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A Loss of Control: Privilege Cases Diminish Presidential Power

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A Loss of Control

Privilege cases diminish presidential power

BY NEAL DEVINS

When the dust of the Monica Lewinsky investigation settles, the law of privilege will be better developed, but the question of who speaks for the government in court will remain unanswered.

The U.S. Court of Appeals for the D.C. Circuit sided with independent counsel Kenneth Starr in two recent decisions, rejecting privilege claims of Secret Service officers and deputy White House counsel Bruce Lindsey.

Starr had sought their testimony in his investigation of possible perjury and obstruction of justice by President Clinton in connection with Paula Jones' sexual harassment lawsuit.

Losses on Two Fronts

The president came out the loser for two reasons. First, the decisions will bar the White House from claiming certain types of privilege in any subsequent independent counsel probes and, possibly, in congressional investigations.

Second, the executive branch infighting weakened the presidency and, in so doing, transferred power to the courts.

BRUCE LINDSEY (left), White House deputy counsel, was barred from invoking attorney-client privilege in grand jury proceedings.

AP/LINDA SPILLERS

By refusing to embrace Justice Department arguments in these cases, the White House made it difficult for unelected federal judges to sort out the preferences of the executive branch. This disagreement signaled the courts that Lewinsky-related privilege claims were, at best, speculative and contributed to the White House legal defeats.

In the Secret Service dispute, Starr and Attorney General Janet Reno differed over whether agents who protect Clinton can be forced to testify about his relationship with Lewinsky. Representing the "United States," Starr argued there is no authority to support a protective function privilege for Secret Service agents. In sharp contrast, "the United States acting through the Attorney General" filed a brief arguing that such a privilege exists.

For its part, the White House distanced itself from the dispute, claiming that the attorney general was acting on her own when she decided to file the brief and then to appeal her defeat.

The dispute between Reno and Starr was unavoidable. After President Nixon ordered the firing of Archibald Cox, a Watergate special prosecutor in the Justice Department, Congress created an independent counsel who could not be sacked by the president nor disciplined by the attorney general.

Thus, there was little Reno could do to stop Starr from making arguments she considered wrongheaded. Her choices were to make her case in court or stand by the sidelines.

But for Judge Laurence Silberman of the D.C. Circuit, the Justice brief should have been tossed out because "[w]e cannot have two opposing lawyers before us representing the same named party."

His colleagues, however, allowed Reno to make her argument before ruling in favor of Starr in *In re Sealed Case*, No. 98-3069 (July 7).

A Three-for-All

Three parts of government tangled in another Lewinsky-related matter, namely, the grand jury testimony of deputy White House counsel Lindsey. The dispute was between the White House, Justice and, of course, the Office of Independent Counsel.

Starr argued that government

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lawyers can never invoke attorney-client privilege in criminal matters. The White House maintained that the president has an absolute privilege over all conversations with government lawyers.

Said the Justice Department, which filed an amicus curiae brief, courts ought to weigh the needs of a thorough investigation against the president's interest in candid confidential advice.

The competing filings of the White House and Justice Department may seem convenient when different parts of the administration cannot agree on what the law is or should be. But if Justice is not finally accountable to the president for the positions it takes, to whom is it accountable?

And if Justice is not accountable to the president, then it seems to follow that the president is not responsible for what Justice says.

Furthermore, how can federal judges take seriously the views of the United States when the White House and Justice present conflicting arguments?

In this case, the D.C. Circuit rejected both the White House and Justice Department and again sided with Starr.

It concluded in *In re Lindsey*, No. 98-3060 (July 27), that a government lawyer may not invoke the attorney-client privilege in any federal grand jury investigation.

In support of its holding, the court cited the public interest in honest government and in exposing wrong doing by government officials.

Even if the White House and Justice were in sync in the Lindsey case, the Office of Independent Counsel would still be making arguments antagonistic to the executive branch. When Congress grants litigation authority to officials whom the president cannot dismiss, such as independent counsel or heads of independent agencies, the inevitable by-product is diminished presidential authority over legal policy-making.

Clinton's predecessor, George Bush, learned this the hard way. In a dispute between the U.S. Postal Service and the Postal Rate Commission, the Bush Justice Department argued that it, not judges, should broker intragovernmental disputes. But the Postal Service's board of governors resisted, arguing that it had independent litigation authority.

Following this rebuff, Bush himself demanded that the Postal Service withdraw from the case and threatened to remove the board if his order was not followed.

MONICA LEWINSKY fueled disputes between the White House, Justice and Ken Starr.

SABA/KIM KOLISH

In the end, however, the emperor was found to have no clothes. The board sought and obtained a preliminary injunction against the president, blocking its threatened removal.

The lesson is that the administrative state is—surprise—somewhat rigged against a strong presidency. Independent agencies, independent counsel and the like are supposed to disagree with the president—not all of the time, of course, but definitely some of the time. That is why the president cannot remove independent agency heads.

But presidents can ensure that the executive branch speaks with a single voice in court. The Reagan White House, for example, persuaded Clarence Thomas, who was then chair of the Equal Employment Opportunity Commission, to withdraw a brief supporting race-conscious affirmative action.

In sharp contrast, in *Bob Jones University v. United States*, the Reagan administration shot itself in the foot. After suffering great embarrassment for its decision to reverse longstanding IRS policy and grant tax breaks to racist schools, the administration asked the Supreme Court to appoint a "counsel adversary" to defend the government's earlier position.

At the same time, the administration filed a competing brief defending its policy reversal. To no one's surprise, the Court embraced the counsel adversary's arguments.

Advice for a Strong Presidency

Like the Reagan administration in *Bob Jones*, the Clinton administration has done itself great damage in the Lindsey lawsuit.

By allowing the Justice Department and White House to butt heads with each other, the Clinton administration has relieved the courts of any pressure to defer to the executive branch.

When the people elected Bill Clinton, it was to head the United States of America, not some office in the executive branch known as the White House.

While statutes like the one creating the independent counsel may create the situation that the president now confronts, it is nevertheless true that the buck must stop somewhere. In the Lindsey case, it must stop at the Oval Office. ■