AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan Era—Separation of Powers

William French Smith, **Assertion of Executive Privilege in Response to a Congressional Subpoena** (1981)[1]

In the fall of 1981, Attorney General William French Smith provided President Ronald Reagan a formal opinion on the president's constitutional authority to assert executive privilege against congressional oversight committees. The Reagan administration found itself immediately embroiled in executive privilege battles. Legal conservatives in the administration wanted to revitalize the presidential authority to assert executive privilege, which they saw as having been weakened during the Watergate scandals. At the same time, the Republican White House faced a Democratic House of Representatives, and Democratic legislators were eager to use congressional oversight hearings to blunt conservative policymaking in the executive branch. Early in his administration, President Reagan entered into a political struggle with congressional committees over assertions of executive privilege involving Interior Secretary James Watt and Environmental Protection Agency Administrator Ann Gorsuch.

The administration set about developing policies regarding executive privilege. A 1982 memorandum from the president directed executive agencies to "comply with Congressional Requests for information to the fullest extent consistent with the constitutional and statutory obligation of the Executive Branch" and noted that privilege would only be claimed upon the personal decision of the president, only in "the most compelling circumstances" and when all efforts at good-faith negotiation and accommodation have failed.[2] The administration took the view that internal executive branch deliberations could potentially be protected from public scrutiny, though it recognized that valid congressional interest in such materials should be accommodated whenever possible.

This opinion was written upon the issuance of a congressional subpoena by a House oversight committee to James Watt for documents relating to oil leases on federal lands. The administration asserted privilege over those documents, and the committee voted to hold Watt in contempt of Congress. The administration eventually made the document available for a limited legislative viewing, ending the impasse and avoiding a House floor vote on the contempt citation.

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All of the documents in issue are either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations. Several of the documents reflect views of officials of the Canadian government transmitted in confidence to United States officials as well as statements regarding the status of Canada by officials of the Department of State. Other documents, prepared for the Cabinet Council on Economic Affairs and the Cabinet-level Trade Policy Committee, are predecisional, deliberative memoranda which have been considered by

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[1] Excerpt taken from William French Smith, "Assertion of Executive Privilege in Response to a Congressional Subpoena," 5 *Op. Off. Legal Counsel* 27 (1981).

[2] "Memorandum to the Heads of Executive Departments and Agencies, November 4, 1982," in Frederick M. Kaiser, Walter J. Oleszek, Todd B. Tatelman, *Congressional Oversight Manual*, Congressional Research Service Report (January 6, 2011), 143.

officials at the highest levels of government. Both the Cabinet Council and the Trade Policy Committee prepare recommendations for presidential action; in addition, you personally attend some Cabinet Council meetings and chair these meetings when you do attend. Finally, a large portion of the documents being withheld reflect internal deliberations within the Department of the Interior regarding the status of Canada under the Act. Some of these documents are staff level advice to policymakers containing recommendations regarding decisions which have not yet become final. Others contain internal Interior Department deliberations regarding its participation in the Trade Policy Staff Committee and the Cabinet Council on Economic Affairs. Still other documents reflect tentative legal judgments regarding questions arising under the Act. In addition, the subpoena encompasses preliminary drafts of congressional testimony by the Secretary of the Interior. These latter documents, although generated at levels below that of the Cabinet and subcabinet, are of a highly deliberative nature and involve an ongoing decisional process of considerable sensitivity.

The Office of Legal Counsel of the Department of Justice has examined each of these documents and has concluded that they may properly be withheld from the Congress at this time. These documents are quintessentially deliberative, predecisional materials. Each of the agencies which generated the documents has stated that their release to the Subcommittee would seriously interfere with or impede the deliberative process of government and, in some cases, the Nation's conduct of its foreign policy. Because the policy options considered in many of these documents are still under review in the Executive Branch, disclosure to the Subcommittee at the present time could distort that decisional process by causing the Executive Branch officials to modify policy positions they would otherwise espouse because of actual, threatened, or anticipated congressional reaction. Moreover, even if the decision at issue had already been made, disclosure to Congress could still deter the candor of future Executive Branch deliberations, because officials at all levels would know that they could someday be called by Congress to account for the tentative policy judgments which they had earlier advanced in the councils of the Executive Branch. As the Supreme Court has noted, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States v. Nixon* (1974). You must have access to complete and candid advice in order to provide the soundest basis for presidential decisions. I have concluded that release of these documents would seriously impair the deliberative process and the conduct of foreign policy. There is, therefore, a strong public interest in withholding the documents from congressional scrutiny at this time.

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Congress does have a legitimate interest in obtaining information to assist it in enacting, amending, or repealing legislation. This interest extends beyond information bearing on specific proposals for legislation; it includes, as well, the congressional "oversight" function of being informed regarding the manner in which the Executive Branch is executing the laws which Congress has passed. Such oversight enables the Legislative Branch to identify at an early stage shortcomings or problems in the execution of the law which can be remedied through legislation.

While I recognize the legitimacy of the congressional interest in the present case, it is important to stress two points concerning that interest. First, the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question. At the stage of oversight, the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not. The information requested is usually broad in scope and the reasons for the request correspondingly general and vague. In contrast, when Congress is examining specific proposals for legislation, the information which Congress needs to enable it to legislate effectively is usually quite narrow in scope and the reasons for obtaining that information correspondingly specific. A specific, articulated need for information will

weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.

Second, the congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances. It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached. Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances. Congressional demands, under the guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on the Executive Branch's function of executing the law. At the same time, the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing.

Applying the balancing process required by the Supreme Court, it is my view that the Executive Branch's interests in safeguarding the integrity of its deliberative processes and its conduct of the Nation's foreign policy outweigh the stated interest of the Subcommittee in obtaining this information for oversight purposes. It is, therefore, my view that these documents may properly be withheld from the Sub-committee at the present time.

. . . In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each branch to accommodate the legitimate needs of the other. The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation, of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.

It is my view that the Executive Branch has made such a principled effort at accommodation in the present case. . . .

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