AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemorary Era – Separation of Powers

In re Sealed Case, 121 F. 3d 729 (D.C. Cir., 1997)

In 1994, an independent counsel was appointed to investigate accusations that President Bill Clinton's secretary of agriculture, former Democratic congressmen Mike Espy, had illegally accepted gifts from lobbyists and others with business in the Department of Agriculture. Espy resigned under pressure and was later acquitted of corruption charges in a jury trial. The constitutionality of the independent counsel statute had earlier been upheld by the Supreme Court in Morrison v. Olson*, but by the end of the Clinton administration the statutory scheme had been abandoned by Congress.*

When the scandal first broke, President Clinton directed the White House Counsel to investigate the allegations that had surfaced against Espy. Espy resigned a week before the White House Counsel's report was released, and the White House Counsel concluded that no further action was necessary beyond requiring further ethics training for senior administration officials. By then, however, the independent counsel had been appointed and was conducting his own criminal investigation of Espy and others. As part of that criminal investigation, a grand jury issued a subpoena for all materials assembled or produced by the White House Counsel's office in preparation of its report. The White House initially announced that it would fully comply with the subpoena, but later withheld 84 documents on the grounds that they were protected by executive privilege. After several months of negotiation failed to convince the White House to release the documents to the grand jury, the independent counsel filed a motion in federal district court seeking to compel the White House to provide the documents. The judge asked to view the documents in camera *(privately in chambers), to which the White House agreed. After reviewing the documents, the judge upheld the administration's claim of executive privilege and denied the independent counsel's motion, though with little explanation.*

The independent counsel appealed this ruling on its motion to the Court of Appeals for the District of Columbia. A three-judge panel consisting of Judge Patricia Wald, Ruth Bader Ginsburg, and Judith Rogers (all Democratic appointees) heard the appeal. In a unanimous decision (that was initially sealed), the circuit court vacated the decision and remanded the case back to the trial judge for further deliberation given the new standard of executive privilege laid out in the circuit court's opinion (though the circuit court's opinion was itself supportive of the administration's claims). In reviewing the Clinton's administration's claims of privilege, the circuit court considered the implications of the Watergate-era precedents on executive privilege, clarifying the form of privilege that the Clinton administration was attempting to claim and extending the scope of those earlier precedents. Decided by an influential panel of circuit court judges in a high-profile case, the opinion elaborated and extended the president's constitutional claims of executive privilege to White House advisors. In doing so, the opinion touched upon many of themes of the "unitary executive" that had been emphasized by conservative lawyers and judges since the 1980s. Under what circumstances can an official claim executive privilege?

JUDGE WALD delivered the opinion of the Court.

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Since the beginnings of our nation, executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government. Courts ruled early that the executive had a right to withhold documents that might reveal military or state secrets. See . . . *Totten v. United States* (1875). The courts have also granted the executive a right to withhold the identity of government

informers in some circumstances . . . and a qualified right to withhold information related to pending investigations. . . .

The most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege; it allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." . . . Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative. . . . Both requirements stem from the privilege's "ultimate purpose[, which] . . . is to prevent injury to the quality of agency decisions" by allowing government officials freedom to debate alternative approaches in private. . . .

The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is made flexibly on a case-by-case, ad hoc basis. . . . Although executive privilege in general is no stranger to the courtroom, one form of the executive privilege is invoked only rarely and that is the privilege to preserve the confidentiality of presidential communications. Hints of a presidential communications privilege made an early appearance in *Marbury v. Madison* (1803) where Chief Justice Marshall suggested that for a court to intrude "into the secrets of the cabinet" would give the appearance of "intermeddl[ing] with the prerogatives of the executive." . . .

. . . . Presidential claims of a right to preserve the confidentiality of information and documents figured more prominently in executive-congressional relations, but these claims too were most often essentially assertions of the deliberative process privilege. Moreover, given the restrictions on congressional standing and the courts' reluctance to interfere in political battles, few executive-congressional disputes over access to information have ended up in the courts. As a result, it was not until the 1970s and Watergate-related lawsuits seeking access to President Nixon's tapes as well as other materials that the existence of the presidential privilege was definitively established as a necessary derivation from the President's constitutional status in a separation of powers regime.

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The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged. However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need. If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents in camera to excise non-relevant material. The remaining relevant material should be released. Further, the President should be given an opportunity to raise more particularized claims of privilege if a court rules that the presidential communications privilege alone is not a sufficient basis on which to withhold the document.

. . . . The presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege. . . . Consequently, congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege. . . .

In addition, unlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as predeliberative ones. Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents. . . .

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The withheld documents in this case include materials used in the investigation and formulation of several earlier drafts of the White House Counsel's report, notes of meetings among White House advisers, and draft press briefings. It is undisputed that none of these documents was actually viewed by the President. As a result, the key issue in this case is whether any, and if so which, of these documents come under the presidential communications privilege. Does the privilege only extend to direct communications with the President, or does it extend further to include communications that involve his

chief advisers? And if the privilege does extend past the President, how far down into his circle of advisers does it extend?

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There are acknowledgedly strong arguments in favor of holding that the presidential communications privilege applies to only those communications that directly involve the President. This approach comports with the principle that "the President's unique status under the Constitution distinguishes him from other executive officials." *Nixon v. Fitzgerald* (1982), particularly in separations of powers analysis. . . . The Constitution after all vests the executive power not in the executive branch, but in the President; it is the President who, as "the chief constitutional officer of the Executive branch, [is] entrusted with supervisory and policy responsibilities of the utmost discretion and sensitivity." *Fitzgerald*, at 102. *Nixon* identified the President's Article II powers and responsibilities as the constitutional basis of the presidential communications privilege. *United States v. Nixon* (1974). . . .

. . . . [A] reason to restrict the presidential communications privilege to direct communications with the President is the general rule, underscored by the Supreme Court in *Nixon*, that privileges should be narrowly construed: "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." . . .

Extending presidential privilege to the communications of presidential advisers not directly involving the President inevitably creates the risk that a broad array of materials in many areas of the executive branch will become "sequester[ed]" from public view. . . . President Nixon's attempt to invoke presidential privilege to prevent release of evidence indicating that high level executive officers engaged in illegal acts is perhaps the starkest example of potential for abuse of the privilege. And openness in government has always been thought crucial to ensuring that the people remain in control of their government. . . .

But a very powerful case can also be made for extending the presidential communications privilege beyond those materials with which the President is "personally familiar," and at the end of the day we find the arguments for a limited extension of the privilege beyond the President to his immediate advisers more convincing. . . .

Presidential advisers do not explore alternatives only in conversation with the President or pull their final advice to him out of thin air – if they do, their advice is not likely to be worth much. Rather, the most valuable advisers will investigate the factual context of a problem in detail, obtain input from all others with significant expertise in the area, and perform detailed analyses of several different policy options before coming to closure on a recommendation for the Chief Executive. . . . In the vast majority of cases, few if any of the documents advisers generate in the course of their own preparations 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.

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. . . . Nor does it suffice to respond that the public interest in honest and accountable government is stymied if presidential advisers are allowed even a qualified privilege when government misconduct is charged. The President's supervisory control over executive branch officials is an important means of ensuring that abuse of office is uncovered and swiftly addressed, and the President needs access to candid and informed advice if he is to exercise this control effectively. . . .

The ultimate question is whether restricting the presidential communication privilege to communications that directly involve the President will "impede the President's ability to perform his constitutional duty." *Morrison v. Olson* (1988). . . . Given the President's dependence on presidential advisers and the inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight, we conclude that limiting the privilege in this fashion would indeed impede effective functioning of the presidency.

. . . . [T]he privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant

responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. See *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898, 910 (D.C. Cir. 1993). . . .

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Finally, we underscore our opinion should not be read as in any way affecting the scope of the privilege in the congressional-executive context, the arena where conflict over the privilege of confidentiality arises most frequently. The President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings. . . . Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us, namely where information generated by close presidential advisers is sought for use in a judicial proceeding, and we take no position on how the institutional needs of Congress and the President should be balanced.

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We conclude that *Nixon*'s demonstrated, specific need standard has two components. A party seeking to overcome a claim of presidential privilege must demonstrate: first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere. . . .

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The decision of the district court is vacated and the case is remanded for further proceedings consistent with this opinion.