

Governor's executive privilege tested

Corzine wants to protect his e-mails with ex-CWA leader Katz

Sunday, August 10, 2008

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Richard Nixon made it notorious during Watergate. It was invoked repeatedly by Bill Clinton and most recently by President Bush.

And in New Jersey, Gov. Jon Corzine wants to use it as a cloak over e-mails he exchanged with his ex-girlfriend and former state-workers union leader Carla Katz.

Executive privilege -- the doctrine that chief executives must be able to keep certain communications secret -- is at the heart of Corzine's court battle to block disclosure of the e-mails.

On Friday his lawyers appealed a Superior Court judge's ruling that e-mails between Corzine and Katz about contract negotiations in 2006 and 2007 must be made public.

The case has drawn attention for its elements of political intrigue and soap opera: ex-lovers Corzine and Katz sending each other private messages while publicly opposing each other over the contract. But its legal significance is as a test case that could shape the limits of executive privilege for future governors of New Jersey.

"This is sort of crying out for reclarification, redefinition of what do you mean by executive privilege," said Ingrid Reed, director of the New Jersey Project at Rutgers' Eagleton Institute of Politics.

"There're only a few cases involving the actual invocation of the privilege by the governor," added Tom Cafferty, general counsel to the New Jersey Press Association. "I think, inevitably, you've got to look to the nature of the communications -- what's the purpose of the privilege, and are these communications really related to why the privilege exists?"

The case stems from a lawsuit filed by Tom Wilson, the state Republican Party chairman, seeking the documents' release. He said the public should be able to judge whether the correspondence between Corzine, his aides and Katz inappropriately influenced the contract talks. Corzine, a Democrat, countered some of the e-mails were private and others protected by executive privilege.

A main point of contention is whether Katz qualifies for the privilege, since she is not a member of the governor's staff.

In his ruling in May, Superior Court Judge Paul Innes said Katz could have confidentiality when acting as an outside adviser to Corzine on "issues of general statewide policy." But as adversaries in the contract bargaining, the judge ruled, "back channel communications"

between the governor and Katz, then head of Communications Workers of America Local 1034, would not be protected.

Innes said the Corzine-Katz relationship "created a clear potential for conflict" that the public had the right to evaluate.

In their appeal, Corzine's lawyers argue that Innes' ruling is inconsistent with the state constitution and past court decisions and would grant broad access to "search the e-mail conversations of the governor on any issue of interest to anyone who asks."

The fact that Katz was an adversary in the contract talks doesn't matter, the appeal says. "Indeed, in order for the governor to govern effectively, he must be able to receive information from, and communicate and consult with people with whom he disagrees."

But the fact that it is Wilson, a private individual, and not a court or government body that is seeking disclosure, does make a difference, Corzine's lawyers contend. Executive privilege, they argue, "may be overcome only in the face of a compelling need" on behalf of a branch of government.

The administration makes the classic argument in favor of the privilege: A chief executive benefits from receiving advice and information, and people will speak candidly when they know it's confidential.

Presidential claims of executive privilege go back to George Washington, but they are often unsuccessful. During Watergate, the Supreme Court ruled it did not apply to audio recordings Nixon made in the White House; he was forced to hand over the infamous tapes, and resigned four days later. Courts overturned former President Clinton's executive privilege claims in the Whitewater and Monica Lewinsky investigations. President Bush has asserted the privilege in a congressional probe into the dismissal of nine federal prosecutors; a judge ruled July 31 it does not shield Bush's confidants from subpoenas.

Corzine acknowledges he's in an awkward position but insists he's not trying to hide anything. Because it could set a precedent for chief executives, he says, he has no choice but to keep the case alive and suffer the political consequences. His critics scoff that Corzine's resistance is less about standing on principle than protecting his own reputation.

In New Jersey, the key ruling came in 1978, when the state Supreme Court ruled then-Gov. Brendan Byrne "must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function." Corzine's appeal makes several references to that decision (*Nero vs. Hyland*).

"The Nero case gets cited, not only in New Jersey but around the country, as sort of a standard reference dealing with executive privilege in gubernatorial situations," said Don Linky, former counsel to Byrne and now a senior policy fellow at the Eagleton Institute.

But with the subsequent passage of the Open Public Records Act, and the advent of e-mail, much has changed, he said.

Wilson cited OPRA in seeking release of the Corzine-Katz e-mails. The governor's appeal contends OPRA specifically excludes communications covered by executive privilege and that Judge Innes misapplied the law.

Corzine has said the prospect of having e-mail subject to public scrutiny has prompted him to stop using it -- a move he has said is "debilitating" when e-mail is the dominant way to communicate.

Peter Verniero, a former state Supreme Court justice and attorney general, said judges in cases across the country are trying to sort out issues of privacy and disclosure involving e-mail.

"Courts are now having to grapple to apply the old rules to the new methods of communication. In many respects, that has not been an easy transition," he said.

But in the case of Corzine and Katz, the manner of conversation matters less than the people doing the talking, said state Sen. Bill Baroni (R-Mercer). "I've never found a case where you argue someone outside of government is covered by executive privilege," Baroni said.

Cafferty, the press association lawyer who helped craft OPRA, said what really matters is the content -- "and without seeing the specific e-mails, it's hard to assess whether the e-mails properly fall within the privilege."

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