Hawley's Probe of Governor's Secret App Unbelivable

—By Andrew Hirth, Joanna Trachtenberg, Joe Bindbeutel, Bradley Ketcher, Ronald Holliger, and Michael Wolff

As lawyers who have served the state, we are dismayed by Attorney General Josh Hawley's halfhearted investigation into Governor Greitens' alleged use of Confide—a smartphone messaging app that automatically destroys text messages as soon as they are read and prevents recipients from preserving their contents.

The only thing more suspicious than the governor's secret communication system is our attorney general's apparent willingness to accept bogus legal arguments and implausible narratives from the Governor's Office.

We are left to wonder if Hawley is protecting the governor or is simply incompetent.

Last fall's media reports that senior staff in the Greitens Administration had installed Confide on their personal cell phones caused widespread concern that his office was flouting state records-retention laws. Hawley initially declined to investigate the matter, claiming a conflict of interest due to his office's defense of the governor in other cases. He overcame his ethical reservations around the same time public opinion and other government officials began turning on the governor, announcing last December that his office would open an "inquiry" into the Confide allegations.

Two months later, Hawley quietly released his "Final Report" on the "AGO Inquiry into Use of Confide by Staff of the Governor's Office." The highlights of that report are as follows:

(1) The Governor's Office "asserted a blanket objection to all questions" regarding the governor's own communications based on "the doctrine of executive privilege."

(2) The Attorney General's office interviewed only eight unidentified "high-level members" of the Governor's Office.

(3) These staff members reported that all communications sent through Confide were "exclusively non-substantive" and "generally involved logistical and scheduling matters."

(4) The Attorney General supposedly found the staff members' accounts to be "credible" while conceding that "the nature of Confide necessarily means that no documentary evidence exists to corroborate (or contradict) this testimony."

Hawley's "Final Report" is baffling. For starters, the accounts of the eight "high-level members" of the governor's staff are anything but believable. No reasonable person would use Confide to schedule meetings. As described in the Final Report, "the recipient of a Confide message cannot view the entire message at once but instead can view only several words at a time by scrolling his or her finger over the text." Not only that, "Confide immediately and automatically deletes messages once the recipient has read them." It makes no sense to coordinate the time, date, and location of meetings through a messaging app that shows only a few words at a time and immediately deletes the message after one reading. And why would anyone install a separate, super-secretive messaging app on his phone solely to schedule meetings while continuing to send regular text messages or email for everything else?

It's hard to believe our state's chief law enforcement officer would accept such a patently unbelievable story.

More importantly, the attorney general should have done some legal research before accepting the governor's invocation of "executive privilege." No Missouri court has ever recognized the existence of executive privilege, and the two cases from other jurisdictions cited in the AGO's Final Report provide only limited protection for substantive communications between chief executives and their closest advisors.

The Ohio Supreme Court, for example, concluded that it is "ultimately the role of the courts to determine, on a case-by-case basis, whether the public's interest in affording its governor an umbrella of confidentiality is outweighed by a need for disclosure."

While Hawley cites the Ohio decision in his Final Report, he fails to identify—much less apply—the legal framework the Ohio Supreme Court established for determining which communications are privileged and when the privilege may be overcome by the particularized need of the party seeking disclosure. Hawley doesn't explain why "exclusively non-substantive" texts on "logistics and scheduling"—the only kind of messages Greitens' staffers claim

to have sent through Confide—should qualify as "confidential gubernatorial communications" in the first place.

Nor does he seem to understand that the Missouri Attorney General's own authority and obligation to investigate alleged violations of our Sunshine Law is just the sort of "particularized need" that may outweigh "the public's interest in affording its governor an umbrella of confidentiality."

When his office faced severe criticism for giving the governor a free pass, Hawley complained that "We have no authority to compel anyone to cooperate with us, to tell us anything, to seize anything." ("Hawley's office defends probe of Greitens' use of secret texting app," *Kansas City Star*, March 16, 2018).

Hawley's ignorance of his own legal authority is inexcusable. Under Missouri law, "[t]he attorney general shall institute, in the name and on the behalf of the state, all civil suits … necessary to protect the rights and interests of the state … against any and all persons …; and he may also appear … in any proceeding or tribunal in which the state's interests are involved." § 27.060 RSMo. More specifically, "[a]ny aggrieved person, taxpayer to, or citizen of, this state, *or the attorney general* … may seek judicial enforcement" of the Missouri Sunshine Law, § 610.027 RSMo.

Indeed, Missouri citizens have already filed two separate Sunshine Law actions against the Governor over his use of Confide. As the Attorney General of Missouri, Hawley has the authority to intervene in the private Sunshine Law cases pending against the governor or to file his own. Either course would allow him to obtain relevant documents from the governor's office and even question Governor Greitens under oath.

Yet, once the governor threatened to invoke executive privilege—which does not currently exist under Missouri law—Hawley simply gave up. Even assuming the Missouri Supreme Court would decide to adopt some form of "executive privilege" as Ohio did, the governor's assertion of privilege would only be the first step – it would be up to the court to determine whether the public interest demanded the release of the information despite the "executive privilege" objection.

When an Attorney General starts an investigation, the public interest requires that he finish it. Is this too hard for Hawley – who has degrees from Stanford and Yale – to understand?