AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

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

*Charles J. Cooper*, **Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act** (1986)[[1]](#footnote-1)

*In the wake of the Watergate scandal, Congress passed the Ethics in Government Act in 1978, which provided for the appointment of independent counsels to investigate possible wrongdoing by senior officials in the executive branch. The law directed the attorney general to convene a special panel of circuit court judges to appoint an independent counsel when there was evidence of possible criminal offenses committed by certain executive branch officials. Congress soon took an interest in how the statute was being applied, and in particular with whether the attorney general was appointing independent counsels in all the appropriate cases. In 1987, shortly before the independent counsel statute was reauthorized by Congress, the Reagan administration produced an opinion laying out the principles that should guide executive branch responses to congressional inquiries about implementation of the statute. The Reagan Department of Justice took the view that such prosecutorial decisions were close to the heart of the executive’s constitutional responsibilities and were mostly privileged from congressional scrutiny.*

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The language of the Act’s confidentiality provisions that the documents “shall not be revealed to any individual outside the division of the court or the Department of Justice” is carefully drafted, and on its face prohibits disclosures to Congress no less than disclosures to the public. The legislative history of the Act supports this interpretation of the statute’s unambiguous language. ‘The contents of the report by the Attorney General after a preliminary finding of some impropriety is to remain secret, available only to the court and I presume, to the special prosecutor, but may not be released to the public *or to Congress* without of special leave of this new court.”

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Article II of the Constitution places the power to enforce the laws solely in the Executive Branch of government. The executive therefore has the exclusive authority to enforce the laws adopted by Congress, and neither the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the Executive Branch by directing the executive to prosecute particular individuals. . . . The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. . . .

The constitutional role of Congress is to adopt general legislation that will be implemented — “executed” — by the Executive Branch. “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.” The courts have recognized that this general legislative interest gives Congress broad rein to investigate. Both Houses of Congress have broad power, “through their own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.” *McGrain* *v. Daugherty* (1927). The issuance of subpoenas in aid of this function “has long been held to be a legitimate use by Congress of its power to investigate,” provided that the investigation is “related to, and in furtherance of, a legitimate task of the Congress.” . . . The power of investigation can be delegated by either House of Congress to committees, subcommittees, or even individual legislators, as long as “the instructions to an investigating committee spell out that group’s jurisdiction and purpose with sufficient particularity.” The scope of judicial inquiry on these matters is narrow, and ‘“should not go beyond the narrow confines of deter-mining that a committee’s inquiry may fairly be deemed within its province.’” *Eastland v. United States Servicemen’s Fund* (1975).

Nonetheless, the investigative power of Congress is not unlimited. Congress cannot, for example, inquire into matters “which are within the exclusive province of one of the other branches of Government. . . . Neither can it supplant the Executive in what exclusively belongs to the Executive.” *Barenblatt v. United States* (1959). Congress must be able to articulate a legitimate legislative purpose for its inquiry; if Congress lacks constitutional authority to legislate on the subject (or to authorize and appropriate funds), arguably Congress has no jurisdiction to inquire into the matter.

Accordingly, a threshold inquiry that should be made upon receipt of any congressional request for information is whether the request is supported by any legitimate legislative purpose. The clearest application of this constraint on congressional requests for information is with respect to matters that are vested exclusively in the President (such as the removal of executive officers). Given the breadth of Congress’ legislative jurisdiction, particularly its authority regarding the appropriation of funds, it may be difficult to articulate more precise limits. With respect to decisions made by the Attorney General under the Independent Counsel Act, we believe that Congress could not justify an investigation based on its disagreement with the prosecutorial decision regarding appointment of an independent counsel for a particular individual. Congress simply cannot constitutionally second-guess that decision. Congress does, however, have a legitimate legislative interest in overseeing the Department’s enforcement of the Independent Counsel Act and relevant criminal statutes and in determining whether legislative revisions to the Act should be made. Given the general judicial reluctance to look behind congressional assertions of legislative purpose, such an assertion would likely be deemed sufficient to meet the threshold requirement for congressional inquiry.

Assuming that Congress has a legitimate legislative purpose for its inquiry, the Executive Branch’s interest in keeping the information confidential must be assessed. . . .

The Constitution nowhere states that the President, or the Executive Branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution, has been asserted by numerous Presidents from the earliest days of our Nation, and has been explicitly recognized by the Supreme Court. *United States v. Nixon* (1974).

Although the principle of executive privilege is well established, there are few clear guidelines regarding its practical application. The privilege has most frequently been asserted in the areas of foreign affairs and military and domestic secrets, but it has also been invoked in a variety of other contexts. In 1954, President Eisenhower asserted that the privilege extends to deliberative communications within the Executive Branch. . . .

Moreover, the policy of the Executive Branch throughout our Nation’s history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement Files except in extraordinary circumstances. This policy with respect to Executive Branch investigations was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files.

This policy is grounded primarily on the need to protect the government’s ability to prosecute fully and fairly. Attorney General Robert H. Jackson articulated the basic position over forty years ago:

It is the position of this Department, restated now with the approval of and at the direction of the President, that 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.

Similarly, this Office has explained that “the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.” Other grounds for objecting to the disclosure of law enforcement files include the potential damage to proper law enforcement that would be caused by the revelation of sensitive techniques, methods, or strategy; concern over the safety of confidential informants and the chilling effect on other sources of information; 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.

Quite apart from the concern that disclosure would prejudice the particular prosecution prompting congressional inquiry is the purely internal concern that disclosure might hamper prosecutorial decision-making in *future* cases. Employees of the Department would likely be reluctant to express candidly their views and recommendations on controversial and sensitive matters if those views could be exposed to public scrutiny by Congress upon request.

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There are, of course, circumstances in which the Attorney General may decide to disclose to Congress information about his prosecutorial decisions. Once an investigation has been closed without further prosecution, many of the considerations previously discussed lose some of their force. . . . Obviously, much of the information in a closed criminal enforcement file, such as unpublished details of allegations against particular individuals and details that would reveal confidential sources, and investigative techniques and methods, would continue to need protection (which may or may not be adequately afforded by a confidentiality agreement with Congress). In addition, the Department and the Executive Branch have a long-term institutional interest in maintaining the integrity of the prosecutorial decision-making process. The Supreme Court has recognized that “[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.” . . . .

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[W]hen the Attorney General is acting in his role as the President’s chief legal adviser, his communications to the President may warrant greater confidentiality than those of some other Cabinet advisers because of the nature of the Attorney General’s responsibilities to the executive and his special areas of expertise, e.g., legal advice and law enforcement. This Office has previously emphasized the particular importance of protecting the President’s ability to receive candid legal in advice. . . .

We believe that these considerations we have outlined apply to decisions whether to recommend appointment of an independent counsel no less than they apply to any other prosecutorial decision made by this Department. . . .

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Thus, we believe there are strong constitutional and policy considerations, flowing from the doctrine of separation of powers, the obligation to preserve the integrity of the prosecutorial function, and the need to protect the rights of those who are the target of criminal investigations, that should inform and guide the Department’s response to a congressional request for information about independent counsel decisions. . . .

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1. Excerpt taken from Charles J. Cooper, “Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act” 10 *Op. O.L.C*. 68 (1986) [↑](#footnote-ref-1)