AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan Era—Separation of Powers

Theodore Olson, Memorandum on the Confidentiality of Attorney General's Communications (1982)[1]

In 1982, Theodore Olson served as the assistant attorney general in the Office of Legal Counsel. Attorney General William French Smith asked Olson to provide an analysis of the extent to which the attorney general's legal advice to the president, and the background deliberations that produced that legal advice, could be held as confidential from Congress, the courts, or the general public. The Reagan administration found itself immediately embroiled in executive privilege battles. Legal conservatives in the administration wanted to revitalize the presidential authority to assert executive privilege, which they saw as having been weakened during the Watergate scandals. At the same time, the Republican White House faced a Democratic House of Representatives, and Democratic legislators were eager to use congressional oversight hearings to blunt conservative policymaking in the executive branch. Early in his administration, President Reagan entered into a political struggle with congressional committees over assertions of executive privilege involving Interior Secretary James Watt and Environmental Protection Agency Administrator Ann Gorsuch.

The administration set about developing policies regarding executive privilege. A 1982 memorandum from the president directed executive agencies to "comply with Congressional Requests for information to the fullest extent consistent with the constitutional and statutory obligation of the Executive Branch" and noted that privilege would only be claimed upon the personal decision of the president only in "the most compelling circumstances," and when all efforts at good-faith negotiation and accommodation have failed.[2] The administration took the view that internal executive branch deliberations could potentially be protected from public scrutiny, though it recognized that valid congressional interest in such materials should be accommodated whenever possible. This memo by Olson emphasized that executive privilege could be extended to consultations with the attorney general as well.

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Any discussion of the confidential nature of the Attorney General's communications with the President must begin with a recognition of the dual counseling functions performed by the Attorney General. The Attorney General serves as both a Cabinet adviser and the principal legal adviser to the President. As a member of the President's Cabinet, the Attorney General maintains a close and confidential advisory relationship with the President over a broad range of policy issues, including the highest and most delicate affairs of state. This advisory relationship to the President, a relationship shared by all members of the President's Cabinet, is constitutionally based. . . .

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[1] Excerpt taken from Theodore B. Olson, "Memorandum on the Confidentiality of the Attorney General's Communications in Counseling the President," 6 *Op. Off. Legal Counsel* 481 (1982).

[2] "Memorandum to the Heads of Executive Departments and Agencies, November 4, 1982," in Frederick M. Kaiser, Walter J. Oleszek, Todd B. Tatelman, *Congressional Oversight Manual*, Congressional Research Service Report (January 6, 2011), 143.

The doctrine of executive privilege defines the constitutional authority of the Executive Branch to protect documents or information in its possession from public disclosure and from the compulsory process of the Legislative and Judicial Branches. Executive privilege protects material the disclosure of which would significantly impair the conduct of foreign relations, the national security, or the performance of the Executive's lawful duties.[7] It also shields confidential deliberative communications which have been generated within the Executive Branch from compulsory disclosure, in the absence of a strong showing of need by the branch seeking disclosure that access to the privileged communications is critical to the responsible fulfillment of its constitutional functions. . . .

. . . It is premised on the need to discuss confidential matters which arise within the Executive Branch and to assist the President in the discharge of his constitutional powers and duties, by ensuring discussion that is free-flowing and frank, unencumbered by fear of disclosure or intrusion by the public or the other branches of government. The President and those who assist him require candid advice on the wide range of issues which confront the Executive, and such candid advice may not be forthcoming if Cabinet advisers or their aides must anticipate disclosure of the advice rendered by them and the potential public or legislative criticism which might result therefrom.

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The Supreme Court and lower federal courts have made clear that the presumption of confidentiality accorded presidential communications is intended to protect not only the substance of sensitive communications between the President and his advisers but the integrity of the decisionmaking process within the Executive Branch as well. It is these concerns which justify the invocation of executive privilege by the President, or, where appropriate, the heads of executive departments, as well as the "deliberative process" privilege, which may be claimed by any federal agency pursuant to exemption 5 of the Freedom of Information Act to withhold documents requested by members of the public.

Notwithstanding the necessity for confidentiality in executive deliberations, the privilege against their disclosure to Congress and the courts is qualified, in both scope and application. First, the executive privilege for intragovernmental deliberations does not protect materials the disclosure of which would not implicate or hinder the Executive Branch's decisionmaking processes. *United States v. Nixon* (1974). Thus, factual, nonsensitive materials—communications from the Attorney General which do not contain advice, recommendations, tentative legal judgments, drafts of documents, or other material reflecting deliberative or policymaking processes—do not fall within the scope of materials for which executive privilege may be claimed as a basis of nondisclosure.

Second, even in cases involving sensitive deliberative materials for which a claim of privilege may be appropriate, the executive interest in nondisclosure must be balanced against the needs of the requesting branch before the validity of the claim of privilege can be determined. It is in these cases of potential conflict and competing claims of legitimate need by each branch that the separation of powers principle on occasion must yield to the principles of "a workable government"—"separateness but interdependence, autonomy but reciprocity." These principles recognize a "spirit of dynamic compromise" among the coordinate branches when a conflict in authority arises—a spirit which requires each branch to "take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in a particular fact situation." . . .

The more generalized the executive interest in withholding the disputed information, the more likely it is that the claim of privilege will yield to a specific, articulated need related to the effective performance by the coordinate branches of their constitutionally assigned functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of the requesting branch for the information, the more likely it is that the Executive's need for confidentiality will prevail. . . .

In the case of Congress, the grant of legislative power in Article I of the Constitution implies a requirement that Congress have access to pertinent information, as well as the authority to summon

witnesses and to compel the production of needed evidence, as a prerequisite to the proper performance of its legislative function. Congress' duty to investigate and inform itself of matters which may involve the Executive is very broad, extending "over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate." This broad-based power of inquiry includes matters requiring new or remedial legislation, appropriations of funds, congressional probes into various governmental departments to expose corruption, inefficiency, or waste, as well as the administration of existing laws or proposed statutes. Yet, these very sources of Congress' power to obtain information also outline the limits of that power: Congress may only inquire into those matters on which it may potentially legislate or appropriate—it may not inquire into those matters "which are within the exclusive province" of the Executive or the Judiciary. Nevertheless, the validity of a claim of privilege for documents demanded by Congress in the performance of its legitimate legislating functions, including the "oversight" function, can only be determined by balancing the particular interests of the Legislative and Executive Branches against each other in each case, in light of the possibility of accommodation.

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For purposes of invoking executive privilege, communications from the Attorney General, *qua* the President's chief legal adviser, should be analyzed in the same fashion as communications from other Cabinet advisers and trusted high-level officials. Unlike the attorney-client privilege, which focuses exclusively on communications of a *legal* advisory nature, executive privilege may be claimed for any nonfactual, sensitive deliberative communication for which there exists a sufficiently strong public interest in nondisclosure. While it is unlikely that very many of the Attorney General's communications will be in the category of communications with regard to which claims of privilege are entitled to the strictest deference, *e.g.*, military, diplomatic, or sensitive national security matters, his communications to the President may nevertheless demand 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.

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Although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector. *Brinton v. Department of State* (D.C. Cir., 1980). . . .

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. . . As in the traditional attorney-client context, once the privilege has attached, only the client, in this case the President or some other high level official in the Office of the President who is responsible for receiving and acting on the legal advice, may waive it. Thus, for example, a FOIA request lodged with the Department of Justice for information communicated to the Office of the President by the Attorney General which is protected by the attorney-client privilege should not be honored unless the Office of the President consents to release of the information.

In addition, the person seeking to assert the privilege—either the client or the attorney on the client's behalf—must be able to demonstrate that the confidential disclosures "might not have been made absent the privilege," and that the underlying facts for which the privilege is claimed have *remained* confidential. Applying this rule to President-Attorney General communications, the circulation of advisory documents outside the operative circle of officials responsible for giving or receiving advice in the Office of the President or the Department of Justice, or, the reporting of factual information acquired from persons or sources outside the privileged relationship, would constitute a waiver, whether express or implied, of the privilege with respect to those documents and would subject them to disclosure, unless exempt from the Freedom of Information Act pursuant to some other exemption. . . .

The so-called "governmental" evidentiary privileges are common law privileges, now incorporated into the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which have traditionally been available exclusively to the government as a litigant. . . . These privileges—the informant's privilege, the law enforcement investigatory files privilege, and the privilege for confidential information on required reports—supplement the deliberative process, attorney-client and work-product privileges discussed above which are available to governmental as well as private parties in the civil litigation and discovery contexts. These "governmental" privileges are necessary to protect the ability of the Executive Branch to discharge its duties under the Constitution and the laws of the United States, but because their assertion in litigation does not raise the problems of a constitutional conflict with a coequal branch, these privileges may be invoked by the head of the executive department in possession or control of the requested documents, or his or her delegate. . . .

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. . . While the foregoing discussion should prove helpful in providing a framework for analysis of potential claims of privilege, we would caution that the applicability of any privilege to a given set of circumstances will almost always involve a judgment of competing values. While the Attorney General or the client must decide initially whether to assert the privilege, the task of resolving conflicts arising out of such competing values, in the final analysis, is one that is reserved to the courts.