

# Showdown Looming Over Executive Privilege

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George W. Bush's presidential tenure has been marked by one cover-up after another. But the masterful spinning of Karl Rove and a compliant media enabled Bush to get away with it. Now that the Democrat-controlled Congress is investigating administration malfeasance, Bush's cover-ups have come cloaked in the guise of "executive privilege."

Bush has claimed executive privilege in resisting congressional subpoenas in the investigation of the U.S. Attorney firing scandal. U.S. Attorneys who weren't "loyal Bushies" were ousted in a mass purge. Bush instructed former White House political director Sara Taylor and former White House counsel Harriet Miers to refuse to testify about any "White House consideration, deliberations or communications" regarding the firings. He also instructed his chief of staff Joshua Bolten to withhold documents demanded by the House Judiciary Committee. Defying a congressional subpoena is a crime.

Taylor testified before the Senate Judiciary Committee, invoking the privilege selectively. Miers's and Bolten's situation is even more problematic. They refused to show-up at the House committee altogether. A witness must appear, be sworn, and then invoke the privilege. Miers and Bolten committed a crime when they failed to appear. They could be locked up for ignoring the subpoenas. Bush will claim the Executive is supreme and that his order to Miers and Bolten nullifies the subpoenas.

There are already signs that Bush will refuse to allow his Justice Department to enforce congressional contempt charges. Senate Judiciary Committee Chairman Patrick Leahy responded angrily, saying, "By acting above the law, this President and Vice President seek to override the independence of law enforcement and manipulate our valued system of checks and balances," adding, "an independent review is probably in order." It remains to be seen whether Congress will match its rhetoric with its votes.

As it did after the Haditha massacre, the U.S. military covered up the real cause of Pat Tillman's death. After claiming he died in a heroic gun battle with the enemy, the administration was later compelled to admit Tillman died from "friendly-fire." When the House Committee on Oversight and Government Reform subpoenaed "all documents received or generated by any official in the Executive Office of the President" relating to Tillman's death, Bush refused, claiming executive privilege. Again, a showdown is looming, this time over documents.

Chairman Henry Waxman and ranking Committee Republican Tom Davis wrote a letter to White House Counsel Fred Fielding, which said: "The Committee hearing [on Tillman's death]. . . raised questions about whether the administration has been providing accurate information to Congress and the American people about the ongoing war in Iraq and

Afghanistan.”

Congress has three options. First, if a majority of the judiciary committee and the full chamber agree, they can issue contempt citations and then certify them to the United States Attorney for the District of Columbia, “whose duty it shall be to bring the matter before the grand jury for its action,” according to a federal statute. But in spite of that statute, the White House will reportedly forbid the Justice Department from pursuing contempt charges.

Second, Congress could invoke its own “inherent contempt” power, direct the Sergeant-at-Arms to arrest the recalcitrant witness, and imprison her in the Capitol basement. This power was last used in 1934.

Finally, Congress can hire counsel to enforce the subpoenas in civil court.

In the past, when the White House and Congress have clashed over claims of executive privilege, the President generally capitulated before criminal proceedings began. But Bush has consistently defied Congress and the courts with his secret spying program and his signing statements. He will likely hold firm, banking on favorable rulings in the increasingly conservative Supreme Court.

Perhaps Congress should subpoena Dick Cheney to shed light on these matters. Since Cheney denies belonging to the executive branch, he’d be hard pressed to assert executive privilege.

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