AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Executive Privilege

**Judicial Watch, Inc. v. Department of Justice, 365 F.3d 1108** (D.C. Cir. 2004)

*Judicial Watch is a conservative activist group that formed during the Bill Clinton presidency to investigate and publicize executive malfeasance and corruption. On Bill Clinton’s last day in the White House, he issued an unusually large number of controversial pardons, including one to Marc Rich, a Democratic donor and hedge fund manager who had fled the country after being indicted for tax evasion. In 2001, Judicial Watch filed two Freedom of Information Act requests with the Department of Justice seeking documents relating to pardons granted or considered by President Bill Clinton in January of that year. The Freedom of Information Act is a post-Watergate reform that gives members of the public access to government documents upon request, but it has a number of statutory exceptions. The department released thousands of pages of documents in response to the request, but it withheld thousands of additional pages. Some were withheld because of privacy concerns relating to private individuals, but many were withheld on the grounds that they involved privileged communications.*

*Judicial Watch filed suit in federal district court seeking a waiver of the processing fees on the documents and a mandate that the department release the withheld documents. The district court ruled in favor of the government, finding that the documents had been properly withheld as part of the presidential communications privilege since they were documents generated for the sole purpose of advising the president on the conduct of his executive duties. Judicial Watch appealed to the circuit court for the District of Columbia. A divided circuit court panel reversed in part, holding that some of the documents were not properly privileged. The decision narrowed the scope of the presidential communications privilege to exclude staff outside of the White House itself. Like other cases involving executive privilege resolved by the courts, this case most immediately involved a statutory framework that protected privileged information in the executive branch, but the statutory scheme is understood to mirror executive privilege claims grounded in the Constitution itself.*

Judge ROGERS.

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. . . . As described in In re Sealed Case (D.C. Cir. 1997), the deliberative process privilege under Exemption 5 protects "confidential intra-agency advisory opinions" and "materials reflecting deliberative or policy-making processes." . . .

Exemption 5 also has been construed to incorporate the presidential communications privilege. In United States v. Nixon (1974), which involved a grand jury subpoena for tape recordings of President Nixon's conversations in the Oval Office, the Supreme Court instructed that there is "a presumptive privilege for Presidential communications," which is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." . . . As analyzed by this court in In re Sealed Case, "[t]he President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential." Unlike the deliberative process privilege, which is a general privilege that applies to all executive branch officials, the presidential communications privilege is specific to the President and "applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones." The presidential communications privilege thus is a broader privilege that provides greater protection against disclosure, although it too can be overcome by a sufficient showing of need.

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. . . . In In re Sealed Case, the court was called upon to extend the privilege beyond communications directly involving and documents actually viewed by the President, to the communications and documents of the President's immediate White House advisers and their staffs. In the instant case, the Department seeks a further extension of the presidential communications privilege to officials within the Justice Department whose sole function, according to the Department, is to advise and assist the President in the performance of his non-delegable pardoning duty. We decline to sanction such an extension of the presidential communications privilege to all agency documents prepared in the course of developing the Deputy Attorney General's pardon recommendations for the President. Instead, consistent with the teachings of Nixon and In re Sealed Case, we hold that the presidential communications privilege applies only to those pardon documents "solicited and received" by the President or his immediate White House advisers who have "broad and significant responsibility for investigating and formulating the advice to be given the President."

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[W]e proceed on the basis that "the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected." In re Sealed Case. Further extension of the privilege to internal Justice Department documents that never make their way to the Office of the President on the basis that the documents were created for the sole purpose of advising the President on a non-delegable duty is unprecedented and unwarranted. The only documents at issue in In re Sealed Case were documents created within the White House or received by key White House advisers or their staff. . . .

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. . . . Communications never received by the President or his Office are unlikely to "be revelatory of his deliberations." Nor is there reason to fear that the Deputy Attorney General's candor or the quality of the Deputy's pardon recommendations would be sacrificed if the presidential communications privilege did not apply to internal agency documents. Any pardon documents, reports, or recommendations that the Deputy Attorney General submits to the Office of the President, and any direct communications the Deputy or the Pardon Attorney may have with the White House Counsel or other immediate presidential advisers will remain protected. The In re Sealed Case court's concern for providing "sufficient elbow room for [presidential] advisers to obtain information from all knowledgeable sources," will also not be undermined. It is only those documents and recommendations of Department staff that are not submitted by the Deputy Attorney General for the President and are not otherwise received by the Office of the President, that do not fall under the presidential communications privilege. Although the potential for chilling the candor of the staffs of the Pardon Attorney or the Deputy Attorney General is greater than if everything produced in relation to pardon recommendations were covered under the privilege, because the deliberations of these staff are not close enough to the President to be revelatory of his deliberations and will in any event remain protected pursuant to the deliberative process privilege, the justification for expanding the presidential privilege that far disappears.

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In many different areas the President has a choice between using his staff to perform a function and using an agency to perform it. While not always substantively significant, these choices are often unavoidably significant for FOIA purposes, because the Act defines agencies as subject to disclosure and presidential staff as exempt.

The court considered the President's decisions about the location of advisers as reflective of his understanding of the access that the public could potentially have to government documents under FOIA. . . .

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. . . . Extension of the presidential communications privilege beyond the limits of In re Sealed Case to all documents prepared or received by the Pardon Attorney or his Office simply because they are produced for the sole function of assisting the Deputy Attorney General in presenting pardon recommendations for the President would have far-reaching implications for the entire executive branch that would seriously impede the operation and scope of FOIA.

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The Pardon Attorney, therefore, does not, as a matter of his working relationships, directly advise the President on pardon recommendations or serve as immediate staff to the White House Counsel or other key White House advisers in the Office of the President. In practice, the Deputy Attorney General acts as an intermediate controlling official who exercises independent judgment on which pardon applications and what recommendations to submit for the President's consideration. Cf. Ryan *v. Department of Justice* (D.C. Cir. 1980). These internal working relationships are part of the "regular business" of the Department. The fact that the Deputy Attorney General's recommendations for the President are transmitted to the Office of the White House Counsel through the Pardon Attorney does not minimize the significance for FOIA purposes of the Department's intermediary role in preparing pardon recommendations for the President. This role contrasts with that of the key White House advisers in the Office of the President who directly advise the President as was discussed in In re Sealed Case. The White House Counsel, in the Office of the President, who enjoys close proximity to the President, is one such key adviser; the Pardon Attorney, in the Justice Department, who is at least twice removed from the President, is not.

. . . . Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in In re Sealed Case, "pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President."

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Accordingly, we hold that the presidential communications privilege applies to pardon documents "solicited and received" by the President or his immediate advisers in the Office of the President, and that the deliberative process privilege applies to internal agency documents that never make their way to the Office of the President. This approach heeds the teachings of Nixon and In re Sealed Case, and strikes an appropriate balance between the President's need for confidentiality and frank advice and the obligations of open government. As is demonstrated by the Department's historical reliance on the deliberative process privilege, the public interest in protecting the President's decision-making process is preserved without extending the presidential communications privilege to internal Department documents that do not accompany the Deputy Attorney General's pardon recommendations for the President and are not otherwise solicited and received by the Office of the President. . . .

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*Reversed in part*.

Judge RANDOLPH, dissenting.

In my view, documents originated for the sole purpose of advising the President on his pardon power are protected by the presidential communications privilege. The President alone has the "Power to grant Reprieves and Pardons for Offenses against the United States"; he cannot delegate this authority. In exercising his nondelegable power to pardon, the President has historically requested and received recommendations from the Office of Pardon Attorney, as reviewed by the Deputy Attorney General. The Pardon Attorney produces documents and other information in determining what advice to give to the President. As in In re Sealed Case, this information is "generated in the course of advising the President in the exercise of... a quintessential and nondelegable Presidential power." It follows that the information and documents, as well as the final recommendation, are privileged. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." United States v. Nixon (1974).

The majority agrees that the presidential communications privilege protects the Pardon Attorney's final recommendations sent to the President. But it holds the privilege inapplicable to the drafts of those recommendations, or to any other documents the Pardon Attorney or his supervisor, the Deputy Attorney General, produce in formulating advice to the President on "Reprieves and Pardons." In re Sealed Case gave good reasons for holding the opposite: "In the vast majority of cases, few if any of the documents advisers generate in the course of their own preparation for rendering advice to the President, other than documents embodying their final recommendations, will ever enter the Oval Office. Yet these pre-decisional documents are usually highly revealing as to the evolution of advisers' positions and as to the different policy options considered along the way. If these materials are not protected by the presidential privilege, the President's access to candid and informed advice could well be significantly circumscribed."

The majority has two grounds, repeated in many different ways, for departing from this precedent. The first relies on an organizational chart, the second on a slippery slope.

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. . . . If the President set up an executive branch task force each time he received a pardon application and asked the members to advise him whether to grant or deny the pardon, there is no doubt that the work of each such task force would be covered by the privilege. It can make no difference that the President, instead, relies on a permanent office to perform the same function.

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The slope is slippery, the majority argues, because there is no non-arbitrary line between this case and other FOIA cases throughout the Executive Branch. The argument is invalid. The dividing line is clear, it is unmistakable and it is principled. It is a line In re Sealed Case itself recognized in distinguishing advice about "a quintessential and nondelegable Presidential power," which is subject to the privilege, from "information regarding governmental operations that do not call ultimately for direct decision-making by the President," which is not. The vast majority of executive branch documents — those relating either to delegated responsibilities or having purposes other than advising the President on a nondelegable duty — would therefore not be swept in if the privilege were applied here.

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