and was held in contempt by the whole House.[54] The same day the

[49] 481 U.S. 787, 107 S.Ct 2124 (1987).

[50] Jurney v. MacCracken, 294 U.S. 125, 148 (1935).

[51] Kaiser, et. al., *supra* note 24, at CRS-37.

[52] U.S. v. House of Representatives, 556 F.Supp. 150 (D.D.C. 1983); Senate Select v. Nixon, 498 U.S. 725 (D.C. Cir. 1974).

[53] *See* Senate Select, 498 F.2d at 732.

[54] U.S. v. House of Representatives, 556 F.Supp. at 151.

House voted to hold her in contempt, the Administration filed an action in federal court seeking a declaratory judgment that executive privilege shielded the documents. The court refused to rule on the executive privilege claim, finding that the two branches had not done enough to negotiate their respective positions: "when constitutional disputes arise concerning the respective powers of the Legislative and Executive branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted."[55]

Your situation is distinguishable from that of the EPA subpoenas. You have asked the Administration for information on past and present surveillance activities no less than nine times, which is only amplified by the many requests submitted by other committees of jurisdiction. Over the last year and a half, the Administration has patently refused to cooperate with oversight attempts of this Congress and, in relation to the Judiciary Committees, successfully thwarted all attempts at collecting information. When the Administration refuses to negotiate in good faith, over such an extended period of time, you have clearly reached an impasse that is ripe for judicial intervention and civil compulsory processes.

In *Senate Select*, Congress did not sufficiently demonstrate its need for the infamous "Nixon tapes," and therefore did not have its subpoena enforced. In particular, the House Judiciary Committee already had possession of the exact same information and impeachment proceedings based on those tapes had already been instituted in the House, undercutting the Select Committee's claim to unique and original oversight.[56] The court also could find no pressing legislative decision that could not be made in the absence of the tapes.[57]

Here again, your subpoenas differ from that which was rejected in *Senate Select*. No committee in Congress has a full picture about what surveillance activity has taken place since the President authorized the National Security Agency to conduct electronic surveillance outside the scope of the Foreign Intelligence Surveillance Act, or on what legal authority this surveillance was authorized. Your investigative role is not redundant with other Committees; you have a unique jurisdiction that has been frustrated by the Administration's stonewalling. Moreover, the Administration has repeatedly called upon Congress to amend the very surveillance laws that the Administration has been ignoring since September 11, 2001. Determining the nature and extent of the past and present surveillance activities, as well as the legal arguments underpinning them, is crucial to fulfilling your Committee's legislative duties, and this obligation overcomes any Administration claim of executive privilege.

D. Other Means of Compulsion are Available to the Congress.

The Framers gave Congress, as the direct representatives of the people, robust powers to exert its authority over the Executive Branch when their interests conflict. In addition to the contempt authorities discussed above, Congress may exercise its appropriation powers to influence the President's decision whether to withhold information from Congress by refusing to fund programs the President favors, including the surveillance programs that are the subject of your Committee's subpoenas.[58] Likewise, the Senate can exercise its

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[55] *Id*. at 152.

[56] Senate Select, 498 F.2d at 190.

[57] *Id.*

[58] See, Louis Fisher, "Congressional Access to Information: Using Legislative Will and Leverage," 52 Duke L. J. 323, 326, (Nov. 2002).

appointment power to withhold confirmation of presidential nominees until compliance with the subpoenas is received.[59] These powers can make the political cost of non-compliance with congressional demands for information untenable.

IV. Conclusion

While the courts have recognized that the President has a constitutional privilege of confidentiality in the face of legislative demands for information and documents, that privilege is limited and can be overcome by an adequate showing of need. Your Committee has a legitimate legislative purpose for seeking documents regarding the legal justifications for and the authorization of the President's warrantless electronic surveillance programs, as recent legislation amending FISA contains a sunset provision that will require additional legislative action in the near term. Moreover, claims of executive privilege all but disappear when government misconduct is at is alleged, and the warrantless wiretapping program that is the subject of your subpoenas involves potential violations of law with substantial criminal penalties. Congress has ample authority to compel the President to comply with its demands for information, and Congress should exercise all of these authorities to get the answers it needs regarding these unwarranted surveillance programs.

[59] *Id*., at 336.