AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

Theodore B. Olson, **Prosecution for Contempt of Congress of an Executive Branch Official** (1984)[1]

In 1982, the House of Representatives investigated the Environmental Protection Agency for mismanagement of the Superfund, a large fund designed to clean up hazardous waste sites. As part of its inquiry, Congress subpoenaed a large collection of documents from the executive branch detailing how the Superfund Act was enforced. EPA administrator Anne Gorsuch refused to release documents in the open case files involving sites that were still under investigation, claiming executive privilege. The claim of executive privilege was ultimately approved by President Ronald Reagan, who instructed Gorsuch to continue to withhold the documents. The House responded by adopting a resolution charging Gorsuch with contempt of Congress, and the Speaker of the House sent the contempt citation to the U.S. attorney for the District of Columbia asking that Gorsuch be criminally prosecuted. By January of 1983, the Speaker was arguing that the U.S. attorney was obliged to immediately refer the matter to a grand jury. The U.S. attorney refused to do so. The issue was resolved when the administration agreed to provide limited access to the requested documents and Gorsuch resigned. In the summer of 1983, the federal grand jury refused to indict Gorsuch for criminal contempt of Congress.

In 1984, Attorney General William French Smith asked Assistant Attorney General Theodore Olson, the head of the Office of Legal Counsel, to provide an opinion on whether Congress could require the prosecution of executive branch officials for contempt of Congress in disputes over executive privilege. Olson responded with a lengthy memo concluding that existing statutes did not require prosecution in such circumstances and that the Constitution precluded Congress from attempting to mandate such a prosecution. The constitutional separation of powers required that the executive retain discretion over when to initiate a prosecution and blocked Congress from using the threat of criminal prosecution to overcome claims of executive privilege. Olson's opinion became a touchstone for later presidents, who likewise refused to prosecute congressional contempt citations against executive branch officials.

How far does prosecutorial discretion extend? How might Congress enforce a contempt citation without the assistance of the executive branch?

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. . . We have concluded that, as a matter of both statutory construction and the Constitution's structural separation of powers, a United States attorney is not required to refer a contempt citation in these circumstances to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President's instructions . . . . We believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. . . .

Our conclusions are predicated upon the proposition, endorsed by a unanimous Supreme Court less than a decade ago, that the President has the authority, rooted inextricably in the separation of powers under the Constitution, to preserve the confidentiality of certain Executive Branch documents. The President's exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. . . . If one House of Congress could make it a crime simply to assert the President's presumptively valid claim . . . the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and

[1] Excerpt taken from Theodore B. Olson, "Prosecution for Contempt of Congress of an Executive Branch Official who has Asserted a Claim of Executive Privilege" 8 *Op. Off. Legal Counsel* 101 (1984).

to obtain the documents it seeks, even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.

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The basic structural concept of the United States Constitution is the division of federal power among three branches of government. Although the expression "separation of powers" does not actually appear in the Constitution, the Supreme Court has emphasized that the separation of powers "is at the heart of the Constitution." . . .

Of the three branches of the new government created in Philadelphia in 1787, the legislature was regarded as the most intrinsically powerful, and the branch with powers that required the exercise of the greatest precautions.

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. . . . Each branch must not only perform its own delegated functions, but each has an additional duty to resist encroachment by the other branches. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, *must* be resisted." *INS v. Chadha* (1983) (emphasis added).

The fundamental responsibility and power of the Executive Branch is the duty to execute the law. Article II, section 1 of the Constitution expressly vests the executive power in the President. Article II, section 3 commands that the President "take Care that the Laws be faithfully executed." . . . [B]y virtue of these constitutional provisions, the Executive Branch has the exclusive constitutional authority to enforce federal laws. . . . As a practical matter, this means that there are constitutional limits on Congress' ability to take actions that either disrupt the ability of the Executive Branch to enforce the law or effectively arrogate to Congress the power of enforcing the laws.

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The doctrine of prosecutorial discretion is based on the premise that because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress. That principle was reaffirmed by the Supreme Court in *Buckley v. Valeo* (1976), in which the Court invalidated the provision of the Federal Election Act that vested the appointment of certain members of the Federal election Commission in the President *pro tempore* of the Senate and the Speaker of the House. . . .

The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals. . . .

The doctrine of executive privilege is founded upon the basic principle that in order for the President to carry out his constitutional responsibility to enforce the laws, he must be able to protect the confidentiality of certain types of documents and communications within the Executive Branch. If disclosure of certain documents outside the Executive Branch would impair the President's ability to fulfill his constitutional duties or result in the impermissible involvement of other branches in the enforcement of the law, then the President must be able to claim some form of privilege to preserve his constitutional prerogatives. This "executive privilege" has been explicitly recognized by the Supreme Court . . . *United States v. Nixon* (1974). . . .

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A number of courts have expressly relied upon the constitutional separation of powers in refusing to force a United States Attorney to proceed with a prosecution. For example, [a district court] declined to order the United States Attorney to commence a prosecution for violation of federal wiretap laws on the ground that it was

> clear beyond question that it is not the business of the Courts to tell the United States Attorney to perform what they conceive to be his duties.

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First . . . Congress may not deprive the Executive of its prosecutorial discretion. In areas where the President has specific executive authority, Congress may establish standards for the exercise of that

authority, but it may not remove all Presidential authority. For example, Congress may require the President to make appointments to certain executive positions and may define the qualifications of those positions, but it may not select the particular individuals whom the President must appoint to those positions. . . .

Second, if Congress could specify an individual to be prosecuted, it would be exercising powers that the Framers intended not be vested in the legislature. A legislative effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based. . . . The constitutional role of Congress is to adopt general legislation that will be applied and implemented by the Executive Branch. . . .

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The Department of Justice has previously taken the position that the criminal contempt of Congress statute does not apply to executive officials who assert claims of executive privilege at the direction of the President. In 1956, Deputy Attorney General (subsequently Attorney General) William P. Rogers took this position before a congressional subcommittee . . . .

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The United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that criminal contempt proceedings are an inappropriate means for resolving documents disputes, especially when they involve another governmental entity. . . .

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Application of the criminal contempt statute to Presidential assertions of executive privilege would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions. If the statute were construed to apply to Presidential assertions of privilege, the President would be in the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility that he found necessary to the performance of his constitutional duty. Even if the privilege were upheld, the executive official would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege. . . .

By contrast, the congressional interest in applying the criminal contempt sanctions to a Presidential assertion of executive privilege is comparatively slight. Although Congress has a legitimate and powerful interest in obtaining any unprivileged documents necessary to assist it in its lawmaking function, Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena. . . .

The most potent effect of the potential application of criminal sanctions would be to deter the President from asserting executive privilege and to make it difficult for him to enlist the aid of his subordinates in the process. Although this significant *in terrorem* effect would surely reduce claims of executive privilege and, from Congress' perspective, would have the salutary impact of virtually eliminating the obstacles to the obtaining of records, it would be inconsistent with the constitutional principles that underlie executive privilege. . . .

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