AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan/Bush Era – Separation of Powers/Executive Privilege

*William French Smith*, **Letter to Hon. John Dingell on Executive Privilege** (1982)[[1]](#footnote-1)

*Anne Gorsuch, a Colorado lawyer and state legislator, served as the first administrator of the Environmental Protection Agency under President Ronald Reagan. For twenty-two months, she pursued an aggressive conservative approach to the agency, cutting budgets, deregulating, and loosening enforcement efforts. She was soon embroiled in a conflict with the Democratic-controlled House of Representatives over how she was administering the agency, and particularly how she was managing the Superfund program to clean up toxic waste sites. The White House asserted executive privilege over various documents that the congressional committees wanted as part of their oversight investigations. When Gorsuch refused to provide those documents, the House voted in December 1982 to hold her in contempt of Congress. The administration declined to prosecute Gorsuch and instead brought a civil suit asking a federal district court to declare the contempt charge unlawful. The chair of the House Public Works Committee, Elliott Levitas, who had started the contempt citation, then threatened to pursue impeachment charges against the attorney general for his refusal to prosecute Gorsuch. After further negotiations between the House and the White House, the lawsuit was dropped and the committees were given access to the desired documents. Gorsuch resigned in March 1983.*

*In November 1982, Attorney General William French Smith sent a letter to John Dingell, the chair of the Subcommittee on Oversight and Investigations for the House Committee on Energy and Commerce. A copy of the letter was also sent to Levitas. The letter outlined the administration’s legal position in asserting executive privilege over investigative files held by the executive branch.*

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As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982**,** "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . **.** . [Elxecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates. that assertion of the privilege is necessary." Nevertheless, it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General. Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

"It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and. that congressional or public access to them would not be in the public interest.

"Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. . . . The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis,, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

. . . .

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files 4re widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case .... " *United States v. Nixon* (1974).

The policy which Ireiterate here was first expressed byPresident Washington and has been reaffirmed byor on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. . . .

. . . . At bottom, the President has a responsibility vested in him by the-Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

. . . . To the extent that a congressional committee believes That a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review, but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the claim of privilege presented in [any particular] case." *United States v. Nixon* (1974); *Senate Select Committee v. Nixon* (D.C. Cir. 1974).

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination.

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct byagency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. . . .

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1. Excerpt taken from William French Smith, “Letter to Hon. John Dingell, November 30, 1982,” in House Judiciary Committee, *Report on Investigation of Role of Department of Justice in Withholding Environmental Protection Agency Documents from Congress in 1982-83*, vol. 1, House Report 99-435, 99th Cong., 1st Sess. (1985), 1168-1175. [↑](#footnote-ref-1)