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DOJ's Office of Legal Counsel Memo on Executive Privilege

This update provides a brief overview of the executive privilege, summarizes OLC's new Opinion and its potential impact on congressional investigations; and delivers actionable insights for businesses and individuals.

On August 10, 2026, the Department of Justice's Office of Legal Counsel (OLC) issued an opinion concluding that executive privilege can shield the President's communications with private advisers—individuals outside the Executive Branch—so long as the communications relate to official presidential decisionmaking, involve or reflect communications with the President or his direct advisers, and are confidential. *See Applicability of Executive Privilege to Presidential Communications with Private Advisers*, 50 Op. O.L.C. __ (Aug. 10, 2026), available here (the Opinion). The Opinion arrives at a consequential moment. Midterm elections loom, and if control of the House or Senate changes hands, so too will control of the congressional investigative agenda. A Democrat-led House or Senate would likely pursue inquiries into President Trump's administration, businesses, and decision-making that would include document requests and hearings spotlighting administration officials and private entities with perceived ties to the Trump Administration. For those private entities, the Opinion matters: their communications with the White House may now sit within the President's asserted zone of confidentiality, raising novel questions about whose privilege it is, what exactly the privilege covers, who may waive it, and what happens when a congressional subpoena lands on a private party's desk rather than the government's.

Executive privilege covers presidential communications with deliberative material and is asserted frequently when congressional committees seek documents and information from the Executive Branch. Because disputes between Congress and an administration rarely are finally decided by the courts, the governing law remains unsettled. The recent Opinion injects a significant new variable into an already murky landscape—and its breadth suggests the Executive Branch is preparing for battles with Congress.

This client alert provides a brief overview of the executive privilege, summarizes OLC's new Opinion and its potential impact on congressional investigations; and delivers actionable insights for businesses and individuals.

I. Executive Privilege

Executive privilege allows Executive Branch officials 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."[1]Although the Constitution does not explicitly reference a privilege of confidentiality, the Supreme Court has held that the President has an "interest in confidentiality" "to the extent [that] interest relates to the effective discharge of a President's powers."[2] This doctrine—which is comprised of a "suite"[3] of separate privileges—"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."[4] The two main strands are the presidential communications privilege and the deliberative process privilege, which, while "closely affiliated" are "distinct and have different scopes."[5] The presidential communications privilege applies "specifically to decisionmaking of the President" and is "rooted in constitutional separation of powers principles."[6] This privilege is "invoked only rarely."[7] The other, a far more "frequent[ly]"[8] relied upon and sweeping privilege, is the deliberative process privilege, a common-law privilege that protects executive branch decisionmaking more broadly—although, as discussed in Section III below, DOJ has long maintained that this privilege, too, has constitutional roots. Although deliberative process privilege protects communications among a broader set of people (*i.e.*, the entire Executive Branch) and is invoked more regularly both in Congress and the courts, it applies only to predecisional and deliberative documents.[9] The presidential communications privilege, on the other hand, is not limited to documents that are predecisional.[10]

II. OLC Opinion on Executive Privilege

Earlier this month, OLC issued a sweeping opinion on executive privilege, interpreting it to apply to "presidential communications with ***private*** advisers so long as the communications relate to official presidential decisionmaking, involve or reflect communications with the President or his direct advisers, and are confidential."[11] The underlying claim, however, is not new. In 2007, then-Solicitor General Paul Clement asserted executive privilege over White House communications with individuals outside the Executive Branch concerning the dismissal and replacement of U.S. Attorneys,[12] and, in 1974, OLC's opined on the constitutionality of the

Federal Advisory Committee Act reasoned that the President could claim privilege over the advice of private committees.[13] What is new is the Opinion's effort to pull these strands together into a single, comprehensive framework—laying down a marker for the inter-branch disputes to come.

The 21-page Opinion carefully tracks the development of privilege doctrine from the founding era, highlighting the importance of a president's ***private*** advisers, especially when a president determines "that a private adviser has unique insight or experience, and that full knowledge about a contemplated decision cannot be obtained through consultation only with government employees."[14] Indeed, OLC leans heavily on the underlying purpose of the privilege and analogous privileges,[15] interpreting it broadly to allow the President and his advisers to speak freely and candidly.

The Opinion defines "private advisers" as "***anyone*** the President consults outside the Executive Branch, whether they be members of the public, state officials, or employees of other branches of the federal government."[16] This includes even individuals who are not technically subordinate to the President, on the basis that the President is the one asserting the privilege.[17]

Further, according to the Opinion, the privilege reaches only communications made with, or solicited and received by, the President or his "direct advisers"—a term the Opinion does not define. Nor does the Opinion, by its terms, extend to communications with agency personnel generally, or even to everyone within the White House. For this reason, third parties should not assume that every communication with "the Administration" falls within the privilege's protection.[18] The Opinion also admits to a few other limitations, like waiver through disclosure, that would continue to limit the privilege.

Although the Opinion is formally limited to the scope of the presidential communications aspect of executive privilege, the Opinion appears at points to sweep farther, extending its reasoning to the deliberative process privilege. That application would have significant implications. As noted, the deliberative process privilege is the most expansive purported form of the executive privilege and shields communications of agency officials, not just the President.[19] That could allow the Executive Branch to claim that qualifying communications between agency officials and private individuals are privileged from disclosure.

It appears to be no accident that the OLC is releasing its Opinion in advance of the 120th Congress, which could usher in additional scrutiny of the Executive Branch; indeed, the Opinion anchors its historical analysis in the accessions of early Congresses to Presidents Washington and Jefferson's refusals to produce certain documents to the Legislative Branch. As the Opinion notes approvingly, Rep. Samuel Sitgreaves (the first ever congressman from PA-4) reportedly submitted: "The House have made a demand on the President; the President refused it; [and] this must naturally put an end to the correspondence on this subject."[20] Congress and the President have sparred on issues of executive privilege since the earliest days of the Republic. Through the Opinion, this Administration is doing what it can to ensure the next Congress takes its cues from Congressman Sitgreaves.

III. The Deliberative Process Privilege Explained

The “most frequent form”[21] of executive privilege is the deliberative process privilege, which allows the Executive Branch to withhold documents reflecting “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”[22] This common-law privilege[23] has only been given a name and some elemental formulation in the last century, but its origins are rooted in the Republic’s earliest days[24] and across the Atlantic.[25] The deliberative process privilege has been relied upon by both parties over the past many decades, including by the Obama,[26] Bush,[27] and Clinton[28] Administrations. Today, for a document to be protected by the deliberative process privilege, “it must be both predecisional and deliberative.”[29] A “predecisional” document must have been generated temporally before the agency’s final decision on the matter, as part of the process of reaching that decision. A “deliberative” document is one that reflects the “give-and-take” of the consultative process; not a recitation of facts or a final opinion.[30] The deliberative process privilege is not absolute: it can be overcome based on a number of non-exclusive factors such as the relevance of the material, the availability of evidence elsewhere, the seriousness of the matter, and the possibility of “future timidity” by government employees.[31]

Although the privilege is usually invoked in the judicial setting (especially in FOIA actions), recent caselaw, specifically the 2020 Supreme Court decision in *Trump v. Mazars*, implies (in dicta) that the privilege may apply before Congress too, since it is a common law privilege.[32] Note, however, whether the deliberative process privilege is anything more than a creature of the common law is itself contested. The Department of Justice has long maintained that the privilege carries constitutional force—a position the Executive Branch took in the *Fast and Furious* investigation,[33] and reiterated during the first Trump Administration.[34] Judge Amy Berman Jackson, in *Committee on Oversight and Government Reform v. Lynch*, held that there is “an important constitutional dimension to the deliberative process aspect of the executive privilege” and it may be invoked against a congressional subpoena.[35] By locating part of the privilege in the separation of powers rather than the common law, the decision treated the privilege as stronger protection against congressional demands than other courts have recognized. Few courts have engaged with that framing, and later decisions have not extended it. No federal appellate court has adopted the view that the privilege carries a constitutional dimension. The better reading is that the deliberative process privilege is primarily a common-law doctrine. That view is consistent with D.C. Circuit precedent. *In re Sealed Case* sharpened the distinction between the deliberative process privilege from the presidential communications privilege, which rests on separation of powers and the President’s unique constitutional role.[36] There, the court wrote that “[t]he 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.”[37] The distinction matters, and could be the basis for an inter-branch dispute, especially if Congress were to challenge the *Mazars* dictum about common law privileges.

Congress has long attempted to collect from private entities information denied to it by the Executive Branch. This approach was on display during the 119th Congress, where House and Senate Committees investigated former Special Counsel Jack Smith’s use of subpoenas for congressional members’ telephone records by seeking records directly from the telecommunications companies.

Ultimately, OLC's broader executive privilege view—and whether the deliberative process privilege is implicated—may quickly come to a head in the form of third-party congressional subpoenas.

IV. Consequences of OLC Opinion

OLC's latest Opinion is destined to ignite controversy between the Executive and Legislative branches, especially if Democrats gain control of the House of Representatives or Senate and seek to investigate President Trump, his administration, and his relationships with non-governmental officials. If Congress continues to see information from private parties as a way to probe inter-government conduct, it may run up against a privilege fight, predicated on the new interpretation that private party communications, as much as government communications, are protected. Businesses will inevitably find themselves in the middle of this fight, hoping to both cooperate with Congress while not antagonizing the Executive Branch by producing documents over which it has claimed a privilege. Indeed, businesses that have any relationship with the government could end up being subpoenaed. And although the questions raised by the Opinion will likely make their way through the judicial process eventually, companies will need to come up with a response plan far before a federal judge has had an opportunity to rule. When litigation does arise, third party custodians can expect to be affected. Because the Speech or Debate Clause immunizes congressional committees from suit (regarding actions conducted within the legitimate legislative sphere), an Executive Branch challenge to a subpoena would need to be brought against the third-party recipient of the subpoena, as occurred in *Trump v. Mazars*. Companies should therefore plan for the possibility of being a nominal defendant in an inter-branch dispute.

While a new Congress may feel distant, there are some things that companies can do *now* to minimize risk and prepare for a congressional investigation:

- **Start planning now.** Review recent interactions with the Trump Administration and with the federal government more broadly, bringing together cross-functional teams to anticipate what might draw the focus of congressional investigators. Work with your legal team to assess what you might do in a privilege fight, including what categories of documents or communications might be covered by executive privilege, given OLC's broadening of the privilege to cover communications with private advisers—which may very well include your company and certain executives. Now is the time to consider who are the most likely document custodians within your business, and who might have had confidential communications with the Administration.

- **Consider how, if at all, you might engage in a dispute over privilege.** To be clear, the President owns the privilege—not the company. If a third party does not have a legitimate basis to assert privilege, and tries to assert it anyway, the company or executive risks a contempt vote or criminal referral. Fights over executive privilege are likely to be between the Executive Branch and a congressional committee, with businesses waiting on the sidelines for the results. Nonetheless, such a fight can still impact a third party waiting to see whether it will be compelled to produce certain documents or communications.

- **Re-assess confidentiality practices.** Moving forward, it is imperative that businesses define expectations of confidentiality in writing before engaging as an adviser to the

President or his advisers, so that, if Congress seeks a document production, it will be unmistakable which communications are covered by the updated definition of executive privilege.

[1] *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997).

[2] *United States v. Nixon*, 418 U.S. 683, 711 (1974).

[3] Todd Garvey, Cong. Rsch. Serv., R47102, Executive Privilege and Presidential Communications: Judicial Principles 3 (2022).

[4] *Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 115 (1984).

[5] *In re Sealed Case*, 121 F.3d at 745.

[6] *Id.*

[7] *Id*. at 738.

[8] *Id.* at 745.

[9] The deliberative process privilege is discussed more thoroughly in Section III, *infra.*

[10] *In re Sealed Case*, 121 F.3d at 745.

[11] *Applicability of Executive Privilege to Presidential Communications with Private Advisers*, 50 Op. O.L.C. __, (Aug. 10, 2026) (hereinafter OLC Op.) (emphasis added).

[12] *Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 5–6 (2007) (Clement, Acting Att'y Gen.).

[13] *Constitutionality of the Federal Advisory Committee Act*, 1 Op. O.L.C. Supp. 502, 506–08 (1974).

[14] OLC Op. at 13

[15] Though, after drawing upon the breadth of the legislative privilege, OLC concedes in passing that the legislative privilege—unlike executive privilege—is rooted in the Constitution's Speech or Debate clause.

[16] OLC Op. at 3 n.1

[17] *Id.* at 17

[18] *Id.* at 18–19 & n.7 (declining to address the protections that might apply to other White House officials' communications with private persons).

[19] *Id*. at 9.

[20] *Id*. at 6 (citation omitted).

[21] *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

[22] *Id.* (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd* 384 F.2d 979 (D.C. Cir. 1967)). Indeed, the 1966 *Carl Zeiss* decision appears to have been the first to describe the privilege in "deliberative process" terminology.

[23] *Id.* at 745 (describing the deliberative process privilege as "primarily a common law privilege.").

[24] *See* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 284–85 (1989) (describing assertions of executive privilege by Presidents Washington and Jackson).

[25] *See, e.g.*, *Smith v. E. India Co*., 41 Eng. Rep. 550, 552 (Ch. 1841).

[26] *See Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious*, 36 Op. O.L.C. 1, 3 (2012) (Holder, Att'y Gen.).

[27] Exec. Order. No. 13233, 66 Fed. Reg. 56025 (Nov. 5, 2001) (discussing the scope of the executive privilege, including "the deliberative processes of the President or his advisors").

[28] *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1 (1999).

[29] *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 109 (D.D.C. 2016).

[30] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975).

[31] *Lynch*, 156 F. Supp. 3d at 112–13.

[32] *Trump v. Mazars USA, LLP*, 591 U.S. 848, 863 (2020).

[33] *See Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious*, 36 Op. O.L.C. 1, 2–3 (2012) (Holder, Att'y Gen.).

[34] *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 131, 139 n.2 (2019); *Congressional Oversight of the White House*, 45 Op. O.L.C. __, at *30–33 (Jan. 8, 2021).

[35] *Lynch*, 156 F. Supp. 3d at 104.

[36] *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

[37] *Id.* at 745.

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