*Protecting the House's Institutional Prerogative to Enforce Its Subpoenas**

By Irvin B. Nathan[1]

The suspicious and apparently politically motivated firings in 2006 by President George W. Bush of several of the United States attorneys he had appointed led to the unprecedented action by the United States House of Representatives to file suit in federal court to enforce its subpoenas against high-ranking White House officials. The lawsuit resulted in a landmark ruling by a federal judge (appointed by George W. Bush) that held that the House could properly bring such a suit and that top executive branch officials had no right to ignore the subpoenas, but must appear in person, answer questions truthfully, and assert, where appropriate, on a question-by-question basis any privilege, including executive privilege.[2]

Prior to this lawsuit, it was the conventional wisdom that the House had only two ways to enforce its subpoenas: (1) vote to hold the witness in contempt and refer the matter to the U.S. Department of Justice for criminal prosecution under 2 U.S.C. Sections 192 and 194; or (2) direct the sergeant-at-arms to arrest the witness, try her in the House, and upon conviction, place her in detention in a House facility until she either complied with the subpoena or the term of the Congress expired, whichever came first. Since the first option was not available, according to the Department of Justice, when the recalcitrant witness was acting at the direction of the White House, and since the second option did not appear politically palatable when the witness in contempt for refusing to appear for her testimony was a gracious, middle-aged professional who was acting at the direction of the president of the United States, it was necessary to find a third way to proceed.

The unconventional lawsuit approach was opposed by, among others, the Republicans in the House, then in the minority headed by Minority Leader John Boehner. Indeed, the Republicans in the House filed an amicus brief with the court, urging dismissal of the action. However, proving once again that where one stands on an issue depends on where one sits, when the Republicans took control of the House, and a Democrat, Barack Obama, was elected president, Speaker Boehner used the *Miers* precedent to direct the House to file suit against Attorney General Eric Holder for withholding documents despite a subpoena in the so-called "Fast and Furious" investigation. This suit also resulted in a ruling in favor of the House's ability to bring suit to enforce its subpoenas (in a decision by a judge appointed by President Obama).[3]

It is now reasonably well settled that, at least, where all of the formalities have been observed—including proper service of the subpoenas, reasonable efforts to secure compliance, a formal vote of contempt of the House for non-compliance with the subpoena, and a House resolution authorizing a lawsuit—the House may bring an action in court to enforce a subpoena, and the failure of the witness to comply with a resulting court order can result in

1. The author was the general counsel of the U.S. House of Representatives under Speaker Nancy Pelosi and was the lead counsel for the House in the lawsuit to enforce the subpoenas issued to former White House Counsel Harriet Miers and Bush White House Chief of Staff Joshua Bolten. He is currently senior counsel at the Washington law firm of Arnold & Porter.

2. *See* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

3. *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013).

contempt of court and appropriate judicial sanctions. This case study describes how this remedy came to be available to the House and why in certain circumstances it is preferable to the two conventional approaches.

A. Factual Background

In late 2006, nine United States attorneys who had been appointed by President George W. Bush were unceremoniously forced from office by the Bush administration without notice, warning or explanation. Suspicions promptly arose that the firings were politically motivated since several of the deposed U.S. attorneys were either prosecuting prominent Republican officials or failing to pursue Democratic officials or supporters as vigorously as White House officials hoped. Examples of the fired U.S. attorneys included:

- Carol Lam, the U.S. attorney in Los Angeles, who secured a conviction on corruption charges of powerful Republican Representative Randy "Duke" Cunningham and was actively pursuing a corruption investigation of a top Bush-appointed CIA official and a prominent Republican donor. Before her firing, Ms. Lam had informed senior Justice Department officials that she would be executing search warrants in the corruption investigation.

- David Iglesias, the U.S. attorney in New Mexico, who was fired shortly after he rebuffed urgent requests from Republican Senator Pete Dominici and Republican Representative Heather Wilson to expedite his office's investigation of state Democratic officeholders. Indictments of the local Democrats would have benefited Wilson who at the time was running for re-election against the Democratic attorney general of New Mexico. Federal indictments would have made it appear that her adversary had not been sufficiently aggressive in enforcing the law against his fellow Democratic officeholders. Iglesias later termed his removal "a political fragging, pure and simple."

- John McKay, a U.S. attorney in the state of Washington, who Republican officials had asked to pursue allegations of voter fraud against suspected Democratic voters. McKay found the allegations unsupported by the evidence and, to the vocal dismay of Republican state operatives, declined to bring criminal charges. He was confronted on this issue by then White House counsel Harriet Miers and her deputy not long before he was notified of his dismissal.

Concerned about the apparent politicization of the federal criminal justice system and the potential messages sent to the remaining U.S. attorneys by these firings, committees of both houses of Congress initiated investigations into the firings in early 2007. In the House, the investigation was initiated by the Commercial and Administrative Law Subcommittee of the House Judiciary Committee, which has jurisdiction over the Executive Office for U.S. Attorneys. As difficulties developed in obtaining information, the matter was taken on by the full House Judiciary Committee. The House committee's investigative staff was ably led by Elliot Mincberg, who had formerly been a partner at a leading Washington law firm and for many years the lead counsel at a prominent public advocacy organization.

Top officials at the Department of Justice, including then Attorney General Alberto Gonzales, gave false and misleading testimony, claiming that there was little White House involvement in the termination decisions and claiming that the fired U.S. attorneys were "poor performers." In fact, documents obtained from the Department of Justice showed that most of the fired U.S. attorneys were evaluated as excellent and former Deputy Attorney General James Comey (now FBI director), who had been their supervisor, testified that most were outstanding performers. Many of the explanations for the firings offered by Justice officials to both Congress and the public proved to be pretextual and demonstrably false, and testimony to Congress minimized the role of the White House in the terminations.[4]

Documents obtained from the Department of Justice demonstrated that the White House had a substantial role in the determination of which U.S. attorneys were to be terminated. The documents indicated that the idea of replacing U.S. attorneys in the second Bush term had originated with influential White House adviser Karl Rove. They showed that multiple drafts of lists of U.S. attorneys to be fired passed between the Department of Justice and the White House

4. Office of the Inspector Gen., Office of Prof'l Responsibility, An Investigation into the Removal of Nine U.S. Attorneys in 2006 (2008).

counsel's office, when Harriet Miers was White House counsel. These drafts were ever-changing, and additions were made after complaints from Republican operatives from the states were delivered to the White House. The attorney general repeatedly claimed not to remember any of the details regarding the firing process or why these particular U.S. attorneys were chosen for termination. In fact, no witness from the Department of Justice could explain who decided which U.S. attorneys should be terminated or the criteria used for these decisions.

When all sources within the Department of Justice had been exhausted, key questions remained unanswered. Who drew up the lists? Who decided who would be on them? What criteria were used for the termination decisions? The House Judiciary Committee, headed by Rep. John Conyers, attempted to obtain through voluntary cooperation with the White House relevant documents and interviews with current and former White House officials with knowledge about the selection process and the reasons for the termination. In written correspondence, the White House counsel, Fred Fielding, refused to produce any documents or witnesses for interviews unless the committee agreed to a number of conditions. They included: accepting a very limited set of documents; conducting the interviews without any oath or transcript; and precluding in advance any follow-up to whatever information was provided. These conditions were totally unacceptable to the committee. It issued subpoenas for the testimony of Ms. Miers, by this time a retired White House counsel who had returned to the private practice of law in Texas, and for pertinent White House documents in the custody and control of then White House chief of staff Joshua Bolten.

In response to the subpoenas, the White House refused to produce a single document, claiming executive privilege as to every responsive document. The White House refused to produce a privilege log, which is commonly used in litigation to identify and describe the withheld documents (by date, author, recipient and so forth) so that informed challenges could be made to an assertion of privilege. The subpoena to Ms. Miers, issued on June 13, 2007, directed her to appear for testimony about a month later, on July 12. As late as July 9, her private counsel advised the committee that she would appear, but might withhold some documents and decline to answer certain questions if she believed that they were protected by executive privilege. Then on July 10, her counsel sent a letter to the committee advising that the White House counsel, Mr. Fielding, had advised him that the president's senior advisors, including retired ones like Ms. Miers, were "absolutely immune" from testimonial compulsion by a congressional committee and further that President Bush had directed Ms. Miers not to appear at the scheduled hearing.[5]

In response, on July 11, 2007, one day before the scheduled hearing, the committee sent a letter to Ms. Miers' counsel, noting that there was no court decision supporting the claim of absolute immunity; that no one, including high White House officials, had the option of failing to appear in response to a congressional subpoena; that numerous current and former senior White House officials, including White House counsel, had testified before Congress; and that a refusal to appear could subject Ms. Miers to contempt proceedings, including criminal prosecution and the inherent contempt authority of the House.

Ms. Miers did not appear before the committee on the day of the hearing.

B. Actions of the House In Response to the Failure to Comply with the Subpoenas

On the day of the scheduled hearing, July 12, 2007, the chairwoman of the Commercial and Administrative Law Subcommittee of the Judiciary Committee, Rep. Linda Sanchez, ruled that the claims of privilege and immunity were not properly asserted and that there was no legal basis for the witness's refusal to appear. The next day Chairman Conyers sent a letter to Ms. Miers' counsel giving her the opportunity to mitigate her noncompliance and avoid contempt by appearing at a rescheduled hearing. Once again, the chairman reminded counsel of the possibility of a contempt proceeding. In response, her counsel reiterated that she would refuse to appear as a result of a direction from President Bush and the legal conclusion of White House counsel Fielding that she was absolutely immune from congressional subpoenas.

On July 25, 2007, the Judiciary Committee voted, largely along party lines, 22-17, to recommend that the full House find Miers and White House chief of staff Bolten in contempt of Congress. Efforts over the summer and fall to resolve

5. *See Miers*, 558 F. Supp. 2d at 56.

by negotiations what Fielding referred to as an "impasse" were unsuccessful. In the meantime, the staff of the committee considered options to enforce a contempt citation if the full House voted, for the first time in 25 years, to hold a cabinet-level official in contempt.

The staff recognized that the statutory procedure for a criminal prosecution would not succeed under these circumstances. The procedure set forth in the federal criminal code contemplates that after a vote by the full House to hold a subpoenaed witness in contempt of Congress, the speaker refers the matter to the U.S. attorney in the District of Columbia, who then seeks an indictment and prosecutes the contemnor. Upon conviction, the defendant can be imprisoned or fined or both. In this case, since the executive branch was the source of the legal advice that the witness need not appear pursuant to the subpoena, it was clear that the Department of Justice would not permit the U.S. attorney to prosecute either the former White House counsel or the White House chief of staff.

An alternative to federal criminal prosecution is for the House to use its inherent contempt authority to imprison the contemptuous witness. As a result of early 19th century Supreme Court precedents, it is well established that the House (as well as the Senate) has the power to arrest and try an individual who has acted in contempt of Congress.[6] If convicted, the individual could be imprisoned in the House until either the witness cures the contempt or until the session of Congress is concluded. This procedure has not been employed in the last 75 years, and the author is reliably informed that the space formerly used as the House jail now serves as a snack bar.

While this alternative procedure was known to be available to the House, no one seriously considered it because of its political non-viability. Both the Judiciary Committee and the White House were battling over the political firings of the U.S. attorneys in the press and with the public. The committee had the high road with its search for the reasons behind the suspicious firings and those directly responsible for them. There would have been a great loss of public support if the House had attempted to imprison a distinguished professional woman who had served her country as White House counsel and had even been a nominee to be a Supreme Court justice, who in failing to appear was acting at the direction of the president.

A third alternative had to be found. The staff raised the possibility of a federal lawsuit for a declaratory judgment and an injunction and as a senior counsel to the committee, I urged that we pursue that approach. There was no direct precedent for such a suit, but all of the elements for such a suit appeared to be satisfied and it appeared to the staff that this was the best available approach. After all, the White House was making a legal claim that the witnesses were absolutely immune from House subpoenas and the Judiciary Committee was asserting that there was no such immunity. This was a legal issue, pure and simple, one which the courts were there to resolve. As Chief Justice John Marshall wrote in the landmark case of *Marbury v. Madison*: "It is emphatically the province and duty of the Judicial Department to say what the law is."[7]

The committee staff requested and received a legal opinion from the Congressional Research Service on the ability of the House to seek civil judicial enforcement of a subpoena. In an opinion, written by Morton Rosenberg and Todd Tatelman, the CRS reported that there had never been such a lawsuit before and had never been a House resolution authorizing such a specific action. There had, however, been prior instances when the House had passed resolutions authorizing committees to intervene in pending court cases where the House had a compelling interest and cases where the House had authorized investigative actions, which could eventually include judicial enforcement. The opinion concluded that it was possible to argue that the House, by adopting an authorizing resolution, could permit a committee, the House's general counsel or an outside private law firm to represent the House in court to seek a judgment ordering compliance with a congressional subpoena. At the same time the opinion warned that that there would be significant procedural hurdles that would have to be overcome before a court could reach the merits of such an action, including the House's standing to bring such an action, the jurisdiction of the court to consider it, and prudential reasons for the court to decline to entertain such a suit.

Internally, there was considerable debate whether to bring such a lawsuit. Attorneys with long experience in the House general counsel's office, and with considerable devotion to the prerogatives of the House, strongly recommended against

6. *See, e.g.*, Anderson v. Dunn, 19 U.S. 204 (1821).

7. Marbury v. Madison, 5 U.S. (1Cranch) 137, 177-78 (1803).

such a suit. Their argument was that the House was likely to lose the suit and thus the powers of the House would be diminished. Recognizing that it would be an uphill battle and that there were substantial procedural hurdles—including the fact that the Senate had by statute a right to bring such a suit, but the House was conspicuously absent from the statute—I, as general counsel, and some on the committee staff argued in favor of the suit. We believed that we had the better of the procedural arguments and a clear winner on the merits, if the court would reach them. We argued that if we did not sue, the House would appear to be a paper tiger, holding the witnesses in contempt but without any effective follow up action. I also argued that even if we lost on procedural grounds, it would be a loss on a ground that could likely be cured by future legislation, thus not doing any long term damage to the powers of the House. After I made my recommendations to them, Speaker Pelosi and Chairman Conyers exhibited considerable courage to pursue the litigation.

On February 14, 2008, the full House took up the Judiciary Committee resolution to hold Ms. Miers and Mr. Bolten in contempt. By an overwhelming vote of 223-32, the House voted to cite Ms. Miers and Mr. Bolten for contempt and to refer them for criminal prosecution. Knowing that the criminal prosecution was not likely, the full House also adopted a resolution authorizing the House Judiciary Committee to initiate a civil action in federal court to seek declaratory and injunctive relief "affirming the duty of any individual" to comply with a duly issued House subpoena.[8] The House Republicans walked out of the proceedings en masse and boycotted the votes on these resolutions.

In accordance with the resolutions, Speaker Pelosi certified the matter to the U.S. attorney in D.C., who was directed, under the statutes, to present the matter to a grand jury. The speaker also sent a letter to Attorney General Michael Mukasey to the same effect. Promptly thereafter, the attorney general advised the speaker that because the witnesses were acting at the express direction of the president "non-compliance …with the Judiciary Committee subpoenas did not constitute a crime and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute" the witnesses.[9]

C. The Precedent-Setting Litigation

Less than 10 days after the rejection by the attorney general and less than a month after the full House vote, the committee filed its 36-page complaint in the federal court in the District of Columbia seeking declaratory and injunctive relief. The complaint urged the court to rule that the witnesses had to honor the subpoenas and appear before the committee to answer questions or raise privilege objections to specific questions and either to provide the subpoenaed documents or identify in writing the documents withheld and the basis for withholding them. The case was assigned randomly by the clerk's office to Judge John Bates, who had been appointed to the bench by President George W. Bush.

As the lead litigator for the House, I believed it was critical to demonstrate that this suit was intended to preserve the institutional integrity and powers of the House, and was not a partisan matter between a Democratic-controlled House and a Republican president. Accordingly, I tried to convince the Republicans in the House to join the suit. I met with then-Minority Leader John Boehner in his office. He listened cordially as I explained that this suit was intended to preserve the institutional integrity of the House. I argued in the spring of 2008 that it did not take a lot of imagination to posit a day in the not too distant future when there would be a Democrat in the White House and the Republicans would control the House. (Indeed, that is exactly what happened by January, 2011.) Mr. Boehner was not persuaded, and advised that the Republicans would oppose our suit. Indeed, the minority leadership in the House, led by Mr. Boehner, filed an amicus brief urging that our suit be dismissed on the ground that it was "not ripe" for resolution.

To demonstrate the non-partisan nature of the suit, I worked hard to secure amici across the political spectrum and from both major political parties. With the aid of some of the terminated U.S. attorneys, we assembled a group of former U.S. attorneys, some appointed by Republican presidents and some appointed by Democratic presidents, ranging in their service from the days of President Lyndon Johnson to President George W. Bush. Their brief (written by outstanding lawyers at the premier boutique firm of Robbins Russell) attested to how important it was that the administration of the criminal justice system be (and be perceived as being) non-partisan and non-political. It also contended that it was important that

8. *Miers*, 558 F. Supp. 2d at 63.

9. *Id.* at 62-63.

the House determine what had led to the firings of nine of the president's own appointed U.S. attorneys. Finally, the brief argued that these White House officials could not ignore duly authorized congressional subpoenas by asserting a unilateral, unqualified claim of immunity.

We also secured a bipartisan group of prominent current and former members of Congress who filed an amicus brief (prepared by the highly regarded attorney, James Hamilton) on the importance of congressional oversight and the need for enforceable subpoena powers and the absence of any absolute executive privilege. An amicus brief (prepared by eminent Washington attorney Barry Coburn) was also filed by prominent academics from liberal and conservative institutions who were experts at separation of powers and the history and procedures for the assertion of executive privilege. They explained that no one had absolute immunity from a congressional subpoena, and that even where executive privilege applied, it had to be asserted on a question by question basis. Finally, an amicus brief (prepared by lawyers at the well known law firm of Paul Weiss and Brennan Center legal scholars headed by Frederick A.O. Schwarz, Jr.) in support of our positions was filed by a broad array of think tanks that focused on the importance of separation of powers in the federal government and the need and propriety for the court to resolve the impasse. Among those joining this amicus brief were the Brennan Center for Justice, the Rutherford Institute, Judicial Watch and the Citizens for Responsibility and Ethics in Washington.

As anticipated, the Department of Justice on behalf of defendants Miers and Bolten hit us with a barrage of procedural defenses to encourage the court to avoid the merits, that is, whether the witnesses were right to claim that they, as senior White House officials, were absolutely immune from congressional subpoenas. The executive branch's motion to dismiss claimed that (1) the House had no legal injury and therefore lacked standing to sue; (2) the House had no cause of action; and (3) the court should exercise its discretion to decline to entertain the suit under the Declaratory Judgment Act. The motion argued that only if the House had cleared each of these obstacles should the court reach the merits, and then rule that these high White House officials were absolutely immune from congressional subpoenas.

We had anticipated each of these arguments and had been researching these issues for months before filing suit. We had also consulted with some of the leading constitutional authorities in academia, including the brilliant Harvard Law School civil procedure professor Daniel Meltzer, who provided us invaluable assistance. (Ironically, Professor Meltzer became deputy White House counsel in the Obama White House and had to recuse himself when the Obama administration inherited the litigation from the Bush administration. Sadly, Professor Meltzer passed away prematurely shortly after completing his White House duties.)

In addition to filing our detailed opposition to the executive branch's motion to dismiss, we filed our motion for partial summary judgment because there were no material facts in dispute and because it was important to get a prompt result. We deliberately sought only partial summary judgment because we wanted to emphasize to the court that it did not need to decide at this point whether executive privilege was valid as to any specific questions or to any particular request for documents. Both our motion and the executive's were briefed on an expedited basis, and oral argument was scheduled for the end of June, less than four months after the filing of the case. The oral argument was held in the large ceremonial courtroom of the federal district court building in Washington, D.C. before an overflow crowd. Demonstrating to the court the importance each side attached to the litigation, White House counsel Fred Fielding sat at counsel table for the executive branch defendants with a half dozen lawyers from the Department of Justice. House Judiciary Chairman John Conyers sat with my team of lawyers from the House general counsel's office at plaintiffs' counsel table.

Judge Bates, who had spent much of his career before ascending the bench serving as the head of the civil division of the U.S. attorney's office in the District of Columbia defending suits against the executive branch, came to the oral argument fully prepared. He had obviously read carefully not only all of the voluminous briefs filed by both sides but many of the leading cases cited in those briefs. For over three hours, he peppered both sides with tough but fair questions, probing the vulnerable points of each side, and never indicating which way he was leaning. Recognizing what he later wrote was "the extraordinary constitutional significance" of the issues presented, Judge Bates allowed each side to make their full arguments, with rebuttals and surrebuttals.[10] Taking the matter under advisement without any indication of the result, the judge promised a prompt decision. Each side left the hearing confident that it had made its full case and best arguments

10. *Miers*, 558 F. Supp. 2d at 55.

but totally unsure what the result would be.

Less than one month later, the judge, true to his word, gave us our answer.

D. The Court's Decision

In a carefully considered, highly detailed 93-page opinion, Judge Bates ruled for the House on each of the issues. The opinion found that the House had standing to sue to enforce its subpoenas; that it had an implied cause of action under the Constitution and an express vehicle under the Declaratory Judgment Act; that the court should exercise its discretion to hear this case on the merits; and that senior White House officials were not immune from compulsory process from the Congress. The court did not rule on whether executive privilege might be properly invoked to some questions and requests for documents, but did order the defendants to honor the subpoenas by appearing as a witness and by producing not a full privilege log but a "detailed list and description of the documents" withheld on the basis of executive privilege sufficient to enable resolution first by the parties and ultimately, if necessary, by the court.[11]

The court repeatedly stressed how limited its holding was, noting that it had not ruled on whether executive privilege protected any particular document or answer. The court also emphasized that it was encouraging the political parties to resume their negotiations to resolve the matter, without further intervention by the court, now that the basic legal issues had been decided. But the judge was too modest. The opinion did set a significant precedent on important issues, one that has been followed by another federal judge and is likely to be followed by others. That is the reason that, even though the matter was thereafter resolved by negotiations between the Obama administration and the House and without an appellate resolution, the House insisted as part of the eventual settlement that the Bates decision not be withdrawn, and it never was.

To demonstrate how the *Miers* case should be interpreted in the future, it is worth exploring the basis and limits of each of the court's rulings on the three procedural questions and on the merits.

1. Standing

Under established Supreme Court doctrine, there are three elements to standing: (i) a concrete, particularized injury sustained by the plaintiff; (ii) a causal connection between the asserted injury and the defendants' challenged actions; and (iii) the ability of a favorable court decision to redress the injury. The executive branch conceded the latter two, reserving its attack on whether the House had sustained the requisite "injury". The court's decision on this issue is very significant because while it allowed the suit for subpoena enforcement to continue, it also set limits against congressional suits where members or chambers of Congress simply disagree with an interpretation of a statute or even a constitutional provision by the executive branch.

The court found that the injury the House had sustained as a result of the executive's failure to comply with the subpoenas was both the loss of information needed to carry out its constitutional oversight and investigatory functions and the institutional diminution of its subpoena power. Distinguishing this case from other battles between the political branches, the court emphasized that enforcement of a subpoena is a "routine and quintessential judicial task" and the judiciary is the final arbiter of privilege questions, including executive privilege.[12] The court reasoned that the Congress has the power of inquiry as an essential part of its legislative function and that enforceability of subpoenas is a critical part of the power of inquiry. This reasoning suggests that other types of suits—such as a difference of opinion in interpreting a statute or even a constitutional provision—would not necessarily give rise to standing, and those kinds of disputes would have to be fought out in the political sphere.

11. *Id.* at 107.

12. *Id.* at 71.

2. Cause of Action

The court found two bases for predicating its suit: the Declaratory Judgment Act (DJA) and an implied right of action under the U.S. Constitution. The court found that the House had met the specific conditions set out in the declaratory judgment statute: because (i) there was an actual controversy and (ii) the House had filed "an appropriate pleading" seeking a "declaration" regarding its "rights and other legal relations."[13] The House was not seeking an advisory opinion, but wanted actual compliance with its subpoenas. The court agreed with our arguments that the DJA can provide an appropriate vehicle to come to court when another law establishes the legal relationship between the parties. In this case, the other law was the Constitution. The court, relying on a long line of Supreme Court precedents, found that the power of inquiry—with the compulsory process to enforce it—is an essential auxiliary to the legislative function. Thus, it was in aid of its constitutional rights and powers that the DJA was being invoked by the House.

As an alternative basis for finding a cause of action, the court found that the House had an implied cause of action under Article I of the Constitution. The court distinguished the cases where courts are loath to create an implied cause of action from a statute, which requires considering congressional intent in passing the statute. In the case of the Constitution, it is the courts that have the authority to determine how rights and powers should be construed in order to make our nation's charter function effectively. The court noted that this was not an action for damages and establishing an implied cause of action in this limited circumstance was unlikely to open a floodgate of litigation. The court accepted our argument that the Supreme Court had already established an implied remedy—inherent contempt—for those in contempt of Congress, and the implied remedy of a judicial subpoena enforcement action was considerably less severe than incarceration in the House premises.

The court considered the executive's argument that these kinds of disputes should be settled in the political arena, using measures such as withholding of appropriations or confirmations of appointees (which, of course, is only available to the Senate), but concluded that the "appropriations process is too far removed" from this kind of legal dispute, which turned on a well-defined legal analysis, such as the availability and extent of a recognized privilege.[14] The court also noted that a ruling on the enforcement of a subpoena would have little risk of any negative impact on the conduct of government operations. Where a lawsuit might have considerable impact on government operations, a court should take little comfort from the *Miers* opinion and should lean toward not allowing the matter to be handled in court but rather in the political processes. The court concluded by noting that the implied cause of action it was recognizing for enforcement of subpoenas "is exceedingly narrow" and would apply only "in this very limited scenario."[15] The court also agreed with our contention that even under the executive's theory of leaving this dispute to the inherent House power of contempt, the matter would still end up in the courts as a result of an imprisoned contemnor's habeas corpus petition.

3. Equitable Discretion

The court recognized that it did have discretion under the Declaratory Judgment Act to decline to entertain the action. Notwithstanding the executive's claim that the court should not get involved in a dispute between the political branches, the court decided that it should exercise its discretion to decide the legal issue separating the parties. One of the leading factors was that if the court did not decide the immunity issue, the impasse would continue and the executive would prevail, even if there was no basis for its legal position. The court was persuaded that a judicial resolution would settle the legal issue and allow both sides to move on in accordance with applicable law. The court also believed that the issues were of significant public importance, where the public would benefit by a judicial resolution.

Finally, as expressed a number of times in the opinion, the court agreed with our contention that the DJA was a particularly appropriate vehicle to avoid the unseemly scenario in which the House would arrest and detain high-ranking executive branch officials, thereby bringing both branches into less repute with the public and possibly precipitating a serious constitutional crisis. Where arrests and detentions are not a possibility, a court might be more inclined to let political battles between the branches play out in the political processes as contemplated by the Constitution.

13. *Id.* at 78.

14. *Id.* at 93.

15. *Id.* at 93, 94.

4. Rejection of Absolute Immunity

Having resolved all of the procedural obstacles, the court reached the merits and unequivocally rejected the executive's claim that senior presidential aides have any immunity from congressional subpoenas. Relying on well-established Supreme Court precedent, the court held that compliance by all citizens, regardless of their governmental positions, with a congressional subpoena is a binding legal requirement. The court noted that senior White House officials have often testified before Congress subject to various subpoenas, and allowing them to ignore subpoenas would interfere with a critical part of Congress's constitutional role. As the court explained, endorsing the immunity urged by the executive "would eviscerate Congress's historical oversight function."[16]

Bearing in mind that there was no claim that the matters under inquiry involved national security or foreign relations, the court declined to speculate whether there might be limited immunity in those circumstances. The court concluded by noting that the underlying investigation—the reasons for the termination of a large number of U.S. attorneys—was extremely important, that there was good reason to believe that the subpoenaed information would be pertinent to that inquiry, and that there was no reason to believe the subpoenas were issued to harass or burden the recipients. The court ordered that Ms. Miers was required to appear for testimony, but could assert executive privilege on a question-by-question basis, subject to ultimate review by the court. Similarly, while not requiring the White House custodian of records to file a full-fledged privilege log, the court ordered the witnesses to provide to the House committee a detailed list and description of the nature and scope of the documents they sought to withhold, first so the parties can attempt to resolve their differences and if not, for ultimate resolution, if necessary, by the court.

Having resolved all the legal issues to that point, the court's opinion repeatedly encouraged the political branches to resume their negotiations "to resolve their differences constructively, while recognizing each branch's essential role."

E. The Aftermath

When the *Miers* decision came down, there were less than six months left of the Bush administration, and it was clear that it could drag its feet through the appellate process and avoid compliance with the court's order. Accordingly, after the November election of Barack Obama as the president-elect, our attention focused on trying to reach an accommodation with the incoming administration. We had good reason to believe that new administration would be a more favorable negotiating partner. During the presidential election campaign, candidate Obama had been asked about the Miers matter, and he responded that he thought the committee was correct, that its subpoenas should be obeyed, and that there was no basis to claim immunity for top White House aides.[17] That position did not continue quite so robustly after the president took office in January 2009. By that time, President Obama had become more protective of executive privilege.

In the fall, the Bush administration noticed its appeal from the Judge Bates decision, and a panel of the U.S. Court of Appeals for the D.C. Circuit stayed the effectiveness of the order. Perfecting the appeal by filing of briefs was put off until the first quarter of 2009, when the Obama administration was in office. It was apparent that the Obama Department of Justice did not want to file an appellate brief, defending the position of the Bush administration, particularly to conceal the facts behind the political firings of Bush U.S. attorneys. Yet, presumably looking ahead to future confrontations with the Congress, the new administration did not want to make wholesale release of the subpoenaed documents. A delicate set of negotiations ensued, where one of the key sticking points was a demand by the White House that the Judge Bates opinion be withdrawn. To their considerable credit, both Speaker Pelosi and Chairman Conyers refused that request and instead, the appeal was dropped.

As a result of the negotiations that ensued after the district court's decision, Ms. Miers' deposition was taken by the House Judiciary Committee staff on the record, under oath, with very few assertions of privilege. Also as a result of the decision,

16. *Id.* at 103.

17. Matt Apuzzo, *Lawsuit Could Be Power Shake-up for Obama, McCain*, USA Today, Jun. 24, 2008, http://usatoday30.usatoday.com/news/washington/2008-06-23-2444639400_x.htm (quoting then-candidate Barack Obama in reference to the House Judiciary Committee's subpoenas to Ms. Miers and Mr. Bolten: "The blanket notion that [the House] can't subpoena White House aides where there's evidence of genuine wrongdoing, I think is completely misguided. We're a nation of laws and not men and women … and that's a precedent I don't mind living with as president of the United States.").

the Senate Judiciary Committee was able to depose Karl Rove, the White House political operative, who until the judicial decision had also been refusing to appear for testimony despite a subpoena from that committee. Many of the subpoenaed documents were produced. No further challenges were made to those withheld on grounds of executive privilege. Ms. Miers' memory turned out to be as poor as former Attorney General Gonzales,' and no smoking gun appeared either in the testimony or the documents. Conversely, nothing appeared from the records to support any explanation for the firings other than the suspected political calculation that the fired U.S. attorneys were too aggressive in pursuing corruption cases against Republican officials and not perceived by Bush loyalists as sufficiently aggressive against Democratic interests. That was the conclusion reached by a majority of the Judiciary Committee in 2009.[18] Fallout from the investigation included the resignations of Attorney General Gonzales, his chief of staff (who participated directly with Ms. Miers in preparing the list of U.S. attorneys to be terminated) and several other top aides who were implicated in the process of implementing the terminations.

The *Miers* decision remains on the books as a persuasive precedent and ironically was relied on heavily by the Republican controlled House in its lawsuit against Attorney General Eric Holder in its so-called Fast and Furious investigation to compel the production of documents withheld on various privilege grounds. In denying a motion to dismiss the House's civil action to enforce the subpoena against the executive branch, Judge Amy Berman Jackson, appointed to the bench by President Obama, called the *Miers* decision "a persuasive opinion" that the courts have jurisdiction to resolve privilege disputes raised by the executive branch to congressional subpoenas. Relying largely on the reasons set forth in *Miers*, Judge Jackson let the suit go forward, finding that "neither the Constitution nor prudential considerations require judges to stand on the sidelines" and rejected the notion that there is any "unreviewable privilege" that can be asserted by the executive "in response to a legislative demand."[19] There is no question but that the *Miers* decision strengthened the hand of the House *vis a vis* the executive and established that its duly issued subpoenas are not to be ignored by anyone, including high-ranking executive branch officials.

Whether the *Miers* holding will be extended by the judiciary beyond enforcement of subpoenas and determination of legal privileges remains to be seen. But at this time, it is established that a civil action in court is available to either the House or the Senate as one of three possible remedies for a witness who refuses to comply with a congressional subpoena. It will presumably be the alternative of choice when the recalcitrant witness is an executive branch official who is acting under the advice or at least with the acquiescence of the Department of Justice. In such a case, criminal prosecution will be unavailable. As an alternative to a civil judicial remedy, with its attendant delays and uncertainties, the Congress may wish to consider modernizing its procedures and attendant practices for inherent contempt. Under that approach, there will be no need for Congress to seek judicial intervention, although if incarceration by the House remains an option, habeas corpus relief in the courts at the initiative of the witness will remain a possibility.

A thoughtful study by the Congressional Research Service (CRS) has suggested consideration of adopting the Senate's practice during the impeachment process of establishing a special committee that gathers facts and formulates recommendations which are sent to the full body before the trial on the floor of the Senate, a practice that has been approved by the Supreme Court. If the House were to adopt such procedures for contempt (which were used in some 19th century inherent contempt proceedings), provide essential due process protections (including reasonable notice, opportunity to defend with counsel and cross-examination) and limit the penalty upon conviction to a monetary fine, it might have a more seemly process that would satisfy political and constitutional standards and be more expeditious than civil judicial enforcement.[20] This approach would obviate any need for Congress to seek judicial intervention, but does not guarantee that the respondent will not seek judicial review of any resulting penalty. Indeed, one can foresee that there will be litigation regarding whether this type of procedure can be used against executive branch officials as well as other challenges. In addition, if the issue is one of an asserted privilege, whether by a government official or by

18. *See* Office of the Inspector Gen., Office of Prof'l Responsibility, An Investigation into the Removal of Nine U.S. Attorneys in 2006 (2008) (concluding that the process used to remove the 9 U.S. attorneys was "fundamentally flawed," that statements made by senior DOJ officials about the terminations were "inaccurate and misleading," and that the firings and the aftermath" severely damaged" the credibility of the Department and raised doubts in the public's mind about the "integrity of Department prosecutorial decisions."). That report, however, was admittedly incomplete because Ms. Miers, Mr. Rove and his deputy refused to be interviewed and the White House refused to provide its internal documents even to its own Department of Justice.

19. *Holder,* 979 F. Supp. 2d at 4.

20. *See* Todd Garvey, Alissa M. Dolan, Cong. Research Serv., RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice and Procedure (2014).

a private party, such as the attorney-client privilege, it is most likely that the respondent will insist on neutral judicial review rather than accepting the resolution by Congress.

As a postscript, I should note that one of my proudest possessions, displayed prominently in my office, is a gift I received from the staff of the House general counsel's office when I retired from that position. It is a signed, autographed copy of the *Miers* opinion, with the judicious inscription by Judge Bates, reading: "A fascinating case, well litigated by all."