

Legislative Power and Executive Privilege in the Courts

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An article entitled 'Parliamentary Privilege and Search Warrants: Will the US Supreme Court Legislate for Australia?', in *Papers on Parliament* No. 48, January 2008, referred to an issue of parliamentary privilege, the immunity of members of the Parliament from the seizure of their legislative documents by the execution of search warrants. The article recounted cases in the Senate and involving senators, which were influenced by a judgment in an American case, and which led to an agreement between the Senate and the government about the execution of search warrants in the premises of senators. These developments in turn were conveyed to American legislative officers involved in another court case there, and that case resulted in a judgment of the Court of Appeals supportive of the Australian arrangements and favourable to the legislative immunity.

Subsequently the US administration sought a review of the judgment by the Supreme Court. There was an apprehension that the Supreme Court might reverse or dilute the earlier judgment, and that this could ultimately have the effect of unravelling the law and the arrangements in Australia, where the US judgment could be persuasive. As it turned out, the Supreme Court in April 2008 declined to review the Court of Appeals judgment, which therefore stands.

Now another case is before the US courts which could have an indirect, persuasive influence in Australia if it results in an authoritative judgment. This involves executive privilege, the claimed right of the executive government to withhold information from the legislature on public interest grounds.

The Australian Senate, the US Houses of Congress and other legislatures worthy of the name have never conceded that there is any such thing as executive privilege. The position of the Senate was stated as long ago as 1975 in a resolution arising from the Overseas Loans Affair: if the Senate demands the giving of evidence or the production of documents, and the executive government claims that they should be withheld on public interest grounds, the Senate will consider whether the grounds are made out and

determine whether the evidence or documents should be produced. This resolution reflected the position previously arrived at by common law courts, which dispensed with the term 'Crown privilege' (also used in executive claims against the legislature), substituted the term 'public interest immunity', and held that the courts would determine whether the public interest grounds for a claim of such immunity are made out. Eminent scholars who researched the question from the standpoint of history and law came to the same conclusion,¹ and the US Houses have generally maintained this line.

In both countries, the issue has not been resolved as an issue of law before the courts. It has been regarded as a political issue to be determined between the legislature and the executive. The Australian Senate has not resorted to law and the courts when the executive has refused to produce information in response to Senate demands, but has pursued disputes as political matters and sought to impose procedural and political penalties on recalcitrant executives. In the United States, however, the situation is somewhat different because of historical enactments of the Congress. This has brought the matter before the courts in the past and has now done so again.

In all of the past cases, the courts have avoided becoming involved in resolving specific executive claims of immunity. Usually such claims have been settled by some kind of compromise, and often the Congress has gained the better of the arrangements which have been made. The courts have sought to stay out of the confrontations until political settlement comes to the fore. Court judgments have suggested that there may be some constitutional basis for executive privilege, but have not ruled on the issue in relation to particular legislative/executive contests.

Early in 2007 nine federal prosecutors were dismissed. There was a suspicion that they had been deprived of their positions for political reasons, and that the administration was seeking to replace them with others who would be ideologically aligned with the White House. This touched on the impartiality of the prosecution service and the even-handed administration of justice. Congressional inquiries were initiated. Evidence supported the suspicions. The Attorney-General was forced to resign over the affair. The House Judiciary Committee subpoenaed administration officials to tell what they knew. The President claimed executive privilege, on the basis that internal administration deliberations should be protected from disclosure to preserve confidentiality of advice to the President, and the subpoenaed officials refused to appear. The House then 'cited' the officials for contempt.

At this juncture, the House had a choice which would not be open to the Australian Senate. The House could direct that the officials concerned be prosecuted for the criminal offence of contempt of Congress under a long-standing statute which provides for the prosecution of recalcitrant congressional witnesses. There is no such statute in Australia, and, apart from procedural and political remedies, the Australian Senate would have only its power, under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*, to impose penalties directly on the witnesses. The US Houses also possess this power, called there an inherent power because it is not specified in the Constitution but has been held by the courts to be inherent in the legislative power constitutionally possessed by the Houses. The choice was made not to go down that route, to the disappointment of commentators, learned and otherwise, who urged the

¹ Eg. Raoul Berger, *Executive Privilege: a Constitutional Myth*. Harvard, 1974.

House to use its inherent power, not exercised since the Senate last used it in 1934. The House then sent its 'citation' to the Justice Department, in effect demanding that the contemnors be prosecuted. The replacement Attorney-General, however, declined to allow this, claiming that federal prosecutors were not obliged to initiate a prosecution when the President asserted executive privilege.² The House then brought a civil action in a US District Court, seeking to support its subpoenas. This potentially involves the court in the question of whether a claim of executive privilege confers immunity against the legislature's demand for information. The Judiciary Committee argued that an attempt by the House to use its power to punish contempts would be contested in court by the administration and thereby would ultimately lead to this situation in any event.

In response to this action the administration raised an expansive claim of a general and absolute immunity of administration officials from congressional subpoenas, and also claimed that the court lacked jurisdiction in the matter.

In one respect the response by the administration was surprisingly candid. In urging that the courts should not determine the issue as one of law, but should leave it as a political matter to be resolved between the legislature and the executive as in the past, the executive pointed out that the Congress possesses ample power to enforce its orders by political means, such as its power to refuse approval for all future presidential appointments, and to cut off funds for executive agencies. It is remarkable to have an executive government virtually inviting its legislature to exercise these kinds of powers against it.

In a preliminary judgment delivered on 31 July 2008, a District Court held that the courts have jurisdiction to enforce congressional subpoenas, and rejected the claim of absolute immunity of administration officials. (The latter aspect of the judgment could have implications for claims sometimes made in Australia that ministerial staff have some kind of immunity from inquiry by the legislature.) The court at this stage has not passed judgment on specific claims of immunity relating to the particular information concerned, but has invited the parties to settle such claims by negotiation, as in the past.

It remains to be seen whether the court will be able to avoid further involvement in the dispute, or whether it will have to determine specific immunity claims. Any judgment by the court, which could be unfavourable to the position of either the legislature or the executive, would almost certainly be appealed and would probably end up in the Supreme Court. The administration in any event may appeal the judgment already made.

Any further judgments will be awaited with some anxiety in Australia. It is possible that some future Senate majority will regard the procedural and political remedies of the past as inadequate, and will push a dispute with the executive over the disclosure of information to its limit, for example, by imposing a penalty on a public servant, which the government might then contest in court. A US judgment could then be persuasive in any Australian judicial resolution, for good or ill in the cause of parliamentary accountability.

² If the Australian Parliament ever adopts the oft-made suggestion that all contempts of Parliament should be converted to statutory criminal offences prosecutable in the courts, it should be careful to explicitly provide that each House, or indeed any person, may initiate a prosecution, to avoid this situation.