AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

*Eric H. Holder*, **Assertion of Executive Privilege over Documents** (2012)[[1]](#footnote-1)

*Early in the Obama administration, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) launched “Operation Fast and Furious” as a new strategy to obstruct gun trafficking across the border of the United States and Mexico. In the operation, the ATF oversaw illegal gun sales in the United States with the goal of tracking the movement of such weapons into Mexico, but in the process lost track of hundreds of weapons as it waited for evidence that the guns were ultimately making their way to Mexican drug cartels. The operation was shut down shortly after guns from those illegal sales were found at the scene of the fatal shooting of a U.S. Border Patrol agent in Arizona. A whistleblower led to a 2011 congressional investigation of the ATF, which is located within the Department of Justice (DOJ). Over the course of the investigation, Congress charged Attorney General Eric Holder of covering up missteps by the ATF as well as the Department of Justice’s own involvement in the operation. Holder and the investigating committees frequently disagreed over what DOJ documents ought to be turned over to congressional investigators. In the summer of 2012, Holder formally asked President Obama to extend executive privilege over many of the documents sought by the investigators, which the president did. The House of Representatives responded by voting to hold the attorney general in criminal contempt. In 2014, a district court ordered the Department of Justice to release many of the documents. As the House of Representatives and the Department of Justice argued their case over executive privilege in federal court, a federal judge ordered the release of a related set of documents as the result of separate litigation, eventually leading the Department of Justice to release tens of thousands of documents that it had been withholding. Shortly afterwards, Holder announced that he was resigning the office of attorney general.*

Dear Mr. President: I am writing to request that you assert executive privilege with respect to confidential Department of Justice documents that are responsive to the subpoena issued by the Committee on Oversight and Government Reform of the United States House of Representatives. . . .

. . . .

Executive privilege is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon* (1974). It is “a necessary corollary of the executive function vested in the President by Article II of the Constitution.” . . .

The documents at issue fit squarely within the scope of executive privilege. In connection with prior assertions of executive privilege, two Attorneys General have advised the President that documents of this kind are within the scope of executive privilege. . . .

It is well established that “[t]he doctrine of executive privilege . . . encompasses Executive Branch deliberative communications.” . . . The threat of compelled disclosure of confidential Executive Branch deliberative material can discourage robust and candid deliberations, for “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearance and for their own interests to the detriment of the decisionmaking process.” Thus, Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials from congressional subpoena. . . .

Because the documents at issue were generated in the course of the deliberative process concerning the Department’s responses to congressional and related media inquiries into Fast and Furious, the need to maintain their confidentiality is heightened. Compelled disclosure of such material, regardless of whether a given document contains deliberative content, would raise “significant separation of powers concerns” by “significantly impair[ing]” the Executive Branch’s ability to respond independently and effectively to matters under congressional review. . . .

Congressional oversight of the process by which the Executive Branch responds to congressional oversight inquiries would create a detrimental dynamic that is quite similar to what would occur in litigation if lawyers had to disclose to adversaries their deliberations about the case, and specifically about how to respond to their adversaries’ discovery requests. As the Supreme Court recognized in establishing the attorney work product doctrine, “it is essential that lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” . . .

Similarly, in the oversight context, as the Department recognized in the prior administration, a congressional power to request information from the Executive Branch and then review the ensuing Executive Branch discussions regarding how to respond to that request would chill the candor of those Executive Branch discussions and “introduce a significantly unfair imbalance to the oversight process.” . . .Such congressional power would disserve both Branches and the oversight process itself, which involves two co-equal branches of government and, like litigation, often is, and needs to be, adversarial. . . .

. . . .

A congressional committee “may overcome an assertion of executive privilege only if it establishes that the subpoenaed documents are ‘*demonstrably critical* to the responsible fulfillment of the Committee’s functions.’” Letter for the President from Michael B. Mukasey, Attorney General, *Re: Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the vice President and Senior White House Staff* (July 15, 2008). . . .

The Committee has not satisfied the “demonstrably critical” standard with respect to the documents at issue. . . .

At the threshold, it is not evident that the Committee’s asserted need to review the management of the Department’s response to congressional inquiries furthers a *legislative* function of Congress. . . . In any event, the purported connection between the congressional interest cited and the documents at issue is now highly attenuated as a result of the Department’s extraordinary efforts to accommodate the Committee’s interest in this regard. Through these efforts, the Department has amply fulfilled its constitutional “obligation . . . to make a principled effort to acknowledge, and if possible to meet, the [Committee’s] legitimate needs.” . . .

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In sum, when I balance the Committee’s asserted need for the documents at issue against the Executive Branch’s strong interest in protecting the confidentiality of internal documents generated in the course of responding to congressional and related media inquiries and the separation of powers concerns raised by a congressional demand for such material, I conclude that the Committee has not established that the privileged documents are demonstrably critical to the responsible fulfillment of the Committee’s legitimate legislative function.

For the reasons set forth above, I have concluded that you may properly assert executive privilege over the documents at issue, and I respectfully request that you do so.

1. Excerpt taken from Letter to the President from the Eric H. Holder, Attorney General, *Re: Assertion of Executive Privilege over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious* (June 19, 2012). [↑](#footnote-ref-1)