Executive Privilege

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OPINION OF THE OFFICE OF LEGAL COUNSEL

Congressional Requests for Confidential Executive Branch Information

This memorandum summarizes the principles and practices governing congressional requests for confidential executive branch information.

1989 OLC LEXIS 98

June 19, 1989

CORE TERMS: oversight, accommodation, deliberations, advisers, constitutional privilege, memorandum, subpoena, confidentiality, conversations, disclosure, presidential, recordings, duty, tape, confidential, deliberative, negotiation, subpoenaed, coordinate, legislate, seldom, deliberative process, accommodate, contempt, ongoing, candid, secret, information requested, compelled disclosure, criminal prosecution

ADDRESSEE:
[*1]

Memorandum Opinion for the General Counsels' Consultative Group

OPINIONBY: BARR

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This memorandum summarizes the principles and practices governing congressional requests for confidential executive branch information. As discussed below, the executive branch's general practice has been to attempt to accommodate whatever legitimate interests Congress may have in obtaining the information, while, at the same time, preserving executive branch interests in maintaining essential confidentiality. Only when the accommodation process fails to resolve a dispute and a subpoena is issued does it become necessary for the President to consider asserting **executive privilege.**

I. Congress' Oversight Authority

The constitutional role of Congress is to adopt general legislation that will be implemented -- "executed" -- by the executive branch. The courts have recognized that this general legislative interest gives Congress investigatory authority. Both Houses of Congress have power, "through [their] own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." **[*2]** McGrain v. Daugherty, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," Eastland v. United States Serviceman's Fund, 421 U.S. 491, 504 (1975), provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." Watkins v. United States, 354 U.S. 178, 187 (1957). The inquiry must pertain to subjects "on which legislation could be had." McGrain v. Daugherty, 273 U.S. at 177. Thus, Congress' oversight authority is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of

the Government.

Barenblatt v. United States, 360 U.S. 109, 111-12 (1959).

II. **Executive Privilege**

If it is established that Congress has a legitimate legislative purpose for its oversight inquiry, the executive branch's interest in keeping the information **[*3]** confidential must be assessed. This subject is usually discussed in terms of "**executive privilege,**" and that convention is used here. The question, however, is not strictly speaking just one of **executive privilege.** While the considerations that support the concept and assertion of **executive privilege** apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to a congressional request for information, the executive branch is not necessarily bound by the limits of **executive privilege.**

Executive privilege is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution. n1 It has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the Supreme Court in United States v. Nixon, 418 **[*4]** U.S. 683, 705-06 (1974).

n1 The privilege to withhold information is implicit in the scheme of Article II and particularly in the provisions that "[t]he executive Power shall be vested in a President of the United States of America," U.S. Const. art. II, * 1, cl. 1, and that the President shall "take Care that the Laws be faithfully executed," U.S. Const. art. II, * 3.

There are at least three generally-recognized components of **executive privilege:** state secrets, law enforcement, and deliberative process. Since most disputes with Congress in this area in recent years have concerned the privilege for executive branch deliberations, this memorandum will focus on that component. See generally Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 484-90 (1982).

The first congressional request for information from the executive branch occurred in 1792, in the course of a congressional investigation into the failure of an expedition under the command of one General St. Clair. President Washington called his Cabinet together to consider his response, stating that he could conceive that there might be papers of so secret a nature that **[*5]** they ought not be given up. The President and his Cabinet concluded "that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." 1 Writings of Thomas Jefferson 304 (1903) (emphasis added). While President Washington ultimately determined in the St. Clair case that the papers requested could be furnished without injury to the public, he refused four years later to comply with a House committee's request for copies of instructions and other documents employed in connection with the negotiation of a treaty with Great Britain.

The practice of refusing congressional requests for information, on the ground that the national interest would be harmed by the disclosure, was employed by many Presidents in the ensuing years. See generally History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part I - Presidential Invocations of **Executive Privilege** Vis-a-Vis Congress, 6 Op. O.L.C. 751 (1982). The privilege was most frequently asserted in the areas of foreign affairs and military and national security secrets; it was also invoked in a variety of other **[*6]** contexts, including executive branch investigations. In 1954, in instructing the Secretary of Defense concerning a Senate investigation, President Eisenhower asserted that the privilege extends to deliberative communications within the executive

branch:

Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions.

Pub. Papers of Dwight D. Eisenhower 483-84 (1954).

The Supreme Court has recognized that the Constitution gives the President the power to protect the confidentiality of executive branch deliberations. See generally Nixon v. Administrator of Gen. Servs., 433 U.S. 425, **[*7]** 446-55 (1977). This power is independent of the President's power over foreign affairs, national security, or law enforcement; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." United States v. Nixon, 418 U.S. at 708.

It necessarily follows -- and the Supreme Court so held in United States v. Nixon -- that communications among the President and his advisers enjoy "a presumptive privilege" against disclosure in court. Id. n2 The reasons for this privilege, the Nixon Court explained, are "plain." "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." Id. at 705. Often, an adviser's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisers change their views, or make mistakes which others correct; this is indeed the purpose of internal debate. The result is that advisers are likely to be inhibited if they must anticipate that their remarks will be **[*8]** disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisers may hesitate -- out of self-interest -- to make remarks that might later be used against their colleagues or superiors. As the Court stated, "[a] president and those who assist him 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." Id. at 708.

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[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

418 U.S. at 705-06 (footnote omitted). The Court also acknowledged that the privilege stems from the principle of separation of powers: "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." Id. at 708. **[*9]**

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information. The possibility that deliberations will be disclosed to Congress is, if anything, more likely to chill internal debate among executive branch advisers. When the Supreme Court held that the need for presidential communications in the criminal trial of President Nixon's close aides outweighed the constitutional privilege, an important premise of its decision was that it did not believe that "advisers will be moved to temper the candor of their remarks by the infrequent occasions of

disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." Id. at 712. By contrast, congressional requests for executive branch deliberative information are anything but infrequent. Moreover, compared to a criminal prosecution, a congressional investigation is usually sweeping; its issues are seldom narrowly defined, and the inquiry is not restricted by the rules of evidence. Finally, when Congress is investigating, it is by its own account often in an adversarial position to the executive branch and **[*10]** initiating action to override judgments made by the executive branch. This increases the likelihood that candid advice from executive branch advisers will be taken out of context or misconstrued. For all these reasons, the constitutional privilege that protects executive branch deliberations against judicial subpoenas must also apply, perhaps even with greater force, to Congress' demands for information.

The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional demands. During the Watergate investigation, the Court of Appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices. The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. Senate Select Comm. on Presidential Campaign Activities v. Nixon, **498** F.2d 725 (D.C. Cir. 1974) (en banc). Indeed, the court held that the committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the **[*11]** Committee's functions." Id. at 731 (emphasis added). n3

n3 The Supreme Court has assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. See United States v. Nixon, 418 U.S. at 712 n.19. Moreover, the Court held in Administrator of General Services, that the constitutional privilege protects executive branch deliberations from disclosure to members of the same branch in a later administration; the Court rejected the specific claim of privilege in the case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. See 433 U.S. at 446-55. Since the Court has held that the privilege protects executive branch communications against compelled disclosure to the judicial branch and to later members of the executive branch, there is every reason to believe that the Court would hold that it protects against compelled disclosure to Congress.

Finally, history is replete with examples of the executive's assertion of privilege in the face of congressional requests for deliberative process information. We have previously recounted the incidents **[*12]** in which Presidents, beginning with President Washington, have withheld from Congress documents that reflected deliberations within the executive branch. History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part II - Invocations of **Executive Privilege** by Exective Officials, 6 Op. O.L.C. 782 (1982).

III. Accommodation Process

Where Congress has a legitimate need for information that will help it legislate, and the executive branch has a legitimate, constitutionally recognized need to keep certain information confidential, at least one court has referred to the obligation of each branch to accommodate the legitimate needs of the other. This duty to accommodate was described by the D.C. Circuit in a case involving a House committee's request to a private party for information which the executive branch believed should not be disclosed. The court said:

The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this **[*13]** view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch

should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

. . . .

[Because] it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

United States v. AT&T, 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (footnotes omitted).

In an opinion he issued in connection with a 1981 **executive privilege** dispute involving a committee of the House of Representatives and the Department of Interior, Attorney General William French Smith captured the essence of the **[*14]** accommodation process:

The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.

Assertion of **Executive Privilege** in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) ("Smith Opinion").

The process of accommodation requires that each branch explain to the other why it believes its needs to be legitimate. Without such an explanation, it may be difficult or impossible to assess the needs of one branch and relate them to those of the other. At the same time, requiring such an explanation imposes no great burden on either branch. If either branch has a reason for needing to obtain or withhold information, it should be able to express it.

The duty of Congress to justify its requests not only arises directly from the logic of accommodation between the two branches, but it is established in the case law as well. In United States v. Nixon, the Supreme Court emphasized that the need for evidence was articulated and specific. 418 U.S. at 700-02, 713. Even more to the point is Senate **[*15]** Select Committee on Presidential Campaign Activities. In that case, the D.C. Circuit stated that the sole question was "whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." **498** F.2d at 731. The court held that the Committee had not made a sufficient showing. It pointed out that the President had already released transcripts of the conversations of which the Committee was seeking recordings. The Committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. Id. at 723-33. But the court answered that, in order to legislate, a committee of Congress seldom needs a "precise reconstruction of past events." Id. at 732. The court concluded:

The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made **[*16]** without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain.

Id. at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . . is too attenuated and too tangential to its functions" to override the President's constitutional privilege. Id.

Senate Select Committee thus establishes Congress' duty to articulate its need for particular materials -- to "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in" the privileged document it has requested. Moreover, this case suggests that Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials. When Congress demands such information, it must explain its need carefully and convincingly.

It is difficult to generalize about the kind of accommodation with respect to deliberative process information that may be appropriate in particular cases. Whether to adhere to the consistent general policy of confidentiality for such information will depend on the facts **[*17]** of the specific situation. Certain general principles do apply, however. As Attorney General Smith explained in advising President Reagan:

[T]he interest of Congress in obtaining information for oversight purposes is . . . considerably weaker than its interest when specific legislative proposals are in question. At the stage of oversight, the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not. The information requested is usually broad in scope and the reasons for the request correspondingly general and vague. In contrast, when Congress is examining specific proposals for legislation, the information which Congress needs to enable it to legislative effectively is usually quite narrow in scope and the reasons for obtaining that information correspondingly specific. A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.

Smith Opinion, 5 Op. O.L.C. at 30. Moreover, Attorney General Smith explained, information concerning ongoing deliberations need rarely be disclosed: **[*18]**

[T]he congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances. It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached. Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances. Congressional demands, under the guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded **[*19]** on the Executive Branch's function of executing the law. At the same time, the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing.

Id. at 30-31.

IV. Procedures

President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" ("Reagan Memorandum") sets forth the long-standing executive branch policy in this area:

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances,

and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the executive branch have minimized the need for invoking **executive privilege,** and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

Reagan Memorandum at 1. The Reagan Memorandum also sets forth the procedures **[*20]** for asserting **executive privilege** in response to a congressional request for information. Under the terms of the Memorandum, an agency must notify and consult with the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, as soon as it determines that compliance with the request raises a "substantial question of **executive privilege.**" The Memorandum further provides that **executive privilege** cannot be asserted without specific authorization by the President, based on recommendations made to him by the concerned agency head, the Attorney General, and the Counsel to the President.

In practice, disputes with Congress in this area typically commence with an informal oral or written request from a congressional committee or subcommittee for information in the possession of the executive branch. Most such requests are honored promptly; in some cases, however, the executive branch official may resist supplying some or all of the requested information either because of the burden of compliance or because the information is of a sensitive nature. The executive branch agency and the committee staff will typically negotiate during this period to see if the **[*21]** dispute can be settled in a manner acceptable to both sides. In most cases this accommodation process is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued. At that point, if further negotiation is unavailing, it is necessary to consider asking the President to assert **executive privilege.**

If after assertion of **executive privilege** the committee remains unsatisfied with the agency's response, it may vote to hold the agency head in contempt of Congress. If the full Senate or House of Representatives then votes to hold the official in contempt, it might attempt to impose sanctions by one of three methods. First, it might refer the matter to a United States Attorney for reference to a grand jury. See 2 U.S.C. ** 192, 194. Second, the Sergeant-at-Arms theoretically could be dispatched to arrest the official and detain him in the Capitol; if this unlikely event did occur, the official would be able to test the legality of this detention through a habeas corpus petition, thereby placing in issue the legitimacy of his actions in refusing to disclose the subpoenaed information. Third, and the most likely option due to legal and practical **[*22]** difficulties associated with the first two options, the Senate or House might bring an action in court to obtain a judicial order requiring compliance with the subpoena and contempt of court enforcement orders if the court's order is defied.

WILLIAM P. BARR

Assistant Attorney General

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*1989 OLC LEXIS 18, *; 13 Op. O.L.C. 185*

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Memorandum

General Counsels' Consultative Group

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There are at least three generally-recognized components of **executive privilege:** state secrets, law enforcement, and deliberative process. Since most disputes with Congress in this area in recent years have concerned the privilege for Executive Branch deliberations, this memorandum will focus on that component. See generally Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 484-90 (1982).

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These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information. The possibility that deliberations will be disclosed to Congress is, if anything, more likely to chill internal debate among Executive Branch advisers. When the Supreme Court held that the need for presidential communications in the criminal trial of President Nixon's close aides outweighed the constitutional privilege, an important premise of its decision was that it did not believe that "advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." Id. at 712. By contrast, congressional requests for Executive Branch deliberative information are anything but infrequent. Moreover, compared to a criminal prosecution, a congressional investigation is usually sweeping; its issues are seldom narrowly defined, and the inquiry is not restricted by the rules of evidence. Finally, when Congress is investigating, it is by its own account often in an adversarial position to the Executive **[*10]** Branch. Its interest, generally, is in checking the Executive Branch and initiating action to override judgments made by the Executive Branch. This increases the likelihood that candid advice from Executive Branch advisers will be taken out of context or misconstrued. For all these reasons, the constitutional privilege that protects Executive Branch deliberations against judicial subpoenas must also apply, perhaps even with greater force, to Congress' demands for information.

The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional demands. During the Watergate investigation the court of appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices. The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725 (D.C. Cir. 1974) (en banc). Indeed, the court held that the committee was not entitled to the recordings unless it showed **[*11]** that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." Id. at 731 (emphasis added). n3

n3 The Supreme Court has assumed that the constitutional privilege protects Executive Branch deliberations against Congress to some degree. See United States v. Nixon, 418 U.S. at 712 n.19. Moreover, the Court held in Administrator of General Services, supra, that the constitutional privilege protects Executive Branch deliberations from disclosure to members of the same branch in a later administration; the Court rejected the specific claim of privilege in that case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. See 433 U.S. at 446-455. Since the Court has held that the privilege protects Executive Branch communications against compelled disclosure to the Judicial Branch and to later members of the Executive Branch, there is every reason to believe that the Court would hold that it protects against compelled disclosure to Congress.

Finally, history is replete with examples of the Executive's **[*12]** assertion of privilege in the face of congressional requests for deliberative process information. We have previously recounted the incidents in which Presidents, beginning with President Washington, have withheld from Congress documents that reflected deliberations within the Executive Branch. History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part II - Invocations of **Executive Privilege** by Executive Officials, 6 Op. O.L.C. 782 (1982).

III. Accommodation Process

Where Congress has a legitimate need for information that will help it legislate, and the Executive Branch has a legitimate, constitutionally recognized need to keep certain information confidential, at least one court has referred to the obligation of each Branch to accommodate the legitimate needs of the other. This duty to accommodate was described by the D.C. Circuit in a case involving a House committee's request to a private party for information which the Executive Branch believed should not be disclosed. The court said:

> The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise **[*13]** would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.
>
> * * *
>
> [Because] it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (footnotes omitted).

In an opinion he issued in connection **[*14]** with a 1981 **executive privilege** dispute involving a committee of the House of Representatives and the Department of Interior, Attorney General William French Smith captured the essence of the accommodation process:

> The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.

Opinion of the Attorney General for the President, Assertion of **Executive Privilege** in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) (Smith Opinion).

The process of accommodation requires that each Branch explain to the other why it believes its needs to be legitimate. Without such an explanation, it may be difficult or impossible to assess the needs of one Branch and relate them to those of the other. At the same time, requiring such an explanation imposes no great burden on either Branch. If either Branch has a reason for needing to obtain or withhold information, it should be able to express it.

The duty of Congress to justify its requests not only arises directly from the logic of accommodation **[*15]** between the two Branches, but it is established in the case law as well. In United States v. Nixon, the Supreme Court emphasized that the need for evidence was articulated and specific. 418 U.S. at 700-702, 713. Even more to the point is Senate Select Committee on Presidential Campaign Activities. In that case, the D.C. Circuit stated that the sole question was "whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." **498** F.2d at 731. The court held that the Committee had not made a sufficient showing. It pointed out that the President had already released transcripts of the conversations of which the Committee was seeking recordings. The Committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that, in order to legislate, a committee of Congress seldom needs a "precise reconstruction of past events." Id. at 732. The court concluded:

> The Committee has . . . shown no more than that **[*16]** the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain.

Id. at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . . is too attenuated and too tangential to its functions" to override the President's constitutional privilege. Id.

Senate Select Committee thus establishes Congress' duty to articulate its need for particular materials -- to "point[ ] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in" the privileged document it has requested. Moreover, this case suggests that Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular Executive Branch officials. When Congress demands such information, it must explain its need carefully and convincingly. **[*17]**

It is difficult to generalize about the kind of accommodation with respect to deliberative process information that may be appropriate in particular cases. Whether to adhere to the consistent general policy of confidentiality for such information will depend on the facts of the specific situation. Certain general principles do apply, however. As Attorney General Smith explained in advising President Reagan:

> [T]he interest of Congress in obtaining information for oversight purposes is . . . considerably weaker than its interest when specific legislative proposals are in question. At the stage of oversight, the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not. The information requested is usually broad in

> scope and the reasons for the request correspondingly general and vague. In contrast, when Congress is examining specific proposals for legislation, the information which Congress needs to enable it to legislate effectively is usually quite narrow in scope and the reasons for obtaining that information correspondingly specific. A specific, articulated need for information **[*18]** will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.

Smith Opinion, 5 Op. O.L.C. at 30. Moreover, Attorney General Smith explained, information concerning ongoing deliberations need rarely be disclosed:

> [T]he congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances. It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached. Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations **[*19]** only in the rarest of circumstances. Congressional demands, under the guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on the Executive Branch's function of executing the law. At the same time, the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing.

Id. at 30-31.

IV. Procedures

President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" (the Reagan Memorandum) sets forth the long-standing Executive Branch policy in this area:

> The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good **[*20]** faith negotiations between Congress and the Executive Branch have minimized the need for invoking **executive privilege,** and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

The Reagan Memorandum also sets forth the procedures for asserting **executive privilege** in response to a congressional request for information. Under the terms of the Memorandum, an agency must notify and consult with the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, as soon as it determines that compliance with the request raises a "substantial question of **executive privilege.**" The Memorandum further provides that **executive privilege** cannot be asserted without specific authorization by the President, based on recommendations made to him by the concerned agency head, the Attorney General, and the Counsel to the President.

In practice, disputes with Congress in this area typically commence with an informal oral or written request from a congressional committee or subcommittee for information in the possession of the Executive Branch. Most such requests are honored promptly; in some cases, however, **[*21]** the Executive Branch official may resist supplying some or all of the requested information either because of the burden of compliance or because the information is of a sensitive nature. The Executive Branch agency and the committee staff will typically negotiate during this period to see if the dispute can be settled in a manner acceptable to both sides. In most cases this accommodation process is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued. At that point, if further negotiation is unavailing, it is necessary to consider asking the President to assert **executive privilege.**

If after assertion of **executive privilege** the committee remains unsatisfied with the agency's response, it may vote to hold the agency head in contempt of Congress. If the full Senate or House of Representatives then votes to hold the official in contempt, it might attempt to impose sanctions by one of three methods. First, it might refer the matter to a United States Attorney for reference to a grand jury. See 2 U.S.C. §§ 192, 194. Second, the Sergeant-at-Arms theoretically could be dispatched to arrest the official and detain him in the **[*22]** Capitol; if this unlikely event did occur, the official would be able to test the legality of his detention through a habeas corpus petition, thereby placing in issue the legitimacy of his actions in refusing to disclose the subpoenaed information. Third, and the most likely option due to legal and practical difficulties associated with the first two options, the Senate or House might bring an action in court to obtain a judicial order requiring compliance with the subpoena and contempt of court enforcement orders if the court's order is defied.

William P. Barr

Assistant Attorney General

Office of Legal Counsel

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*1989 OLC LEXIS 7, *; 13 Op. O.L.C. 93*

OPINION OF THE OFFICE OF LEGAL COUNSEL

Congressional Requests for Information From Inspectors General Concerning Open Criminal Investigations

1989 OLC LEXIS 7; 13 Op. O.L.C. 93

March 24, 1989

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

CORE TERMS: law enforcement, oversight, reporting, confidential information, confidentiality, confidential, memorandum, agency head, General Act, accommodation, subcommittee, disclosure, prosecutorial, subpoena, investigative, withholding, ongoing, extraordinary circumstances, criminal investigation, alteration, authorize, envision, deletion, intend, deliberative process, faithfully executed, duty, legislative history, semi-annual, articulated

ADDRESSEE:
[*1]

Memorandum For Oliver B. Revell

Chairman, Investigations/Law Enforcement Committee

President's Council on Integrity and Efficiency

OPINIONBY: KMIEC

OPINION:
Introduction and Summary

This memorandum is in response to your request for the opinion of this Office on the obligations of Inspectors General (IGs) with respect to congressional requests for confidential information about open criminal investigations. Specifically, you have asked this Office to advise you as to the obligations of the IGs with respect to (1) requests based on Congress' oversight authority and (2) requests based on the reporting requirements of the Inspector General Act of 1978 (the Act), Pub. L. No. 95-452, 92 Stat. 1101 (1978), codified at 5 U.S.C. Appendix 3. n1

n1 On March 8, 1989, Larry Elston of your staff orally confirmed to Paul Colborn of this Office that these are the questions on which you seek our opinion.

As discussed below, when pursuant to its oversight authority Congress seeks to obtain from an IG confidential information about an open criminal investigation, established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of **executive [*2] privilege,** require that the IG decline to provide the information, absent extraordinary circumstances. With respect to congressional requests based on the congressional reporting requirements of the Act, we have concluded as a matter

of statutory construction that Congress did not intend those provisions to require production of confidential information about open criminal investigations. Accordingly, IGs are under no obligation under the Act to disseminate confidential law enforcement information.

I. Congressional Requests Based on Oversight Authority

The decision on how to respond to a congressional request for information from an IG based on Congress' oversight authority requires the weighing of a number of factors arising out of the separation of powers between the executive and legislative branches. The principal factors to be weighed are the nature of Congress' oversight interest in the information and the interest of the executive branch in maintaining confidentiality for the information.

A. Congress' Oversight Authority

The constitutional role of Congress is to adopt general legislation that will be implemented -- "executed" -- by the executive branch. "It **[*3]** is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810). The courts have recognized that this general legislative interest gives Congress investigatory authority. Both Houses of Congress have power, "through [their] own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." McGrain v. Daugherty, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975), provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." Watkins v. United States, 354 U.S. 178, 187 (1957). The inquiry must pertain to subjects "on which legislation could be had." McGrain v. Daugherty, 273 U.S. at 177.

In short, Congress' **[*4]** oversight authority

> is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.
>
> Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.

Barenblatt v. United States, 360 U.S. 109, 111-12 (1959) (emphasis added).

The execution of the law is one of the functions that the Constitution makes the exclusive province of the executive branch. Article II, section 1 provides that "[t]he executive Power shall be vested in a President of the United States of America." Article II, section 3 imposes on the President the corresponding duty to "take Care that the Laws be faithfully executed." n2 In particular, criminal prosecution is an exclusively executive branch responsibility. Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 138 (1976); United States v. Nixon, 418 U.S. 683, 693 (1974). Accordingly, neither the judicial nor legislative branches may directly **[*5]** interfere with the prosecutorial discretion of the executive branch by directing it to prosecute particular individuals. n3 Indeed, in addition to these general constitutional provisions on executive power, the Framers specifically demonstrated their intention that Congress not be involved in prosecutorial decisions or in

questions regarding the criminal liability of specific individuals by including in the Constitution a prohibition against the enactment of bills of attainder. Art. I, § 9, cl. 3. See United States v. Lovett, 328 U.S. 303, 317-18 (1946); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring).

n2 One of the fundamental rationales for the separation of powers is that the power to enact laws and the power to execute laws must be separated in order to forestall tyranny. As James Madison stated in Federalist No. 47:

> The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."

The Federalist No. 47 at 303 (1961) (emphasis in original).

n3 See Heckler v. Chaney, 470 U.S. at 832 ("the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed'"); United States v. Nixon, 418 U.S. at 693 ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). **[*6]**

On the other hand, Congress' oversight authority does extend to the evaluation of the general functioning of the Inspector General Act and relevant criminal statutes, as well as inquiring into potential fraud, waste and abuse in the executive branch. Such evaluations may be seen to be necessary to determine whether the statutes should be amended or new legislation passed. See Watkins v. United States, 354 U.S. at 187. Given the general judicial reluctance to look behind congressional assertions of legislative purpose, an assertion that Congress needed the information for such evaluations would likely be deemed sufficient in most cases to meet the threshold requirement for congressional inquiry. This general legislative interest, however, does not provide a compelling justification for looking into particular ongoing cases. n4 Accordingly, we do not believe that as a general matter it should weigh heavily against the substantial executive branch interest in the confidentiality of law enforcement information. We discuss that interest next.

n4 For instance, Congress' interest in evaluating the functioning of a criminal statute presumably can be satisfied by numerical or statistical analysis of closed cases that had been prosecuted under the statute, or (at most) by an analysis of the closed cases themselves. **[*7]**

B. **Executive Privilege**

Assuming that Congress has a legitimate legislative purpose for its oversight inquiry, the executive branch's interest in keeping the information confidential must be assessed. This subject is usually discussed in terms of "**executive privilege,**" and we will use that convention here. n5 **Executive privilege** is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution, has been asserted

by numerous Presidents from the earliest days of our Nation, and has been explicitly recognized by the Supreme Court. United States v. Nixon, 418 U.S. at 705-06. There are three generally-recognized components of **executive privilege:** state secrets, law enforcement, and deliberative process. Since congressional requests for information from IGs will generally implicate only the law enforcement component of **executive privilege, [*8]** we will limit our discussion to that component.

n5 The question, however, is not strictly speaking just one of **executive privilege.** While the considerations that support the concept and assertion of **executive privilege** apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to a congressional request for information, the executive branch is not necessarily bound by the limits of **executive privilege.**

It is well established and understood that the executive branch has generally limited congressional access to confidential law enforcement information in order to prevent legislative pressures from impermissibly influencing its prosecutorial decisions. As noted above, the executive branch's duty to protect its prosecutorial discretion from congressional interference derives ultimately from Article II, which places the power to enforce the laws exclusively in the executive branch. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is some danger that congressional pressures will influence, or will **[*9]** be perceived to influence, the course of the investigation. Accordingly, the policy and practice of the executive branch throughout our Nation's history has been to decline, except in extraordinary circumstances, to provide committees of Congress with access to, or copies of, open law enforcement files. No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files. n6

n6 See generally, Letter to John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, from William French Smith, Attorney General, 6 Op. O.L.C. 31 (1982) (regarding request for open law enforcement investigative files of the Environmental Protection Agency); Memorandum for the Deputy Attorney General from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Refusals by Executive Branch to Provide Documents from Open Criminal Investigative Files to Congress (Oct. 30, 1984).

Attorney General Robert H. Jackson well articulated the basic position:

> It is the position of this Department, restated now with the approval of and at the direction of **[*10]** the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

Other grounds for objecting to the disclosure of law enforcement files include the potential

damage to proper law enforcement that would be caused by the revelation of sensitive techniques, methods, or strategy; concern over the safety of confidential informants and the chilling effect on other sources of information; sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law; and well-founded **[*11]** fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. n7 See generally, Memorandum for the Deputy Attorney General from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Congressional Subpoenas of Department of Justice Investigative Files 14-20 (Oct. 17, 1984).

n7 In addition, potential targets of enforcement actions are entitled to protection from premature disclosure of investigative information. It has been held that there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952). Pretrial publicity originating in Congress, therefore, can be attributed to the government as a whole and can require postponement or other modification of the prosecution on due process grounds. Id.

C. Accommodation with Congress

The executive branch **[*12]** should make every effort to accommodate requests that are within Congress' legitimate oversight authority, while remaining faithful to its duty to protect confidential information. n8 See generally, United States v. American Telephone & Telegraph Co., 567 F.2d 121, 127-30 (D.C. Cir. 1977); Opinion of the Attorney General for the President, Assertion of **Executive Privilege** in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) ("The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.").

n8 President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" states that "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking **executive privilege,** and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches."

Only rarely do congressional requests for information result in a subpoena of an executive branch official or in other congressional action. In most cases the informal process of negotiation and accommodation recognized by the courts, and mandated for the executive branch by President Reagan's 1982 memorandum, is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee. At that point, it would be necessary to consider asking the President to assert **executive privilege.** Under President Reagan's memorandum, **executive privilege** cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President. We have no reason to believe that President Bush envisions a different procedure. **[*13]**

The nature of the accommodation required in responding to a congressional request for information clearly depends on the balance of interests between the Executive and Congress. For its part, Congress must be able to articulate its need for the particular materials -- to

"point[ ] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and to show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725, 731, 733 (D.C. Cir. 1974). The more generalized the executive branch interest in withholding the disputed information, the more likely it is that this interest will yield to a specific, articulated need related to the effective performance by Congress of its legislative functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of Congress for the information, the more likely it is that the Executive's need for confidentiality will prevail. See Nixon **[*14]** v. Administrator of General Services, 433 U.S. 425, 446-55 (1977) (discussion of balance of interests); United States v. Nixon, 418 U.S. at 707-13 (same); United States v. American Telephone & Telegraph Co., 567 F.2d at 130-33 (same).

In light of the limited and general congressional interest in ongoing criminal investigations and the specific and compelling executive branch interest in protecting the confidentiality of such investigations, the executive branch has generally declined to make any accommodation for congressional committees with respect to open cases: that is, it has consistently refused to provide confidential information. However, on occasion after an investigation has been closed, and after weighing the interests present in the particular case, the executive branch has briefed Congress on prosecutorial decisions and has disclosed some details of the underlying investigation. n9

n9 Once an investigation has been closed without further prosecution, some of the considerations previously discussed lose their force. Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution; likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear. Still, such records are not automatically disclosed to Congress. Obviously, much of the information in a closed criminal enforcement file -- such as unpublished details of allegations against particular individuals and details that would reveal confidential sources and investigative techniques and methods -- would continue to need protection.

In addition, the executive branch has a long-term institutional interest in maintaining the confidentiality of the prosecutorial decisionmaking process. The Supreme Court has recognized that "[h]uman 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." United States v. Nixon, 418 U.S. at 705. It is therefore important to weigh the potential "chilling effect" of a disclosure of details of the prosecutorial deliberative process in a closed case against the immediate needs of Congress. **[*15]**

In conclusion, although in the absence of a concrete factual setting we cannot analyze the case for withholding any particular document or information in response to a congressional oversight request, we can advise that as a general matter Congress has a limited oversight interest in the conduct of an ongoing criminal investigation and the executive branch has a strong interest in preserving the confidentiality of such investigations. Accordingly, in light of established executive branch policy and practice, and absent extraordinary circumstances, an IG should not provide Congress with confidential information concerning an open criminal investigation.

II. Congressional Requests Based on the Inspector General Act

The second question raised by your opinion request is whether the reporting provisions of the Inspector General Act require that IGs provide Congress with confidential information on open criminal investigations that is not normally shared with Congress under established executive

branch policy and practice with respect to oversight requests. We believe that both the text and legislative history of these provisions demonstrate that they do not impose such a requirement. **[*16]**

The Act establishes a number of congressional reporting requirements with respect to the activities of the IGs. Most generally, section 4(a)(5) requires each IG

> to keep the head of [the agency within which his office is established] and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such [agency], to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

Section 5(a) requires each IG to prepare semi-annual reports summarizing the activities of his office, and section 5(b) requires that the head of the IG's agency submit these reports to the appropriate committees or subcommittees of Congress within 30 days of receiving them. Section 5(d) requires each IG to

> report immediately to the head of the [agency] whenever the [IG] becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations **[*17]** of such [agency]. The head of the [agency] shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the [agency] containing any comments such head deems appropriate.

Finally, section 5(e) provides in subsection (1) that none of the reporting requirements "shall be construed to authorize the public disclosure" of certain information, while also providing in subsection (3) that neither the reporting requirements nor any other provision of the Act "shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof."

In our judgment, nothing in the text of these provisions provides that confidential law enforcement materials pertaining to ongoing cases must be transmitted to Congress. To the contrary, the statutory scheme set out in section 5 of the Act merely envisions that the periodic reports from each IG to Congress will be a general "description" and "summary" of the work of the IG. This view of section 5 is supported by the Act's legislative history. In proposing the congressional reporting requirements **[*18]** that were ultimately enacted into law, n10 the Senate committee made it clear that it did not contemplate that reports from the IGs would be so specific that confidential investigative information would fall within the scope of the report and, in any event, it was not intended that such information would be required. For example, with respect to section 5(a)(4)'s requirement that semi-annual reports contain "a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted," the committee indicated that

> [b]y using the word "summary" in subsection (a)(4), the committee intends that Congress would be given an overview of those matters which have been referred

> to prosecutive authorities. It would be sufficient, for instance, for an [IG] at HUD to include in his report the fact that he had referred 230 cases of fraud in FHA programs to the Justice Department for further investigation and prosecution. It would be highly improper and often a violation of due process for an [IG's] report to list the names of those under investigation or to describe them with sufficient precision to enable the identities of the targets to be easily ascertained. **[*19]** However, once prosecutions and convictions have resulted, the [IG] could certainly list those cases, if he deems such a listing appropriate.

S. Rep. No. 1071 at 30.

n10 The Act was originally considered by the House of Representatives as H.R. 8588, which contained similar reporting requires to those of the Senate bill. Compare House version, sections 3-4, 124 Cong. Rec. 10399 (1978), with Senate version, sections 4-5, 124 Cong. Rec. 32029-32030 (1978). The legislative history regarding the House provisions is much less extensive than that for the Senate provisions. See generally, H. Rep. No. 584, 95th Cong., 1st Sess. 13-14 (1977). H.R. 8588 passed the House, but failed in the Senate, which considered instead a substitute bill reported from the Senate Committee on Governmental Affairs. See 124 Cong. Rec. 30949 (1978); S. Rep. No. 1071, 95th Cong., 2nd Sess. (1978). The House accepted the substitute Senate bill and it was enacted into law.

The committee noted that section 5(b)'s requirement that semi-annual reports be submitted to Congress "contemplates that the [IG's] reports will ordinarily be transmitted to Congress by the agency head without alteration or deletion." **[*20]** Id. at 31 (emphasis added). The committee went on to stress, however, that

> nothing in this section authorizes or permits an [IG] to disregard the obligations of law which fall upon all citizens and with special force upon Government officials. The Justice Department has expressed concern that since an [IG] is to report on matters involving possible violations of criminal law, his report might contain information relating to the identity of informants, the privacy interest of people under investigations, or other matters which would impede law enforcement investigations. As noted above, the committee does not envision that a report by the [IG] would contain this degree of specificity. In any event, however, the intent of the legislation is that the [IG] in preparing his reports, must observe the requirements of law which exist today under common law, statutes, and the Constitution, with respect to law enforcement investigations. . .
> .
>
> The committee recognizes, however, that in rare circumstances the [IG], through inadvertence or design, may include in his report materials of this sort which should not be disclosed even to the Congress. The inclusion of such materials **[*21]** in an [IG's] report may put a conscientious agency head in a serious bind. The obligation of an agency head is to help the President "faithfully execute the laws." Faithful execution of this legislation entails the timely transmittal, without alteration or deletion, of an [IG's] report to Congress. However, a conflict of responsibilities may arise when the agency head concludes that the [IG's] report contains material, disclosure of which is improper under the law. In this kind of rare case, section 5(b) is not intended to prohibit the agency head from deleting the materials in question. n11

Id. at 31-32 (emphasis added). n12

n11 "In the rare cases in which alterations or deletions have been made, the committee envisions that an agency head's comments on an [IG's] report would indicate to the Congress that alterations or deletions had been made, give a description of the materials altered or deleted, and the reasons therefore." Id. at 32.

n12 In addition to thus stating its intention with respect to the confidentiality of law enforcement information, the committee also expressed its understanding that section 5(b) cannot override **executive privilege** with respect to deliberative process information:

> [T]he committee is aware that the Supreme Court has, in certain contexts, recognized the President's constitutional privilege for confidential communications or for information related to the national security, diplomatic affairs, and military secrets. Insofar as this privilege is constitutionally based, the committee recognizes that subsection 5(b) cannot override it. In view of the uncertain nature of the law in this area, the committee intends that subsection 5(b) will neither accept nor reject any particular view of Presidential privilege but only preserve for the President the opportunity to assert privilege where he deems it necessary. The committee intends that these questions should be left for resolution on a case-by-case basis as they arise in the course of implementing this legislation.

Id. at 32 (emphasis added) (citations omitted). **[*22]**

The committee also made it clear that the same principles apply with equal force to the requirement of section 5(d) that the IG reports to agency heads on "particularly serious or flagrant problems" also be submitted to Congress. In stating with respect to this section that "as in subsection (b), the agency head has no general authority or right to delete or alter certain provisions of the report" (id. at 33), the committee clearly implied that the agency head retained the ability -- as in the "rare case" identified with respect to subsection (b) -- to delete "materials . . . which should not be disclosed even to the Congress" (id. at 32).

Conclusion

Long-established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of **executive privilege,** require that in the absence of extraordinary circumstances an IG must decline to provide confidential information about an open criminal investigation in response to a request pursuant to Congress' oversight authority. With respect to congressional requests based on the reporting requirements of the Inspector General Act, we similarly conclude that the reporting provisions **[*23]** of the Inspector General Act do not require IGs to disseminate confidential information pertaining to open criminal investigations. n13

n13 Our conclusion is unaffected by section 5(e)(3), which Congress added to the Act in 1982 as part of legislation establishing an IG for the Department of Defense. Pub. L. No. 97-252, sec. 1117, 96 Stat. 718, 753 (1982). Section 5(e)(3) provides that nothing in the Act "shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof." The effect of this subsection is simply to make it clear that the Act itself does not affect the availability of information that may otherwise be lawfully and appropriately provided to Congress. Thus, section 5(e)(3) does not address when such provision of information is lawful and appropriate. As to this issue and as discussed in the first part of this memorandum, in light of established executive branch policy and practice

with respect to confidential law enforcement information, the IGs should generally not make such information available in response to congressional oversight requests.

Douglas W. Kmiec

Assistant Attorney General **[*24]**

Office of Legal Counsel

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*1989 OLC LEXIS 112, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations

Long-established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of **executive privilege,** require that in the absence of extraordinary circumstances an Inspector General must decline to provide confidential information about an open criminal investigation in response to a request pursuant to Congress' oversight authority.

The reporting provisions of the Inspector General Act do not require Inspectors General to disseminate to Congress confidential information pertaining to open criminal investigations.

1989 OLC LEXIS 112

March 24, 1989

CORE TERMS: law enforcement, oversight, confidential information, reporting, confidentiality, confidential, General Act, agency head, accommodation, disclosure, prosecutorial, memorandum, subpoena, extraordinary circumstances, criminal investigation, investigative, ongoing, subcommittee, alteration, deletion, envision, intend, deliberative process, faithfully executed, withholding, duty, legislative history, disseminate, articulated, semi-annual

ADDRESSEE:
[*1]

Memorandum Opinion for the Chairman Investigations/Law Enforcement Committee President's Council on Integrity and Efficiency

OPINIONBY: KMIEC

OPINION:
Introduction and Summary

This memorandum is in response to your request for the opinion of this Office on the obligations of Inspectors General ("IGs") with respect to congressional requests for confidential information about open criminal investigations. Specifically, you have asked this Office to advise you as to the obligations of the IGs with respect to (1) requests based on Congress' oversight authority and (2) requests based on the reporting requirements of the Inspector General Act of 1978 ("the Act"), Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified at 5 U.S.C. app. 3). n1

n1 On March 8, 1989, Larry Elston of your staff orally confirmed to Paul Colborn of this Office that these are the questions on which you seek our opinion.

As discussed below, when pursuant to its oversight authority Congress seeks to obtain from an IG confidential information about an open criminal investigation, established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of **executive privilege,** require **[*2]** that the IG decline to provide the information, absent extraordinary circumstances. With respect to congressional requests

based on the congressional reporting requirements of the Act, we have concluded as a matter of statutory construction that Congress did not intend those provisions to require production of confidential information about open criminal investigations. Accordingly, IGs are under no obligation under the Act to disseminate confidential law enforcement information.

I. Congressional Requests Based on Oversight Authority

The decision on how to respond to a congressional request for information from an IG based on Congress' oversight authority requires the weighing of a number of factors arising out of the separation of powers between the executive and legislative branches. The principal factors to be weighed are the nature of Congress' oversight interest in the information and the interest of the executive branch in maintaining confidentiality for the information.

A. Congress' Oversight Authority

The constitutional role of Congress is to adopt general legislation that will be implemented -- "executed" -- by the executive branch. "It is the peculiar province of the **[*3]** legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810). The courts have recognized that this general legislative interest gives Congress investigatory authority. Each House of Congress has power, "through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." McGrain v. Daugherty, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975), provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." Watkins v. United States, 354 U.S. 178, 187 (1957). The inquiry must pertain to subjects "on which legislation could be had." McGrain v. Daugherty, 273 U.S. at 177.

In short, Congress' oversight authority is as penetrating and far-reaching **[*4]** as the potential power to enact and appropriate under the Constitution.

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.

Barenblatt v. United States, 360 U.S. 109, 111-12 (1959) (emphasis added).

The execution of the law is one of the functions that the Constitution makes the exclusive province of the executive branch. Article II, Section 1 provides that "the executive Power shall be vested in a President of the United States of America." Article II, Section 3 imposes on the President the corresponding duty to "take Care that the Laws be faithfully executed." n2 In particular, criminal prosecution is an exclusively executive branch responsibility. Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 138 (1976); United States v. Nixon, 418 U.S. 683, 693 (1974). Accordingly, neither the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the executive branch by directing it to **[*5]** prosecute particular individuals. n3 Indeed, in addition to these general constitutional provisions on executive power, the Framers specifically demonstrated their intention that Congress not be involved in prosecutorial decisions or in questions regarding the criminal liability of specific individuals by including in the Constitution a prohibition against the enactment of bills of attainder. U.S. Const. art. I, * 9, cl. 3. See United States v. Lovett, 328 U.S. 303, 317-18 (1946); INS v. Chadha, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring).

n2 One of the fundamental rationales for the separation of powers is that the power to enact laws and the power to execute laws must be separated in order to forestall tyranny. As James Madison stated in Federalist No. 47:

The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."

The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961). **[*6]**

n3 See Heckler v. Chaney, 470 U.S. at 832 ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"); United States v. Nixon, 418 U.S. at 693 ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

On the other hand, Congress' oversight authority does extend to the evaluation of the general functioning of the Inspector General Act and relevant criminal statutes, as well as inquiring into potential fraud, waste and abuse in the executive branch. Such evaluations may be seen to be necessary to determine whether the statutes should be amended or new legislation passed. See Watkins v. United States, 354 U.S. at 187. Given the general judicial reluctance to look behind congressional assertions of legislative purpose, an assertion that Congress needed the information for such evaluations would likely be deemed sufficient in most cases to meet the threshold requirement for congressional inquiry. This general legislative **[*7]** interest, however, does not provide a compelling justification for looking into particular ongoing cases. n4 Accordingly, we do not believe that as a general matter it should weigh heavily against the substantial executive branch interest in the confidentiality of law enforcement information. We discuss that interest next.

n4 For instance, Congress' interest in evaluating the functioning of a criminal statute presumably can be satisfied by numerical or statistical analysis of closed cases that had been prosecuted under the statute, or (at most) by an analysis of the closed cases themselves.

B. **Executive Privilege**

Assuming that Congress has a legitimate legislative purpose for its oversight inquiry, the executive branch's interest in keeping the information confidential must be assessed. This subject is usually discussed in terms of "**executive privilege,**" and we will use that convention here. n5 **Executive privilege** is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence **[*8]** of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution, has been asserted by numerous Presidents from the earliest days of our Nation, and has been explicitly recognized by the Supreme Court. United States v. Nixon, 418 U.S. at 705-06. There are three generally-recognized components of **executive privilege:** state secrets, law enforcement, and deliberative process. Since congressional requests for information from IGs will generally implicate only the law enforcement component of **executive privilege,** we will limit our discussion to that component.

n5 The question, however, is not strictly speaking just one of **executive privilege.** While the considerations that support the concept and assertion of **executive privilege** apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to a congressional

request for information, the executive branch is not necessarily bound by the limits of **executive privilege.**

It is well established and understood that the executive branch has generally limited **[*9]** congressional access to confidential law enforcement information in order to prevent legislative pressures from impermissibly influencing its prosecutorial decisions. As noted above, the executive branch's duty to protect its prosecutorial discretion from congressional interference derives ultimately from Article II, which places the power to enforce the laws exclusively in the executive branch. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is some danger that congressional pressures will influence, or will be perceived to influence, the course of the investigation. Accordingly, the policy and practice of the executive branch throughout our Nation's history has been to decline, except in extraordinary circumstances, to provide committees of Congress with access to, or copies of, open law enforcement files. No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files. n6

n6 See generally Assertion of **Executive Privilege** in Response to Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31 (1982) (regarding request for open law enforcement investigative files of the Environmental Protection Agency); Memorandum for the Deputy Attorney General from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Refusals by Executive Branch to Provide Documents from Open Criminal Investigative Files to Congress (Oct. 30, 1984). **[*10]**

Attorney General Robert H. Jackson well articulated the basic position:

It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

Other grounds for objecting to the disclosure of law enforcement files include the potential damage to proper law enforcement that would be caused by the revelation of sensitive techniques, methods, or strategy; concern over the safety of confidential informants and the chilling effect on other sources of information; **[*11]** sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law; and well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. n7 See generally Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252, 262-66 (1984).

n7 In addition, potential targets of enforcement actions are entitled to protection from premature disclosure of investigative information. It has been held that there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952). Pretrial publicity originating in Congress, therefore, can be attributed to the government as a whole and can require postponement or other modification of the prosecution on due process grounds. Id.

C. Accommodation with Congress **[*12]**

The executive branch should make every effort to accommodate requests that are within Congress' legitimate oversight authority, while remaining faithful to its duty to protect confidential information. n8 See generally United States v. AT&T, 567 F.2d 121, 127-30 (D.C. Cir. 1977); Assertion of **Executive Privilege** in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) ("The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.").

n8 President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" states:

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking **executive privilege,** and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

Only rarely do congressional requests for information result in a subpoena of an executive branch official or in other congressional action. In most cases the informal process of negotiation and accommodation recognized by the courts, and mandated for the executive branch by President Reagan's 1982 memorandum, is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee. At that point, it would be necessary to consider asking the President to assert **executive privilege.** Under President Reagan's memorandum, **executive privilege** cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President. We have no reason to believe that President Bush envisions a different procedure. **[*13]**

The nature of the accommodation required in responding to a congressional request for information clearly depends on the balance of interests between the Executive and Congress. For its part, Congress must be able to articulate its need for the particular materials -- to "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and to show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Comm. on Presidential Campaign Activities v. Nixon, **498** F.2d 725, 731, 733 (D.C. Cir. 1974). The more generalized the executive branch interest in withholding the disputed information, the more likely it is that this interest will yield to a specific, articulated need related to the effective performance by Congress of its legislative functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of Congress for the information, the more likely it is that the Executive's need for confidentiality will prevail. See Nixon v. Administrator **[*14]** of General Services, 433 U.S. 425, 446-55 (1977) (discussion of balance of interests); United States v. Nixon, 418 U.S. at 707-13 (same); United States v. AT&T, 567 F.2d at 130-33 (same).

In light of the limited and general congressional interest in ongoing criminal investigations and the specific and compelling executive branch interest in protecting the confidentiality of such investigations, the executive branch has generally declined to make any accommodation for congressional committees with respect to open cases: that is, it has consistently refused

to provide confidential information. However, on occasion after an investigation has been closed, and after weighing the interests present in the particular case, the executive branch has briefed Congress on prosecutorial decisions and has disclosed some details of the underlying investigation. n9

n9 Once an investigation has been closed without further prosecution, some of the considerations previously discussed lose their force. Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution; likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear. Still, such records are not automatically disclosed to Congress. Obviously, much of the information in a closed criminal enforcement file -- such as unpublished details of allegations against particular individuals and details that would reveal confidential sources and investigative techniques and methods -- would continue to need protection.

In addition, the executive branch has a long-term institutional interest in maintaining the confidentiality of the prosecutorial decisionmaking process. The Supreme Court has recognized that "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." United States v. Nixon, 418 U.S. at 705. It is therefore important to weigh the potential "chilling effect" of a disclosure of details of the prosecutorial deliberative process in a closed case against the immediate needs of Congress. **[*15]**

In conclusion, although in the absence of a concrete factual setting we cannot analyze the case for withholding any particular document or information in response to a congressional oversight request, we can advise that as a general matter Congress has a limited oversight interest in the conduct of an ongoing criminal investigation and the executive branch has a strong interest in preserving the confidentiality of such investigations. Accordingly, in light of established executive branch policy and practice, and absent extraordinary circumstances, an IG should not provide Congress with confidential information concerning an open criminal investigation.

II. Congressional Requests Based on the Inspector General Act

The second question raised by your opinion request is whether the reporting provisions of the Inspector General Act require that IGs provide Congress with confidential information on open criminal investigations that is not normally shared with Congress under established executive branch policy and practice with respect to oversight requests. We believe that both the text and legislative history of these provisions demonstrate that they do not impose such a requirement. **[*16]**

The Act establishes a number of congressional reporting requirements with respect to the activities of the IGs. Most generally, section 4(a)(5) requires each IG to keep the head of [the agency within which his office is established] and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such [agency], to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

Section 5(a) requires each IG to prepare semi-annual reports summarizing the activities of his office, and section 5(b) requires that the head of the IG's agency submit these reports to the appropriate committees or subcommittees of Congress within 30 days of receiving them. Section 5(d) requires each IG to report immediately to the head of the [agency] whenever the [IG] becomes aware of particularly serious or flagrant problems, abuses, or deficiencies

relating to the administration of programs and operations of such [agency]. **[*17]** The head of the [agency] shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the agency containing any comments such head deems appropriate.

Finally, section 5(e) provides in subsection (1) that none of the reporting requirements "shall be construed to authorize the public disclosure" of certain information, while also providing in subsection (3) that neither the reporting requirements nor any other provision of the Act "shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof."

In our judgment, nothing in the text of these provisions provides that confidential law enforcement materials pertaining to ongoing cases must be transmitted to Congress. To the contrary, the statutory scheme set out in section 5 of the Act merely envisions that the periodic reports from each IG to Congress will be a general "description" and "summary" of the work of the IG. This view of section 5 is supported by the Act's legislative history. In proposing the congressional reporting requirements that were ultimately enacted **[*18]** into law, n10 the Senate committee made it clear that it did not contemplate that reports from the IGs would be so specific that confidential investigative information would fall within the scope of the report and, in any event, it was not intended that such information would be required. For example, with respect to section 5(a)(4)'s requirement that semi-annual reports contain "a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted," the committee indicated:

By using the word "summary" in subsection (a)(4), the committee intends that Congress would be given an overview of those matters which have been referred to prosecutive authorities. It would be sufficient, for instance, for an [IG] at HUD to include in his report the fact that he had referred 230 cases of fraud in FHA programs to the Justice Department for further investigation and prosecution. It would be highly improper and often a violation of due process for an IG's report to list the names of those under investigation or to describe them with sufficient precision to enable the identities of the targets to be easily ascertained. However, once prosecutions and convictions **[*19]** have resulted, the IG could certainly list those cases, if he deems such a listing appropriate.

S. Rep. No. 1071 at 30.

n10 The Act was originally considered by the House of Representatives as H.R. 8588, which contained similar reporting requires to those of the Senate bill. Compare House version, sections 3-4, 124 Cong. Rec. 10,399 (1978), with Senate version, sections 4-5, 124 Cong. Rec. 32,029-30 (1978). The legislative history regarding the House provisions is much less extensive than that for the Senate provisions. See generally H.R. Rep. No. 584, 95th Cong., lst Sess. 13-14 (1977). H.R. 8588 passed the House, but failed in the Senate, which considered instead a substitute bill reported from the Senate Committee on Governmental Affairs. See 124 Cong. Rec. 30,949 (1978); S. Rep. No. 1071, 95th Cong., 2d Sess. (1978). The House accepted the substitute Senate bill and it was enacted into law.

The committee noted that section 5(b)'s requirement that semi-annual reports be submitted to Congress "contemplates that the IG's reports will ordinarily be transmitted to Congress by the agency head without alteration or deletion." Id. at 31 (emphasis added). The committee went on **[*20]** to stress, however, that nothing in this section authorizes or permits an [IG] to disregard the obligations of law which fall upon all citizens and with special force upon Government officials. The Justice Department has expressed concern that since an [IG] is to report on matters involving possible violations of criminal law, his report might contain information relating to the identity of informants, the privacy interest of people under investigations, or other matters which would impede law enforcement investigations. As noted above, the committee does not envision that a report by the [IG] would contain this degree of specificity. In any event, however, the intent of the legislation is that the [IG] in

preparing his reports, must observe the requirements of law which exist today under common law, statutes, and the Constitution, with respect to law enforcement investigations. . . .

The committee recognizes, however, that in rare circumstances the [IG], through inadvertence or design, may include in his report materials of this sort which should not be disclosed even to the Congress. The inclusion of such materials in an [IG's] report may put a conscientious agency head in a serious **[*21]** bind. The obligation of an agency head is to help the President "faithfully execute the laws." Faithful execution of this legislation entails the timely transmittal, without alteration or deletion, of an [IG's] report to Congress. However, a conflict of responsibilities may arise when the agency head concludes that the [IG's] report contains material, disclosure of which is improper under the law. In this kind of rare case, section 5(b) is not intended to prohibit the agency head from deleting the materials in question. n11

n11 "In the rare cases in which alterations or deletions have been made, the committee envisions that an agency head's comments on an [IG's] report would indicate to the Congress that alterations or deletions had been made, give a description of the materials altered or deleted, and the reasons therefore." Id. at 32.

Id. at 31-32 (emphasis added). n12

n12 In addition to thus stating its intention with respect to the confidentiality of law enforcement information, the committee also expressed its understanding that section 5(b) cannot override **executive privilege** with respect to deliberative process information:

[T]he committee is aware that the Supreme Court has, in certain contexts, recognized the President's constitutional privilege for confidential communications or for information related to the national security, diplomatic affairs, and military secrets. Insofar as this privilege is constitutionally based, the committee recognizes that subsection 5(b) cannot override it. In view of the uncertain nature of the law in this area, the committee intends that subsection 5 (b) will neither accept nor reject any particular view of Presidential privilege but only preserve for the President the opportunity to assert privilege where he deems it necessary. The committee intends that these questions should be left for resolution on a case-by-case basis as they arise in the course of implementing this legislation.

Id. at 32 (emphasis added) (citations omitted). **[*22]**

The committee also made it clear that the same principles apply with equal force to the requirement of section 5(d) that the IG reports to agency heads on "particularly serious or flagrant problems" also be submitted to Congress. In stating with respect to this section that "as in subsection (b), the agency head has no general authority or right to delete or alter certain provisions of the report" id. at 33, the committee clearly implied that the agency head retained the ability -- as in the "rare case" identified with respect to subsection (b) -- to delete "materials . . . which should not be disclosed even to the Congress." Id. at 32.

Conclusion

Long-established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of **executive privilege,** require that in the absence of extraordinary circumstances an IG must decline to provide confidential information about an open criminal investigation in response to a request pursuant to Congress' oversight authority. With respect to congressional requests based on the reporting requirements of the Inspector General Act, we similarly conclude that the reporting provisions of the Inspector **[*23]** General Act do not require IGs to disseminate confidential information pertaining to open criminal investigations.

DOUGLAS W. KMIEC

Assistant Attorney General

Office of Legal Counsel

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*1988 OLC LEXIS 20, *; 12 Op. O.L.C. 213*

OPINION OF THE OFFICE OF LEGAL COUNSEL

GAO Investigation Concerning Manuel Noriega

1988 OLC LEXIS 20; 12 Op. O.L.C. 213

August 16, 1988

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

CORE TERMS: intelligence, oversight, law enforcement, intelligence information, national security, foreign policy, disclosure, duty, statutory authority, presidential, investigative, existing law, recordings, tape, constitutional privilege, intelligence committees, deliberative process, accommodation, subpoena, diplomatic, advisor's, confidentiality, deliberations, confidential, memorandum, intelligence agencies, legislative history, policymaking, gathering, wiretaps

ADDRESSEE:
[*1]

MEMORANDUM FOR PAUL SCHOTT STEVENS

Executive Secretary, National Security Council

OPINIONBY: KMIEC

OPINION:
INTRODUCTION AND SUMMARY

This memorandum is in response to your request for the opinion of this Office on whether, or to what extent, the Administration has a legal basis for declining to cooperate with the pending General Accounting Office (GAO) investigation concerning U.S. foreign policy decisions with respect to Manuel Noriega. In its June 23, 1988 letter to the National Security Council, GAO described the nature and purpose of the investigation: In order to evaluate whether "information about illegal activities by high-level officials of other nations may not be adequately considered in U.S. foreign policy decisions . . ., the General Accounting Office is undertaking an initial case study of how information about General Noriega was developed by various government agencies, and what role such information played in policy decisions regarding Panama." As stated in the National Security Council's response to GAO of July 13, 1988, representatives of GAO have made it clear that GAO's "three areas of interest [are] intelligence files, law enforcement files, and the deliberative process **[*2]** of the Executive branch, including internal communications and deliberations leading to Executive branch actions taken pursuant to the President's constitutional authority."

Specifically, you have asked this Office to advise you as to whether the GAO investigation is within GAO's statutory authority; whether there are statutory or constitutional grounds for denying GAO's request to the extent it is directed specifically at intelligence information, at law enforcement information, or at deliberative process information; and whether there are other grounds for denying GAO's request in whole or in part. As explained below, we conclude

that on the present record the GAO investigation is beyond GAO's statutory investigative authority. n1 Because of this conclusion it is unnecessary to address any constitutional basis for challenging GAO's authority to conduct the investigation. In addition, we are unable to evaluate the strength of any constitutional objection to providing particular information because specific information requests have not yet been made. As a matter of general guidance, however, we outline the constitutional principles which would be applied in evaluating whether **[*3]** particular information can be withheld.

n1 Moreover, in addition to GAO's lack of statutory authority to pursue this investigation, we believe that the Intelligence Oversight Act, Pub. L. No. 96-450, sec. 407, 94 Stat. 1975, 1981 (1980), extinguishes whatever authority GAO might otherwise possess in gaining access to intelligence information.

I. AUTHORITY TO CONDUCT THE INVESTIGATION

A. GAO's Investigative Authority

1. Statutory Limitations

GAO's investigative authority is set forth in subchapter II of chapter 7 of title 31 of the U.S. Code. Except for section 717(b), the various grants of authority in subchapter II are limited to auditing the finances of government agencies and are thus inadequate bases for the GAO Noriega investigation, which clearly goes well beyond a financial audit. See 31 U.S.C. 711-715. Accordingly, GAO must base this investigation on its authority in section 717(b) to "evaluate the results of a program or activity the Government carries out under existing law" (emphasis added). 2 Op. Office of Legal Counsel 415, 420 (1978) (where a GAO investigation goes beyond fiscal matters, GAO's authority must be based on section 204(b), **[*4]** the substantially identical predecessor version of section 717(b)).

We believe as a matter of statutory construction that the phrase "program or activity . . . under existing law" must refer only to activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities. n2 The juxtaposition of "program or activity" with "existing law" strongly suggests an intent to refer to statutory responsibilities. Moreover, the use of the qualifier "existing" appears to suggest that the laws at issue are statutes that may lapse rather than constitutional authorities of the President which are of greater permanence. Finally, the legislative history of section 717(b) confirms that Congress' focus of concern was the oversight of its legislative programs: "It is intended that in performing [evaluations under section 717(b)], the Comptroller General shall review and analyze Government program results in a manner which will assist the Congress to determine whether those programs and activities are achieving the objectives of the law." S. Rep. No. 1215, 91st Cong., 2d Sess. 82 (1970). Nothing in the legislative **[*5]** history manifests any congressional intent to extend GAO's investigative authority beyond statutory programs into the Executive's discharge of its constitutional responsibilities. See S. Rep. No. 924, 93d Cong., 2d Sess. 72 (1974); S. Rep. No. 202, 91st Cong., 1st Sess. (1969); S. Rep. No. 1215, supra, at 18, 34, 81-84; 116 Cong. Rec. 24597 (1970).

n2 The views we express here concerning the limitations on GAO's investigative authority under section 717(b) are not novel. In 1978, the Office opined that GAO's authority under the similarly worded predecessor to 717(b) did not extend to the discharge of the President's constitutional, as opposed to statutory, responsibilities. 2 Op. Office of Legal Counsel 415, 420 (1978) ("[T]he appointment of officers of the United States by the President by and with the advice of the Senate does not constitute a Government program or activity carried out under existing law . . . .").

2. GAO Has Not Justified its Investigation Under Section 717(b)

We conclude on the record before us that GAO has not established that it has authority under section 717(b) to pursue this investigation. The subject of the investigation according to **[*6]** GAO is foreign policymaking, a subject matter which is generally within the purview of the President's power under Article II of the Constitution. GAO has failed to assert any interest in evaluating the results of any specific statutory program or activity that may relate to foreign policy.

As this Office has consistently observed, n3 section one of Article II confers on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. See generally United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Specifically, the President's constitutional authority includes the authority to negotiate with foreign nations, to articulate the foreign policy of the United States, to carry out diplomatic and intelligence missions, and to protect the lives of Americans abroad. Id.

n3 See, e.g., Memorandum for Judith H. Bello, General Counsel, Office of the United States Trade Representative, Re: The President's Authority to Terminate the International Express Mail Agreement With Argentina Without the Consent of the Postal Service (June 2, 1988). **[*7]**

Of course, pursuant to its own substantial authority under the Commerce Clause and its exclusive power of appropriation, Congress has enacted statutes that relate to the foreign policy of the United States. For instance, Congress has appropriated funds for foreign assistance and enacted statutes regulating arms sales to foreign governments. If GAO were to express a specific interest in materials relating to such statutes, there would be reasonable and legitimate questions as to which materials were within the scope of GAO's section 717(b) authority, and which were not.

The request before us, however, does not present these close questions. The GAO letter of June 23, 1988 makes it clear that foreign policymaking is the subject of the GAO investigation, and it provides no basis for concluding that GAO is interested in reviewing Executive foreign policymaking pursuant to statutory authority. The GAO letter states that the GAO investigation is premised on a concern that "information about illegal activities by high-level officials of other nations may not be adequately considered in U.S. foreign policy decisions" and that it is directed at learning "what role [information about **[*8]** General Noriega] played in policy decisions regarding Panama." The GAO letter thus demonstrates an interest in our "diplomatic" or "national security" foreign relations with Panama and General Noriega, and provides no basis for concluding that it relates to activities undertaken by the Executive under any specific statute.

We therefore conclude based on the nature of the GAO request that the subject of the GAO investigation is the Executive's discharge of its constitutional foreign policy responsibilities, not its statutory responsibilities. The subject is thus not "a program or activity the Government carries our under existing law," and it is beyond GAO's authority under 31 U.S.C. 717(b). Accordingly, unless this request is tailored to inquire specifically about a program or activity carried out under existing statutory law, we believe there is no obligation to grant GAO access to executive branch agencies for purposes of conducting this investigation.

B. Intelligence Oversight

In addition to the infirmity in GAO's statutory authority to pursue this investigation, we believe that GAO is specifically precluded by statute from access to intelligence information. In establishing **[*9]** by law the oversight relationship between the intelligence committees and the executive branch, Congress indicated that such oversight would be the exclusive means for Congress to gain access to confidential intelligence information in the possession of

the executive branch. n4

n4 As a general matter, intelligence gathering is often viewed as a form of diplomatic activity that is within the President's Article II powers. As Professor Louis Henkin has noted, "[t]he gathering of information is a principal purpose of sending ambassadors and maintaining diplomatic relations, an exclusive Presidential power. It is only a small extension to conclude that gathering information by any means is part of the President's 'eyes and ears' function. There is, therefore, a strong case for presidential authority to obtain intelligence not only through our embassies but also through our agents representing the Executive . . . ." Letter from Louis Henkin to Representative Louis Stokes, March 31, 1987, reprinted in H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to Congress: Hearings Before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence, 100th Cong., 1st Sess. 221 (1987). **[*10]**

This intelligence oversight system has been codified at 50 U.S.C. 413. That section sets forth requirements for the Director of Central Intelligence, the heads of all other federal agencies involved in intelligence activities, and the President to inform the Congress -- through the intelligence committees (and in some circumstances the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate) -- of intelligence activities.

The legislative history of section 413 makes it clear that both the legislative and executive branches believed they were establishing a comprehensive scheme for congressional oversight of intelligence activities that would constitute the exclusive means of congressional oversight. As President Carter stated when he signed the section into law, it

> establishes, for the first time in statute, a comprehensive system for congressional oversight of intelligence activities . . . . The oversight legislation that was passed . . . codifies the current practice and relationship that has developed between this administration and the Senate and House intelligence committees over the past 3 years. n5

n5 16 Weekly Comp. Pres. Doc. 2231 (Oct. 14, 1980). **[*11]**

Senator Huddleston, sponsor of the floor amendment containing the version of section 413 that was enacted into law, emphasized upon the amendment's introduction the comprehensive and exclusive nature of the scheme being established: "[T]his amendment is identical to Senate bill 2284 which the Senate passed by a vote of 89 to 1 on June 3 of this year. It is a bill that establishes the congressional oversight procedures dealing with our intelligence agencies . . . ." n6 Senator Huddleston also agreed, in a floor colloquy with Senator Javits on S. 2284, with the following statement by Senator Javits:

> I agree thoroughly with the need for simplifying [the practice of the oversight committees]. There are some seven committees here that could have had this wrestling match with the executive . . . I am satisfied . . . that the method we now have chosen . . . represents a fair, effective, and objective way in which to accomplish the results of simplifying the intelligence relations between the President and Congress . . . and limiting further the opportunities for misadventure, premature disclosure, and so forth . . . . What we are doing is simply legislating . . . a new arrangement **[*12]** or modus vivendi for the handling of information and consultations between Congress and the intelligence agencies n7

n6 126 Cong. Rec. 17692 (1980).

n7 126 Cong. Rec. 17692-3 (1980). Senator Moynhihan agreed with the position of Senators Huddleston and Javits that a major purpose of the Intelligence Oversight Act was to reduce the number of congressional committees that sought intelligence information: "[T]here is a rule of intelligence, which the Senator [Javits] knows well from his wartime experience, which is that you protect sensitive information by compartmentation. The more important that matter is the fewer persons you want to know about it . . . ." Id. at 17694.

The Senate report on S. 2284 also confirms the understanding that congressional oversight with respect to intelligence matters was to be limited to the intelligence committees. In the "general statement" that preceded the section-by-section analysis, the report noted:

> Out of necessity, intelligence activities are conducted primarily in secret. Because of that necessary secrecy, they are not subject to public scrutiny and debate as is the case for most foreign policy and defense issues. **[*13]** Therefore, the Congress, through its intelligence oversight committees, has especially important duties in overseeing these vital activities by the intelligence agencies of the United States. [50 U.S.C. 413] is intended to authorize the process by which information concerning intelligence activities of the United States is to be shared by the two branches in order to enable them to fulfill their respective duties and obligations to govern intelligence activities within the constitutional framework. The Executive branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding, without confrontation. The purpose of [§ 413] is to carry this working relationship forward into statute. n8

n8 S. Rep. No. 730, 96th Cong., 2d Sess 5 (1980) (emphasis added). More specifically, the Senate report stated that "[t]his amendment repeals the congressional reporting requirement of the Hughes-Ryan Amendment of 1974 . . . . The effect is to limit reporting to the two intelligence oversight committees, as compared with the seven committees that now receive such reports . . . ." Id. at 5. **[*14]**

Based on the evidence of intent on the part of both the legislative and executive branches that oversight by the intelligence committees would be the exclusive method of congressional oversight concerning intelligence information, we conclude that 50 U.S.C. 413 stands as statutory authority for the Administration to decline to provide GAO with access to any intelligence information sought in the Noriega investigation.

II. **EXECUTIVE PRIVILEGE**

Should GAO, in response to an appropriate direction from Congress, subsequently undertake an investigation properly related to its statutory authority, it would then be necessary to review established principles concerning the maintenance of confidentiality with respect to certain executive branch information. Congressional investigations normally do not pose this problem to the degree suggested by the pending GAO investigation because they are properly tailored to address non-confidential subjects. Disturbingly, and in contrast, the type of information in which GAO expressed interest in its letter of June 23, 1988 suggests a desire to review confidential material generally not available outside the executive branch, such as intelligence, **[*15]** law enforcement, and deliberative process information. n9

n9 This subject is usually discussed in terms of "**executive privilege,**" and we will use that convention here. The question, however, is not strictly speaking just one of **executive privilege.** The privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena.

Since GAO has not yet made any specific requests, we cannot analyze the case for withholding any particular document or information. What we do below is summarize briefly the general **executive privilege** principles that apply in the individual contexts of intelligence, law enforcement, and deliberative process information.

A. Protection of Intelligence Information

In the hierarchy of **executive privilege,** the "protection of national security" constitutes the strongest interest that can be asserted by the President and one to which the courts have traditionally shown the utmost deference. In United States v. Nixon, for instance, the Court contrasted President Nixon's claim of **executive privilege** based on the Executive's general interest in confidentiality with a claim based on the President's national security **[*16]** responsibilities:

> [President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the Courts have traditionally shown the utmost deference to Presidential responsibilities.

418 U.S. 683, 710 (1974).

B. Protection of Law Enforcement Information

With respect to open law enforcement files, it has been the policy of the executive branch throughout our Nation's history to protect these files from any breach of confidentiality, except in extraordinary circumstances. Attorney General Robert H. Jackson well articulated the basic position:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective **[*17]** defendant, could have no greater help than to know how much or how little information that Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

There are, however, circumstances in which the Department of Justice may decide to disclose to Congress information about prosecutorial decisions. This is particularly true where an investigation has been closed without further prosecution. In such a situation concerns about

real or perceived congressional interference with an investigation, and about the effects of undue pretrial publicity on a jury, would disappear. Still, extreme caution must be applied whenever the disclosure of such records is contemplated. Much of the information in a closed criminal enforcement file -- such as unpublished details of allegations against particular individuals and details that would reveal confidential sources and investigative techniques and methods -- would continue to merit protection.

C. Protection of Deliberative Process Information

The Constitution gives the President the power to protect the confidentiality of **[*18]** deliberations within the executive branch. See Nixon v. Administrator of General Services, 433 U.S. 425, 446-455 (1977); United States v. Nixon, 418 U.S. at 708. This is independent of the President's power over foreign affairs or national security, or law enforcement; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." Id. at 708. The Supreme Court has held that, for this reason, communications among the President and his advisers enjoy "a presumptive privilege" against disclosure in court. Id.

The reasons for this privilege, the Court said in United States v. Nixon, are "plain." "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." Id. at 705. Often, an advisor's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisors change their views, or make mistakes which others correct; this is indeed the purpose **[*19]** of internal debate. The result is that advisors are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisors may hesitate -- out of self-interest -- to make remarks that might later be used against their colleagues or superiors. As the Supreme Court has stated, "[a] President and those who assist him 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." Id. at 708.

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information. n10 The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional inquiries. n11

n10 The Supreme Court has assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. See United States v. Nixon, 418 U.S. at 712 n.19. Moreover, in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Court held that the constitutional privilege protects executive branch deliberations from disclosure to members of the same branch in a later administration; the Court rejected the specific claim of privilege in that case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. See id. at 446-455.

n11 During the Watergate investigation the court of appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices. The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725 (D.C. Cir. 1974) (en banc). The court held that the committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." Id. at 731 (emphasis added). **[*20]**

D. Accommodation with Congress

1. Governing Principles

Because a claim of **executive privilege** is not absolute, the executive branch has a duty to seek to accommodate requests that are within Congress' legitimate oversight powers. See United States v. American Telephone & Telegraph Co., 567 F.2d 121, 127-130 (D.C. Cir. 1977) (suggesting that, even when a claim of **executive privilege** rests on national security grounds, the Executive does not enjoy clear and absolute discretion to deny legitimate congressional requests for information, but that each of the two branches must attempt to balance and accommodate the legitimate needs of the other). n12 This duty of accommodation means that the Executive should attempt to satisfy the requests of Congress as completely as it can without making harmful disclosures. See Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning the Gasoline Conservation Fee (Jan. 18, 1981). In this spirit, the Executive has occasionally offered Congress **[*21]** summaries of documents prepared in such a manner as not to disclose, for example, deliberative aspects that might chill executive branch decisionmaking. See id. at 22-23.

n12 It should be emphasized, however, that in United States v. AT&T the information Congress sought related to wiretaps on American citizens placing telephone calls from the United States. Although these wiretaps were justified on national security grounds and the President, in turn, could assert national security as a basis for withholding the information, Congress clearly had a substantial interest in this subject matter, because the wiretaps implicated the individual rights of American citizens. Accordingly, we believe that a court may view the relative weights of executive and legislative interests differently when the information sought relates directly to the conduct of foreign relations rather than to the rights of American citizens.

The nature of the accommodation required in responding to a congressional request for information depends on the balance of interests between the Executive and Congress. In order for its interests to be given weight, Congress must articulate its need for **[*22]** the particular materials; it must "point[ ] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d at 731, 733. n13

n13 In Senate Select Committee, for example, the court held that the committee had not made a sufficient showing of need for copies of the presidential tape recordings, given that the President had already released transcripts of the recordings. The committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events." **498** F.2d at 732. "The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain." Id. at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . . is too attenuated and too tangential to its functions" to override the President's constitutional privilege. Id. **[*23]**

2. Procedural Issues

Only rarely do congressional requests for information result in a subpoena of an executive

branch official or in other congressional action. In most cases the informal process of negotiation and accommodation recognized by the courts, and mandated for this Administration by President Reagan, n14 is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee. n15 At that point, it would be necessary to consider asking the President to assert **executive privilege.** Under the terms of the President's Memorandum, **executive privilege** cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President.

n14 President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" states that "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking **executive privilege,** and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches."

n15 In the current context, such a subpoena could only be issued after GAO had reported to its congressional requester that it was unable to obtain the information from the executive branch. Before requesting that a congressional committee issue a subpoena, GAO might attempt to enforce its request for information pursuant to the judicial enforcement mechanism authorized under 31 U.S.C. 716. Such a course of action could be successfully resisted by the executive branch without a claim of **executive privilege,** however, because judicial enforcement is precluded whenever the Director of the Office of Management and Budget or the President certify that the information could be withheld under exemptions (b)(5) (information withholdable in litigation) or (b)(7) (law enforcement information) of the Freedom of Information Act (5 U.S.C. 552(b)(5), (b)(7)) and "disclosure reasonably could be expected to impair substantially the operations of the Government." 31 U.S.C. 716(d)(1)(C). Upon such a certification, GAO would presumably refer enforcement to the congressional committee. **[*24]**

CONCLUSION

We believe that there are statutory grounds which preclude GAO's present request for access to executive branch agencies for the purposes of conducting the investigation described in its letter of June 23, 1988. Should GAO's request be reformulated in a manner which properly relates it to a congressional interest within the terms of 31 U.S.C. 717(b) and which comports with the statutory restrictions on access to intelligence information found in 50 U.S.C. 413, it will be appropriate at that time to consider the application of additional lawful authority to withhold particular national security, intelligence, law enforcement, or deliberative process information. This Office is available for consultation with respect to requests for particular documents or information.

Douglas W. Kmiec

Acting Assistant Attorney General

Office of Legal Counsel

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*1988 OLC LEXIS 51, *; 12 Op. O.L.C. 171, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

Investigative Authority of the General Accounting Office

1988 OLC LEXIS 51; 12 Op. O.L.C. 171

August 16, 1988

CORE TERMS: intelligence, oversight, law enforcement, intelligence information, foreign policy, national security, statutory authority, disclosure, duty, deliberative process, presidential, investigative, existing law, recordings, tape, constitutional privilege, intelligence committees, accommodation, memorandum, subpoena, diplomatic, advisor's, confidentiality, deliberations, confidential, Intelligence Oversight Act, intelligence agencies, legislative history, policymaking, gathering

SYLLABUS:
[*1]

The General Accounting Office lacks statutory authority to review the Executive's discharge of its constitutional foreign policy responsibilities.

GAO is precluded by the Intelligence Oversight Act from access to intelligence information.

The memorandum also reviews generally the **executive privilege** principles that apply in the contexts of intelligence, law enforcement, and deliberative process information.

ADDRESSEE:
Memorandum Opinion for the Executive Secretary National Security Council

OPINIONBY: KMIEC

OPINION:
[171] Introduction and Summary**

This memorandum is in response to your request for the opinion of this Office on whether, or to what extent, the Administration has a legal basis for declining to cooperate with the pending General Accounting Office ("GAO") investigation concerning U.S. foreign policy decisions with respect to Manuel Noriega. In its June 23, 1988 letter to the National Security Council, GAO described the nature and purpose of the investigation: In order to evaluate whether "information about illegal activities by high level officials of other nations may not be adequately considered in U.S. foreign policy decisions . . ., the General Accounting Office is undertaking an initial **[*2]** case study of how information about General Noriega was developed by various government agencies, and what role such information played in policy decisions regarding Panama." As stated in the National Security Council's response to GAO of July 13, 1988, representatives of GAO have made it clear that GAO's "three areas of interest [are] intelligence files, law enforcement files, and the deliberative process of the Executive branch, including internal communications and deliberations leading to Executive branch actions taken pursuant to the President's constitutional authority."

Specifically, you have asked this Office to advise you as to whether the GAO investigation is within GAO's statutory authority; whether there are statutory or constitutional grounds for denying GAO's request to the extent it is directed specifically at intelligence information, at

law enforcement information, or at deliberative process information; and whether there are other grounds for denying GAO's request in whole or in part. As explained below, we conclude that on the present record the GAO investigation is beyond GAO's statutory investigative **[**172]** authority. n1 Because of this conclusion it is unnecessary **[*3]** to address any constitutional basis for challenging GAO's authority to conduct the investigation. In addition, we are unable to evaluate the strength of any constitutional objection to providing particular information because specific information requests have not yet been made. As a matter of general guidance, however, we outline the constitutional principles which would be applied in evaluating whether particular information can be withheld.>FTNT>

n1 Moreover, in addition to GAO's lack of statutory authority to pursue this investigation, we believe that the Intelligence Oversight Act for Fiscal Year 1981, Pub. L. No. 96-450, § 407, 94 Stat. 1975, 1981 (1980), extinguishes whatever authority GAO might otherwise possess in gaining access to intelligence information.>ENDFN>

I. Authority to Conduct the Investigation

A. GAO's Investigative Authority

1. *Statutory Limitations*

GAO's investigative authority is set forth in subchapter II of chapter 7 of title 31 of the U.S. Code. Except for section 717(b), the various grants of authority in subchapter II are limited to auditing the finances of government agencies and are thus inadequate bases for the GAO Noriega investigation, **[*4]** which clearly goes well beyond a financial audit. *See* 31 U.S.C. §§ 711-715. Accordingly, GAO must base this investigation on its authority in section 717(b) to "evaluate the results of a program or activity the Government carries out *under existing law*." 2 Op. O.L.C. 415, 420 (1978) (emphasis added) (where a GAO investigation goes beyond fiscal matters, GAO's authority must be based on section 204(a), the substantially identical predecessor version of section 717(b)).

We believe as a matter of statutory construction that the phrase "program or activity . . . *under existing law*" must refer only to activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities. n2 The juxtaposition of "program or activity" with "existing law" strongly suggests an intent to refer to statutory responsibilities. Moreover, the use of the qualifier "existing" appears to suggest that the laws at issue are statutes that may lapse rather than constitutional authorities of the President, which are of greater permanence. Finally, the legislative history of section 717(b) confirms that Congress' focus of concern **[*5]** was the oversight of its legislative programs: "It is intended that in performing [evaluations under section 717(b)], the Comptroller General shall review and analyze Government program results in a manner which will assist the Congress to determine whether those programs and activities are achieving the objectives of the law." H.R. Rep. No. 1215, 91st Cong., 2d Sess. 82 (1970). Nothing in the legislative history manifests **[**173]** any congressional intent to extend GAO's investigative authority beyond statutory programs into the Executive's discharge of its constitutional responsibilities. *See* S. Rep. No. 924, 93d Cong., 2d Sess. 72 (1974); S. Rep. No. 202, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 1215, *supra*, at 18, 34, 81-84; 116 Cong. Rec. 24,597 (1970).>FTNT>

n2 The views we express here concerning the limitations on GAO's investigative authority under section 717(b) are not novel. In 1978, the Office opined that GAO's authority under the similarly worded predecessor to 717(b) did not extend to the discharge of the President's constitutional, as opposed to statutory, responsibilities. 2 Op. O.L.C. 415, 420 (1978) ("The appointment of officers of the United States by the President by and with the advice of the Senate does not constitute a Government program or activity carried out under existing law . . . .").>ENDFN> **[*6]**

2. *GAO Has Not Justified its Investigation Under Section 717(b)*

We conclude on the record before us that GAO has not established that it has authority under section 717(b) to pursue this investigation. The subject of the investigation according to GAO is foreign policymaking, a subject matter which is generally within the purview of the President's power under Article II of the Constitution. GAO has failed to assert any interest in evaluating the results of any specific statutory program or activity that may relate to foreign policy.

As this Office has consistently observed, n3 Section 1 of Article II confers on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. *See generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Specifically, the President's constitutional authority includes the authority to negotiate with foreign nations, to articulate the foreign policy of the United States, **[*7]** to carry out diplomatic and intelligence missions, and to protect the lives of Americans abroad. *Id.*>FTNT>

n3 *See, e.g.*, Memorandum for Judith H. Bello, General Counsel, Office of the United States Trade Representative, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Authority to Terminate the International Express Mail Agreement With Argentina Without the Consent of the Postal Service* (June 2, 1988).>ENDFN>

Of course, pursuant to its own substantial authority under the Commerce Clause and its exclusive power of appropriation, Congress has enacted statutes that relate to the foreign policy of the United States. For instance, Congress has appropriated funds for foreign assistance and enacted statutes regulating arms sales to foreign governments. If GAO were to express a specific interest in materials relating to such statutes, there would be reasonable and legitimate questions as to which materials were within the scope of GAO's section 717(b) authority, and which were not.

The request before us, however, does not present these close questions. The GAO letter of June 23, 1988 makes it clear that foreign policymaking is **[*8]** the subject of the GAO investigation, and it provides no basis for concluding that GAO is interested in reviewing Executive foreign policymaking pursuant to statutory authority. The GAO letter states that the GAO investigation is premised on a concern that "information about illegal activities by high level officials of other nations may not be adequately considered in U.S. foreign policy decisions" and that it is directed at learning "what role [information about General Noriega] played in policy decisions regarding Panama." The GAO letter thus demonstrates an interest **[**174]** in our "diplomatic" or "national security" foreign relations with Panama and General Noriega, and provides no basis for concluding that it relates to activities undertaken by the Executive under any specific statute.

We therefore conclude based on the nature of the GAO request that the subject of the GAO investigation is the Executive's discharge of its constitutional foreign policy responsibilities, not its statutory responsibilities. The subject is thus not "a program or activity the Government carries our under existing law," and it is beyond GAO's authority under 31 U.S.C. § 717(b). Accordingly, unless **[*9]** this request is tailored to inquire specifically about a program or activity carried out under existing statutory law, we believe there is no obligation to grant GAO access to executive branch agencies for purposes of conducting this investigation.

B. Intelligence Oversight

In addition to the infirmity in GAO's statutory authority to pursue this investigation, we believe that GAO is specifically precluded by statute from access to intelligence information.

In establishing by law the oversight relationship between the intelligence committees and the executive branch, Congress indicated that such oversight would be the exclusive means for Congress to gain access to confidential intelligence information in the possession of the executive branch. n4>FTNT>

n4 As a general matter, intelligence gathering is often viewed as a form of diplomatic activity that is within the President's Article II powers. As Professor Louis Henkin has noted, "the gathering of information is a principal purpose of sending ambassadors and maintaining diplomatic relations, an exclusive Presidential power. It is only a small extension to conclude that gathering information by any means is part of the President's 'eyes and ears' function. There is, therefore, a strong case for presidential authority to obtain intelligence not only through our embassies but also through our agents representing the Executive . . . ." Letter from Louis Henkin to Representative Louis Stokes, March 31, 1987, *reprinted in H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to Congress: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 100th Cong., 1st Sess. 221 (1987).>ENDFN> **[*10]**

This intelligence oversight system has been codified at 50 U.S.C. § 413. That section sets forth requirements for the Director of Central Intelligence, the heads of all other federal agencies involved in intelligence activities, and the President to inform the Congress through the intelligence committees (and in some circumstances the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate) of intelligence activities.

The legislative history of section 413 makes it clear that both the legislative and executive branches believed they were establishing a comprehensive scheme for congressional oversight of intelligence activities that would constitute the exclusive means of congressional oversight. As President Carter stated when he signed the section into law, it

> establishes, for the first time in statute, a comprehensive system for congressional oversight of intelligence activities . . . . The oversight legislation that was passed . . . codifies the current practice **[**175]** and relationship that has developed between this administration and the Senate and House intelligence committees over the past 3 years. n5

>FTNT>

n5 16 Weekly Comp. Pres. Doc. 2231 (Oct. 14, 1980).>ENDFN> **[*11]**

Senator Huddleston, sponsor of the floor amendment containing the version of section 413 that was enacted into law, emphasized upon the amendment's introduction the comprehensive and exclusive nature of the scheme being established: "this amendment is identical to Senate bill 2284 which the Senate passed by a vote of 89 to 1 on June 3 of this year. It is a bill that establishes the congressional oversight procedures dealing with our intelligence agencies." n6 Senator Huddleston also agreed, in a floor colloquy with Senator Javits on S. 2284, with the following statement by Senator Javits:

> I agree thoroughly with the need for simplifying [the practice of the oversight committees]. There are some seven committees here that could have had this wrestling match with the executive . . . . I am satisfied . . . that the method we now have chosen . . . represents a fair, effective, and objective way in which to accomplish the results of simplifying the intelligence relations between the President and Congress . . . and limiting further the opportunities for misadventure, premature disclosure, and so forth . . . . What we are doing is

> simply legislating . . . a new arrangement or modus **[*12]** vivendi for the handling of information and consultations between Congress and the intelligence agencies n7

>FTNT>

n6 126 Cong. Rec. 17,692 (1980).

n7 126 Cong. Rec. 17,692-93 (1980). Senator Moynihan agreed with the position of Senators Huddleston and Javits that a major purpose of the Intelligence Oversight Act was to reduce the number of congressional committees that sought intelligence information: "there is a rule of intelligence, which the Senator [Javits] knows well from his wartime experience, which is that you protect sensitive information by compartmentation. The more important that matter is the fewer persons you want to know about it . . . ." *Id.* at 17,694.>ENDFN>

The Senate report on S. 2284 also confirms the understanding that congressional oversight with respect to intelligence matters was to be limited to the intelligence committees. In the "general statement" that preceded the section by section analysis, the report noted:

> Out of necessity, intelligence activities are conducted primarily in secret. Because of that necessary secrecy, they are not subject to public scrutiny and debate as is the case for most foreign policy and defense issues. **[*13]** Therefore, the Congress, *through its intelligence oversight committees*, has especially important duties in overseeing these vital activities by the intelligence agencies of the United States. [*50 U.S.C. § 413] is intended to authorize the process by which information concerning intelligence activities* **[**176]** *of the United States is to be shared by the two branches* in order to enable them to fulfill their respective duties and obligations to govern intelligence activities within the constitutional framework. The Executive branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding, without confrontation. The purpose of [section 413] is to carry this working relationship forward into statute. n8

>FTNT>

n8 S. Rep. No. 730, 96th Cong., 2d Sess. 5 (1980) (emphasis added). More specifically, the Senate report stated that "this amendment repeals the congressional reporting requirement of the Hughes-Ryan Amendment of 1974 . . . . The effect is to limit reporting to the two intelligence oversight committees, as compared with the seven committees that now receive such reports . . . ." *Id.* at 5.>ENDFN> **[*14]**

Based on the evidence of intent on the part of both the legislative and executive branches that oversight by the intelligence committees would be the exclusive method of congressional oversight concerning intelligence information, we conclude that 50 U.S.C. § 413 stands as statutory authority for the Administration to decline to provide GAO with access to any intelligence information sought in the Noriega investigation.

II. Executive Privilege

Should GAO, in response to an appropriate direction from Congress, subsequently undertake an investigation properly related to its statutory authority, it would then be necessary to review established principles concerning the maintenance of confidentiality with respect to certain executive branch information. Congressional investigations normally do not pose this problem to the degree suggested by the pending GAO investigation because they are properly tailored to address non-confidential subjects. Disturbingly, and in contrast, the type of information in which GAO expressed interest in its letter of June 23, 1988 suggests a desire

to review confidential material generally not available outside the executive branch, such as intelligence, **[*15]** law enforcement, and deliberative process information. n9>FTNT>

n9 This subject is usually discussed in terms of "**executive privilege,**" and we will use that convention here. The question, however, is not strictly speaking just one of **executive privilege.** The privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena.>ENDFN>

Since GAO has not yet made any specific requests, we cannot analyze the case for withholding any particular document or information. What we do below is summarize briefly the general **executive privilege** principles that apply in the individual contexts of intelligence, law enforcement, and deliberative process information.

A. Protection of Intelligence Information

In the hierarchy of **executive privilege,** the "protection of national security" constitutes the strongest interest that can be asserted by the President and one to **[**177]** which the courts have traditionally shown the utmost deference. In *United States v. Nixon*, for instance, the Court contrasted President Nixon's claim of **executive privilege** based on the Executive's general interest in confidentiality with a claim based on the President's national **[*16]** security responsibilities:

> [President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the Courts have traditionally shown the *utmost deference* to Presidential responsibilities.

418 U.S. 683, 710 (1974) (emphasis added).

B. Protection of Law Enforcement Information

With respect to open law enforcement files, it has been the policy of the executive branch throughout our Nation's history to protect these files from any breach of confidentiality, except in extraordinary circumstances. Attorney General Robert H. Jackson well articulated the basic position:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or **[*17]** prospective defendant, could have no greater help than to know how much or how little information that Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

There are, however, circumstances in which the Department of Justice may decide to disclose to Congress information about prosecutorial decisions. This is particularly true where an investigation has been closed without further prosecution. In such a situation concerns about

real or perceived congressional interference with an investigation, and about the effects of undue pretrial publicity on a jury, would disappear. Still, extreme caution must be applied whenever the disclosure of such records is contemplated. Much of the information in a closed criminal enforcement file such as unpublished details of allegations against particular **[**178]** individuals and details that would reveal confidential sources and investigative techniques and methods would continue to merit protection.

C. Protection of Deliberative Process Information

The Constitution gives the President the power to protect the confidentiality **[*18]** of deliberations within the executive branch. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 446 455 (1977); *United States v. Nixon*, 418 U.S. at 708. This is independent of the President's power over foreign affairs or national security, or law enforcement; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708. The Supreme Court has held that, for this reason, communications among the President and his advisers enjoy "a presumptive privilege" against disclosure in court. *Id.*

The reasons for this privilege, the Court said in *United States v. Nixon*, are "plain." "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." *Id.* at 705. Often, an advisor's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisors change their views, or make mistakes which others correct; this is indeed the purpose of internal debate. **[*19]** The result is that advisors are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisors may hesitate out of self interest to make remarks that might later be used against their colleagues or superiors. As the Supreme Court has stated, "[a] President and those who assist him 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." *Id.* at 708.

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information. n10 The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional inquiries. n11>FTNT>

n10 The Supreme Court has assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. *See United States v. Nixon*, 418 U.S. at 712 n.19. Moreover, in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977), the Court held that the constitutional privilege protects executive branch deliberations from disclosure to members of the *same* branch in a later administration; the Court rejected the specific claim of privilege in that case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. *See id.* at 446-55. **[*20]**

n11 During the Watergate investigation the court of appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices. The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, **498** F.2d 725 (D.C. Cir. 1974) (en banc). The court held that the committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions." *Id.* at 731 (emphasis added).>ENDFN>

[179]** *D. Accommodation with Congress*

1. *Governing Principles*

Because a claim of **executive privilege** is not absolute, the executive branch has a duty to seek to accommodate requests that are within Congress' legitimate oversight powers. *See* United States v. AT&T, 567 F.2d 121, 127 130 (D.C. Cir. 1977) (suggesting that, even when a claim of **executive privilege** rests on national security grounds, the Executive does not enjoy clear and absolute discretion to deny legitimate congressional requests **[*21]** for information, but that each of the two branches must attempt to balance and accommodate the legitimate needs of the other). n12 This duty of accommodation means that the Executive should attempt to satisfy the requests of Congress as completely as it can without making harmful disclosures. *See* Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning the Gasoline Conservation Fee* (Jan. 13, 1981). In this spirit, the Executive has occasionally offered Congress summaries of documents prepared in such a manner as not to disclose, for example, deliberative aspects that might chill executive branch decisionmaking. *See id.* at 22-23.>FTNT>

n12 It should be emphasized, however, that in *United States v. AT&T* the information Congress sought related to wiretaps on American citizens placing telephone calls from the United States. Although these wiretaps were justified on national security grounds and the President, in turn, could assert national security as a basis for withholding the information, Congress clearly had a substantial interest in this subject matter, because the wiretaps implicated the individual rights of American citizens. Accordingly, we believe that a court may view the relative weights of executive and legislative interests differently when the information sought relates directly to the conduct of foreign relations rather than to the rights of American citizens.>ENDFN> **[*22]**

The nature of the accommodation required in responding to a congressional request for information depends on the balance of interests between the Executive and Congress. In order for its interests to be given weight, Congress must articulate its need for the particular materials; it must "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Comm. on Presidential Campaign Activities v. Nixon, **498** F.2d at 731, 733. n13>FTNT>

n13 In *Senate Select Committee*, for example, the court held that the committee had not made a sufficient showing of need for copies of the presidential tape recordings, given that the President had already released transcripts of the recordings. The committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events." **498** F.2d at 732. "The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain." *Id.* at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . . is too attenuated and too tangential to its functions" to override the President's constitutional privilege. *Id.*>ENDFN> **[*23]**

[180]** **2.** *Procedural Issues*

Only rarely do congressional requests for information result in a subpoena of an executive

branch official or in other congressional action. In most cases the informal process of negotiation and accommodation recognized by the courts, and mandated for this Administration by President Reagan, n14 is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee. n15 At that point, it would be necessary to consider asking the President to assert **executive privilege.** Under the terms of the President's Memorandum, **executive privilege** cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President.>FTNT>

n14 President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" states:

> The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . **Executive privilege** will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking **executive privilege,** and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. **[*24]**

n15 In the current context, such a subpoena could only be issued after GAO had reported to its congressional requester that it was unable to obtain the information from the executive branch. Before requesting that a congressional committee issue a subpoena, GAO might attempt to enforce its request for information pursuant to the judicial enforcement mechanism authorized under 31 U.S.C. § 716. Such a course of action could be successfully resisted by the executive branch without a claim of **executive privilege,** however, because judicial enforcement is precluded whenever the Director of the Office of Management and Budget or the President certify that the information could be withheld under exemptions (b)(5) (information withholdable in litigation) or (b)(7) (law enforcement information) of the Freedom of Information Act (5 U.S.C. § 552(b)(5), (b)(7)) and "disclosure reasonably could be expected to impair substantially the operations of the Government." 31 U.S.C. § 716(d)(1)(C). Upon such a certification, GAO would presumably refer enforcement to the congressional committee.>ENDFN>

Conclusion

We believe that there are statutory grounds which preclude GAO's present request for **[*25]** access to executive branch agencies for the purposes of conducting the investigation described in its letter of June 23, 1988. Should GAO's request be reformulated in a manner which properly relates it to a congressional interest within the terms of 31 U.S.C. § 717(b) and which comports with the statutory restrictions on access to intelligence information found in 50 U.S.C. § 413, it will be appropriate at that time to consider the application of additional lawful authority to withhold particular national security, intelligence, law enforcement, or deliberative process information. This Office is available for consultation with respect to requests for particular documents or information.

DOUGLAS W. KMIEC

Acting Assistant Attorney General Office of Legal Counsel

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*1986 OLC LEXIS 55, *; 10 Op. O.L.C. 233*

OPINION OF THE OFFICE OF LEGAL COUNSEL

APPLICABILITY OF **EXECUTIVE PRIVILEGE** TO THE RECOMMENDATIONS OF INDEPENDENT AGENCIES REGARDING PRESIDENTIAL APPROVAL OR VETO OF LEGISLATION

1986 OLC LEXIS 55; 10 Op. O.L.C. 233

December 22, 1986

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

CORE TERMS: recommendation, disapproval, disapprove, advice, confidentiality, approve, removal, decisionmaking process, functional analysis, direct supervision, national security, deliberative, disclosure, advisers

SYLLABUS:
[*1]

In making recommendations to the President to approve or disapprove legislation, an independent agency functions as part of the President's core of executive advisers.

When independent agencies render advice to the President concerning his approval or disapproval of legislation, they are acting in an executive capacity, and such advice can be protected under the doctrine of **executive privilege.**

ADDRESSEE:
MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

OPINIONBY: KMIEC

OPINION:
As part of the internal executive branch process for presenting to the President recommendations for approval or disapproval of legislation, the Office of Management and Budget often solicits the views of the "independent agencies" with respect to legislation of particular concern to them. Their recommendations and comments are consolidated by OMB and communicated to the President along with those of the other concerned agencies and departments.

Because existing precedent separates the "independent agencies" somewhat from the President's direct supervision and control, see, e.g., Humphrey's Executor v. United States, 295 U.S. 602 (1935), the question has arisen as to whether recommendations **[*2]** and comments made by an independent agency in this context, i.e., as advice to the President on his approval or disapproval of legislation, may be protected from disclosure to Congress by the doctrine of **executive privilege.**

A preliminary question, which does not depend on the status of an agency as "independent," is whether Congress has authority to inquire into approval or veto recommendations made to the President. The Supreme Court has acknowledged that the investigative power of

Congress, while broad, is not unlimited. There must be a subject matter for the inquiry, the investigation must be authorized by Congress, there must be a valid legislative purpose, the witness must be accorded certain constitutional protections, and the information demanded must be pertinent to the inquiry. See Gojack v. United States, 384 U.S. 702, 704-05, 714 (1966); Wilkinson v. United States, 365 U.S. 399, 408-09 (1961); Barenblatt v. United States, 360 U.S. 109, 111, 117 (1959); Watkins v. United States, 354 U.S. 178, 187 (1957); United States v. Rumely, 345 U.S. 41, 44-46 (1953); McGrain v. Daugherty, 273 U.S. 135, 173, 176 (1927); Kilbourn **[*3]** v. Thompson, 103 U.S. 168, 190 (1881). The information sought by Congress must be "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725, 731 (D.C. Cir. 1974) (en banc). Congress may of course appropriately request the views of the Executive Branch on pending legislation, as part of its inquiry into the wisdom of and need for the legislation. However, once that legislation has been passed by Congress, the President alone must determine whether it should be approved. The President's authority to approve or disapprove legislation is absolute, unqualified (except insofar as Congress may override a veto through the legislative process), and unreviewable. Because the veto power is one vested exclusively in the President by the Constitution, it is therefore difficult to see how Congress has any legitimate legislative interest in reviewing the exercise of that power. n1

n1 In a similar context -- that of removal of executive branch officers -- the Executive Branch has consistently refused to comply with congressional requests to explore the reasons for dismissal, because under Article II the power to remove Executive Branch officers is exclusively the President's. For example, President Andrew Jackson declined to give the Senate the reasons for dismissal of an executive officer, explaining that "the President in cases of this nature possesses the exclusive power of removal from office, and, under the sanction of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require." 3 J. Richardson, Messages and Papers of the President 133 (Gov't Printing Office ed. 1896). President Cleveland similarly rejected "the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function." 8 J. Richardson, Messages and Papers of the President at 381. In the more recent past, General Omar Bradley refused in 1951 to testify before Senate committees concerning his discussions with President Truman regarding the firing of General MacArthur. General Bradley's refusal was upheld by the Senate Committees on Armed Services and Foreign Relations. Military Situation in the Far East: Hearings before the Sen. Comm. on Armed Services and Sen. Comm. on Foreign Relations, 82d Cong., 1st Sess., Part 2, 832-72 (1951). **[*4]**

Even if Congress can claim a legitimate legislative interest in recommendations made to the President with respect to the approval or disapproval of legislation, it is clear, at least with respect to "nonindependent" Executive Branch agencies, that the doctrine of **executive privilege** may be invoked to prevent disclosure of those recommendations. In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court established in unequivocal terms that the privilege is of constitutional stature. The Court rested this ruling, first, on the need for protection of communications between high government officials and those who assist and advise them, and, second, on the constitutional separation of powers between the three branches:

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional **[*5]** duties. Certain

powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705-06. In determining whether to approve or disapprove legislation, the President needs the benefit of full and frank discussions within the Executive Branch of the merits of the legislation. Recommendations made to the President are therefore quintessentially deliberative type materials that can be protected under the doctrine of **executive privilege.** n2

n2 In order to protect the confidentiality of those recommendations, the privilege would extend as well to drafts and inter- or intra-agency deliberative communications preparatory to making the final recommendation. See generally NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The rationale that justifies withholding this type of material under the doctrine of **executive privilege** is equally applicable to the "independent agencies." In making recommendations to the President to approve or disapprove legislation, an independent **[*6]** agency is functioning as part of the President's core of executive advisers, just as the other departments and agencies. The role played by the various agencies in the process is virtually indistinguishable, regardless of whether the agency is termed "independent" or not. It would be inconsistent with the underlying principle of **executive privilege** -- the need to preserve the integrity of the President's decisionmaking process -- to conclude that recommendations made by a Cabinet agency may be protected, whereas recommendations on the same bill, made as part of the same inter-agency process, cannot be protected.

This functional analysis is consistent with the Supreme Court's view in Humphrey's Executor of the relationship between the President and the independent agencies. Even assuming, arguendo, the continuing validity of Humphrey's Executor, n3 it clearly does not divorce entirely the "independent agencies" from the executive branch. Under Humphrey's Executor, the President may be limited, in certain questions of removal, from asserting direct supervision and control over the "quasi- legislative" or "quasi-judicial" functions of the agencies. Nothing in the decision **[*7]** suggests, however, that when an agency functions in a clearly executive capacity -- such as rendering advice to the President -- it is likewise insulated from direct Presidential supervision. A more detailed discussion of this question can be found in a 1957 opinion of this Office. Memorandum for the Attorney General from W. Wilson White, Assistant Attorney General, Office of Legal Counsel (Nov. 5, 1957). That opinion concludes, based on an analysis of Humphrey's Executor, that, "in many respects the functions and operations of the independent agencies are subject to executive control," and "in such cases the doctrine of **executive privilege** should apply to the independent regulatory commissions to the same extent that it applies to the executive departments and officers of the federal government." A current example of application of this functional analysis is the Executive Order on classification and declassification of sensitive national security information. Executive Order No. 12356, 47 Fed. Reg. 14874 (1982). This order, which is based on the President's supervisory authority over the disclosure of information that may harm the national security (a long-recognized branch **[*8]** of **executive privilege)** applies equally to "independent agencies" and the other executive agencies.

n3 See generally Bowsher v. Synar, 478 U.S. 714, 761 n.3 (1986).

Douglas W. Kmiec

Deputy Assistant Attorney General

Office of Legal Counsel

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*1986 OLC LEXIS 64, *; 10 Op. O.L.C. 91*

OPINION OF THE OFFICE OF LEGAL COUNSEL

RESPONSE TO CONGRESSIONAL REQUESTS FOR INFORMATION REGARDING DECISIONS MADE UNDER THE INDEPENDENT COUNSEL ACT

1986 OLC LEXIS 64; 10 Op. O.L.C. 91

April 28, 1986

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

CORE TERMS: independent counsel, subpoena, contempt, subcommittee, disclosure, prosecutorial, appointment, confidentiality, confidential, investigative, memorandum, notification, legislative history, criminal contempt, investigate, law enforcement, referral, legislative purpose, special prosecutor, speaker, attorney-client, prosecute, authorize, duty, advice, civil action, decision-making, arm, prosecutorial discretion, legal advice

SYLLABUS:
[*1]

With one narrow exception, the Attorney General may not disclose to Congress the contents of any application or report filed with the court pursuant to the Independent Counsel Act unless the court agrees.

All congressional requests for information about a decision regarding the appointment of an independent counsel must be supported by a legitimate legislative purpose. In addition, before such disclosures are made other considerations, such as whether or not to assert **executive privilege,** whether the information is covered by the attorney-client privilege, and whether the information must be kept confidential to preserve the integrity of the prosecutorial function, must be reviewed.

Congress may not, as a matter of statutory or constitutional law, invoke the criminal contempt of Congress procedure against the head of an Executive agency acting on the President's instructions to assert **executive privilege** in response to a congressional subpoena.

An assertion of **executive privilege** must be based upon an evaluation of the Executive Branch's interest in keeping the requested information confidential, the strength of Congress' need for the information, and whether those needs can be accommodated **[*2]** in some other way.

ADDRESSEE:
MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

OPINIONBY: COOPER

OPINION:
I. Introduction and Summary

You have asked this Office to review the legal principles that should inform the Department's response to congressional inquiries about any decision regarding appointment of an independent counsel under the Independent Counsel Act, 28 U.S.C. §§ 591 et seq. (Act). The scope and nature of any such response would, of course, depend on the facts of the particular situation, including the scope and nature of the request, the congressional interests at stake, the status of the investigation and/or decision-making process within the Department, and your judgment as to the particular harm that would result from release of the requested information. To some extent the decision whether or how to respond to such congressional requests must weigh factors, such as political constraints that affect the Department's position vis-a-vis Congress, which are beyond our expertise. Our discussion here is therefore necessarily quite general and is limited to those constitutional and legal considerations that should be reflected in the Department's response to possible congressional inquiries into decisions **[*3]** made under the Act. As we discuss below, we believe that the Department's response to any such inquiry must take account of: (1) the provisions of the Independent Counsel Act requiring that memoranda, reports, and other documents filed with the special division of the court remain confidential unless otherwise authorized by the court; (2) the scope of Congress' legitimate interest in obtaining the information; and (3) the Justice Department's responsibility to protect the integrity of ongoing criminal investigations and of prosecutorial decision-making. These considerations, which flow largely from the constitutionally mandated principle of separation of powers, would also shape any formal Presidential claim of **executive privilege,** in the unlikely event such a claim proves necessary to resist a congressional subpoena.

In addition to our discussion of the substantive legal principles, we outline below the procedural steps that would be involved if Congress pursued its requests through a subpoena, and possible defenses that could be raised to any such subpoena.

II. Confidentiality Requirements of the Independent Counsel Act

The Independent Counsel Act itself contains strict confidentiality **[*4]** requirements. Section 592(d)(2) broadly provides:

> No application or any other documents, materials, or memorandums supplied to the division of the court . . . shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

28 U.S.C. § 592(d)(2).

Other, narrower provisions limit the disclosure of any report finding no grounds for appointment of an independent counsel, n1 as well as the report required to be filed by the independent counsel at the completion of his investigation. n2 Even the name and prosecutorial jurisdiction of any independent counsel appointed by the court remain confidential until an indictment is returned or a criminal information is filed, unless the Attorney General requests public disclosure prior to that time or the court determines "that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice." 28 U.S.C. § 593(b).

n1 If the Attorney General notifies the court under § 592(b)(1) that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," the memorandum filed with the court summarizing the Department's investigation "shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court." 28 U.S.C. § 592(b)(3). **[*5]**

n2 The independent counsel must file a report with the court describing "fully and completely . . . the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted." The court may release this report "to the Congress, the public, or to any appropriate person," subject to "such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution." 28 U.S.C. § 595(b)(2), (3).

The confidentiality provisions were regarded as "crucial to the general scheme" of the Act. S. Rep. No. 170, 95th Cong., 2d Sess. 58 (1978). Congress recognized that "just because a person holds a high level position does not justify making unsubstantiated allegations of criminal conduct public, nor does it justify publicly announcing the initiation of a criminal investigation at a very early stage of the investigation." Id. In fact, Congress contemplated that there would be situations in which an independent counsel would be appointed "when the public is not at all aware **[*6]** that a criminal investigation is underway." Assuming that the independent counsel's investigation does not result in prosecution, "it is conceivable that this whole process could take place without the public even knowing that there were serious allegations against such a high level official." Id.

In cases in which there has already been considerable publicity about the allegations and the requirements of the Independent Counsel Act, Congress recognized that "there does not appear to be any purpose to keeping the fact that application for a special prosecutor has been made confidential." S. Rep. No. 170, supra, at 58. However, even if the court agrees to disclose that an application has been made or to announce the identity and jurisdiction of an independent counsel, "there may still be justification for keeping the contents of an application for a special prosecutor . . . confidential because of unsubstantiated allegations and other information which may be contained in the application for appointment." Id.

The language of the Act's confidentiality provisions that the documents "shall not be revealed to any individual outside the division of the court or the Department **[*7]** of Justice" is carefully drafted, and on its face prohibits disclosures to Congress no less than disclosures to the public. The legislative history of the Act supports this interpretation of the statute's unambiguous language. "The contents of the report by the Attorney General after a preliminary finding of some impropriety is to remain secret, available only to the court and I presume, to the special prosecutor, but may not be released to the public or to Congress without of special leave of this new court." 124 Cong. Rec. 3462 (1978) (remarks of Rep. Wiggins) (emphasis added). n3

n3 Although the language of the confidentiality provisions refers only to documents actually filed with the court, the provisions obviously cannot lawfully be circumvented by disclosing the contents of the documents. See 124 Cong. Rec. at 3462 ("The contents of the report . . . are to remain secret . . . ."); S. Rep. No. 170, supra, at 58.

In general, then, the Act restricts the Attorney General's ability to of disclose to Congress the contents of any application or report filed with of the court, unless and until the court agrees. This blanket confidentiality requirement, however, is **[*8]** subject to a narrow exception triggered when Congress requests under § 595(e) n4 that the Attorney General apply for an independent counsel. If the Attorney General receives such a request, he is required to "provide written notification of any action . . . taken in response to such request and, if no application has been made to the division of the court, why such application was not made." 28 U.S.C. § 595(e). Because such a notification must necessarily disclose at least some information that is included in the confidential report filed with the court, § 595(e) appears to create a narrow exception to the general rule of confidentiality. n5

n4 Section 595(e) of the Act authorizes "[a] majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress" to request the Attorney General to apply for the appointment of an

independent counsel. 28 U.S.C. § 595(e).

n5 Disclosure is not authorized to the public, although the committee may, either "on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual." 28 U.S.C. § 595(e). **[*9]**

The legislative history of this provision suggests, however, that the scope of the required notification is very limited; disclosure of particular details of the investigatory findings and the prosecutorial decision is not contemplated:

> The Attorney General might respond that he had already applied for the appointment of a special prosecutor or he might respond that upon the conclusion of a preliminary investigation, he made a finding and filed the requisite memorandum indicating that the matter was so unsubstantiated as to not warrant further investigation or prosecution. If no application for the appointment of a special prosecutor has been made to the division of the court, the Attorney General is required to explain the specific reasons why a special prosecutor is not required under the standard set forth in § 592(e). If the reason for not appointing a special prosecutor is the fact that the matter is so unsubstantiated as to not warrant further investigation or prosecution, the Attorney General's explanation under this subsection need only state that fact. The Committee does not intend that the Attorney General go into any detail with regard to the basis for the decision **[*10]** made in the exercise of his prosecutorial discretion that a matter simply did not warrant any further investigation or prosecution after the conclusion of a preliminary investigation.

S. Rep. No. 170, supra, at 72 (emphasis added). That history also makes clear that Congress contemplated that the names of implicated individuals would be included in the required notification. n6

n6 In discussing cases in which the information contained in the notification should be kept confidential by Congress, the Senate Report specifically notes that "the Committee . . . may decide to delete the names of individuals mentioned in the notification especially if those individuals are not the subject of the alleged criminal activity." S. Rep. No. 170, supra, at 73.

Based on this legislative history and the overriding concern reflected in the Act with preserving confidentiality, we believe that, unless the court has approved disclosure, the notification required by § 595(e) need (and may) encompass only a statement that an application for an independent counsel has been filed as to a particular individual or individuals, or that after investigation the Attorney General determined that **[*11]** the allegations against particular individuals did not warrant further investigation. Obviously, if the Attorney General determined, on some ground other than the sufficiency and credibility of the evidence, that he need not apply for an independent counsel -- for example, if he determined that the facts, if true, would nonetheless not constitute a non-petty criminal offense or that the individual is not covered by the Act -- the notification to Congress would set forth that rationale. n7

n7 Similarly, if the Attorney General applies for an independent counsel for an individual not named in § 591(b), because investigation by the Department "may result in a personal, financial, or political conflict of interest," 28 U.S.C. § 591(c), he would have to provide some specific description of the facts giving rise to the conflict.

The Act also contemplates that the independent counsel will provide "from time to time"

reports to Congress and to the public containing "such information as the independent counsel deems appropriate," 28 U.S.C. § 595(a), and that the independent counsel "shall advise the House of Representatives of any substantial and credible information which such independent **[*12]** counsel receives that may constitute grounds for an impeachment." Id. § 595(c). Oversight jurisdiction "with respect to the official conduct of any independent counsel" is given to the "appropriate committees of Congress" and the independent counsel "shall have the duty to cooperate with the exercise of such oversight jurisdiction." Id. § 595 (d). The legislative history of these provisions governing disclosures by the independent counsel is sparse and provides little guidance as to what extent the independent counsel would be bound by the Act's confidentiality restrictions when making such disclosures.

III. Protecting the Integrity of Criminal Investigations

A separate consideration is how disclosure of information about any independent counsel decision would affect the Attorney General's responsibilities as the Nation's chief law enforcement officer and the ability of the Department to investigate and prosecute criminal offenses. n8 There are a number of factors, arising out of the separation of powers between the executive and legislative branches, that should be weighed in making that determination.

n8 Obviously, to the extent the confidentiality provisions of the Independent Counsel Act bar disclosure, the more generalized considerations we outline here need not be considered. However, there may be some information such as details of the deliberative process that are not encompassed by the confidentiality restrictions of the Act, or are not reflected in the report filed with the court. Moreover, at some point the court might authorize disclosure of some or all information contained in the report, which would remove any statutory bar to further disclosures.

[*13]

A. Constitutional Division of Responsibilities

Article II of the Constitution places the power to enforce the laws solely in the Executive Branch of government. The executive therefore has the exclusive authority to enforce the laws adopted by Congress, and neither the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the Executive Branch by directing the executive to prosecute particular individuals. n9 United States v. Nixon, 418 U.S. 683, 693 (1974); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1869); Smith v. United States, 375 F.2d 243, 247 (5th Cir.), cert. denied, 389 U.S. 841 (1967); United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979); accord Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967). The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. See United States v. Lovett, 328 U.S. 303, 317 (1946); INS v. Chadha, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring). n10 "'When the legislative and executive powers are united in the same person or **[*14]** body,' says [Montesquieu] 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.'" The Federalist No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original).

n9 For this reason the executive branch has expressed constitutional qualms about the Act itself, which allows an individual not appointed by the President or an officer of the executive branch nonetheless to carry out prosecutorial functions. Despite these doubts, the Department of Justice has thus far taken the position that it will abide by the provisions of the Independent Counsel Act. See Letter to Michael Davidson, Senate Legal Counsel from William French Smith,

Attorney General (Apr. 17, 1981), reprinted in Hearings on the Ethics in Government Act Amendments of 1982 before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 115 (1982).

n10 In fact, the Constitution specifically excludes Congress from the decision whether to prosecute particular cases. A legislative effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based. See Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 853-54 (1984); United States v. Brown, 381 U.S. 437, 447 (1965); United States v. Lovett, 328 U.S. at 315. **[*15]**

The constitutional role of Congress is to adopt general legislation that will be implemented "executed" by the Executive Branch. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810). The courts have recognized that this general legislative interest gives Congress broad rein to investigate. Both Houses of Congress have broad power, "through their own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." McGrain v. Daugherty, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975), provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." Watkins v. United States, 354 U.S. **[*16]** 178, 187 (1957). See also McGrain v. Daugherty, 273 U.S. at 177 (inquiry must pertain to a subject "on which legislation could be had"). This sphere of legitimate legislative activity "is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution." Barenblatt v. United States, 360 U.S. 109, 111 (1959). See also Watkins v. United States, 354 U.S. at 187. The power of investigation can be delegated by either House of Congress to committees, subcommittees, or even individual legislators, see Eastland v. United States Servicemen's Fund, 421 U.S. at 505; Watkins v. United States, 354 U.S. at 200-01, as long as "the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity." Id. at 201. The scope of judicial inquiry on these matters is narrow, and "'should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.'" Eastland v. United States Servicemen's Fund, 421 U.S. at 506, (quoting Tenny v. Brandhove, 341 U.S. 367, 378 (1951)).

Nonetheless, the investigative power **[*17]** of Congress is not unlimited. Congress cannot, for example, inquire into matters "which are within the exclusive province of one of the other branches of Government . . . . Neither can it supplant the Executive in what exclusively belongs to the Executive." Barenblatt v. United States, 360 U.S. at 111; see also Kilbourn v. Thompson, 103 U.S. 168, 192 (1881) (Congress cannot exercise judicial authority). Congress must be able to articulate a legitimate legislative purpose for its inquiry; if Congress lacks constitutional authority to legislate on the subject (or to authorize and appropriate funds), arguably Congress has no jurisdiction to inquire into the matter. n11

n11 Moreover, there must be a subject matter for the inquiry, the investigation must be authorized by Congress, there must be a valid legislative purpose, the

witness must be accorded certain constitutional protections, and the information demanded must be pertinent to the inquiry. See Gojack v. United States, 384 U.S. 702, 704-05, 714 (1966); Wilkinson v. United States, 365 U.S. 399, 408-09 (1961); Barenblatt v. United States, 360 U.S. at 111; Watkins v. United States, 354 U.S. at 187; United States v. Rumely, 345 U.S. 41, 44-46 (1953); McGrain v. Daugherty, 273 U.S. at 173, 176; Kilbourn v. Thompson, 103 U.S. at 190.
[*18]

Accordingly, a threshold inquiry that should be made upon receipt of any congressional request for information is whether the request is supported by any legitimate legislative purpose. n12 The clearest application of this constraint on congressional requests for information is with respect to matters that are vested exclusively in the President (such is as the removal of executive officers). n13 Given the breadth of Congress' legislative jurisdiction, particularly its authority regarding the appropriation of funds, it may be difficult to articulate more precise limits. With respect to decisions made by the Attorney General under the Independent Counsel Act, we believe that Congress could not justify an investigation based on its disagreement with the prosecutorial decision regarding appointment of an independent counsel for a particular individual. Congress simply cannot constitutionally second-guess that decision. Congress does, however, have a legitimate legislative interest in overseeing the Department's enforcement of the Independent Counsel Act and relevant criminal statutes and in determining whether legislative revisions to the Act should be made. Given the general judicial **[*19]** reluctance to look behind congressional assertions of legislative purpose, such an assertion would likely be deemed sufficient to meet the threshold requirement for congressional inquiry.

n12 The relevance of this inquiry is not limited to the question whether the Department should respond, but affects also how it should respond. If Congress' legitimate legislative interest is relatively narrow, the Department may be able to satisfy the inquiry without disclosing confidential information.

n13 For example, the Director of the Office of Personnel Management recently refused to answer questions asked by a congressional subcommittee concerning the removal of the Deputy Director of OPM, on the ground that the removal was a judgment that rested exclusively with the President. The appointment of officers presents a somewhat more difficult problem, at least for those officers who must be appointed with the advice and consent of the Senate. In such cases, the Senate can claim a legitimate interest in obtaining information about the nominee.

B. **Executive Privilege**

Assuming that Congress has a legitimate legislative purpose for its inquiry, the Executive Branch's interest in **[*20]** keeping the information confidential must be assessed. That interest is usually discussed in terms of "**executive privilege,**" and we will use that convention here. The question, however, is not strictly speaking just one of **executive privilege.** Although the considerations that support the concept and assertion of **executive privilege** apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to an informal congressional request for information, the Executive Branch is not necessarily bound by the limits of **executive privilege.**

1. Constitutional Basis of **Executive Privilege**

The Constitution nowhere states that the President, or the Executive Branch

generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution, has been asserted by numerous Presidents from the earliest days of our Nation, and has been explicitly recognized by the Supreme Court. United States **[*21]** v. Nixon, 418 U.S. at 705-06.

2. Protection of Law Enforcement Files

Although the principle of **executive privilege** is well established, there are few clear guidelines regarding its practical application. The privilege has most frequently been asserted in the areas of foreign affairs and military and domestic secrets, but it has also been invoked in a variety of other contexts. In 1954, President Eisenhower asserted that the privilege extends to deliberative communications within the Executive Branch. In a letter to the Secretary of Defense, he stated:

> Because it is essential to effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents **[*22]** or reproductions . . . .

1954 Pub. Papers 483-84 (May 17, 1954).

Moreover, the policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances. This policy with respect to Executive Branch investigations was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files. See "History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress" (Part I), 6 Op. O.L.C. 751 (1982).

This policy is grounded primarily on the need to protect the government's ability to prosecute fully and fairly. Attorney General Robert H. Jackson articulated the basic position over forty years ago:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative **[*23]** reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941). Similarly, this Office has explained that "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." Memorandum for Edward L. Morgan, Deputy Counsel to the President from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. **[*24]** 19, 1969). Other grounds for objecting to the disclosure of law enforcement files include the potential damage to proper law enforcement that would be caused by the revelation of sensitive techniques, methods, or strategy; concern over the safety of confidential informants and the chilling effect on other sources of information; sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law; and well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process.

Quite apart from the concern that disclosure would prejudice the particular prosecution prompting congressional inquiry is the purely internal concern that disclosure might hamper prosecutorial decision-making in future cases. Cf. United States v. Nixon, 418 U.S. at 708. Employees of the Department would likely be reluctant to express candidly their views and recommendations on controversial and sensitive matters if those views could **[*25]** be exposed to public scrutiny by Congress upon request.

In addition, potential targets of enforcement actions are entitled to protection from premature disclosure of investigative information. It has been held that there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952). Pretrial publicity originating in Congress, therefore, can be attributed to the government as a whole and can require postponement or other modification of the prosecution on due process grounds. Ibid. Moreover, a person who is ultimately not prosecuted may be subjected to unfair and prejudicial publicity and thus suffer substantial and lasting damage to his professional and community standing based on unfounded allegations. n14

n14 Department of Justice officials, as attorneys, are directed to observe the Code of Professional Responsibility to the extent it does not prevent their loyal service to the United States. See 28 C.F.R. § 45.735-1. The Code prohibits a lawyer who is associated with an investigation from making or participating in making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration" already public or highly generalized information about the matter. Model Code of Professional Responsibility, DR 7-107(A) (1979). **[*26]**

There are, of course, circumstances in which the Attorney General may decide to disclose to Congress information about his prosecutorial decisions. Once an investigation has been closed without further prosecution, many of the considerations previously discussed lose some of their force. Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution; likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear. Still, such records should not automatically be disclosed to Congress. Obviously, much of the information in a closed criminal enforcement file such as unpublished details of allegations against particular individuals and details that would reveal confidential sources, and investigative techniques and methods would continue to need protection (which may or may not be adequately afforded by a confidentiality agreement with Congress). In addition, the Department and the Executive Branch have a long-term institutional interest in maintaining the integrity **[*27]** of the prosecutorial decision-making process. The Supreme Court has recognized that "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 decision-making process." United States v. Nixon, 418 U.S. at 705. It therefore is important to weigh the potential "chilling effect" of a disclosure of details of the deliberative process against the immediate needs of Congress and of the Department. After assessing all of these factors, on occasion the Department has briefed Congress on prosecutorial decisions and has disclosed some details of the underlying investigation, once the investigation has been closed.

3. Attorney-Client Communications

Some of the communications relevant to an Independent Counsel Act decision could conceivably fall within the scope of the common law evidentiary privilege for attorney-client communications. n15 Although the attorney-client privilege may be invoked by the government in litigation and under the Freedom of Information Act separately from any "deliberative process" privilege, n16 it is not generally considered **[*28]** to be distinct from the **executive privilege** in any dispute between the executive and legislative branches. The interests implicated under common law by the attorney-client privilege generally are subsumed by the constitutional considerations that shape **executive privilege,** and therefore it is not usually considered to constitute a separate basis for resisting congressional demands for information. As this Office has previously noted, for the purpose of responding to congressional requests, communications between the Attorney General, his staff, and other Executive Branch "clients" that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications. See Confidentiality of the Attorney General's Communications in Counseling the President," 6 Op. O.L.C. 481, 490 & n.17, 494 & n.24 (1984). n17

n15 The attorney-client privilege generally embraces confidential disclosures of a client to his attorney, made in order to obtain legal assistance and not for the purpose of committing a crime or tort. 8 Wigmore, Evidence § 2290 (McNaughton rev. 1961). In order to prevent inadvertent disclosures, either directly or by implication, of information which the client had previously confided to the attorney, as well as to foster the attorney's ability to give sound and informed professional advice, the privilege has generally been extended to include an attorney's communications to his client. Mead Data Central v. Department of the Air Force, 566 F.2d 242, 252-55 (D.C. Cir. 1977). **[*29]**

n16 See, e.g., Brinton v. Department of State, 636 F.2d 600, 605 (D.C. Cir.

1980), cert. denied, 452 U.S. 905 (1981); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d at 252; Coastal States Gas Corp. v. DOE, 617 F.2d 854, 865 (D.C. Cir. 1980); 5 U.S.C. § 552(b)(5) (documents exempted from mandatory disclosure under the Freedom of Information Act include those "which would not be available by law to a party . . . in litigation with the agency").

n17 Likewise, communications that would be protected in litigation or under the Freedom of Information Act by the work product privilege would generally be considered part of the government's deliberative process, and therefore subsumed under **executive privilege,** for the purpose of responding to congressional requests for information. See generally 6 Op. O.L.C. at 497-98 n.32.

Nonetheless, when the Attorney General is acting in his role as the President's chief legal adviser, his communications to the President may warrant greater confidentiality than those of some other Cabinet advisers, in because of the nature of the Attorney General's responsibilities to the executive and **[*30]** his special areas of expertise, e.g., legal advice and law enforcement. This Office has previously emphasized the particular importance of protecting the President's ability to receive candid legal in advice:

> The reasons for the constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved. None of the President's obligations is more solemn than his duty to obey the law. The Constitution itself places this responsibility on him, in his oath of office and in the requirement of article II, section 3 that "he shall take Care that the laws be faithfully executed." Because this obligation is imposed by the Constitution itself, Congress cannot lawfully undermine the President's ability to carry it out. Moreover, legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, objective, expert advice. As crucial as frank debate on policy matters is, "it is even more important that legal advice be candid, objective, and even blunt or harsh," see United States v. Nixon, 418 U.S. at 708 (1974), where necessary. Any other approach would jeopardize **[*31]** not just particular policies and programs but the principle that the government must obey the law. For these reasons, it is critical that the President and his be able to seek, and give, candid legal advice and opinions free of the fear of compelled disclosure.

Memorandum for the Attorney General re "The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning the Gasoline Conservation Fee" (Jan. 13, 1981).

4. Independent Counsel Act Decisions

We believe that these considerations we have outlined apply to decisions whether to recommend appointment of an independent counsel no less than they apply to any other prosecutorial decision made by this Department. Although the ultimate decision whether to prosecute a particular individual rests with the independent counsel, the threshold decisions whether to investigate and whether to recommend appointment of an independent counsel are critical steps in that ultimate prosecutorial judgment. The decision whether "there are reasonable grounds to believe that further investigation or prosecution is warranted" is

quintessentially a prosecutorial decision, akin to those made **[*32]** every day in the course of the Department's enforcement of the criminal laws. In fact, the Act specifically recognizes that the Attorney General's decision whether to seek appointment of an independent counsel is unreviewable by the courts, like any other exercise of prosecutorial discretion. n18

n18 The Act provides that the Attorney General's decision to apply for appointment of an independent counsel "shall not be reviewable in any court." 28 U.S.C. § 592(f). The nonreviewability provision applicable to the Attorney General's decision not to seek appointment is phrased in somewhat different terms. Under § 592(b)(1), if the Attorney General reports to the court that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," the court "shall have no power to appoint an independent counsel." Id. § 592(b)(1). In Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984), the Court of Appeals held that this provision was intended by Congress to bar any "judicial review, at the behest of members of the public, of the Attorney General's decisions not to investigate particular allegations and not to seek appointment of independent counsel." **[*33]**

A decision not to apply for an independent counsel could be treated as a closed investigation, in accordance with the Department's practice. If the Attorney General seeks appointment of an independent counsel, however, the investigation would be very much alive, as the independent counsel would step into the Department's shoes and continue the investigation into the allegations of wrongdoing. n19 In fact, the Department could still be quite involved in assisting the independent counsel, including providing information, personnel, and other resources. See 28 U.S.C. § 594(d). It seems clear, therefore, that all the considerations that counsel against disclosure of information relevant to open investigations being conducted by the Department itself apply equally when the investigation is being conducted by the independent counsel.

n19 It could be argued that even if the Attorney General applies to the court for appointment of an independent counsel, the Department's investigations may technically be considered "closed," because § 597(a) requires the Department to "suspend all investigations and proceedings regarding a matter within the prosecutorial discretion of an independent counsel" unless the independent counsel "agrees in writing that such investigation or proceedings may be continued by the Department of Justice." For the reasons set forth above, we believe this argument is without merit. **[*34]**

The more difficult question is whether any distinction between "closed" and "open" investigations could or should be drawn in a case in which the Attorney General determines that the evidence warrants further investigation of some, but not all, of those individuals against whom allegations have been directed. That determination would rest in large part on the facts and documents at issue and would in most cases probably require a particularized judgment as to whether some information relating to "closed" cases could be reasonably segregated and disclosed to Congress without undue risk of prejudicing the independent counsel's "open" investigation. We are obviously not in a position to make that judgment, and would defer to the Criminal Division. It seems to us, however, that in many, perhaps most, cases the evidence may be so intertwined that no separation is possible. In other cases, especially those of a simple nature in which the allegations against particular individuals are only marginally related, separation may be feasible.

In addition, because the Attorney General's decision not to seek an independent counsel for particular individuals must be based on his determination that

[*35] "there are no reasonable grounds to believe that further investigation or prosecution is warranted, "the interests of those individuals in continued confidentiality would seem particularly strong. Moreover, even though the decision by the Attorney General not to seek appointment of an independent counsel is nonreviewable, in an interrelated investigation the possibility always exists that the independent counsel's investigation may uncover new information that will result in further investigation. n20

n20 The independent counsel's jurisdiction is, of course, limited to that specified by the court, based on the application filed by the Attorney General. See 28 U.S.C. §§ 592(d)(1), 593(b), 594(a). Although the language of the Act, see 28 U.S.C. §§ 592(d)(1), 593(b), and its legislative history, see S. Rep. No. 170, supra, at 64, suggest that the court may have some flexibility in defining the independent counsel's jurisdiction, we do not believe that the court can grant the independent counsel -- or that the independent counsel can assume -- any jurisdiction in excess of that recommended by the Attorney General. Any other interpretation would completely circumvent the clear congressional judgment that the Attorney General's decision whether to seek an independent counsel be unreviewable. In addition, the Act itself provides several avenues by which the jurisdiction of the independent counsel could be expanded, all of which require the participation of the Attorney General. For example, if the Attorney General receives additional information "sufficient to constitute grounds to investigate about the matter to which such memorandum related," his obligation to investigate and report is renewed, see 28 U.S.C. § 592(c)(2); the Attorney General may ask the independent counsel "to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction," id. § 592(e); and the independent counsel himself may ask the Attorney General or the court to "refer matters related to his prosecutorial jurisdiction" or "may accept referral of a matter by the Attorney General," see id. § 594(e). Finally, our constitutional qualms about the role of the independent counsel would be considerably exacerbated if the critical decision as to what individuals and offenses may be prosecuted were taken completely out of the hands of the Attorney General. **[*36]**

Thus, we believe there are strong constitutional and policy considerations, flowing from the doctrine of separation of powers, the obligation to preserve the integrity of the prosecutorial function, and the need to protect the rights of those who are the target of criminal investigations, that should inform and guide the Department's response to a congressional request for information about independent counsel decisions. It may be that any such request could be accommodated through a process of negotiation with Congress. Only rarely do congressional requests for information result in a subpoena of an Executive Branch official or in any congressional action. In most cases the informal process of negotiation and accommodation mandated by President Reagan in his November 4, 1982, Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" is sufficient to resolve any dispute. n21 On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee. At that point, it would be necessary to consider what procedures and defenses are available to the Executive Branch. **[*37]**

n21 That memorandum states that "the policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . . **Executive privilege** will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the

Executive Branch have minimized the need for invoking **executive privilege,** and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches."

We outline below some of the issues that would be raised if Congress subpoenaed the Attorney General in connection with a congressional request for information about an independent counsel decision. Our particular focus here is on the House of Representatives, because it is far more likely that such action would be taken by the House than by the Senate.

IV. Subpoena Authority of the House of Representatives

A. Basis of Subpoena Authority

As previously noted, Congress has a broad, but not unlimited, investigative authority. **[*38]** See McGrain v. Daugherty, 273 U.S. at 174. This investigative authority necessarily presupposes some means of compelling the cooperation of contumacious witnesses:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it. Experience has taught that mere requests for such information are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

Id. at 175. Because the subpoena power is regarded as inherent in Congress' Article I power, it does not require enactment of a statute. Nonetheless, the exercise of subpoena power must be authorized by the relevant House. See, e.g., Reed v. County Commissioners, 277 U.S. 376, 389 (1928); McGrain v. Daugherty, 273 U.S. at 158.

Since 1974, the House Rules have given standing committees and subcommittees the authority to authorize and issue subpoenas. n22 **[*39]** House Rule XI(m)(1)(B) authorizes any committee or subcommittee "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary." Subpoenas may be issued by a committee or subcommittee "only when authorized by a majority of the members voting, a majority being present," except that " the power to authorize and issue subpoenas . . . may be delegated to the chairman of the committee pursuant to such rules and under such limitations as the committee may prescribe." House Rule XI(m)(2)(A). Any authorized subpoena must be signed by the chairman of the committee or by a member designated by the chairman. Id. The rules of each standing committee flesh out somewhat the requirements for issuance of a subpoena, specifying in particular if, or under what circumstances, the chairman of the full committee may issue a subpoena without a vote of the committee.

n22 Prior to adoption of the Hansen proposals in 1974, subpoena authority was granted only on a case-by-case basis. See Congressional Quarterly, Guide to the Congress 164 (1982).

B. Enforcement **[*40]** of Subpoenas

If a subpoenaed witness refuses to respond fully to a subpoena, the subcommittee or committee, as the case may be, can vote to hold the witness in contempt of Congress. As a matter of consistent historical practice, a contempt of Congress vote by a subcommittee is referred to the full committee, although there appears to be no technical requirement to interpose committee approval between a subcommittee contempt resolution and referral to the full House. n23

n23 The courts have underscored the importance of the procedural safeguards built into the contempt of Congress process and, in particular, the multiple steps of review that must take place before a contempt of Congress prosecution is brought. See Wilson v. United States, 369 F.2d 198, 203 (D.C. Cir. 1966); see also United States Fund v. Eastland, 488 F.2d 1252, 1260 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 491 (1975); Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972); Ansara v. Eastland, 442 F.2d 751, 754 (D.C. Cir. 1971). It could therefore be argued that committee consideration of a subcommittee contempt resolution would be necessary in order to provide an additional check upon the contempt of Congress process. No court, however, has so held, and we have not found any requirement in the House or any committee rules for referral to the full committee. Neither have we found any instance in which a subcommittee referred a contempt resolution directly to the House, without seeking approval from the full committee. For example, the contempt resolution voted by the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation against EPA Administrator Burford was referred to the full Committee, and reported by that Committee to the House. **[*41]**

By operation of House Rule XI(m)(2)(B), any action to enforce compliance with a committee or subcommittee subpoena must be approved by and the House. See In re Beef Industry Antitrust Litigation, 589 F.2d 786, 790 (5th Cir. 1979) (House approval required for intervention in private antitrust suit to gain access to documents subpoenaed by subcommittee from d a party to the litigation); see generally Wilson v. United States, 369 F.2d 198, 201 (D.C. Cir. 1966) (suggesting that referrals under 2 U.S.C. §§ 192-194 require a vote of the full House or Senate, except during adjournments).

The House would have three alternatives available to enforce the subpoena: (1) referral to the United States Attorney for prosecution under 2 U.S.C. §§ 192-194; (2) arrest by the Sergeant-at-Arms; or (3) a civil suit seeking declaratory enforcement of the subpoena. The first two of these alternatives may well be foreclosed by advice previously rendered by this Office.

1. Referral Under 2 U.S.C. §§ 192-194

The criminal contempt of Congress statute contains two principal sections, 2 U.S.C. §§ 192 and 194. n24 Section 192, which sets forth the criminal offense of contempt of Congress, provides in **[*42]** pertinent part:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $ 1,000 nor less than $ 100 and imprisonment in a common jail for not less than 1 month nor

more than 12 months. n25

n24 A third provision, 2 U.S.C. § 193, denies the existence of any testimonial privilege for a witness to refuse to testify on the ground that his testimony would disgrace him.

n25 This statute has been found constitutionally valid as a punitive supplement to Congress' inherent coercive power to imprison for contempt. See, e.g., United States v. Fort, 443 U.S. 670, 677 (D.C. Cir. 1970), cert. denied, 403 U.S. 942 (1971).

Section 194 imposes certain responsibilities on the Speaker of the House or the President of the Senate, as the case may be, and on the United States Attorney to take **[*43]** actions leading to the prosecution of persons certified by a House of Congress to have failed to produce information in response to a subpoena. It provides:

Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House . . . or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States Attorney, whose duty it shall be to bring the matter before the Grand Jury for its action.

Under this provision, the committee would refer a resolution **[*44]** of contempt to the House, which would then have to approve the resolution and instruct the Speaker to certify the contempt to the United States Attorney for presentation to the grand jury. n26

n26 By its terms, § 194 would permit the Speaker (or President pro tempore) to certify a contempt without the approval of the House, if the House were not in session. This option, however, would appear to be foreclosed by the House rules, which clearly require full House approval for any enforcement action.

The contempt of Congress procedure has been used only once against an Executive Branch official who refused to comply with a subpoena on **executive privilege** grounds. In 1982, EPA Administrator Burford, acting at the President's direction, refused to release certain enforcement sensitive documents in response to a subpoena from the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation. The Subcommittee and subsequently the full Committee approved a contempt of Congress resolution, and on December 16, 1982, the full House adopted the resolution. On December 17, Speaker O'Neill certified the contempt to the United States Attorney for the **[*45]** District of Columbia for prosecution under § 192. The United States Attorney declined to refer the contempt citation to the grand jury, pending resolution of a lawsuit filed by the Executive Branch to block enforcement of the subpoena n27 and completion of negotiations between the executive and

legislative branches to reach a compromise settlement. n28

n27 United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

n28 Those negotiations eventually resulted in an agreement and withdrawal of the contempt citation.

During the EPA matter, this Office rendered advice to the Attorney General, since memorialized in a memorandum, on the applicability of §§ 192 and 194 to Executive Branch officials who assert claims of **executive privilege** on behalf of the President. n29 In brief, we concluded that a United States Attorney is not required to refer a contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President's instruction to assert **executive privilege.** Our conclusion rested partly on the need to preserve traditional prosecutorial discretion, i.e., that Congress may not direct the executive to **[*46]** prosecute a particular individual without leaving any discretion in the executive to determine whether a violation of the law has occurred. We also concluded more broadly, however, that the contempt of Congress statute simply was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of **executive privilege.** We noted that neither the legislative history nor the subsequent implementation of §§ 192 and 194 suggest that Congress intended the statute to apply to executive officials who carry out a Presidential assertion of **executive privilege.** Moreover, as a matter of constitutional law, we concluded that the threat of criminal prosecution would unduly chill the President's ability to protect presumptively privileged Executive Branch deliberations:

> The President's exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that **[*47]** official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks, even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.

8 Op. O.L.C. at ___. Therefore, Congress could not, as a matter of statutory or constitutional law, invoke the criminal contempt of Congress procedure set out in 2 U.S.C. §§ 192 and 194 against the head of an Executive Branch agency, if he acted on the instructions of the President to assert **executive privilege** in response to a congressional subpoena.

n29 See "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of **Executive Privilege,**" 8 Op. O.L.C. ___ (1984).

2. Inherent Contempt Power of Congress

The second alternative is for the House **[*48]** to instruct the Sergeant-at-Arms to arrest the Executive Branch official and detain him in the Capitol guardroom. The arrest could then be challenged by application for a writ of habeas corpus. 28 U.S.C. §§ 2241 et seq.

The Supreme Court has ruled in the past that Congress has the inherent constitutional authority to imprison individuals for contempt. See Jurney v. MacCracken, 294 U.S. 125 (1935); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). The authority is one of self preservation and is accordingly limited to "the least possible power adequate to the end proposed." Id. at 231.

Although the authority has been cited by a court as recently as 1970, see United States v. Fort, 443 F.2d at 676, Congress has not attempted to use it for approximately 50 years n30 and it seems most unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an Executive Branch official who claimed **executive privilege.** Moreover, while Supreme Court precedents support the right of Congress to imprison individuals for contempt, there is some question whether such authority would continue to be upheld. In recent years the Supreme Court has been more **[*49]** wary of Congress' exercising judicial authority:

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment.

United States v. Lovett, 328 U.S. at 317; see also United States v. Brown, 381 U.S. 437 (1965); INS v. Chadha, 462 U.S. at 962, 966 (Powell, J., concurring). The Court has also been careful in recent cases to restrict Congress to its legislative functions and not to permit it to exercise authority belonging to another branch. See INS v. Chadha, supra; Buckley v. Valeo, 424 U.S. 1 (1976). The current Court therefore may not afford Congress the same latitude with respect to its inherent contempt power that was provided during the 19th and early 20th centuries. See Memorandum for the Deputy Attorney General from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Oct. 18, 1984).

n30 See Marshall v. Gordon, 243 U.S. 521 (1917); Congressional Quarterly, Guide to the Congress 162 (1982).

In any event, **[*50]** the same considerations that inform the analysis of the applicability of §§ 192 and 194 to Executive Branch officials are relevant to an exercise of Congress' inherent contempt power. In our 1984 memorandum to the Attorney General discussing §§ 192 and 194, we noted that the reach of the criminal contempt statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect the penalties imposed), and concluded that "the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well." 8 Op. O.L.C. at n.42.

3. Civil Suit for Enforcement of a Subpoena

The most likely route for Congress to take would be to file a civil action seeking enforcement of the subpoena. There is no statute that expressly grants the

federal courts jurisdiction over such suits. n31 There are, however, at least two precedents for bringing such civil suits under the grant of federal question jurisdiction in 28 U.S.C. § 1331. In 1973, the Senate Select Committee on Presidential Campaign Finances sought civil enforcement of its subpoena for tapes and documents; **[*51]** the Committee urged, inter alia, that § 1331 provided subject matter jurisdiction. The district court found that the $ 10,000 jurisdictional amount in controversy requirement was not met and held that jurisdiction was therefore lacking under section 1331. The court did not be suggest that there was any other basis for denying federal question jurisdiction. Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 59 61 (D.D.C. 1973). Legislation was subsequently enacted to authorize jurisdiction over that particular suit. See Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725, 727 (D.C. Cir. 1974). Section 1331 has since been amended to be eliminate the $ 10,000 amount in controversy limitation in actions brought against the United States. Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980).

n31 Under 2 U.S.C. § 288d, the Senate Legal Counsel "when directed to do so [by the Senate] . . . shall bring a civil action . . . to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order issued by the Senate or a committee or a subcommittee of the Senate authorized to issue a subpoena or order." The United States District Court for the District of Columbia has jurisdiction over such actions, but its jurisdiction does not extend to any actions brought "to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity." 28 U.S.C. § 1364(a).

The argument could be made that this authority provides the exclusive route for either House to bring a civil action to enforce its subpoenas, and thus, that no route exists for civil enforcement against an executive branch officer. The legislative history of these statutes, however, counsels against that conclusion. The legislative history specifically notes that the jurisdictional exception for executive branch subpoenas "is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal Government," but rather was intended specifically to provide the Senate with a less drastic remedy than criminal contempt for refusals by private citizens to comply with subpoenas, and to avoid reliance on the Department of Justice to enforce such subpoenas. See S. Rep. No. 170, 95th Cong., 2d Sess. 88-89 (1978). **[*52]**

General federal question jurisdiction was also used as a basis for the be civil suit filed by the Department of Justice against the House in the EPA matter. See United States v. House of Representatives, C.A. No. 82-3583 (D.D.C. 1983). The Department took the position in that case that the controversy be arose under the Constitution and laws of the United States, because resolution "depended directly on construction of the Constitution and be the Court has consistently held such suits are authorized by section 1331." Powell v. McCormack, 395 U.S. 486, 515 (1969). Relying upon the decision in United States v. AT&T Co., 551 F.2d 384 (D.C. Cir. 1976), which held that an action brought by the United States to block a response by a third party to a congressional subpoena met the threshold jurisdictional requirements of section 1331, the Department argued that subject matter jurisdiction similarly exists in a suit to halt enforcement of a subpoena addressed directly to the Executive Branch. n32 The rationale used by the Department in that suit would appear to apply equally to suits filed by a House of Congress seeking enforcement of its subpoena against **executive [*53]**

privilege claims.

n32 The decision of the district court in United States v. House of Representatives does not directly address the jurisdictional question, although it casts considerable doubt on whether the executive branch can seek review in a civil action, when the legislative branch has chosen to use the criminal contempt provisions. 556 F. Supp. at 153. Nonetheless, the court did not foreclose any civil actions by the House:

> Judicial resolution of this constitutional claim, however, will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress. Id. (emphasis added).

In addition, the courts may be willing to entertain a civil suit brought by the House in order to avoid any question about the possible applicability of the criminal contempt provisions of §§ 192 and 194. When a possible impairment of the President's constitutional prerogatives is involved, the courts are particularly careful to construe statutes to avoid a constitutional confrontation. In United States v. Nixon, for example, the Court construed the limitation in 28 U.S.C. § 1291 (that **[*54]** appeals be taken only from "final" decisions of a district court) to permit the President to appeal an adverse ruling on his claim of **executive privilege** without having to place himself in contempt of court:

> The traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government.

418 U.S. at 691-92. The U.S. Court of Appeals for the District of Columbia has stated on several occasions that criminal contempt proceedings are an inappropriate means for resolving document disputes, especially when they involve another governmental entity. See Tobin v. United States, 306 F.2d 270 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962); see also United States v. Fort, 443 F.2d at 677-78. The Fifth Circuit appears to have held that no government official need subject himself to contempt in order to **[*55]** obtain review of his claim that the government is privileged to refuse to comply with a court's demand for documents. See Cates v. LTV Aerospace Corp., 480 F.2d 620, 622 (5th Cir. 1973); Carr v. Monroe Manufacturing Co., 431 F.2d 384, 387 (5th Cir. 1970), cert. denied, 400 U.S. 1000 (1971); but see In re the Attorney General, 596 F.2d 58, 62 (2d Cir.), cert. denied, 444 U.S. 903 (1979). Thus, although the civil enforcement route has not been tried by the House, it would appear to be a viable option. n33

n33 Any notion that the courts may not or should not review such disputes is dispelled by United States v. Nixon, 418 U.S. at 703-05, in which the Court clearly asserted its role as ultimate arbiter of **executive privilege** questions. The

need for judicial review in fact was emphasized by this Department in the United States v. House of Representatives litigation as a basis for the court to entertain the suit. The Department argued that, in some circumstances, only judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of government operations.

It is also possible that **[*56]** Congress might attempt to invoke the provisions of the Independent Counsel Act, which require the Attorney General to conduct an investigation "whenever he receives information sufficient to constitute grounds to investigate" that any of the enumerated Executive Branch officials "has committed a violation of any Federal criminal law other than a violation constituting a petty offense." 28 U.S.C. § 591. The crime of contempt of Congress is a non-petty criminal offense. See 2 U.S.C. § 192; 18 U.S.C. § 1. Thus a contempt citation against a covered official would arguably trigger the Attorney General's obligation under the Act. Invocation of the Act would not, however, necessarily require the Attorney General to apply for the appointment of an independent counsel. As this Office has advised on prior occasions, the Attorney General retains a certain measure of discretion with respect to whether to apply for an independent counsel.

B. Defenses to Congressional Subpoenas

1. Lack of Jurisdiction

As we discussed above, Congress' investigative power, while broad, is not unlimited. Thus, short of asserting **executive privilege,** there may be other lines of defense against a subpoena. The **[*57]** most promising line is that the subcommittee has no jurisdiction to request the information, either because Congress as a whole has no authority to inquire into the matter, or because Congress has not given the committee the requisite authority.

a. Scope of Congress' Jurisdiction

The Supreme Court has not articulated with precision whether there are particular limits to the jurisdiction of Congress to request information from the Executive Branch. Nonetheless, as we have previously set forth, Congress must at a minimum be able to articulate a legitimate legislative purpose for its inquiry. We will not repeat that discussion here, except to say that if the matter either falls exclusively within the province of another branch, see Kilbourn v. Thompson, 103 U.S. at 192, or Congress cannot point to some rational nexus between the inquiry and its legislative power, see Barenblatt v. United States, 360 U.S. at 111, we believe the subpoena would be held invalid for lack of authority, and could be challenged on that basis.

b. Scope of Committee's Jurisdiction

Not only must the investigation fall within Congress' jurisdiction, but the committee or subcommittee must also have **[*58]** been specifically authorized by the relevant House to conduct the investigation. Since defiance of a subpoena raises the possibility of criminal prosecution, "a clear chain of authority from the House to the questioning body is an essential element of the offense." Gojack v. United States, 384 U.S. at 716. It "must appear that Congress empowered the Committee to act, and further that at the time the witness allegedly defied its authority the Committee was acting within the power granted to it." n34 Id. (quoting United States v. Lamont, 18 F.R.D. 27 (S.D.N.Y. 1955), aff'd, 236 F.2d 312 (2d Cir. 1956)). See also Watkins v. United States, 354 U.S. at 204-05, 214-15; Eastland v. United States Servicemen's Fund, 421 U.S. at 505-06. Thus, a

witness cannot be compelled to answer questions that fall outside of the investigative jurisdiction of a committee or subcommittee. See United States v. Rumely, 345 U.S. at 44-45; Bergman v. Senate Select Committee on Aging, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975); United States v. Cuestra, 208 F. Supp. 401, 406 (D.P.R. 1962).

n34 Because the legality of the committee's action is judged as of the time the witness defies the subpoena, a subsequent vote by the full House to enforce the subpoena (through contempt or otherwise) will not cure any jurisdictional defect. Gojack, 384 U.S. at 175 n.12. **[*59]**

Although this general principle is well recognized by the courts, in practice they have given considerable deference to a committee's definition of its jurisdiction. In cases in which the courts have refused to enforce a subpoena because the inquiry fell outside of the committee's jurisdiction, the primary defect was that the investigative authority given to the committee was simply so broad and ill defined that it gave the witness no fair notice of the scope of the inquiry. See, e.g., Watkins v. United States, 354 U.S. at 204; United States v. Rumely, 345 U.S. at 43. In many cases, the courts have considered the "legislative history" of the committee's investigation (e.g., the language and background of the authorizing resolution, remarks made by the chairman or members of the committee to outline the scope of the investigation, the existence and scope of similar investigations) to determine whether a particular matter falls within a committee's jurisdiction. "Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation and long usage, so the proper meaning of an authorization to a congressional committee **[*60]** is not to be derived alone from its abstract terms unrelated to the definite context furnished them by the course of congressional actions." Barenblatt v. United States, 360 U.S. at 117. See also Wilkinson v. United States, 365 U.S. at 408; Tobin v. United States, 306 F.2d at 275-76; United States v. Fort, 443 F.2d at 682. This analysis, of course, cuts both ways. If a committee has historically exercised investigative jurisdiction over a particular subject, and makes the nexus between its investigative jurisdiction and the n to particular subject matter clear, the courts may hesitate to second guess to that judgment. See, e.g., Barenblatt v. United States, 360 U.S. at 119-20. On the other hand, if the committee has not previously asserted investigative jurisdiction over the subject matter, and the subject matter to is not clearly linked to the committee's jurisdiction, the courts may lean to in favor of protecting the witness' prerogative to refuse to testify, particularly if constitutional interests are implicated. n35 See Tobin v. United States, 306 F.2d at 275-76.

n35 The judicial decisions dealing with Congress' subpoena authority have for the most part involved refusals by private individuals to testify. In those cases the courts have been sensitive to First, Fourth, and Fifth Amendment concerns raised by the defendants, and have weighed those interests in the balance in determining how specific Congress must be in authorizing a committee's investigation. See, e.g., United States v. Rumely, 345 U.S. at 45; Watkins v. United States, 354 U.S. at 204-05. Although the constitutional interests implicated by a subpoena of an executive branch official arise from Articles I and II, rather than the Bill of Rights, a court should be equally sensitive to those constitutional concerns. **[*61]**

The courts have also suggested that the power of either the witness or to the court to define for itself the scope of a committee's jurisdiction is to limited. In Barenblatt, 360 U.S. at 124, the Court noted that it "goes to without saying that the scope of the Committee's authority was for the House, not a witness, to determine, subject to the ultimate reviewing responsibility of this Court."

Similarly, "it is appropriate to observe o that just as the Constitution forbids the Congress to enter fields reserved o to the Executive and Judiciary, it imposes on the Judiciary the reciprocal duty of not lightly interfering with Congress' exercise of its legitimate powers." Hutcheson v. United States, 369 U.S. 599, 622 (1962). See also McSurely v. McClellan, 521 F.2d 1024, 1038 (D.C. Cir. 1975) (prerogative of the judiciary to determine whether the investigation is within the jurisdiction of a particular committee is "extremely limited").

Nevertheless, it is clear that a witness may refuse to answer on the ground that the inquiry has not been authorized by the relevant House. Particularly where constitutional concerns are raised by compelled testimony, courts may be reluctant **[*62]** to countenance a far ranging inquiry by a particular committee or subcommittee that does not appear to fall within the jurisdiction granted by Congress.

2. **Executive Privilege**

Finally, the subpoena could be resisted on the ground that the information requested is protected by the **executive privilege.** It is important to remember, however, that assertion of the privilege does not just involve an evaluation of the Executive Branch's interest in keeping the information confidential; it also involves an evaluation of the strength of Congress' need for that information, and whether those needs can be accommodated in some other way.

Thus, Congress must be able to articulate its need for the particular materials to "point to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and to show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d at 731, 733. In Senate Select Committee, for example, the court held that **[*63]** the committee had not made a sufficient showing of need for copies of the Presidential tape recordings, given that the President had already released transcripts of the recordings. The committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events." Id. at 732. "The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain." Id. at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . . is too attenuated and too tangential to its functions" to override the **[*64]** President's constitutional privilege. Id.

Moreover, in cases in which Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each branch to accommodate the legitimate needs of the other. See United States v. AT&T Co., 567 F.2d 121, 130 (D.C. Cir. 1977).

Here, the considerations outlined above particularly the need to preserve the position of the Executive Branch as the sole entity that enforces the criminal laws would weigh strongly in favor of nondisclosure by the Executive Branch.

Ultimately it would be those interests in maintaining confidentiality that must be balanced against Congress' interest in gaining access to particular information for legitimate legislative purposes. As noted above, it is difficult for us to speculate as to what legitimate interests Congress would have in gaining access to the details of a prosecutorial decision made by the Attorney General -- a decision that Congress constitutionally could not alter or interfere with. The decision to assert **executive privilege** in response **[*65]** to a congressional subpoena, however, is the President's to make. Under the terms of the Reagan Memorandum, **executive privilege** cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President. That decision must be based on the specific facts of the situation, and therefore it is impossible to predict in advance whether **executive privilege** could or should be claimed as to any particular types of documents or information.

Charles J. Cooper

Assistant Attorney General

Office of Legal Counsel

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*1985 OLC LEXIS 54, *; 9 Op. O.L.C. 102*

OPINION OF THE OFFICE OF LEGAL COUNSEL

LEGISLATION PROVIDING FOR COURT-ORDERED DISCLOSURE OF GRAND JURY MATERIALS TO CONGRESSIONAL COMMITTEES

1985 OLC LEXIS 54; 9 Op. O.L.C. 102

September 24, 1985

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

CORE TERMS: grand jury, secrecy, law enforcement, occurring, disclosure, investigative, oppose, prosecutorial discretion, prosecutorial, grand, withholding, prejudicial, publicity, proposed amendment, judicial forum, court-authorized, negotiation, functioning, prosecute, endanger, effective, exclusive authority, interfere, multiply, execute, jurors, standing to challenge, political question, standing to bring, pocket veto

SYLLABUS:
[*1]

Proposed legislation authorizing personnel of committees of Congress to obtain court-ordered release of matters occurring before a grand jury would violate separation of powers principles by encroaching upon the Executive's control of prosecutorial matters and would entail a major departure from longstanding practices and traditions of grand jury secrecy.

Because the Executive alone is entrusted with the power to enforce the laws, the Executive alone should make the day-to-day decisions as to whether the release of law enforcement materials to Congress would interfere with its prosecutorial discretion.

Independent access by Congress to grand jury materials without the consent of the Department of Justice would seriously endanger grand jury secrecy and thereby weaken the grand jury as an institution.

Access to grand jury materials by other Executive Branch agencies should be limited to cases where access is needed for law enforcement purposes and should require the approval of the Justice Department.

ADDRESSEE:
MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS

OPINIONBY: COOPER

OPINION:
You have requested the comments of this office on S. 1562, introduced **[*2]** by Senator Grassley, which would amend the False Claims Act. The portion of the bill of interest to this office is § 5, which would amend Rule 6(e) of the Federal Rules of Criminal Procedure. First, the amendment would permit automatic disclosure of "matters occurring before a grand jury" to Justice Department attorneys for civil purposes without a court order. n1 Second, the

amendment would expand the types of proceedings for which other executive departments and agencies may gain access to Rule 6(e) material to include not only "judicial proceedings," but also other matters within their jurisdiction, such as adjudicative and administrative proceedings. Significantly, the bill would allow these departments and agencies to seek disclosure without the approval of the Department of Justice. Finally, the bill would also allow personnel of any committee of Congress directly to obtain court-authorized release of "matters occurring before the grand jury" upon a showing of "substantial need." n2 At present, Congress has no independent ability to petition the judiciary for release of "matters occurring before the grand jury."

n1 The phrase "matters occurring before a grand jury" has been broadly defined by the courts to include not only materials presented to a grand jury but also large categories of law enforcement files that may relate to a grand jury. See infra Part III. In this memorandum we will sometimes refer to "matters occurring before a grand jury" as "Rule 6(e) material." **[*3]**

n2 The Administration's proposed amendments to Rule 6(e) would allow federal agencies with the consent of the Department of Justice to obtain court-authorized release of "matters occurring before the grand jury" upon a showing of "substantial need." The Administration's amendment makes no mention of independent congressional access to Rule 6(e) material.

The Office of Legal Counsel strongly opposes any provision that would permit Congress independently to petition the courts for Rule 6(e) material. By giving Congress an independent right of access to large portions of law enforcement files through the judiciary, the amendment would codify legislative encroachment into the Executive's exclusive authority to enforce the law. Because it is the fundamental premise of the separation of powers that the Executive alone is entrusted with the enforcement of the laws, the Executive alone should make the day-to-day decisions as to whether the release of law enforcement materials to Congress, a branch of government constitutionally forbidden to prosecute individual cases, would interfere with the Executive's prosecutorial discretion.

Moreover, this amendment would represent a radical departure **[*4]** from the long tradition of grand jury secrecy. This secrecy has evolved to protect the proper functioning of the grand jury and has aided the Executive Branch in the fair execution of the laws. Independent access to grand jury materials by Congress without the consent of the Department of Justice would seriously endanger the secrecy on which participants in the grand jury process have come to rely, and therefore be extremely injurious to the grand jury as an institution.

The amendment would also have a serious impact on both the frequency and the method of resolution of disputes over **Executive privilege.** By arguably providing Congress with the standing to obtain a ready judicial forum for these disputes, the proposed amendment undoubtedly would multiply the number of confrontations over **executive privilege** and encourage judicial resolution of political disputes that have in the past been handled by compromise and negotiation. As a consequence, the President will be handing over his privilege, the scope of which he has largely determined for himself, to the judiciary for its review. The nature and scope of **executive privilege** may thereby be profoundly changed.

Finally, with respect **[*5]** to access to grand jury materials by other executive departments and agencies, we believe that access should be limited to law enforcement purposes and that such access must be obtained with the approval and representation of this Department so that the integrity of the Department's criminal investigations and prosecutions can be protected from untimely disclosure.

I. The Proposed Amendment is Inconsistent with the Separation of Powers

In our view, the Executive Branch must be able to control congressional access to law enforcement documents to prevent legislative pressures from impermissibly influencing its

prosecutorial decisions. The Executive Branch's duty to protect its prosecutorial discretion from congressional interference derives ultimately from Article II, which places the power to enforce the laws squarely in the Executive Branch of the federal government. See Buckley v. Valeo, 424 U.S. 1, 119-20 (1976) (per curiam). The Executive therefore has the exclusive authority to enforce the laws adopted by Congress, and neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive to prosecute **[*6]** particular individuals. United States v. Nixon, 418 U.S. 683, 693 (1974); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1869).

Indeed one of the fundamental rationales for the "separation of powers" is that the power to enact laws and the power to execute laws must be separated to forestall tyranny. As James Madison stated in The Federalist No. 47:

> The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."

The Federalist No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961). For this reason, the Constitution specifically excludes Congress from the decision whether to prosecute particular cases. U.S. Const. art. I, § 9, cl. 3. A legislative effort to require prosecution of specific individuals would seem to be inconsistent with many of the policies upon which the Constitution's **[*7]** prohibition against bills of attainder was based. See Selective Serv. Sys. v. Minnesota Public Interest Research Group, 468 U.S. 841, 854-55 (1984); United States v. Brown, 381 U.S. 437, 447 (1965); United States v. Lovett, 328 U.S. 303, 315 (1946). The constitutional role of Congress is to adopt general legislation that will be applied and implemented by the Executive Branch: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810). The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. As the Supreme Court stated in Lovett: "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment." 328 U.S. at 317. n3

n3 Article II's specific grant of exclusive authority to the Executive to enforce the laws and Article I's specific prohibition against legislative prosecution provide a principled basis for allowing administrative agencies, which are part of the Executive Branch, to obtain court-authorized release of Rule 6(e) material for law enforcement purposes, while prohibiting Congress from doing so. **[*8]**

Moreover, the Department of Justice has an obligation flowing from the Due Process Clause to ensure that the fairness of the decisionmaking with respect to its prosecutorial function is not compromised by excessive congressional pressures, and that the due process rights of those under investigation are not violated. See Pillsbury v. FTC, 354 F.2d 952 (5th Cir. 1966). Just as an agency's ability to fulfill its statutory obligation may be impermissibly strained by pressure from the Legislative Branch during the administrative decision-making process, D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246-47 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972), excessive interference with the exercise of prosecutorial discretion can substantially prejudice the rights of persons under investigation. Persons who ultimately are not prosecuted may be subjected to prejudicial publicity without being given an opportunity

to cleanse themselves of the stain of unfounded allegations. Moreover, the injection of impermissible factors, such as political pressures, into the decision whether to initiate prosecution not only endangers the rights of the accused, but also impairs **[*9]** the professional obligation of government attorneys to the integrity of the judicial process and, ultimately, the obligation of the Executive faithfully to execute the laws.

In addition, potential targets of enforcement actions are entitled to protection from widespread premature disclosure of investigative information. Because Congress and the Department of Justice are both part of the United States Government that prosecutes a criminal defendant, there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952). Therefore, pretrial publicity originating in Congress can be attributed to the government as a whole and can result in postponement, modification, or even termination of the prosecution on due process grounds. Id. The discretion of prosecutive officials to conduct their investigations and trials in the manner they deem to be the most efficient and constructive can be infringed by precipitous disclosures which prompt a court to impose remedial procedural obligations upon **[*10]** the Government. To be sure, these separation of powers and due process concerns are present to a greater degree when Congress is seeking files of an open investigation than when Congress is seeking information about an investigation that is closed. It has been the traditional position of this Department that intolerable practical restraints on discretion may result and the effectiveness and fairness of investigations may be impaired if Congress becomes, in a sense, a partner in an ongoing investigation. If a congressional committee is fully apprised of all details of an investigation as it proceeds, there is a substantial chance that congressional pressures will influence the course of the investigation.

Separation of powers and due process concerns are also present, however, when Congress is seeking investigative files of closed investigations. Indeed, because one of the reasons Congress sometimes seeks files of closed investigations is to put pressure on the Executive to reopen an investigation, the same concerns outlined above may often attend requests for closed files. Moreover, the possibility that persons who ultimately are not prosecuted may be subjected to prejudicial publicity **[*11]** is as great from congressional inquiry into closed as into open investigations. For these reasons, the Office of Legal Counsel opposes any compromise with Congress on an amendment to Rule 6(e) whereby Congress would be given access to Rule 6(e) material from closed investigations, especially if that access is independent of executive control. Because the Executive is uniquely charged with enforcing the law, it should retain the power in the first instance to decide what law enforcement materials to release to Congress after its independent evaluation of the separation of powers and due process concerns described above. In our view, it would be a great mistake to codify the rather artificial distinction between closed and open investigations, when both kinds of investigations implicate concerns of constitutional magnitude that are best evaluated on a case-by-case basis.

II. The Amendment Breaches Grand Jury Secrecy and Thus Impairs Proper Enforcement of the Law by the Executive

Due process concerns were at the heart of the historical origin of the grand jury. Indeed, the concept of grand jury secrecy originated as a means of preventing the government from bringing undue pressure on **[*12]** the grand jury's decision. In the celebrated trial of the Earl of Shaftesbury in 1681, the grand jurors insisted on hearing the witnesses to the charge of treason in secret despite the demands of the Crown that they be heard in public.

Grand jury secrecy is still justified by the need to protect the witnesses and grand jurors from undue pressures. Today, however, it is not disclosure to the prosecution but disclosure to the public that is seen as destructive of the effective functioning of the grand jury. Indeed, secrecy is now thought to be of importance to the Executive in obtaining indictments,

because jurors may be apprehensive that their votes to indict may be disclosed. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979). Secrecy is also important to the Executive for preparation of its case, because it facilitates free and open discussion by witnesses and complainants. Id. Moreover, secrecy facilitates the capture of an accused who is in fact indicted and prevents the accused from obtaining collusive testimony in the hope of blocking the indictment. Id. Finally, secrecy protects the accused who is charged by the complaint before the grand jury **[*13]** but is exonerated by the grand jury's refusal to indict. Id.

Independent access by Congress, or even by other agencies, to grand jury material without the concurrence of the prosecution would obviously endanger the cloak of secrecy that has historically been seen as essential to the functioning of the grand jury and therefore to the effective enforcement of the criminal law. Because the Department of Justice is charged with preparing federal criminal cases, it is in a far better position than Congress, other executive agencies, or even the judiciary to determine how essential secrecy is to the preparation of a particular case. Moreover, the Department of Justice has the preeminent institutional interest in preserving secrecy because the confidence of future participants in the grand jury process in the secrecy of the proceedings is necessary for continued proper execution of the laws. Therefore, this Office opposes the proposed amendment's grant of independent access, not only to Congress but also to other agencies, which cannot be presumed to have the perspective or the institutional interest to give proper weight to the need for grand jury secrecy. Even other Executive agencies **[*14]** should gain access to Rule 6(e) material only with the consent of the Department of Justice.

III. The Amendment Will Lead to More Disputes Over **Executive Privilege** and Will Change the Method of Resolving These Disputes

The policy of the Executive Branch throughout this Nation's history has been generally to decline to provide committees of Congress with access to, or copies of, law enforcement files except in extraordinary circumstances. n4 Attorney General Robert Jackson articulated this position over forty years ago:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses **[*15]** or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941). This policy with respect to Executive Branch investigations was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. No President to our knowledge has departed from this position affirming the confidentiality of law enforcement files. n5

n4 The justifications for invoking **executive privilege** with respect to investigative files are rooted in the principles of separation of powers and due process outlined in Part I above. An additional reason for withholding investigative files is that effective and candid deliberations

among the numerous advisers who participate in a case in various roles and at various stages of a prosecution would be rendered impossible if the confidential deliberative communications were held open to public scrutiny. Cf. United States v. Nixon, 418 U.S. 683, 708 (1974). The deliberative memoranda that constitute a significant portion of investigative files are an intrinsic part of the prosecutorial process. Employees of the Department would be reluctant to express their personal, unofficial views if those views could be obtained by congressional request. This justification for withholding may apply to files of both open and closed investigations. **[*16]**

n5 Some withholding of Executive Branch files has been accomplished through the President's formal invocation of **executive privilege.** More often negotiations have been undertaken by executive officers to protect the integrity of their files through communication of their concerns to Congress before resorting to a formal Presidential assertion of the privilege.

The proposed amendment is likely to multiply the number of disputes over **executive privilege** with respect to law enforcement files and radically change their method of resolution. Although it has been argued that the issues of **executive privilege** may be separated from the issue of congressional access to Rule 6(e) material, the proposed amendment, as presently drafted, is unlikely to permit such separation. The term "matters occurring before a grand jury" has been interpreted broadly to include any documents that reveal any matter occurring before a grand jury. Therefore, it is generally recognized that the phrase includes any material that would reveal the strategy or direction of the grand jury investigation, the nature of the evidence produced before the grand jury, or the views expressed by members of the grand jury's **[*17]** deliberations. See, e.g., Fund for Constitutional Gov't v. National Archives, 656 F.2d 856, 870 (D.C. Cir. 1981); United States v. Hughes, 429 F.2d 1243, 1294 (10th Cir. 1970). The broad definition means that Rule 6(e) material will substantially overlap with the kind of law enforcement files that the Executive has traditionally attempted to withhold.

As the amendment is currently drafted, Congress may obtain a court order directing the release of all Rule 6(e) material. There is no provision that excepts material over which the Executive has a claim of privilege from the potential scope of the order. Nor is there any provision that even requires that the Executive be provided with notice that Congress is seeking such release. Assuming that a notice provision were added to the amendment, the Executive would no doubt have the opportunity to assert **executive privilege** in court in order to prevent Congress from obtaining sensitive documents. Although the possibility of asserting **executive privilege** would be thereby preserved, the method of resolving disputes over its assertion would be transformed. Instead of arguing and negotiating with Congress on a case-by-case **[*18]** basis on the scope of the privilege, the President and his officers would in effect be handing over his privilege to the courts for their frequent adjudication.

The effects of this change should not be underestimated. As a practical matter, the provision of a ready judicial forum for resolution of disputes over **executive privilege** would undoubtedly multiply the number of potential confrontations. In the past, Congress has had to engage in long and hard negotiations for access to documents over which there was a potential claim of **executive privilege.** Such negotiations have entailed both the expenditure of time and political capital. Because access to the judicial forum provided for in the amendment would furnish a relatively painless and rapid means of resolving these disputes, it would likely lead to more congressional challenges to the withholding of investigative documents on **executive privilege** grounds.

Moreover, the nature of **executive privilege** itself may be transformed by changing the forum in which disputes over **executive privilege** are resolved. The President would in effect be sharing his privilege with the judiciary. n6 The judicial forum would give the judiciary the opportunity **[*19]** to frame principles to govern the President's assertion of **executive privilege** against a congressional demand for information. n7 In our view, constant judicial oversight is certain eventually to erode the President's control over his privilege. Nor does

such an expanded judicial role comport well with the functioning of democratic government as a whole. The assertion of **executive privilege** has always been a practical undertaking that is not governed by fixed rules but by considerations of prudence that take into account political factors such as public reaction. In this, as in other areas of dispute between the Legislature and the Executive, more can be constructively accomplished by accommodation between the elected branches of government than by declarations of principle from a judiciary that is necessarily remote from the political exigencies of the situation.

n6 Because disputes over **executive privilege** between Congress and the Executive have been resolved in an ad hoc fashion in the past, courts have left the permissible scope of such assertions almost totally undefined. In only one case has a court clearly adjudicated the legitimacy of the assertion of **executive privilege** against a congressional demand for information. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, **498** F.2d 725 (D.C. Cir. 1974) (en banc). **[*20]**

n7 Assuming that a dispute over **executive privilege** between the Executive and Congress were properly before a court, it seems unlikely that the court would decline to hear it on the grounds that it was a nonjusticiable political question. In Senate Select Committee, the court declined to rule that the dispute between the Watergate Committee and President Nixon was a nonjusticiable political question. Moreover, it also unlikely that a court would at present conclude that Congress lacked standing to bring an action based on a dispute with the Executive over its request for law enforcement documents. The issue of whether Congress has standing to bring suit to protect its governmental powers is sharply disputed at present. Compare Barnes v. Kline, 759 F.2d 21, 26 (D.C. Cir. 1985) (holding that both houses of Congress and individual members of Congress had standing to challenge a pocket veto on the grounds that the veto improperly nullified their votes) with id. at 41 (Bork, J., dissenting) (stating that neither the Houses of Congress nor individual members of Congress have standing to challenge the pocket veto). Nevertheless, a court might well hold that the case for congressional standing is strengthened by the enactment of this amendment. See Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) ("The question whether the litigant is a proper party to request adjudication . . . is within the power of Congress to determine."). **[*21]**

Because the President holds his power of **executive privilege** as a trustee for his successors, we believe that it would be a violation of that trust to approve a provision that would have the effect of making the judiciary a frequent partner in determination of the scope of the privilege, even if under present political circumstances such a partnership would seem advantageous. For this reason, the Office of Legal Counsel is constrained to oppose any provision that purports to provide Congress with standing to obtain Rule 6(e) material and thereby enjoy the opportunity to gain ready judicial resolution of **executive privilege** questions. We would therefore oppose a compromise that would permit committees of Congress directly to obtain court-authorized release of "matters occurring before the grand jury" upon a showing of "particularized need." The higher showing does not in our view rectify the proposed amendment's inconsistency with the separation of powers or its potential to expand the power of the judiciary over the exercise of **executive privilege.**

Conclusion

For the foregoing reasons, the Office of Legal Counsel urges the Department to oppose strongly the provisions of S. 1562 that **[*22]** afford Congress a mechanism for obtaining access to grand jury materials. We believe that support for these provisions, even if revised to limit access to closed cases, would adversely affect fundamental notions of the separation of powers.

Charles J. Cooper

Acting Assistant Attorney General

Office of Legal Counsel

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*1984 OLC LEXIS 47, *; 8 Op. O.L.C. 315*

OPINION OF THE OFFICE OF LEGAL COUNSEL

CONGRESSIONAL SUBPOENAS OF DEPARTMENT OF JUSTICE INVESTIGATIVE FILES

1984 OLC LEXIS 47; 8 Op. O.L.C. 315

October 17, 1984

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

CORE TERMS: grand jury, subpoena, subcommittee, disclosure, investigative, occurring, ongoing, criminal investigation, subpoenaed, duty, confidentiality, secrecy, prosecute, law enforcement, pertaining, publicity, prosecutor, indictment, prosecutorial discretion, judicial proceeding, Federal Rules Of Criminal Procedure, recommendation, prosecutorial, shipbuilding, articulated, interfere, deliberation, redaction, withhold, invoke

SYLLABUS:
[*1]

Congressional subpoenas seeking information from the Department of Justice concerning two closed investigations and one open investigation may be complied with only if the materials sought may be revealed consistent with Rule 6(e) of the Federal Rules of Criminal Procedure, which requires the Department to maintain the secrecy of matters occurring before the grand jury, and with the President's constitutional obligation to executive faithfully the laws of the United States.

If it is determined after review of the requested documents that compliance with the subpoena would jeopardize the ongoing criminal investigation, we would advise the President to assert **executive privilege** to ensure the continued confidentiality of the documents contained in the open investigative file.

Because of the importance of the process of determining whether documents may be released to Congress consistent with Rule 6(e) and the President's constitutional obligations, Congress must allow Executive Branch officials sufficient time to review the requested documents.

ADDRESSEE:
MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

OPINIONBY: SHANKS

OPINION:
On Monday, October 1, 1984, the Subcommittee on Administrative Practice and Procedure **[*2]** of the Committee on the Judiciary of the United States Senate issued to Assistant Attorney General Stephen S. Trott of the Criminal Division a subpoena, signed by Subcommittee Chairman Charles E. Grassley, calling for Mr. Trott to appear before the Subcommittee at 9:30 a.m. on October 4, 1984 and to produce at that time documents pertaining to three investigations of alleged false shipbuilding claims against the Navy by Company A, Company B, and Company C. Specifically, the October 1 subpoena seeks production of the following described documents:

(1) All prosecutors' memoranda concerning the above named companies, including, but not limited to, all recommendations for or against prosecution, all reports and memoranda about the status of the investigations, all reports and memoranda concerning investigative plans, all legal analyses prepared with reference to any of the cases, and any dissenting views by one or more of the attorneys with respect to any of the reports and memoranda indicated above.

(2) The report forwarded earlier this year to the Department of Justice by Elsie Munsell, U.S. Attorney for the Eastern District of Virginia, commenting on the 1983 report of the Office of **[*3]** Policy and Management Analysis, Department of Justice, entitled "Review of Navy Claims Investigations."

(3) All other reports and memoranda of the U.S. Attorney's Office for the Eastern District of Virginia dealing with the subject of Navy shipbuilding claims.

(4) A list of all documents within these three categories of documents.

The subpoena was served on Assistant Attorney General Trott on October 1, 1984, following a joint hearing of the Subcommittee on International Trade, Finance, and Security Economics of the Joint Economic Committee and Senator Grassley's Subcommittee, at which Mr. Trott appeared for two-and-one-half hours. The subpoena itself did not exclude grand jury materials from the document request. In a letter of August 9, 1984, however, Senators Proxmire and Grassley indicated that the Subcommittee was not seeking grand jury materials.

In response to the subpoena, Assistant Attorney General Trott appeared before the Subcommittee on October 4, 1984, and read a statement. In brief, Mr. Trott agreed to make available documents related to the closed Company A and Company C investigations (subject to the need to redact grand jury materials), but objected to the production **[*4]** of documents pertaining to the open Company B investigation. Following the hearing, Assistant Attorney General McConnell met with Chairman Grassley, Assistant Attorney General Trott, and others.

The following day, on October 5, 1984, the Subcommittee issued another subpoena, again signed by Chairman Grassley. This subpoena was issued to the Attorney General "or designated custodian of described documents" and commands him to appear before the Subcommittee at 10:00 a.m. on October 19, 1984, and to produce the following specified documents:

> (1) All prosecutors' memoranda concerning [Company B], including, but not limited to, all recommendations for or against prosecution, all reports and memoranda about the status of the investigation, all reports and memoranda concerning investigative plans, all reports and memoranda from the Federal Bureau of Investigation regarding this investigation, and any dissenting views by one or more of the attorneys with respect to any of the reports and memoranda indicated above.
>
> (2) A list of all documents described above.
>
> * This request does not include 6(e) material. n1

n1 The subpoena states that a personal appearance by the Attorney General or designated custodian is not necessary if the requested materials are delivered to the Subcommittee. We read this to mean that the Acting Attorney General for this matter is free to designate a

custodian of the documents for the purpose of responding to this subpoena. Any assertion of **executive privilege,** however, must be authorized by the President and made on his behalf. **[*5]**

Because the October 1 subpoena appears to have been complied with except to the extent that it overlaps with the October 5 subpoena, we have focused our legal analysis upon the issues raised in the later subpoena. We have not yet been able to conduct a review of the subpoenaed documents. n2 Our legal analysis is therefore more general and less specific to the requested documents than we would prefer. However, we intend to have the opportunity to examine the documents which are identified in the October 5 subpoena before the return date of that subpoena. We have attempted below to provide you with general guidance to assist you in advising the President concerning the need to reconcile the obligation of the Executive Branch to respond to the subpoenas with its obligation to maintain the secrecy of grand jury materials and to resist improper congressional attempts to interfere with the Executive's conduct of ongoing criminal investigations.

n2 In a letter to the Subcommittee dated September 28, 1984, Assistant Attorney General Trott called Senator Grassley's attention to the fact that the Subcommittee's previous requests for a wide variety of documents pertaining to just one of the closed investigations covered more than 250,000 documents. We are informed that the number of documents in the Company B file that fall within the broad language of the Subcommittee's subpoena is much smaller, in the neighborhood of 55 to 60 documents. **[*6]**

Based upon our understanding of the facts of this dispute and upon a renewed examination of the relevant legal and historical precedents, we believe that a number of the documents covered by the subpoenas relating to all three investigations may be covered by the requirement of Rule 6(e) of the Federal Rules of Criminal Procedure, which requires the Department to maintain the secrecy of "matters occurring before the grand jury." In addition, documents in the files of the Company B investigation, an ongoing criminal investigation, may be shielded from disclosure to Congress by a claim of **executive privilege.** We are fully cognizant of the President's announcement that "the policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . . **Executive privilege** will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Memorandum from President Reagan to the Heads of all Executive Departments and Agencies (Nov. 4, 1982). Nevertheless, we believe that both Rule 6(e) **[*7]** and the probability that certain documents covered by the request will be privileged require that careful consideration be given to the documents and the potential effects of disclosure before documents from the Company B file are made available to the Subcommittee.

For the reasons detailed below, our recommendation at this time, based upon the conclusion of the Criminal Division that disclosure of the Company B investigative documents will substantially interfere with the Department's ongoing criminal investigation in that case, and subject to our own review of the documents, is to advise the President to assert **executive privilege** to ensure the continued confidentiality of the documents contained in the open investigative file. We have applied the legal authorities to general categories of documents as they have been described to us, and on that basis we have concluded that a claim of **executive privilege** very likely would be appropriate for at least some of the subpoenaed documents pertaining to the open criminal investigation. We also suggest certain alternative procedures below which should be considered before the final decision is made to assert **executive privilege.** n3

n3 We understand that the Attorney General has recused himself from any consideration of the subjects with respect to which the subpoena has been issued and that the recusal is in writing. As a matter of practice and statutory construction, the Department has treated the Attorney General's recusal from a matter as the equivalent of a disability. Under the

departmental succession statute, the Deputy Attorney General becomes Acting Attorney General with respect to the matter. See 28 U.S.C. § 508. **[*8]**

I. Background

The events leading up to the issuance of the subpoena are as follows: On February 7, 1984, Vice Chairman Proxmire of the Subcommittee on International Trade, Finance and Security Economics of the Joint Economic Committee wrote to the Attorney General to inquire about the status of a Department of Justice investigation of alleged fraudulent shipbuilding claims filed with the Navy. The Vice Chairman was particularly interested in the Department's anticipated treatment of Mr. D, a former head of a division of Company B, who had offered to provide information to the Department regarding these claims. In that letter, Senator Proxmire asked five specific questions relating to the Department's earlier investigation of the shipbuilding matter, the termination of the investigation in 1981 and any current Department plans to reopen the investigation and to speak with Mr. D. In his response of February 17, 1984, Assistant Attorney General Trott explained that Mr. D was at the time a fugitive from a federal indictment, and that the Department was attempting to secure whatever information it could from Mr. D regarding the shipbuilding matter without compromising that pending prosecution. **[*9]** A further request on the same subject was written to the Attorney General on February 27, 1984 and answered by Assistant Attorney General Trott on March 6, 1984. In his response, Mr. Trott provided more details regarding the prior investigation and current negotiations with Mr. D. Other correspondence of little substance was exchanged.

On May 9, 1984, Senator Proxmire again wrote to the Attorney General with a list of specific requests for information. Mr. Trott responded in full to some of those questions, but declined to respond to others. In a letter of June 14, 1984, he declined to provide the names of specific career employees who had worked on the earlier investigation without some particular articulated legislative need. In addition, he asserted that it would be improper for him to provide internal Department of Justice legal memoranda on a pending matter because premature public disclosure would prejudice the interests of the investigation. He informed the Subcommittee that deletion of grand jury material was not practical because that material was so extensive that its deletion would render the documents meaningless. In an exchange of letters in late July 1984, Mr. Trott **[*10]** and Senator Proxmire agreed to work together to resolve any outstanding disclosure.

On August 9, 1984, Senators Proxmire and Grassley wrote a joint letter to Mr. Trott requesting information similar to that specified in the October 1 subpoena. Mr. Trott responded on September 7, 1984. He declined to provide to Congress the prosecutors' memoranda and internal deliberative documents as well as grand jury materials. At the same time, he offered assurances that efforts were underway to comply with the request to the extent possible. On September 18, 1984, the two Senators requested that Mr. Trott appear at a joint hearing on October 1. In a letter dated September 28, 1984, Mr. Trott indicated that he had reconsidered his position to some extent. Addressing each case independently, Mr. Trott informed the Senators that the Department would seek clarification of its obligations under Rule 6(e) from the court that had supervised the investigations. He agreed that documents relating to the Company C investigation would be provided to Congress as soon as the question of grand jury redactions had been resolved by the court. Any material not protected by Rule 6(e) would be turned over to the Subcommittee. **[*11]** With respect to the investigation of Company A, Mr. Trott offered to make all non-grand jury documents available as soon as they could be reviewed. The Company C investigation, however, presented different considerations because it has been reopened and is now under active grand jury investigation. He promised, however, to turn over the materials pertaining to the Company C investigation at the completion of the case. The October 1 subpoena followed, requesting materials relating to all three cases.

At the appointed hour on October 4, 1984, Assistant Attorney General Trott appeared before the Subcommittee and read a prepared statement. That statement explained that the

Department of Justice was making available to the Subcommittee all of the subpoenaed material that, in the judgment of Assistant Attorney General Trott and his staff, was not prohibited from release by Rule 6(e) of the Federal Rules of Criminal Procedure, which imposes an obligation to maintain the secrecy of "matters occurring before the grand jury." Documents related to the Company A and Company C investigations were therefore made available after redaction to protect grand jury materials. With respect to this redacted **[*12]** grand jury material, Mr. Trott explained his intention to file a motion in the Eastern District of Virginia no later than October 12, 1984 seeking permission to release the remainder of the subpoenaed material. We have been informed that such a motion was filed and is currently pending before the court.

Assistant Attorney General Trott's statement to the Subcommittee explained that different treatment is required of information relating to the Company B investigation, because that matter is currently the subject of an open criminal investigation that is pending before an active grand jury. Due to the need to protect the integrity of the prosecutorial process, Mr. Trott declined to release the files from the Company B investigation, but offered to make them available on the same basis as the other two cases, "as soon as the [Company B] case is closed." The Subcommittee responded to Mr. Trott's submission with a statement issued by Senator Grassley on October 5, 1984, and with its October 5 subpoena to the Attorney General. Senator Grassley's statement set forth the Senator's conclusion that the Department had not fully complied with the October 1 subpoena, but noted that the Executive **[*13]** Branch had requested more time in which to respond to the request for documents related to Company B.

To summarize, Mr. Trott has made available to the Subcommittee all documents relative to the closed investigations, with redactions made to enable the Department to comply with Rule 6(e)'s prohibition on disclosure of matters occurring before the grand jury. Consistent with a prior representation to the Subcommittee, the Department has filed a motion with the district court on this issue to clarify the application of Rule 6(e) to the specific documents contained in the two closed files. The Department has agreed to provide all documents from the two closed files that are determined not to contain grand jury materials. With respect to the investigation of Company B, Mr. Trott has informed the Subcommittee that the Department is hindered in complying with the subpoena both by Rule 6(e), which presents particular problems because the investigation is currently under the review of a sitting grand jury, and by the Executive's obligation not to compromise an ongoing criminal investigation. On October 9, the Subcommittee was provided a list of the approximately 56 documents in the Company **[*14]** B file.

Senator Grassley's Subcommittee did not indicate why Mr. Trott's submission of September 28 and the proposal contained therein were not adequate to satisfy its needs. Rather, it issued the October 1 subpoena and gave the Department three days in which to comply. Following Mr. Trott's appearance at the October 4 hearing, the Subcommittee again articulated no basis for disagreement with the legal position taken by Mr. Trott with respect to the release of documents pertaining to an ongoing criminal investigation. It simply issued the October 5 statement and subpoena, demanding the release of the open Company B files, and declaring that "if the deadline of October 19th is not honored, the Subcommittee will do whatever it must to enforce its subpoena."

The Senator has declined repeated requests from Assistant Attorney General McConnell to meet and discuss the issues relating to disclosure of the subpoenaed documents. The most recent of Mr. McConnell's efforts was a letter of October 17, 1984, in which he offered again to bring Assistant Attorney General Trott, Associate Attorney General Jensen, or Deputy Attorney General Dinkins to Senator Grassley's office for discussions.

II. **[*15]** Impediments to Disclosure

The principal objections to release of certain of the subpoenaed files can be divided into two

categories: the attorneys' obligation under Federal Criminal Procedure Rule 6(e) to protect the confidentiality of matters occurring before the grand jury, and the obligation of the Executive Branch not to disclose internal information pertaining to an open investigation. In an effort to resolve the first issue, the Criminal Division has filed a motion with the appropriate district court seeking guidance on the applicability of Rule 6(e) to the subpoenaed files of the two closed cases. Under the rule, disclosure may be made "when so directed by a court preliminarily or in connection with a judicial proceeding." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 220 (1979). With respect to the two closed cases, the Department has expressed its intention to release all materials that are not protected by the court's decision regarding the reach of Rule 6(e). The October 1 subpoena thus appears to us to have been substantially complied with, at least with respect to the two closed investigations. The open investigation raises more serious concerns. On **[*16]** the one hand, the October 5 subpoena purports to disavow any intention to request grand jury materials relating to the Company B investigation. On the other hand, the descriptions of requested documents in the attachment to the subpoena depict materials which are, for the most part, quintessentially grand jury materials when requested in the context of an ongoing criminal investigation. For example, "all prosecutors' memoranda," documents revealing "the status of the investigation," and "investigative plans," as specified in the subpoena, are precisely the type of information the courts have required to be withheld in order to protect the integrity of the grand jury process. Thus, the nominal exclusion of 6(e) materials from the subpoena does not correct an apparent failure on the part of the Subcommittee to recognize that files of a case under active consideration by a grand jury may likely be protected in their entirety from disclosure by Rule 6(e). In light of this uncertainty in the intended scope of the subpoena, we explain in more detail the restrictions imposed on the Department by the courts through Rule 6(e).

A. Duty to Protect Grand Jury Secrecy

The secrecy of grand jury **[*17]** activities, which enjoys ancient common law roots, has received consistent and emphatic protection by the Supreme Court over the years. See, e.g., United States v. Baggot, 463 U.S. 476 (1983); United States v. Sells Engineering, 463 U.S. 418 (1983); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979); Pittsburg Plate Glass Co. v. United States, 360 U.S. 395, 399-400 (1959); United States v. Proctor & Gamble Co., 356 U.S. 677, 681-82 (1958). The doctrine is an outgrowth of the extraordinary powers granted the grand jury. In order to determine when there is probable cause to believe a crime has been committed and to screen charges not warranting prosecution, the operation of the grand jury "generally [is] unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." United States v. Calandra, 414 U.S. 338, 343 (1974). Unlike most administrative investigations, the scope of the grand jury's inquiry is not "limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly **[*18]** subject to an accusation of crime." Id. (quoting Blair v. United States, 250 U.S. 273, 282 (1919)).

The broad powers enjoyed by the grand jury, as well as its need to pursue investigations effectively, have given rise to a "long-established policy that maintains the secrecy of grand jury proceedings in the federal courts." United States v. Proctor and Gamble Co., 356 U.S. at 681. As explained on several occasions by the Supreme Court, this doctrine serves several distinct purposes: (1) to prevent the escape of persons whose indictment may be contemplated; (2) to ensure freedom to the grand jury in its deliberations; (3) to prevent subornation of perjury or tampering with grand jury witnesses; (4) to encourage the free disclosure of information to the grand jury; and (5) to protect from unfavorable publicity persons who are accused of crimes but are ultimately exonerated. United States v. Proctor & Gamble Co., 356 U.S. at 681-82 n.6. Thus, grand jury secrecy is "'as important for the protection of the innocent as for the pursuit of the guilty.'" United States v. Sells, 463 U.S. at 424-25 (quoting United States v. Johnson, 319 U.S. 503, 513 **[*19]** (1943)).

This long established policy is currently codified in Rule 6(e) of the Federal Rules of Criminal Procedure. Under this Rule, no attorney for the Department of Justice n4 may disclose "matters occurring before the grand jury" to any other person, unless one of five narrow exceptions is met. n5 While none of these exceptions covers disclosure of grand jury materials to a committee of Congress in the present circumstances, it is useful to review the courts' treatment of two of these exceptions, which highlight the importance the courts place on shielding matters that fall within Rule 6(e).

n4 The prohibition also covers grand jurors, interpreters, stenographers, operators of recording devices, typists who transcribe testimony, and government personnel to whom documents are disclosed in order to assist government attorneys in their responsibilities with respect to the grand jury. See Fed. R. Crim. P. 6(e)(2).

n5 The exceptions include (1) disclosure to another government attorney for use in the performance of such attorneys' duty; (2) disclosure to government personnel as are deemed necessary to assist an for the government in the performance of his duties; (3) disclosure directed by a court preliminary to or in connection with a judicial proceeding; (4) disclosure by a government attorney to another grand jury; and (5) disclosure at the request of a defendant and approved by a court "upon a showing that grounds may exist for motion to dismiss the indictment because of matters occurring before the grand jury." Fed. R. Crim. P. 6(e). **[*20]**

The first of these exceptions permits disclosure of "matters occurring before a grand jury," "when so directed by a court preliminary to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(c)(i). Narrowly interpreting the scope of this section, the Supreme Court recently held in United States v. Baggot, 463 U.S. at 480, that the section provided an exemption only "when the primary purpose of the disclosure is . . . to assist in preparation or conduct of a judicial proceeding." Thus, under the Court's decision in Baggot, the Internal Revenue Service could not obtain information pertaining to matters occurring before the grand jury for use in a civil tax audit because the audit was not related to "some identifiable litigation." Id.

Although committees of Congress have on occasion sought to claim this exception as a basis for enforcement of subpoenas seeking material protected by Rule 6(e), the analysis employed by the Supreme Court in Baggot, as well as in several lower court decisions denying such claims, does not sustain such an argument in this case. A congressional committee's oversight responsibilities simply "do not constitute a 'judicial **[*21]** proceeding'" within the meaning of Rule 6(e). In re Grand Jury Impanelled October 2, 1978, 510 F. Supp. 112, 114 (D.D.C. 1981); see also In re Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cases | 62798, at 78639, 78643-44 (D.D.C. Aug. 16, 1979). Indeed, the Subcommittee apparently concedes that its inquiry is subject to the restrictions of Rule 6(e). n6

n6 See October 5 subpoena; Letter from Senators Proxmire and Grassley to Assistant Attorney General Trott (Aug. 9, 1984).

The other exception which has recently been the subject of Supreme Court examination is set forth in Rule 6(e)(3)(A)(i), which permits disclosure to "an attorney for the government for use in the performance of such attorneys' duty." The language of this provision is exceedingly broad, and would ordinarily suggest that attorneys for the government -- generally defined in Rule 54(c) of the Federal Rules of Criminal Procedure -- to cover all authorized attorneys in the Department of Justice could freely exchange grand jury materials. In United States v. Sells Engineering, 463 U.S. at 428, however, the Supreme Court once again interpreted an exception to Rule 6(e) very narrowly, **[*22]** finding that disclosure among Department of Justice attorneys "is limited to use by those attorneys who conduct the criminal matters to which the materials pertain." As a general matter, therefore, Department attorneys who are assisting the grand jury may not disclose such materials to any other attorney in the Department for purposes of civil litigation even though there may be a legitimate use for the

materials under this exception and the attorneys work for the same Department.

In reaching this narrow construction of what would otherwise appear to be a rather broad authorizing provision, the Court in Sells relied heavily on the need to maintain the secrecy of grand jury proceedings. Among other things, it suggested that expanding the number of persons with access to grand jury materials would "threaten . . . the willingness of witnesses to come forward and to testify fully and carefully." 463 U.S. at 432. "If a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action," the Court reasoned, "he well may be less willing to speak for fear that he will get himself into trouble in **[*23]** some other forum." Id. Although the decision in Sells obviously does not bear directly on the question of what materials can be disclosed to a congressional committee in these circumstances, it does serve to highlight the importance the Supreme Court places on the protections of Rule 6(e), even to the point of precluding attorneys within this Department engaged in parallel civil and criminal investigation from exchanging grand jury material subject to Rule 6(e).

Because the materials sought by the Subcommittee relate to three separate grand jury investigations, and do not fall within any of the exceptions to Rule 6(e) secrecy, it is necessary for this Department to review each document to determine whether release of its contents would reveal a "matter occurring before the grand jury." While the meaning of this ambiguous phrase has been the subject of extensive litigation, and occasionally apparently inconsistent judicial decisions, compare, e.g., Fund for Constitutional Government v. National Archives, 656 F.2d 856, 870 (D.C. Cir. 1981) with, e.g., United States v. Weinstein, 511 F.2d 622, 627 n.5 (2d Cir.), cert. denied, 422 U.S. 1042 **[*24]** (1975), it is generally recognized that Rule 6(e) prohibits the disclosure of any material that would reveal the strategy or direction of the grand jury investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else about the grand jury's deliberations. See Fund for Constitutional Government v. National Archives, 656 F.2d at 869; United States v. Hughes, 429 F.2d 1293, 1294 (10th Cir. 1970). The application of this general standard, however, requires sensitive judgments with respect to all of the documents by who are familiar with the particular investigation. Moreover, there exists some uncertainty as to the application of Rule 6(e) to documents which have been subpoenaed by or presented to the grand jury, but which are sought for their own sake, and not to learn what took place before the grand jury. See United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960). Due in part to the difficulty of these questions, and in response to the Supreme Court decision in Sells and Baggot, the Department established a Working Group on Rule 6(e), which recently **[*25]** published an extensive "Guide to Rule 6 (e) After Sells and Baggot" to assist our attorneys in keeping abreast of the developing case law in this area.

In light of the Supreme Court's recent pronouncements in Sells and Baggot, we cannot overemphasize the statutory duty of government attorneys to protect grand jury materials. It is therefore imperative that the Department screen the documents sought by the Subcommittee's October 5 subpoena and withhold those which are prohibited from disclosure under Rule 6(e). Because of the uncertainty in determining whether some documents are protected, and the importance of the issue, steps may have to be taken to clarify the application of Rule 6(e) to any of the open files about which there is doubt.

Members of our Office have discussed certain facts relating to the Company B file with the Deputy Chief of the Fraud Section, Criminal Division, the attorney responsible for supervising the investigation. The Deputy Chief believes that a very high percentage of the substance of the files, perhaps 98 to 99 percent, relates to matters occurring before the grand jury. This high percentage is explained by the fact that the investigators **[*26]** in this case were unable to obtain or cooperation without the assistance of the grand jury process, so virtually the entire investigation was conducted before the grand jury. The Deputy Chief has stated that redaction of grand jury materials would not be feasible because little or nothing of substance would remain. Assistant Attorney General Trott has informed the Subcommittee of

the impracticability of redacting grand jury materials.

Although we have not as yet examined the approximately 56 documents contained in the Company B file, and although we are not accustomed to making Rule 6(e) determinations, we rely on the representations of the Criminal Division in believing that, with regard to many of the documents, the Department of Justice may have no discretion to release, nor the Subcommittee to demand, the grand jury materials contained therein. Rule 6(e) therefore appears to remove from contention large portions of the documents, and perhaps some documents in their entirety. Depending upon the decision with respect to other possible bases for protecting these documents from disclosure to the Subcommittee, it may be necessary or desirable to seek judicial guidance in determining **[*27]** which documents or portions of documents are protected from disclosure under Rule 6(e). We discuss this option further below.

B. Duty to Protect the Integrity of Ongoing Investigations

In the case of an ongoing criminal investigation, not only are the concerns of Rule 6(e) heightened because the case is currently before the grand jury, but also further concerns counsel against compliance with a congressional subpoena. The policy of the Executive Branch throughout this Nation's history has been generally to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, articulated this position over forty years ago:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest. **[*28]**
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

Thus the dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, there would appear to be no reason not to adhere in this instance to the consistent position of previous presidents and attorneys general. Deputy Assistant Attorney General Kauper explained the concerns:

> Over a number of years, a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigative files. Most important, the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised **[*29]** of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.

Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Submission of Open CID Investigation Files 2 (Dec. 19, 1969). This policy with respect to Executive Branch investigations was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. No President, to our knowledge, has departed from this position affirming the confidentiality of law enforcement files.

Other grounds for objecting to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information, sensitivity to the rights of innocent individuals who may be identified in law enforcement files **[*30]** but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. These concerns are very close to those which underlie Rule 6(e), but they extend to the entire investigative process, not just those problems associated with a grand jury.

Not the least internal concern, of course, is that effective and candid deliberations among the numerous advisers who participate in a case in various roles and at various stages of a prosecution would be rendered impossible if confidential deliberative communications were held open to public scrutiny. Cf. United States v. Nixon, 418 U.S. 683, 708 (1974). The deliberative memoranda that constitute a significant portion of investigative files are an intrinsic part of the prosecutorial process. Employees of the Department would be reluctant to express their personal, unofficial views if those views could be obtained by Congress upon request. This concern is particularly acute in the context **[*31]** of an ongoing investigation in which persons called upon to make recommendations regarding prosecution must be assured that their advice will not be subject to immediate review and publicity by a congressional committee.

In addition, potential targets of enforcement actions are entitled to protection from widespread premature disclosure of investigative information. Because the Congress and the Department of Justice are both part of the United States Government which prosecutes a criminal defendant, there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952). Pretrial publicity originating in Congress, therefore, can be attributed to the Government as a whole and can require postponement or other modification of the prosecution on due process grounds. Id. The discretion of prosecutive officials to conduct their investigations and trials in the manner they deem to be the most efficient and constructive can be infringed by precipitous disclosures which prompt a court to impose **[*32]** remedial procedural obligations upon the Government.

The Department of Justice also has an obligation to ensure that the fairness of the decisionmaking with respect to its prosecutorial function is not compromised by excessive congressional pressures, and that the due process rights of those under investigation are not violated. See Pillsbury v. Federal Trade Comm'n, 354 F.2d 952 (5th Cir. 1966). Just as an agency's ability to fulfill its statutory obligation may be impermissibly strained by pressure from the Legislative Branch during the administrative decision making process, D.C. Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246-1247 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972), excessive interference with the exercise of prosecutorial discretion can substantially prejudice the rights of persons under investigation. Persons who ultimately are not prosecuted may be subjected to prejudicial publicity without being given an opportunity

to cleanse themselves of the stain of unfounded allegations. Moreover, the injection of impermissible factors in the decision whether to initiate prosecution offends not only the rights of the accused, but also the **[*33]** professional obligation of government attorneys to the integrity of the judicial process and, ultimately, the obligation of the Executive faithfully to execute the laws.

Article II of the Constitution places the power to enforce the laws squarely in the Executive Branch of Government. The Executive therefore has the exclusive authority to enforce the laws adopted by Congress, and neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive to prosecute particular individuals. United States v. Nixon, 418 U.S. 683, 693 (1974); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1869). This principle was explained in Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967), in which the court considered the applicability of the Federal Tort Claims Act to a prosecutorial decision not to arrest or prosecute persons injuring plaintiff's business. The court ruled that the government was immune from suit under the discretionary decision exception of the Act on the ground that the Executive's prosecutorial discretion was rooted in the separation of powers under **[*34]** the Constitution:

> The President of the United States is charged in Article 2, Section 3, of the Constitution with the duty to "take care that the laws be faithfully executed . . . ." The Attorney General is the President's surrogate in the prosecution of all offenses against the United States . . . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute. . . .
>
> This discretion is required in all cases.

* * *

> We emphasize that this discretion, exercised in even the lowliest and least consequential cases, can affect the policies, duties, and success of a function placed under the control of the Attorney General by our Constitution and statutes.

375 F.2d at 246-47. The court went on to state that this prosecutorial discretion is protected "no matter whether these decisions are made during the investigation or prosecution of offenses." 375 F.2d at 248. "Courts are rightly reluctant to encroach on the constitutionally-based independence of the prosecutor and grand jury." United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979); accord Newman v. United States, 382 **[*35]** F.2d 479, 480 (D.C. Cir. 1967). A court "will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process." United States v. Welch, 572 F.2d 1359, 1360 (9th Cir.), cert. denied, 439 U.S. 842 (1978).

The Constitution specifically excludes Congress from the decision whether to prosecute particular cases. A legislative effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based. See Selective Serv. Sys. v. Minnesota Public Interest Research Group, 468 U.S. 841, 853-54 (1984); United States v. Brown, 381 U.S. 437, 447 (1965); United States v. Lovett, 328 U.S. 303, 315 (1946). The constitutional role of Congress is to adopt general legislation that will be applied and implemented by the Executive Branch. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society **[*36]** would seem to be the duty of other departments." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810). The Framers intended that Congress not

be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. As the Supreme Court stated in Lovett:

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment.

328 U.S. at 317. Justice Powell recently echoed this concern: "The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'" INS v. Chadha, 462 U.S. 919, 961 (1983) (Powell, J., concurring). It is well established that courts may not require prosecution of specific individuals, even though the Judicial Branch is expressly assigned the role of adjudicating individual guilt. A fortiori, the Legislative Branch, which is assigned the role of passing laws of general applicability and specifically excluded from questions of individual **[*37]** guilt or innocence, may not decide on an individual basis who will be prosecuted. "'When the legislative and executive powers are united in the same person or body,' says [Montesquieu], 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.'" The Federalist No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961).

Finally, Department of Justice officials, as attorneys, are directed to observe the Code of Professional Responsibility to the extent it does not prevent their loyal service to the United States. See 28 C.F.R. 45.735-1 (1983). The Code prohibits a lawyer who is associated with an investigation from making or participating in making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration" already public or highly generalized information about the matter. Model Code of Professional Responsibility, DR 7-107(A) (1979). Although arguments can be made that the Model Code is not binding on federal officials, we know of no justification in this instance for **[*38]** failing to observe the minimum standard of conduct prescribed by the American Bar Association for attorneys in the investigation of criminal matters. Indeed, courts have held that the prosecution has a special obligation not to release information that might prejudice the defendant's right to a fair trial. Delaney v. United States, 199 F.2d 107, 113 (1st Cir. 1952).

C. Specific Application to this Investigation

The wisdom and necessity of these general principles, developed over years of judicial, congressional and executive experience, are clearly illustrated by consideration of the specific damaging effects congressional interference has had and may continue to have upon the Company B investigation. The principal trial attorney responsible for the investigation, the Deputy Chief of the Fraud Section of the Criminal Division, prepared a statement which outlines the specific ways in which release of prosecutive or investigative memoranda would interfere with the ongoing investigation of the Electric Boat matter. The following concerns are drawn from that statement.

The key witness in the Company B matter, Mr. D, has already delayed cooperating with the Department because **[*39]** he hoped to benefit from congressional pressure on the Department related to his pending indictment in another matter. Further, certain Members of Congress have declared that they possess substantial evidence relevant to the Company B investigation but have refused Department of Justice requests for access to that evidence.

In addition, employees of Company B, both former and present, are in fear of retribution if their cooperation should be disclosed. The Department may be unable to secure reliable evidence from employees if it cannot guarantee total confidentiality. Further, disclosure of

Federal Bureau of Investigation reports will effectively preclude the Bureau's providing assistance in the investigation and deprive the Department of the valuable resources on which it depends. Moreover, the pursuit of parallel investigations of the same matter by a congressional subcommittee and the Department of Justice will confuse matters in the public eye and enable potential targets to continue to play Congress and the Department against one another.

The Department also has serious concerns about the possibility of jeopardizing the indictments that may be secured as a result of the investigation. **[*40]** Department participation in abusive publicity or inadvertent release of grand jury material inextricably bound up with other material, whether willing or in response to a congressional subpoena could subject an indictment to dismissal. In sum, the serious concerns for the integrity of the investigative and prosecutive process that underlie the legal principles discussed above have vivid application to the current matter.

III. Limitations on Power to Withhold

The policy of confidentiality does not necessarily extend to all material contained in investigative files. Depending upon the nature of the specific files and type of investigation involved, certain of the information contained in such files may be shared with Congress in response to a proper request. Indeed, Assistant Attorney General Trott has informed the Subcommittee that the Department will release all documents in the closed files that are judicially determined not to reveal grand jury material. In the same vein, there may be documents in even the open Company B files that do not implicate any of the constitutional or pragmatic problems identified in our discussion. If that is the case, those documents should be turned **[*41]** over to Congress in response to a proper request. However, each document should be examined in light of the basic principles articulated above.

An additional limitation on the assertion of **executive privilege** is that the privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers. The documents must therefore be reviewed for any evidence of misconduct which would render the assertion of privilege inappropriate. "It should always be remembered that even the most carefully administered department or agency may have made a mistake or failed to discover a wrongdoing committed inside or outside the Government." Study, Congressional Inquiries Concerning the Decisionmaking Process and Documents of the Executive Branch: 1953-1960. The greatest danger attending any assertion of **executive privilege** has always arisen from the difficulty, perhaps impossibility, of establishing with absolute certainty that no mistake or wrongdoing will subsequently come to light which lends credence to congressional assertions that the privilege has been improperly invoked. We are unaware of any serious allegations of criminal or unethical conduct in this **[*42]** matter, but we nevertheless strongly recommend a document-by-document review of the relevant materials to avoid any possibility of a misapplication of the privilege.

IV. Needs of Congress

The letters from Senator Proxmire and Senator Grassley do not specify the purpose for seeking access to an open investigative file. Although they have cited their intent to review the Department of Justice's management of certain fraud investigations, neither the letters nor the subpoenas articulate a reason for including an ongoing investigation in that review process. In our opinion, the mere statement of review power falls far short of the test established by the United States Court of Appeals for the District of Columbia: "The sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the fulfillment of the committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725, 731 (D.C. Cir. 1974).

V. Recommendations and Conclusions

The above discussion emphasizes the fact-specific nature of the determinations required to be made before investigative files can be turned over to Congress **[*43]** consistent with federal prosecutors' obligations to the court and to potential defendants, and the constitutional obligation of the Executive to execute the laws. The very core of these determinations necessitates a careful review and deliberation for every document involved. In addition, the complexity of our obligations to preserve the confidentiality of matters occurring before the grand jury involves a careful of each document in the Company B file. Because of the importance of protecting this investigation and future Department of Justice investigations, and based upon the conclusion of the Criminal Division concerning the dangers to the ongoing criminal investigation, we believe documents in the open file should not be disclosed to the Subcommittee. As the great bulk of the material is, we have been informed, already protected from disclosure by Rule 6(e), the extent to which an assertion of **executive privilege** will be necessary to achieve this result may well depend upon how far Rule 6(e) is interpreted to reach with respect to the particular documents at issue. The broadest application of Rule 6(e), of course, might obviate the need for resort to **executive privilege.** Even **[*44]** a less expansive construction of Rule 6(e) would substantially narrow the number of documents in dispute and focus the points of controversy on a relatively small group of materials.

We recommend, therefore, that careful attention be given to a determination of the Rule 6(e) issue. If there are some documents or portions of documents that simply cannot be placed with confidence on one side or the other of the Rule 6(e) line, and a good-faith motion to the appropriate district court could be made for clarification of the Rule's effect on certain specific documents, then we believe the court's guidance should be sought. We have a strong interest in establishing the extent of our Rule 6(e) obligation regardless of whether the President decides to invoke his privilege. If he declines to invoke the privilege, we have an obligation to the court not to reveal matters occurring before the grand jury. If the President should decide to invoke the privilege, then where appropriate we will want to claim Rule 6(e), as well as the privilege, as a basis for refusing to comply with the Subcommittee's subpoena. Because the Subcommittee seems to agree that it is not entitled to receive Rule 6(e) documents, **[*45]** a judicial determination of our Rule 6(e) obligation could serve to narrow the range of controversy and limit the number of documents for which a claim of **executive privilege** would be necessary. Perhaps negotiations with the Subcommittee could be more successful under these circumstances.

Should the President decide not to invoke his privilege, the Department will still be under an obligation to protect the confidentiality of grand jury materials. As discussed above, we have been informed by the Criminal Division that the vast majority of the materials sought by the Subcommittee's subpoenas are grand jury materials by definition, although the Subcommittee has indicated that it is not seeking materials subject to Rule 6(e). Under these circumstances, it would seem reasonable to take the Subcommittee at its word and make available only those materials that we determine in good faith are not subject to Rule 6(e). Again, it may be useful to seek guidance from the supervising court to help define the scope of our Rule 6(e) obligation not to reveal matters occurring before a grand jury.

Finally, in the event that there is not adequate time before the return date of the subpoena to consider **[*46]** and resolve whether a claim of **executive privilege** should be asserted by the President, the question may arise whether the documents may be withheld without the formal assertion of a claim on the basis that additional time is necessary to determine whether a claim should be made.

We conclude that, inherent in the constitutional doctrine of **executive privilege** is the right to have sufficient time to review subpoenaed documents in order to determine whether an **executive privilege** claim should be made. If the Executive Branch could be required to respond to a subpoena (either judicial or congressional) without having adequate opportunity to review the demanded documents and determine whether a privilege claim would be

necessary in order to protect the constitutional prerogatives of the President, the President's ability effectively to assert a claim of **executive privilege** would be effectively nullified. Therefore, if the President is to be able to assert **executive privilege** at all, he must have adequate time within which to make a determination whether or not to assert the privilege. Thus, in the right to withhold documents for a time sufficient to make a determination whether to assert **[*47]** privilege is an element of **executive privilege** itself, and it is a justifiable basis upon which to withhold documents.

This Office has previously concluded that it would be constitutionally impermissible to prosecute an Executive Branch official for asserting the President's constitutionally based claim of **executive privilege.** See "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of **Executive Privilege,**" 8 Op. O.L.C. ___ (1984). For the reasons articulated in that memorandum, it would be equally impermissible to prosecute an Executive Branch official for withholding subpoenaed documents for a reasonable time sufficient to make a determination whether **executive privilege** should be asserted.

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