"Facet" or "Facets" of Executive Privilege in Oklahoma? *Vandelay*'s Unclear Outcome

I. Introduction

Courts rarely confront issues of presidential or gubernatorial executive privilege, but when they do, they often make headlines. This is understandable, as executive privilege deals with a sovereign's highest leader attempting to withhold information that would otherwise be available to the public. Plausibly, a leader is unlikely to assert executive privilege unless what they were withholding would be newsworthy. Executive privilege has taken a front seat in the news cycle with the recent search of former President Trump's residence at Mar-a-Lago.[1] Former President Trump also asserted the privilege in an attempt to block testimonies concerning the January 6 insurrection.[2] Even more recently, with both President Biden and former Vice President Pence being investigated for improperly handling classified documents, it is likely that executive privilege will remain in the news for some time.[3]

Despite the modern notion of executive privilege existing for over half a century, it has taken a long time for its contours to develop in case law. *In re Sealed Case*[4] and *United States v. Nixon*[5] resolved foundational questions about executive privilege at the federal level, and now the questions surrounding executive privilege are now growing more nuanced. Recently, the United States Supreme Court addressed the scope of a former President's ability to assert executive privilege to prevent disclosure of records to Congress when the sitting President was willing to disclose the records.[6]

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1. *See, e.g.*, *Executive Privilege*, AM. BAR ASS'N LEGAL FACT CHECK, http://abalegalfactcheck.com/articles/executive-privilege.html (last updated Jan. 21, 2022).

2. Becky Sullivan, *The Pence Subpoena Could Set Up a Showdown over Executive Privilege*, NPR NEWS (Feb. 11, 2023, 12:58 PM), https://www.npr.org/2023/02/11/1156205144/mike-pence-subpoena-executive-privilege.

3. Michael D. Sheer & Katie Rogers, *Investigators Seize More Classified Documents from Biden's Home*, N.Y. TIMES (Jan. 24, 2023), https://www.nytimes.com/2023/01/21/us/politics/biden-documents.html; Sarah N. Lynch & Steve Holland, *FBI Searches and Finds One Additional Classified Record in Pence's Home*, REUTERS (Feb. 10, 2023, 11:43 PM), https://www.reuters.com/world/us/fbi-searching-pences-home-classified-documents-probe-source-2023-02-10/.

4. 121 F.3d 729 (D.C. Cir. 1997).

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

6. Trump v. Thompson, 142 S. Ct. 680, 680 (2022) (stay denied).

Though the Court allowed the Federal Circuit's decision to stand,[7] the slip opinion showed the Court's understanding of the serious nature of these questions.[8]

Case law on executive privilege at the state level is far more sparce, and state jurisdictions have only recently begun grappling with questions about how, if at all, executive privilege applies to governors and other executive agencies. Despite the lack of developed case law on executive privilege in these jurisdictions, governors are beginning to realize the power they may (or may not) hold. In the last five years, at least six governors have asserted executive privilege in some fashion to avoid releasing requested records.[9] Even some municipal leaders are beginning to experiment with the theory that their communications are privileged,[10] and many of these jurisdictions have no case law on executive privilege.

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7. The Court explained that since the D.C. Circuit concluded that President Trump's claims would have failed even if he were the incumbent, any of the Circuit's discussion of Trump's status as a former President was "nonbinding dicta." *Id.*

8. *Id.* ("The questions [of executive privilege] . . . are unprecedented and raise serious and substantial concerns.").

9. The following six states have all had executive privilege issues arise in the last five years: (1) Montana, Darrell Ehrlick, *Gianforte Mum About Legislative Tracking Form, Claims Executive, Deliberative Privilege*, DAILY MONTANAN (Apr. 21, 2022, 6:05 PM), https://dailymontanan.com/2022/04/21/gianforte-mum-about-legislative-tracking-form-claims-executive-deliberative-privilege/; (2) Tennessee, Kimberlee Kruesi & Jonathan Mattise, *Governor Claims 'Executive Privilege,' Denies Public Records*, AP NEWS (Jan. 13, 2020, 6:03 PM), https://apnews.com/article/84466f297aa795e37a544799392ee960; (3) New Hampshire, Cassidy Jensen, *Sununu Cites 'Executive Privilege' to Deny Records on the Sale of Downtown DOT Buildings*, VALLEY NEWS (West Lebanon, N.H.) (Sept. 26, 2021, 8:05 PM), https://web.archive.org/web/20211009094524/https://www.vnews.com/Gov-denies-records-request-under-exec-privilege-42692780; (4) Florida, Emily L. Mahoney, *DeSantis Has Executive Privilege, a Judge Ruled, Setting Up Legal Battle over Secrecy*, TAMPA BAY TIMES (Feb. 23, 2023), https://www.tampabay.com/news/florida-politics/2023/02/04/ron-desantis-executive-privilege-transparency-constitution-legal; (5) Virginia, Dean Mirshahi, *Second Lawsuit Filed Against Gov. Youngkin Over Tip Line Records,* 8NEWS (Aug. 9, 2022, 2:17 PM), https://www.wric.com/news/virginia-news/second-lawsuit-filed-against-gov-youngkin-over-tip-line-records/; and (6) Iowa, Clark Kauffman, *Reynolds Cites Pandemic and Asserts Executive Privilege in Open-Records Lawsuit*, IOWA CAP. DISPATCH (Dec. 8, 2021, 3:11 PM), https://iowacapitaldispatch.com/2021/12/08/reynolds-cites-pandemic-and-asserts-executive-privilege-in-open-records-lawsuit.

10. David Bauerlein, *Jacksonville City Council Probe of JEA Sales Attempt Faces Executive Privilege Claims*, FLORIDA TIMES-UNION (Jacksonville, Fla.) (Aug. 20, 2020, 5:58 PM), https://www.jacksonville.com/story/news/local/2020/08/20/memo-conversations-mayor-curry-shielded-executive-privilege/5609790002/.

Oklahoma was one of the first states to address certain facets of a Governor's ability to assert executive privilege.[11] The current state of the privilege in Oklahoma, however, is complicated. Oklahoma's foundational—and only—case on executive privilege has not only left open high-stakes questions, such as how far down the executive ladder the scope of the privilege extends, but it has strayed from how other jurisdictions understand executive privilege.[12] As a result, Oklahoma's law on executive privilege makes it arguably impossible for the legislature to override, and such a rigid notion of privilege might even extend to lower-level agencies. The implications of a congressionally unchangeable privilege extending to the Governor and, arguably, lower level agencies and suggestions for how to clarify the current state of executive privilege in Oklahoma, are explored here.

In this Note, Part II surveys the general "facets" of federal and state executive privilege in most jurisdictions.[13] Part III summarizes *Vandelay Entertainment, LLC v. Fallin*,[14] the only Oklahoma Supreme Court case addressing executive privilege, and how it seems to have established a "hybrid" of two very distinct facets of the privilege.[15] Part IV addresses the open questions that *Vandelay* created, particularly whether other facets of executive privilege exist, and if so, how far down the executive branch they extend. Part V provides recommendations for how the Oklahoma Supreme Court should clarify the questions addressed in Part IV. Finally, Part VI concludes by urging that, given the current hybrid state of executive privilege, the Oklahoma Supreme Court should not extend the right of executive privilege to executive officials beyond the Governor, nor should it create any new facets.

II. The General Law on Executive Privilege: Deliberative Process Privilege vs. Executive Communications Privilege

Executive privilege has multiple facets. Each facet serves a different purpose, extends to different groups, is rooted in different law, and places different burdens on parties. Generally, the three established facets of

11. *See generally* Vandelay Ent., LLC v. Fallin, 2014 OK 109, 343 P.3d 1273.

12. *See generally id.*

13. *Id.* ¶ 1, 343 P.3d at 1280 (Combs, J., concurring). Justice Combs in his concurrence used the term "facets" to highlight how executive privilege has many legal forms. *Id.* This Note adopts that term and uses it throughout.

14. *See generally id.*

15. *Id.* ¶ 7, 343 P.3d at 1281 (Combs, J., concurring).

executive privilege are the executive communications privilege,[16] the deliberative process privilege,[17] and the state secrets privilege.[18] While federal courts have established all three facets, state responses have varied drastically. Some state courts have not addressed the existence of any facets. Others have addressed and adopted one or both of the executive communications privilege and the deliberative process privilege. No state jurisdiction has adopted the state secrets privilege.[19]

Generally, the deliberative process privilege is a privilege that more executive entities may assert, but it is easier to overcome and protects fewer communications.[20] The executive communications privilege is harder to overcome, but it is available to fewer entities, usually only the chief executive and his advisors.[21] The next sections explain their contours.

A. A Lower Bar for More Entities: The Deliberative Process Privilege

The purpose of the deliberative process privilege is "to protect the frank exchange of ideas and opinions critical to the government's decision-making process where disclosure would discourage such discussion in the future."[22] This privilege is widely recognized in many jurisdictions and almost always rooted in common law.[23] Its wide acceptance is evident from statutes such as Freedom of Information Act ("FOIA") that explicitly mention the deliberative process privilege.[24] Indeed, multiple state and federal cases discuss its contours as well, often spending little time on defining the privilege or explaining its origins, suggesting its existence in common law is evident and well established.[25]

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16. *See In re* Sealed Case, 121 F.3d 729, 742 (D.C. Cir. 1997).

17. *See id.* at 737.

18. *See* United States v. Reynolds, 345 U.S. 1, 6-8 (1953).

19. Given that no states have adopted the state secrets privilege, it is outside the scope of this Note.

20. *See* Aziz Huq, *Background on Executive Privilege*, BRENNAN CTR. FOR JUST. (Mar. 23, 2007), https://www.brennancenter.org/our-work/research-reports/background-executive-privilege.

21. *Id.*

22. City of Colorado Springs v. White, 967 P.2d 1042, 1051 (Colo. 1998). The Oklahoma Supreme Court cites *White* often in *Vandelay* when describing executive privilege.

23. *See id.* at 1048-49 (calling the deliberative process privilege a "common law executive privilege" and citing ten federal and state cases recognizing the deliberative process privilege). *But see* Vandelay Ent., LLC v. Fallin, 2014 OK 109, ¶ 12, 343 P.3d 1273, 1276 (finding that the privilege is rooted in the Oklahoma state constitution).

24. 5 U.S.C. § 552(b)(5).

25. *See, e.g.*, U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 267 (2021).

The modern-day notion of the deliberative process privilege can be traced back to *Kaiser Aluminum & Chemical Corp. v. United States*.[26] In *Kaiser*, Kaiser Aluminum sued the United States for breach of contract.[27] Among other documents, Kaiser sought drafts of the contract that the government worked on before issuing its final contract.[28] The United States objected, invoking executive privilege to withhold the document.[29] While this case occurred before different facets of executive privilege were delineated, the United States was functionally invoking the deliberative process facet of executive privilege. The court agreed with the United States, reasoning that the document was an "intra-office advice on policy . . . the kind that every head of an agency or department must rely upon for aid in determining a course of action or as a summary of an assistant's research."[30] After this case, the deliberative process privilege "spread through the federal courts like wildfire."[31]

With so many federal and state courts applying the deliberative process privilege over the last half century, minor nuances between jurisdictions developed, but there are near-universal commonalities. Although the Supreme Court has recently and directly addressed a question concerning the deliberative process privilege,[32] the D.C. Circuit in *In re Sealed Case* provides a clearer illustration of the doctrine's contours.[33] Concerning a subpoena duces tecum served on the President's counsel who was investigating the former secretary of agriculture, the President withheld documents otherwise within the scope of the request, asserting "executive/deliberative privilege."[34] In response, the Court mapped the profile of the privilege at length. First, the Court affirmed that the deliberative process privilege is a common-law privilege[35] (unlike the executive communications privilege[36]). Unlike the executive communications privilege, which protects all executive communications in their entirety, the

26. 157 F. Supp. 939 (Ct. Cl. 1958).
27. *Id.* at 942.
28. *Id.*
29. *Id.* at 943-44.
30. *Id.* at 945.
31. Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 567 (1999).
32. *See generally* U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261 (2021).
33. 121 F.3d 729 (D.C. Cir. 1997).
34. *Id.* at 735 (quoting the White House privilege log).
35. *Id.* at 745.
36. *See infra* Section II.B.

deliberative process privilege does not protect all forms of documents; instead, only pre-decisional and deliberative documents can be protected.[37]

The burden initially falls on the government to show that the documents are pre-decisional and deliberative.[38] But even if the government meets this burden, the privilege "can be overcome by a sufficient showing of need."[39] Factors that affect the requesting party's need include the documents' relevance, availability, the role of the government in the request, and "the extent to which disclosure would hinder frank and independent discussion" within the government.[40]

Finally, in a recent and rare Supreme Court case on the deliberative process privilege, the Court addressed exactly how far in the decisional process a document may go before it is considered final and therefore nonprivileged.[41] Concerning a FOIA request by The Sierra Club to the United States Fish and Wildlife Service for documents including a draft opinion that was ultimately never adopted, the Court held that even in-house drafts of policies that end up being the "last word" may still be considered pre-decisional for purposes of executive privilege.[42] The only reason such a draft was the last word was not because it was final, but rather because it "died on the vine."[43]

Many states mirror the federal system's conception of the deliberative process privilege. The Colorado Supreme Court in *Colorado Springs v. White* summarized in detail the common aspects of the deliberative process privilege.[44] Like the federal system, most jurisdictions root the privilege in common law and place the initial burden on the government.[45] Further, even if the government has met their burden, public policy interests may trump the government's interest in withholding the documents.[46]

As noted, not all state courts have fully addressed or detailed the deliberative process privilege. Many jurisdictions have no case law at all on

37. *In re Sealed Case*, 121 F.3d at 737.
38. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).
39. *In re Sealed Case*, 121 F.3d at 737.
40. Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019).
41. U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777, 788 (2021).
42. *Id.*
43. *Id.*
44. City of Colorado Springs v. White, 967 P.2d 1042, 1046-49 (Colo. 1998).
45. *See id.* at 1053.
46. *See id.*

the privilege while others, including Oklahoma and New Mexico, have diverged in unusual ways from a majority of jurisdictions.[47]

B. A Higher Bar for Fewer Entities: The Chief Executive Communications Privilege

Compared to the deliberative process privilege, the executive communications privilege is available to fewer members of the executive branch, but the materials that are protected are broader in scope. Most jurisdictions do not recognize the executive communications privilege as coming from common law like the deliberative process privilege; instead, the former is viewed as inherently "rooted in constitutional separation of powers principles and the President's unique constitutional role."[48] The executive communications privilege may only be invoked by the chief executive and his advisers "in the course of preparing advice for the [chief executive]."[49] However, the materials protected go beyond those that are pre-decisional or deliberative: they protect "documents in their entirety."[50] Thus, only the chief executive and their senior aides may invoke the privilege, but it protects all forms of documents. Both federal and state approaches to the executive communications privilege are discussed below.

1. Federal Law on the Chief Executive Communications Privilege

The modern-day understanding of the executive communications privilege began to take shape in *United States v. Nixon*.[51] There, President Nixon was served a subpoena duces tecum to produce certain "memoranda, papers, transcripts or other writings relating to certain precisely identified meetings between the President and others" concerning the Watergate scandal.[52] In response, President Nixon refused to comply with the subpoena, asserting that he had an absolute executive privilege to withhold those documents.[53] The Supreme Court first acknowledged that presidents have the authority to assert executive privilege for documents involving their communications with policy officials.[54] Unlike the deliberative process

47. *See supra* Part III; *see also* Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't, 2012-NMSC-026, ¶ 41, 283 P.3d 853, 867-68 (holding the deliberative process privilege doesn't exist in New Mexico, but the executive communications privilege does).

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

49. *Id.* at 751-52.

50. Karnoski v. Trump, 926 F.3d 1180, 1203 (9th Cir. 2019).

51. 418 U.S. 683 (1974).

52. *Id.* at 688.

53. *Id.* at 686.

54. *Id.* at 708.

privilege, the Court held that a "Presidential Communications" privilege was "inextricably rooted in the separation of powers under the Constitution."[55] However, the Court rejected the President's assertion that such a privilege is absolute.[56] It reasoned that although a President invoking the executive communications privilege is owed "great deference" from the judiciary, separation of powers or the desire to keep communications private cannot "sustain an absolute, unqualified Presidential privilege of immunity from all judicial process under all circumstances."[57] The Court did, however, suggest that matters concerning national security or military or diplomatic secrets would be enough to rise above the general need for privacy and may be exempt from judicial review.[58]

After establishing that there is a constitutionally rooted executive communications privilege, and that such a privilege is not absolute but qualified, the Court went on to explain how it can be overcome.[59] First, due to the great "deference" owed by courts, when the President invokes the executive communications privilege, the documents are presumptively privileged.[60] The Court never explicitly outlined a test or what factors should be considered in order to overcome such a presumption. Rather, the Court addressed the specific criminal case at hand. The Court balanced the President's interests in withholding the documents requested against the "inroads of such a privilege on the fair administration of criminal justice."[61] The Court first minimized the particular interests of the President by suggesting that, given the "infrequen[cy]" of times that the President's documents would be requested for a criminal proceeding, it was highly unlikely that the President's conversations would be affected.[62] Considering the presumably negligible effects on presidential communications, the Court heavily weighted the interests of disclosure: not allowing documents that are relevant for a criminal proceeding would seriously impact the due process of law and "gravely impair the basic function of courts."[63] Based on this balancing, the Court held that the presumption of privilege was overcome, and President Nixon was required to disclose the documents.[64] The Supreme

55. *Id.*
56. *Id.* at 707.
57. *Id.* at 706.
58. *Id.*
59. *Id.* at 684.
60. *Id.* at 708.
61. *Id.* at 711-12.
62. *Id.* at 712.
63. *Id.*
64. *Id.* at 716.

Court's consideration of the impact that disclosing the documents would have on the President's conversations might provide insight on how the Court would define the contours of the executive communications privilege for former presidents, since such interest either does not exist or is drastically reduced when one is no longer in office.[65]

The Court in *United States v. Nixon*, while applying a balancing test to the specific facts in that case, never laid out a general rule for how courts should determine whether the presumption of privilege is overcome. Many decades later, the D.C. Circuit in *In re Sealed Case* observed that it would be "strange" if overcoming the executive communications privilege necessitated nothing more than meeting the Federal Rules of Criminal Procedure's requirement of showing "relevancy, admissibility, and specificity."[66] Given this reasoning, the D.C. Circuit established the current test:[67] overcoming the executive communications privilege requires "first, that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence elsewhere."[68]

Notably, although the executive communications privilege was initially established and applied in situations requiring discovery in criminal litigation, federal courts have also held that the privilege applies similarly to FOIA requests and to civil suits.[69] This application follows from the language of FOIA because the act contains a privilege exemption to FOIA requests, typically referred to as "Exemption 5."[70] The D.C. Court of Appeals explained: "Exemption 5 'incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant'—including the presidential communications privilege . . . and the deliberative process privilege—and excludes these privileged documents from FOIA's reach."[71]

To summarize, federal law on executive communications privilege is well-recognized as existing for the President in a qualified manner. It protects communications with the President in their entirety, regardless of content.

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65. *See generally* Trump v. Thompson, 142 S. Ct. 680 (2022) (stay denied).

66. *In re* Sealed Case, 121 F.3d 729, 754 (D.C. Cir. 1997) (applying the requirements for a subpoena).

67. For example, it was applied recently in *Karnoski v. Trump*, 926 F.3d 1180, 1205 (9th Cir. 2019) (quoting *In re Sealed Case*, 121 F.3d at 754-55).

68. *In re Sealed Case*, 121 F.3d at 754.

69. *See, e.g.*, Loving v. Dep't of Def., 550 F.3d 32, 40 (D.C. Cir. 2008).

70. 5 U.S.C. § 552(b)(5).

71. *Loving*, 550 F.3d at 37 (quoting Baker & Hostetler LLP v. U.S. Dep't of Com., 473 F.3d 312, 321 (D.C. Cir. 2006)).

When the President (or adviser) asserts the privilege, the documents in question are presumptively privileged. The requesting party may rebut the privilege by showing that the documents likely contain important evidence and that the documents cannot be obtained elsewhere. These interests are balanced with the President's interest in free-flowing exchange of communications with government advisers. Compared to the deliberative process privilege, the executive communications privilege protects more documents in a stronger way but for fewer people. It is unclear whether the executive communications privilege is conferred only to the President and his advisors or if others may invoke it and, if so, "how far down the chain of command the presidential communication privilege extends."[72]

2. State Law Approaches on the Executive Communications Privilege

As applied to their governors, only a handful of states have addressed the existence of the executive communications privilege, and fewer states have adopted it.[73] Of the states that have adopted the privilege, many of them virtually "copy-pasted" the federal model of executive communications privilege to apply to their governor.[74] As will be discussed in Part V, it is unclear whether this approach makes sense in the context of states and their governors. State courts should carefully consider whether the justifications supporting the more secretive executive communications privilege apply with equal force in this context.

A few states—including Oklahoma—have recognized some version of executive privilege but have been unclear as to where, if at all, the distinct lines of executive communications and deliberative process privilege are drawn.[75] Perhaps most curiously, at least one state has adopted the executive communications privilege yet has explicitly rejected the deliberative process privilege.[76]

72. *In re Sealed Case*, 121 F.3d at 749-50.

73. *See* Christina Koningisor, *Secrecy Creep*, 169 U. PA. L. REV. 1751, 1771 n.121 (2021) (listing the "[r]oughly ten" state jurisdictions, including Oklahoma, that have addressed the executive communications privilege).

74. *See, e.g.*, Cap. Info. Grp. v. State, 923 P.2d 29, 33 (Alaska 1996) ("We have . . . accepted the 'executive privilege' articulated in *United States v. Nixon* . . . .").

75. *See generally* Vandelay Ent., LLC v. Fallin, 2014 OK 109, 343 P.3d 1273.

76. Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't, 2012-NMSC-026, ¶¶ 38, 40, 283 P.3d 853, 867.

III. Oklahoma Law on Executive Privilege

Oklahoma case law on executive privilege consists of one case. In 2014, the Oklahoma Supreme Court in *Vandelay* established the foundation for Oklahoma's law on executive privilege, but the court's opinion left many questions unanswered.[77] Most significantly, the court seems to "blur[] the line" between the deliberative process privilege and the chief executive communications privilege.[78] This blurring leaves it unclear whether the court recognizes two distinct forms of privilege, or if the *Vandelay* court intended to combine the two.

This is not a trivial distinction. Whether an open record request is successful, whether the burden of overcoming a request falls on the requestor or the requestee, and whether lower-level government agencies are able to withhold records on the basis of executive privilege all hinge on this distinction.

A. A Summary of Vandelay Entertainment, LLC v. Fallin

In *Vandelay*, Vandelay Entertainment ("Vandelay") brought an action against Governor Fallin under the Oklahoma Open Records Act[79] to release records regarding funding for programs under the Affordable Care Act.[80] Governor Fallin provided Vandelay with many documents but withheld one-hundred pages, invoking executive privilege, particularly the "deliberative process component" of executive privilege.[81] The district court held that Oklahoma common law recognizes the deliberative process privilege, permitted Governor Fallin to invoke executive privilege, and directed her to submit a log for judicial review.[82] After the district court recognized the privilege, Governor Fallin submitted the one-hundred remaining documents to Vandelay, satisfied that the court had recognized the right of deliberative process privilege.[83] Despite the controversy appearing to be over, the Oklahoma Supreme Court agreed to take up the case to address future conflicts involving executive privilege.[84]

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77. *Vandelay*, ¶¶ 29-30, 343 P.3d at 1279.

78. *Id.* ¶ 1, 343 P.3d at 1280 (Combs, J., concurring).

79. 51 OKLA. STAT. §§ 24A.1-33 (2024).

80. *Vandelay*, ¶ 1, 343 P.3d at 1274-75.

81. *Id.* ¶¶ 2-3, 343 P.3d at 1275. Notably, Governor Fallin failed to invoke a chief executive communications privilege, opting instead for the less protective deliberative process privilege. *Id.*

82. *Id.* ¶ 4, 343 P.3d at 1275.

83. *Id.* ¶ 5, 343 P.3d at 1275.

84. *Id.* ¶ 8, 343 P.3d at 1276.

The supreme court held that a right of executive privilege exists, but, contrary to the district court's holding, the privilege is rooted in the Oklahoma Constitution.[85] The court reasoned that the inherent powers, as "reflected in the separation of powers clause in Article 4, § 1 of the Oklahoma Constitution" is what confers this privilege.[86] Though the court never explicitly stated that the deliberative process privilege in particular is conferred on the Governor through the Constitution (contrary to most jurisdictions), the court certainly seemed to suggest that. Specifically, the court never mentioned any other form of privilege.[87] The court agreed with the trial court (which addressed only deliberative process privilege) but "on grounds different than those articulated by the trial court,"[88] and the Court also discussed the "deliberative process privilege" frequently when discussing the Oklahoma Constitution.[89] Further, the executive privilege that the court then discussed has many similar features to what other states define to be deliberative process privilege.[90]

The court never addressed the existence of an executive communications privilege and suggested that the power of a Governor to withhold documents from a requesting party comes from, at least in part, the deliberative process privilege.[91] Confusingly, the court used language from *Nixon* to assert the existence of a deliberative process privilege, but *Nixon* did not concern the deliberative process privilege at all (nor did the Supreme Court even mention it).[92] Rather, *Nixon* concerned the existence of an executive communications privilege.[93] Yet, the Oklahoma Supreme Court quoted from *Nixon*: "[T]hose who assist [executive decision-makers] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."[94] The court, however, left out the next sentence of *Nixon*: "These are the considerations justifying a presumptive privilege for Presidential communications," or an executive

85. *Id.* ¶¶ 14-15, 343 P.3d at 1276-77.

86. *Id.* ¶ 13, 343 P.3d at 1276.

87. *See id.* ¶¶ 26-27, 343 P.3d at 1279.

88. *Id.* ¶ 9, 343 P.3d at 1276.

89. *See, e.g.*, *id.* ¶¶ 26-27, 343 P.3d at 1279.

90. *See id.* ¶ 23-24, 343 P.3d at 1278 (requiring a showing that the advice was pre-decisional and deliberative); *see also id.* ¶ 30, 343 P.3d at 1279 (putting the initial burden on the government, not the party requesting information).

91. *Id.* ¶ 20, 343 P.3d at 1278.

92. *Id.* ¶ 21, 343 P.3d at 1278.

93. United States v. Nixon, 418 U.S. 683, 705-06 (1974).

94. *Vandelay*, ¶ 17, 343 P.3d at 1277 (alteration in original) (quoting *Nixon*, 418 U.S. at 708).

communications privilege.[95] The court therefore used language from *Nixon*, which only established the existence of the executive communications privilege, in order to justify the existence of a deliberative process privilege in Oklahoma.

Establishing in *Vandelay* that a deliberative process privilege is constitutionally rooted is a stark divergence from other courts that apply the more government-friendly executive communications privilege regarding communications by and to a President or Governor. The implications of such a divergence are discussed in Parts IV and V.

B. Justice Combs's Concurrence Highlights the Problem

Justice Combs's concurrence in *Vandelay* is notable, and he raised many of the issues discussed in this Note. Justice Combs was concerned that the court conflated two separate notions of executive privilege.[96] Particularly, he argued that using the words "deliberative process privilege" to establish that executive privilege is constitutionally based is worrying as it "blurs the line between distinct facets of executive privilege in a manner likely to cause confusion in the future."[97] Justice Combs further suggested that the blending of the two facets of executive privilege essentially created a "hybrid entity" of executive privilege in Oklahoma.[98] It is certainly true that, as the law stands now, Oklahoma appears to have a hybrid entity; however, it is unclear if this was the court's intent in *Vandelay*. If it was not, this hybrid entity can and should be unblended in future cases.

C. The Current State of Oklahoma Law on Executive Privilege

Vandelay involved direct communications with Governor Fallin which would, in most other jurisdictions, invoke the more government-favorable executive communications privilege. However, *Vandelay* mostly follows the more requestor-favorable deliberative process privilege. Until the court clarifies the contours of executive privilege further, it seems reasonable to assume that for a requesting party to obtain allegedly privileged material, the process is as follows:

First, if the Governor invokes executive privilege, the burden falls on the Governor to show "that the advice was (1) pre-decisional, and (2) deliberative."[99] So far, this follows how other jurisdictions apply deliberative

95. *Nixon*, 418 U.S. at 708.
96. *Vandelay*, ¶¶ 6-7, 343 P.3d at 1281 (Combs, J., concurring).
97. *Id.* ¶ 1, 343 P.3d at 1280 (Combs, J., concurring).
98. *Id.* ¶ 7, 343 P.3d at 1281.
99. *Id.* ¶ 24, 343 P.3d at 1278.

process privilege requirements. Next, however, the court adds an additional requirement.[100] The Governor must then show:

> (1) the Governor solicited or received advice from a "senior executive branch official"[101] for use in deliberating policy or making a discretionary decision, (2) the Governor and the "senior executive branch official" knew or had a reasonable expectation that the advice was to remain confidential at the time it was provided to the Governor, and (3) the confidentiality of the advice was maintained by the Governor and the "senior executive branch official."[102]

It is unclear why the court added this second step and its three sub-steps. No other jurisdictions have added these additional requirements.[103]

Once the Governor successfully meets the requirements above, "the burden shifts to the party requesting a document to show (1) a substantial or compelling need for disclosure, and (2) this need for disclosure outweighs the public interest in maintaining the confidentiality of the executive communication."[104] The court specifically mentions that a document "shed[ding] light on government wrongdoing" is an example of one that "may . . . outweigh the need for confidentiality."[105]

Consistent with other jurisdictions, Oklahoma has a deliberative process privilege that places the initial burden on the Governor, may be overcome by a showing of need, and protects only deliberative and pre-decisional documents. However, Oklahoma's deliberative process privilege, unlike most jurisdictions, is constitutionally rooted and has an additional second

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100. *Id.*

101. *Id.* The court later says this "would reasonably include the Governor's general counsel and staff, the members of the Governor's cabinet, executive branch officers elected statewide, and executive branch agency heads appointed by the Governor." *Id.*

102. *Id.*

103. Interestingly, despite no other jurisdiction adding these sub-step requirements, Justice Kavanaugh, in his statement respecting denial of application in *Trump v. Thompson*, observed something similar to *Vandelay's* third sub-step: "[T]he Presidential communications privilege cannot fulfill its critical constitutional function unless Presidents and their advisers can be confident in the present *and* future confidentiality of their advice." 142 S. Ct. 680, 681 (2022) (stay denied). This adds to the confusion caused in *Vandelay* even further, as *Vandelay's* third sub-step is meant to be an element to satisfy a Governor's assertion of the *deliberative process privilege*, yet Justice Kavanaugh seems to suggest that such an element is necessary for the *executive communications privilege*.

104. *Vandelay*, ¶ 25, 343 P.3d at 1278.

105. *Id.* ¶ 25, 343 P.3d at 1279.

element that functionally serves the purposes of an executive communications privilege.[106]

IV. Vandelay *Leaves Two Critical Questions Unanswered*

Since *Vandelay*, the state of executive privilege in Oklahoma is murky, but the privilege can be clarified by addressing two questions: first, whether the executive communications privilege exists at all in Oklahoma and, second, how far down the executive chain the right to assert executive privilege goes.

One interpretation of *Vandelay* is that the executive communications privilege does not exist. On the other hand, an equally fair interpretation is that *Vandelay* left open the possibility that the executive communications privilege might exist. After all, *Vandelay* never explicitly addressed this privilege, it was never invoked by Governor Fallin (giving the court no occasion to discuss the matter), and the court quoted language from *Nixon*—the case that established the executive communications privilege in the first place.

Similarly unclear is whether the deliberative process privilege extends to lower-level executive agencies or whether it is confined to the Governor. One could argue that the deliberative process privilege likely does not exist to lower-level executive agencies, since the court has established that the privilege is constitutionally based. But on the other hand, common law in other jurisdictions confers a deliberative process privilege on other executive agencies, suggesting that it would apply the same in Oklahoma. Perhaps an even more compelling argument is that, because the Oklahoma Constitution (unlike the U.S. Constitution) specifically establishes multiple executive agencies and, because the deliberative process privilege is constitutionally rooted, at least the constitutionally prescribed agencies have the executive communications privilege. This Note discusses each question in turn.

A. Does the Executive Communications Privilege Exist in Oklahoma?

Because *Vandelay* never discussed the executive communications privilege—much less establish it—it is entirely possible that the privilege does not exist in Oklahoma. It is difficult to see how, given the shape of the deliberative process privilege set out in *Vandelay*, future cases could find room for an executive communications privilege.

First, if a privilege like the executive communications privilege established in *Nixon* and other states did exist in Oklahoma, *Vandelay* would

106. *See supra* notes 85-90 and accompanying text.

have been an excellent fact pattern for the court to apply such a privilege, as the case involved communications with the Governor. If the Governor of Oklahoma has access to a privilege where the burden is on the requesting party, and which protects communications in their entirety, it would seem strange for the Oklahoma Supreme Court not to raise this much more governor-friendly privilege when ruling in her favor. While it is true that Governor Fallin only invoked the deliberative process privilege in *Vandelay*, federal courts have established that the chief executive does not need to invoke the privilege for a court to recognize it.[107]

Second, even if the court were to nonetheless establish an executive communications privilege, it would be difficult to distinguish it from how *Vandelay* established the deliberative process privilege. If the deliberative process privilege in Oklahoma is constitutionally rooted, the executive communications privilege—which has always been recognized as constitutionally rooted in other jurisdictions—is surely constitutionally rooted, as well. It is hard to imagine how an additional constitutionally rooted privilege conferred on the Governor is that much different from the one the court has already recognized.

Since establishing Oklahoma's deliberative process privilege as being constitutionally rooted gives little room for yet another constitutionally rooted privilege, and because *Vandelay* would have been the appropriate fact pattern to establish such a privilege, it is doubtful that the Oklahoma Supreme Court would go down this road.

B. Does the Deliberative Process Privilege Exist for Lower-Level Executive Agencies?

It is less clear whether the deliberative process privilege is limited only to the Governor. This is for two reasons.

First, although the privilege is constitutionally rooted, the Oklahoma Constitution, unlike the U.S. Constitution, establishes more than the office of President and Vice President.[108] Article VI executive authority in Oklahoma is not just vested in the Governor and Lieutenant Governor but also in the "Secretary of State, State Auditor and Inspector, Attorney General, State Treasurer, Superintendent of Public Instruction, Commissioner of Labor, Commissioner of Insurance and other officers provided by law and this Constitution."[109] Article VI indeed establishes "other officers," such as the

107. Cheney v. U.S. Dist. Ct. for Dist. of Columbia, 542 U.S. 367, 388 (2004).
108. *See* OKLA. CONST. art. VI, § 1.
109. *Id.*

President of the Board of Agriculture[110] and the role of "chief officer of the Insurance Department."[111] If the deliberative process privilege is constitutionally rooted, it is at least arguable that the executive communications privilege would be conferred upon these agencies, as well. But it is also arguable that the executive communications privilege is only conferred on the head of the executive branch and, thus, is only conferred upon the person that holds the "Supreme Executive power," that is, the Governor of Oklahoma"[112] The answer to this question is consequential, and Part V will recommend the best conclusion to this question.

Second, *Vandelay* only addressed the deliberative process privilege's contours to the extent that a Governor could assert it. Thus, since the Oklahoma Supreme Court had no occasion to rule on the ability (or inability) of other executive agencies to assert executive privilege, it is possible that *Vandelay's* holding applies only to the Governor. The controversy in *Vandelay*, though not moot,[113] was over. Nonetheless, the court still decided to take the case to establish executive privilege.[114]And if the court took the case despite the controversy being over, why not—if the privilege does indeed exist for other agencies—announce that in *Vandelay*? On the other hand, the court did expressly leave other questions about the deliberative process privilege "for a more appropriate case."[115] Perhaps the question of whether the privilege extends to other agencies is one of those questions.

V. Looking Ahead: How the Court Can Clarify Vandelay *in Future Cases*

The Oklahoma Supreme Court must clarify two key questions arising from *Vandelay*. The first question is whether the executive communications privilege exists and, if it does, how it differs from the deliberative process privilege. The second question is whether the deliberative process privilege extends beyond the Governor to members of lower-level executive agencies or whether it stops at the Governor or extends to other constitutionally rooted agencies mentioned in Part IV. This section addresses both questions.

The Oklahoma Supreme Court should not recognize the executive communication privilege as being a privilege that the Governor holds. By establishing the deliberative process privilege as being constitutionally

110. *Id.* art. VI, § 32.
111. *Id.* art. VI, § 23.
112. *Id.* art. VI, § 2.
113. Vandelay Ent., LLC v. Fallin, 2014 OK 109, ¶ 8, 343 P.3d 1273, 1276.
114. *See id.* ¶ 9, 343 P.3d at 1276.
115. *Id.* ¶ 23, 343 P.3d at 1278.

rooted, Oklahoma already has a "light" version of the executive communications privilege—leaving little room for another facet. Further, establishing the executive communications privilege would be hard to square with the court's detailed explanation of the deliberative process privilege in *Vandelay*: if the executive communications privilege exists, why rule in favor of Governor Fallin using the much less governor-favorable deliberative process privilege?

Whether the court should extend the deliberative process privilege to other agencies besides the Governor is more complicated. For the reasons below, however, the court should limit the deliberative process privilege to the Governor only.

First, extending the deliberative process privilege to other executive agencies would prevent the Oklahoma Legislature from having the authority to statutorily bar agencies from claiming executive privilege through open records requests. This is one of the unfortunate consequences of finding the deliberative process privilege to be constitutionally rooted as opposed to being grounded in common law. Every other jurisdiction that has established the deliberative process privilege has held the privilege to be born from common law, and thus legislatures can give citizens the right to request otherwise privileged material. For example, Hawaii stripped its executive agencies from asserting the deliberative process privilege through the statutory language of its open records act.[116] Such a case in Oklahoma would come out differently if the *constitutionally rooted* deliberative process privilege was conferred to executive agencies in Oklahoma. Indeed, the Court in *Vandelay* said as much: "the principle of separation of powers in [the Oklahoma Constitution] protects this privilege [that is, the deliberative process privilege] from encroachment by Legislative Acts such as the Open Records Act."[117]

Further, the growing trend of states' adoption of federal privilege law lead to what Professor Christina Koningisor recently referred to as "secrecy creep":[118] the idea that federal notions of privilege, which serve unique interests at the federal level such as military secrets and foreign affairs, are bleeding into state (and more disturbingly, local) jurisdictions for which no such interest exists.[119] Despite the lack of states' interest in secrecy for foreign diplomacy or military reasons, more and more states adopt the federal framework in its entirety. There is no need for other executive agencies in

116. Peer News LLC v. Honolulu, 431 P.3d 1245, 1254-55 (Haw. 2018).
117. *Vandelay*, ¶ 20, 343 P.3d at 1278.
118. *See* Koningisor, *supra* note 73, at 1758.
119. *Id.*

Oklahoma to have a constitutionally rooted power that is immune from legislative oversight to withhold documents from subpoenas or records requests. The executive interest is far too low, and the risk of hiding misconduct is far too high. The Oklahoma Supreme Court should not extend such a power to other agencies.

VI. Conclusion

The current strength of executive privilege in Oklahoma lies somewhere in between the less protective common law-based deliberative process privilege and the more protective constitutionally rooted executive communications privilege. On the more protective side, Oklahoma's deliberative process privilege is not common-law rooted but constitutionally based and, thus, immune to legislative intervention. On the less protective side, Oklahoma's deliberative process privilege has not yet been extended to other executive agencies, nor has the Oklahoma Supreme Court recognized the existence of an executive communications privilege. Thus, the supreme court has created a "hybrid" of the two facets of executive privilege for the Governor: a constitutionally established right to assert executive privilege that is more easily overcome than the less requestor-friendly executive communications privilege. Given state's lack of foreign diplomatic or military power, he Oklahoma Supreme Court should not expand such a privilege through recognition of new facets or through application to other agencies. In future cases, the Oklahoma Supreme Court should clarify that the right of executive privilege established in *Vandelay* is contained only to the Governor and that no other facets of executive privilege, such as an executive communications privilege, exist.

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