MEMORANDUM

TO: Brian Hughes, Chief Administrative Officer, Mayor's Office

FROM: Stephen M. Durden, Chief Assistant, Office of General Counsel

RE: Executive Privilege and Legislative Investigation – Executive Summary

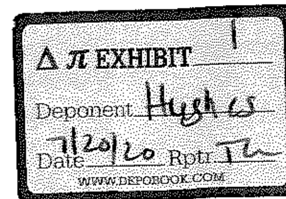
DATE: July 17, 2020

Nearly half a century ago, the United States Supreme Court held that then-President Richard M. Nixon was not above the law. *United States v. Nixon*, 418 U.S. 683 (1974). At the same time, the Court recognized that the President's unique and singular role in a tripartite system of government requires that courts recognize "executive privilege," a doctrine that protects the President from compelled disclosure of his or her communications related to the President's authority and duty, except under the rarest of circumstances, such as criminal investigation of egregious, felonious conduct by either the President or the President's closest advisors.

This privilege flows from the separation powers required by the United States Constitution. The President embodies the Executive Branch. Indeed, the President *is* the Executive Branch. Most state courts have applied this same separation of powers principle to recognize executive privilege for their state's chief executive. *Protect Fayetteville v. City of Fayetteville*, 2019 Ark. 28, 7–8, 566 S.W.3d 105, 110 (2019). Again relying on separation of powers, at least a few courts have applied executive privilege to mayors. *See, e.g., Marisol A. v. Giuliani,* 1998 WL 132810 (S.D.N.Y. Mar. 23 1998). Jacksonville's Charter, with its very strong and express separation of powers provisions[1] requires that the doctrine of separation of powers recognize the Mayor's executive privilege in a manner similar to other chief executives.[2]

In addition to protecting the chief executive, executive privilege protects (1) the communication between the chief executive and his or her advisors and (2) communications among those advisors. Courts often refer to this second layer of privilege as the deliberative process privilege.

> The reasons for this privilege, the Nixon Court explained, are "plain." "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." *Id.* at 705. Often, an adviser's remarks can be fully understood only in the context of a particular debate and positions others have taken. Advisers change their views, or make mistakes which other correct; this is indeed the purpose of internal debate. The result is that advisers are likely



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[1] Article 4, Charter.

[2] Given that the Committee has not sought to compel the Mayor's testimony, it is not necessary to consider whether the Council could compel such testimony. It should be noted that Congress has impeachment power, a power the Council does not have.

> to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisers may hesitate – out of self-interest – to make remarks that might later be used against their colleagues or superiors. As the Court stated, "[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." *Id.* at 708.

13 U.S.Op.Off. Legal Counsel 153, **3(O.L.C.), 1989 WL 595843

Asking advisors questions has the same impact on the executive branch as asking the chief executive. As with the United States Constitution, the Charter places *all* executive power within the chief executive, i.e., the Mayor. *Article 4, Charter.* The Charter also recognizes that the Mayor cannot execute and administer the law without appointing trusted advisors. *Section 6.04, Charter.*

In order to justify a demand for material protected by executive privilege, a congressional committee, for example, must demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Where a legislative committee seeks access to privileged information based on its desire to oversee the government operations, such a generalized interest weighs substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation. A legislative committee must show that the requested information is "demonstrably critical to the responsible fulfillment of the [committee's] functions." *Senate Select Committee*, 498 F.2d at 731.

The legislative branch may only exercise its inquiry power "in aid of the legislative function." *McGrain v. Daugherty* 273 U.S. at 135. The Supreme Court has explicitly held that Congress may not be use its inquiry power to arrogate to itself functions allocated by the Constitution to another branch of government. In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), the Supreme Court held that the House had exceeded its authority because the committee sought to find evidence of criminal or other wrongdoing, i.e., engaged in an inquiry judicial in nature, an inquiry in respect to which no valid legislation could be enacted. *See also Watkins v. United States*, 354 U.S. at 187. Accordingly, "lacking the judicial power given to the Judiciary, Congress cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive." *Barenblatt v. United States*, 360 U.S. 109, 112 (1927).

A committee must do more than assert that the subpoenaed documents may, at some level, relate to a legitimate oversight interest. To overcome an assertion of executive privilege, a congressional committee must "point[] to ... specific legislative decisions that cannot responsibly be made without access to [the privileged] materials." *Senate Select Comm.*, 498 F.2d at 733. In this sense, the D.C. Circuit has emphasized, "[t]here is a clear difference between Congress's legislative tasks and the responsibility of a grand jury." *Id.* at 732. "While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend

more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." *Id.* The legislative branch will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials.

The City Council has even less reason to inquire into past wrongdoings (unrelated to specific legislature proposals) than Congress. Congress has the power to remove from office, not only the president, but also the president's advisors. The City Council has not even a modicum of that power. Nor does the Council have legislative power over the processes by which the executive branch interacts with outside agencies. Council may, on the other hand, investigate facts within the knowledge of mayoral appointees so long as the investigation does not delve into deliberation processes among and between mayoral appointees, e.g., discussions of policies the Mayor should or should not recommend or act upon.

The following framework can be used to resolve the potential conflict between executive privilege and legislative investigation. First, and most obvious, the question arises as to whether executive privilege presumptively protects various communications. Second, the question arises as to the *legislative* need for the information. As the Office of Legal Opinions points out, some matters fall completely outside the bounds of legitimate legislation. For example, the legislative branch may not legislate from whom the executive gathers information as to the executive's express veto power or appointment or removal power. Nor may the legislative branch legislate as to any process the executive uses to make such decisions. Indeed, the legislative branch may not legislate with regard to any information the executive seeks to gather or the processes used to gather such information with regard to any decision solely within the discretion of the executive, e.g. veto, appointment, removal, policy recommendations. At a minimum, should an executive branch official, particularly a close advisor to the Mayor, claim executive privilege, the Committee owes the official an explanation as to the legislation under consideration. As with any interbranch discussion the best resolution is the one worked out in negotiations between the branches.

Out of respect for the Charter's separation of powers, information should be exchanged between the branches in a way that protects the deliberative process of the Mayor while providing information necessary for the fulfillment of Council's investigative duties. The Council should avoid transgressing on executive communications regarding policy.

Whether the executive branch official chooses to assert the privilege on a question-by-question basis or whether the official chooses to assert a blanket privilege is asserted preventing even an appearance, depends on the propriety of the scope of inquiry. If it is evident that any questions asked would fall within the realm of the privilege, a blanket assertion of the privilege in lieu of an appearance could be justified. Care should be taken to avoid interfering with an official's duties.

Once the privilege is asserted, the communications become presumptively privileged. Any decision to challenge a colorable assertion of executive privilege in the current context, therefore, would be brought to the General Counsel who would need to carefully consider the principle of separation of powers, the relevance of communications, the availability of other sources of the information, the effect compelled disclosure would have on future City employees, and the philosophical underpinnings of our consolidated government.

Summary

Executive privilege applies to all communications between the Mayor's staff and the Mayor.

Executive privilege applies to all communications among the Mayor's staff.

Executive privilege applies to all communications between the Mayor and any other person with regard to decisions within the Mayor's discretion, including but not limited to advice on policy that the Mayor may or may not want to advance.

Executive privilege applies to all communications between the Mayor's staff and any other person with regard to decisions within the Mayor's discretion, including but not limited, to advice on policy that the Mayor may or may not want to advance.

In order for legislative inquiry to overcome a claim for privilege, the legislative inquiry must relate to legislative judgment or legislative decision-making. In other words, the Council inquiry may overcome a claim for privilege if it relates to matters upon which the Council is considering legislation.

It is always best for the legislative and executive branches to negotiate solutions where there may be conflict between the two branches with regard to claims of executive privilege.