

Curbing the Grand Inquest: Legislature v. Executive in the United States and Australia

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Introduction

The ability of the legislature to scrutinise the actions of the executive is of continuing relevance to our system of government. This article contrasts two specific cases in which committees of the legislative branch inquired into possible political malfeasance by the executive branch, here and in the United States. The first case involved congressional inquiry into the allegedly politicised firing of nine United States Attorneys in 2006. The second involved an inquiry by an Australian Senate committee into the ‘children overboard’ case, including allegations that the public had been misled for electoral gain in 2001. In both cases, the committees sought to compel the testimony of political advisers to an executive officer, with varying success.

While the Australian Parliament and the United States Congress are subject to differing constitutional arrangements, a comparison of the two cases reveals similar battles with executive government. While the design and nature of these two systems of government diverge at multiple points, of particular interest is the increased role played by the judiciary in the United States since the Watergate cases resulted in landmark precedents.

In order to provide context to the two cases, the article begins with an overview of the constitutional arrangements, followed by a brief history of public interest immunity claims (or executive privilege) in both countries.

Constitutional arrangements in the United States and Australia

The American and Australian systems of government share a number of features, including the separation of government powers amongst three bodies: the legislature, the executive and the judicature.¹

The framers of the United States Constitution were influenced by the ideas of leading European philosophers such as John Locke and Baron de Montesquieu, who argued for the division of governmental powers as a check against tyranny.² The framers

¹ The Australian Constitution refers to the Judicature, the American to the Judicial Branch.

² Mark Rozell, *Executive Privilege: the Dilemma of Secrecy and Democratic Accountability*, John Hopkins University Press, Baltimore, 1994, p. 22.

therefore set out at the constitutional convention to devise a government system of limited powers.³ Thus the legislative power was vested in Congress, the executive power in the President and the judicial power in the Supreme Court.⁴

There is some argument as to whether the branches were intended to be truly equal. Raoul Berger argues that the legislative branch was intended to be supreme over the executive branch, citing (amongst many other things) the precedent of the English Parliament and a statement by the chief constitutional architect, James Madison, that ‘in republican government, the legislative authority necessarily predominates’.⁵ However, Mark Rozell argues that Berger overstates his case, and that the framers saw a strong executive as necessary to the protection of liberty.⁶

In any event, it is clear that a primary concern in the construction of the United States Constitution was to implement a system of checks and balances that would prevent the accumulation of power in one branch. Government functions were divided amongst the branches, forcing cooperation and negotiation. For example:

- treaties could be made by the President but with the advice and consent of two thirds of the Senate;⁷
- Congress was granted the power to raise armies and declare war, but the President was appointed Commander-in-Chief of the armed forces;⁸ and
- the House of Representatives has the power to impeach the President, but the trial is the preserve of the Senate, with the Chief Justice presiding.⁹

The deliberate division of functions resulted in a system suited to negotiation and compromise.

The Australian Constitution, influenced by the American example, adopted a similar tripartite division of powers. Thus, the legislative power is vested in the Parliament, and the ultimate judicial power in a federal supreme court (the High Court of Australia). However, the executive power is vested in the Queen, a point at which the systems begin to diverge.

³ *ibid.*, p. 12.

⁴ Congress was able to establish inferior courts, however the ultimate judicial power lay in the Supreme Court.

⁵ Raoul Berger, *Executive Privilege: a Constitutional Myth*, Harvard University Press, Cambridge, Mass., 1974, p. 13.

⁶ Rozell, *op. cit.*, pp. 22–5.

⁷ United States Constitution, art. 2, s. 2.

⁸ United States Constitution, art. 1, s. 8; art. 2, s. 2.

⁹ United States Constitution, art. 1, ss. 2, 3.

In addition to an American-style separation of powers, the Australian Constitution also appropriated the traditions of Westminster. This included provisions prescribing a system of responsible government.¹⁰

Where the American version of the separation of powers arguably presumes coequal branches of government, the Westminster system of responsible government traditionally presumes the supremacy of parliament. Where the American President is directly elected, the Australian Parliament extends confidence to a ministry who advises the Crown. The executive government is thus responsible to the Australian Parliament. Specifically, the ministry is required to hold the confidence of a majority of the lower house.

It seems logical therefore to expect that there exists a greater claim to oversight of the executive by the parliament in the Australian system than the American. For instance, in *Lange v. Australian Broadcasting Corporation*, the High Court referred to the chain of accountability to the electorate as implying ‘a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament’.¹¹

Parliament is directly accountable to the people through regular elections, but the executive government is accountable to the Parliament. This is the fundamental chain that is meant to ensure the democratic accountability of government to the people. By contrast, the American people are able to vote for both their representative and President.

One might expect that, as a result, the Australian Parliament would have greater power relative to the executive government than its American counterpart. In reality, however, the ability of the legislature to successfully investigate the executive has been a vexed issue in both jurisdictions, and is explored in the following section.

Legislative inquiry and public interest immunity claims in the United States and Australia

The term ‘public interest immunity claim’ refers to a claim by the executive branch of government that the disclosure of certain information would be against the public interest. In Australia, it has also been known as ‘Crown privilege’. In America, it is commonly known as executive privilege, although this has come to refer specifically to the confidentiality of presidential deliberation and communication.

¹⁰ The specific provisions that give rise to responsible government were identified in *Lange v. Australian Broadcasting Corporation* (see note 11).

While public interest immunity claims may be made on a number of grounds, this paper focuses on the claimed immunity pertaining to executive branch deliberation and communication. The principle behind such a claim is that confidentiality is necessary to ensure that governments can receive candid advice and deliberate effectively. It is argued that transparency would result in self-censorship and inhibit internal discussion and therefore the efficient operation of government. In Australia, these principles are represented by the confidentiality of cabinet deliberations. A similar argument is applied to the need for confidentiality in the public service, particularly in the provision of advice to ministers. In the United States, the focus is on the President and his advisers, but also communications with and within government departments.

The following sections briefly outline the development of public interest immunity claims generally, and the protection of government communications specifically in each jurisdiction. As might be expected in two systems with a shared ancestor, in the form of the Westminster Parliament, the basic principles are very similar. A marked difference, however, has been the increasing use of judicial intervention in the United States, particularly since the 1970s.

Executive privilege in the United States

The United States Congress has a long history of committee inquiry into executive branch conduct. This power of inquiry has been confirmed as an implicit adjunct of the legislative power. In 1927, the Supreme Court found that ‘the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function’.¹² A further case, arising from the activities of the House Un-American Activities Committee, established that the power was broad, but not unlimited:

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 probes into departments of the Federal Government to expose corruption, inefficiency or waste.¹³

¹¹ *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

¹² *McGrain v. Daugherty* (1927) 273 U.S. 135, 174.

¹³ *Watkins v. United States* (1957) 354 U.S. 178, 187.

The court noted that no inquiry was an end in itself, but needed to be related to, and in furtherance of, a legitimate task of Congress.¹⁴

The executive response to congressional inquiry has changed over time. The earliest precedents were set by presidents that had direct involvement with the drafting of the Constitution. When faced with a congressional request for information in connection with the St Clair inquiry, President Washington convened a meeting to discuss how to respond. Thomas Jefferson recorded that there was general agreement at the meeting that ‘the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion’.¹⁵

The earliest precedent therefore suggests that the balancing of competing public interests was inherent in resolving such cases. Congress too recognised the concept. For example, an 1807 request by the House of Representatives for information relating to the Burr conspiracy included the caveat ‘except such as [Jefferson] may deem the public welfare to require not to be disclosed’.¹⁶

However, the grounds for presidential refusals to provide information expanded to include arguments based on constitutional arrangements. In 1833, President Jackson stated that Congress could not ‘require of [him] an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council’. President Jackson, in 1835, refused information on a subject ‘exclusively belonging to the executive department or otherwise encroached on the constitutional powers of the executive’.¹⁷

Claims to immunity from congressional inquiry were made on a variety of grounds throughout the 19th century and early 20th century. However the aggressive use of the Senate’s investigatory powers by Senator McCarthy and the House Un-American Activities Committee in the 1950s caused both the Truman and Eisenhower administrations to make a significant number of claims of immunity. The Eisenhower administration was the first to describe such claims as ‘executive privilege’ referring specifically to the claimed protection of communications between the President, White House aides and other officials.¹⁸

¹⁴ *ibid.*

¹⁵ Paul Ford, *The Writings of Thomas Jefferson*, Putnam, New York, 1892, pp. 189–90.

¹⁶ Berger, *op. cit.*, p. 179.

¹⁷ Rozell, *op. cit.*, p. 39.

¹⁸ Berger, *op. cit.*, p. 170.

In the 1970s the pendulum swung in the other direction. President Nixon's extreme statement of the unlimited nature of executive privilege in connection with investigation of the Watergate controversy led to a series of landmark court cases. Most importantly, in *United States v. Nixon*, the Supreme Court found a constitutional basis for executive privilege, in the 'supremacy of each branch within its own assigned area of constitutional duties' and the separation powers.¹⁹ The privilege found and examined by the court specifically related to the confidentiality of presidential communications only. The court noted that a claim for immunity based on military, national security or foreign affairs may have higher protection.²⁰ The term 'executive privilege' is therefore commonly used to refer specifically to the protection of presidential communications.

However, the court also rejected Nixon's assertion that this privilege was absolute. Rather, it was presumptive and could be overcome by an appropriate showing of public need by the branch seeking access to the communications.²¹ This test, essentially one of public interest, was applied to a congressional committee in *Senate Select Committee on Presidential Campaign Activities v. Nixon*.²²

A number of cases in subsequent decades have further refined the operation of executive privilege.

Firstly, the judicial branch still prefers not get involved in disputes between the other two branches. Only after a political solution has been attempted and failed will the courts intervene.²³

Secondly, courts have sought to define executive privilege narrowly. This was emphasised in *Nixon v. Administrator of General Services*, where the court repeated statements from *United States v. Nixon* that the privilege was limited to communications in the performance of the President's constitutional functions.²⁴

Similarly, the cases *In re: Sealed Case (Espy)* and *Judicial Watch, Inc. v. Department of Justice* further defined the privilege. Key points from the cases include:

¹⁹ Morton Rosenberg, 'Presidential claims of executive privilege: history, law, practice and recent developments', *CRS Report for Congress*, Congressional Research Service, updated July 5, 2007, p. 6, citing *United States v. Nixon*, 705 (see note 20).

²⁰ *United States v. Nixon* (1974) 418 U.S. 683, 710.

²¹ Rosenberg, 'Presidential claims of executive privilege', op. cit., p. 6, citing *Nixon v. Sirica* (D.C. Cir. 1973) 487 F.2d 750.

²² *Senate Select Committee on Presidential Campaign Activities v. Nixon* (D.C. Cir. 1974) 498 F.2d 725.

²³ See *United States v. AT&T* (D.C. Cir. 1977) 567 F.2d 121; *United States v. House of Representatives* (D.D.C. 1983) 556 F.Supp. 150.

²⁴ Rosenberg, 'Presidential claims of executive privilege', op. cit., p. 7.

- a distinction between presidential communications and general executive branch communications (deliberative process). The latter is a weaker form of executive privilege and disappears altogether when there is any reason to believe government misconduct has occurred;²⁵
- the presidential communications privilege is limited to communications made, or solicited and received by a presidential adviser or their staff in order to inform the President's decision-making. The advisers or staff members in question were limited to White House staff with operational proximity to direct presidential decision-making.²⁶
- The decision-making in question was limited to that relating to the President's core Article II functions, involving 'quintessential and non-delegable Presidential power'.²⁷

These precedents have formed the 'ground rules' in battles between the executive and Congress and were relied on extensively in the US case study below.

Public interest immunity in Australia

As in the United States, the Australian Constitution does not explicitly grant the Parliament the power of inquiry, nor the executive the power to withhold information from Parliament.

However, it does grant both houses of Parliament the powers of the House of Commons in 1901, as well as the right to establish their own powers, privileges and immunities.²⁸ Given the inquiry powers of the House of Commons at that time, there is a general acceptance of similar inquiry powers of the Australian Parliament.

In marked contrast with the development of the principles of executive privilege in the United States, Australia does not share the American history of judicial intervention that commenced with the Nixon cases. As a result, there are very few legal precedents that directly relate to the relationship between the parliament and the executive.

However, the issue of public interest immunity and the inquiry powers of parliament have, to a degree, been tested in court with respect to the New South Wales Parliament. There are major differences in the mechanism by which the parliament is empowered in NSW and federally. However, both jurisdictions operate a similar version of both responsible and representative government.

²⁵ *ibid.*, p. 17, citing *In re: Sealed Case* (D.C. Cir. 1997) 121 F.3d 729 (*Espy*).

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ Australian Constitution, s. 49.

Two specific findings stand out. First, the New South Wales Court of Appeal found that the Legislative Council's power extended to the production of documents to which claims of legal professional privilege and public interest immunity could be made, but that the Council could not compel the production of cabinet documents.²⁹

Secondly, statements by the High Court in *Egan v. Willis* confirmed previous views in *Lange v. Australian Broadcasting Corporation* regarding responsible government. In addition to identifying the key parliamentary functions of both law-making and the review of executive conduct, the High Court noted that the principles of responsible government were a resource that could be used by the courts in interpreting the Constitution, but that the concepts were flexible over time and were responsive to modern administrative arrangements.³⁰

At the federal level, a number of court decisions relating to the ability of the judicature to compel evidence from the executive in the face of public interest immunity claims are also relevant, although do not directly apply to the Parliament. The last fifty years have seen a change in the treatment of the issue by the courts; from a historical view that a certificate (invoking what was then called Crown privilege) from a minister was conclusive to a focus on a public interest test.³¹

Two cases relating to the immunity of cabinet documents from disclosure in a trial set important precedents for the protection of such high level documents. *Sankey v. Whitlam* established that the immunity attaching to cabinet documents was not absolute and that even they could be disclosed in pursuit of the public's interest in justice. Indeed, *Sankey* cited *United States v. Nixon*, and the two cases bore striking resemblance in terms of the principles argued.³²

The principle was further refined in *Commonwealth v. Northern Land Council*. The court held that the very high public interest in confidentiality of cabinet documents could only be outweighed in exceptional circumstances where a significant likelihood

²⁹ Christos Mantziaris, 'Egan v. Willis and Egan v. Chadwick: responsible government and parliamentary privilege', Research paper no. 12, 1999–2000, Australian Parliamentary Library, December 1999, p. 8; Cabinet documents, in essence a recording of cabinet deliberation, are presumably analogous to the presidential communications identified above.

³⁰ *ibid.*, pp. 11–12.

³¹ Harry Evans (ed.), *Odgers' Australian Senate Practice*, 12th edn, Department of the Senate, Canberra, 2008, p. 470; Principles of public interest were first outlined in *Duncan v. Cammell, Laird and Co.*, although the issuing of a certificate was still accepted as conclusive at that stage. This changed in 1968, in *Conway v. Rimmer*—The House of Lords held that a minister's certificate was not conclusive in all cases and that court was the final arbiter of a claim of public interest immunity.

³² *Sankey v. Whitlam and Others* (1978) 142 CLR 1.

existed that the public interest would be better served through the disclosure of the documents allowing the proper administration of justice.³³

Alister v. the Queen dealt with public interest immunity on the grounds of national security. The court ordered the production of ASIO documents for inspection, noting that this issue too was subject to a public interest immunity test.³⁴ A number of other cases have similarly enforced the view that no document is completely immune from judicial scrutiny, subject to a public interest test.³⁵

However, these matters involved disputes between the executive and the judicature. In terms of parliamentary scrutiny, the upper and lower houses have differed in character. Of the two, only the Senate has typically been outside the control of the executive, whereas party discipline has tended to ensure the effective dominance of the House of Representatives by the executive. As the case studied below relates to a Senate committee, the remainder of this section deals with that chamber.

As with judicature, the last half century has seen a change in the treatment of what was then called ‘Crown privilege’ and is now called public interest immunity claims in the Senate. This has broadly reflected the change in judicial treatment of public interest immunity, with the modern practice involving a test of competing public interests.

The issue came to a head in 1975 over the Khemlani Loans Affair. An inability to compel key evidence from a group of public servants led to a landmark resolution. In it, the Senate recognised that while it has the power to summons witnesses and documents, it may determine that a valid claim of public interest immunity does exist.³⁶ However, the Senate also held that the right to determine the validity of such claims lay with it, not the executive.

This order, which can be considered as the Senate’s formal position on the matter, was supplemented in 2009 by an order of continuing effect that included a formal procedure to be adopted by the executive upon making a public interest immunity claim:

- the claim should be made by a minister;
- the harm to public interest must be explained; and

³³ *Commonwealth v. Northern Land Council* (1993) 176 CLR 604.

³⁴ *Alister v. the Queen* (1984) 154 CLR 404.

³⁵ Evans, op. cit., p. 472.

³⁶ *Journals of the Senate*, 16 July 1975, p. 831.

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- the minister should notify the Senate whether the harm could be avoided through supplying the information in camera.³⁷

In the event that the Senate and the executive disagree over the validity of a claim, the practice has been for the Senate to adopt political rather than legal remedies. The outcome of a conflict is thus generally resolved with respect to the political damage to the executive of disclosure versus non-disclosure.³⁸

Case studies

The following case studies involve situations where committees of the legislature sought to investigate possible political misfeasance on behalf of the executive government. The testimony of advisers was sought in both cases, with an attempt made to refuse access to these individuals. As will be shown, the American committee was eventually able to secure evidence from presidential advisers after protracted debate involving legal precedents and eventual judicial involvement. The Australian committee was unable to secure the attendance of key ministerial advisers, and was unwilling to proceed to summons, which may have resulted in unprecedented judicial involvement.

Congressional investigation into the firing of nine United States Attorneys

In December 2006, the Department of Justice (DoJ) fired seven United States Attorneys (US Attorneys), prompting a major political controversy that eventually led to the resignation of a number of senior DoJ officials.³⁹ Two other US Attorneys had been told to resign earlier in 2006. These firings became the subject of two separate congressional committee inquiries.

The ostensible reason given for the firings was underperformance, although this was only clearly enunciated in the months following.⁴⁰ However, subsequent speculation suggested that the firings had in fact been influenced by the partisan interests of the White House. Speculated motivations included political retribution for conduct in voter-fraud and other cases and giving politically favoured candidates the opportunity to serve as a US Attorney.⁴¹

³⁷ *Journals of the Senate*, 13 May 2009, pp. 1941–2.

³⁸ Evans, op. cit., p. 469.

³⁹ Seven US Attorneys were contacted on that date and asked to resign, although the actual date of resignation occurred later in each case.

⁴⁰ Alberto Gonzales, ‘They lost my confidence’, *USA Today*, 7 March 2007.

⁴¹ Dan Eggen and Amy Goldstein, ‘Voter-fraud complaints by GOP drove dismissals’, *Washington Post*, 14 May 2007.

An investigation conducted by the Department of Justice's Office of the Inspector General and Office of Professional Responsibility would later find that the process used to remove the US Attorneys was fundamentally flawed and that there was significant evidence that political partisan considerations were an important factor in the removal of several of the US Attorneys.⁴²

Congressional investigation into the firing of the attorneys occurred in both chambers. The Senate Committee on the Judiciary (SJC) commenced a series of hearings into the matter in February 2007, under the title 'Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?'

Similarly, the House Committee on the Judiciary (HJC), initially through the Subcommittee on Commercial and Administrative Law, commenced an investigation into the firings on 6 March 2007.⁴³

Both committees heard from a number of senior Department of Justice officials, including the Attorney General and his deputy. Following this testimony, the committees began to turn their attention to the involvement of White House staff in the matter.

Subpoenas were issued by both committees demanding the testimony of a number of White House staff, including Karl Rove, Deputy Chief of Staff; Harriet Miers, White House Counsel during the firings; and Sara Taylor, former Director of the Political Affairs section. Additionally, a subpoena for documents held by the Chief of Staff, Josh Bolten, was issued.⁴⁴

In response, the Bush administration advised the committees that both the document subpoenas and those demanding the testimony of White House officials were subject to executive privilege, which was argued on three grounds.

The first related to 'internal White House communications' which, according to the White House Counsel, fell squarely within the scope of executive privilege as 'internal deliberations amongst White House officials' citing the precedent in *United States v. Nixon* that notes the need for frank and candid discussion in decision-

⁴² US Department of Justice Office of the Inspector General and US Department of Justice Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, US Department of Justice, Washington DC, 2008, pp. 325–6.

⁴³ *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et al.*, Memorandum Opinion, Civil Action no. 08-0409 (JDB), US District Court (District of Columbia), 31 July 2008, p. 6.

⁴⁴ Jonathan Geldert, 'Presidential advisors and their most unpresidential activities: why executive privilege cannot shield White House information in the U.S. Attorney firings controversy', *Boston College Law Review*, vol. 49, no. 3, May 2008, p. 825.

making.⁴⁵ Further, this was argued to be a particularly strong claim as it involved the President's constitutional appointment and removal power, a 'quintessential and non-delegable Presidential power' as per the precedent set by *Espy*.⁴⁶ The question posed by the White House was therefore whether the public benefit of the committee's access to the evidence (in this case, oversight) was strong enough to overcome, as per *Senate Select Committee v. Nixon*.⁴⁷

The second related to communications between White House officials and individuals outside the executive branch, including judicial officials. It was argued that the interest in confidentiality extended to a case where the President or his advisers had to go outside the executive branch in order to inform themselves.⁴⁸

The final category related to communications between the White House and the Department of Justice. It was stated that these communications were deliberative and hence fell within the scope of executive privilege.

Additionally, the memorandum cast doubt on whether Congress had a legislative authority over the nomination or replacement of US Attorneys.⁴⁹ This was despite the Senate's traditional role in the confirmation process, although may have been more applicable in the case of the HJC. A final argument referred to *Senate Select Committee*, opining that the number of documents already provided to committees was sufficient, and that further evidence was merely cumulative and unnecessary.⁵⁰

The committee chairmen responded by labelling it an 'unprecedented blanket claim' and requested a detailed privilege log for documents including the specific basis for the assertion of privilege in each case. They also noted the precedent arising from *Espy* and *Judicial Watch*, that executive privilege was limited to communications that, in the case of advisers, were solicited and received for the purpose of informing the President. This was relevant as initial comments by executive officials suggested that the President had no involvement in the decision to fire the US Attorneys.⁵¹

⁴⁵ Rosenberg, 'Presidential Claims of Executive Privilege', op. cit., p. 24.

⁴⁶ *ibid.*

⁴⁷ As described previously, this was a case where the precedent in *United States v. Nixon* (the requirement for a strong showing of need) was applied to the demands of a Senate committee. See note 22.

⁴⁸ Rosenberg, 'Presidential Claims of Executive Privilege', op. cit., p. 25.

⁴⁹ *ibid.*

⁵⁰ *ibid.*; In that case, the court had ruled against the select committee, partly on the grounds that a House committee already had access to the tapes in question and were conducting an investigation. As a result, the benefit of the Senate committee's investigation was merely cumulative, as it was in addition to an existing investigation of similar aim.

⁵¹ Senator the Hon. Patrick Leahy in US Senate Committee on the Judiciary, *Preserving Prosecutorial Independence: Is the Department of Justice Politicising the Hiring and Firing of US Attorneys?*, Committee hearing transcript, 11 July 2007, p. 388.

Sara Taylor, who had since left the White House, agreed to appear before the Senate committee under oath on 11 July 2007, but stated that she would uphold a presidential direction to not testify concerning:

White House consideration, deliberations, communications, whether internal or external, relating to the possible dismissal or appointment of United States Attorneys, including consideration of possible responses to congressional and media inquiries on the United States Attorneys matters.⁵²

The committee accepted that Ms Taylor was in a difficult position, in the ‘middle of a constitutional struggle between two branches of Government’ and did not press the issue.⁵³

On the same day, the committees were informed that neither Ms Miers, Mr Rove nor Mr Bolten would be responding to the subpoenas. An opinion by the Office of Legal Counsel argued that the President, as the head of an independent branch of government, could not be forced to appear before a congressional committee, as this would threaten ‘fundamental separation of powers principles—including the President’s independence and autonomy from Congress’.⁵⁴ As an extension of the President, this immunity flowed to his advisers. The fact that Ms Miers was a former adviser by this stage did not alter the principle—post-service immunity was required to fully insulate advisers during the period of their service.⁵⁵ The arguments were based on principle and previous executive opinions and did not directly cite any case law.

In response, both the Senate and House committees voted to cite certain advisers for contempt for their refusal to respond to subpoena. The House Judicial Committee’s contempt resolution was adopted and passed by the House of Representatives itself, in February 2008.⁵⁶

As Rosenberg notes, Congress has three kinds of contempt proceedings at its disposal. It can choose to cite a witness under the inherent contempt power, under a statutory criminal contempt procedure, or in some cases, enforce orders through a civil

⁵² Sara M. Taylor in Senate Committee on the Judiciary, Committee transcript, op. cit., p. 394.

⁵³ Senator the Hon. Charles Grassley in Senate Committee on the Judiciary, Committee transcript, op. cit., p. 393.

⁵⁴ ‘Immunity of former counsel to the President from compelled congressional testimony’, Memorandum Opinion for the Counsel to the President, 10 July 2007, *Opinions of the Office of Legal Counsel*, vol. 31, p. 2.

⁵⁵ *ibid.*

⁵⁶ 110th Congress, House Resolution 982, 14 February 2008.

contempt procedure.⁵⁷ In this case however, the committee resorted to a new type of action.

Rather than conducting a contempt trial itself, the House requested the judiciary to handle the matter (following the statutory criminal contempt procedure). The House Speaker referred the citations to the DoJ, requesting a grand jury investigation. However the Attorney General declared that this would not occur as in his opinion, the officials had not committed a crime.⁵⁸

The HJC therefore commenced a civil suit against Ms Miers and Mr Bolten in the US District Court (District of Columbia), challenging the executive's claimed immunity of presidential advisers from congressional subpoena. In *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et. al.*, the court found that Ms Miers' failure to respond to the subpoena was without any legal basis, and that in fact the Supreme Court had made it 'abundantly clear that compliance with a congressional subpoena is a legal requirement'.⁵⁹ Quoting the Supreme Court case *United States v. Bryan*, the court noted:

A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity.⁶⁰

However, the District Court emphasised the narrow scope of its decision, stating:

The Court holds only that Ms. Miers (and other senior presidential advisers) do not have absolute immunity from compelled congressional process in the context of this particular subpoena dispute. There may be some instances where absolute (or qualified) immunity is appropriate for such advisers, but this is not one of them. For instance, where national security or foreign affairs form the basis for the Executive's assertion of privilege, it may be that absolute immunity is appropriate. Similarly, this decision applies only to advisers, not to the President.⁶¹

⁵⁷ Morton Rosenberg, 'When Congress comes calling', The Constitution Project, Washington DC, 2009, p. 14.

⁵⁸ Geldert, op. cit., p. 826.

⁵⁹ *Committee on the Judiciary, U.S. House of Representatives v. Harriet Miers, et al.*, op. cit., p. 78.

⁶⁰ *ibid.*, p. 79. Underline added by D.C. Court.

⁶¹ *ibid.*, p. 89.

The court also noted that Ms Miers remained free to make claims of executive privilege in answering the committee's questions.⁶² The case did not deal with the question of the validity of such claims, only that they did not confer an immunity from subpoena.

The Bush Administration appealed the decision; however the case was later withdrawn as a result of an accommodation reached with the White House.⁶³ The terms of the accommodation were essentially as follows:

- the HJC would be restricted to interviewing Miers and Rove, with an option to interview William Kelley (another former official) if necessary;
- the committee reserved its right to seek public testimony from Rove and Miers;
- transcripts of the interviews would be created (they were later released publicly);
- the scope of the interviews was limited to facts relating to the decision to replace the US Attorneys and testimony provided to the committee by DoJ officials;
- for questions within the scope of the interviews, official privileges were limited to questions relating to communications to or from the President; and
- counsel for all parties concerned were permitted to attend the interview.⁶⁴

Similar agreement was reached over a number of documents that had been requested by the committee. In return, the parties agreed to a stay in the litigation, which was later withdrawn. It was also noted that:

The Committee will not argue that this accommodation operates as a bar or waiver of the current or former Administration's existing rights, including but not limited to the right to argue jurisdictional objections, claims of immunity, or claims of executive privilege.⁶⁵

In mid-2009, the committee finally received evidence from both Rove and Miers. Upon release of the testimony and associated exhibits in August 2009, the chair of the committee, John Conyers stated:

⁶² *ibid.*, p. 90.

⁶³ Court of Appeals Docket 08-5357, U.S Court of Appeals for D.C. Circuit. 14 October 2009.

⁶⁴ Gregory Craig, 'Agreement concerning accommodation', 4 March 2009, online at <http://judiciary.house.gov/hearings/pdf/RExhibits.pdf>.

⁶⁵ *ibid.*, p. 3.

I am especially grateful to the Speaker of the House, Nancy Pelosi, and the House Democratic leadership for their strong and unwavering support of this investigation, including the citations for contempt of Congress issued by the House in 2008. I also thank all members who voted in support of those citations and authorized the historic litigation that was instrumental in bringing us to this point. Today's release marks a powerful victory for the rule of law, and should be celebrated by all who cherish our constitutional system of separation of powers and open, transparent government.⁶⁶

While both the committee and an internal DoJ investigation found evidence of partisan influence in the replacement of the US Attorneys, a special attorney appointed as a result of the DoJ inquiry found that no criminal charges could be laid.⁶⁷

Senate Select Committee on a Certain Maritime Incident

On 6 October 2001, the HMAS Adelaide intercepted SIEV (Suspected Illegal Entry Vehicle) 4, a boat carrying asylum seekers destined for Australia. An erroneous account that some of the asylum seekers had thrown children overboard was reported to the Australian public the following day.

Photos from a separate incident on 7 October showed children in the water and were released as though they depicted the interception of SIEV 4.

The allegations were made in the context of an upcoming election where illegal migration had become a major issue. The claims made about the actions of a group of asylum seekers were therefore perceived to be politically beneficial to the government of the day. Then Minister for Defence, Peter Reith, did not correct the public statement until following the November election, leading some to conclude that the public had deliberately been misled for political gain.

In 2002, the Senate established the Select Committee on a Certain Maritime Incident to investigate the matter, in addition to broader issues relating to asylum seeker policy. The committee took evidence from a number of public servants and desired to investigate the chain of communications involving the minister's office and the minister. The committee's preferred course of action was to call as witnesses Mr Reith (who had retired prior to the inquiry), several of his former advisers (Mike

⁶⁶ Congressman John Conyers, Jr., Chairman, US House Judiciary Committee, media release, 11 August 2009, online at <http://judiciary.house.gov/news/090811.html>.

⁶⁷ Ronald Weich, Assistant Attorney General, correspondence to the Hon. John Conyers, Jr, Chairman, House Judiciary Committee, 21 July 2010, online at <http://www.talkleft.com/media/weichletter.pdf>.

Scrafton, Ross Hampton and Peter Hendy) and the Prime Minister's international adviser, Miles Jordana.⁶⁸

However, a cabinet decision was taken to refuse access to ministerial staff, including public servants who had served in the minister's office at that time. The cabinet decision ordered all individuals in those categories not to appear before the Senate committee.⁶⁹ As a result, none of the advisers did.

Mr Reith also decline to appear, despite three requests to do so.⁷⁰ He used advice from the Clerk of the House of Representatives (House Clerk) to justify his stance, which is examined more closely below.

The committee's requests for the ex-minister and his staffers to appear and provide evidence were thus met with concerted resistance by the executive of the day. The committee noted that it was unwilling to proceed with formal summons for the witnesses on the grounds that it 'would be contested in the courts with the taxpayer having to foot the bill and with the inquiry having to mark time until the issue was settled'.⁷¹ Additionally, the chair of the committee noted that he had no wish to expose the advisers to the risk of being found in contempt of the Senate and subject to a jail term or fine as a result of a ministerial direction. This harked back to a similar decision of the Senate during the investigation of the 1975 Loans Affair. For these reasons, the committee never did issue summons.

In the absence of legal precedent, the case was argued on principle and past practice. The two sides of the argument were represented in a series of advices from both the Clerk of the Senate (Senate Clerk) and the House Clerk, together with a number of legal opinions solicited in connection with those advices.⁷²

At issue were three distinct questions:

- what was the nature of the immunity of a minister who is a sitting member of one house of parliament from an inquiry of the other;
- did that immunity continue once the minister retired from parliament; and

⁶⁸ Senate Select Committee on a Certain Maritime Incident, *Report*, pp. xiv–xv, online at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=maritime_incident_ctte/report/index.htm.

⁶⁹ *ibid.*, p. xiv.

⁷⁰ *ibid.*, p. xv.

⁷¹ *ibid.*

⁷² *ibid.*, pp. 345–445. The arguments raised were complex and have been distilled here for the purposes of the paper. The actual correspondence is commended to the reader.

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- did that (or any other) immunity extend to the staff of the minister's office.⁷³

The first question was the most important as it informed the answer to the other two. It was the source of a significant difference of opinion.

The Senate Clerk argued that the immunity was based on the principle of comity between the Senate and the House of Representatives. The immunity had nothing to do with the identity of the individual as a minister, but resulted from the fact that the individual was a sitting member of the House of Representatives.⁷⁴ The Senate Clerk noted that the only immunity from compulsion to appear recognised by the Senate was that of current members of the lower house, and current state office holders.⁷⁵

In contrast, the House Clerk described the immunity as being 'something more akin to a legal immunity'.⁷⁶ The House Clerk held that rather than the immunity deriving from a 'loose concept of comity' it was in fact derived from the 'complete autonomy of the Houses from each other ... primarily based on section 49 of the Constitution, and section 50 providing for each to determine its rules and orders'.⁷⁷

In a legal opinion by Professor Geoffrey Lindell solicited by the House Clerk, he noted that his own view was that the immunity was more properly viewed as a legal restriction on the powers of both houses deriving from section 49:

The same immunity is acknowledged to exist in relation to the Houses of the British Parliament. The immunity is likely to be based on the need for each House to function independently of, and without interference from, the authority of the other House. It appears to make good sense from a policy point of view as well as *from an analytical perspective since it may flow directly from the terms of section 49 of the Constitution* if, as seems likely, this was an immunity enjoyed by the House of Commons at the establishment of the Commonwealth.⁷⁸

⁷³ For simplicity, the question ignores complications arising from either the minister or the staff remained employed in that capacity at the time of the inquiry.

⁷⁴ Senate Select Committee on a Certain Maritime Incident, op. cit., correspondence between Harry Evans, Clerk of the Senate and Senator the Hon. John Faulkner, 19 February 2002.

⁷⁵ *ibid.*

⁷⁶ Senate Select Committee on a Certain Maritime Incident, op. cit., correspondence between Ian Harris, Clerk of the House of Representatives and Committee Secretary Brenton Holmes, 3 April 2002.

⁷⁷ *ibid.*

⁷⁸ Geoffrey Lindell, 'Comments provided by Professor G.J. Lindell on advice given by the Clerks of both houses of the Commonwealth Parliament', Senate Select Committee on a Certain Maritime Incident, op. cit. appendix (emphasis added).

On the other hand, an opinion by Bret Walker, QC, solicited by the Senate Clerk, supported the view that no such extended immunity applied. In essence, Mr Walker argued that the rationale behind the immunity from compulsion of a current member was to ensure they could attend to their business in the chamber.⁷⁹ Thus it was a protection against an impediment to the ability of the house to meet, debate and legislate.

The rationale behind the accepted immunity of ministers, as current members of the lower house, was crucial, because it would assist in determining whether such an immunity extended to former ministers and their staff.

The House Clerk, having determined that the immunity was derived from a constitutional necessity for the independence of each house, believed that the immunity therefore applied to former members and ministers of the House. This was due to a consideration that ‘to regard the immunity otherwise would render it incomplete and defeat the essential objective of that immunity’.⁸⁰

Having disagreed with the source of a current House minister’s immunity, the Senate Clerk rejected this proposition, noting that former ministers of the House had appeared before a committee under summons in 1994.⁸¹ Mr Walker also noted that the rationale he had identified did not apply to former members nor to their advisers, and as such no immunity existed.⁸²

In terms of advisers, a number of arguments were made to justify a possible immunity:

- public servants working in the minister’s office were bound by a clause in the Public Service Act to maintain appropriate confidentiality about dealings as an employee with any minister or minister’s staff. As the Public Service Act was more recent than the *Parliamentary Privileges Act 1987*, it could possibly overrule the older Act’s position on parliamentary committees;⁸³ and

⁷⁹ Bret Walker, ‘Australian Senate witnesses—former ministers and ministerial staff’, Opinion, 16 May 2002 in Senate Select Committee on a Certain Maritime Incident, op. cit., appendix.

⁸⁰ Senate Select Committee on a Certain Maritime Incident, op. cit., correspondence between Harris and Holmes, 3 April 2002.

⁸¹ Senate Select Committee on a Certain Maritime Incident, op. cit., correspondence between Evans and Faulkner, 19 February 2002.

⁸² Walker, op. cit.

⁸³ Senate Select Committee on a Certain Maritime Incident, op. cit., correspondence between Harris and Holmes, 3 April 2002.

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- advisers employed under the *Members of Parliament (Staff) Act 1984* were essential in assisting the minister to perform his role and as such should be considered a part of the minister.⁸⁴

Inherent in the argument was an understanding that ministerial staff were accountable to the minister, and the minister to the Parliament—presumably in the form of their particular house. However, as the Senate Clerk noted, there was evidence that ministerial staff had come to exercise a number of functions of increasing independence from their minister, creating a need for greater oversight.⁸⁵

The difference of opinion between the two Clerks, and the stance of the Senate committee and the executive, remained unresolved. The committee declined to issue summons and the matter was not tested by a court. As a result key testimony was not provided to the select committee.

However, in 2004 one of the advisers in question, Mike Scafton, wrote a letter to the editor of the *Australian* providing his version of the events, which appeared to contradict statements of the Prime Minister back in 2002. The Senate established a second committee, the Senate Select Committee on the Scafton Evidence in order to revisit the issue in light of the new evidence.

Comparison of cases

In any comparison of the two cases, it needs to be recognised that while the American and Australian systems of government share a number of features, both are also subject to very different sets of circumstances. As a result, it is not possible to draw concrete conclusions without considering all of these different circumstances.

Nevertheless, both cases provide an interesting insight into the contemporary challenges to legislative inquiry posed by the growth in importance of executive office advisers. Of particular interest to this author, however, is the role played by the courts in the American case, and the use of legal precedents to inform the debate between the two players. By contrast, the Australian debate occurred more at the level of principle, rather than precedent.

⁸⁴ *ibid.*

⁸⁵ Senate Select Committee on a Certain Maritime Incident, *op. cit.*, correspondence between Harry Evans, Clerk of the Senate and Senator the Hon. Peter Cook, Chair of Select Committee, 22 March 2002. Note that as a result of this case, the issue was examined by the Senate Finance and Public Administration References Committee. That committee recommended a number of changes that would ensure advisers would appear before committees under certain circumstances, ensuring that their conduct could be suitably examined. These recommendations were not adopted by the government.

The power to compel attendance

The HJC was far more successful in penetrating executive barriers in its investigation, but it must be recognised that even in the US case, the committee entered into a compromise with the White House. Where it could have pressed for the attendance of Ms Miers and Mr Rove at a public hearing, they were instead interviewed in private in accordance with a negotiated agreement. The agreement limited the scope of questioning, but also constrained the executive's ability to make claims of executive privilege.

It would appear that the catalyst for reaching this agreement was the committee's willingness to challenge the claimed immunity of advisers and the subsequent favourable finding by the DC Court. Though the case was appealed by the executive, the possibility that it would be upheld likely gave the committee a strong position in negotiation.

By contrast, the Australian committee decided against summoning Peter Reith on the basis that it would likely be subject to legal challenge. The ministerial advisers were also not summonsed on the basis that it would be unfair to create the possibility of their being charged with contempt, given they were caught in a battle between the executive and the parliament. As noted above, members of the US SJC made similar comments during the negotiated testimony of Sara Taylor.

Given the Australian committee's preference for political negotiation over judicial intervention in the case of Mr Reith, it is also likely that the committee had a similar view with regard to the summoning of advisers.

The variety and complexity of issues raised in the debate between the two Clerks and various academics demonstrates the confusion arising from the vaguely defined concepts of responsible government. This is further compounded by statements such as that of the High Court in *Egan v. Willis* that the concepts of responsible government are flexible over time, suggesting that any future findings may pit historical convention against modern administrative arrangements.

The sheer complexity and number of variables that exist in a system that pits responsible government against a separation of powers regime makes predicting a finding by the High Court difficult. This surely acts as a significant impediment to either the parliament or the executive resorting to judicial intervention, in the absence of confidence of a positive outcome.

To a certain extent, this impediment no longer exists in the United States. It was 'broken' by *United States v. Nixon* and related cases when the Supreme Court

established both the constitutional standing of executive privilege and a mechanism by which it may be overcome. From that point onwards, the risk associated with legal action was lessened as the major yardstick had already been placed.

It is tempting to conclude that, being mindful of precedent, congressional committees are more likely to challenge and overcome claims of executive privilege, as occurred to a limited extent in this case. Interviews conducted by the author in Washington DC in March 2011 suggest that such a conclusion is not accurate and the reality is far less clear-cut.⁸⁶

Interviews with key personnel suggest that the existence of legal precedent in the area of committee powers and executive privilege did not necessarily give the committee confidence that a court would find in their favour. It would appear that the committee proceeded with litigation without being certain of a favourable outcome.

Indeed, the extent to which the House Judiciary Committee pushed the matter, including to the extent of appealing to the judiciary for assistance in enforcing the subpoena, was apparently unusual. Individuals associated with the case noted the degree of frustration with the Bush administration's assertions of immunity from congressional processes that had built up over seven years. One individual described the 'empty chair' moment, when the subpoenaed individuals failed to attend a committee hearing as directed, as a galvanising moment that increased the resolve of the committee to take unique steps against the executive. These factors appear to be key to the course of action taken by the committee and its eventual success.

Complications arising from the fusion of responsible government and the separation of powers

In addition to the key difference of legal action, a comparison of the two cases also demonstrates the confusion arising in the Australian system due to the dual identity of a minister as both a member of the executive and of the parliament. As demonstrated in the Australian case above, confusion over the extent of this immunity has also been used to prevent access to both former ministers and ministerial advisers.

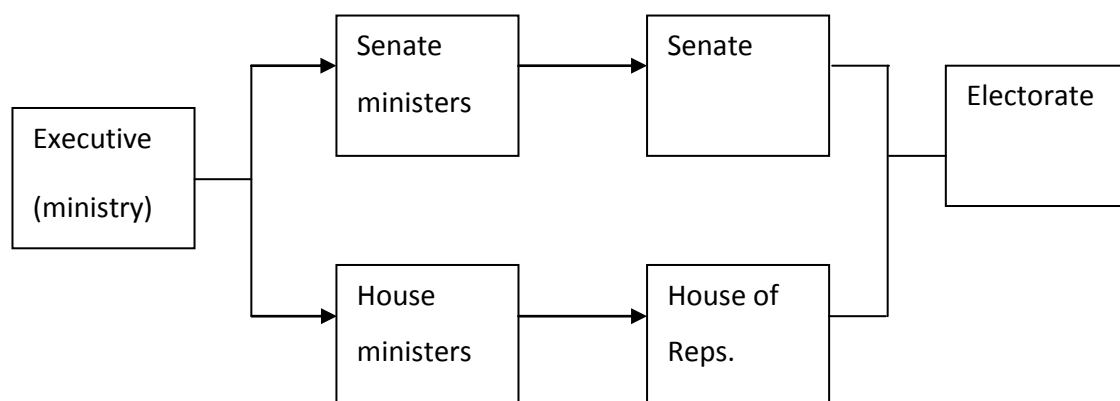
Even to accept the immunity at its minimum (that espoused by the Senate Clerk), the fact that current House ministers are usually only questioned by the House itself highlights a major flaw in ministerial responsibility. As the House is almost always

⁸⁶ Interviews were conducted with staff of House Judiciary Committee, Congressional Research Service and other individuals who were involved with the case.

dominated by the party of the executive,⁸⁷ and party discipline is demonstrably strong, the possibility of critical oversight of those ministers is significantly weakened.

Theoretically speaking, if it is accepted that serving (or indeed former) ministers are only answerable to their own chamber, then the line of accountability identified by the High Court (connecting the executive and the people via the parliament) is split into two tracks. Ministers selected from the Senate are accountable to the Senate and ministers selected from the House are accountable to the House. If one house is dominated by the executive, a flaw in the overall chain is evident.

Figure 1: A two-track chain of accountability



In practice, there are a number of mitigating factors. These include the likelihood that general elections serve as a referendum on the executive, rather than merely the selection of local representatives. This would tend to make executives directly accountable, if by indirect means. However, it is also true that competent investigation can better inform the electorate, thus informing their electoral decision.

The American system of government avoids the complications inherent in the Australian system by fully separating the legislature and executive. The clean separation of powers in the American system, even with a supposed equality of the branches, appears to have enabled far greater penetration of the executive branch's activities, at least in the case examined. In the absence of a broader study, it is inconclusive as to whether this finding can be generalised.

It is also important to note that other factors not addressed above may have played a key role. This paper makes no attempt to measure the relative strength of public or media pressure in each case, other than to merely assert that both cases had a high profile and received widespread media attention. It is also likely that the change to a

⁸⁷ The current Parliament notwithstanding.

Democratic administration midway through the US inquiry was important. The agreement was negotiated in March 2009, two months after the inauguration of Barack Obama as President, with both houses of Congress controlled by the Democrats. By contrast, Prime Minister Howard maintained control of the executive branch and the House of Representatives until well after the inquiry, and its successor, concluded.

Concluding observations

Confusion resulting from the inclusion of both separation of powers considerations and provisions relating to responsible government have clouded understanding of the relationship between the parliament and the executive in Australia. Differing interpretations of these constitutional arrangements in the Certain Maritime Incident case prevented any resolution of arguments about whether a former minister who was also a member of the House of Representatives, and their advisers, could be compelled to give an account of their actions to a Senate committee.

This situation points to a hole in ministerial responsibility, where ministers who are also a member of the lower house are able to avoid scrutiny by the Senate, but also their own house by reason of executive dominance of that chamber.⁸⁸ The assertion that this protection extends to former ministers and to advisers will likely be repeated again where it suits the executive of the day.

By contrast, the somewhat greater tendency in the United States to seek judicial intervention to resolve issues relating to the congressional–presidential relationship has provided significant clarification of their respective powers, for better or for worse. This tendency towards legal arbitration is perhaps particularly suited to the American understanding of the separation of powers, with its deliberate and enunciated system of checks and balances.

The HJC was able to threaten the executive with potential and actual litigation in wielding its inquisitorial powers of both subpoena and the ability to overcome executive privilege. As a result, it reached an accommodation with the White House and secured the testimony it required.

While it is tempting to compare the outcomes of the two cases, it is important to note that a direct comparison between the two jurisdictions cannot be made. Specifically, the operation and understanding of what is meant by the separation of powers in each constitution differs significantly. History and convention suggest that the Australian

⁸⁸ The current situation of minority government may or may not result in a change in this regard, particularly if it proves to be a one-off or rare occurrence.

courts are unlikely to involve themselves in the relationship between the parliament and the executive. In the absence of a catalysing event such as the Watergate scandal in the United States, this is unlikely to change in the foreseeable future.