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DOJ Executive Privilege Opinion Portends 3rd Party Dilemmas

By **Michael Bopp, Jillian Katterhagen and Kareem Ramadan** (September 9, 2026, 3:32 PM EDT)

On Aug. 10, the U.S. Department of Justice's Office of Legal Counsel 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 decision-making, involve or reflect communications with the president or his direct advisers, and are confidential.[1]

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The opinion arrives at a consequential moment. The midterm elections loom, and if control of the U.S. House of Representatives or U.S. Senate changes hands, so too will control of the congressional investigative agenda.

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A Democrat-led House or Senate would likely pursue inquiries into President Donald Trump's administration, businesses and decision-making. Such inquiries would include document requests and hearings spotlighting administration officials and private entities with real or perceived ties to the Trump administration.

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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 the desk of a private party rather than that of the government.

Executive privilege covers presidential communications that contain deliberative material and is asserted frequently when congressional committees seek documents and information from the executive branch.[2] Because disputes between Congress and an administration are rarely decided with finality 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 article provides a brief overview of the executive privilege, summarizes the OLC's new opinion and its potential impact on congressional investigations, and delivers actionable insights for businesses and individuals.

Executive Privilege

Executive privilege, comprising numerous related privileges,[3] "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," according to a 1984 OLC opinion.[4]

The two main strands are the presidential communications privilege and the deliberative process privilege, which, according to the U.S. Court of Appeals for the District of Columbia Circuit's 1997 In re: Sealed Case decision, are "closely affiliated ... [but] are distinct and have different scopes."[5]

The D.C. Circuit explained in this case that 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 deliberative process privilege is far more frequently relied upon and sweeping.[8] It protects executive branch decision-making more broadly, allowing 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," according to the D.C. Circuit in In re: Sealed Case.[9]

Although the 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.

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. In its 1980 Coastal States Gas Corp. v. U.S. Department of Energy decision, the D.C. Circuit defined a "deliberative" document as one that "reflects the give-and-take of the consultative process," not a recitation of facts or a final opinion.[10]

The deliberative process privilege is not absolute and can be overcome based on a number of nonexclusive factors. Courts must weigh competing interests, 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," according to the D.C. Circuit in In re: Sealed Case.[11]

This common-law privilege[12] 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[13] and across the Atlantic.[14]

Although the privilege is usually invoked in the judicial setting, especially in Freedom of Information Act actions, recent case law — specifically, the U.S. Supreme Court's 2020 decision in Trump v. Mazars USA LLP — implies, in dicta, that the privilege may apply before Congress too, since it is a common-law privilege.[15]

Note, however, that whether the deliberative process privilege is anything more than a creature of the common law is itself contested. The DOJ has long maintained that the privilege carries constitutional force. The executive branch took this position in the "Operation Fast and Furious" investigation — a contentious Obama-era battle between Congress and the executive branch over a poorly executed gunwalking operation on the Southwest border[16] — and reiterated it during the first Trump administration.[17]

U.S. District Judge Amy Berman Jackson, in her 2016 decision 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.[18]

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.

However, few courts have engaged with that framing, and later decisions have not extended it. Further, no federal appellate court has adopted the view that the privilege carries a constitutional dimension.

Thus, 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 and the presidential communications privilege, which rests on separation of powers and the president's unique constitutional role.[19] 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."[20]

The distinction matters, and it could be the basis for an interbranch dispute, especially if Congress were to challenge the Mazars dictum about common-law privileges.

The OLC Opinion on Executive Privilege

In early August, the 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."[21]

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.[22] And, in 1974, the OLC's opinion on the constitutionality of the Federal Advisory Committee Act reasoned that the president could claim privilege over the advice of private committees.[23]

What is new, however, is the opinion's effort to pull these strands together into a single, comprehensive framework — laying down a marker for the interbranch 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."[24]

Indeed, the OLC leans heavily on the underlying purpose of the privilege and analogous privileges,[25] 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."[26] This includes even individuals who are not technically subordinate to the president, on the basis that the president is the one asserting the privilege.[27]

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.[28] 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 presidential communications privilege alone, the opinion appears to sweep farther, at points — 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.[29] That could allow the executive branch to claim that qualifying communications between agency officials and private individuals are privileged from disclosure.

The release of the opinion in advance of the 120th Congress could usher in additional scrutiny of the executive branch; indeed, the opinion anchors its historical analysis in the accessions of early Congresses to Presidents George Washington's and Thomas Jefferson's refusals to produce certain documents to the legislative branch.

As the opinion notes approvingly, Rep. Samuel Sitgreaves 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."[30]

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 Sitgreaves.

Consequences of the OLC Opinion

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, when 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, the 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.

The OLC's latest opinion is destined to ignite controversy between the executive and legislative branches, especially if Democrats gain control of the House or Senate and seek to investigate Trump, his administration and his relationships with nongovernmental officials.

If Congress continues to see information from private parties as a way to probe intergovernment 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 and not antagonize 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 interbranch 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 the federal government more broadly, bringing together cross-functional teams to anticipate what might draw the focus of congressional investigators.

Assess what you might do in a privilege fight, including what categories of documents or communications might be covered by executive privilege, given the 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 — not the company — owns the privilege. 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 affect a third party waiting to see whether it will be compelled to produce certain documents or communications.

Reassess 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.

Conclusion

The OLC's recent opinion that executive privilege extends to private advisers threatens to make congressional oversight of the executive branch — already a challenging task — even more difficult.

If Democrats retake the House and/or Senate and focus much of their investigative energies on the Trump administration, these efforts will very quickly bump up against the new OLC opinion, which tries to close the door to Congress obtaining communications with the executive branch from private parties.

Under such circumstances, Congress is very likely to seek help from the courts to push back. Private parties will need to be nimble in order to avoid finding themselves in the middle of a heavyweight interbranch dispute.

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[1] See Applicability of Executive Privilege to Presidential Communications with Private Advisers, 50 Op. O.L.C. __ (Aug.10, 2026), available at https://www.justice.gov/olc/media/1457271/dl.(hereinafter OLC Op.)

[2] 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." In re: Sealed Case, 121 F.3d 729, 736 (D.C. Cir. 1997). 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." 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] Id. at 737 (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.

[10] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) ("In deciding whether a document should be protected by the privilege we look to . . . whether the document is 'deliberative' whether it reflects the give-and-take of the consultative process.").

[11] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 112-13 (D.D.C. 2016).

[12] In re: Sealed Case, 121 F.3d at 745 (describing the deliberative process privilege as "primarily a common law privilege.")

[13] 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).

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

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

[16] 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.).

[17] 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).

[18] Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 104 (D.D.C. 2016).

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

[20] Id. at 745.

[21] OLC Op. at 1.

[22] 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.).

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

[24] OLC Op. at 13

[25] 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.

[26] OLC Op. at 3 n.1

[27] Id. at 17

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

[29] Id. at 9.

[30] Id. at 6 (citation omitted).