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# Executive Privilege under Washington's Separation of Powers Doctrine

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# EXECUTIVE PRIVILEGE UNDER WASHINGTON'S SEPARATION OF POWERS DOCTRINE

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*Abstract*: Since *United States v. Nixon*, the U.S. Supreme Court has recognized a qualified executive privilege grounded in federal separation of powers. The privilege allows the President to withhold executive branch communications when disclosure would undermine presidential decisionmaking while executing core constitutional duties. Several states have followed the Supreme Court's lead and adopted an analogous gubernatorial privilege under state constitutional separation of powers. Focusing on Washington State's well-developed separation of powers doctrine and strong populist history, this Comment argues that the Washington State Supreme Court should recognize a qualified gubernatorial privilege that also respects the state's long history of citizen oversight.

## INTRODUCTION

> *The spirit of reciprocity and interdependence requires that if checks by one branch undermine the operation of another branch or undermine the rule of law which all branches are committed to maintain, those checks are improper and destructive exercises of the authority*.[1]

The separation of powers doctrine is deeply rooted in Washington jurisprudence.[2] It protects each branch of government from encroachment into its core sphere of competence, guarding against burdensome checks on its power by the other branches.[3] Nevertheless, the Washington State Supreme Court has so far avoided determining the extent to which the executive branch may shield its internal decisionmaking processes from a judicial order to disclose records for criminal proceedings, civil litigation, or public records requests.[4]

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1. *In re* Juvenile Dir., 87 Wash. 2d 232, 243, 552 P.2d 163, 170 (1976).

2. *See infra* note 229.

3. *See infra* note 231.

4. "During discovery, [the Washington State Farm Bureau] sought disclosure of many internal government documents that the State claimed were protected by legislative or executive privilege. The trial court ruled that such privileges exist, subject to a list of qualifications. Because we resolve this case in favor of the State, it is unnecessary for us to address this privileges issue, and we decline to do so." Wash. State Farm Bureau Fed'n v. Gregoire, 162 Wash. 2d 284, 298 n.20, 174 P.3d 1142, 1148–49 n.20 (2007) (declining to address, in the face of a ripe and fully briefed issue, the merits of an executive privilege doctrine in Washington state). Because this case was heard on direct appeal,

In *United States v. Nixon*,[5] the U.S. Supreme Court held that the President has a qualified privilege to withhold executive communications.[6] The privilege presumptively applies whenever the President formally asserts it in response to a specific request for information.[7] A requestor must then demonstrate a particularized need for the communications at issue.[8] If the requestor can demonstrate sufficient need, then a court will review the communications in camera and engage in a balancing test to determine whether the requestor's particular need outweighs the public interest in maintaining the integrity of the President's decisionmaking process.[9] In *Nixon*, the Court held that the need for evidence in a criminal proceeding was sufficient to compel in camera inspection and the subsequent release of admissible and relevant recorded conversations between the President and his advisors.[10]

After *Nixon*, states have recognized varying degrees of analogous gubernatorial privilege grounded in common law[11] or state constitutional separation of powers.[12] Some states provide a deliberative process exemption[13] that protects communications only insofar as they pertain to

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there is no Washington Court of Appeals precedent on executive privilege. *Id.* at 298, 174 P.3d at 1149.

5. 418 U.S. 683 (1974).

6. *Id.* at 708–09.

7. *Id.* at 713.

8. *Id.*

9. *Id.* at 713–14.

10. *Id.* at 713–15.

11. *See infra* Part II.B.

12. *See infra* Part II.A.

13. *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), comprehensively distinguished between executive privilege and the deliberative process privilege:

> The most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege; it allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. Although this privilege is most commonly encountered in Freedom of Information Act ("FOIA") litigation, it originated as a common law privilege. Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative. . . .
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> The presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role. . . .
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> . . . [U]nlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones. Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents. . . . There is no indication either that the presidential privilege is restricted to pre-decisional materials. . . . Nor would exclusion of final or post-decisional materials make sense, given the Nixon cases' concern that the President be given sufficient room to operate effectively. These materials often will be revelatory of the President's deliberations—as, for example, when the President decides to pursue a particular course of action, but asks his advisers to submit follow-up reports so that he can monitor

pre-decisional opinions.[14] Under this exemption, factual material divorced from advisor opinion is generally not protected.[15] Furthermore, once the governor makes a final decision on the relevant issue, the deliberative process exemption ceases to protect even advisor opinions.[16] Other states apply a more robust executive privilege doctrine closely analogous to that applied in *Nixon*, which exempts both pre- and post-decisional gubernatorial communications. These states protect both fact statements and advisor opinions from compelled disclosure.[17] They also protect documents even after a final decision has been made.[18]

The Washington Public Records Act (PRA)[19] guarantees citizen access to public records of state and local governmental bodies, including the governor's office as a state agency.[20] The PRA includes a deliberative process exemption,[21] which the Washington State Supreme Court strictly limits to pre-decisional opinions.[22] The Court refuses to

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> whether this course of action is likely to be successful. The release of final and post-decisional materials would also limit the President's ability to communicate his decisions privately, thereby interfering with his ability to exercise control over the executive branch.
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> Finally, while both the deliberative process privilege and the presidential privilege are qualified privileges, the Nixon cases suggest that the presidential communications privilege is more difficult to surmount. In regard to both, courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence. But this balancing is more ad hoc in the context of the deliberative process privilege, and includes consideration of additional factors such as whether the government is a party to the litigation. Moreover, the privilege disappears altogether when there is any reason to believe government misconduct occurred. On the other hand, a party seeking to overcome the presidential privilege seemingly must always provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials.

*Id.* at 737, 745–46 (citations omitted).

14. *See, e.g.*, WASH. REV. CODE § 42.56.280 (2012) ("Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.").

15. *See, e.g.*, Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wash. 2d 243, 256–57, 884 P.2d 592, 600 (1994); West v. Port of Olympia, 146 Wash. App. 108, 116–17, 192 P.3d 926, 930–31 (2008).

16. *See, e.g.*, *Animal Welfare Soc'y*, 125 Wash. 2d at 256–57, 884 P.2d at 600; *West*, 146 Wash. App. at 116–17, 192 P.3d at 930–31.

17. *See infra* Part II.

18. *See infra* Part II.

19. WASH. REV. CODE §§ 42.56.001–.904 (2012).

20. *Id.* § 42.56.010(1).

21. *Id.* § 42.56.280. The PRA also provides for a civil discovery exemption. § 42.56.290.

22. "In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions

protect communicated opinions once a final decision has been reached.[23] Furthermore, courts reviewing disclosure requests start with a strong presumption in favor of disclosure and apply the statutory exemption narrowly.[24] This framework is consistent with Washington's populist constitutional history.[25] The ratifiers of the constitution feared special interest influence over government and instituted robust democratic checks on government power.[26]

The PRA's liberal construction and its narrow exceptions leave Washington's executive branch open to public records requests that encroach upon its decisionmaking processes and threaten separation of powers. This Comment argues that the Washington State Supreme Court should recognize an executive privilege doctrine modeled after the qualified privilege outlined in *United States v. Nixon* and grounded in state constitutional separation of powers. Part I outlines federal executive privilege history and doctrine. Part II discusses how state courts have adopted analogous executive privilege doctrines and traces common themes for demonstrating a requestor's need for access to executive decisionmaking processes. Part III introduces Washington's populist history and outlines how the Washington State Supreme Court conceives state separation of powers. Part IV argues that Washington's separation of powers doctrine requires executive privilege but that the state's populist history should inform that privilege. This history suggests that any gubernatorial privilege should be qualified, and that the privilege should protect only gubernatorial decisionmaking processes that implicate core constitutional functions.

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and not the raw factual data on which a decision is based." Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wash. 2d 243, 256, 884 P.2d 592, 600 (1994) (citing Columbia Publ'g Co. v. Vancouver, 36 Wash. App. 25, 31–32, 671 P.2d 280, 284–85 (1983)).

23. *Id.* at 257, 884 P.2d at 600.

24. WASH. REV. CODE § 42.56.030 (2012) ("The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern."); Yousoufian v. Office of Ron Sims, 152 Wash. 2d 421, 429, 98 P.3d 463, 467 (2004).

25. *See infra* Part III.A.

26. *See infra* notes 216–27 and accompanying text.

## I. DESPITE NO CLEAR PRECEDENT, THE U.S. SUPREME COURT RECOGNIZED EXECUTIVE PRIVILEGE IN *UNITED STATES V. NIXON*

The U.S. Supreme Court first outlined the constitutional foundation for executive privilege in *United States v. Nixon*.[27] The Court grounded the privilege in separation of powers, but also relied on the functional difficulties broad disclosure places on the executive to guide its analysis of individual claims of privilege. State courts draw on this analysis when determining whether to recognize executive privilege and how to analyze specific claims of privilege when they do.

### *A. The History of Chief Executive Privilege Prior to U.S. Independence Sheds Little Light on State Executive Privilege Doctrine*

Prior to U.S. Independence, English common law was ambiguous as to executive privilege. Structural differences between modern popularly elected state governors and both English Parliament and monarch-appointed colonial governors distinguish English precedent. Yet, this history also demonstrates some balance between the Monarch's sovereignty and executive accountability to constituencies beyond the Crown itself.

As early as 1621, Parliament had the power to inquire into the activities of the King's ministers.[28] Although parliamentary inquiry was largely used as a prelude to impeachment, inquiry extended generally to executive conduct over war making, foreign affairs, and accounting of public moneys, and was used as a basis for legislation and to evaluate executive law enforcement.[29] Even so, sensitive correspondences, the release of which could jeopardize foreign affairs, were subject to delayed parliamentary inspection at least on one occasion.[30] Modern scholars debate whether Parliament's authority to compel disclosure of the Monarch's documents derived from its inherent power or merely

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27. 418 U.S. 683 (1974).

28. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 15–16 (1974).

29. *Id.* at 17–20.

30. *Compare id.* at 24–26 (dismissing the so-called Walpole incident, where Sir Robert Walpole's administration withheld certain correspondences from Parliament in order to protect ongoing peace negotiations with Prussia, as an incident of "transient political control" because Walpole's successor later released those correspondences), *and* Raoul Berger, *Executive Privilege: A Reply to Professor Sofaer*, 75 COLUM. L. REV. 603, 605–07 (1975), *with* Abraham D. Sofaer, Book Review, *Executive Privilege: A Constitutional Myth*, 88 HARV. L. REV. 281, 284 (1974) (countering that the later release by Walpole's successor could also demonstrate merely "transient political control").

from its practical political power.[31] This uncertainty may limit the utility of English precedent for interpreting executive privilege.[32]

United States colonial precedent is also distinguishable. Although several assemblies possessed the power of inquiry over the Monarch's officers,[33] colonial governors, as extensions of the Crown, possessed the sole power to remove executive and judicial officers.[34] The Monarch's dominance over the colonies through appointed governors further undermines the analogy between colonial and state governors.[35] In all, while the structural differences between appointed colonial administrations and elected post-independence administrations limit the utility of English precedent, the balance between the sovereign Monarch and executive accountability was not merely academic prior to independence.

### *B. Presidential Assertions of Executive Privilege Shortly After Independence Foreshadow the Modern Doctrine of a Qualified Executive Privilege*

Building on English and colonial precedent,[36] early instances of post-independence presidential withholdings demonstrate this tension between privilege and accountability. During the nation's first executive administration, President George Washington withheld executive communications from Congress.[37] President Washington's firm belief in an executive power to withhold communications to protect the public interest[38] was never challenged by Congress or in court.[39] Rather, the first serious challenge to a President's withholding came during the 1807 treason trial of Aaron Burr.[40]

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31. *See* sources cited *supra* note 30. President Jefferson, in both his and President Washington's administrations, cites the Walpole incident as support for the President's privilege to withhold certain communications, whether interpreted correctly or not. *See* sources cited *supra* note 30.

32. *See* sources cited *supra* note 30.

33. BERGER, *supra* note 28, at 32–33 (recounting assembly investigations into Crown officials by the Massachusetts House of Commons and the Pennsylvania Assembly).

34. *Id.* at 31–32.

35. *Id.* at 31–33.

36. *See supra* notes 30–31.

37. *See generally* Abraham D. Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318 (1975).

38. John C. Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J. L. & PUB. POL'Y 1, 34 (2010).

39. Sofaer, *supra* note 37, at 1318.

40. John C. Yoo, *The First Claim: The Burr Trial,* United States v. Nixon, *and Presidential Power*, 83 MINN. L. REV. 1435, 1437 (1999); *see also* United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

Through subpoena, Burr's counsel demanded that President Jefferson turn over a letter he received from General James Wilkinson.[41] The President objected, asserting a privilege to withhold the letter as a private communication whose release could endanger national security.[42] Chief Justice Marshall, sitting in circuit, issued the subpoena nonetheless, but noted that content irrelevant to the trial and harmful to the public would be suppressed.[43] In dicta in a later opinion, the Chief Justice qualified his position and noted that "although subject to the general rules which apply to others, [the President] may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production."[44] At least one scholar asserts that every President has claimed some type of exclusively presidential privilege.[45]

### *C. Federal Courts Presume Presidential Communications Are Privileged Unless the Requestor Demonstrates a Particularized Need that Outweighs the Value of the Privilege in the Specific Case*

While these historical incidents of executive privilege and Justice Marshall's dicta both fall short of establishing a constitutional principle, the U.S. Supreme Court firmly established the modern doctrine of qualified executive privilege in *United States v. Nixon*.[46] In *Nixon*, the Court first reasoned that a well-functioning executive branch requires that some executive communications be kept private. The Court famously stated: "Human 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."[47] The Court, however, did not limit its

41. United States v. Burr, 25 F. Cas. 30, 30–31 (C.C.D. Va. 1807) (No. 14,692d).

42. *Id.*

43. *Id.* at 37.

44. United States v. Burr, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694).

45. Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1070 (1999).

46. 418 U.S. 683, 708 (1974). The D.C. Circuit first addressed President Nixon's claim of privilege in *Nixon v. Cirica*, 487 F.2d 700 (D.C. Cir. 1973). However, President Nixon did not appeal that court's order to disclose nine specific tapes for in camera review. *In re* Sealed Case, 121 F.3d 729, 742 (D.C. Cir. 1997).

47. 418 U.S. at 705 (noting that the 1787 Constitutional Convention was conducted completely in private and that all meeting records were sealed for 30 years after the Convention). The first Watergate Special Prosecutor, Archibald Cox, grounded this line of reasoning in two rationales: "(1) to encourage aides and colleagues to give completely candid advice by reducing the risk that they will be subject to public disclosure, criticism and reprisals; (2) to give the President or other officer

reasoning to this functional rationale alone. For the first time, the Court grounded the functional need for unencumbered presidential decisionmaking in constitutional separation of powers.[48] The Court did not discuss the common law deliberative process privilege. Instead, it held that the separation of powers doctrine, derived from the Constitution's structure, requires a sphere of privilege to ensure "the effective discharge of a President's powers" through uncompromised internal deliberations.[49]

After firmly grounding executive privilege in constitutional doctrine, the Court established a three-part test to analyze claims of privilege. First, a President must formally assert executive privilege to withhold certain communications and specify why their release would hamper the President's ability to fulfill constitutional duties.[50] After this initial showing, the Court will presume that the privilege applies.[51] The Court justified this presumption as "necess[ary] for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," which presidential advisors "would be unwilling to express except privately."[52] Under this analysis, confidential executive decisionmaking is necessary for the executive branch to carry out its constitutional duties, and the separation of powers doctrine operates to shield those communications.[53]

Second, after a President asserts executive privilege to withhold specific communications, the party seeking access must overcome the presumed privilege by demonstrating particularized need.[54] In *Nixon*, the special prosecutor demonstrated particularized need by showing that certain presidential tapes were necessary evidence in a criminal conspiracy prosecution.[55] The Court accepted this basis for compelled disclosure on the ground that "our historic commitment to the rule of law" in the American adversarial system requires the development of facts through evidence.[56] Furthermore, although the Constitution[57] and

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the freedom 'to think out loud,' which enables him to test ideas and debate policy and personalities uninhibited by the danger that his tentative but rejected thoughts will become subjects of public discussion." Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1410 (1974).

48. *See* Cox *supra* note 47, at 1408–09.

49. *United States v. Nixon*, 418 U.S. at 708, 711.

50. *Id.* at 713.

51. *Id.*

52. *Id.* at 708.

53. *Id.*

54. *Id.* at 708, 713–14.

55. *Id.* at 687–90.

56. *Id.* at 708–09.

57. *Id.* at 709 (citing U.S. CONST. amend. V).

common law[58] both recognize certain evidentiary privileges, these exceptions "are not lightly created nor expansively construed" because they impede the search for truth.[59]

Finally, once an assertion of privilege is rebutted, the court inquires whether the demonstrated need for disclosure actually outweighs the value of the privilege in the context of the circumstances at hand.[60] Generally, a court will review the contested documents in camera and redact irrelevant material prior to release.[61] Absent military, diplomatic, or national security secrets, district court in camera review sufficiently protects presidential communications.[62]

Applying this balancing test in *Nixon*, the Court considered the nature and importance of the requested communications and whether the specific disclosure would temper the candor of presidential advisors.[63] The Court contrasted the President's broadly asserted need for confidentiality with the special prosecutor's narrowly articulated need for evidence in a criminal proceeding.[64] Here, both considerations weighed against the President. The Court reasoned that "infrequent occasions of disclosure" in the context of criminal prosecutions are unlikely to temper advisor candor.[65] In contrast, it determined that "to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair

58. *Id.* (citing attorney and clergy communication privileges).

59. *Id.* at 710.

60. *Id.* at 711–13.

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

62. *United States v. Nixon*, 418 U.S. at 706. Presumably, important foreign affairs documents may preclude even in camera inspection.

63. *Id.* at 712.

64. *Id.* at 712–13. To note, the Court expressly limited its holding to criminal proceedings: "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials." *Id.* at 712 n.19. *But see* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (refusing to enforce a Senate Committee subpoena investigating illegal activities during the 1972 presidential election because the committee failed to show that the tapes were "critical to the responsible fulfillment of the Committee's functions"); Sun Oil Co. v. United States, 514 F.2d 1020, 1024 (Ct. Cl. 1975) (holding evidentiary demands in a civil proceeding may be sufficient to overcome a claim of executive privilege, but noting "the burden on the litigant seeking discovery might be heavier"); *accord* Dellums v. Powell, 561 F.2d 242, 247 (D.C. Cir. 1977).

65. *United States v. Nixon*, 418 U.S. at 712.

the basic function of the courts."[66]

Following *United States v. Nixon*, the Supreme Court acknowledged in *Nixon v. Administrator of General Services*[67] that a former President may claim executive privilege for communications exchanged during a previous administration.[68] However, the Court held that General Services' restriction on public access would be sufficient to preserve presidential confidentiality, rendering the privilege unnecessary.[69] Thus, while the Court recognizes a qualified executive privilege grounded in constitutional separation of powers, it has yet to indicate where that privilege exists outside the criminal context.[70] Moreover, the Court has yet to indicate whether any concerns besides critical national security interests could overcome the need for disclosure in a criminal proceeding.

### *D. Executive Privilege Applies to Non-Presidential Communications and May Be Broader in the Context of Civil Discovery*

After the *Nixon* line of cases, lower federal courts and the U.S. Supreme Court have tended to expand the presidential communications privilege.[71] In *In re Sealed Case*,[72] the D.C. Circuit extended the privilege to communications that do not involve the President but occur between the President's advisors "in conjunction with the process of advising the President" in matters requiring direct presidential decisionmaking.[73] The case is important because it clearly distinguishes between the executive privilege outlined in *Nixon* and the common law deliberative process privilege applicable to Freedom of Information Act requests.[74] Importantly, the D.C. Circuit emphasized that "unlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety, and covers final and post-

66. *Id.*

67. 433 U.S. 425 (1977).

68. *Id.* at 448–49.

69. *Id.* at 450.

70. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 359 (3d ed. 2006).

71. *But see* Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1112, 1114, 1123 (D.C. Cir. 2004) (limiting executive privilege coverage of agency documents to those solicited by the Office of the President). Importantly, the functional rationale of encouraging advisor candor is not implicated in situations where the advice is unsolicited. *Id.* at 1116–17.

72. 121 F.3d 729 (D.C. Cir. 1997).

73. *Id.* at 752.

74. *Id.* at 745–46.

decisional materials as well as pre-deliberative ones."[75]

Next, in *Cheney v. U.S. District Court for the District of Columbia*,[76] the U.S. Supreme Court declined to apply *Nixon* mechanically in the civil discovery context.[77] In contrast with the criminal discovery order in *Nixon*, the Court held that Vice President Richard B. Cheney need not formally assert executive privilege to withhold documents from a civil discovery request and invite a separation of powers balancing inquiry.[78] The Court suggested that the federal district court could have narrowed the overly broad civil discovery requests at issue before requiring the Vice President to formally assert the privilege and justify each withholding with specificity.[79] Federal courts should first consider whether issuing a civil discovery order would constitute unwarranted impairment of another branch's performance of its constitutional duties.[80] The unchecked civil discovery orders here ("everything under the sky"[81]) were too burdensome compared to *Nixon*, where the Court required the special prosecutor to show the propriety of his requests.[82]

While the *Cheney* Court did not hold that a civil discovery request could never result in compelled disclosure, it did suggest that the Vice President (and President) may deny overly broad discovery requests without first invoking executive privilege.[83] Furthermore, the Court clearly noted the distinction between civil and criminal cases, stating, "[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal

75. *Id.* at 745.

76. 542 U.S. 367 (2004).

77. *Id.* at 383–86.

78. *Id.* at 389–90.

79. *Id.* at 390.

80. *See id.* at 385.

81. *Id.* at 387.

82. *Id.* at 388.

83. *Id.* at 389–90. Other presidential withholdings from Congress may be interesting, but are less instructive due to political resolution of the underlying disputes. MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30319, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 1, 9–16, 24–27, 29–31 (2007); State *ex rel.* Dann v. Taft (*Dann I*), 848 N.E.2d 472, 479 n.1 (Ohio 2006) ("President Franklin D. Roosevelt refused to give Congress FBI investigative files, President Eisenhower invoked executive privilege on over 30 occasions, and President Kennedy cited the privilege to prevent congressional oversight of foreign policy.") (citing Benjamin J. Priester et al., *The Independent Counsel Statute: A Legal History*, 62 WTR LAW & CONTEMP. PROBS. 5, 79 (1999); Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1570 (2002)).

subpoena requests in *Nixon*."[84]

## II. STATES GENERALLY ADOPT THE SUBSTANTIVE RATIONALES AND PROCEDURAL REQUIREMENTS FROM *UNITED STATES V. NIXON*

Almost all states that have grappled with executive privilege recognize some form of gubernatorial privilege grounded in state separation of powers.[85] Generally, states tend to emulate the separation of powers rationale and three-step analysis outlined in *United States v. Nixon* even if some construe the scope of the privilege more narrowly than the federal analogue. Additionally, two states have analyzed executive privilege claims outside the gubernatorial context. New Mexico applied the privilege to the state's independently elected attorney general,[86] and Massachusetts broadly rejected the doctrine after an appointed cabinet member asserted the privilege.[87]

### *A. Most States Ground Executive Privilege in Constitutional Separation of Powers and Construe the Privilege Broadly in the Context of Civil Litigation*

After *Nixon*, New Jersey was the first state to recognize a gubernatorial analogue to the federal executive privilege doctrine.[88] In *Nero v. Hyland*,[89] Governor Brendan Byrne indicated at a press

84. *Cheney*, 542 U.S. at 384.

85. *See, e.g.*, Doe v. Alaska Super. Ct., Third Jud. Dist., 721 P.2d 617 (Alaska 1986); Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 782 (Del. Super. 1995); Hamilton v. Verdow, 414 A.2d 914 (Md. 1980); *Dann I*, 848 N.E.2d 472; Nero v. Hyland, 386 A.2d 846 (N.J. 1978); State *ex rel.* Att'y Gen. v. First Jud. Dist. Ct. of N.M., 629 P.2d 330 (N.M. 1981); *accord* Republican Party of N.M. v. N.M. Taxation & Revenue Dep't., No. 32,524, 2012 WL 2928471, at *11 (N.M. 2012); Killington, Ltd. v. Lash, 572 A.2d 1368 (Vt. 1990). Massachusetts is alone in broadly rejecting executive privilege. Babets v. Sec'y of Exec. Office of Human Servs., 526 N.E.2d 1261 (Mass. 1988) (considering the privilege as asserted by an appointed cabinet member).

86. *First Jud. Dist. Ct. of N.M.*, 629 P.2d 330; *accord Republican Party of N.M.*, 2012 WL 2928471, at *11.

87. *Babets*, 526 N.E.2d 1261.

88. Nero v. Hyland, 386 A.2d 846 (N.J. 1978). Prior to *Nixon*, the Arizona Supreme Court recognized its governor's presumptive right to deny inspection of documents, but suggested trial court in camera inspection would necessarily follow any assertion of such privilege in order to determine whether disclosure "would be detrimental to the best interests of the state." Mathews v. Pyle, 251 P.2d 893, 896–97 (Ariz. 1952). Prior to *Mathews*, most state litigation over gubernatorial withholdings centered on mandamus actions. *See* David R. Petrarca, Jr., Notes and Comments, *A Small Illegitimate Power: Executive Privilege in Rhode Island*, 13 ROGER WILLIAMS U. L. REV. 659, 665 n.48 (2008) (citing Daniel Farber, Comment, *Executive Privilege at the State Level*, 1974 U. Ill. L.F. 631, 633 & n.20 (1974); R. E. Heinselman, Annotation, *Mandumus to Governor*, 105 A.L.R. 1124 (1936)).

89. 386 A.2d 846.

conference that he declined to appoint John Nero to the New Jersey Lottery Commission because of information revealed in a state police background report.[90] Seeking to defend his reputation, Mr. Nero filed a public records request for that background report.[91] The New Jersey Supreme Court held that the report fell outside the statutory definition of "public records" subject to mandatory disclosure under New Jersey's Right to Know Law.[92] The Court then held the request could not satisfy a separate balancing test under the state's common law access to public documents rule and also failed under a newly adopted executive privilege balancing test.[93] With respect to gubernatorial privilege, the Court largely adopted the rationales set forth in *Nixon*.[94] The Court reasoned that preventing the chilling effect disclosure would have on informers in pre-appointment screening investigations was "far more compelling" than the need to protect an already public figure from potential unjust public censure.[95] Importantly, the Court concluded that "[a] vital public interest is clearly involved in the effectiveness of the decisionmaking and investigatory duties of the executive."[96] Noting that the state's constitution provides for a strong executive, the Court held that these gubernatorial functions implicate constitutional duties.[97] Thus, robust pre-appointment screening investigations and advisor candor concerning recommendations arising from those investigations merited executive privilege.[98]

The Alaska Supreme Court followed the New Jersey Supreme Court's reasoning in *Doe v. Alaska Superior Court*[99] under similar circumstances.[100] An unsuccessful applicant for gubernatorial appointment to the State Medical Board brought a defamation suit against a citizen group after the Alaska Governor's Office announced her appointment but later rescinded it.[101] During discovery, the applicant

90. *Id.* at 848.

91. *Id.*

92. *Id.* at 850 (citing N.J. STAT. ANN. § 47:1A–2 (repealed 2002) (current version at N.J. STAT. ANN. § 47:1A–5) (2003)).

93. *Id.* at 851–53.

94. *Id.* at 853 (citing *Nixon* and federal separation of powers).

95. *Id.* at 853.

96. *Id.*

97. *Id.*

98. *Id.*

99. 721 P.2d 617 (Alaska 1986).

100. *Id.*

101. *Id.* at 619.

requested the governor's appointment file, which included letters from the public opposing her appointment.[102] Citing *Nixon* and *Nero*, the Alaska Supreme Court held the state's separation of powers doctrine entitled the governor to a qualified executive privilege to withhold certain communications.[103] That privilege did not extend, however, to the unsolicited letters from the general public contained in the appointment file.[104] Rather, the underlying rationales articulated in *Nixon*—promoting candid advice from aids and creative internal deliberations—only demanded protection of internal communications.[105]

Similar to *Nero* and *Alaska Superior Court*, in *Hamilton v. Verdow*[106] the Maryland Court of Appeals analyzed gubernatorial privilege in a civil proceeding.[107] During discovery, the plaintiff requested a confidential report prepared for the governor concerning a patient released from a state mental health facility.[108] The Maryland Court began its analysis by analogizing its governor to the President: "[T]he Governor bears the same relation to this State as does the President to the United States" and is generally "entitled to the same privileges and exemptions in the discharge of his duties as is the President."[109] The Court then recognized a qualified executive privilege grounded in both the functional and separation of powers rationales set forth in *Nixon*.[110] Regardless of the nature of the parties in an underlying dispute, the separation of powers doctrine "place[s] limits on a court's power to review or interfere with the conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority."[111] In applying this reasoning, the Court instructed the district court to determine whether the report consisted of mostly factual material, not entitled to a presumptive privilege, and subject to in camera

102. *Id.*

103. *Id.* at 623.

104. *Id.* at 624–25.

105. *Id.* (adopting Professor Cox's articulation of the rationales in *Nixon*, see Cox, *supra* note 47). The Alaska Supreme Court later narrowed the privilege to materials that are both deliberative and pre-decisional, adopting something closer to the deliberative process privilege. Capital Info. Group v. State, 923 P.2d 29, 33–36 (Alaska 1996). However, Alaska's executive privilege doctrine is still rooted in state separation of powers. *Id.* at 35.

106. 414 A.2d 914 (Md. 1980).

107. *Id.* at 917.

108. *Id.*

109. *Id.* at 921.

110. *Id.* at 920–24 (citing the Burr incident relied on in *Nixon*, United States v. Burr, 25 F. Cas. 30, 37–38 (C.C. Va. 1807) (No. 14,692d); the functional rationales identified by Professor Cox, *see* Cox, *supra* note 47; and *Nixon*'s grounding the privilege in separation of powers, United States v. Nixon, 418 U.S. 683, 705 (1974)).

111. *Id.* at 921.

inspection.[112]

Most recently, the Ohio Supreme Court recognized a qualified executive privilege protecting gubernatorial communications.[113] A public records request under the state's Public Records Act provided the backdrop.[114] State Senator Marc Dann requested several "short topical" weekly reports prepared for Governor Bob Taft by the Bureau of Workers' Compensation Administrator.[115] In a mandamus action before the Ohio Supreme Court, Governor Taft claimed an executive privilege analogous to *Nixon*[116] to withhold over 200 reports spanning a six-year period.[117] The Court recognized a qualified executive privilege, citing the functional rationales in several federal[118] and state supreme court[119] opinions. Unlike any other state supreme court, however, the Court analyzed its state's own constitutional history to determine whether the state constitution supported the privilege.[120]

The Ohio Supreme Court first acknowledged the legislature's primacy over the judicial and executive branches in Ohio's 1802 Constitution.[121] It found, however, that "over the years, various constitutional amendments increased the power of the executive branch to achieve a rough equality with the other branches."[122] The Court then outlined the development of its separation of powers doctrine in light of the state's now "three coequal branches."[123] It held executive privilege to be consistent with its separation of powers doctrine.[124] It reasoned that the public interest is best served by preserving the "quality of

112. *Id.* at 928.

113. *Dann I*, 848 N.E.2d 472 (Ohio 2006).

114. *Id.* at 475.

115. *Id.*

116. *Id.* at 480.

117. *Id.* at 477.

118. *Id.* at 480–81 (citing Nixon v. Fitzgerald, 457 U.S. 731 (1982); United States v. Nixon, 418 U.S. 683 (1974); Judicial Watch, Inc. v. Dept. of Justice, 365 F.3d 1108 (D.C. Cir. 2004); *In re* Sealed Case, 121 F.3d 729 (D.C. Cir. 1997)).

119. *Id.* at 482 (citing Doe v. Alaska Super. Ct., Third Jud. Dist., 721 P.2d 617, 623 (Alaska 1986); Mathews v. Pyle, 521 P.2d 893, 896–97 (Ariz. 1952); Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 783 (Del. Super. Ct. 1995); Hamilton v. Verdow, 414 A.2d 914, 921 (Md. 1980); Nero v. Hyland, 386 A.2d 846, 853 (N.J. 1978); New England Coal. for Energy Efficiency & Env't v. Office of Governor, 670 A.2d 815, 817–18 (Vt. 1995); Killington, Ltd. v. Lash, 572 A.2d 1368, 1373–74 (Vt. 1990)).

120. *Dann I*, 848 N.E.2d at 483.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 484.

decisionmaking by the highest executive officer of Ohio government," which requires "unhampered" advisor candor.[125] Finally, the Court acknowledged that the state's Public Records Act does not require a requestor to demonstrate particular need[126] and that the Act is construed liberally in favor of broad access.[127] Yet, the reports were gubernatorial-privileged and therefore not "public records" under the Act.[128]

### *B. Vermont and Delaware Ground Executive Privilege in Both Common Law and Constitutional Doctrines*

In *Killington, Ltd. v. Lash*,[129] the Vermont Agency of Natural Resources claimed executive privilege over its communications directly to or from the Vermont Governor's Office.[130] The Vermont Access to Public Records law establishes a citizen right to access government information without a particular showing of need.[131] However, the statute also codifies common law privileges, both in substance and procedure, as specific exemptions to disclosure.[132] The Agency argued that executive privilege was among the common law exemptions recognized in the public records statute.[133] The Vermont Supreme Court agreed and held that executive privilege, as a common law privilege, constitutes such an exception.[134] Because the statute also adopts the procedures for each privilege created at common law, the privilege here shifted the presumption from disclosure under the Access to Public Records statute to a presumption of privilege under the executive privilege doctrine.[135] The Court specifically noted the doctrine's constitutional and common law roots, emphasizing that pre-*Nixon* precedent regarded the privilege as part of the common law of evidence.[136] Indeed, the Court reaffirmed the privilege's common law roots in *New England Coalition for Efficiency & the Environment v.*

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125. *Id.*

126. *Id.* at 486.

127. *Id.* at 477.

128. *Id.* at 487; *see* OHIO REV. CODE § 149.43(A)(1)(v) (excluding from the definition of "public records" those "[r]ecords the release of which is prohibited by state or federal law").

129. 572 A.2d 1368 (Vt. 1990).

130. *Id.* at 1370–71.

131. *Id.* at 1375 (citing VT. STAT. ANN. tit. 1 § 315, 319(a)).

132. *Id.*

133. *Id.* at 1370–71.

134. *Id.* at 1375.

135. *Id.*; *accord* New England Coal. for Energy Efficiency & Env't v. Office of Governor, 670 A.2d 815, 817 (Vt. 1995).

136. *Killington*, 572 A.2d at 1373–74.

*Office of the Governor*.[137] In addition to the privilege's strong common law roots, the Court broadly construed the privilege's scope to include post-decisional documents.[138] The unique nature of gubernatorial decisionmaking justified this expansion:

> The decision-making process of the chief executive is not prescribed by statute, nor does it consist of regularized procedures. The public does not have the same interest in examining the internal workings of the process. Moreover, because the chief executive has a range of consultative and decisional responsibilities not easily separated into discrete decisions, predecision and postdecision line-drawing would be an arbitrary exercise.[139]

Thus, although the Vermont Supreme Court grounds executive privilege in common law roots, it expressly recognizes the constitutional magnitude of chief executive decisionmaking.[140]

Similarly, a Delaware Superior Court determined that both constitutional separation of powers and the common law of evidence supported an executive privilege doctrine.[141] Using the Delaware Freedom of Information Act, a plaintiff sought access to records from the governor's Judicial Nominating Commission concerning prospective nominees to fill a Delaware Supreme Court vacancy.[142] Under the statute, some documents are "specifically exempted from public disclosure by statute or common law."[143] The court determined that the constitutional and common law roots of executive privilege were sufficient to trigger this statutory exemption.[144] Like the Court in *Killington*, the Delaware court held that a state Freedom of Information Act request alone does not supply a particularized need to rebut a presumed executive privilege, per se.[145] In other words, because the Act incorporates common law exemptions to disclosure, a request is not independently sufficient to rebut the presumption in favor of executive

137. 670 A.2d 815.

138. *Id.* at 817.

139. *Id.* at 818.

140. *Id.* at 820.

141. Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 782 (Del. Super. 1995).

142. *Id.* at 779.

143. *Id.* at 782–83 (citing DEL. CODE ANN. tit. 29, § 10002(d)(6) (current version at DEL. CODE ANN. tit. 29, § 10002(g)(6) (2003))).

144. *Id.* at 782–83.

145. *Id.* at 785.

privilege. Executive privilege constitutes a common law exemption.[146] Therefore, it would be incongruous to use the Act's presumption in favor of disclosure to rebut an exemption to the Act itself.[147]

Although the Vermont and Delaware courts draw heavily on the common law to support an executive privilege, both also rely on constitutional separation of powers. This reliance indicates that both Vermont and Delaware may serve as persuasive precedent for other states in adopting executive privilege grounded in constitutional separation of powers.

### *C. New Mexico and Massachusetts Have Reached Divergent Conclusions Regarding Non-Gubernatorial Application of Executive Privilege*

The New Mexico Supreme Court extended executive privilege to the state's attorney general[148] in *State v. First Judicial District Court of New Mexico*.[149] Through civil discovery, plaintiffs sought investigatory material compiled by the state's attorney general concerning a state penitentiary riot.[150] The Court held that the state's constitution, and not the state's rules of evidence or supreme court rules, required application of executive privilege.[151] After noting the state constitution's specific separation of powers provision, the Court outlined the familiar decisionmaking protection rationales for the privilege articulated in *Nixon*.[152] The Court summarily concluded that, as a member of the executive department under the state's constitution, the attorney general holds the privilege.[153] Finally, the Court adopted a burden shifting analysis and balancing test closely analogous to *Nixon*'s to determine whether the privilege applies in a specific case.[154] With little analysis, the Court held "[t]he material obtained by the Attorney General from corrections officers and other executive department personnel is

146. *Id.*

147. *Id.*

148. New Mexico's attorney general is popularly elected, separate from the state's governor. N.M. CONST. art. V, § 1.

149. 629 P.2d 330 (N.M. 1981). In a recent opinion, the New Mexico Supreme Court refused to extend the privilege to an appointed cabinet member seeking to withhold communications that did not contain policy recommendations to the governor or otherwise evidence gubernatorial deliberations. Republican Party of N.M. v. N.M. Taxation & Revenue Dep't., No. 32,524, 2012 WL 2928471, at *17 (N.M. 2012).

150. *First Jud. Dist. Ct. of N.M.*, 629 P.2d at 332.

151. *Id.* at 333.

152. *Id.* at 333–34.

153. *Id.* at 334 (citing N.M. CONST. art. V, § 1).

154. *Id.*

protected by the executive privilege."[155]

Similarly, in *Babets v. Secretary of Executive Office of Human Services*,[156] the Massachusetts Supreme Judicial Court considered executive privilege in the context of non-gubernatorial communications.[157] Plaintiffs requested documents relating to policy development in a challenge to a specific Department of Social Services rulemaking.[158] The secretary produced some requested documents, but refused to produce others, claiming a "governmental privilege."[159] The trial judge refused to recognize the privilege in the absence of Massachusetts precedent.[160] Instead, the judge referred the matter for direct appellate review,[161] making "certain findings and rulings" that the documents would be privileged under a federal deliberative process privilege framework.[162]

After granting direct review,[163] the Massachusetts Supreme Judicial Court broadly rejected both the secretary's privilege claim and the doctrine's roots in the Massachusetts Constitution.[164] The constitution's text includes a legislative privilege, but excludes a similar executive privilege.[165] The Court found it "reasonable to expect that [the constitution's framers] would expressly have created one" had they so desired.[166] The Court also refused to create an executive privilege under the common law and rejected the secretary's functional arguments out of hand.[167] Here, the Court cited its own "customary reluctance . . . to create common law privileges to exclude relevant evidence" and a preference to leave privilege law to the legislature.[168]

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155. *Id.*

156. 526 N.E.2d 1261 (Mass. 1988).

157. *Id.* at 1262.

158. *Id.*

159. *Id.* at 1262–63.

160. *Id.* at 1263.

161. *Id.*

162. *Id.* at 1263 n.5.

163. *Id.* at 1262.

164. *Id.* at 1263.

165. *Id.* (citing the Massachusetts speech and debate clause, MASS. CONST. pt. 1, art. XXI).

166. *Id.* at 1263.

167. *Id.*

168. *Id.* at 1264. Despite the Massachusetts Supreme Judicial Court's close reading of the Massachusetts Constitution and deference to the state's legislative body, its reason for rejecting the secretary's claim, even had it adopted federal precedent, is not entirely persuasive. *Id.* (citing Nixon v. Adm'r of Gen. Services, 433 U.S. 435, 445 (1997)). The federal precedent cited, *Nixon v. Administrator of General Services*, recognized that a federal statute requiring storage of executive materials in a federal agency did not violate executive privilege, in part because the privilege could

### *D. States Generally Apply* Nixon*'s Three-Part Framework for Analyzing Executive Privilege Claims*

States have borrowed more than *Nixon*'s separation of powers rationale; they have also adopted its three-part framework for analyzing executive privilege claims. Importantly, executive privilege analysis starts with a presumption in favor of privilege even when state public records statutes do not require a showing of need by the requesting party.[169] This is because communications covered by executive privilege are exempt by statute from public records laws.[170] To determine whether a specific executive communication is in fact exempt, state courts use the three-step analysis under *Nixon*, beginning with the presumptive privilege.

Under the *Nixon* framework, in response to a discovery or public records request, a court must first review a governor's[171] formal assertion of privilege.[172] In a privilege log or affidavit, the governor's

later be asserted to protect those communications from public dissemination. 433 U.S. at 444. "The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch." *Id.* It is not apparent how this precedent provides support for a federal rule of unrestricted disclosure of executive documents in civil discovery.

169. *See, e.g.*, Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 782 (Del. Super. 1995) (exempting from the "public record" definition "[a]ny records specifically exempted from public disclosure by statute or common law") (citing DEL. CODE ANN. tit. 29, § 10002(d)(6) (current version at DEL. CODE ANN. tit. 29, § 10002(g)(6) (2003))); *Dann I*, 848 N.E.2d 472, 492 (Ohio 2006) (excluding from the definition of "public records" those "[r]ecords the release of which is prohibited by state or federal law" (citing OHIO REV. CODE § 149.43(A)(1)(v))); Killington, Ltd. v. Lash, 572 A.2d 1368, 1375 (Vt. 1990) (citing VT. STAT. ANN. tit. 1, § 317(b)(4) (current version at VT. STAT. ANN. tit. 1 § 317(c)(4) (2010))). Vermont exempts from "public inspection and copying . . . records which, if made public pursuant to this subchapter, would cause the custodian to violate any statutory or common law privilege other than the common law deliberative process privilege as it applies to the general assembly and the executive branch agencies of the state of Vermont." VT. STAT. ANN. tit. 1, § 317(c)(4) (2012). *But cf.* Republican Party of N.M. v. N.M. Taxation & Revenue Dep't., No. 32,524, 2012 WL 2928471, at *16 (N.M. 2012) ("Unlike a party seeking discovery in civil litigation, a party requesting public records under [the Inspection of Public Records Act] need not assert any particular need for disclosure . . . . [The] instruction that courts should balance the competing needs of the executive and the party seeking disclosure, therefore, does not apply to claims of executive privilege under IPRA. Instead, courts considering the application of executive privilege to an IPRA request must independently determine whether the documents at issue are in fact covered by the privilege, and whether the privilege was invoked by the Governor, to whom the privilege is reserved.") (citation omitted).

170. *See* sources cited *supra* note 169.

171. Recall that New Mexico extends the privilege to the state's attorney general, an executive department official named in the state's constitution. State *ex rel.* Att'y Gen. v. First Jud. Dist. Ct. of N.M., 629 P.2d 330, 334 (N.M. 1981) (citing N.M. CONST. art. V, § 1); *accord Republican Party of N.M.*, 2012 WL 2928471, at *11 (N.M. 2012).

172. Doe v. Alaska Sup. Ct., Third Jud. Dist., 721 P.2d 617, 626 (Alaska 1986); *First Jud. Dist. Ct. of N.M.*, 629 P.2d at 334; *Dann I*, 848 N.E.2d at 485–86; *Killington*, 572 A.2d at 1376.

office must identify the records being withheld and justify the privilege for each withholding.[173] To establish a prima facie claim of privilege, the governor need only assert that the communications "were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking."[174] Absent this showing, a court will not recognize the privilege.[175] In camera review at this stage is inappropriate if the governor's justifications establish a prima facie privilege.[176] Indeed, in camera inspection would undermine the functional and separation of powers rationales underlying the initial presumption in favor of privilege.[177]

Second, after a governor establishes a prima facie privilege to withhold certain communications, the requestor must overcome this presumption.[178] Requestors can overcome the presumptive privilege only if they demonstrate particularized need for the specific communications.[179] Absent a showing of particularized need, the privilege holds, and the communications are shielded even from in camera review.[180] Generally, requests in criminal proceedings and requests implicating individual legal rights in civil litigation can rebut a governor's presumptive privilege.[181]

Finally, if a requestor demonstrates particularized need sufficient to outweigh a governor's presumptive privilege, then a reviewing court will balance the relative interests at stake.[182] On one side are the collective public interest in robust and unhampered executive decisionmaking and the degree to which release of the communications at issue will

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173. *See* sources cited *supra* note 172.

174. *Dann I*, 848 N.E.2d at 485–86.

175. *See id.* at 487.

176. *Alaska Sup. Ct.*, 721 P.2d at 626; Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 785 (Del. Super. Ct. 1995); Hamilton v. Verdow, 414 A.2d 914, 926–27 (Md. 1980); *Killington*, 572 A.2d at 1375.

177. United States v. Nixon, 418 U.S. 683, 708 (1974); *Killington*, 572 A.2d at 1376 ("Where those documents directly involve the governor, even an in camera inspection might materially and irrevocably compromise the fundamental interests of the executive branch of government."). In camera inspection ordered by one branch of government against another necessarily implicates separation of powers concerns.

178. *Alaska Sup. Ct.*, 721 P.2d at 626; *Guy*, 659 A.2d at 785; *Hamilton*, 414 A.2d at 926; State *ex rel.* Att'y Gen. v. First Jud. Dist. Ct. of N.M., 629 P.2d 330, 334 (N.M. 1981); *Dann I*, 848 N.E.2d at 485–86; *Killington*, 572 A.2d at 1375.

179. *See* sources cited *supra* note 178.

180. *See* sources cited *supra* note 178.

181. *See infra* notes 191–96 and accompanying text.

182. Nero v. Hyland, 386 A.2d 846, 853 (N.J. 1978); *First Jud. Dist. Ct. of N.M.*, 629 P.2d at 334; *Dann I*, 848 N.E.2d at 485.

undermine this interest.[183] On the other side are the demonstrated particularized need for those communications and the possibility that withholding them would jeopardize other constitutional mandates[184] or deprive a litigant of the sole means of obtaining badly needed information.[185] Here, in camera review to balance requestor and public interests is appropriate,[186] and a court may uphold or reject a gubernatorial claim of privilege, in whole or in part.[187]

### *E. State Courts Collectively Identify Three Categories of Claimed Requestor Need: Evidence in Criminal Proceedings, Evidence in Certain Civil Litigation, and General Inquiry into Executive Deliberations*

While courts recognize a governor's presumptive privilege over gubernatorial communications with only modest justification,[188] courts honor that presumption.[189] To overcome the presumption, a requestor's need must be both demonstrated and particularized.[190] Taken as a whole, state courts have addressed three categories of need to overcome a governor's presumptive privilege. First, following *Nixon*, state courts have noted in dicta that in criminal cases, "the very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts."[191] On its face, courts likely will always

183. *See, e.g.*, *Alaska Sup. Ct.*, 721 P.2d at 626; *Dann I*, 848 N.E.2d at 485–87; *Hamilton*, 414 A.2d at 924–26; *Nero*, 386 A.2d at 853.

184. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 711 (1974) ("The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.").

185. For example, the "possible unjust censure of a candidate for appointment . . . who is already a public figure whose character and personal attributes are already the subject of legitimate public interest" did not outweigh the public interest in "effective pre-appointment screening of prospective appointees" by the governor. *Nero*, 386 A.2d at 853.

186. Doe v. Alaska Sup. Ct., Third Jud. Dist., 721 P.2d 617, 626 (Alaska 1986); Hamilton v. Verdow, 414 A.2d 914, 927 (Md. 1980).

187. *Dann I*, 848 N.E.2d at 486.

188. *See supra* note 174 and accompanying text.

189. *Hamilton*, 414 A.2d at 926 ("[W]here the material sought from the government consists wholly of confidential opinions, deliberations and recommendations for use in civil litigation where the government is not a party, and where there is no charge of misconduct involving the government agency from which production is sought, the material is clearly privileged.").

190. *See* sources cited *supra* note 178.

191. Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 785 (Del. Super. Ct. 1995) (quoting *United States v. Nixon*, 418 U.S. at 709); *Hamilton*, 414 A.2d at 925.

recognize that the Constitution's evidentiary requirements for criminal prosecutions are sufficient to rebut an initial presumptive privilege.[192]

Second, requestors with authority to investigate civil matters, like legislative committees or grand juries, may demonstrate particularized need.[193] State courts have also noted in dicta that the need for evidence in civil cases alleging government misconduct might rebut an initial presumption of privilege.[194] This is also true any time the government is party to the underlying litigation.[195] For example, a taxpayer who alleges governmental misconduct surrounding a government account in which she has a specific pecuniary interest may trigger in camera inspection of potentially responsive records.[196]

Thus, in civil litigation contexts, state courts treat their governors with less deference than the U.S. Supreme Court treats the President.[197] This difference reflects the fact that state governors have fewer inherent powers, if any, than the President.[198] Furthermore, even in states with strong executives, their governors have limited, if any, corresponding foreign affairs responsibilities as compared to the President.[199]

Finally, despite this power difference, state courts have been reluctant to recognize general state policies favoring transparency in government as a third category sufficient to rebut presumptive gubernatorial

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192. *See supra* note 184.

193. *Dann I*, 848 N.E.2d 472, 486 (Ohio 2006).

194. *Hamilton*, 414 A.2d at 925; Killington, Ltd. v. Lash, 572 A.2d 1368, 1374 (Vt. 1990).

195. *Hamilton*, 414 A.2d at 925, n.8 ("Where the government is a party, a question of unfair litigation advantage may arise. In other words, the government may be in a position of asserting or defending a claim while at the same time depriving its opponent of information needed to overcome the government's position. In these circumstances, courts have weighed the government's need for confidentiality against its opponent's need for information. Of course, in this situation, a determination by a court that the government's need for confidentiality is outweighed by its opponent's need for disclosure, does not absolutely prevent the government from maintaining confidentiality. The government is then left with the choice of either producing the information or having the issue to which the information relates resolved against it. But where the government is not a party to the underlying litigation, this choice is not open to it." (citations omitted)).

196. State *ex rel.* Dann v. Taft (*Dann II*), 850 N.E.2d 27, 30 (Ohio 2006). In contrast, an Ohio tax payer "who paid taxes into the general fund and paid gasoline taxes" was unable to allege particularized need on that basis alone for lack of standing. State *ex rel.* Dann v. Taft (*Dann III*), 853 N.E.2d 263, 266 (Ohio 2006).

197. *See generally supra* notes 77–84 and accompanying text.

198. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 304–06 (2009); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 17–18 (1998).

199. *Compare supra* note 62 and accompanying text, *with* Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2384–98 (2006) (noting gubernatorial responsibilities include responding to requests by foreign governments and international institutions, negotiating international agreements in support of regional cooperation, and administering insurance regulations and purchasing regulations to support foreign policy goals).

privilege[200] even in the face of strong state public records acts.[201] Executive privileged communications are either excluded from the state law's definition of "public record"[202] or exempt from disclosure generally.[203] In either case, a codified public policy favoring disclosure in state public records acts is generally insufficient to rebut a governor's presumptive privilege.[204] Thus, state courts have drawn a line between (1) general legislative policies favoring public access to governmental records and (2) a particular need to protect individual legal interests in criminal or civil litigation, with the former interest characterized as insufficient to overcome executive privilege.

## III. WASHINGTON'S POPULIST ROOTS AND SEPARATION OF POWERS DOCTRINE INFORM STATE CONSTITUTIONAL INTERPRETATION

Although Washington incorporates pre-independence English common law and Territorial common law through a reception statute,[205]

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200. Wilson v. Brown, 962 A.2d 1122, 1136 (N.J. Super. Ct. App. Div. 2009) (citing Nero v. Hyland, 386 A.2d 846 (N.J. 1978)).

201. *See supra* note 169 and accompanying text.

202. *See, e.g.*, Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 782 (Del. Super. Ct. 1995) (exempting from the "public record" definition "[a]ny records specifically exempted from public disclosure by statute or common law") (citing DEL. CODE ANN. tit. 29, § 10002(d)(6) (current version at DEL. CODE ANN. tit. 29, § 10002(g)(6) (2003))); *Dann I*, 848 N.E.2d 472, 492 (Ohio 2006) (excluding from the definition of "public records" those "[r]ecords the release of which is prohibited by state or federal law") (citing OHIO REV. CODE § 149.43(A)(1)(v)).

203. *See, e.g.*, Killington, Ltd. v. Lash, 572 A.2d 1368, 1375 (Vt. 1990) (citing VT. STAT. ANN. tit. 1, § 317(b)(4) (current version at VT. STAT. ANN. tit. 1 § 317(c)(4) (2010))). Vermont exempts from "public inspection and copying . . . records which, if made public pursuant to this subchapter, would cause the custodian to violate any statutory or common law privilege other than the common law deliberative process privilege as it applies to the general assembly and the executive branch agencies of the state of Vermont." VT. STAT. ANN. tit. 1, § 317(c)(4) (2010).

204. *See, e.g.*, *Dann I*, 848 N.E.2d at 486 (suggesting a higher bar for public request where "a court may find a particularized need when disclosure is sought by a uniquely qualified representative of the general public who demonstrates that disclosure of particular information to it will serve the public interest").

205. Washington's constitution incorporates Territorial common law. WASH. CONST. art. XXVII, § 2 ("All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature . . . ."); *In re* Moore, 81 F. 356, 357 (C.C.E.D. Wash. 1897). English common law survived through a Territorial reception statute that is still codified today. WASH. REV. CODE § 4.04.010 (2012) ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."). The Washington State Supreme Court interprets its reception statute as incorporating the "common law of England, including the English statutes in force at the date of the Declaration of Independence." Cooper v. Runnels, 48 Wash. 2d 108, 112, 291 P.2d 657, 659 (1955) (citing WASH. REV. CODE § 4.04.010); *In re* Hudson, 13 Wash. 2d 673, 684–85, 126 P.2d 765, 771 (1942)).

these precedents shed little light on executive privilege.[206] By contrast, the tension between Washington's populist history and its established separation of powers doctrine informs the debate over executive power. Washington State's populist roots, seeded throughout its Constitution[207] and reaffirmed in robust citizen-driven public disclosure laws,[208] caution against expanding gubernatorial power with an executive privilege. Yet, as with other states that have adopted executive privilege, Washington's constitution contemplates meaningful separation of powers.[209] These competing themes should guide Washington's executive privilege doctrine.

### *A. Washington's Constitution Contains Populist Checks Against Government Corruption and Inaction*

Washington's constitution is more easily amended than the Federal Constitution, suggesting its more "political" character is suited to reflect current and evolving local values.[210] State constitutions in general are also credited as the "primary devices" for safeguarding individual rights.[211] The structure of Washington's constitution, as embodying these principles, indicates how Washington's ratifying voters[212] would understand executive privilege.

Washington's constitutional framework calls into question the extent to which Washington's ratifying voters would have ceded public oversight of government to the very office holders they meant to

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Therefore, English common law may provide persuasive authority when interpreting Washington law. King v. King, 162 Wash. 2d 378, 393, 174 P.3d 659, 667 (2007) (examining English common law prior to independence).

206. *See supra* notes 28–33 and accompanying text.

207. *See, e.g.*, Hugh D. Spitzer, *The Past and Present Populist State*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 771, 772 (George E. Connor & Christopher W. Hammons, eds., 2008) ("The public's distrust of railroad, mining, and other corporations; concerns about special-interest control of government; and general objection to the concentration of power in elites led to a constitution that imposed numerous restrictions on the legislature, scattered executive authority among independently elected officials, intentionally hamstrung corporations, and provided strong protections of individual liberties.").

208. *See* Initiative Measure No. 276, 1973 Wash. Sess. Laws 1 (1972).

209. *See infra* note 229 and accompanying text.

210. ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 2 (2002).

211. *Id.* at 3 (citing William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)); Spitzer, *supra* note 207, at 771, 777.

212. The Washington State Supreme Court specifically looks to the intent of "we the people" who voted on ratification, rather than to the constitution's drafters. UTTER & SPITZER, *supra* note 210, at 8 (citing State *ex rel.* Albright v. Spokane, 64 Wash. 2d 767, 395 P.2d 231 (1964)).

constrain.[213] Unlike the federal Constitutional Convention of 1787,[214] debate during Washington's Constitutional Convention was open.[215] Records of the Convention debates reveal that by 1889 Washingtonians possessed "bitter resentment" toward large corporations and the railroads, which extorted land and subsidies from all levels of government.[216] Private corporations in Washington are subject to many populist constitutional provisions restricting their activities.[217] Today, the Washington State Supreme Court still recognizes the state constitution's populist distaste for government and business entanglement.[218]

Washington ratified certain "democratic checks" on state government reflecting this populist sentiment.[219] Washington's constitution provides for an elected judiciary,[220] independently elected executive officers,[221] voter control over state indebtedness,[222] and local self-government through municipal home rule.[223] It prohibits most special legislation,[224] and it requires that each bill contain only one subject that is also reflected in its title.[225] Washington's voters ratified three additional

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213. *See, e.g.*, Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 WASH. L. REV. 669, 671 (1992) ("Washington's citizens feared governmental tyranny, a tyranny they generally identified with the legislative branch.").

214. *See supra* note 47.

215. *See* Yelle v. Bishop, 55 Wash. 2d 286, 292, 347 P.2d 1081, 1084 (1959); UTTER & SPITZER, *supra* note 210, at 9.

216. UTTER & SPITZER, *supra* note 210, at 11.

217. *Id.* at 181; Spitzer, *supra* note 207, at 771, 775–77.

218. *See, e.g.*, Wash. Water Jet Workers Ass'n v. Yarbrough, 151 Wash. 2d 470, 487, 90 P.3d 42, 49–50 (2004) (holding that the qualifier "for the benefit of the state" in the state constitution's convict labor provision, WASH. CONST. art. II § 29, could not be construed to allow the state to contract prison labor for the benefit of private industry).

219. Snure, *supra* note 213, at 677–78, 684–86; *see also* Spitzer, *supra* note 207, at 771, 781–84.

220. WASH. CONST. art. IV, § 3.

221. WASH. CONST. art. III, § 1.

222. WASH. CONST. art. VIII, § 3 (amended 1972).

223. WASH. CONST. art. XI, §§ 4 (amended 1948), 10 (amended 1964).

224. WASH. CONST. art. II, § 28; WASH. CONST. art. XI, §§ 10–11.

225. WASH. CONST. art. II, § 19. This provision keenly reflects the populist movement's distrust of government secrecy. Requiring that bills contain only one subject and that the subject is reflected in the bill's title accomplishes three recognized goals: "first to prevent hodge-podge or 'logrolling' legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." Petroleum Lease Properties Co. v. Huse, 195 Wash. 254, 259, 80 P.2d 774, 776 (1938) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST

checks in 1912 by amending the constitution to include initiative, referendum, and recall provisions.[226] Furthermore, Washington voters adopted a robust public records act and campaign disclosure regime by initiative to the people.[227] These key measures confirm Washington's persistent populism and continued effort to maintain citizen oversight of government.

### *B. The Washington State Supreme Court Recognizes a State Separation of Powers Doctrine*

Although the delegates to Washington's second Constitutional Convention rejected a discrete separation of powers clause,[228] the Washington State Supreme Court recognizes a separation of powers principle analogous to federal doctrine.[229] Three independent vesting clauses divide the state's political power among three familiar branches of government: legislative, executive, and judicial.[230] Washington's separation of powers doctrine preserves the constitutional integrity of each branch by preventing one from invading another's core sphere of

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UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 296 (8th ed. 1927)).

226. WASH. CONST. amend. VII (art II, § 1), amend. VIII (art. I, §§ 33, 34).

227. Initiative Measure No. 276, 1973 Wash. Sess. Laws 1 (1972); *see* WASH. REV. CODE ch. 42.17A (2012) (Campaign Disclosure and Contribution), WASH. REV. CODE ch. 42.56 (2012) (Public Records Act).

228. *Compare* W. LAIR HILL, WASHINGTON: A CONSTITUTION ADAPTED TO THE COMING STATE 30 (1889) ("The powers of the government of the state of Washington shall be divided into three separate departments, the legislative, executive and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions pertaining to either of the others, except as in this constitution expressly directed or permitted."), *with* Brown v. Owen, 165 Wash. 2d 706, 718, 206 P.3d 310, 316 (2009) (recognizing separation of powers in the absence of a specific provision providing for it in Washington's constitution), *and* Carrick v. Locke, 125 Wash. 2d 129, 134–35, 882 P.2d 173, 176–77 (1994) (noting the absence of a specific separation of powers clause in both the federal and Washington constitutions). Hill's draft was distributed to Convention members as a model state constitution. Arthur S. Beardsley, *The Sources of the Washington Constitution as Found in the Constitutions of the Several States*, *in* CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF WASHINGTON 361 (Belle Reeves ed., 1972).

229. Hale v. Wellpinit School Dist., 165 Wash. 2d 494, 506, 198 P.3d 1021, 1026–27 (2009); *see also* Spitzer, *supra* note 207, at 771, 781–82.

230. Article II, section 1 vests the legislative authority in the legislature while reserving some lawmaking powers in the people. Article III, section 1, creates the executive department, and article III, section 2, vests the "supreme executive power" in the governor. Article IV, section 2, vests the judicial power in "a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." *See also* 1 NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 3.2 (7th ed. 2011) (describing constitutional foundations of separation of powers).

competence.[231] This principle prevents the legislature from enacting rules that would "divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers."[232]

In the context of legislative encroachments into the judiciary, for example, the legislature may not determine constitutional rules of decision for Washington State Supreme Court judgments because the Court's duty to interpret the state constitution constitutes a core competence.[233] Similarly, Washington courts refuse to interfere with rulings on points of order within legislative proceedings.[234] On the other hand, the legislature's retroactive amendment to a statute previously construed by the Court does not improperly encroach on the Court's fundamental function if the legislature takes special care to preserve the Court's prior judgment.[235]

The separation of powers doctrine, however, does not force the branches to operate in strict silos.[236] Rather, "because the three branches are not 'hermetically sealed,'" principles of "flexibility and practicality"

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231. State v. Moreno, 147 Wash. 2d 500, 505–06, 58 P.3d 265, 268 (2002) (quoting *Carrick*, 125 Wash. 2d at 135, 882 P.2d at 177).

232. At length, Chief Justice Cooley, the influential Michigan Supreme Court Chief Justice, scholar, and dean of the University of Michigan Law School writes:

> Whether in those cases where power is given by the constitution to the governor, the legislature have the same authority to make rules for the exercise of the power, that they have to make rules to govern the proceedings in the courts, may perhaps be a question. It would seem that this must depend generally upon the nature of the power, and upon the question whether the constitution, in conferring it, has furnished a sufficient rule for its exercise. Where complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations; but when the governor is made commander-in-chief of the military forces of the State, his authority must be exercised under such proper rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department. *There would be this clear limitation upon the power of the legislature to prescribe rules for the executive department, that they must not be such as, under pretence of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers*. Those matters which the constitution specifically confides to him the legislature cannot directly or indirectly take from his control. . . .
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> *It may be proper to say here, that the executive, in proper discharge of his duties, under the constitution, is as independent of the courts as he is of the legislature*.

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 137–38 (5th ed. 1883) (emphasis added). Chief Justice Cooley's constitutional scholarship, in print at the time of Washington's Constitutional Convention, is highly regarded by the Washington State Supreme Court. Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 274, 11 P.3d 762, 814 (2000), *opinion corrected*, 27 P.3d 608 (Wash. 2001) (identifying Justice Cooley as a "renowned constitutional scholar and treatise author relied upon at least 170 times by this court").

233. Seattle Sch. Dist. of King Cnty. v. State, 90 Wash. 2d 476, 496, 585 P.2d 71, 83 (1978).

234. Brown v. Owen, 165 Wash. 2d 706, 722, 206 P.3d 310, 318 (2009).

235. Hale v. Wellpinit Sch. Dist. No. 49, 165 Wash. 2d 494, 509–10, 198 P.3d 1021, 1028–29 (2009); *see also In re* F.D. Processing, Inc., 119 Wash. 2d 452, 461–62, 832 P.2d 1303, 1308 (1992) (outlining the curative amendment doctrine).

236. *See Moreno*, 147 Wash. 2d at 505, 58 P.3d at 268.

allow some functional overlap.[237] The concept of checks and balances contemplates that one branch's performance of its inherent functions will often serve to check another's.[238] Under this framework, the Court asks "not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another."[239] If one branch's activity undermines a second branch's operation or the rule of law, then it violates separation of powers principles.[240]

Under this test, the Court held that the judicial branch did not "invade[] the prerogatives" of the executive branch when a district court judge called and questioned a witness for the state in the absence of a state prosecutor.[241] Merely "asking for both parties' evidence, listening to all of it, and deciding whether an infraction was committed [kept the district court] within the constitutional confines of the judicial power."[242] Similarly, the legislature did not encroach upon the judicial branch's inherent power over its own administration by permitting juvenile court employees to collectively bargain over their salaries with their county paymasters.[243]

Moreover, under Washington's separation of powers doctrine, members of one branch must meet a high standard of proof to compel action by another branch. A governmental entity must assert through "clear, cogent and convincing proof" that another branch's failure to act interferes with its exercise of an inherent power.[244] In *In re Juvenile*

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237. *Id.* (quoting *Carrick*, 125 Wash. 2d at 135, 882 P.2d at 177).

238. *See In re* Juvenile Dir., 87 Wash. 2d 232, 241–43, 552 P.2d 163, 168–69 (1976) (noting similar overlapping functions between branches in both the federal and state systems, including legislative control over appropriations (citing U.S. CONST. art. I, §§ 8, 9; WASH. CONST. art. VIII, § 4), the executive power to veto (citing U.S. CONST. art. I, § 7; WASH. CONST. art. III, § 12), and the judicial authority to declare legislative and executive acts unconstitutional (citing United States v. Nixon, 418 U.S. 683, 703–05 (1974))).

239. *Moreno*, 147 Wash. 2d at 505–06, 58 P.3d at 268 (quoting *Carrick*, 125 Wash. 2d at 135, 882 P.2d at 177).

240. *Juvenile Dir.*, 87 Wash. 2d at 243, 552 P.2d at 170.

241. *Moreno*, 147 Wash. 2d at 506, 58 P.3d at 268.

242. *Id.* at 506, 58 P.3d at 268.

243. Zylstra v. Piva, 85 Wash. 2d 743, 750–51, 539 P.2d 823, 827–28 (1975). However, the portion of the juvenile court employees' collective bargaining agreement with the county that pertained to hiring, firing, and working conditions was void as a matter of statutory interpretation. *Id.* There, the employees' status as state employees exempted them from the Public Employees' Collective Bargaining Act, WASH. REV. CODE ch. 41.56. *Id.*

244. *Juvenile Dir.*, 87 Wash. 2d at 251, 552 P.2d at 174; *see also* Hugh Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31, 36 (1982) (arguing that separation of powers principles should protect the judiciary's sole power over court rulemaking only over "those rules necessary to the very existence and functioning of the courts").

*Director*,[245] the Lincoln County Superior Court ordered the Lincoln County Board of Commissioners to increase the salary of the County's court-appointed juvenile services director.[246] A neighboring superior court judge affirmed the order based on testimony that the Lincoln County juvenile services director's salary was indeed lower than juvenile services director salaries in other similarly sized counties.[247] The Washington State Supreme Court reversed and held that the superior court failed to meet the "clear, cogent and convincing" standard because the court presented no evidence that the director's salary was so inadequate that the court could not fulfill its duties.[248] Furthermore, the court failed to show that it would be unable to hire a qualified candidate at the commission's determined salary.[249] Although the superior court exceeded its constitutional authority in this instance, *In re Juvenile Director* also stands for the proposition that the legislature may not impede the judicial branch from performing its constitutional duties by unreasonably withholding funds necessary for the efficient administration of justice.[250]

## IV. WASHINGTON SHOULD RECOGNIZE A QUALIFIED EXECUTIVE PRIVILEGE BASED ON CONSTITUTIONAL SEPARATION OF POWERS

Washington's established separation of powers doctrine requires gubernatorial executive privilege. Separation of powers alone, however, should not define Washington's executive privilege doctrine. Like the Supreme Court of Ohio, the Washington State Supreme Court should consider its state's substantive constitutional provisions to inform its doctrine. First, in recognizing the privilege, the Court should adopt the familiar three-part framework set forth in *United States v. Nixon* that most state supreme courts have adopted. Second, the Court should broadly apply each category of demonstrated need that other courts recognize as satisfying a requestor's burden. Finally, once a requestor has demonstrated a particularized need, the Court should acknowledge that Washington's populist roots favor openness. To avoid disclosure, the Court should require the governor to show "clear, cogent, and convincing" proof that the requested disclosure will interfere with

245. 87 Wash. 2d 232, 552 P.2d 163.

246. *Id.* at 233, 552 P.2d at 164.

247. *Id.* at 233–34, 552 P.2d at 164–65.

248. *Id.* at 252, 552 P.2d at 175.

249. *Id.* at 234, 552 P.2d at 165.

250. *Id.* at 249–50, 552 P.2d at 173.

performance of a constitutional function.

### *A. The Ohio Supreme Court's Executive Privilege Analysis Provides a Useful Framework for Washington Because Both States Have Powerful Governors and Robust Public Records Acts*

Ohio's and Washington's constitutions create similar executive departments.[251] Both provide for multiple independently elected executive officers,[252] vest the "supreme executive power" in the governor,[253] permit the governor to demand information from officers of the state,[254] vest faithful execution of the laws in the governor,[255] require an annual gubernatorial address to the legislature,[256] allow the governor to convene a special legislative session,[257] designate the governor commander-in-chief of the state military,[258] allow the legislature to regulate the governor's pardoning power,[259] and provide a gubernatorial line-item veto.[260]

Taken together, these provisions suggest an Ohio executive branch roughly equal in power to the legislative and judicial branches.[261] However, Ohio's governor was not always so equal. It was only in 1903 that the governor gained the veto power.[262] The Ohio Supreme Court

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251. Although the executive departments of Washington and Ohio are constitutionally similar today, the Ohio Constitution influenced a "lesser number of sections" of the Washington Constitution than did other state constitutions. *See* Beardsley, *supra* note 228, at 362.

252. *Compare* OHIO CONST. art. III, § 1 (governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general), *with* WASH. CONST. art. III, § 1 (governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and commissioner of public lands). However, Ohio's governor and lieutenant governor run on one ticket while Washington's governor and lieutenant governor run separately. *Compare* OHIO CONST. art III, § 1(a), *with* WASH. CONST. art. III, § 1.

253. OHIO CONST. art. III, § 5; WASH. CONST. art. III, § 2.

254. OHIO CONST. art. III, § 6; WASH. CONST. art. III, § 5. The Ohio Supreme Court rejected any argument that this provision vested with the governor the power to determine whether any communications are confidential and protected from disclosure. *Dann I*, 848 N.E.2d 472, 478–79 (Ohio 2006). In similar fashion, no other state grounds executive privilege in comparable provisions or has analyzed intra-branch executive privilege claims against independently elected executive officials. In states with independently elected executive officers, one might assume that political differences may give rise to hostile intra-executive branch requests.

255. OHIO CONST. art. III, § 6; WASH. CONST. art. III, § 5.

256. OHIO CONST. art. III, § 7; WASH. CONST. art. III, § 6.

257. OHIO CONST. art. III, § 8; WASH. CONST. art. III, § 7.

258. OHIO CONST. art. III, § 10; WASH. CONST. art. III, § 8.

259. OHIO CONST. art. III, § 11; WASH. CONST. art. III, § 9.

260. OHIO CONST. art. II, § 16; WASH. CONST. art. III, § 12.

261. *Dann I*, 848 N.E.2d 472, 483 (Ohio 2006).

262. OHIO CONST. art. II, § 16 (editor's comment).

now recognizes the line-item veto as a significant power-equalizing force for the governor, "a power exceeding that of the President."[263] The current equity of power between Ohio's three branches of government makes separation of powers arguments more compelling.[264] Finally, like Washington, Ohio also has a robust separation of powers doctrine despite the absence of a specific constitutional provision establishing that concept.[265]

These similarities are important to the development of an executive privilege doctrine in Washington for three reasons. First, Ohio's similar constitutional structure makes the Ohio Supreme Court's precedent more persuasive in Washington than other state court precedent analyzing potentially dissimilar constitutions.[266] Importantly, the Ohio Supreme Court has embraced executive privilege despite the fact that Ohio's constitution provides a further populist check on the executive office not found in Washington's constitution: executive officer term limits.[267]

Second, the Ohio Supreme Court's analysis in *State ex. rel. Dann v. Taft* (*Dann I*),[268] demonstrates how constitutional history properly informs executive privilege analysis. Had the Ohio governor been subordinate to the General Assembly, as contemplated in the 1802 Ohio State Constitution, the Ohio Constitution might not support executive privilege.[269] Washington's unique populist history, like Ohio's amendment history, should inform whether its constitutional separation of powers doctrine provides for executive privilege.

Finally, analogy to Ohio's public records law may also be instructive. The Ohio Public Records Act is "construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records."[270] Washington construes its Public Records Act similarly.[271] Furthermore, Ohio excludes from the definition of "public record" those "[r]ecords the release of which is prohibited by state or federal law."[272] Washington similarly exempts from disclosure records where another

263. *Dann I*, 848 N.E.2d at 483.

264. *Id.*

265. *Id.* at 483–84 (quoting City of S. Euclid v. Jemison, 503 N.E.2d 136, 138 (Ohio 1986)).

266. *See, e.g.*, WILLIAMS, *supra* note 198, at 340 n.119 and accompanying text; TARR, *supra* note 198, at 200 n.103 and accompanying text.

267. OHIO CONST. art. III, § 2.

268. 848 N.E.2d 472 (Ohio 2006).

269. *See id.* at 483.

270. *Id.* at 477 (quoting Gilbert v. Summit Cnty., 821 N.E.2d 564, 566 (Ohio 2004)).

271. *See supra* note 24.

272. OHIO REV. CODE § 149.43(A)(1)(v).

statute "exempts or prohibits disclosure."[273] In the face of this liberal construction, the Ohio Supreme Court recognized a qualified executive privilege and corresponding three-step analysis common to federal and state courts.[274]

### *B. Washington's Populist Roots Provide an Insufficient Basis for Rejecting Executive Privilege, but They Should Inform the Way Courts Balance Requestor Need Against Execution of the Governor's Constitutional Duties*

Although Washington's constitution provides populist checks against government corruption and complacency,[275] the specificity of these checks limit their reach. Unlike the governor, who is vested with the "supreme executive power" of the state,[276] Washington's citizens have no similar general authority.[277] Citizen checks on other branches are limited to those enumerated in Washington's constitution.[278] Furthermore, when citizens act through initiatives and referenda, those actions are simply legislative and receive no special status, constitutional or otherwise.[279] Thus, even the people's constitutional power to make laws does not give those citizen-initiated laws extra-statutory reach.[280] Finally, when statutory rights are vindicated through judicial enforcement, the separation of powers doctrine is implicated anew.[281]

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273. WASH. REV. CODE § 42.56.070(1) (2012).

274. *See supra* notes 113–28 and accompanying text.

275. *See supra* notes 219–27 and accompanying text.

276. WASH. CONST. art. III, § 2. Washington's legislature and judiciary also possess general authority over their respective spheres of competence. *See* WASH. CONST. art. II, § 1 (legislative authority vested in legislature); WASH. CONST. art. IV, § 1 (judicial power vested in supreme court).

277. Although Washington's constitution acknowledges "[a]ll political power is inherent in the people," WASH. CONST. art. I, § 1, state plenary power is generally vested in the legislature, subject only to express or implied limitations. UTTER & SPITZER, *supra* note 210, at 16.

278. It would make little sense to refer to implied or inherent citizen powers when state plenary power is vested in other branches of government. *Id.*

279. Wash. State Farm Bureau Fed'n v. Gregoire, 162 Wash. 2d 284, 290–91 174 P.3d 1142, 1145 (2007).

280. *See id.* Similarly, the legislature's adoption of a law, regardless of whether it seeks to enhance the populist goals of the state constitution, is also subject to separation of powers. Thus, apart from independently elected executive officers, no provision in Washington's constitution provides citizen oversight over the executive branch. One would expect standard separation of powers analysis to apply to laws passed by initiative. *See id.* (concluding the populist initiative process did not serve as a separate democratic check against the three traditional branches of government, but merely constituted "legislative power that is coextensive with that of the legislature").

281. *See supra* notes 228–50 and accompanying text.

Indeed, other state courts have not altered the three-part executive privilege framework in the face of separate state public records acts.[282]

Like Ohio, Washington should adopt the federal three-part executive privilege framework. Under this framework, the governor must first invoke the privilege through a detailed privilege log describing the document and explaining why its release would undermine gubernatorial deliberations, policymaking, or decisionmaking.[283] Documents that do not merit privilege will not satisfy this process. For example, unsolicited letters from the general public contained in an appointment file are not presumptively privileged because they do not contain advisor opinions.[284] Similarly, reports containing only fact summaries do not implicate executive-advisor candor.[285] This process requires the governor to put forth a reasonable explanation for the presumptive privilege without overburdening the governor's limited resources, which would defeat the functional rationales underlying the privilege.[286]

Second, a requestor must demonstrate a particular need for specific executive information to rebut the presumptive privilege. Here, Washington's populist history—with an emphasis on government openness and citizen oversight—suggests courts should generously construe a requestor's asserted need.[287] Because the governor already has a qualified presumption in favor of privilege, placing an onerous burden on requestors risks turning the qualified privilege into an absolute privilege.

Washington courts should find a requestor's demonstrated need sufficient to rebut the presumptive privilege when it falls under a recognized category meriting disclosure. Previously recognized categories of sufficient need include evidence in criminal litigation, evidence in civil litigation affecting individual rights, and allegations of government wrongdoing.[288] If a requestor's demonstrated need does not fall under a previously recognized category, then a requestor must show

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282. *See supra* notes 170–87 and accompanying text.

283. The Washington State Supreme Court should decline to adopt a framework similar to *Cheney*, which requires lower courts to narrow overly broad civil requests, in the PRA context. *See supra* notes 77–82 and accompanying text. While PRA requests may be "everything under the sky" like civil discovery requests, *id.*, they are statutorily created rights, WASH REV. CODE § 42.56.080 (2012), rooted in public policy, WASH REV. CODE § 42.56.030 (2012).

284. *See supra* notes 104–05 and accompanying text.

285. *See supra* note 112 and accompanying text.

286. For example, the U.S. Supreme Court expressed concern that merely invoking executive privilege could overburden the Office of the Vice President. *See supra* notes 76–83 and accompanying text.

287. *See supra* notes 213–27 and accompanying text.

288. *See supra* notes 188–204 and accompanying text.

that the gubernatorial withholding at issue would jeopardize the historic commitment to the rule of law in the adversarial system of justice.[289] To a lesser degree, courts might also consider whether an instance of gubernatorial withholding undermines a particular constitutional principle[290] or legislative policy.[291]

Third, once a requestor has demonstrated sufficient need, courts should inspect the documents in camera to determine whether disclosure—subject to redaction of irrelevant or otherwise protected information—would impermissibly undermine the governor's ability to fulfill a constitutionally assigned duty.[292] *In re Juvenile Director* provides the clearest standard to analyze claimed separation of powers violations. The Court held that a superior court could not compel a county commission to raise salary levels unless it could show by "clear,

289. *See supra* note 56 and accompanying text.

290. For example, Washington courts could also find particularized need when citizens seek access to gubernatorial decisionmaking around issues of particular concern during the framing of Washington's constitution. Interactions between state government and business, under Washington's constitution, are presumptively suspect and citizens have a historically rooted interest in oversight of relationships between government and business. *See* Wash. Water Jet Workers Ass'n v. Yarbrough, 151 Wash. 2d 470, 487–88, 90 P.3d 42, 50–51 (2004). Similarly, access to the state's administration of the initiative and referendum process may necessarily constitute demonstrated need because that process itself provides a constitutional citizen check on government overreach and complacency. *See supra* note 226 and accompanying text.

291. However, other state courts have been less receptive to this consideration. *See supra* note 200 and accompanying text.

292. Whether a gubernatorial duty is constitutionally assigned is itself a difficult question. The supreme executive power is vested in the governor, WASH. CONST. art. III, § 2, with a corresponding responsibility to "see that the laws are faithfully executed," WASH. CONST. art. III, § 5. Other constitutional duties and powers include: requiring information in writing from other state officers, WASH. CONST. art. III, § 5; delivering an annual message to the legislature, WASH. CONST. art. III, § 6; convening special legislative sessions, WASH. CONST. art. III, § 7; serving as commander-in-chief of the state military, WASH. CONST. art. III, § 8; exercising pardoning power as regulated by the legislature, WASH. CONST. art. III, §§ 9, 11; exercising veto, entire-section veto, or line-item appropriation veto powers, WASH. CONST. art. III, § 12; and filling vacancies in appointive and other state offices, WASH. CONST. art. III, § 13. The governor also exercises limited foreign affairs functions, including foreign sister state agreements and limiting economic activity with a specific state, among others. *See* Ku, *supra* note 199. Foreign affairs may preclude in camera review even after sufficient requestor showing. *See supra* note 62 and accompanying text. In responding to a state of emergency or invasion, the governor's constitutional duties may also be implicated. *See generally* Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 240 (2006) (arguing that state executives possess inherent constitutional authority to respond during times of crisis). Although the Washington governor's power to respond to state emergencies is regulated by statute, the legislature has broadly authorized gubernatorial responses. *See* WASH. REV. CODE §§ 43.06.010, 43.06.200–.270 (2012); Cougar Bus. Owners Ass'n v. State, 97 Wash. 2d 466, 472, 647 P.2d 481, 484 (1982). Professor Rossi suggests that any ambiguity under such a regime should be resolved in favor of authorizing "state officials to act to address crisis-related issues based on inherent executive power under state constitutions." Rossi, *supra* at 258.

cogent and convincing" proof that the commission's failure to appropriate jeopardized the court's ability to fulfill an inherent constitutional function.[293] As with the county commission's statutory authority in *In re Juvenile Director*, requestors at this stage will have authority through criminal discovery, civil discovery implicating individual legal rights, or by plausibly alleging government wrongdoing.[294] Therefore, the governor should bear the burden of showing through "clear, cogent and convincing" proof that the burden of disclosure on her ability to execute a constitutionally assigned function outweighs the benefits of the requestor's demonstrated need.

The governor might look to the following factors to show that the burden of a request outweighs the particular benefits of disclosure:

(1) whether the requested disclosure is broad or narrow;[295]

(2) whether other, less burdensome means are available for obtaining the information sought;[296]

(3) whether the disclosure would be kept confidential by the requesting party and the privilege could later be asserted to protect future disclosures;[297]

(4) whether disclosure will blunt future advisor candor necessary for effective gubernatorial decisionmaking;[298]

(5) whether disclosure will impede future executive investigations;[299] and

(6) whether the alleged constitutional duty impeded by disclosure is explicitly enumerated in the state constitution,[300] implied by other constitutional provisions,[301] or delegated by the legislature.[302]

Finally, like other states,[303] Washington should not recognize public

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293. *In re* Juvenile Dir., 87 Wash. 2d 232, 252, 552 P.2d 163, 175 (1976). Importantly, this burden was applied against the commission's exercise of delegated state legislative authority to fix compensation levels. *Id.* at 234, 552 P.2d at 166.

294. Recall that exemptions from disclosure under public records acts cannot be rebutted by the underlying mechanisms in the acts themselves. *See supra* notes 200–04 and accompanying text.

295. *See supra* text accompanying note 64.

296. *See supra* notes 79–80 and accompanying text.

297. *See supra* notes 68–69 and accompanying text.

298. *See* Cox, *supra* note 47.

299. *See supra* notes 95–98 and accompanying text.

300. *See supra* note 292.

301. For example, advisor candor may be implied from duties enumerated in the constitution. *See, e.g.*, *supra* note 49 and accompanying text.

302. *See* Rossi, *supra* note 292. Importantly, state governors generally possess only delegated and not inherent authority. *See* WILLIAMS, *supra* note 198, at 304–06.

303. *See supra* notes 200–04 and accompanying text.

records requests under the state's Public Records Act (PRA) as necessarily demonstrating requestor need. First, like Ohio,[304] Washington's PRA excuses disclosure of records where another statute exempts or prohibits disclosure.[305] As a constitutional doctrine, executive privilege should qualify as an "other statute" exempting disclosure.[306] Second, PRA requests generally do not fall under any of the specific categories of accepted need.[307] Initiating a PRA request does not necessarily implicate government wrongdoing, and denying a PRA request does not necessarily burden a requestor's constitutional rights or undermine the adjudication of individual rights.

## CONCLUSION

Washington's populist beginnings counsel against unchecked concentrated power within one branch of government. Despite this history, the Washington State Supreme Court recognizes a separation of powers doctrine that protects each branch's ability to fulfill its constitutional duties. The separation of powers doctrine demands, in some cases, that one branch of government shield internal deliberations from disclosure that threatens its very functioning. However, this principle must be balanced against the populist value of facilitating citizen oversight of government. The well-established three-part executive privilege framework properly balances the competing citizen interests in an executive branch that is able to execute state law effectively with citizen oversight of executive officials.

304. *See supra* notes 270–74 and accompanying text.

305. WASH. REV. CODE § 42.56.070(1) (2012); *see*, *e.g.*, Ameriquest Mortg. Co. v. Office of the Att'y Gen., 170 Wash. 2d 418, 439–40, 241 P.3d 1245, 1255–56 (2010) (incorporating federal statutes and federal regulations); Hangartner v. City of Seattle, 151 Wash. 2d 439, 453, 90 P.3d 26, 33 (2004) (incorporating another state statute); O'Connor v. Dep't of Soc. & Health Servs., 143 Wash. 2d 895, 912, 25 P.3d 426, 434–35 (2001) (incorporating court rules).

306. Yakima Cnty. v. Yakima Herald-Republic, 170 Wash. 2d 775, 808, 246 P.3d 768, 783 (2011) (recognizing in dicta that the argument for incorporating provisions in the federal Bill of Rights as exemptions under WASH. REV. CODE § 42.56.070(1) "has force").

307. *See supra* notes 200–01 and accompanying text.