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*1984 OLC LEXIS 50, *; 8 Op. O.L.C. 129*

OPINION OF THE OFFICE OF LEGAL COUNSEL

PROSECUTION FOR CONTEMPT OF CONGRESS OF AN EXECUTIVE BRANCH OFFICIAL WHO HAS ASSERTED A CLAIM OF **EXECUTIVE PRIVILEGE**

1984 OLC LEXIS 50; 8 Op. O.L.C. 129

May 30, 1984

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

CORE TERMS: contempt, grand jury, duty, prosecutorial discretion, presidential, subpoena, prosecute, criminal contempt, site, indictment, memorandum, confidentiality, contempt citation, subcommittee, Superfund Act, referral, disclosure, prosecuted, subpoenaed, assigned, criminal prosecution, legislative history, inappropriate, mandatory, asserting, prosecutor, faithfully executed, claim of privilege, presumptively, prerogative

SYLLABUS:
[*1]

As a matter of statutory construction and separation of powers analysis, a United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who carries out the President's instruction to invoke the President's claim of **executive privilege** before a committee of Congress.

ADDRESSEE:
MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

OPINIONBY: OLSON

OPINION:
I. Introduction

This memorandum memorializes our formal response to your request for our opinion whether, pursuant to the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194, a United States Attorney must prosecute or refer to a grand jury a citation for contempt of Congress issued with respect to an executive official who has asserted a claim of **executive privilege** in response to written instructions from the President of the United States. Your inquiry originally arose in the context of a resolution adopted by the House of Representatives on December 16, 1982, during the final days of the 97th Congress, which instructed the Speaker of the House of Representatives to certify the report of the Committee on Public Works and Transportation concerning the "contumacious conduct **[*2]** of the Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee . . . to the United States Attorney for the District of

Columbia, to the end that the Administrator . . . may be proceeded against in the manner and form provided by law." H.R. Res. 632, 97th Cong., 2d Sess. (1982). n1 Section 192 of Title 2, United States Code, provides, in general, that willful failure to produce documents in response to a congressional subpoena shall be a misdemeanor. Section 194 provides that if such a failure is reported to either house of Congress it "shall" be certified to the "appropriate United States attorney whose duty it shall be to bring the matter before the grand jury for its action."

n1 Although the December 1982 dispute is now a matter of history, it raises recurring issues.

Your inquiry presents a number of complex issues that will be considered in this memorandum. The first issue is whether the Executive retains some discretion with respect to referral of a contempt of Congress citation to a grand jury. This issue raises questions **[*3]** of statutory construction and the separation of powers with respect to the scope of the Executive's exercise of prosecutorial discretion. The second issue is whether the criminal contempt of Congress statute applies to an Executive Branch official who, on the orders of the President, asserts the President's claim of **executive privilege.** This issue also involves questions of statutory interpretation and the constitutional separation of powers.

As we have previously discussed with you, and as we explain in detail in this memorandum, we have concluded that, as a matter of both statutory construction and the Constitution's structural separation of powers, a United States Attorney is not required to refer a contempt citation in these circumstances to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President's instruction in a factual context such as that presented by the December 16, 1982, contempt citation. First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the **[*4]** Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute 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** in this context.

Our conclusions are predicated upon the proposition, endorsed by a unanimous Supreme Court less than a decade ago, that the President has the authority, rooted inextricably in the separation of powers under the Constitution, to preserve the confidentiality of certain Executive Branch documents. 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 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 **[*5]** 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.

Before setting out a more detailed explanation of our analysis and conclusions, we offer the caveat that our conclusions are limited to the unique circumstances that gave rise to these questions in late 1982 and early 1983. Constitutional conflicts within the federal government must be resolved carefully, based upon the facts of each specific case. Although tensions and friction between coordinate branches of our government are not novel and were, in fact, anticipated by the Framers of the Constitution, they have seldom led to major confrontations with clear and dispositive resolutions.

> The accommodations among the three branches of the government are not automatic. They are undefined, and in the very nature of things could not have been **[*6]** defined, by the Constitution. To speak of lines of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory.

Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010, 1016 (1924) (emphasis in original). "The great ordinances of the Constitution do not establish and divide fields of black and white." Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). Therefore, although we are confident of our conclusions, prudence suggests that they should be limited to controversies similar to the one to which this memorandum expressly relates, and the general statements of legal principles should be applied in other contexts only after careful analysis.

II. Background

Because the difficult and sensitive constitutional issues that we consider in this opinion could conceivably be resolved differently depending upon the specific facts of a controversy, this analysis is presented in the context of the December 16, 1982, actions of the House of Representatives. The facts surrounding this dispute will be set out in detail in the following pages.

[*7]

A. EPA's Enforcement of the Superfund Act

On December 16, 1982, the House of Representatives cited the Administrator of the Environmental Protection Agency (EPA) because she declined to produce, in response to a broad subcommittee subpoena, a small portion of the subpoenaed documents concerning the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, 9657 (Supp. V 1981) (Superfund Act). The Superfund Act, adopted in December of 1980, authorizes the federal government to take steps to remedy the hazards posed by abandoned and inactive hazardous waste sites throughout the United States. n2 The EPA, which was delegated part of the President's authority to enforce the Superfund Act in August of 1981, n3 has considerable flexibility with respect to how this goal may be accomplished. EPA may request the Department of Justice to proceed immediately against those responsible for the hazardous waste sites to "secure such relief as may be necessary to abate" an "imminent and substantial endangerment to the public health or welfare or the environment." See 42 U.S.C. § 9606. Alternatively, EPA may initiate clean-up efforts itself by using funds from the **[*8]** $ 1.6 billion Superfund. See 42 U.S.C. § 9631. If EPA itself implements the clean-up efforts, it may subsequently sue those responsible for the hazardous waste to recover the clean up cost and, in some instances, may obtain treble damages. See 42 U.S.C. § 9607. These two basic enforcement mechanisms are supplemented by other broad enforcement powers, which authorize the issuance of administrative orders "necessary to protect the public health and welfare and the environment" and to require designated persons to furnish information about the storage, treatment, handling, or disposal of hazardous substances. See 42 U.S.C. §§ 9606, 9604(e)(1). Finally, the Superfund Act imposes criminal liability on a person in charge of a facility from which a hazardous substance is released, if that person fails to notify the government of the release. See 42 U.S.C. § 9603.

n2 Another statute, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., provides federal authority to deal with the current disposal of hazardous industrial wastes.

n3 See Executive Order No. 12316, "Responses to Environmental Damage" (Aug. 14, 1981).

Prior to the initiation of judicial **[*9]** proceedings, EPA must undertake intensive investigation and case preparation, including studying the nature and the extent of the hazard present at sites, identifying potentially responsible parties, and evaluating the evidence that exists or that must be generated to support government action. See Amended Declaration of Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel, EPA, filed in United States v. House of Representatives, Civ. No. 82-3583 (D.D.C. Jan. 14, 1983). Many sites apparently involve hundreds of waste generators; hence, the initial investigation of a site can take months and involve the examination of tens of thousands of documents. Id.

Based on its initial investigations of hazardous waste sites throughout the country, EPA created a comprehensive national enforcement scheme and developed during 1982 an interim priorities list, which identified the 160 sites that posed the greatest risk to the public health and welfare and the environment. n4 EPA also promulgated enforcement guidelines to direct the implementation of the Superfund Act against these potentially hazardous sites. See 47 Fed. Reg. 20664 (1982). **[*10]**

n4 Subsequently, EPA published a proposed national priorities list (to replace the interim list), which identified the 418 sites that, in EPA's judgment, required priority in use of the Superfund to effect clean up. See 47 Fed. Reg. 58476 (1982).

Under this basic enforcement scheme, EPA commenced actual enforcement of the Superfund Act. As part of the enforcement effort with respect to each site, EPA generally develops a strategy for conducting negotiations and litigation consistent with its overall enforcement goals and the individual facts of each particular case. Once a case strategy has been developed, EPA notifies responsible parties that it intends to take action at a site unless the parties undertake an adequate clean up program on their own. Following the issuance of notice letters, EPA typically negotiates with responsible parties to agree on a clean up plan. These negotiations may involve hundreds of potentially responsible parties and millions of dollars in clean up costs. Depending upon the strengths and weaknesses of individual cases and the effect on the overall enforcement effort, EPA may decide to settle with some but not all parties and proceed to litigation **[*11]** with a certain number of potential defendants. If EPA decides to bring a lawsuit, it refers the case to the Land and Natural Resources Division of this Department, which is responsible for conducting the actual litigation. n5

n5 We understand that as of January 14, 1983, EPA had sent more than 1,760 notice letters, undertaken Superfund financed action at 112 sites involving the obligation of in excess of $ 236 million, instituted Superfund claims in 25 judicial actions, and obtained one criminal conviction. As of the early months of 1983, EPA and the Department of Justice had reached settlements in 23 civil actions providing for the expenditure of more than $ 121 million to conduct clean up operations and were actively negotiating with responsible parties concerning the clean up of 56 sites throughout the country. See Amended Declaration of Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel of the EPA, filed in United States v. House of Representatives, Civ. No. 82-3583 (D.D.C. Jan. 14, 1983).

During EPA's enforcement of the Superfund Act, the agency created or received hundreds of thousands of documents concerning various **[*12]** aspects of the enforcement process. Many of these documents concerned the facts relating to specific hazardous waste sites; others involved general agency strategy and policies with respect to the Superfund Act; still others, a small portion of the enforcement files, were attorney and investigator memoranda and notes that contained discussions of subjects such as EPA's enforcement strategy against particular defendants, analyses of the strengths and weaknesses of the government's case against actual or potential defendants, consideration of negotiation and settlement strategy, lists of potential witnesses and their anticipated testimony, and other litigation planning matters. Enforcement officials at both the career and policy level at EPA and in the Land and

Natural Resources Division at the Department of Justice determined that some of those documents, which concerned the legal merits and tactics with respect to individual defendants in open enforcement files, were particularly sensitive to the enforcement process and could not be revealed outside the agencies directly involved in the enforcement effort without risking injury to EPA's cases against these actual and potential defendants **[*13]** in particular and the EPA enforcement process in general. n6

n6 Id.

B. The House Subcommittee's Demands for Enforcement Files

In the midst of EPA's ongoing enforcement efforts under the Superfund Act, the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation (Public Works Subcommittee), chaired by Rep. Levitas, began hearings to review EPA enforcement of the Act. In the course of these hearings, the Public Works Subcommittee first demanded access to, and then subpoenaed, a wide range of documents concerning enforcement of the Superfund Act with respect to the 160 sites that were on the agency's interim priorities list. The documents demanded by the Public Works Subcommittee included not only documents concerning the facts relating to these sites and EPA's general policies, but also the sensitive material contained in open case files that set out discussions concerning case strategy with respect to actual and potential defendants. n7 The Public Works Subcommittee subpoena was dated November 16, 1982, and was served on November 22, 1982. It called for production of the subpoenaed documents eleven days later on December 2, **[*14]** 1982. The EPA Administrator responded to the Public Works Subcommittee's subpoena by offering to provide the Public Works Subcommittee with access to an estimated 787,000 pages of documents within the scope of the subpoena. n8 The EPA and the Land and Natural Resources Division officials responsible for conducting EPA enforcement litigation determined, however, that release outside the enforcement agencies of a limited number of the most sensitive enforcement documents contained in open files concerning current and prospective defendants would impair EPA's ongoing enforcement efforts and prevent EPA and the Department of Justice from effectively implementing the Superfund Act.

n7 The subpoena required the EPA Administrator to

> produce all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980 the date of enactment of the Superfund Act, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of the Superfund Act.

See United States v. House of Representatives, 556 F. Supp. 150, 151 (D.D.C. 1983). **[*15]**

n8 See Testimony of Administrator Gorsuch before the Public Works Subcommittee, attached as Exhibit C to Declaration of Robert M. Perry, supra.

Therefore, in accordance with the explicit guidelines adopted by the President to govern possible claims of **executive privilege,** see Memorandum re: Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), EPA suggested that some of the documents be withheld under a claim of **executive privilege** and consulted with this Office and the Office of the Counsel to the President in order to determine whether such a claim might be asserted to avoid impairing the constitutional responsibility of the President

to take care that the laws be faithfully executed. A further review of the documents in question by enforcement officials at EPA and the Land and Natural Resources Division was then undertaken to confirm that the particular documents selected for consideration for an **executive privilege** claim were, in the judgment of those officials, sufficiently sensitive that their disclosure outside the Executive Branch might adversely affect the law enforcement process. The documents were then reviewed by officials **[*16]** in this Office and officials in the Office of the Counsel to the President to confirm that the documents were of the type described by the enforcement officials. Various unsuccessful efforts were thereafter made to resolve the dispute short of a final confrontation. The President, based upon the unanimous recommendation of all Executive Branch officials involved in the process, ultimately determined to assert a claim of **executive privilege** with respect to 64 documents from open enforcement files that had been identified as sufficiently enforcement sensitive as of the return date of the subpoena that their disclosure might adversely affect pending investigations and open enforcement proceedings. The President implemented this decision in a memorandum dated November 30, 1982, to the EPA Administrator, which instructed her to withhold the particularly sensitive documents from disclosure outside the Executive Branch as long as the documents remained critical to ongoing or developing enforcement actions. The legal basis for this decision was explained in letters from the Attorney General on November 30, 1982, to the House Public Works Subcommittee and one other House subcommittee. n9 On **[*17]** December 2, 1982, 64 of the most sensitive documents were withheld from the Subcommittee. n10

n9 See Letters to Hon. Elliott H. Levitas and Hon. John D. Dingell from Attorney General William French Smith (Nov. 30, 1982). The Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee (Energy and Commerce Subcommittee), chaired by Representative John D. Dingell, was pursuing a parallel demand for similar documents relating to enforcement of the Superfund Act with respect to certain specific sites that were among the 160 on the interim priorities list. While the Energy and Commerce Subcommittee sought documents relative to three specific hazardous waste sites, the Public Works Subcommittee subpoena demanded production of virtually all documents for all 160 sites. The President's assertion of **executive privilege** applied to both subpoenas. Although the Energy and Commerce Subcommittee approved a contempt of Congress resolution against the EPA Administrator, this resolution never reached the full Committee or the floor of the House of Representatives.

n10 As of that date, EPA had been able to examine only a portion of the hundreds of thousands of pages of documents that had been subpoenaed. The 64 documents that were withheld were those among the subpoenaed documents that had been reviewed and determined to fall within the President's instruction not to produce documents the release of that would adversely affect ongoing enforcement proceedings. See Amended Declaration of Robert M. Perry, supra.

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C. The Contempt of Congress Proceedings in the House of Representatives

The President's assertion of **executive privilege,** and the Attorney General's explanation of the law enforcement considerations and constitutional justification for the decision not to release the documents outside the Executive Branch while enforcement proceedings were ongoing, did not dissuade the congressional subcommittees from pressing their demands for the withheld material. After the EPA Administrator asserted the President's claim of privilege at a December 2, 1982, Public Works Subcommittee hearing, the Subcommittee immediately approved a contempt of Congress resolution against her. The full Committee did likewise on December 10, 1982, and rejected a further proposal by the Department of Justice to establish a formal screening process and briefings regarding the contents of the documents. n11 The full House adopted the contempt of Congress resolution on December 16, 1982, n12 and the following day Speaker O'Neill certified the contempt citation to the United States Attorney for the District of Columbia for prosecution under the criminal contempt of Congress statute.

n11 See Letter to Hon. Elliott H. Levitas from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs (Dec. 9, 1982). **[*19]**

n12 The contempt resolution stated:

> Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

128 Cong. Rec. 31754 (1982).

D. The Criminal Contempt of Congress Statute

The criminal contempt of Congress statute contains two principal sections, 2 U.S.C. §§ 192 & 194. n13 Section 192, which sets forth the criminal offense of contempt of Congress, provides in pertinent part:

> Every person who having **[*20]** 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 one month nor more than twelve months.

n13 A third provision, 2 U.S.C. § 193, which denies the existence of any testimonial privilege for a witness to refuse to testify on the ground that this testimony would disgrace him, is not relevant to the issues discussed in this memorandum.

Section 194 purports to impose mandatory duties on the Speaker of the House or the President of the Senate, as the case may be, and the United States Attorney, to take certain 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 **[*21]** 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 said President of the Senate or the 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.

(Emphasis added.)

E. The Department of Justice Civil Suit

Immediately after the House passed the resolution adopting the finding that the EPA Administrator was in contempt of Congress, the Department of Justice filed a civil suit in the United States District Court for the District **[*22]** of Columbia to obtain a ruling that "insofar as the EPA Administrator . . . did not comply with the Subpoena, her non-compliance was lawful" because of a valid Presidential claim of **executive privilege.** n14 The House moved to dismiss the Department's complaint on jurisdictional grounds, and the Department cross moved for summary judgment on the merits. In a letter to Speaker O'Neill dated December 27, 1982, the United States Attorney indicated that during the pendency of the lawsuit, he would take no further action with respect to the Speaker's referral of the contempt citation. The Speaker responded in a letter dated January 4, 1983, in which he took the position that the United States Attorney must, as a matter of law, immediately refer the matter to a grand jury.

n14 See Amended Complaint in United States v. House of Representatives, Civ. No. 82-3583 (D.D.C. Dec. 29, 1982).

The trial court responded to the cross-motions for dismissal and summary judgment by exercising its discretion under equitable rules of judicial restraint not to accept jurisdiction over the lawsuit, and it dismissed the suit. The court concluded:

> When constitutional disputes arise concerning **[*23]** the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. . . .
>
> The difficulties apparent in prosecuting the Administrator . . . for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement.

United States v. House of Representatives, 556 F. Supp. 150, 152-53 (D.D.C. 1983). No appeal was taken. n15

n15 Although the United States Court of Appeals for the District of Columbia Circuit previously had been willing to entertain a civil action to resolve a conflict between a congressional subpoena for documents and a Presidential claim of **executive privilege** when the action was brought by a congressional committee, Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725 (D.C. Cir. 1974) (en banc), the trial court decision in the EPA matter casts some doubt on the viability of such an action when Congress, as in this case, does not wish to resolve the controversy in a civil suit. We must assume, for the purpose of this opinion, that a civil suit is an avenue that is open to Congress, but closed to the Executive, absent a legislature willing to have the matter resolved in a civil proceeding.

Of course, the courts might be more amenable to a civil action challenging a contempt citation if they felt that a criminal prosecution in this context was untenable. The district

court judge in the EPA matter noted but did not attempt to consider in depth the "difficulties" of prosecuting an executive official for carrying out the President's constitutional responsibility. **[*24]**

F. Resolution of the EPA Dispute

Subsequent to the trial court decision, the two branches engaged in negotiations to reach a compromise settlement. The parties eventually reached an agreement under which the Public Works Subcommittee would have limited access to the withheld documents and would sponsor a resolution to "withdraw" the contempt citation against the EPA Administrator. Pursuant to the agreement, the Subcommittee reviewed the documents, and the House later adopted a resolution withdrawing the contempt citation. H.R. Res. 180, 98th Cong., 1st Sess. (Aug. 3, 1983). The issue whether the House of Representatives in the 98th Congress could "withdraw" the contempt citation of the House during the 97th Congress was never resolved.

During the pendency of the lawsuit and the subsequent settlement negotiations, the United States Attorney for the District of Columbia refrained from referring the contempt citation to the grand jury. The United States Attorney took the position that referral would have been inappropriate during that period and that the statute left him with discretion to withhold referral. See Testimony of Stanley S. Harris before the House Committee on Public **[*25]** Works and Transportation, 98th Cong., 1st Sess. 100-07 (June 16, 1983). Following the passage of the resolution withdrawing the contempt citation, "the relevant facts and documents were presented . . . to a federal grand jury, which voted unanimously not to indict the EPA Administrator." Letter from Stanley S. Harris, United States Attorney, District of Columbia, to Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives (Aug. 5, 1983).

III. Generally Applicable Legal Principles: The Separation of Powers, the Duties of the Executive to Enforce the Law, and the Derivation and Scope of the Principles of Prosecutorial Discretion and **Executive Privilege**

A. The Separation of Powers

The basic structural concept of the United States Constitution is the division of federal power among three branches of government. Although the expression "separation of powers" does not actually appear in the Constitution, the Supreme Court has emphasized that the separation of powers "is at the heart of our Constitution," and has recognized "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." Buckley **[*26]** v. Valeo, 424 U.S. 1, 119-20 (1976). It needs little emphasis that the separation of powers doctrine is vital to any analysis of the relative responsibilities of the branches of our government, inter se. In The Federalist No. 47, James Madison, who believed that "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the concept of the separation of powers, defended this tripartite arrangement in the Constitution by citing Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct:

> The reasons on which Montesquieu grounds his maxim 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." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were **[*27]** it joined to the executive power, the judge might behave with all the violence of an oppressor."

The Federalist No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961); see Buckley v. Valeo, 424 U.S. at 120-21. n16

n16 Madison characterized Montesquieu as the "oracle who is always consulted and cited on [the] subject [of the separation of powers]." See The Federalist No. 47, supra, at 301.

Of the three branches of the new government created in Philadelphia in 1787, the legislature was regarded as the most intrinsically powerful, and the branch with powers that required the exercise of the greatest precautions.

Madison warned that the "legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, supra, at 309. He admonished that because of their experiences in England, the founders of the thirteen colonies had focused keenly on the danger to liberty from an "overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority," but had tended to ignore the very real dangers from "legislative **[*28]** usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." Id. Reflecting the views of many of his colleagues, Madison believed that although the risk of tyranny would naturally come from the King in an hereditary monarchy, in a representative republic, like that created by the constitutional convention, in which executive power was "carefully limited, both in the extent and duration of its power," the threat to liberty would come from the legislature,

> which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

Id.

The Framers feared that the legislature's power over the purse would foster a dependence by the executive departments on the legislature "which gives still greater facility to encroachments" by **[*29]** the legislature on the powers of the Executive. Id. at 310. The concerns of the Framers with respect to the power of the legislature have been recognized by the Supreme Court. The Court, citing many of the above statements, has observed that because of the Framers' concerns about the potential abuse of legislative power, "barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform functions of the other departments." United States v. Brown, 381 U.S. 437, 444 (1965). Justice Powell noted that "during the Confederation, the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown." INS v. Chadha, 462 U.S. 917, 961 (1983) (Powell, J. concurring). After citing several specific legislative abuses that had been of particular concern to the Framers, Justice Powell concluded that it "was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches." Id. at 962.

Thus, the careful separation of governmental functions among three branches **[*30]** of government was a very deliberate and vital structural step in building the Constitution. The Framers understood human nature and anticipated that well-intentioned impulses would lead each of the branches to attempt to encroach on the powers allocated to the others. They

accordingly designed the structure of the Constitution to contain intrinsic checks to prevent undue encroachment wherever possible. Particular care was taken with respect to the anticipated tendency of the Legislative Branch to swallow up the Executive. The Framers did not wish the Legislative Branch to have excessive authority over the individual decisions respecting the execution of the laws: "An elective despotism was not the government we fought for." T. Jefferson, Notes on the State of Virginia 120 (Univ. N.C. Press ed. 1955) n17 The constitutionally prescribed separation of powers creates enforceable abuses that had been of particular concern to the Framers, Justice Powell concluded that it "was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches." Id. The division of delegated powers was designed "to assure, as nearly **[*31]** as possible, that each Branch of government would confine itself to its assigned responsibility." INS v. Chadha, 462 U.S. at 951. The doctrine of separated powers "may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. Id. at 963 (Powell, J. concurring) (citations omitted). Although the Supreme Court has recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," it has also emphasized that the Court "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." Buckley v. Valeo, 424 U.S. at 121, 123. Therefore, although the Constitution does not contemplate "a complete division of authority between the three branches," each branch retains certain core prerogatives upon which the other branches may not **[*32]** transgress. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977). Each branch must not only perform its own delegated functions, but each has an additional duty to resist encroachment by the other branches. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 462 U.S. at 951 (emphasis added).

B. The Duties of the Executive to Enforce the Law

The fundamental responsibility and power of the Executive Branch is the duty to execute the law. Article II, § 1 of the Constitution expressly vests the executive power in the President. Article II, § 3 commands that the President "take Care that the Laws be faithfully executed." Enforcement of the laws is an inherently executive function, and by virtue of these constitutional provisions, the Executive Branch has the exclusive constitutional authority to enforce federal laws. Since the adoption of the Constitution, these verities have been at the heart of the general understanding of the Executive's constitutional authority. During the debates on the Constitution, James Wilson noted **[*33]** that the "only powers he conceived strictly executive were those of executing the laws." 1 M. Farrand, The Records of the Federal Convention of 1787, at 65-66 (1937). During the first Congress, James Madison stated that "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Congress 481 (1789). The Supreme Court has recognized this fundamental constitutional principle. In Springer v. Philippine Islands, 277 U.S. 189 (1928), the Court observed:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

n17 It is noteworthy, at least from an historical perspective, that the House of Representatives, because of its immense powers, was considered to be the governmental

body least vulnerable to encroachments by other segments of government and, at the same time, because of its popular origin and frequent renewal of authority by the people, the body whose encroachment on the other branches would be least distrusted by the public. The Supreme Court later noted:

> It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny.

Kilbourn v. Thompson, 103 U.S. 168, 192 (1881).

[*34]

Id. at 202. More recently, Judge Wilkey, writing for a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit in a decision later affirmed by the Supreme Court, recognized that the Constitution prevents Congress from exercising its power of "oversight, with an eye to legislative revision," in a manner that amounts to "shared administration" of the law. Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425, 474 (D.C. Cir. 1982), aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of America, 43 U.S. 1216 (1983). It thus seems apparent that the drafters of the Constitution intended clearly to separate the power to adopt laws and the power to enforce them and intended to place the latter power exclusively in the Executive Branch. n18 As a practical matter, this means that there are constitutional limits on Congress' ability to take actions that either disrupt the ability of the Executive Branch to enforce the law or effectively arrogate to Congress the power of enforcing the laws.

n18 Of equal concern was the need to separate the judicial power from the executive power. The drafters intended to preserve the impartiality of the judiciary as "neutral arbiters in the criminal law" by separating the judiciary from the prosecutorial function. Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

[*35]

C. The Derivation and Scope of Prosecutorial Discretion and **Executive Privilege**

The issues addressed by this memorandum involve two important constitutional doctrines that spring from the constitutional limits imposed by the separation of powers and the Executive's duty to enforce the laws: prosecutorial discretion and **executive privilege.**

1. Prosecutorial Discretion

The doctrine of prosecutorial discretion is based on the premise that because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress. That principle was reaffirmed by the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), in which the Court invalidated the provision of the Federal Election Act that vested the appointment of certain members of the Federal Election Commission in the President pro tempore of the Senate and the Speaker of the House. In so holding, the Court recognized the exclusively executive nature of some of the Commission's powers, including the right to commence litigation:

> The Commission's enforcement power, exemplified **[*36]** by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take care that the

laws be faithfully executed." Art. II, § 3.

424 U.S. at 138.

The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals. 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 **[*37]** of powers under 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." Id. at 248.

The limits and precise nature of the Executive's prosecutorial discretion are discussed in greater detail below. At this point in our examination of the issues considered in this memorandum, it is sufficient to observe that meaningful and **[*38]** significant separation of powers issues are raised by a statute that purports to direct the Executive to take specified, mandatory prosecutorial action against a specific individual designated by the Legislative Branch.

2. **Executive Privilege**

The doctrine of **executive privilege** is founded upon the basic principle that in order for the President to carry out his constitutional responsibility to enforce the laws, he must be able to protect the confidentiality of certain types of documents and communications within the Executive Branch. If disclosure of certain documents outside the Executive Branch would impair the President's ability to fulfill his constitutional duties or result in the impermissible involvement of other branches in the enforcement of the law, then the President must be able to claim some form of privilege to preserve his constitutional prerogatives. This "**executive privilege**" has been explicitly recognized by the Supreme Court, which has stated that the privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708 (1974). We believe that it is **[*39]** beyond peradventure that the constitutionally mandated separation of powers permits the President to prevent disclosure of certain Executive Branch documents under the doctrine of **executive privilege** and that the ability to assert this privilege is fundamental to the President's ability to carry out his constitutionally prescribed duties.

The Supreme Court has suggested that in some areas the President's **executive privilege** may be absolute and in some circumstances it is a qualified privilege that may be overcome by a compelling interest of another branch. United States v. Nixon, 418 U.S. at 713; see also Senate Select Comm. on Presidential Campaign Activities v. Nixon, **498** F.2d 725 (D.C. Cir. 1974) (en banc). Nevertheless, the unanimous Supreme Court decision in Nixon clearly stands for the proposition that there is a privilege, that it stems from the separation of powers, and that it may be invoked (although perhaps overridden by a court) whenever the President finds it necessary to maintain the confidentiality of information within the Executive Branch in order to perform his constitutionally assigned responsibilities. n19

n19 Presidents have invoked the privilege throughout our history for a variety of reasons. See, e.g., "History of Refusals by Executive Branch to Provide Information Demanded by Congress," 6 Op. O.L.C. 751 (1982); Memorandum from John Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert Lipschutz, Counsel to the President (June 8, 1977); Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y Gen. 45 (1941). **[*40]**

The scope of **executive privilege** includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws. First, as the Supreme Court has held, the privilege protects deliberative communications between the President and his advisors. The Court has identified the rationale for this aspect of the privilege as the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. 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 (footnotes omitted).

Another category of Executive Branch material that is subject to a President's claim of privilege is material necessary "to protect military, diplomatic, or sensitive national security secrets." United States v. Nixon, 418 U.S. 683, 706 (1974). In Nixon, the Court stated:

> As to **[*41]** those areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In C.& S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948), dealing with Presidential authority involving foreign policy considerations, the Court said:
>
> > "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In United States v. Reynolds, 345 U.S. 1 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the

> occasion for the privilege is appropriate, and the court should not jeopardize the security **[*42]** which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." Id. at 10.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

418 U.S. at 710-11.

An additional important application of **executive privilege,** which, as noted earlier, relates centrally to the discharge of the President's constitutional duties, involves open law enforcement files. Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature. n20 The basis for this application of the privilege is essentially the same as for all aspects of **executive privilege;** the Executive's ability to enforce the law would be seriously impaired, and the impermissible **[*43]** involvement of other branches in the execution and enforcement of the law would be intolerably expanded, if the Executive were forced to disclose sensitive information on case investigations and strategy from open enforcement files.

> IV. The Duty of the Executive Branch When an Executive Official Has Been Cited for Contempt of Congress for Asserting the President's Claim of **Executive Privilege**

n20 As explained by Attorney General (later, Supreme Court Justice) Robert Jackson in April 1941:

> 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.

40 Op. Att'y Gen. 45, 46 (1941). As similarly expressed a few years later by Deputy Assistant Attorney General Kauper:

> 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 investigational 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 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 the Deputy Counsel to the President from Deputy Assistant Attorney General Kauper re: Submission of Open CID Investigation Files (Dec. 19, 1969). This significant constitutional privilege provides a foundation for our discussion below of the

penalties that Congress may attach to the President's assertion of the privilege in response to a congressional subpoena.

[*44]

A. Prosecutorial Discretion

The first specific question that is presented by the circumstances that gave rise to this memorandum is whether the United States Attorney is required to refer every contempt of Congress citation to a grand jury. This question raises issues of statutory construction as well as the constitutional limits of prosecutorial discretion. We deal first with the statutory questions.

As a preliminary matter, we note that § 194 does not on its face actually purport to require the United States Attorney to proceed with the prosecution of a person cited by a house of Congress for contempt; by its express terms the statute discusses only referral to a grand jury. Even if a grand jury were to return a true bill, the United States Attorney could refuse to sign the indictment and thereby prevent the case from going forward. United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); In re Grand Jury, January, 1969, 315 F. Supp. 662 (D. Md. 1970). See Hamilton & Grabow, A Legislative Proposal for Resolving **Executive Privilege** Disputes Precipitated by Congressional Subpoenas, 21 Harv. J. on Legis. 145, 155 (1984). **[*45]** Thus, as a matter of statutory interpretation, there is no doubt that the contempt of Congress statute does not require a prosecution; the only question is whether it requires referral to the grand jury. n21

n21 Although it is by no means certain as a matter of law, if the case were referred to a grand jury, the United States Attorney might be required to take certain steps short of signing the indictment, and the grand jury's decision might well become public. In Cox, a majority of the court (made up of the three dissenting judges and one concurring judge) took the view that the United States Attorney could be required to prepare an indictment for use by the grand jury. In addition, the district court in In re Grand Jury, supra, held that even though the United States Attorney could not be required to sign an indictment, in the circumstances of that case "the substance of the charges in the indictment should be disclosed, omitting certain portions as to which the Court, in the exercise of its discretion, concludes that the public interest in disclosure is outweighed by the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment." 315 F. Supp. at 678-79. Under this analysis, if the contempt citation were to reach a grand jury and the grand jury were to vote a true bill, a court might be able to require the United States Attorney to prepare an indictment and then might order the disclosure of that indictment as voted by the grand jury. For the reasons set out in our discussion of prosecutorial discretion, the court could not, however, order the United States Attorney to prosecute.

Because the contempt of Congress statute does not require the United States Attorney to refer to a grand jury a citation for contempt of Congress issued to an executive official who has asserted the President's claim of **executive privilege,** we have not attempted to determine definitively what additional steps, if any, the United States Attorney could be required to take if such a matter were referred to a grand jury. **[*46]**

1. Previous Department of Justice Positions Concerning Prosecutorial Discretion Under the Contempt of Congress Statute

In the past, the Department of Justice has taken the position that if Congress cited an executive officer for contempt because of an assertion of **executive privilege** and "the Department determined to its satisfaction that the claim was rightfully made, it would not, in the exercise of its prosecutorial discretion, present the matter to a grand jury." Testimony of Assistant Attorney General (now Solicitor General) Rex Lee, Hearings on Representation of Congress and Congressional Interests in Court, Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 2d Sess. 8 (1976).

This principle of prosecutorial discretion under the contempt of Congress statute was followed by the Department in the cases of three officials of the Port of New York Authority who were cited for contempt of Congress in 1960 for refusing to produce documents to the House Judiciary Committee. As a part of an investigation of the Port Authority, which had been established by an interstate compact approved by Congress, the Judiciary Committee subpoenaed **[*47]** a large number of documents concerning the Port Authority's operations, most of which the Port Authority declined to produce on the orders of the governors of New York and New Jersey (the states within which the Port Authority was located). Because of the failure to produce the documents, the Committee recommended, and the House adopted, contempt resolutions against three principal officials of the Port Authority. n22 On August 23, 1960, these resolutions were referred to the United States Attorney for prosecution. See N.Y. Times, Aug. 24, 1960, at 1. The United States Attorney never referred any of these citations to the grand jury. On November 16, 1960, the Department of Justice announced that it would proceed against the officials by information rather than indictment, and therefore would not present the citations to a grand jury. See N.Y. Times, Nov. 17, 1960, at 1. On November 25, 1960, the Department announced that it would file an information against only one of the Port Authority officials, Executive Director Austin Tobin, and would not prosecute the remaining two officials. See N.Y. Times, Nov. 26, 1960, at 1. The trial began in January 1961 and continued under **[*48]** the supervision of the new Attorney General, Robert F. Kennedy, who never altered the decision not to prosecute the two remaining officials, in spite of a congressional request to do so. Ultimately Tobin's conviction was reversed by the United States Court of Appeals for the District of Columbia Circuit. Tobin v. United States, 306 F.2d 270 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962). n23

n22 See 106 Cong. Rec. 17313 (1960) (citation against Austin J. Tobin, Executive Director of the Authority); id. at 17316 (citation against S. Sloan Colt, Chairman of the Board); id. at 17319 (citation against Joseph G. Carty, Secretary). The contempt resolution in each case read as follows:

> Resolved, That the Speaker of the House of Representatives certify the report of the Committee on the Judiciary as to the contumacious conduct of name in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon him and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that name may be proceeded against in the manner and form provided by law. **[*49]**

n23 The Court of Appeals ruled that the documents requested by the Committee went beyond the investigative authority delegated to the Committee by the House.

In the foregoing instance, the Department (under two administrations) exercised its prosecutorial discretion not to refer contempt of Congress citations to a grand jury, notwithstanding the seemingly mandatory phrasing of the statute. n24 For the reasons set forth more fully below, we continue to adhere to the conclusion that the Department retains prosecutorial discretion not to refer contempt citations to a grand jury.

n24 We know of at least two other individuals who were cited for contempt of Congress, but whose cases were not referred to a grand jury by the Department of Justice. See Department of Justice File No. 51-51-484 (1956). The file was closed because the Department concluded that there was an insufficient basis for prosecution.

2. Judicial Opinions Interpreting the Language of § 194

Section 194 imposes similarly worded, nominally mandatory, referral obligations on both the Speaker of the House (or the President of the Senate) and the United States Attorney once a contempt of Congress resolution has been **[*50]** adopted by the House or Senate:

> it shall be the duty of the said President of the Senate or the 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.

(Emphasis added.)

Although the language, "it shall be the duty of" and "whose duty it shall be," might suggest a nondiscretionary obligation, the United States Court of Appeals for the District of Columbia Circuit has expressly held, at least with respect to the Speaker of the House, that the duty is not mandatory, and that, in fact, the Speaker has an obligation under the law, at least in some cases, to exercise his discretion in determining whether to refer a contempt citation. Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966). In Wilson, the court reversed a conviction for contempt of Congress on the ground that the Speaker had assumed that the statute did not permit any exercise of discretion by him and he had therefore automatically referred a contempt **[*51]** citation to the United States Attorney while Congress was not in session. The court based its conclusion that the Speaker was required to exercise his discretion on the longstanding practice of both the House and Senate and on congressional debates on contempt citations in which the houses had recognized their own discretion not to approve a contempt resolution. The court concluded that because full House approval of a contempt citation is necessary when Congress was in session, the Speaker is required to exercise some discretion when the House is not in session. 369 F.2d at 203-04.

Although the reasons underlying the court's decision not to impose a mandatory duty on the Speaker in Wilson do not necessarily require the same conclusion with respect to the United States Attorney, the decision at least supports the proposition that the seemingly mandatory language of § 194 need not be construed as divesting either the Speaker or the United States Attorney of all discretion. n25

n25 In this respect, we believe that Wilson implicitly disapproved the dictum of Ex parte Frankfeld, 32 F. Supp. 915 (D.D.C. 1940), in which the district court stated:

> It seems quite apparent that Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate, under such circumstances, but made the certification of facts to the district attorney a mandatory proceeding, and it left no discretion with the district attorney as to what he should do about it. He is required, under the language of the statute, to submit the facts to the grand jury.

Id. at 916. The Frankfeld court expressly linked the responsibilities of the Speaker and the United States Attorney. Wilson ruled that the Speaker's duty is discretionary, at least when the House is not in session. Therefore, since the Speaker's duty is in pari materia with the duty of the United States Attorney, the law, at least in the District of Columbia Circuit, seems to be that both duties should be viewed as containing some elements of discretion. **[*52]**

In several cases, the United States Court of Appeals for the District of Columbia Circuit has at least assumed that the United States Attorney retains discretion not to refer a contempt of

Congress citation to a grand jury. In these cases, the court refused to entertain challenges to congressional subpoenas, at least in part on the ground that the prospective witnesses would have adequate subsequent opportunities to challenge a committee's contempt finding, including the opportunity to persuade the United States Attorney not to refer the case to a grand jury. For example, in Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971), the court declined to entertain a suit to quash a congressional subpoena on the ground that it would be inappropriate, as a matter of the exercise of its equitable power, to interfere with an ongoing congressional process. The court stated that protections were available "within the legislative branch or elsewhere," and then in a footnote indicated that these protections resided "perhaps in the Executive Branch which may decide not to present the matter to the grand jury (as occurred in the case of the officials of the New York Port Authority); or **[*53]** perhaps in the Grand Jury which may decide not to return a true bill." 442 F.2d at 754 n.6 (emphasis added). n26 See also Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972). In United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 491 (1974), the court agreed to review a challenge to a congressional subpoena brought by a third party, and it distinguished Ansara and McClellan on the ground that, because the congressional subpoena was issued to a third party, the plaintiffs had no alternative means to vindicate their rights. 488 F.2d at 1260. Among the alternative means the court cited was the right to "seek to convince the executive (the attorney general's representative) not to prosecute." Id.

n26 Ansara v. Eastland was cited with approval three times by Judge Smith in United States v. House of Representatives, 556 F. Supp. 150, 152-53 (D.D.C. 1983). Thus, although the opinion made a passing reference to the mandatory nature of referral, Judge Smith must have recognized that the United States Attorney retained prosecutorial discretion.

These cases emphasize the particular significance **[*54]** of prosecutorial discretion in the context of the contempt of Congress statute. In general, with respect to any criminal allegation, prosecutorial discretion plays an important role in protecting the rights of the accused by providing an additional level of review with respect to the factual and legal sufficiency of the charges. This role is even more important when dealing with the contempt of Congress statute because, as the above cases demonstrate, witnesses generally have no opportunity to challenge congressional subpoenas directly. Thus, as the cases indicate, prosecutorial discretion serves a vital purpose in protecting the rights of the accused in contempt cases by mitigating the otherwise stern consequences of asserting a right not to respond to a congressional subpoena.

Thus, the practice of the Congress and the available judicial authority support the proposition that the seemingly mandatory duties imposed on congressional officials by 2 U.S.C. § 194 are and were intended to be discretionary. The practice of the Executive Branch and the court decisions reflect a similarly discretionary role under the statute for the United States Attorney. Because, as the balance of this **[*55]** memorandum reveals, these interpretations are consistent with other common-law principles and avoid conclusions that would be at odds with the separation of powers, we believe that a correct reading of 2 U.S.C. § 194 requires recognition of the prosecutor's discretion with respect to referral to a grand jury.

3. Common-Law Prosecutorial Discretion

In addition to the court decisions that suggest that the United States Attorney may decide not to refer a contempt citation to a grand jury, the common-law doctrine of prosecutorial discretion weighs heavily against and, in our opinion, precludes an interpretation that the statute requires automatic referral. Because of the wide scope of a prosecutor's discretion in determining which cases to bring, courts, as a matter of law, do not ordinarily interpret a statute to limit that discretion unless the intent to do so is clearly and unequivocally stated. The general rule is that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1974). See also Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869). The Attorney General and his

subordinates, **[*56]** including the United States Attorneys, have the authority to exercise this discretion reserved to the Executive. United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); The Gray Jacket, 72 U.S. (5 Wall.) 370 (1866). In general, courts have agreed with the view of Judge (now Chief Justice) Burger:

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967). See also United States v. Batchelder, 442 U.S. 114 (1979); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Courts have applied this general principle of prosecutorial discretion in refusing to interfere with a prosecutor's decision not to initiate a case, despite the specific language of 28 U.S.C. § 547, which states in part that "each United States Attorney, within his district, shall . . . prosecute for all offenses against the United States." (Emphasis added.) For example, in Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. **[*57]** 1965), cert. denied, 384 U.S. 906 (1966), the court denied a mandamus petition that sought to force the Attorney General to prosecute a national bank. The court ruled: "It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of this discretion." Id. at 234. See also United States v. Brown, 481 F.2d 1035 (8th Cir. 1973); Bass Anglers Sportsman's Society v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971); Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961); United States v. Brokaw, 60 F. Supp. 100 (S.D. Ill. 1945).

Courts exhibit the same deference to prosecutorial discretion even when the specific statute involved uses words that would otherwise have mandatory, nondiscretionary implications. For example, 42 U.S.C. § 1987 states that United States Attorneys are "authorized and required . . . to initiate prosecutions against all persons violating any of the provisions of the federal criminal civil rights statutes." (Emphasis added.) Although a number of cases have been initiated to force a United States **[*58]** Attorney to bring civil rights actions on the ground that this statute imposes a nondiscretionary duty to prosecute, see Note, Discretion to Prosecute Federal Civil Rights Crimes, 74 Yale L.J. 1297 (1965), the courts uniformly have rejected the contention that the statute limits a prosecutor's normal discretion to decide not to bring a particular case. For example, in Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973), the court ruled that the "mandatory nature of the word 'required' as it appears in § 1987 is insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes." 477 F.2d at 381. The court noted that although similar mandatory language was contained in other statutes, "such language has never been thought to preclude the exercise of prosecutorial discretion." Id. Accord Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970); Moses v. Kennedy, 219 F. Supp. 762 (D.D.C. 1963), aff'd sub nom. Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965). The language employed in 2 U.S.C. § 194 is neither stronger nor more clearly mandatory **[*59]** than the language of § 1987, which the courts have decided is insufficient to limit the normal prosecutorial discretion.

In fact, there is nothing to distinguish the contempt of Congress statute from any other statute where the prosecutor retains discretion with respect to who shall be prosecuted. Since the early part of the 19th century, it has been recognized that offenses against Congress that are punishable by Congress through its inherent contempt power may also be violations of the criminal laws and, as such, offenses against the United States, with respect to which the normal rules governing criminal prosecutions apply. See 2 Op. Att'y Gen. 655 (1834) (concluding that an assault against a congressman could be prosecuted consistent with the

Double Jeopardy Clause under the criminal laws, even if the defendant had already been punished by Congress, because the act created two separate offenses, one against Congress and one against the United States). This principle was adopted by the Supreme Court when it upheld the constitutionality of the contempt of Congress statute. In re Chapman, 166 U.S. 661 (1897). In Chapman, the Court held that the contempt statute did not **[*60]** violate the Double Jeopardy Clause even though a defendant could be punished through Congress' inherent contempt power as well as under the contempt statute. The Court concluded that a refusal to testify involved two separate offenses, one against Congress and one against the United States, and that

> it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being diverso intuitu and capable of standing together.

166 U.S. at 672.

The import of the Court's conclusion in this context is clear. Congress' inherent contempt power is the remedy for the offense against Congress, and that remedy remains within Congress' control. The crime of contempt of Congress, like any other federal statutory crime, is an offense against the United States that should be prosecuted as is any other crime. This criminal offense against the United States properly remains subject to the prosecutorial **[*61]** control of the Executive Branch. Therefore, because the contempt statute should be treated as are other federal criminal statutes, we do not believe that § 194 should be read to limit the common law prosecutorial discretion of the United States Attorney. There is nothing in the legislative history of the contempt of Congress statute that is inconsistent with this conclusion. See 42 Cong. Globe, 34th Cong., 3d Sess. 4030-44 (1857).

4. Constitutional Considerations

Our construction of § 194 is reinforced by the need to avoid the constitutional problems that would result if § 194 were read to require referral to a grand jury. As discussed above, the constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law. Although most cases expressly avoid this constitutional question by construing statutes not to limit prosecutorial discretion, the cases that do discuss the subject make it clear that common law prosecutorial discretion is strongly reinforced by the constitutional separation of powers. See, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d **[*62]** 375 (2d Cir. 1973); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966).

A number of courts have expressly relied upon the constitutional separation of powers in refusing to force a United States Attorney to proceed with a prosecution. For example, in Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961), the court declined to order the United States Attorney to commence a prosecution for violation of federal wiretap laws on the ground that it was

> clear beyond question that it is not the business of the Courts to tell the United States Attorney to perform what they conceive to be his duties.
>
> Article II, § 3 of the Constitution, provides that "the President shall take Care that the Laws shall be faithfully executed." The prerogative of enforcing the criminal

> law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government.

193 F. Supp. at 634. See also Goldberg v. Hoffman, 225 F.2d 463, 464-65 (7th Cir. 1955). n27

n27 These conclusions are not inconsistent with Rule 48(a) of the Federal Rules of Criminal Procedure, which requires leave of court before dismissal of a criminal action. This provision is intended primarily to protect defendants against repeated prosecutions for the same offense, and a court's power to deny leave under this provision is extremely limited. See Rinaldi v. United States, 434 U.S. 22 (1977); United States v. Hamm, 659 F.2d 624 (5th Cir. 1981); United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973). The United States Court of Appeals for the Fifth Circuit has stated that the constitutionality of Rule 48(a) is dependent upon the prosecutor's unfettered ability to decide not to commence a case in the first place. United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Moreover, Judge Weinfeld has stated that even if a court denied leave to dismiss an indictment, a court "in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine." United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483 (S.D.N.Y. 1964). **[*63]**

The Fifth Circuit, sitting en banc, has underscored the constitutional foundations of prosecutorial discretion. United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). In Cox, the court overturned a district court's order that a United States Attorney prepare and sign an indictment that a grand jury had voted to return. The plurality opinion stated:

> The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed. The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless **[*64]** an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

342 F.2d at 171 (footnotes omitted). See also id. at 182-83 (Brown, J. concurring); id. at 190-93 (Wisdom, J., concurring). Even the three dissenting judges in Cox conceded that, although they believed that the United States Attorney could be required to sign the indictment, "once the indictment is returned, the Attorney General or the United States Attorney can refuse to go forward." Id. at 179. See United States v. Nixon, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case") (citing, inter alia, Cox).

Although prosecutorial discretion may be regulated to a certain extent by Congress and in some instances by the Constitution, the decision **[*65]** not to prosecute an individual may

not be controlled because it is fundamental to the Executive's prerogative. For example, the individual prosecutorial decision is distinguishable from instances in which courts have reviewed the legality of general Executive Branch policies. See Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); NAACP v. Levi, 418 F. Supp. 1109 (D.D.C. 1976). In these cases the courts accepted jurisdiction to rule whether an entire enforcement program was being implemented based on an improper reading of the law. The cases expressly recognize, however, both that a decision to prosecute in an individual case involves many factors other than merely probable cause, and that "the balancing of these permissible factors in individual cases is an executive, rather than a judicial function which follows from the need to keep the courts as neutral arbiters in the criminal law generally . . . and from Art. II, § 3 of the Constitution, which charges the President to 'take Care that the Laws be faithfully executed.'" Nader v. Saxbe, 497 F.2d at 679 n.18. Similarly distinguishable **[*66]** are the cases concerning the constitutional limits on selective prosecution, which hold that prosecutorial discretion may not be exercised on the basis of impermissible factors such as race, religion, or the exercise of free speech. See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980); Oyler v. Boles, 368 U.S. 448 (1962).

If the congressional contempt statute were interpreted to divest the United States Attorney of discretion, then the statute would create two distinct problems with respect to the separation of powers. "The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches while others say that a given task is not to be performed by a given branch." United States v. Brown, 381 U.S. 437, 443 (1965). Divesting the United States Attorney of discretion would run afoul of both aspects of the separation of powers by stripping the Executive of its proper constitutional authority and by vesting improper power in Congress.

First, as the cases cited above demonstrate, Congress may not deprive the Executive of its prosecutorial discretion. In areas **[*67]** where the President has specific executive authority, Congress may establish standards for the exercise of that authority, but it may not remove all Presidential authority. For example, Congress may require the President to make appointments to certain executive positions and may define the qualifications for those positions, but it may not select the particular individuals whom the President must appoint to those positions. See Buckley v. Valeo, 424 U.S. 1 (1976). Similarly, Congress may adopt the criminal provisions for which individuals may be prosecuted and impose certain qualifications on how the Executive should select individuals for prosecution, but it may not identify the particular individuals who must be prosecuted. The courts have declared that the ultimate decision with respect to prosecution of individuals must remain an executive function under the Constitution.

Second, if Congress could specify an individual to be prosecuted, it would be exercising powers that the Framers intended not be vested in the legislature. 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 **[*68]** with many of the policies upon which the Constitution's prohibition against bills of attainder was based. See United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (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); see United States v. Brown, 381 U.S. 437, 446 (1965). 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 has echoed this concern: "The **[*69]** 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. 917, 961 (1983) (Powell, J. concurring). As we have shown above, 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 guilt or innocence, may not decide on an individual basis who will be prosecuted.

These constitutional principles of prosecutorial discretion apply even though the issue here is referral to the grand jury and not commencement of a criminal case after indictment. A referral to a grand jury commences the criminal prosecution process. That step is as much a part of the function of executing the laws as is the decision to sign an indictment. The cases expressly recognize that prosecutorial discretion applies at any stage of the investigative process, even to the decision whether to begin an investigation at all. See Inmates of Attica **[*70]** Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); Smith v. United States, 375 F.2d 243, 248 (5th Cir.), cert. denied, 389 U.S. 841 (1967). In the latter case, the court emphasized that prosecutorial discretion was protected "no matter whether these decisions are made during the investigation or prosecution of offenses." 375 F.2d at 248. Moreover, if the Executive has already determined that, as a matter of law, no violation of the law has occurred, it would serve no practical purpose to refer a case to the grand jury. Given the importance of these constitutional principles and the fundamental need to preserve the Executive's power to enforce the laws, we see no reason for distinguishing between the decision to prosecute and the decision to refer to the grand jury in this case. n28

n28 These conclusions are not inconsistent with Rule 48(a) of the Federal Rules of Criminal Procedure, which requires leave of court before dismissal of a criminal action. This provision is intended primarily to protect defendants against repeated prosecutions for the same offense, and a court's power to deny leave under this provision is extremely limited. See Rinaldi v. United States, 434 U.S. 22 (1977); United States v. Hamm, 659 F.2d 624 (5th Cir. 1981); United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973). The Fifth Circuit has stated that the constitutionality of Rule 48(a) is dependent upon the prosecutor's unfettered ability to decide not to commence a case in the first place. United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Moreover, Judge Weinfeld has stated that even if a court denied leave to dismiss an indictment, a court "in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine." United States v. Greater Blouse, Skirt & Neckwear Contractors Association, Inc., 228 F. Supp. 483 (S.D.N.Y. 1964). **[*71]**

For all of the above reasons, as a matter of statutory construction strongly reinforced by constitutional separation of powers principles, we believe that the United States Attorney and the Attorney General, to whom the United States Attorney is responsible, retain their discretion not to refer a contempt of Congress citation to a grand jury. It follows, of course, that we believe that even if the provision of a statute requiring reference to a grand jury were to be upheld, the balance of the prosecutorial process could not be mandated.

B. Whether the Criminal Contempt of Congress Statute Applies to an Executive Official Who Asserts, On Direct Orders of the President, the President's Claim of **Executive Privilege**

We next consider, aside from the issue of prosecutorial discretion, whether the criminal contempt of Congress statute is intended to apply, or constitutionally could be applied, to

Presidential claims of **executive privilege.**

1. Previous Department of Justice Interpretations of the Contempt of Congress Statute

The Department of Justice has previously taken the position that the criminal contempt of Congress statute does not apply to executive officials who assert claims **[*72]** of **executive privilege** at the direction of the President. In 1956, Deputy Attorney General (subsequently Attorney General) William P. Rogers took this position before a congressional subcommittee investigating the availability of information from federal departments and agencies. In a lengthy memorandum of law, Deputy Attorney General Rogers set forth the historical basis of **executive privilege** and concluded that in the context of Presidential assertions of the privilege, the contempt of Congress statute was "inapplicable to the executive departments." See Hearings Before a Subcommittee of the House Committee on Government Operations, 84th Cong., 2d Sess. 2933 (1956). n29 We are not aware of any subsequent Department position that reverses or weakens this conclusion, and we have found no earlier Department position to the contrary.

n29 The memorandum cited, inter alia, a 1909 Senate debate over the issue of **executive privilege** in which Senator Dolliver questioned "where Congress gets authority either out of the Constitution or the laws of the United States to order an executive department about like a servant." 43 Cong. Rec. 3732 (1909). Other historical examples cited by the report are discussed below. **[*73]**

We believe that the Department's long-standing position that the contempt of Congress statute does not apply to executive officials who assert Presidential claims of **executive privilege** is sound, and we concur with it. Our conclusion is based upon the following factors: (1) the legislative history of the contempt of Congress statute demonstrates that it was not intended to apply to Presidential assertions of **executive privilege;** and (2) if the statute were construed to apply to Presidential assertions of **executive privilege,** it would so inhibit the President's ability to make such claims as to violate the separation of powers.

2. The Legislative History of the Contempt of Congress Statute

Neither the legislative history nor the historical implementation of the contempt statute supports the proposition that Congress intended the statute to apply to executive officials who carry out a Presidential assertion of **executive privilege.** The criminal contempt statute was originally enacted in 1857 during proceedings in the House of Representatives to consider a contempt of Congress citation against a New York Times correspondent who had refused to answer questions put to him by a select **[*74]** committee appointed by the House to investigate charges of bribery of certain Representatives. As a result of the committee's unavailing efforts to obtain the reporter's testimony, the committee chairman introduced a bill designed "more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to deliver testimony." 42 Cong. Globe 404 (1857). The bill was supported as a necessary tool in the House's efforts to investigate the allegations of bribery. See id. at 405 (remarks of the Speaker), 426 (remarks of Sen. Toombs), 427 (remarks of Rep. Davis), 445 (remarks of Sen. Brown). The bill was rushed through Congress in less than a week in order to permit the House to bring greater pressure on the reporter to reveal the alleged source of the congressional corruption. That the bill was sponsored by the select committee, and not the Judiciary Committee, further demonstrates that the bill was not the result of a general consideration of Congress' contempt power, but was enacted as an expedient to aid a specific investigation. Thus, the circumstances of the bill's passage certainly do not affirmatively suggest that Congress anticipated **[*75]** application of the statute to instances in which the President asserted a claim of **executive privilege.**

In fact, the sponsor of the bill disclaimed any such far-reaching implications. Representative Dunn asked the sponsor, Representative Orr, what impact the proposed bill would have on diplomatic secrets, one of the principal areas in which the President had historically asserted a privilege of confidentiality. Representative Dunn stated that use of the contempt statute by Congress to force disclosure of such material "might be productive of great mischief, and in time of war of absolute ruin of the country." 42 Cong. Globe 431 (remarks of Rep. Dunn). Representative Orr replied, "I can hardly conceive such a case" and emphasized that the bill should not be attacked "by putting instances of the extremest cases" because the "object which this committee had in view was, where there was corruption in either House of Congress, to reach it." Id. at 431 (remarks of Rep. Orr). The implication is that Congress did not intend the bill to apply to Presidential assertions of privilege. n30

n30 The legislative history contains one reference to the application of the statute against executive officials. During the floor debates, Representative Marshall attacked the bill by claiming that it "proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people." 42 Cong. Globe at 429. This statement does not, however, suggest that the statute was intended to apply to Presidential assertions of **executive privilege.** Indeed, virtually all previous assertions of **executive privilege** against Congress had been made by the President himself, and Congress expressed no intent to utilize the criminal contempt provisions against the President. Representative Marshall's statement, therefore, simply lends support to the proposition, with which we agree, that there are certain circumstances in which the congressional contempt statute might be utilized against an executive official, such as instances in which an executive official, acting on his own, engaged in disruptive and contumacious conduct during a congressional hearing, or in which an executive official, acting on his own, committed an offense. See Marshall v. Gordon, 243 U.S. 521 (1917). As the remainder of Representative Marshall's remarks demonstrate, the principal force driving the bill was Congress' desire to obtain an expeditious method for investigating questions regarding the integrity of Congress and not to provide Congress with a statute requiring the President to prosecute criminally those who had asserted the President's constitutionally based claim of **executive privilege.** We have found no evidence in the legislative history that supports an intention to apply the proposed statute in such a context. **[*76]**

In the years preceding the adoption of the statute, the President had, on a number of occasions, withheld documents from Congress under a claim of **executive privilege,** and many of these instances had been hotly contested in the public arena, and at least five of these instances occurred within the decade immediately preceding the enactment of the congressional contempt statute. See supra note 19 (collecting authorities). In spite of these highly visible battles over the subject of **executive privilege,** we have located no indication in the legislative history of the criminal contempt statute that Congress intended the statute to provide a remedy for refusals to produce documents pursuant to a Presidential claim of **executive privilege.**

The natural inference to be drawn from this vacuum in the legislative history is reinforced by Congress' failure, as far as we know, ever to utilize its inherent power of arrest to imprison Executive Branch officials for contempt of Congress for asserting claims of **executive privilege,** even though Congress had previously asserted and exercised its clearly recognized right to do so with respect to other instances of contempt by private citizens. **[*77]** See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821); Ex Parte Nugent, 18 F. Cas. 471 (C.C.D.C. 1848). The absence of any congressional discussion of the use of the contempt power against Presidential claims of **executive privilege** and Congress' previous failure ever to attempt to use its inherent contempt power in such cases, strongly suggest that the statute was not intended to apply to such assertions.

This conclusion is supported by the subsequent history of the congressional contempt statute. Since enactment of the statute in 1857, there have been numerous instances in which the President has withheld documents from Congress under a claim of **executive privilege.**

Despite the fact that many of these disputes were extraordinarily controversial, until the citation of the EPA Administrator in December 1982, 125 years after the contempt statute was enacted, neither house of Congress had ever voted to utilize the contempt statute against a Presidential assertion of **executive privilege.** In fact, during congressional debates over Presidential refusals to produce documents to Congress, there have been express acknowledgements by members of Congress that Congress had no recourse **[*78]** against the Executive if the President asserted **executive privilege.** In 1886, the Senate engaged in a prolonged debate over President Cleveland's order to his Attorney General not to produce to Congress documents concerning the dismissal of a United States Attorney. The debate was intense, controversial, and memorable; 23 years after the debate a Senator termed it the "most remarkable discussion which was ever had upon this question of the President's right to withhold documents from Congress." 43 Cong. Rec. 841 (1909) (remarks of Sen. Bacon). During this debate, even Senators who insisted upon the Senate's right to receive the documents recognized that if the President ordered them not to be produced, "there is no remedy." 17 Cong. Rec. 2800 (1886) (remarks of Sen. Logan); see also id. at 2737 (1886) (remarks of Sen. Voorhees). n31

n31 The only remedy then recognized by the Senators was the ultimate sanction of impeachment. See 17 Cong. Rec. 2737, 2800 (1886). As we note below, a much more effective and less controversial remedy is available -- a civil suit to enforce the subpoena -- which would permit Congress to acquire the disputed records by judicial order. See also Senate Select Committee on Presidential Campaign Practices v. Nixon, **498** F.2d 725 (D.C. Cir. 1974) (en banc). **[*79]**

Congress' failure to resort to the contempt statute during any of the multitude of robust conflicts over **executive privilege** during the previous century and one quarter and Congress' own explicit recognition that it was without a remedy should the President order the withholding of documents, strongly suggest that Congress never understood the statute to apply to an executive official who asserted the President's claim of **executive privilege.** n32

n32 Congress' practices with respect to the contempt statute and the absence of any previous application of the statute to an Executive Branch official in these circumstances are highly probative of the meaning and applicability of the statute. In general, the Supreme Court has examined historical practice to determine the scope of Congress' powers. For example, in determining the scope of Congress' power to call and examine witnesses, the Court looked to the historical experience with respect to investigations and concluded that when Congress' practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers; and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful. McGrain v. Daugherty, 273 U.S. 135, 174 (1927); see also Fairbank v. United States, 181 U.S. 283, 308 (1901). Moreover, the Court traditionally gives great weight to a contemporaneous construction of a statute by the agency charged with its execution. See Power Reactor Development Co. v. Electricians, 367 U.S. 396, 408 (1961); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153 (1946). In this instance, Congress is responsible for taking the first step in implementing the contempt statute. Therefore, Congress' previous interpretations and past uses of the statute are analogous to the contemporaneous construction of the agency charged with implementation of the statute, and are of significance in determining the meaning of the statute. **[*80]**

3. Prudential Reasons for Construing the Contempt Statute Not To Apply to Presidential Assertions of Privilege

Courts traditionally construe statutes in order to avoid serious doubts about a statute's constitutionality. Califano v. Yamasaki, 442 U.S. 682, 693 (1979); Crowell v. Benson, 285 U.S. 22, 62 (1932). As stated by the United States Court of Appeals for the District of

Columbia Circuit, "when one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear statement' of contrary legislative intent." United States v. Brown, 483 F.2d 1314, 1317 (D.C. Cir. 1973) (quoting United States v. Thompson, 452 F.2d 1333, 1337 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1972)).

When a possible conflict with the President's constitutional prerogatives is involved, the courts are even more careful to construe statutes to avoid a constitutional confrontation. A highly significant example may be found in the procedural history and holding of United States v. Nixon, 418 U.S. 683 (1974), in which the Court construed the limitation in 28 U.S.C. **[*81]** § 1291 (that appeals be taken only from "final" decisions of a district court) in order to permit the President to appeal an adverse ruling on his claim of **executive privilege** without having to place himself in contempt of court. Although the plain language of that statute seemed to preclude an appeal of a lower court's interlocutory ruling on an evidentiary matter, the Court construed the statute to permit an immediate appeal, without going through the otherwise required contempt proceeding:

> 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 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.

Congress itself has previously recognized the impropriety of resolving **executive privilege** disputes in the context of criminal contempt proceedings. During the dispute over the Watergate tapes, Congress provided a civil enforcement mechanism **[*82]** through which to test the President's claim of **executive privilege.** Senator Ervin, the sponsor of the bill, noted in his explanatory statement to the Senate that the use of criminal contempt "may be inappropriate, unseemly, or nonefficacious where executive officers are involved." 119 Cong. Rec. 35715 (1973). In defending the civil enforcement procedure before the district court, Congress argued that in that case the contempt procedures would be "inappropriate methods for the presentation and resolution of the **executive privilege** issue," and that a criminal proceeding would be "a manifestly awkward vehicle for determining the serious constitutional question here presented." Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Senate Select Committee on Presidential Campaign Activities v. Nixon, Civ. No. 1593-73, at 5 (D.D.C. Aug. 28, 1973).

The United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that criminal contempt proceedings are an inappropriate means for resolving document disputes, especially when they involve another governmental entity. In Tobin v. United States, 306 F.2d **[*83]** 270 (D.C. Cir.), cert. denied, 371 U.S. 902 (1962), the court reversed a contempt of Congress conviction on the ground that the congressional subpoena had gone beyond the investigative authority delegated to the committee that issued the subpoena. After deciding this issue, however, the court felt "inclined to add a few words in conclusion" concerning the problems involved in a criminal contempt of Congress case against a public official. In dictum, the court noted that the "conflicting duality inherent in a request of this nature is not particularly conducive to the giving of any satisfactory answer, no matter what the answer should prove to be," and it cited the "eloquent plea" of District Judge Youngdahl in the case below, which read in part:

> Especially where the contest is between different governmental units, the representative of one unit in conflict with another should not have to risk jail to vindicate his constituency's rights. Moreover, to raise these issues in the context of a contempt case is to force the courts to decide many questions that are not really relevant to the underlying problem of accommodating the interest of two sovereigns.

306 F.2d at **[*84]** 276. See also United States v. Fort, 443 F.2d 670, 677 78 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971).

The analysis contained in United States v. Nixon demonstrates that principles of the separation of powers compel the application of special rules when a Presidential claim of a constitutional privilege is in tension with the request of another branch for confidential Executive Branch records. In discussing the issue of **executive privilege** in that case in response to a judicial subpoena, the Court stressed that the President's assertion of privilege was not to be treated as would a claim of a statutory or common law privilege by a private citizen. 418 U.S. at 708, 715. The President's constitutional role as head of one of three separate branches of government means that special care must be taken to construe statutes so as not to conflict with his ability to carry out his constitutional responsibilities. See, e.g., Myers v. United States, 272 U.S. 52 (1926) (upholding the President's removal power against limitations Congress sought to impose). The same special attention is provided, of course, to the other two branches when they assert **[*85]** responsibilities or prerogatives peculiar to their constitutional duties. See, e.g., Gravel v. United States, 408 U.S. 606 (1972) (extending immunity of Speech and Debate Clause to congressional assistants); Pierson v. Ray, 386 U.S. 547 (1967) (granting absolute civil immunity for judges' official actions).

In this case, the congressional contempt statute must be interpreted in light of the specific constitutional problems that would be created if the statute were interpreted to reach an Executive Branch official such as the EPA Administrator in the context considered here. n33 As explained more fully below, if executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of **executive privilege,** it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of **executive privilege** also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege. n34

n33 The same principle applies to protect the constitutional functions of the other branches. The separation of powers would similarly seem to require that a statute that made it a crime to disregard a statute passed by Congress be read not to apply to a judge who struck down a congressional enactment as unconstitutional. **[*86]**

n34 In addition to the encroachment on the constitutionally required separation of powers that prosecution of an Executive Branch official in this context would entail, there could be a serious due process problem if such an official were subjected to criminal penalties for obeying an express Presidential order, an order which was accompanied by advice from the Attorney General that compliance with the Presidential directive was not only consistent with the constitutional duties of the Executive Branch, but also affirmatively necessary in order to aid the President in the performance of his constitutional obligations to take care that the law was faithfully executed. See Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959).

Furthermore, a person can be prosecuted under § 192 only for a "willful" failure to produce documents in response to a congressional subpoena. See United States v. Murdock, 290 U.S. 389, 397 98 (1933); Townsend v. United States, 95 F.2d 352, 359 (D.C. Cir.), cert. denied,

303 U.S. 664 (1938). There is some doubt whether obeying the President's direct order to assert his constitutional claim of **executive privilege** would amount to a "willful" violation of the statute. Moreover, reliance on an explicit opinion of the Attorney General may negate the required mens rea even in the case of a statute without a willfulness requirement. See Model Penal Code § 2.04(3)(b); United States v. Barker, 546 F.2d 940, 955 (D.C. Cir. 1976) (Mehrige J., concurring). **[*87]**

4. The Constitutional Implications of Application of the Contempt of Congress Statute to Executive Branch Officials Who Assert the President's Claim of Privilege

The Supreme Court has stated that, in determining whether a particular statute

> disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. United States v. Nixon, 418 U.S. at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). Thus, in analyzing this separation of powers issue, one must look first to the impact that application of the congressional contempt statute to Presidential assertions of **executive privilege** would have on the President's ability to carry out his constitutionally assigned functions. Then, if there is a potential for disruption, it is necessary to determine whether Congress' need to impose criminal contempt sanctions **[*88]** in **executive privilege** disputes is strong enough to outweigh the impact on the Executive's constitutional role.

In this instance, at stake is the President's constitutional responsibility to enforce the laws of the United States and the necessarily included ability to protect the confidentiality of information vital to the performance of that task. As explained earlier in this memorandum, the authority to maintain the integrity of certain information within the Executive Branch has been considered by virtually every President to be essential to his capacity to fulfill the responsibilities assigned to him by the Constitution. Thus, as discussed above, and as the Supreme Court has recognized, the capacity to protect the confidentiality of some information is integral to the constitutional role of the President.

For these reasons, the Supreme Court has ruled that the President's assertion of **executive privilege** is presumptively valid and can be overcome only by a clear showing that another branch cannot responsibly carry out its assigned constitutional function without the privileged information. United States v. Nixon, 418 U.S. at 708. In Nixon, the Court stated that **[*89]** "upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged." 418 U.S. at 713. The United States Court of Appeals for the District of Columbia Circuit has stated that this presumptive privilege initially protects documents "even from the limited intrusion represented by in camera examination of the conversations by a court." Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725, 730 (D.C. Cir. 1974) (en banc). The court went on to note:

> So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations we believed in Nixon v. Sirica, and continue to believe, that the effective functioning of the presidential

office will not be impaired.

Id. at 730. In order to overcome the presumptively privileged nature of the documents, a congressional committee must show that "the subpoenaed evidence **[*90]** is demonstrably critical to the responsible fulfillment of the Committee's functions." Id. at 731 (emphasis added). Thus, the President's assertion of **executive privilege** is far different from a private person's individual assertion of privilege; it is entitled to special deference due to the critical connection between the privilege and the President's ability to carry out his constitutional duties.

Application of the criminal contempt statute to Presidential assertions of **executive privilege** would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions. If the statute were construed to apply to Presidential assertions of privilege, the President would be in the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility that he found necessary to the performance of his constitutional duty. Even if the privilege were upheld, the executive official would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege. As Judge Learned Hand stated **[*91]** with respect to the policy justifications for a prosecutor's immunity from civil liability for official actions,

> to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to sic satisfy a jury of his good faith.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). The Supreme Court has noted, with respect to the similar issue of executive immunity from civil suits, that "among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." Nixon v. Fitzgerald, 457 U.S. 731, 752 n.32 (1982); see also Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478 (1978). Thus, the courts have recognized that the risk **[*92]** of civil liability places a pronounced burden on the ability of government officials to accomplish their assigned duties, and have restricted such liability in a variety of contexts. Id. n35 The even greater threat of criminal liability, simply for obeying a Presidential command to assert the President's constitutionally based and presumptively valid privilege against disclosures that would impair his ability to enforce the law, would unquestionably create a significant obstacle to the assertion of that privilege. See United States v. Nixon, 418 U.S. 683 (1974).

n35 See also Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896). Some officials, such as judges and prosecutors, have been given absolute immunity from civil suits arising out of their official acts. Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967).

By contrast, the congressional interest in applying the criminal contempt sanctions to a Presidential assertion of **executive privilege** is comparatively slight. Although Congress has a legitimate and powerful interest in obtaining any unprivileged documents necessary to assist it **[*93]** in its lawmaking function, Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena. n36 Congress' use of civil enforcement

power instead of the criminal contempt statute would not adversely affect Congress' ultimate interest in obtaining the documents. Indeed, a conviction of an Executive Branch official for contempt of Congress for failing to produce subpoenaed documents would not result in any order for the production of the documents. n36 A civil suit to enforce the subpoena would be aimed at the congressional objective of obtaining the documents, not at inflicting punishment on an individual who failed to produce them. Thus, even if criminal sanctions were not available against an executive official who asserted the President's claim of privilege, Congress would be able to vindicate a legitimate desire to obtain documents if it could establish that its need for the records outweighed the Executive's interest in preserving confidentiality.

n36 It is arguable that Congress already has the power to apply for such civil enforcement, since 28 U.S.C. § 1331 has been amended to eliminate the amount in controversy requirement, which was the only obstacle cited to foreclose jurisdiction under § 1331 in a previous civil enforcement action brought by the Senate. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). In any event, there is little doubt that, at the very least, Congress may authorize civil enforcement of its subpoenas and grant jurisdiction to the courts to entertain such cases. See Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d 725 (D.C. Cir. 1974) (en banc); Hamilton and Grabow, A Legislative Proposal for Resolving **Executive Privilege** Disputes Precipitated by Congressional Subpoenas, 21 Harv. J. on Legis. 145 (1984). **[*94]**

n37 See Hamilton and Grabow, supra, 21 Harv. J. on Legis. at 151.

The most potent effect of the potential application of criminal sanctions would be to deter the President from asserting **executive privilege** and to make it difficult for him to enlist the aid of his subordinates in the process. Although this significant in terrorem effect would surely reduce claims of **executive privilege** and, from Congress' perspective, would have the salutary impact of virtually eliminating the obstacles to the obtaining of records, it would be inconsistent with the constitutional principles that underlie **executive privilege** to impose a criminal prosecution and criminal penalties on the President's exercise of a presumptively valid constitutional responsibility. The in terrorem effect may be adequate justification for Congress' use of criminal contempt against private individuals, but it is an inappropriate basis in the context of the President's exercise of his constitutional duties. In this respect it is important to recall the statement of Chief Justice Marshall, sitting as a trial judge in the Burr case, concerning the ability of a court to demand documents from a President: **[*95]** "In no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 F. Cas. 187, 192 (C.C. Va. 1807). n38 This fundamental principle, arising from the constitutionally prescribed separation of powers, precludes Congress' use against the Executive of coercive measures that might be permissible with respect to private citizens. The Supreme Court has stated that the fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential equality. Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935).

n38 The Nixon Court thought this statement significant enough in the context of an **executive privilege** dispute to quote it in full at two separate places in its decision. United States v. Nixon, 418 U.S. at 708, 715.

Congress' use of the **[*96]** coercive power of criminal contempt to prevent Presidential assertions of **executive privilege** is especially inappropriate given the presumptive nature of the privilege. In cases involving congressional subpoenas against private individuals, courts start with the presumption that Congress has a right to all testimony that is within the scope

of a proper legislative inquiry. See Barenblatt v. United States, 360 U.S. 109 (1959); McGrain v. Daugherty, 273 U.S. 135 (1927). As noted above, however, the President's assertion of **executive privilege** is presumptively valid, and that presumption may be overcome only if Congress establishes that the requested information "is demonstrably critical to the responsible fulfillment of the Committee's functions." See Senate Select Committee on Presidential Campaign Activities v. Nixon, **498** F.2d at 731; see also United States v. Nixon, 418 U.S. at 708-09. If Congress could use the power of criminal contempt to coerce the President either not to assert or to abandon his right to assert **executive privilege,** this clearly established presumption would be reversed and the presumptive privilege nullified.

Congress has many **[*97]** weapons at its disposal in the political arena, where it has clear constitutional authority to act and where the President has corresponding political weapons with which to do battle against Congress on equal terms. By wielding the cudgel of criminal contempt, however, Congress seeks to invoke the power of the third branch, not to resolve a dispute between the Executive and Legislative Branches and to obtain the documents it claims it needs, but to punish the Executive, indeed to punish the official who carried out the President's constitutionally authorized commands, n39 for asserting a constitutional privilege. That effort is inconsistent with the "spirit of dynamic compromise" that requires accommodation of the interests of both branches in disputes over **executive privilege.** See United States v. American Telephone & Telegraph Co., 567 F.2d 121, 127 (D.C. Cir. 1977). In the AT&T case, the court insisted on further efforts by the two branches to reach a compromise arrangement on an **executive privilege** dispute and emphasized that

> the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, **[*98]** 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.

n39 One scholar (former Assistant Attorney General for the Civil Division, and now Solicitor General, Rex Lee) has noted that

> when the only alleged criminal conduct of the putative defendant consists of obedience to an assertion of **executive privilege** by the President from whom the defendant's governmental authority derives, the defendant is not really being prosecuted for conduct of his own. He is a defendant only because his prosecution is one way of bringing before the courts a dispute between the President and the Congress. It is neither necessary nor fair to make him the pawn in a criminal prosecution in order to achieve judicial resolution of an interbranch dispute, at least where there is an alternative means for vindicating congressional investigative interests and for getting the legal issues into court.

Lee, **Executive Privilege,** Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships, 1978 B.Y.U. L. Rev. 231, 259.
[*99]
Id. at 130. Congress' use of the threat of criminal penalties against an executive official who asserts the President's claim of **executive privilege,** flatly contradicts this fundamental principle. n40

n40 Even when a privilege is asserted by a cabinet official, and not the President, courts are

extremely reluctant to impose a contempt sanction and are willing to resort to it only in extraordinary cases and only after all other remedies have failed. In In re Attorney General, 596 F.2d 58 (2d Cir.), cert. denied, 444 U.S. 903 (1979), the court granted the government's mandamus petition to overturn a district court's civil contempt citation against the Attorney General for failing to turn over documents for which he had asserted a claim of privilege. The court recognized that even a civil contempt sanction imposed on an Executive Branch official "has greater public importance, with separation of powers overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant." 596 F.2d at 64. Therefore, the court held that holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted. Id. at 65. In the case of a Presidential claim of **executive privilege,** there is even more reason to avoid contempt proceedings because the privilege claim has been made as a constitutionally based claim by the President himself and the sanction involved is criminal and not civil contempt. The use of criminal contempt is especially inappropriate in the context under discussion because Congress has the clearly available alternative of civil enforcement proceedings. **[*100]**

The balancing required by the separation of powers demonstrates that the contempt of Congress statute cannot be constitutionally applied to an executive official in the context under consideration. On the one hand, Congress has no compelling need to employ criminal prosecution in order to vindicate its rights. The Executive, however, must be free from the threat of criminal prosecution if its right to assert **executive privilege** is to have any practical substance. Thus, when the major impact on the President's ability to exercise his constitutionally mandated function is balanced against the relatively slight imposition on Congress in requiring it to resort to a civil rather than a criminal remedy to pursue its legitimate needs, n41 we believe that the constitutionally mandated separation of powers requires the statute to be interpreted so as not to apply to Presidential assertions of **executive privilege.** n42

The construction of the statute that is dictated by the separation of powers is consistent with the legislative history of the statute and the subsequent legislative implementation of the statute. Although at the time the criminal statute was enacted, Congress was well aware **[*101]** of the recurring assertions of the right to protect the confidentiality of certain Executive Branch materials, it gave no indication that it intended the contempt statute to tread upon that constitutionally sensitive area. In the many debates on **executive privilege** since the adoption of the statute, Congress at times has questioned the validity of a Presidential assertion of privilege, but, until December of 1982, it never attempted to utilize the criminal contempt sanction to punish someone for a President's assertion of privilege. Regardless of the merits of the President's action, the fundamental balance required by the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution. We therefore conclude that the contempt of Congress statute does not apply to an executive official who carries out the President's claim of **executive privilege.**

n41 See Hamilton and Grabow, A Legislative Proposal for Resolving **Executive Privilege** Disputes Precipitated by Congressional Subpoenas, 21 Harv. J. on Legis. 145 (1984).

n42 We believe that this same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of **executive privilege.** The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). See 42 Cong. Globe 406 (remarks of Rep. Davis). Therefore, 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.

[*102]

Nearly every President since George Washington has found that in order to perform his constitutional duties it is necessary to protect the confidentiality of certain materials, including predecisional Executive Branch deliberations, national security information, and sensitive law enforcement proceedings, from disclosure to Congress. No President has rejected the doctrine of **executive privilege;** all who have addressed the issue have either exercised the privilege, attested to its importance, or done both. Every Supreme Court Justice and every Judge of the United States Court of Appeals for the District of Columbia Circuit who has considered the question of **executive privilege** has recognized its validity and importance in the constitutional scheme. **Executive privilege,** properly asserted, is as important to the President as is the need for confidentiality at certain times in the deliberations of the Justices of the Supreme Court and in the communications between members of Congress and their aides and colleagues. Congress itself has respected the President's need for confidentiality; it has never arrested an executive official for contempt of Congress for failing to produce subpoenaed **[*103]** documents and never, prior to the heated closing moments of the 97th Congress in December of 1982, did a House of Congress seek to punish criminally an executive official for asserting a President's claim of privilege.

Naturally, Congress has and always will resist claims of **executive privilege** with passion and vigor. Congress aggressively asserts its perceived institutional prerogatives, and it will surely oppose any effort by the President to withhold information from it. If it could eliminate claims of **executive privilege** by requiring that an official who asserts such a claim on behalf of the President be prosecuted criminally, it would surely be in favor of doing so. Thus, the tension between the relative strengths and institutional prerogatives of Congress and the President necessarily reaches a high level of intensity in any case involving a claim of **executive privilege.** The specter of mandatory criminal prosecution for the good-faith exercise of the President's constitutional privilege adds a highly inflammatory element to an already explosive environment. We believe that the courts, if presented the issue in a context similar to that discussed in this memorandum, would surely **[*104]** conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution. The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of **executive privilege.** Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual.

In some respects, the tensions between the branches, which become exacerbated during these conflicts, and the pressure placed on the President and his subordinates in this context, call to mind the comments of Chief Justice Chase concerning the impeachment trial of President Andrew Johnson, over which the Chief Justice presided. One of the charges against President Johnson was that he had fired Secretary of War Stanton in violation of the Tenure of Office Act, which purported to strip the President of his removal power over certain Executive Branch officials. n43 Chief Justice Chase declared that the President had a duty to execute a statute passed by Congress which he believed to be unconstitutional "precisely as if he held it to be constitutional." However, **[*105]** he added, the President's duty changed in the case of a statute which

> directly attacks and impairs the executive power confided to him by the Constitution. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

n43 The Tenure of Office Act was, of course, later declared to have been unconstitutional.

Myers v. United States, 272 U.S. 52 (1926).
* * *

> How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to have been passed in violation of it? n44
>
> n44 R. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase 685 (1874). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that the Tenure of Office Act was unconstitutional. Id. See M. Benedict, The Impeachment and Trial of Andrew Johnson 154-55 (1973). Ultimately, the Senate did admit evidence that the President had desired to initiate a court test of the law. Id. at 156. **[*106]**

If the President is to preserve, protect, and defend the Constitution, if he is faithfully to execute the laws, there may come a time when it is necessary for him both to resist a congressional demand for documents and to refuse to prosecute those who assist him in the exercise of his duty. To yield information that he in good conscience believes he must protect in order to perform his obligation, would abdicate the responsibilities of his office and deny his oath. To seek criminal punishment for those who have acted to aid the President's performance of his duty would be equally inconsistent with the Constitution.

In the narrow and unprecedented circumstances presented here, in which an Executive Branch official has acted to assert the President's privilege to withhold information from a congressional committee concerning open law enforcement files, based upon the written legal advice of the Attorney General, the contempt of Congress statute does not require and could not constitutionally require a prosecution of that official, or even, we believe, a referral to a grand jury of the facts relating to the alleged contempt. Congress does not have the statutory or constitutional authority **[*107]** to require a particular case to be referred to the grand jury. In addition, because the Congress has an alternative remedy both to test the validity of the Executive's claim of privilege and to obtain the documents if the courts decide that the privilege is outweighed by a valid and compelling legislative need, a criminal prosecution and the concomitant chilling effect that it would have on the ability of a President to assert a privilege, is an unnecessary and unjustified burden that, in our judgment, is inconsistent with the Constitution.

Theodore B. Olson

Assistant Attorney General

Office of Legal Counsel

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*1982 OLC LEXIS 25, *; 6 Op. O.L.C. 751, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

HISTORY OF REFUSALS BY EXECUTIVE BRANCH OFFICIALS TO PROVIDE INFORMATION DEMANDED BY CONGRESS: PART I -- PRESIDENTIAL INVOCATIONS OF **EXECUTIVE PRIVILEGE** VIS-A-VIS CONGRESS

1982 OLC LEXIS 25; 6 Op. O.L.C. 751

December 14, 1982

CORE TERMS: public interest, negotiation, correspondence, subcommittee, duty, disclosure, treaty, confidential, communicate, subpoena, chairman, refused to provide, secretary, message, compatible, furnish, conversation, incompatible, memorandum, withhold, advice, military, house committee, communicated, withheld, replied, executive department, presidential, withholding, transmitted

SYLLABUS:
[*1]

[The following memorandum, prepared by the Office of Legal Counsel at the request of the Attorney General, describe instances since the founding of the Republic in which officials in the Executive Branch have refused to disclose information or produce documents requested by Congress. The first memorandum, dated December 14, 1982, sets forth examples of situations in which a President has personally directed that information be withheld, relying on the doctrine of **executive privilege.** The second memorandum, dated January 27, 1983, documents incidents where the Attorney General or some other executive official refused to provide information or documents to Congress in situations involving law enforcement, security, or personnel investigations. . . .]

ADDRESSEE:
Memorandum for the Attorney General

OPINIONBY: OLSON

OPINION:
[751]** This memorandum briefly describes those incidents in which a President personally directed the withholding of information from Congress. n1 Included are incidents in which a President found it necessary to withhold specific documents or information, as well as general directives of a President concerning the withholding of information from Congress.

n1 Although an attempt has been made to be as thorough as possible, no claim is made that the following list is comprehensive. In this regard, we note Deputy Assistant Attorney General Mary Lawton's statement in a memorandum to Rep. William S. Moorhead, dated Apr. 25, 1973:

In response to your request . . . I regret that it is not physically possible to furnish you with a comprehensive list of presidential refusals of information to Congress. To give you all of the instances of such refusals since the beginning of the Republic would require an amount of historical research which the Office of Legal Counsel lacks the resources for handling. In addition, there is a categorization problem of distinguishing the relatively few instances of exercise of **Executive Privilege** *per se* [*i.e.,* a refusal to disclose by the President personally] from the many instances of agreed accommodations . . . for nonappearance of witnesses,

nondisclosure or partial disclosure. **[*2]**

No effort has been made to catalogue the numerous instances in which information was withheld from Congress by executive officers other than the President; nor does this survey discuss the countless examples of full disclosure by the Executive. The objective of the memorandum is neither to show how frequently the Executive Branch has refused congressional requests for information, nor to demonstrate how often an accommodation between the branches has been achieved. Rather, the memorandum seeks to show that presidentially **[**752]** mandated refusals to disclose information to Congress -- though infrequent -- are by no means unprecedented acts of this or any other Administration.

1. Washington Administration

St. Clair Incident

On March 27, 1792, the House of Representatives established a congressional committee to investigate the failure of General St. Clair's military expedition against the Indians. The House authorized the committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries." n2

The committee subsequently asked the President for those papers pertaining to the St. Clair campaign. Since this was the first occasion in **[*3]** which Congress had established a committee to investigate the performance of the Executive and had authorized it to request documents from the President, and wishing "that so far as it should become a precedent, it should be rightly conducted," n3 President Washington held a meeting with his Cabinet, attended by Jefferson, Hamilton, Randolph and Knox. Jefferson described the conclusions reached by the Nation's first Cabinet:

We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. *Third, 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: consequently were to exercise a discretion.* Fourth, that neither the committees nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President. n4

n2 3 Annals of Cong. 493 (1792).

n3 1 The Writings of Thomas Jefferson 303 (Lipscomb ed., 1905).

n4 *Id.* at 303-04 (emphasis added). **[*4]**

Although the Cabinet "agreed in this case, that there was not a paper which might not be properly produced," n5 the President apparently felt it advisable nevertheless to negotiate with Congress a non-confrontational resolution of the problem. Jefferson thereupon agreed to speak individually to members of the House committee in order to "bring them by persuasion into the right channel." n6 Jefferson's conciliation efforts were successful, for on April 4, 1792, the House resolved,

that the President of the United States be requested to cause the proper officers to lay before this House *such papers of a public* **[**753]** *nature,* in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair. n7

n5 *Id.* at 305.

n6 *Id. See generally* Younger, *"Congressional Investigations and Executive Secrecy: A Study*

in the Separation of Powers," 20 U. Pitt. L. Rev. 755, 757 (1959).

n7 3 Annals of Cong. 536 (1792) (emphasis added).

Correspondence Involving United States Minister to France

In 1794, the Senate requested by resolution correspondence between the United States Minister **[*5]** to France and the Republic of France, and between the Minister and the State Department. n8 President Washington submitted certain of the correspondence requested, but withheld "those particulars which, in my judgment, for public considerations, ought not to be communicated." n9

n8 Senate Journal, 3d Cong., 1st Sess. 42 (1794).

n9 1 J. Richardson, Messages and Papers of the Presidents 152 (1896).

The Jay Treaty

On March 24, 1796, the House of Representatives requested by resolution that the President disclose to the House his instructions to the United States Minister who negotiated the Jay Treaty with Great Britain, along with correspondence and documents relative to that Treaty. Implementation of the Treaty apparently required an appropriation which the House was called upon to vote. n10 President Washington denied the House's right to demand and receive any of the papers requested. Though the President had provided "all the papers affecting the negotiation with Great Britain" to the Senate in the course of its deliberations on the Treaty, Washington determined that the House had no legitimate claim to those papers:

The nature of foreign negotiations requires caution; **[*6]** and their success must often depend on secrecy; and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making Treaties in the President with the advice and consent of the Senate; the principle on which the body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign Power, would be to establish a dangerous precedent.

n10 *See* W. Binkley, *President and Congress* 53-4 (3d rev. 1947).

[754]** Subsequently, the House debated Washington's refusal for a full month, but took no action. n11 It is highly instructive, however, that during the debate Rep. James Madison, although disagreeing with President Washington's message in some respects, acknowledged **[*7]** on the House floor,

that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time. And if the refusal of the President had been founded simply upon a representation, that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticize it. n12

n11 5 Annals of Cong. 760 (1796); *see id.* at 426-783. The House did pass two resolutions, one declaring that the House had authority to consider the expediency of carrying a treaty into effect, the second that the House need not state the purpose for which it required information from the Executive. *See id.* at 771, 782-83.

n12 *Id.* at 773.

2. Adams Administration

Diplomatic Material Concerning United States Representatives to France

In 1798 the House of Representatives by resolution requested from the President documents containing instructions to, and dispatches from, representatives of the United States to France. n13 On April 3, 1798, President Adams transmitted some of that material **[*8]** to both Houses, but omitted "some names and a few expessions descriptive of the persons" involved. n14

n13 House Journal, 5th Cong., 2d Sess. 249 (1798).

n14 1 Richardson, *supra,* at 265.

3. Jefferson Administration

The Burr Conspiracy

In January 1807, the House of Representatives by resolution requested that the President

lay before this House any information in possession of the Executive, *except such as he may deem the public welfare to require not to be disclosed,* touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together **[**755]** with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same. n15

President Jefferson replied by detailing the activities of Aaron Burr, but declined to mention the names of other alleged participants. Jefferson declared:

The mass of what I have received in the course of these transactions is voluminous, but little has been given under the sanction of an oath so as to constitute formal and legal evidence. **[*9]** It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question. n16

n15 16 Annals of Cong. 336 (1806) (emphasis added). Professor Raoul Berger has argued that the exception clause in the House resolution refutes any argument that Jefferson's subsequent withholding of documents was based on an **executive privilege.** R. Berger, **Executive Privilege:** A Constitutional Myth 179-81 (1974) (describing Jefferson's explanation for withholding information as "gratuitous"). *See also* Cox, ***Executive Privilege,*** 122 U. Pa. L. Rev. 1383, 1397-98 (1974) (arguing that those historical examples of executive withholding which are preceded by a congressional authorization to withhold do not qualify as examples of **executive privilege)**. One could just as well read the exception clause, however, as an early illustration of congressional recognition of the **executive privilege.** *See* § 1, C, *supra;* note 19 *infra.*

Moreover, it is highly unlikely Jefferson actually relied upon the exception clause as the basis for withholding information from the House, given the conclusions he reached while serving in President Washington's Cabinet, *see* § 1, A, *supra,* and given the views he expressed in a letter to the United States District Attorney for Virginia, who was then in charge of the Burr prosecution:

Reserving the necessary right of the President of the U.S. to decide, *independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom,* I assure you of my readiness under that restriction, voluntarily to furnish . . . whatever the purposes of justice may require.

9 The Writings of Thomas Jefferson 55 (P. Ford ed. 1898). Professor Berger also fails to note other occasions on which President Jefferson let it be known that he regarded himself free to withhold certain "confidential" information "given for my information in the discharge of my executive functions, and which my duties & the public interest forbid me to make public." *Id.* at 63-64 (certificate to the court in Burr prosecution).

n16 1 Richardson, *supra,* at 412. **[*10]**

4. Monroe Administration

Stewart Incident

In 1825, the House of Representatives requested by resolution that the President provide the Congress with documents concerning charges against certain naval officers, so far as he deemed such disclosure compatible with the public interest. n17 President Monroe refused to submit the documents, stating:

In consequence of several charges which have been alleged against Commodore Stewart, touching his conduct while commanding **[**756]** the squadron of the United States [at] sea, it has been deemed proper to suspend him from duty and to subject him to trial on those charges. It appearing also that some of those charges have been communicated to the Department by Mr. Prevost, political agent at this time of the United States at Peru . . . and that charges have likewise been made against him by citizens of the United States engaged in commerce in that quarter, it has been thought equally just and proper that he should attend here, as well to furnish the evidence in his possession applicable to the charges exhibited against Commodore Stewart as to answer such as have been exhibited against himself.

In this stage the publication of **[*11]** those documents might tend to excite prejudices which might operate to the injury of both. It is important that the public servants in every station should perform their duty with fidelity, according to the injunctions of the law and the orders of the Executive in fulfillment thereof. It is peculiarly so that this should be done by the commanders of our squadrons, especially on distant seas, and by political agents who represent the United States with foreign powers. . . . It is due to their rights and to the character of the Government that they be not censured without just cause, which cannot be ascertained until, on a view of the charges, they are heard in their defense, and after a thorough and impartial investigation of their conduct. Under these circumstances it is thought that a communication at this time of those documents would not comport with the public interest nor with what is due to the parties concerned. n18

n17 House Journal, 18th Cong., 2d Sess. 102-03 (1825).

n18 2 Richardson, *supra,* at 278.

5. Jackson Administration n19

n19 Former Columbia Law Professor and current Federal District Judge Abraham D. Sofaer has noted:

Available historical sources reveal that, although much information was provided voluntarily, all Presidents from Washington to Jackson withheld large quantities of material, especially

diplomatic correspondence, from their voluntary transmittals. Congress frequently requested the information thus withheld, and Presidents usually complied. Far more often than not, requests for information on sensitive issues contained qualifications authorizing the President to withhold material the disclosure of which might prejudice the nation. Qualifications of information requests dealing with such important issues as the Burr conspiracy exemplify a tradition of legislative deference and trust, surely worth considerable weight in the debate about the discretion inherently possessed by the President.

Sofaer, Book Review, 88 Harv. L. Rev. 281, 289 (1974) (reviewing R. Berger, ***Executive Privilege:*** *A Constitutional Myth*). **[*12]**

Correspondence Between United States and the Republic of Buenos Aires

On December 28, 1832, President Jackson refused to provide the House of Representatives with the copies of correspondence between the United States and the Republic of Buenos Aires and instructions given to the United States charge d'affairs there, that it had requested. President Jackson replied that since negotiations **[**757]** with the Republic had only been suspended and not broken off, it would "not be consistent with the public interest to communicate the correspondence and instructions requested by the House so long as the negotiation shall be pending." n20

n20 2 Richardson, *supra,* at 608-09.

Negotiations with Great Britain Over the Northeastern Boundary

In response to the Senate's request for information regarding negotiations carried on with Great Britain over the Northeastern Boundary, and particularly with respect to the Maine settlement, President Jackson informed the Senate on March 2, 1833, that negotiations with Great Britain were in progress and that in the meantime it was "not deemed compatible with the public interest" to communicate the conditional arrangements made with **[*13]** the State of Maine. n21 The House of Representatives also requested information concerning the settlement of the Northeastern Boundary, and on January 6, 1835, President Jackson advised the House that it would be "incompatible with the public interest" to communicate such information. n22 However, the President did furnish this information to the Senate at the next session, stating that "as the negotiation was undertaken under the special advice of the Senate, I deem it improper to withhold the information which the body has requested, submitting to them to decide whether it will be expedient to publish the correspondence before the negotiation has been closed." n23

n21 *Id.* at 637.

n22 3 Richardson, *supra,* at 127.

n23 *Id.* at 229-30.

Bank of the United States Document

On December 12, 1833, President Jackson responded to a resolution of the Senate requesting him to provide "'a copy of the paper which has been published, and which purports to have been read by him to the heads of the Executive Departments . . . relating to the removal of the deposits of the public money from the Bank of the United States and its offices.'" President Jackson declined to provide **[*14]** the document on the ground that the Legislature had no constitutional authority to "require of me an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council . . . [nor] might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own." n24

n24 *Id.* at 36.

Correspondence with France

On February 6, 1835, President Jackson furnished extracts from the dispatches between the United States and the government of France that the House of **[**758]** Representatives had requested, declining to send the full documents on the ground that it was not at that time in the public interest to do so. n25

n25 *Id.* at 129.

Removal of the Surveyor General

On February 10, 1835, President Jackson sent a message to the Senate declining to comply with its resolution which requested the production of copies of charges made to the President against Gideon Fitz, the Surveyor General, which resulted in Mr. Fitz's removal from office. The resolution based the Senate's need for the documents on: 1) the need to nominate Mr. Fitz's **[*15]** successor, and 2) a pending Senate investigation into fraud in the sale of lands.

The President refused to furnish the documents on the ground that they related to subjects which belonged exclusively to the functions of the Executive. In addition, the President said that disclosure of the documents would subject the motives of the President in removing Mr. Fitz to the review of the Senate when not sitting as judges in an impeachment proceeding, and that the Executive's acquiescence in the Fitz case might be used by Congress as a precedent for similar and repeated requests. The President said:

This is another of those calls for information made upon me by the Senate which have, in my judgment, either related to the subjects exclusively belonging to the executive department or otherwise encroached on the constitutional powers of the Executive. Without conceding the right of the Senate to make either of these requests, I have yet, for the various reasons heretofore assigned in my several replies, deemed it expedient to comply with several of them. It is now, however, my solemn conviction that I ought no longer, from any motive nor in any degree, to yield to these unconstitutional **[*16]** demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive.

. . . . Such a result, if acquiesced in, would ultimately subject the independent constitutional action of the Executive in a matter of great national concernment to the domination and control of the Senate. . . .

I therefore decline a compliance with so much of the resolution of the Senate as requests "copies of the charges, if any," in relation to Mr. Fitz, and in doing so must be distinctly understood as neither affirming nor denying that any such charges were made. . . . n26

n26 *Id.* at 132-34.

[759]** 6. Tyler Administration

Correspondence Regarding Negotiations with Great Britain Over the Northeastern Boundary

In response to the House of Representatives' request for all correspondence not previously communicated regarding the United States' negotiation with Great Britain over the Northeastern Boundary, President Tyler withheld the documents and sent a February 26, 1842, message to Congress saying that "in my judgment no communication **[*17]** could be

made by me at this time on the subject of its resolution without detriment or danger to the public interests." n27

n27 4 Richardson, *supra,* at 101.

Information Regarding Executive Appointments

On March 23, 1842, President Tyler refused to comply with a House resolution requesting that the President and the heads of departments communicate the names of such Members of the 26th and 27th Congresses who had applied for office, what office, and whether such application had been made in person, in writing, or through friends. President Tyler refused to disclose such information on the ground that it was by nature confidential, the disclosure of which could serve no "useful object connected with a sound and constitutional administration of the Government in any of its branches," and further, that

compliance with the resolution which has been transmitted to me would be a surrender of duties and powers which the Constitution has conferred exclusively on the Executive, and therefore such compliance can not be made by me nor by the heads of Departments by my direction. The appointing power, so far as it is bestowed on the President by the Constitution, is conferred **[*18]** without reserve or qualification. The reason for the appointment and the responsibility of the appointment rest with him alone. I can not perceive anywhere in the Constitution of the United States any right conferred on the House of Representatives to hear the reasons which an applicant may urge for an appointment to office under the executive department, or any duty resting upon the House of Representatives by which it may become responsible for any such appointment. n28

n28 *Id.* at 105-06.

Treaty to Suppress Slave Trade

In response to the House of Representatives' request to furnish, "'so far as may be compatible with the public interest,'" a copy of the quintuple treaty between the five powers of Europe for the suppression of the African slave trade **[**760]** and certain correspondence with respect to it, President Tyler replied on June 20, 1842, that he had not received an authentic copy of the treaty and that "[i]n regard to the other papers requested, although it is my hope and expectation that it will be proper and convenient at an early day to lay them before Congress, . . . yet in my opinion a communication of them to the House of Representatives at this time **[*19]** would not be compatible with the public interest." n29

n29 *Id.* at 158.

Information Regarding Steps Taken to Obtain Recognition of American Claims by Mexican Government

The Senate had requested the President to provide information, "so far as he might deem it compatible with the public interest," concerning what measures, if any, had been taken to obtain recognition by the Mexican government of certain claims of American citizens. President Tyler replied on August 23, 1842, that "[i]n the present state of the correspondence and of the relations between the two Governments on these important subjects it is not deemed consistent with the public interest to communicate the information requested. The business engages earnest attention, and will be made the subject of a full communication to Congress at the earliest practicable period." n30

n30 *Id.* at 178-79.

Negotiations Regarding Northwestern Boundary

In response to the Senate's request for information concerning the United States' negotiations with Great Britain for settlement of the Northwest Boundary, President Tyler replied on December 23, 1842, that measures had been taken to settle the dispute and **[*20]** that "under these circumstances I do not deem it consistent with the public interest to make any communication on the subject." n31

n31 *Id.* at 210-11.

Hitchcock Investigation

On January 31, 1843, President Tyler invoked **executive privilege** against a request by the House of Representatives to the Secretary of War to produce investigative reports submitted to the Secretary by Lieutenant Colonel Hitchcock concerning his investigations into frauds perpetrated against the Cherokee Indians. The Secretary of War consulted with the President and under the latter's direction informed the House that negotiations were then pending with the Indians for settlement of their claims, and that in the opinion of the President and the Department, publication of the report at that time would be inconsistent with the public interest. The Secretary of War further stated that the reports sought by the House contained information which was obtained by Colonel Hitchcock through *ex parte* questioning of persons whose statements were not made under oath, and which implicated persons who had no opportunity to contradict the **[**761]** allegations or provide any explanation. The Secretary **[*21]** of War expressed the opinion that to publicize such statements at that time would be unjust to the persons mentioned, and would defeat the object of the inquiry. He also stated that the Department had not yet been given a sufficient opportunity to pursue the investigation, to call the affected parties for explanations, or to make any other determinations regarding the matter. The President stated:

The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed,' necessarily confers an authority, commensurate with the obligation imposed to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective these inquiries must often be confidential. They may result in the collection of truth or of falsehood, or they may be incomplete and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated . . . would deprive him at once of the means of performing one of the most salutary duties of his office. . . . To require from the Executive the transfer of this discretion to a coordinate branch **[*22]** of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive. n32

n32 *Id.* at 222.

In response to the House's claim that it had a right to demand from the Executive and heads of departments any information in the possession of the Executive which pertained to subjects under the House's deliberations, President Tyler stated that the House could not exercise a right to call upon the Executive for information, even though it related to a subject of the deliberations of the House, if, by so doing, it would interfere with the discretion of the Executive. n33

n33 *Id.* at 222-23.

Instructions to Navy Officers

In response to the House of Representatives' request for copies of instructions given to British and American commanding officers who were charged, pursuant to a treaty with Great Britain, with suppressing the slave trade off the coast of Africa, President Tyler sent a May 18, 1844, message to the House declining to provide the information on the ground that to do so would be incompatible with the public interest. n34

n34 *Id.* at 320.

Foreign Correspondence **[*23]** *Regarding the Ownership and Occupation of Oregon Territory*

In June 1844, President Tyler sent a message to the Senate explaining his refusal to comply with its request for documents relating to the ownership and **[**762]** occupation of the Oregon Territory. "[I]n the present state of the subject-matter," the President wrote, "it is deemed inexpedient to communicate the information requested. . . ." n35

n35 *Id.* at 327.

7. Polk Administration

Foreign Relations Expenditures of Prior Administration

In 1846, President Polk refused to provide the House of Representatives with confidential memoranda regarding certain expenses incurred for the conduct of foreign relations during the Tyler Administration. In refusing to comply with a House resolution requesting documentation of these expenses, President Polk stated that where a past President had placed a seal of confidentiality upon an expenditure, and the matter was terminated before he entered office,

[a]n important question arises, whether a subsequent President, either voluntarily or at the request of one branch of Congress, can without a violation of the spirit of the law revise the acts of his predecessor and **[*24]** expose to public view that which he had determined should not be "made public." If not a matter of strict duty, it would certainly be a safe general rule that this should not be done. Indeed, it may well happen, and probably would happen, that the President for the time being would not be in possession of the information upon which his predecessor acted, and could not, therefore, have the means of judging whether he had exercised his discretion wisely or not. n36

n36 *Id.* at 433.

Polk concluded that the President making an expenditure, deemed by him confidential, may, if he chooses, keep all the information and evidence upon which he acts in his own possession. If, for the information of his successors, he leaves some evidence upon which he acts in the confidential files of one of the executive departments, such evidence does not thereby become publicly available.

Military and Diplomatic Instructions with Respect to Mexico

On January 12, 1848, President Polk sent a message to the House transmitting reports of the Secretaries of State, War, and the Navy in response to a congressional resolution seeking copies of all instructions given to American military and diplomatic **[*25]** officers relating to the return of President General Lopez de Santa Anna to Mexico. President Polk stated that he was transmitting the documents, **[**763]** which contain all the information in the possession of the Executive which it is deemed compatible with the public interests to communicate. . . .

The customary and usual reservation contained in calls of either House of Congress upon the Executive for information relating to our intercourse with foreign nations has been omitted in the resolution before me. The call of the House is unconditional. It is that the information requested be communicated, and thereby be made public, whether in the opinion of the Executive (who is charged by the Constitution with the duty of conducting negotiations with foreign powers) such information, when disclosed, would be prejudicial to the public interest

or not. It has been a subject of serious deliberationw ith me whether I could, consistently with my constitutional duty and my sense of the public interests involved and to be affected by it, violate an important principle, always heretofore held sacred by my predecessors, as I should do by a compliance with the request of the House. President **[*26]** Washington, in a message to the House of Representatives of the 30th of March, 1796, declined to comply with a request contained in a resolution of that body, to lay before them "a copy of the instructions to the minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and other documents relative to that treaty, excepting such of the said papers as any existing negotiation may render improper to be disclosed."

. . . Indeed, the objections to complying with the request of the House contained in the resolution before me are much stronger than those which existed in the case of the resolution in 1796. This resolution calls for the "instructions and orders" to the minister of the United States to Mexico which relate to negotiations which have not been terminated, and which may be resumed. The information called for respects negotiations which the United States offered to open with Mexico immediately preceding the commencement of the existing war. The instructions given to the minister of the United States relate to the differences between the two countries out of which the war grew and the terms of adjustment which we **[*27]** were prepared to offer to Mexico in our anxiety to prevent the war. These differences still remain unsettled, and to comply with the call of the House would be to make public through that channel, and to communicate to Mexico, now a public enemy engaged in war, information which could not fail to produce serious embarrassment in any future negotiation between the two countries. I have heretofore communicated to Congress all the correspondence of the minister of the United States to Mexico which in the existing state of our relations with **[**764]** that Republic can, in my judgment, be at this time communicated without serious injury to the public interest.

Entertaining this conviction, and with a sincere desire to furnish any information which may be in possession of the executive department, and which either House of Congress may at any time request, I regard it to be my constitutional right and my solemn duty under the circumstances of this case to decline a compliance with the request of the House contained in their resolution. n37

n37 *Id.* at 565, 566, 567.

Diplomatic Instructions Relating to United States -- Mexico Treaty

On July 29, 1848, President Polk refused **[*28]** to comply with a request by the House of Representatives for copies of instructions provided to commissioners who negotiated the treaty with Mexico on the ground that "it would be 'inconsistent with the public interests' to give publicity to these instructions at the present time." He added that, "as a general rule applicable to all our important negotiations with foreign powers, it could not fail to be prejudicial to the public interest to publish the instructions of our ministers until some time had elapsed after the conclusion of such negotiations." n38

n38 *Id.* at 602.

President Polk did transmit these documents to the House on February 8, 1849, at which time he reaffirmed the general rule enunciated on July 29, but stated that, notwithstanding that, "as [the documents] have been again called for by the House, and called for in connection with other documents, to the correct understanding of which they are indispensable, I have deemed it my duty to transmit them." n39

n39 *Id.* at 679.

8. Fillmore Administration

Diplomatic Instructions

Upon receipt of a request from the Senate to furnish, if not inconsistent with the public interest, information concerning **[*29]** the seizure of the American steamship *Prometheus* by a British war vessel and the measures taken to vindicate "the honor of the country," President Fillmore, on December 15, 1851, transmitted excerpts from a communication giving the facts of the case, but without the instructions given to the United States Minister in London. He declared that "[s]ufficient time has not elapsed for the return of any answer to this dispatch from him, and in my judgment it would at the present moment be inconsistent with the public interest to communicate those instructions. A communication, however, of all the correspondence will be made to the Senate at the earliest moment at which a proper regard to the public interest will permit." n40

n40 5 Richardson, *supra,* at 139-40.

[765]** *Documents Involving American Claims Against the Mexican Government*

In response to a Senate request for papers and proofs on file with the Executive Branch regarding the claim of Samuel A. Belden & Co. against the Mexican government, on May 29, 1852, President Fillmore forwarded all documents save those of a diplomatic nature, and stated that because the claim was still being negotiated it was therefore **[*30]** "not deemed expedient . . . to make public the documents which have been reserved." n41

n41 *Id.* at 151.

Sandwich Islands

On August 14, 1852, President Fillmore refused to provide information to the Senate regarding a proposition made by the King of the Sandwich Islands to transfer the islands to the United States, as not comporting with the public interest. n42

n42 *Id.* at 159.

9. Buchanan Administration

Law Enforcement Files

On January 11, 1859, President Buchanan responded to a request by the Senate for information relating to the landing of a slave ship on the coast of Georgia. The President transmitted a report from the Attorney General which stated that an offense had been committed and that measures were being taken to enforce the law. However, he concurred with the opinion of the Attorney General that "it would be incompatible with the public interest at this time to communicate the correspondence with the officers of the Government at Savannah or the instructions which they have received." n43

n43 *Id.* at 534.

10. Lincoln Administration

Fort McHenry Arrests

On July 27, 1861, President Lincoln refused to provide to the House **[*31]** of Representatives documents revealing the grounds, reasons, and evidence upon which Baltimore police commissioners were arrested at Fort McHenry for the reason that disclosure at that time would be incompatible with the public interest. n44

n44 6 Richardson, *supra,* at 33.

Arrest of Brigadier General Stone

On May 1, 1862, President Lincoln refused to comply with a request by the Senate for more particular information regarding the evidence leading to the **[**766]** arrest of Brigadier General Stone on the ground that the determination to arrest and imprison him was made upon the evidence and in the interest of public safety, and that disclosure of more particular information was incompatible with the public interest. n45

n45 *Id.* at 74.

Negotiations with New Granada

The House of Representatives had requested the Secretary of State to communicate to it, "if not in his judgment incompatible with the public interest," information concerning American relations with New Granada, and what negotiations, if any, had been had with General Herran of that country. President Lincoln, on January 14, 1863, replied to the resolution giving a resume of developments in **[*32]** New Granada. However, with respect to official communications with General Herran, he stated that "[n]o definitive measure or proceeding has resulted from these communications, and a communication of them at present would not, in my judgment, be compatible with the public interest." n46

n46 *Id.* at 147, 149.

11. Johnson Administration

Military Correspondence

On January 26, 1866, President Johnson refused to disclose to the Senate certain communications from military officers regarding violations of neutrality on the Rio Grande on the ground that such disclosure would not be consistent with the public interest. n47

n47 *Id.* at 376-77.

Confinement of Jefferson Davis

On February 9, 1866, President Johnson refused, on advice from the Secretary of War and the Attorney General, to comply with a request by the House of Representatives for a report by the Judge Advocate General concerning the confinement of Jefferson Davis, and others, on the ground that disclosure would not be in the public interest. n48

n48 *Id.* at 378.

New Orleans Investigations

On May 2, 1866, President Johnson refused to provide the House of Representatives with a copy of a **[*33]** report that it had requested concerning General Smith's and James T. Brady's New Orleans investigations, citing the public interest in nondisclosure. n49

n49 *Id.* at 385.

[767]** 12. Grant Administration

Performance of Executive Functions

In April 1876, President Grant was requested by the House of Representatives to provide

information which would show whether any executive acts or duties had been performed away from Washington, the lawfully established seat of government. (This was an attempt to embarrass the President for having spent the hot summer at Long Beach.) On May 4, 1876, the President refused on the ground that the Constitution did not give the House of Representatives authority to inquire of the President where he performed his executive functions, and that, moreover, the House's lawful demands on the Executive were limited to information necessary for the proper discharge of its powers of legislation or impeachment. n50

n50 7 Richardson, *supra,* at 361-66.

13. Cleveland Administration

Dismissal of District Attorney

In response to a resolution by the Senate requesting the Attorney General to provide certain documents concerning the **[*34]** administration of the United States Attorney's Office (then District Attorney) for the Middle District of Alabama, and the President's dismissal of the incumbent district attorney, President Cleveland sent a message on March 1, 1886, to the Senate stating that he was withholding the requested documents because they contained information addressed to him and to the Attorney General by private citizens concerning the former district attorney, and that the documents related to an act (the suspension and removal of an Executive Branch official) which was exclusively a discretionary executive function. n51

n51 8 Richardson, *supra,* at 375.

"Rebecca" Schooner Incident

On February 26, 1887, President Cleveland refused to provide the Senate with information that it requested regarding the seizure and sale of the American schooner *Rebecca* at Tampico, and the resignation of the Minister of the United States to Mexico, on the ground that publication of the requested correspondence would be inconsistent with the public interest. n52

n52 *Id.* at 538.

14. Harrison Administration

International Conference on the Use of Silver

In response to the Senate's request for **[*35]** information regarding the steps taken toward holding an international conference on the use of silver, President Harrison **[**768]** stated on April 26, 1892, that "in my opinion it would not be compatible with the public interest to lay before the Senate at this time the information requested, but that at the earliest moment after definite information can properly be given all the facts and any correspondence that may take place will be submitted to Congress." n53

n53 9 Richardson, *supra,* at 238-39.

15. Cleveland Administration

Cuba Matters

In response to a request by the House of Representatives for copies of all correspondence relating to affairs in Cuba since February 1895, President Cleveland transmitted on February 11, 1896, a communication from the Secretary of State and such portions of the

correspondence requested as he deemed it not inconsistent with the public interest to communicate. n54

n54 *Id.* at 666.

Correspondence with Spain

On May 23, 1896, President Cleveland transmitted to the Senate a requested copy of the protocol with Spain, but withheld copies of certain correspondence with Spain on the ground that it would be incompatible with **[*36]** the public good to furnish such correspondence. n55

n55 *Id.* at 669.

16. McKinley Administration

War Department Investigations

In response to a request made by the Senate to the Secretary of War for a report on the War Department's investigation into receipts and expenditures of Cuban funds, President McKinley informed the Senate on January 3, 1901, that it was not deemed compatible with the public interest to transmit the document at that time. n56

n56 9 Richardson, *supra,* at 6458 (Bur. of Nat'l Literature ed. 1911).

17. Theodore Roosevelt Administration

United States Steel Proceedings

On January 4, 1909, the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against the United States Steel Corporation, and if not, the reasons for its non-action. A request was also made for the opinions of the Attorney General regarding this matter, if any had been written. President Roosevelt replied to the Senate on January 6, 1909, stating that he had been orally advised by the Attorney **[**769]** General that there were insufficient grounds for instituting legal action against U.S. **[*37]** Steel, and that he had

instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever. n57

n57 43 Cong. Rec. 528 (1909).

When the Senate was unable to get the documents from the Attorney General, it subpoenaed the Commissioner of Corporations to produce all papers and documents regarding U.S. Steel in his possession. The Commissioner reported the request to the President, who sought an opinion from Attorney General Bonaparte regarding the Commission's statutory obligation to withhold such information except upon instruction by the President. The Attorney General advised the Commissioner that the discretion to make public the requested documents was vested in **[*38]** the President and that, accordingly, he should turn over all documents within the scope of the subpoena to the President. n58 The Commissioner did so, and President Roosevelt then informed the Judiciary Committee that he had the papers and that the only way the Senate could get them was through his impeachment. President Roosevelt

also explained that some of the facts were given to the government under a pledge of secrecy and that the government had an obligation to keep its word. n59

n58 27 Op. Att'y Gen. 150 (1909).

n59 E. Corwin, The President -- Office and Powers 429 (1957).

18. Coolidge Administration

Bureau of Internal Revenue Oversight

On April 11, 1924, President Coolidge responded to a request by the Senate for a list of all companies in which the Secretary of the Treasury "was interested" (for the purpose of investigating their tax returns) as a part of a general oversight investigation of the Bureau of Internal Revenue. President Coolidge refused to provide the information on the ground that it was confidential information the disclosure of which would be detrimental to public service, calling the Senate's investigation an "unwarranted intrusion," born of **[*39]** a desire other than to secure information for legitimate legislative purposes. n60

n60 65 Cong. Rec. 6087 (1924).

[770]** 19. Hoover Administration

London Treaty Letters

On July 11, 1930, President Hoover responded to a request addressed to the Secretary of State from the Senate Foreign Relations Committee for certain confidential telegrams and letters leading up to the London Naval Conference and the London Treaty. The Committee members had been permitted to see the documents with the understanding that the information contained therein would be kept confidential. The Committee asserted its right to have full and free access to all records touching on the negotiation of the Treaty, basing its right on the constitutional prerogative of the Senate in the treaty-making process. In his message to the Senate, President Hoover pointed out that there were a great many informal statements and reports which were given to the government in confidence. The Executive was under a duty, in order to maintain amicable relations with other nations, not to publicize every negotiating position and statement which preceded final agreement on the Treaty. He stated that the Executive **[*40]** must not be guilty of a breach of trust, nor violate the invariable practice of nations. "In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest." n61

n61 S. Doc. No. 216, 71st Cong., Special Sess. 2 (1930).

20. Franklin D. Roosevelt Administration

FBI Records

On April 30, 1941, at the direction of President Roosevelt, Attorney General Jackson wrote the Chairman of the House Committee on Naval Affairs, stating his refusal to provide the Committee with certain FBI records. Attorney General Jackson declared 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." n62

n62 40 Op. Att'y Gen. 45, 46 (1941).

Radio Intelligence Material

Pursuant to a January 19, 1943, resolution, a House Select Committee to Investigate the Federal Communications Commission (FCC) subpoenaed the Director of the Bureau of the Budget on July 9, 1943, to appear before the **[*41]** Select Committee and produce Bureau files and correspondence dealing with requests by the War and Navy Departments to the President for an executive order transferring the functions of the FCC's Radio Intelligence Division to the military establishments. The Director refused, citing Attorney General Jackson's letter of **[**771]** April 30, 1941, and a presidential instruction that the Bureau's files were to be kept confidential, because disclosure would not comport with the public interest. n63

n63 *Study and Investigation of the Federal Communications Commission: Hearings on H. Res. 21 Before the House Select Comm. to Investigate the Federal Communications Commission,* 78th Cong., 1st Sess. 37 (1943).

In addition, the Acting Secretary of War was requested to appear before the Select Committee to produce documents bearing on the War and Navy Departments' requests to the President and to bring several Army officers to testify. The Acting Secretary refused to provide the documents on the President's direction, on the ground that doing so would be incompatible with the public interest, and, pursuant to his own judgment, refused to permit the Army officers to appear. n64

n64 *Id.* at 67-68. **[*42]**

FBI Records

In 1944, the same Select Committee subpoenaed the Director of the Federal Bureau of Investigation to testify concerning fingerprint records and activities at Pearl Harbor, and also to identify a certain document which he was alleged to have received in the course of his duties. The Director refused to give testimony or to exhibit a copy of the President's directive requiring him, in the interest of national security, to refrain from testifying or disclosing the contents of the Bureau's files. n65 Attorney General Biddle wrote a letter to the Select Committee, dated January 22, 1944, informing the Committee that communications between the President and the heads of departments were privileged and not subject to inquiry by congressional committees. n66

n65 *Id.* at 2304-05.

n66 *Id.* at 2337-39.

21. Truman Administration

Condon Incident

In March 1948, the House Committee on Un-American Activities issued a subpoena to the Secretary of Commerce directing him to appear before the Committee and to bring with him a letter from the Director of the FBI concerning the loyalty of Dr. Condon, Director of the National Bureau of Standards, together with all **[*43]** records, files, and transcripts of the loyalty board relating to Dr. Condon. On March 13, 1948, President Truman issued a directive providing for the confidentiality of all loyalty files and requiring that all requests for such files from sources outside the Executive Branch be referred to the Office of the President, for such response as the President may determine. 13 Fed. Reg. 1359 (1948). At a press conference held on April 22, 1948, President Truman indicated that he would not comply with the request to turn the papers over to the Committee. n67

n67 The Public Papers of the Presidents, Harry S Truman, 1948, at 228.

Steelman Incident

On March 6, 1948, during an investigation into a strike among employees of Government Services, Inc., a subcommittee of the House Committee on Education **[**772]** and Labor issued a subpoena to presidential assistant John R. Steelman. n68 Mr. Steelman returned the subpoena to the chairman of the subcommittee on the ground that "the President directed me, in view of my duties as his assistant, not to appear before your subcommittee." n69 The minority report to H.R. Rep. No. 1595 commented on Mr. Steelman's failure to comply with the subpoena **[*44]** as follows:

the purpose of the subpoena on Mr. Steelman was to obtain from him the contents of any oral or written communications which had been made to him by the President with reference to the strike prevailing in the restaurants maintained by Government Services, Inc. I cannot believe that any congressional committee is entitled to make that kind of investigation into the private conferences of the President with one of his principal aides. I cannot conceive that the views of a Senator or Congressman on a pending bill may be extracted by a court or by a congressional committee by subpoenaing the Senator's of [sic] Congressman's administrative assistant or any other assistant, secretary, or confidential employee. Likewise, I regard it as a direct invasion of the Executive's prerogative to invade the work and time of his assistant in this manner. Dr. Steelman I think acted with the utmost propriety in referring the matter to the President. The Chief Executive very naturally and properly directed Dr. Steelman not to appear before the subcommittee. n70

n68 *Investigation of GSI Strike: Hearings on H. Res. 111 Before a Special Subcomm. of the House Comm. on Education and Labor,* 80th Cong., 2d Sess. 347-53 (1948).

n69 H.R. Rep. No. 1595, 80th Cong., 2d Sess. 3 (1948); *see id.* Pt. 2, at 8.

n70 *Id.* Pt. 1, at 12. **[*45]**

State Department Employee Loyalty Investigation

On March 28, 1950, a subcommittee of the Senate Foreign Relations Committee investigating allegations of disloyalty among State Department employees served subpoenas on the Secretary of State, the Attorney General, and the Chairman of the Civil Service Commission, demanding the production of all files bearing on the loyalty of certain State Department employees. After reference of the subpoena to the President pursuant to the directive of March 13, 1948, the President on April 3, 1950, directed the officials not to comply with the subpoena. n71 Thereafter it appeared that the subpoenaed documents had been made available to the preceding Congress prior to the issuance of the March 13, 1948, directive. President Truman thereupon agreed to make the files available to the subcommittee on the theory that this would not constitute a precedent for subsequent exceptions from the March 13, 1948, directive. n72

n71 The Public Papers of the Presidents, Harry S Truman, 1950, at 240.

n72 S. Rep. No. 2108, 81st Cong., 2d Sess. 9 (1950).

[773]** *General Bradley Incident*

During the investigation into the circumstances surrounding **[*46]** the dismissal of General Douglas MacArthur held by the Senate Committees on Armed Services and Foreign Relations in 1951, General Bradley refused to testify about a conversation with President Truman in which he had acted as the President's confidential adviser. The Chairman of the Committee, Senator Russell, recognized Bradley's claim of privilege. When that ruling was challenged, the Committee upheld it by a vote of 18 to 8. n73 At a press conference held on May 17, 1951, President Truman indicated that he had previously taken the position that his conversation

with General Bradley was privileged and that he was "happy" with the Committee's action. n74

n73 *Military Situation in the Far East: Hearings Before the Senate Comm. on Armed Services and the Senate Comm. on Foreign Relations,* 82d Cong., 1st Sess. 763, 832-72 (1951).

n74 The Public Papers of the Presidents, Harry S Truman, 1951, at 289.

Refusal to Comply with an Excessively Burdensome Demand for Information

During an investigation into the administration of the Department of Justice by a special subcommittee of the House Judiciary Committee, the chairman of the subcommittee requested a number of departments **[*47]** and agencies to furnish the following information:

A list of all cases referred to the Department of Justice or U.S. Attorneys for either criminal or civil action by any governmental department or agency within the last six years, in which:

a. Action was declined by the Department of Justice, including in each such case the reason or reasons assigned by said Department for such refusal to act.

b. Said cases were returned by the Department of Justice to the governmental Department or agency concerned for further information or investigation. In such cases, a statement of all subsequent action taken by the Department of Justice should be included.

c. Said cases have been referred to the Department of Justice and have been pending in the Department for a period of more than one year and are not included in b. above. n75

n75 The Public Papers of the Presidents, Harry S Truman, 1952-53, at 199.

President Truman instructed the heads of all agencies and departments not to comply with that request for the following reasons set forth in his letter, dated March 7, 1952, to the chairman of the subcommittee:

[T]his request of yours is so broad and sweeping in scope that **[*48]** it would seriously interfere with the conduct of the Government's business if the departments and agencies should undertake to **[**774]** comply with it. I am advised that it would require the examination of hundreds of thousands of files, that it would take hundreds of employees away from their regular duties for an extensive period of time, and that it would cost the Government millions of dollars. All this would be done, not for the purpose of investigating specific complaints, not for the purpose of evaluating credible evidence of wrongdoing, but on the basis of a dragnet approach to examining the administration of the laws.

I do not believe such a procedure to be compatible with those provisions of the Constitution which vest the executive power in the President and impose upon him the duty to see that the laws are faithfully executed. n76

n76 *Id.*

Confidentiality of Administration of Loyalty Security Program

In the spring of 1952 members of a Senate Appropriations subcommittee sought detailed information on the administration of the Loyalty Security Program. In response to a request for guidance by the Department of State, President Truman on April 3, 1952, **[*49]** issued detailed instructions which provided for the confidentiality of the Loyalty Security Program. These instructions provided, *inter alia:*

There is no objection to making available the names of all members of an agency loyalty board, but it is entirely improper to divulge how individual board members voted in particular cases or to divulge the members who sat on particular cases. If this type of information were divulged freely, the danger of intimidation would be great, and the objectivity, fairness and impartiality of board members would be seriously prejudiced. n77

n77 *Id.* at 235-36.

22. Eisenhower Administration

Executive Branch Deliberative Discussions

During the Army-McCarthy Hearings, the counselor of the Army was questioned about discussions which had taken place during a conference of high-level government officials.

On May 17, 1954, President Eisenhower directed the Secretary of Defense to instruct the employees of his Department not to testify on those issues. The President's letter stated:

Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in **[*50]** advising with each other on official matters, **[**775]** 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. This principle must be maintained regardless of who would be benefited by such disclosures. n78

n78 The Public Papers of the Presidents, Dwight D. Eisenhower, 1954, at 483-84.

This letter was interpreted as requiring every officer and employee of the government to claim privilege on his own in any situation covered by that letter. Hence there were a considerable number of invocations of **executive privilege** during the Eisenhower Administration which were not referred to, or specifically authorized by, the President.

Conversation with Presidential Assistant Sherman Adams

During hearings in July 1955 on the Dixon-Yates Contract before the Subcommittee **[*51]** on Antitrust and Monopoly of the Senate Judiciary Committee, Securities and Exchange Commission Chairman Armstrong was questioned on various issues. During most of his testimony, questions of privilege were disposed of without reference to the White House. When questioned about a telephone conversation with Presidential Assistant Sherman Adams, he sought the advice of the Special Counsel to the President who, upon advice of the Attorney General, directed that Mr. Armstrong could testify as to existence of the conversation, but not as to matters discussed during the conversation. n79

n79 *Power Policy: Dixon-Yates Contract: Hearings on S. Res. 61 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 84th Cong., 1st Sess. 751 (1955).

Killian and Gaither Panel Reports

In connection with an investigation into satellite and missile programs in January 1958, then-Senator Lyndon Johnson asked for the release of the so-called Killian and Gaither Panel reports. President Eisenhower denied the request in part on the ground that the reports had been prepared with the understanding that the advice contained in them would be kept confidential. The **[*52]** President added that "these reports are documents of the National

Security Council. Never have the documents of this Council been furnished to the Congress." n80

n80 The Public Papers of the Presidents, Dwight D. Eisenhower, 1958, at 117-18.

Confidentiality of ICA Country Reports

Between 1957 and 1959 the International Cooperation Administration (ICA), the predecessor to the Agency for International Development (AID), repeatedly **[**776]** denied to Congress and to the Comptroller General access to its country evaluation reports on the ground that they contained confidential opinions and tentative recommendations on matters involving foreign policy. These refusals were made without express presidential authorization.

When this issue came up at President Eisenhower's news conference of July 1, 1959, the President approved these withholdings largely on the ground that the release of the reports would jeopardize the ability of the United States to obtain confidential information. n81

n81 *Id.,* 1959, at 488, 489.

The Mutual Security legislation of 1959-1961 provided in effect that the ICA could withhold information from Congress or the Comptroller General only upon **[*53]** a presidential certification that he had forbidden the document be furnished and stated the reason for so doing. President Eisenhower made the following certifications:

November 12, 1959, relating to an evaluation report on Vietnam; n82

December 22, 1959, relating to evaluation reports on Iran and Thailand; n83

December 2, 1960, relating to evaluation reports on several South American countries. These reports apparently were made available to the Comptroller General during the following Administration. n84

n82 *Id.* at 776.

n83 *Id.* at 874.

n84 *Id.,* 1960-61, at 881.

23. Kennedy Administration

Confidentiality of Names of Specific Government Employees

During an investigation into military cold war education and speech review policies conducted by the Senate Committee on Armed Services, Senator Thurmond requested the names of individual government employees of the Department of Defense and the Department of State who made or recommended changes in specific speeches.

On February 8, 1962, President Kennedy directed the Secretary of Defense and all personnel under the jurisdiction of his Department not to give any testimony or produce any documents which **[*54]** would disclose such information. The letter stated:

[I]t would not be possible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice.

* * *

I do not intend to permit subordinate officials of our career **[**777]** services to bear the brunt of congressional inquiry into policies which are the responsibilities of their superiors. n85

n85 *Military Cold War Education and Speech Review Policies: Hearings Before the Special Preparedness Subcomm. of the Senate Comm. on Armed Services,* 87th Cong., 2d Sess. 508-509 (1962).

Chairman Stennis upheld the claim of privilege. The ruling was upheld by the Subcommittee. n86 On February 9, 1962, President Kennedy sent a similar letter to the Secretary of State. n87

n86 *Id.* at 513-14.

n87 *Id.* at 725.

Confidentiality of National Security Council Papers

Later, during the same investigation into military cold war education and speech review policies, Senator Thurmond demanded certain National Security Council **[*55]** papers. In a letter to Chairman Stennis dated June 23, 1962, President Kennedy refused to release those papers on the ground that "the unbroken precedent of the National Security Council is that its working papers and policy documents cannot be furnished to the Congress." n88

n88 *Id.* at 2951-57, 3160-61.

24. Johnson Administration

Exemption of Presidential Assistants from Appearance Before Congressional Committees

In 1968, during hearings on the nomination of Justice Fortas to be Chief Justice of the United States, Treasury Under Secretary Barr, Associate Special Counsel to the President DeVier Pierson, and Secretary of Defense Clark Clifford were invited to appear before the Senate Committee on the Judiciary to testify on the question whether Justice Fortas had participated in high-level White House meetings dealing with the development of legislation authorizing the Secret Service to protect presidential candidates.

By letters dated September 16, 1968, Mr. Barr and Mr. DeVier Pierson both declined the invitation. Mr. Barr's letter contained the following pertinent language:

In the development of this legislation, I participated in meetings with representatives **[*56]** of the White House and discussed the matter directly with the President.

Based on long-standing precedents, it would be improper for me under these circumstances to give testimony before a Congressional committee concerning such meetings and discussions. Therefore, I must, with great respect, decline your invitation to appear and testify.

Mr. DeVier Pierson stated:

[778]** As Associate Special Counsel to the President since March of 1967, I have been one of the "immediate staff assistants" provided to the President by law. (3 U.S.C. 105, 106.) It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system

of government. I must, therefore, respectfully decline the invitation to testify in these hearings.

The Secretary of Defense also asked to be excused from a personal appearance before the Committee, stating that "because of the complexities of the current world situation, **[*57]** my time is fully occupied in meeting my obligations and responsibilities as Secretary of Defense." n89

n89 *Nominations of Abe Fortas and Homer Thornberry: Hearings Before the Senate Comm. on the Judiciary,* 90th Cong., 2d Sess. 1347, 1348, 1363 (1968).

25. Nixon Administration

FBI Investigative Files

On November 21, 1970, the Attorney General, with the specific approval of the President, refused to release certain investigative files of the Federal Bureau of Investigation to Rep. L. H. Fountain, Chairman of the Intergovernmental Relations Subcommittee of the House Government Operations Committee. The reports discussed certain scientists nominated by the President to serve on advisory boards of the Department of Health, Education and Welfare. n90

n90 Memorandum for Honorable William S. Moorhead, Chairman, Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations, from Deputy Assistant Attorney General Mary Lawton (Apr. 25, 1973) (Lawton Memorandum); U.S. Government Information Policies and Practices -- The Pentagon Papers, Part 2, House Comm. on Government Operations, 92d Cong., 1st Sess. 362-63 (1971).

Military **[*58]** *Assistance Plan*

On August 30, 1971, President Nixon declined to make available to the Senate Foreign Relations Committee the Five-year Plan for the Military Assistance Program. n91 In a memorandum to the Secretaries of State and Defense, the President stated:

The Senate Foreign Relations Committee has requested "direct access to the Executive Branch's basic planning data on Military Assistance" for future years and the several internal staff papers containing such data. The basic planning data and the various **[**779]** internal staff papers requested by the Senate Foreign Relations Committee do not, insofar as they deal with future years, reflect any approved program of this Administration. . . .

I am concerned, as have been my predecessors, that unless privacy of preliminary exchange of views between personnel of the Executive Branch can be maintained, the full frank and healthy expression of opinion which is essential for the successful administration of Government would be muted.

I have determined, therefore, that it would not be in the public interest to provide to the Congress the basic planning data on military assistance as requested by the Chairman. . . . n92 **[*59]**

n91 ***Executive Privilege:*** *The Withholding of Information By the Executive: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. 45-46 (1971).

n92 *Id.* at 46.

AID Information Concerning Foreign Assistance to Cambodia

On March 15, 1972, the President directed the Secretary of State to withhold from the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee the Agency for International Development (AID) country field submissions for Cambodian foreign assistance for fiscal year 1973. n93

n93 118 Cong. Rec. 8694 (1972); Lawton Memorandum, *supra.*

USIA Memoranda

On the same date the President instructed the Director of the United States Information Agency (USIA) to decline to provide to the Senate Foreign Relations Committee all USIA country program memoranda. n94

n94 *Id.*

Watergate

President Nixon, asserting **executive privilege** during 1973 and 1974, refused to provide to the Senate Select Committee on Presidential Campaign Activities (Watergate Committee) and to the House Judiciary Committee various tape recordings of conversations involving **[*60]** the President, and other materials relating to the involvement of 25 named individuals in criminal activities connected with the 1972 presidential election. n95

n95 *See* J. Hamilton, The Power to Probe 23-26, 65 (1976); Cox, ***Executive Privilege,*** 122 U. Pa. L. Rev. 1383, 1420 (1974). Although the tape recordings were eventually turned over to the House Judiciary Committee, the President's refusal to make those same tapes available to the Senate Watergate Committee was unanimously affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. *Senate Select Committee* v. *Nixon,* **498** F.2d 725 (1974) *(en banc).* President Nixon's refusal to disclose Watergate-related tapes and documents in response to a subpoena in a criminal case is beyond the scope of this memorandum. *See generally United States* v. *Nixon,* 418 U.S. 683 (1974).

26. Carter Administration

Department of Energy Gas Conservation Fee Documents

In April 1980 the Subcommittee on Environment, Energy and Natural Resources of the House Committee on Government Operations subpoenaed documents **[**780]** reflecting intra-Executive Branch deliberations concerning the President's decision **[*61]** to impose a conservation fee on imports of crude oil and gasoline. n96 For several weeks representatives of the Executive Branch negotiated with the Subcommittee about releasing the documents. On April 25, 1980, Secretary of Energy Duncan informed the Subcommittee that "the President has instructed me to pursue all reasonable grounds of accommodation. If there are no further reasonable avenues of negotiation, the President has instructed me to assert a privilege with respect to these documents." n97 Ultimately, some but not all of the documents were given to the Subcommittee, which tacitly withdrew its request for documents that reflected deliberations directly involving the Executive Office of the President. n98

n96 Proclamation No. 4744, 16 Weekly Comp. Pres. Doc. 592 (1980).

n97 Memorandum for the Attorney General, from Assistant Attorney General John Harmon, 6 (Jan. 13, 1981).

n98 *Id.* at 8.

27. Reagan Administration

Secretary Watt's Implementation of the Mineral Lands Leasing Act

On October 2, 1981, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce served a subpoena on Secretary of the Interior James Watt for all documents **[*62]** relative to his determination of Canadian reciprocity under the Mineral Lands Leasing Act, 30 U.S.C. § 181. Among the material covered by the subpoena were a number of Cabinet-level predecisional deliberative documents, while other documents contained classified, diplomatic information. On October 13, 1981, President Reagan directed Secretary Watt not to release 31 particular documents whose disclosure would be inconsistent with the confidential relationship among Cabinet officers and the President, and which would violate the constitutional doctrine of separation of powers. While protecting the confidentiality of these documents, Secretary Watt made repeated efforts to accommodate the Subcommittee's needs through certain limited document disclosures, testimony, and correspondence.

On February 8, 1982, a contempt resolution against Secretary Watt was passed by the Subcommittee; on February 25 the full Committee supported this conclusion by a vote of 23 to 19. By this time, however, Secretary Watt had reached a decision finding Canada to be a "reciprocal" national under the Mineral Lands Leasing Act. Immediately thereafter he informed all members of the Subcommittee that since **[*63]** the deliberative process had concluded, he was "hopeful" that additional documents might be released.

On March 16, 1982, Fred F. Fielding, Counsel to the President, together with members of the Subcommittee, reached an agreement pursuant to which all of the disputed documents were made available for one day at Congress under the **[**781]** custody of a representative from the Office of Counsel to the President. Minimal notetaking, but no photocopying, was permitted; the documents were available for examination by Members Only. n99

n99 *See generally* H.R. Rep. No. 898, 97th Cong., 2d Sess. 73-84 (1982); *Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 97th Cong., 2d Sess. (1982).

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*1982 OLC LEXIS 32, *; 43 Op. Atty Gen. 374;*
*6 Op. O.L.C. 31, **

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

ASSERTION OF **EXECUTIVE PRIVILEGE** IN RESPONSE TO CONGRESSIONAL DEMANDS FOR LAW ENFORCEMENT FILES

1982 OLC LEXIS 32; 43 Op. Atty Gen. 374; 6 Op. O.L.C. 31

November 30, 1982

CORE TERMS: law enforcement, subcommittee, confidentiality, investigative, assurance, confidential, disclosure, faithfully executed, public interest, distributed, memorandum, publicly, sources of information, omission, public distribution, consistent position, enforcement action, unethical conduct, adversely affect, dissemination, articulated, inspection, reiterate, progress, restated, confirm, shield, staff, duty, leak

SYLLABUS:
[*1]

It is the policy of the Executive Branch to decline to provide committees of Congress with access to or copies of law enforcement files, or materials in investigative files whose disclosure might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

Congressional assurance of confidentiality cannot overcome concern over the integrity of law enforcement files, not only because of concern over potential public distribution of the documents by Congress, but because of the importance of preventing direct congressional influence on investigations in progress.

It is the constitutional responsibility of the Executive to determine whether and when materials in law enforcement files may be distributed publicly, and this responsibility cannot and will not be delegated to Congress.

The principle of **executive privilege** will not be invoked to shield documents which contain evidence of criminal or unethical conduct by agency officials, and the documents at issue here have been made available for inspection by congressional staff members to confirm their proper characterization in this regard.

ADDRESSEE:
The Chairman of the Subcommittee on Oversight and **[*2]** Investigations Committee on Energy and Commerce United States House of Representatives

OPINIONBY: SMITH

OPINION:
[31]** DEAR MR. CHAIRMAN: This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as law enforcement files) of the Environmental Protection Agency (EPA). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and

Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent branches of our Nation's government, I shall reiterate at some length in this letter the longstanding position of the **[**32]** Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the **[*3]** heads of all executive departments and agencies on November 4, 1982, "[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." Memorandum from the President to the Heads of Executive Departments and Agencies (Nov. 4, 1982), re: "Procedures Governing Responses to Congressional Requests for Information," at 1. Nevertheless, it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over 40 years ago:

It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents **[*4]** 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).

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your subcommittee and its staff to examine relative **[*5]** to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations, and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

[33]** I continue to believe, as have my predecessors, that unrestricted 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 40 years ago, I see no reason to depart from the consistent position of previous Presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago,

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 **[*6]** proceeds, there is a substantial danger that congressional

pressures will influence the course of the investigation.

Memorandum from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 19, 1969), re: "Proposed letter from Secretary of the Army Resor to Chairman Rivers re submission of open CID investigative files," at 2.

Other objections 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 if the contents of files are widely disseminated; 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. Our policy is premised **[*7]** in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case. . . ." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).

The policy which I reiterate here 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. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

I am not unmindful of your conditional suggestion that your counsel will **[*8]** keep this information "inviolate until such times as the **[**34]** committee determines its disposition." I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee.

40 Op. Att'y Gen. at 50.

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

[S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination *to* the Congress, not by **[*9]** it, is the critical factor. Second, there is the always present concern, often factually justified, with "leaks." Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents.

Kauper Memorandum at 3.

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982, letter, I am sensitive to Rule XI, Clause 2, § 706c of the Rules **[*10]** of the House of Representatives, which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and *all Members of the House shall have access thereto.* . . ." In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, Clause 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your subcommittee is not equivalent to making the documents "public." But, as is **[**35]** evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection **[*11]** to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public. n1 To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the house of Congress involved or some appropriate unit thereof may seek judicial review (*see Senate Select Committee* v. *Nixon,* **498** F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the **[*12]** claim of privilege presented in [any particular] case." *United States* v. *Nixon,* 418 U.S. at 705, quoting *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177 (1803).

n1 Your November 8 letter points out that in my opinion of October 13, 1981, to the President, 43 Op. Att'y Gen. , 5 Op. O.L.C. 27 (1981), a passage from the Court's opinion in *United States* v. *Nixon,* 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. *See* 5 Op. O.L.C. at 29. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's **executive privilege,** functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under *United States* v. *Nixon* would be identical even if the

Court had itself not used the word "public" in the relevant passage. **[*13]**

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination. n2

n2 It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982, to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally. **[*14]**

[36]** These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the members of your subcommittee at the offices of your subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

In closing, I emphasize that we have carefully reexamined the consistent position of the Executive Branch on this subject and **[*15]** we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,

WILLIAM FRENCH SMITH

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*1982 OLC LEXIS 19, *; 6 Op. O.L.C. 632, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

CONSTITUTIONALITY OF STATUTE REQUIRING EXECUTIVE AGENCY TO REPORT DIRECTLY TO CONGRESS

1982 OLC LEXIS 19; 6 Op. O.L.C. 632

November 5, 1982

CORE TERMS: subordinate, budget, recommendation, reporting, concurrent, supervise, right to control, coordinate, duties, removal, decisionmaking process, prerogative, confidentiality, deliberations, deliberative process, faithfully executed, transmitted, power to remove, assigned, appointed, branches of government, effective, confirmed, pleasure, rank, branch of government, disclosure, concurrently, presidential, expedient

SYLLABUS:
[*1]

Statute requiring the Administrator of the Federal Aviation Administration (FAA) to transmit concurrently to Congress any budget information and legislative recommendations that are transmitted to the Secretary of Transportation, the Office of Management and Budget (OMB), and the President, would, if interpreted strictly, on its face violate the constitutional principle of separation of powers.

Separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions, which includes the right to supervise and review the work of such officials; this principle, coupled with the constitutional protection afforded the deliberative process within the Executive Branch, creates an area of executive prerogative that may not be invaded by a coordinate branch of government absent a very compelling and specific need.

Disclosure to Congress of unreviewed recommendations by subordinates within the Executive Branch would disrupt the normal interchange between agency heads and the President in connection with the decisionmaking process, and interfere with the President's ability to supervise the actions of his subordinate officials **[*2]** while this process is going on, thus adversely affecting the President's ability to carry out his responsibilities.

Because there appears to be no specific or compelling congressional need for the information at issue in this case, the concurrent reporting requirement can and should be construed so as to avoid constitutional infirmity, by allowing the FAA Administrator to provide Congress with budget data and legislative comments only after they have been approved by the Administrator's superiors in the Executive Branch, including, where appropriate, the President and OMB.

ADDRESSEE:
Memorandum Opinion for the General Counsel, Department of Transportation

OPINIONBY: OLSON

OPINION:
[632]** This responds to your request for the advice of this Office regarding your implementation of § 506(f) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L.

No. 97-248, 96 Stat. 324, 677 (1982), which requires the Administrator of the Federal Aviation Administration (Administrator) to transmit certain budget information and legislative recommendations directly to Congress at the same time that they are transmitted to the Secretary of Transportation (Secretary), the President, or the Office of Management and Budget **[*3]** (OMB). Specifically, you have expressed concern that this provision may conflict with the principle of separation of powers under the Constitution. In response to your request, we have reviewed the relevant statutory provisions, case law concerning separation of powers, the Constitution itself and the history of its development, **[**633]** and prior opinions of this Office on this general subject. On the basis of this review, we have concluded that, if interpreted strictly, the statutory provision would, on its face, violate the separation of powers which is central to the structure of the United States Constitution.

As discussed in Section II of this opinion, several clearly established principles of the separation of powers doctrine apply to the question raised by the concurrent reporting provision. The separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions and assist him in the performance of his constitutional responsibilities. This power includes the right to supervise and review the work of such subordinate officials, including reports issued either to the public or to Congress. This supervisory **[*4]** control is reinforced by the constitutional protection afforded to the deliberative process within the Executive Branch. These principles combine to create an area of executive prerogative that may not be invaded by a coordinate branch of government absent a very compelling and specific need.

As detailed in Section III, a requirement that subordinate officials within the Executive Branch submit report directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch. This interference contrasts with the relatively nonspecific request for information embodied in § 506(f). In balancing Congress' limited apparent need for direct reports against the President's right to control subordinates within the Executive Branch, it seems clear that § 506(f) would be unconstitutional if it were construed to require the Administrator to report to Congress without prior review by his superiors.

In Section IV, we consider how § 506(f) might be interpreted so as to avoid this constitutional problem. In brief, we conclude that in order to harmonize the statute with the requirements **[*5]** of the Constitution, the Administrator should provide to Congress only budget information and legislative comments that have been approved by the Administrator's superiors, including, where appropriate, the President, OMB, and the Secretary.

I. Background

The Airport and Airway Improvement Act of 1982 (AAIA) was enacted as Title V of the Tax Equity and Fiscal Responsibility Act of 1982. Pub. L. No. 97-248, 96 Stat. 324, 677 (1982). The AAIA generally authorizes an extension of, and enacts certain changes to, the Federal Airport Aid Program. In addition, § 506(f) provides:

(f) TRANSMITTAL OF BUDGET ESTIMATES. -- Whenever the Administrator of the Federal Aviation Administration submits or transmits any budget estimate, budget request, supplemental budget estimate, or other budget information, legislative recommendation, or comment on legislation to the Secretary, the President of the United States, or to the Office of Management and **[**634]** Budget pertaining to funds authorized in subsection (a) or (b) of this section, it shall concurrently transmit a copy thereof to the Speaker of the House of Representatives, the Committees on Public Works and Transportation and Appropriations **[*6]** of the House of Representatives, the President of the Senate, and the Committees on Commerce, Science, and Transportation and Appropriations of the Senate.

In essence, this provision purports to direct the Administrator to report concurrently to Congress any budget data or legislative comments that are transmitted to the President, the

Secretary, or OMB. By the terms of § 506(f), this requirement applies to budget information or legislative comments "pertaining to funds authorized in subsection (a) or (b) of this section . . . ." Subsections (a) and (b) authorize funding for acquiring or establishing and improving air navigation facilities and for establishing demonstration projects in connection with certain research and development activities. In addition, § 504(b) requires the Administrator to prepare and submit to Congress "a national airways system plan" and directs that the preparation be "subject to the requirements of section 506(f). . . ."

Given this statutory language, it is arguable that the Administrator is required to submit the specified reports, information, and comments directly to Congress prior to any review or approval by the President, the Secretary, or OMB. **[*7]** If the statute were read to impose such a requirement, the Administrator would be severed from his superiors in the Executive Branch with respect to these matters and would, in effect, become an independent agency reporting to both Congress and the President. In addition, the internal deliberative process within the Executive Branch would be tapped by an information pipeline running directly to a coordinate branch of government. These possibilities raise serious separation of powers issues, which are discussed below.

II. Applicable Separation of Powers Principles

Article II, § 1 of the United States Constitution begins with the statement that "[t]he executive Power shall be vested in a President of the United States of America." Article II, § 3 requires the President to "take Care that the Laws be faithfully executed . . .," and also requires the President to "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient. . . ." These constitutional provisions, taken together, impose certain fundamental duties upon the President and grant the power to direct the Executive Branch to carry out those duties.

In order to execute the laws adopted **[*8]** by Congress, the President must have the assistance of subordinate officials who will carry out his policies and implement his instructions with respect to the execution of law. The Supreme Court has, from its earliest decisions, consistently recognized this basic principle. For example, in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 164 (1803), Chief Justice Marshall stated:

[635]** By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.

Although it is clear that the Constitution does not contemplate "a complete division of authority between the three branches," *Nixon* v. *Administrator of General Services,* **[*9]** 433 U.S. 425, 443 (1977), each branch retains certain core prerogatives upon which the other branches may not transgress. *See Buckley* v. *Valeo,* 424 U.S. 1 (1976). In *Buckley,* the Court recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," but it emphasized that there was a "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." 424 U.S. at 120-21. The Court declared that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." 424 U.S. at 123.

The extent of the President's right to control subordinate officers was specifically considered by the Supreme Court in a trilogy of cases involving the President's power to remove federal

officials. In *Myers* v. *United States,* 272 U.S. 52 (1926), the Court ruled unconstitutional a statute that limited the President's power to remove **[*10]** certain postmasters, and it declared, in *dictum,* that the repealed Tenure of Office Act had been unconstitutional as well. n1 In reaching this conclusion, the Court considered a number of factors, including the constitutional debates, previous congressional practice, and the relationship between the power to appoint and the power to remove. In addition, the Court expressly based its decision on the conclusion that "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers -- a conclusion confirmed by his obligation to take care that the laws be faithfully executed. . . ." 272 U.S. at 163-64. The Court based this conclusion on the following analysis of the President's control over subordinate officials:

[636]** The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform **[*11]** execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them.

272 U.S. at 135.

n1 The Tenure of Office Act, 14 Stat. 430 (1867), had provided that all officers appointed by and with the consent of the Senate should hold their offices until their successors had been appointed and approved, and that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President who appointed them, subject to removal by consent of the Senate. This Act was the principal basis for the articles of impeachment filed against President Andrew Johnson after he dismissed his Secretary of War without the consent of the Senate. **[*12]**

The Court confirmed this view of the President's power over his subordinates within the Executive Branch in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935). In that case, the Court rules that Congress could, consistent with the Constitution, immunize a Commissioner of the Federal Trade Commission (FTC) from removal by the President at his pleasure. The Court reasoned that the FTC could not "be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." 295 U.S. at 628. *Myers* was distinguished on the ground that "[t]he actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." 295 U.S. at 627. The Court emphasized that within the Executive Branch, the President retained the right to direct the actions of his subordinates free from interference by another branch:

The fundamental necessity of maintaining each of the three **[*13]** general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

295 U.S. at 629-30. Thus, by narrowing *Myers* to cover only subordinates of the President within the Executive Branch, the Court linked the removal power even more clearly to the right of the President to control purely executive officials.

[637]** This principle was reaffirmed in *Wiener* v. *United States,* 357 U.S. 349 (1958). In that case, the Court held that the President did not have a constitutional right to remove a member of the War Claims Commission. The Court ruled that the Commission was essentially judicial in nature and that it was intended by Congress to operate entirely free of the President's control. 357 U.S. at 355-56. The Court **[*14]** expressly linked the right of removal with the right of the President to control a particular official:

If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

357 U.S. at 356. The Court thus emphasized that *Humphrey's Executor* "drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers," and those who were members of an independent body required to exercise its judgment without hindrance from the Executive. 357 U.S. at 353.

These three cases clearly establish the President's right to control the actions and duties of his subordinates within the Executive Branch. *Myers* explicitly set forth the President's right to control as one of the bases for establishing the presidential right to discharge subordinate officials. *Humphrey's Executor* **[*15]** and *Wiener,* while limiting the President's removal power, reinforced the link between the President's right to control and his right to remove Executive Branch officials.

The President's right to control the execution of the laws free from undue interference from coordinate branches of government is supported by an additional line of authority. In *United States* v. *Nixon,* 418 U.S. 683 (1974), the Supreme Court confirmed that the Constitution protects the integrity of the Executive Branch decisionmaking process from interference by another branch through demands for information about the Executive's deliberations. The Court recognized

the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. 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.

418 U.S. at 705 (footnote omitted). The Court specifically acknowledged that **[*16]** this right of confidentiality "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and **[**638]** privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional under-pinnings." 418 U.S. at 705-06 (footnote omitted). The Court further noted that this protection "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708 (footnote omitted).

This decision gives further content to the principle that the constitutional separation of powers requires the President to have effective control over the decisionmaking process within the Executive Branch. The constitutional prerogative recognized by the Court connects the President's constitutional responsibility to take care that the laws be faithfully executed

with the practical need for confidentiality in Executive Branch deliberations. The Court has unmistakably declared that the powers necessary to the implementation of the President's authority over the Executive Branch cannot be abridged absent **[*17]** a compelling and specific need asserted by another branch. n2

n2 Although the *Nixon* case dealt with communications between the President and White House advisors, it seems clear that the principles enunciated therein extend at least to other important decisionmakers within the Executive Branch. *See* United States v. *American Telephone & Telegraph Co.*, 567 F.2d 121 (D.C. Cir. 1977). The *Nixon* Court specifically referred not simply to the President but to "high government officials and those who advise and assist them. . . ." 418 U.S. at 705. Furthermore, as the Supreme Court recognized in *Barr* v. *Matteo*, 360 U.S. 564 (1959), where it extended the privilege against libel suits involving official utterances to executive officials below Cabinet rank:

We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

360 U.S. at 572-73 (footnotes omitted). **[*18]**

The D.C. Circuit has explicitly recognized the right of the President to protect himself from unwarranted intrusions by Congress into the domain of protected decisionmaking activity. In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, **498** F.2d 725 (D.C. Cir. 1974) (*en banc*), the court ruled that the President was not required to produce to Congress certain transcripts of White House conversations. The court decided that the general presumption in favor of the confidentiality of executive deliberations could be overcome "only by a strong showing of need by another institution of government -- a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations. . . ." **498** F.2d at 730. The court found that the general oversight need of Congress in this instance was not sufficient to meet the court's requirement that the information be "demonstrably critical to the responsible fulfillment of the Committee's functions." **498** F.2d at 731.

The decisions and the long practical history concerning the right of the President to protect his control over the Executive Branch are **[*19]** based on the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities. The executive power resides in the President, **[**639]** and he is obligated to "take care that the laws are faithfully executed." In order to fulfill these responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function. Therefore, only the most compelling and specifically supported needs will justify any interference with the President's power within the Executive Branch.

III. Application of Separation of Powers Principles to § 506(f)

In this instance, the potential impact of § 506(f) on the Executive Branch is significant and adverse. On the other hand, the provision does not reflect any particularized **[*20]** congressional need for specific factual information. Under these circumstances, as described more fully below, the constitutionally based need to protect the executive process from a

non-compelling intrusion by Congress suggests that the statutory provision should be very narrowly construed so as not to offend separation of powers principles.

A. Interference with the Executive Process

There is no doubt that the Administrator is a purely executive official who serves at the pleasure of the President and is subject to the President's control. The FAA, as a division of the Department of Transportation, is indisputably an executive agency. The Administrator is appointed by the President with the advice and consent of the Senate, and he serves at the pleasure of the President. 49 U.S.C. § 1652(e)(1). The Administrator reports directly to the Secretary of Transportation, who reports in turn to the President. 49 U.S.C. § 1652(e)(3). Since the Administrator is a purely executive official subject to the direct control of the President, under the principles set forth above, the Administrator must be responsible to the Secretary, and ultimately to the President, and the Administrator's **[*21]** superiors have the right to supervise and approve the Administrator's work.

The concurrent reporting provision could be construed to interfere greatly with the President's right to supervise the Administrator's action. The provision could be read to require the Administrator to submit any budget information or legislative comments directly to Congress prior to any approval or even review by the Administrator's superiors, including the Secretary and the President. If the provision were interpreted in that manner, the Administrator would be effectively severed from his superiors in the Executive Branch with respect to these areas of his responsibility. On these vital budget and legislative matters, the Administrator would become, in effect, an independent agency reporting both to Congress and to the President. This concurrent responsibility is entirely inconsistent with the separation of powers principles set forth above and with the **[**640]** corollary right of the President to control his subordinates within the Executive Branch.

The practical effect of a broad interpretation of § 506(f) would severely impair the President's ability to carry out his constitutionally assigned **[*22]** responsibilities. The President's responsibility to take care that the laws are faithfully executed includes the responsibility imposed by the Budget and Accounting Act to present a unified national budget to Congress. *See* 31 U.S.C. § 11. In order to implement this statutory responsibility, the President has established a budget development and review process through OMB, which is a part of the Executive Office of the President. The President through OMB requires that

the confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, since these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress. . . . Budgetary material should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

OMB Circular No. A-10 (Nov. 12, 1976) at 2. Thus, the Executive has explicitly determined that disclosure of unreviewed recommendations by subordinates within **[*23]** the Executive Branch would adversely affect the President's ability to carry out his responsibilities. n3

n3 Although Congress has enacted concurrent reporting provisions with respect to certain independent agencies, we are unaware that it has ever imposed a concurrent reporting requirement upon a purely executive agency that is under the President's direct supervision and control. *See* 7 U.S.C. § 4a(h)(1) (Commodity Futures Trading Commission); 15 U.S.C. § 2076(k)(1) (Consumer Product Safety Commission); 31 U.S.C. § 11(j) (Interstate Commerce Commission).

Moreover, the President has an explicit constitutional obligation to "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient. . . ."

Article II, § 3. The Administrator is responsible for making recommendations to the President concerning such legislative action so that the President may review them and determine which measures "he shall judge necessary and expedient." *Id.* Congress seeks to interdict this process by requiring immediate reporting of such legislative recommendations prior to the President's review or approval. Thus, although the Constitution gives to the President **[*24]** the right to present legislative recommendations on behalf of the Executive Branch, Congress, by this concurrent reporting provision, purports to require a subordinate executive official to present legislative recommendations of his own. Such a provision clearly transgresses upon the President's constitutionally designated role.

Thus, the concurrent reporting provision presents a constitutional problem that transcends the issue of **executive privilege.** n4 The issue here concerns not just **[**641]** protection of the deliberative process once a final decision has already been made, but rather protection of the President's ability to supervise the actions of his subordinate officials while the decisionmaking process is still going on. Because § 506(f) might be read to require a presidential subordinate to report both to Congress and his superiors within the Executive Branch, it intrudes deeply into the President's constitutional prerogative. Indeed, as thus construed, it would interdict and therefore irreparably damage, if not destroy, the normal exchange of views between agency heads and the President (through OMB) before budget submissions are finally approved. A potential result **[*25]** is that the Administrator might be cut out of the process and made into a figurehead with the budget work assigned to someone not subject to the constraints of § 506(f).

n4 The provision would present a more classic **executive privilege** problem if it required production of recommendations and deliberative documents after the final budget decisions had already been made and transmitted to Congress by the President. That type of statute would present constitutional problems, but they would be of a different character than the ones presented by § 506(f).

This Office has previously considered, and found constitutionally defective, legislative proposals that impose concurrent reporting requirements upon executive officials. For example, this Office has published an opinion concerning a proposal that an inspector general be required to report information directly to Congress, without review or approval by the head of the particular agency involved. *Inspector General Legislation,* 1 Op. O.L.C. 16 (1977). n5 In that opinion, this Office determined that the "President's power of control extends to the entire executive branch, and includes the right to coordinate and supervise all **[*26]** replies and comments from the executive branch to Congress." *Id.* at 17. The opinion stated that the requirement to provide information directly to Congress without Executive Branch clearance was "inconsistent with [the Inspector General's] status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency." *Id.* In conclusion, the opinion set forth the following principle:

Reports of problems encountered and suggestions for remedial legislation may be required of the agencies in question, but those reports must come to Congress from the statutory head of the agency, who must reserve the power of supervision over the contents of these reports.

Id. at 18.

n5 *See also Proposals Regarding an Independent Attorney General,* 1 O.L.C. 75 (1977).

B. Congressional Need for § 506(f)

In the face of this significant interference with the President's right to control his subordinates, there does not appear from the legislation or its history a strong comparable Legislative Branch interest. Congress has not expressed a specific need for § 506, either in the statute itself or in the legislative history. One can only **[*27]** infer that Congress adopted the provision in order to obtain more information to assist it in carrying out its

review of the budget. There is no indication that Congress could not obtain similar information to aid its deliberations from other sources or by other means that would be less intrusive upon the Executive Branch. Certainly there is no indication that the material "is demonstrably **[**642]** critical to the responsible fulfillment of the Committee's functions." *See* Senate Select Committee on Presidential Campaign Activities v. *Nixon,* **498** F.2d at 731.

Moreover, the concurrent reporting provision is a blanket requirement that applies to all budget information and legislative comments. The provision is sweeping and indiscriminate in its demand for information from the Executive Branch. This type of requirement is inconsistent with the Constitution's "spirit of dynamic compromise" with respect to disputes between coordinate branches of government. *See United States* v. *American Telephone & Telegraph Co.,* 567 F.2d 121, 127 (D.C. Cir. 1977). That case involved a Justice Department suit to block a congressional subpoena of third-party materials on the ground **[*28]** that production would pose a threat to national security. In resolving the clash between the Executive and Legislative Branches, the Court insisted on further efforts by the two branches to reach a compromise arrangement and emphasized that

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.

567 F.2d at 130. By enacting a blanket statutory mechanism that would require automatic submission to Congress of preliminary and not fully developed Executive Branch positions, Congress has ignored this common sense construction of constitutional principles. Congress' need is much less significant than would be the case if Congress had made a specific, well-defined request for materials that were necessary for it to fulfill a vital legislative function. Congress may still make such a specific request, and it needs no statute to do so. Congress and its **[*29]** committees frequently obtain information in this manner from the Executive Branch when, in the view of the Executive Branch, the provision of such information will not have an unacceptable impact on the deliberative process.

On balance, if the concurrent reporting provision were construed to require immediate transmission to Congress of the Administrator's budget and legislative recommendations, it would violate the constitutionally prescribed separation of powers. The potential interference with the President's constitutional duty to supervise the actions of his subordinates would be substantial, while there does not appear to be any congressional need of comparable magnitude for the information. Therefore, the provision must be construed in a manner consistent with the separation of powers required under the Constitution.

IV. Implementation of § 506(f)

In implementing § 506(f), the Administrator must act in accordance with the constitutional principles set forth above. Therefore, § 506(f) must be carried out **[**643]** in a manner that will permit the Secretary and, as necessary, the President or OMB to review the Administrator's reports prior to their submission to Congress. **[*30]**

Broadly worded statutes that could be interpreted in such a way as to create a conflict with the separation of powers have, in the past, been interpreted very narrowly so as not to impinge upon the constitutional prerogatives of the Executive Branch. For example, Congress has enacted a provision that on its face requires any executive agency to submit to the Government Operations Committees of the House or Senate "any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954. This provision, however, has been narrowly interpreted by the Executive Branch to grant to the pertinent committees access to only the type of information that has traditionally been made available to Congress and that is not subject to valid claims of **executive privilege.**

Statement of Attorney General Elliot Richardson, June 1973. Attorney General Rogers adopted a similar approach in response to a provision of the Mutual Security Act of 1954 in order to avoid a construction of the statute that would require production of documents presumptively protected by **executive privilege.** *See* 41 Op. Att'y Gen. 507, 525 (1960). This practice is, of course, consistent **[*31]** with the familiar rule that courts will adopt an interpretation of a statute that will avoid constitutional questions. *See, e.g.,* *United States* v. *Rumely,* 345 U.S. 41, 45 (1953).

In this instance, we have concluded that § 506(f) can and should be construed to be consistent with the Constitution by interpreting the budget information and legislative comments that the Administrator is required to produce to Congress to include only "final" information and comments. In other words, until budget information, legislative comments, or any other material required to be transmitted to Congress is reviewed and approved by the appropriate senior officials, the material should be regarded as tentative, rather than final, conclusions of the Administrator. The information or comments would not become final until the appropriate review process was complete, at which time the Administrator, pursuant to § 506(f), would transmit the final information or comments to both the Secretary and Congress.

V. Conclusion

In conclusion, we believe that § 506(f) is constitutional only if interpreted to permit the Secretary and the President to review the Administrator's reports prior to the time **[*32]** that they are submitted to Congress. We recommend that the Administrator carry out his responsibilities under § 506 in accordance with this constitutional requirement.

THEODORE B. OLSON

Assistant Attorney General

Office of Legal Counsel

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*1982 OLC LEXIS 77, *; 6 Op. O.L.C. 481, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

CONFIDENTIALITY OF THE ATTORNEY GENERAL'S COMMUNICATIONS IN COUNSELING THE PRESIDENT

1982 OLC LEXIS 77; 6 Op. O.L.C. 481

August 2, 1982

CORE TERMS: disclosure, exemption, attorney-client, confidentiality, deliberative process, memorandum, adviser, deliberative, law enforcement, confidential, advice, informant, advisory, duty, secret, claim of privilege, deliberations, investigatory, Freedom Of Information Act, legal advice, presidential, discovery, exempt, national security, military, evidentiary, common law, predecisional, work-product, privileged

SYLLABUS:
[*1]

[The following memorandum examines the scope of confidentiality accorded the Attorney General's communications with the President, and the extent to which those communications may be shielded from compulsory disclosure to Members of Congress, the courts, and members of the public. It considers the dual nature of the Attorney General's role as Cabinet member and as principal legal adviser to the President, and extends to the broader question of the confidentiality of the deliberative materials generated by the Attorney General and those who assist him. The memorandum discusses the applicability of the doctrine of **executive privilege,** and the appropriate circumstances for its invocation. It also analyzes the scope of the deliberative process and attorney-client privileges under the Freedom of Information Act, and of the traditional governmental evidentiary privileges and their statutory counterparts.]

ADDRESSEE:
Memorandum for the Attorney General

OPINIONBY: OLSON

OPINION:
[481]** You have asked this Office to advise you regarding the scope of confidentiality accorded your communications with the President in your role as Attorney General. Your inquiry focused particularly on the extent to which legal advice **[*2]** rendered by you to the President may be shielded from compulsory disclosure to Members of Congress, the courts, and members of the public. Our analysis of these issues includes the broader subject of the confidentiality of the deliberative materials generated by you, and those who assist you, in the performance of your responsibilities as adviser to the President. We also discuss briefly certain privileges which protect other communications generated by the Department of Justice in the course of performing its duties.

Any discussion of the confidential nature of the Attorney General's communications with the President must begin with a recognition of the dual counseling functions performed by the Attorney General. The Attorney General serves as both a Cabinet adviser and the principal legal adviser to the President. n1 As a member of the President's Cabinet, the Attorney General maintains a close and confidential advisory relationship with the President over a broad range of policy issues, including the highest and most delicate affairs of state. *See,*

e.g., Rankin, **[**482]** Assistant Attorney General, Office of Legal Counsel, "Memorandum for the Attorney General re: Secrecy **[*3]** of Cabinet Proceedings and Papers" (Oct. 15, 1954). This advisory relationship to the President, a relationship shared by all members of the President's Cabinet, is constitutionally based. Article II, § 2, of the Constitution provides that the President

may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . .

n1 In 1828 Attorney General Wirt described the Attorney General as "confidential law adviser to the Executive branch of the government." *See* H. Cummings and C. McFarland, Federal Justice 91 (1937). In two lengthy essays analyzing the executive departments and the Attorney General in particular, former Attorney General Cushing described the department heads as the President's "constitutional counsellors," his "political or confidential ministers," and his "constitutional advisers." 7 Op. Att'y Gen. 453 (1855); 6 Op. Att'y Gen. 326 (1854).

With respect to the Attorney General, this constitutional duty was carried over into statute by § 35 of the Judiciary Act of 1789, 1 Stat. 93, which required the Attorney General "to give his advice and opinions **[*4]** upon questions of law when required by the President of the United States." This provision is now codified in 28 U.S.C. § 511. n2

n2 The original language of § 35 of the 1789 Judiciary Act has remained virtually intact through subsequent codifications of the provision. *See* 28 U.S.C. § 511 (1976), which provides:

The Attorney General shall give his advice and opinion on questions of law when required by the President.

We note, as a preliminary matter, that the confidentiality of the communications discussed herein cannot be analyzed without consideration of the contents of the communications, including the identities of the persons generating the communications and the persons to whom they are addressed, as well as the identities of the persons seeking disclosure. Generally speaking, however, the conclusions reached in this memorandum, and discussed in detail below, are as follows:

1. The President may assert an arguably absolute **executive privilege** against the Legislative Branch and in the courts to protect from disclosure communications involving military, diplomatic, or national security secrets, n3 a qualified **[**483]** **executive privilege** may be claimed to protect **[*5]** law enforcement investigatory files and sensitive deliberative communications between the Office of the President and the Attorney General's Office, as well as staff communications within the two offices which are reflective of the deliberative process. The President customarily reserves exclusively to himself the power to assert the claim of **executive privilege** against Congress. n4 However, the Attorney General, as "head of [an executive] department which has control over the matter," may, after personal consideration of the matter, invoke the privilege against others in court. *United States* v. *Reynolds,* 345 U.S. 1, 8 (1953). n5

n3 *See Halkin* v. *Helms,* 598 F.2d 1 (D.C. Cir. 1978), holding that "[t]he state secrets privilege is absolute[,]" *id.* at 7, but permitting the district court to examine a classified affidavit *in camera,* in order to satisify itself of the validity of the claim of privilege with respect to the underlying classified information.

Although the Supreme Court has not stated expressly that the privilege for military, diplomatic, and national security secrets is absolute, it has used very strong language to this effect. *See, e.g.,* the Court's suggestion in *United States* v. *Nixon,* 418 U.S. 683, 711 (1974), that even *in camera* examination of documents may be inappropriate when a court is satisfied, "from all the circumstances of the case," that there exists a reasonable danger of

disclosure of military, diplomatic, or national security secrets:

As to the areas of Art. II duties [involving military or diplomatic secrets,] the courts have traditionally shown the utmost deference to Presidential responsibilities. In C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) [(emphasis added)], dealing with Presidential authority involving foreign policy considerations, the Court said:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. *It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."*

In *United States* v. *Reynolds,* 345 U.S. 1 [,10] (1953), . . . the Court said:

"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and *the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."*

418 U.S. at 710-11 (emphasis added). *See also United States* v. *Reynolds,* 345 U.S. 1 (1953):

In each case, the showing of necessity [for access to the documents] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, *but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.*

345 U.S. at 11 (footnote omitted) (emphasis added). *See generally* Daniel, Assistant Attorney General, Civil Division, "Memorandum to All Civil Division Attorneys re: Asserting Claims of Official Governmental Privilege in Litigation" (Nov. 1980); Rehnquist, Assistant Attorney General, Office of Legal Counsel, "Testimony on **Executive Privilege** before the Senate Judiciary Subcommittee on Separation of Powers" (Aug. 4, 1971). *Cf. American Civil Liberties Union* v. *Brown,* 619 F.2d 1170 (7th Cir. 1980) *(en banc),* and *Halkin* v. *Helms, supra,* both construing *Reynolds, supra,* and *Nixon, supra,* to permit *in camera* examinations of documents for which the state secrets privilege was claimed in certain exceptional circumstances. *American Civil Liberties Union, supra,* held that a litigant's strong showing of need, *e.g.,* that withheld documents were critical to substantiate a claim of constitutional violation, may compel the district court to conduct *in camera* review of documents allegedly covered by state secrets privilege in order to determine whether they are properly classified.

n4 This limitation on the exercise of the privilege against Congress stems from a practice instituted by Presidents Kennedy and Johnson, that "**Executive privilege** can be invoked only by the President and will not be used without specific Presidential approval," letter from President Kennedy to Congressman Moss (Mar. 7, 1962), and formalized in President Nixon's "Memorandum for the Heads of Executive Departments and Agencies" (Mar. 24, 1969). To date, subsequent administrations have followed this practice. *See* Olson, Assistant Attorney General, Office of Legal Counsel, "Memorandum to the Attorney General re: **Executive Privilege"** (Oct. 9, 1981); Harmon, Assistant Attorney General, Office of Legal Counsel, "Memorandum to All Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice" (May 23, 1977). *See generally Common Cause* v. *NRC,* 674 F.2d 921, 935 (D.C. Cir. 1982) (dictum to the effect that only the President may assert **executive privilege)**.

n5 Although assertion of the state secrets privilege clearly requires that the claim be made by the head of an agency, the case law governing other claims of **executive privilege** in

litigation is not settled with respect to who must assert the privilege. *Compare* Union Oil v. Morton, 56 F.R.D. 643 (C.D. Cal. 1972); *FTC* v. *Bramman,* 54 F.R.D. 364 (W.D. Mo. 1972); (recognizing claims made by persons other than agency heads), *with* Anchem Products v. GAF Corp., 64 F.R.D. 550 (N.D. Ga. 1974); *Carter* v. *Carlson,* 56 F.R.D. 9 (D.D.C. 1972). *See also* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation," *supra* note 3 (recommending that *all* claims of governmental privilege in litigation, other than those relating to the informant's privilege, be formally asserted by the heads of agencies). **[*6]**

2. The Attorney General may assert a "deliberative process" privilege pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), to withhold from the public nonfactual deliberative communications; absent a breach of the confidentiality of the privileged communication, the President, or the Attorney General on his behalf, may assert the attorney-client privilege pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). Similarly, absent a waiver of the privilege, the Attorney General may assert the common-law privilege for attorney-client communications, which has been codified in Rule 501 of the Federal Rules of Evidence, and Rule 26 of the Federal Rules of Civil Procedure, to protect from disclosure in litigation certain confidential communications of a legal advisory nature which were prepared for the Office of the President.

3. Finally, this memorandum addresses the traditional "governmental" evidentiary privileges which, although available to the Attorney General, only **[**484]** rarely would be applicable to his communications with the President. These privileges, which have analogues in the Freedom of Information Act, protect **[*7]** (a) confidential information which certain employees or members of the public are required to report on government records, (b) the identity of government informants, and (c) certain law enforcement investigatory files. n6

n6 *See* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation," *supra* note 3. *See also FOIA* exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," § 552(b)(6); and exemption 7, which shields certain law enforcement investigatory records, § 552(b)(7).

I. **Executive Privilege**

The doctrine of **executive privilege** defines the constitutional authority of the Executive Branch to protect documents or information in its possession from public disclosure and from the compulsory process of the Legislative and Judicial Branches. *See* Rehnquist, Assistant Attorney General, Office of Legal Counsel, Testimony on **Executive Privilege** Before Senate Judiciary Subcommittee on Separation of Powers (Aug. 4, 1971). **Executive privilege** protects material the disclosure of which would significantly impair the conduct of foreign relations, **[*8]** the national security, or the performance of the Executive's lawful duties. n7 It also shields confidential deliberative communications which have been generated within the Executive Branch from compulsory disclosure, in the absence of a strong showing of need by the branch seeking disclosure that access to the privileged communications is critical to the responsible fulfillment of its constitutional functions. *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 441-55 (1977); *United States* v. *Nixon,* 418 U.S. 683, 711-12 (1974); *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* **498** F.2d 725, 730-31 (D.C. Cir. 1974) *(en banc).* This privilege is based on the need for confidentiality of communications among high-level government officials, as well as the constitutional doctrine of separation of powers, which provides that each branch of government is "suprem [e] . . . within its own assigned area of constitutional duties." *United States* v. *Nixon, supra* at 705.

n7 Because the types of communications discussed in this memorandum are less likely to implicate military, diplomatic, or national security interests, the qualified privilege for law enforcement files, *see* n.33 *infra,* and for sensitive advisory or deliberative communications, provides a more appropriate focus for our analysis. **[*9]**

A. Constitutional and Practical Bases of the Privilege

The necessity for confidentiality in the advisory relationships between Cabinet advisers and the President, and their respective aides, is of both constitutional and practical significance. *See United States* v. *Nixon, supra; Senate Select Committee on Presidential Campaign Activities* v. *Nixon, supra. See also* Opinion of the Attorney General for the President, "Assertion of **Executive Privilege** in Response to a Congressional Subpoena," 43 Op. Att'y Gen. , 5 Op. O.L.C. 27 (Oct. 13, 1981) (hereafter 1981 Attorney General Opinion); Harmon, Assistant Attorney General, Office of Legal Counsel, "Memorandum for the **[**485]** Attorney General re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning Gasoline Conservation Fee" (Jan. 18, 1981) (hereafter Harmon Memorandum); Rehnquist Testimony, *supra.* n8 It is premised on the need to discuss confidential matters which arise within the Executive Branch and to assist the President in the discharge of his constitutional powers and duties, by ensuring discussion that is free-flowing and frank, **[*10]** unencumbered by fear of disclosure or intrusion by the public or the other branches of government. The President and those who assist him require candid advice on the wide range of issues which confront the Executive, and such candid advice may not be forthcoming if Cabinet advisers or their aides must anticipate disclosure of the advice rendered by them and the potential public or legislative criticism which might result therefrom.

n8 *See generally* Rankin, Assistant Attorney General, Office of Legal Counsel, "Memorandum for the Attorney General re: Secrecy of Cabinet Proceedings and Papers" at 3 (Oct. 15, 1954):

[T]he special and perhaps most significant aspect of [Cabinet members'] office is that of trusted adviser to the Chief Executive in the affairs of the Nation, a relationship which cannot long be maintained with respect to those feeling themselves at liberty to make unauthorized disclosures of information imparted to them at Cabinet meetings in strict confidence; and accordingly . . . each member, to retain the confidence of the President, must constantly bear in mind the overriding need for scrupulous observance of the secrecy of Cabinet proceedings and papers. **[*11]**

A unanimous n9 Supreme Court in *United States* v. *Nixon, supra,* affirmed the constitutional underpinnings of the privilege, recognizing the "protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" as supported by the doctrine of separation of powers, and by historic practice. n10 The Court described this constitutional and historic basis as "too plain to require further discussion." *Id.* at 705. *See also Senate Select Committee, supra.* The Court went on to state 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, supra* at 705. Such "temper[ed] candor" in presidential advisers' deliberations clearly would impede the President's performance of his constitutional duty to exercise the executive powers described in Art. II, § 3 of the Constitution. *See Nixon* v. *Administrator of General Services, supra; United States* v. *Nixon, supra.*

n9 Justice Rehnquist did not participate in this decision. 418 U.S. at 685.

n10 The Court noted that the 1787 Constitutional Convention had been conducted by the Framers in complete privacy, and that the records of the Convention were sealed for more than 30 years thereafter. 418 U.S. at 705, n.15. *See* 1 M. Farrand, The Records Of The Federal Convention of 1787, pp. xi-xxv (1911); 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). *See also* C. Warren, The Making Of The Constitution 134-39 (1937).

The need for confidential deliberations is not unique to the Executive Branch. The Framers

recognized that some congressional deliberations would of necessity be privileged from publication, Art. I, § 5, cl. 3, or from questioning beyond the House or Senate floor, Art. I, § 6, cl. 1. Similarly, judicial deliberations, as well as discussions between judges and their law clerks, are undoubtedly privileged, although neither the Executive nor the Legislative Branches has ever attempted to challenge the right of courts to withhold such information. *See generally* Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973) *(en banc);* Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J., concurring); Henkin, "The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers," 120 U. Pa. L. Rev. 271, 274 (1971). **[*12]**

The Supreme Court and lower federal courts have made clear that the presumption of confidentiality accorded presidential communications is intended to protect not only the substance of sensitive communications between the President **[**486]** and his advisers but the integrity of the decisionmaking process within the Executive Branch as well. n11 *See* Nixon v. *Administrator of General Services, supra;* Senate Select Committee, *supra;* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) *(en banc). See also* 1981 Attorney General Opinion *supra;* Harmon Memorandum, *supra.* It is these concerns which justify the invocation of **executive privilege** by the President, or, where appropriate, the heads of executive departments, as well as the "deliberative process" privilege, which may be claimed by any federal agency pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), to withhold documents requested by members of the public. n12

n11 In its analysis of **executive privilege** in *United States* v. *Nixon, supra,* the Supreme Court discussed the role of confidentiality among presidential advisers and concluded:

The expectation of a President to the confidentiality of his conversations and correspondence . . . is [grounded on] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. 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. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

418 U.S. at 708 (footnote omitted).

n12 The deliberative process privilege will be discussed *infra* in part II.A. **[*13]**

B. Limitations on the Scope of the Privilege

Notwithstanding the necessity for confidentiality in executive deliberations, the privilege against their disclosure to Congress and the courts is qualified, in both scope and application. First, the **executive privilege** for intragovernmental deliberations does not protect materials the disclosure of which would not implicate or hinder the Executive Branch's decisionmaking processes. *United States* v. *Nixon, supra.* Thus, factual, nonsensitive materials -- communications from the Attorney General which do not contain advice, recommendations, tentative legal judgments, drafts of documents, or other material reflecting deliberative or policymaking processes -- do not fall within the scope of materials for which **executive privilege** may be claimed as a basis of nondisclosure. *Cf., e.g.,* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Taxation With Representation v. IRS, 646 F.2d 666 (D.C. Cir. 1981); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866-69 (D.C. Cir. 1980). n13

n13 The standard for nondisclosure under a claim of **executive privilege** is analogous to the "deliberative process" privilege codified in the Freedom of Information Act, 5 U.S.C. § 552(b)(5), which exempts predecisional and deliberative documents from the general disclosure mandate of the Act. *See generally* McClelland v. Andrus, 606 F.2d 1278, 1287 n.54 (D.C. Cir.

1979). However, Congress may not expand the public's statutory right to disclosure under FOIA beyond those limits set, in any given case, by the constitutional doctrine of **executive privilege,** *Soucie* v. *David,* 448 F.2d 1067, 1071-72, n.9, 1081-83 (D.C. Cir. 1971); conversely, because of its constitutional basis independent of FOIA, Congress may not limit the scope of **executive privilege** by altering the standards for disclosure under FOIA. *Id.* **[*14]**

Second, even in cases involving sensitive deliberative materials for which a claim of privilege may be appropriate, the executive interest in nondisclosure must be balanced against the needs of the requesting branch before the validity of the claim of privilege can be determined. It is in these cases of potential conflict and competing claims of legitimate need by each branch that the separation of **[**487]** powers principle on occasion must yield to the principles of "a workable government" -- "separateness but interdependence, autonomy but reciprocity." *United States* v. *Nixon, supra* at 707 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). These principles recognize a "spirit of dynamic compromise" among the coordinate branches when a conflict in authority arises -- a spirit which requires each branch to "take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in a particular fact situation." *United States* v. *AT&T,* 567 F.2d 121, 127 (D.C. Cir. 1977). This duty to recognize and accommodate the legitimate **[*15]** needs of the other branches was examined in its constitutional context by the D.C. Circuit in *United States* v. *AT&T, id.* at 130 (footnote omitted):

[I]t was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations . . . [Thus,] 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.

See also 1981 Attorney General Opinion, *supra,* 5 Op. O.L.C. at 30 ("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.").

The more generalized the executive interest in withholding the disputed information, the more likely it is that the claim of privilege will yield to a specific, articulated need related **[*16]** to the effective performance by the coordinate branches of their constitutionally assigned functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of the requesting branch for the information, the more likely it is that the Executive's need for confidentiality will prevail. *Nixon* v. *Administrator of General Services, supra; United States* v. *Nixon, supra. See generally* 1981 Attorney General Opinion, *supra;* Harmon Memorandum, *supra.* Thus, in determining whether to assert the privilege, the Executive, in the first instance, must balance the "public" interest n14 inherent in the "general privilege of confidentiality of Presidential communications in performance of the President's responsibilities" against the national or public interest in disclosure, as determined by the ability **[**488]** of the requesting branch responsibly to fulfill its constitutional duties without the assistance provided by the requested documents. *United States* v. *Nixon, supra,* 418 U.S. at 706, 711-712. *See Nixon* v. *Sirica, supra,* 487 F.2d at 716-17. In making such a determination, each document -- and the role that **[*17]** it plays in the decisionmaking process -- must be examined individually. *Playboy Enterprises* v. *Department of Justice,* 677 F.2d 931, 935 (D.C. Cir. 1982); *Coastal States, supra,* 617 F.2d at 867.

n14 The "public" interest in nondisclosure derives from the recognized value which accrules to the public from an effective executive decisionmaking process, supported by the exchange of "candid, objective, and even blunt or harsh opinions," *United States* v. *Nixon, supra* at

708, and fostered by ensuring the confidentiality of such opinions. *Nixon* v. *Sirica, supra* at 717. *See also McClelland* v. *Andrus,* 606 F.2d 1278, 1287 n.55 (D.C. Cir. 1979) (citations omitted) (recognizing the "compelling public [interest in] confidentiality" which is "[n] owhere . . . more vitally involved than in the fidelity of the sovereign's decision and policymaking resources.") *See generally* Rehnquist Testimony, *supra.*

In the case of Congress, the grant of legislative power in Article I of the Constitution implies a requirement that Congress have access to pertinent information, as well as the authority to summon witnesses and to compel the production of needed evidence, **[*18]** as a prerequisite to the proper performance of its legislative function. *Jurney* v. *MacCracken,* 294 U.S. 125 (1935); *McGrain* v. *Daugherty,* 273 U.S. 135 (1927). *See generally* Rehnquist Testimony, *supra.* Congress' duty to investigate and inform itself of matters which may involve the Executive is very broad, extending "over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate." *Barenblatt* v. *United States,* 360 U.S. 109, 111 (1959). *See also Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 504-07 (1975); *Watkins* v. *United States,* 354 U.S. 178, 187 (1957). *See generally* Cox, "**Executive Privilege,**" 122 U. Pa. L. Rev. 1383, 1426 (1974). This broad-based power of inquiry includes matters requiring new or remedial legislation, appropriations of funds, congressional probes into various governmental departments to expose corruption, inefficiency, or waste, as well as the administration of existing laws or proposed statutes. Yet, these very sources of Congress' power to obtain information also outline the limits of that power: Congress may only inquire **[*19]** into those matters on which it may potentially legislate or appropriate -- it may not inquire into those matters "which are within the exclusive province" of the Executive or the Judiciary. *Barenblatt, supra* at 112. *See Watkins, supra.* Nevertheless, the validity of a claim of privilege for documents demanded by Congress in the performance of its legitimate legislating functions, including the "oversight" function, can only be determined by balancing the particular interests of the Legislative and Executive Branches against each other in each case, in light of the possibility of accommodation. *Senate Select Committee, supra.* n15

n15 *See, e.g.,* 1981 Attorney General Opinion, *supra,* discussing the relatively weak congressional interest in obtaining predecisional, deliberative Executive Branch documents in the context of Congress' performance of its general "oversight" function, as compared to its consideration of specific legislative proposals:

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 will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.

[Moreover,] the 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.

5 Op. O.L.C. at 29 (citations omitted). **[*20]**

[489]** Similarly, with respect to judicial functions, an evaluation must be made of the impact of a successful claim of **executive privilege** on the ability of the Judiciary to perform effectively its duties of fair adjudication of controversies and supervision of grand jury investigations. *See* United States v. *Nixon, supra; Nixon* v. *Sirica, supra.* As is the case when the privilege is asserted against the Legislative Branch, if the information withheld by the Executive is "demonstrably critical to the responsible fulfillment" of the Judiciary's functions, a generalized claim of privilege must fail. *Nixon* v. *Sirica,* 487 F.2d at 717 ("the general confidentiality privilege must recede before the grand jury's showing . . . that the subpoenaed [information] contain[s] evidence peculiarly necessary to the carrying out of [its] vital function."). *Cf. Senate Select Committee,* **498** F.2d at 731.

Notwithstanding these limitations on the scope of the privilege for Executive Branch communications, it is not essential that the communications for which the privilege is claimed have been directed to or emanated from the President himself. *See* Nixon, "Memorandum **[*21]** for the Heads of Executive Departments and Agencies" (March 24, 1969). *See also United States* v. *AT&T, supra;* Harmon Memorandum, *supra.* The underlying rationale of the privilege to foster robust and honest debate in the presidential decisionmaking process is as applicable to Executive Branch advisers both within and outside the immediate Office of the President as it is to the President himself. The Supreme Court, in *United States* v. *Nixon, supra,* recognized the need for the President *"and those who assist him* [to] 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." 418 U.S. 708 (emphasis supplied). In addition, this office has recently expressed the view that because of the importance of the executive department heads and their advisers to the President and his closest advisers in presidential decisionmaking, it would be "artificial" to draw a rigid and inflexible line between the executive departments and the President's Office, limiting the reach of the constitutional privilege only to the latter. Harmon Memorandum, *supra* at 13-14. n16 Thus, **[*22]** memoranda prepared by the Attorney General or his assistants containing legal or policy advice on issues under consideration by the President and his advisers may be properly encompassed by a claim of **executive privilege.** This category of documents would include, for example, staff level advice to Assistant Attorneys General concerning matters on which the President has **[**490]** sought advice, staff level advice to officials in the Office of the President, notes of middle level staff meetings concerning issues before the President or members of his staff, and tentative legal judgments or draft policy statements prepared for the President or his staff.

n16 Nevertheless, former Assistant Attorney General Harmon's January 18, 1981, memorandum recognized that there exist "differences of degree" of sensitivity inherent in the broad category of executive deliberations. The memorandum pointed out that in deciding whether to claim the privilege, it is especially important to protect the integrity of deliberations involving the President himself and his closest advisers:

In accommodating Congress's legitimate need for certain information, the executive branch should be least willing to reveal deliberations directly involving the President and his closest advisers, and more willing to disclose material from within the executive departments.

Harmon Memorandum, *supra,* at 13. **[*23]**

For purposes of invoking **executive privilege,** communications from the Attorney General, *qua* the President's chief legal adviser, should be analyzed in the same fashion as communications from other Cabinet advisers and trusted high-level officials. Unlike the attorney-client privilege, which focuses exclusively on communications of a *legal* advisory nature, **executive privilege** may be claimed for any nonfactual, sensitive deliberative communication for which there exists a sufficiently strong public interest in nondisclosure. While it is unlikely that very many of the Attorney General's communications will be in the

category of communications with regard to which claims of privilege are entitled to the strictest deference, *e.g.,* military, diplomatic, or sensitive national security matters, his communications to the President may nevertheless demand greater confidentiality than those of some other Cabinet advisers, because of the nature of the Attorney General's responsibilities to the Executive and his special areas of expertise, *e.g.,* legal advice and law enforcement. *See* Harmon Memorandum, *supra,* at 26. n17

n17 In his memorandum to the Attorney General regarding a congressional subcommittee's demand for certain documents from the Department of Energy, Assistant Attorney General Harmon advised:

[T]o whatever extent the customary attorney-client privilege applies to government attorneys, we believe that 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. 683, 708 (1974), where necessary. Any other approach would jeopardize 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 advisers be able to seek, and give, candid legal advice and opinions free of the fear of compelled disclosure.

Harmon Memorandum, *supra,* at 26. **[*24]**

II. The Freedom of Information Act -- Exemption 5: The Deliberative Process Privilege and the Attorney-Client Privilege

Exemption 5 of the Freedom of Information Act (FOIA) n18 protects from compulsory disclosure to the public, government materials which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption thus codifies the traditional common law privileges afforded certain documents in the context of civil litigation and discovery, *see* Fed. R. Civ. P. 26; Fed. R. Evid. 501, including the executive "deliberative **[**491]** process" privilege, *NLRB* v. *Sears, supra, EPA* v. *Mink,* 410 U.S. 73 (1973); *Taxation With Representation* v. *IRS,* 646 F.2d 666 (D.C. Cir. 1981); the attorney-client privilege, *Brinton* v. *Department of State,* 636 F.2d 600, 603-04 (D.C. Cir. 1980), *cert. denied,* 452 U.S. 905 (1981); *Mead Data Central* v. *United States Department of Air Force,* 566 F.2d 242, 252-55 (D.C. Cir. 1977); and the attorney work-product privilege, *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 154 (1975); **[*25]** *Bristol-Myers Co.* v. *FTC,* 598 F.2d 18 (D.C. Cir. 1978), as applied to document requests of government agencies from members of the public. *See also Coastal States Gas Corp.* v. *Department of Energy,* 617 F.2d 854 (D.C. Cir. 1980). All of these privileges encompassed by exemption 5 may be claimed, in appropriate circumstances, to protect communications between the Attorney General's Office and the Office of the President from compulsory disclosure to members of the press and the general public. n19 Nevertheless, even though the FOIA exemptions noted above are analogous to the common law evidentiary privileges which have been incorporated by implication into the Act, the standards for asserting the evidentiary privileges can serve only as a "rough guide" to the courts in determining the validity of FOIA exemption claims. This is so because

decisions as to discovery are usually based on a balancing of the relative need of the parties, and standards vary according to the kind of litigation involved. Furthermore, the most

fundamental discovery and evidentiary principle, relevance to the issues being litigated, plays no part in FOIA cases.

Coastal States, supra, **[*26]** at 862, citing *EPA* v. *Mink,* 410 U.S. 73, 86 (1973). *See also Playboy Enterprises* v. *Department of Justice,* 677 F.2d 931, 936 (D.C. Cir. 1982); *McClelland* v. *Andrus,* 606 F.2d 1278, 1287 nn. 54, 55 (D.C. Cir. 1979). n20

n18 While other exemptions to the FOIA occasionally may be applicable to the types of communications discussed in this memorandum, *e.g.,* the exemption 7 privilege for law enforcement investigatory records, *see* 5 U.S.C. § 552(b)(7) discussed in part III.C., *infra,* because of the Attorney General's advisory relationship to the President, most such communications will come within the privileges embraced by exemption 5.

n19 The exemptions contained in the Freedom of Information Act do "not [provide] authority to withhold information from Congress." 5 U.S.C. § 552(c).

n20 In explaining the relationship between the privileges under FOIA and the evidentiary privileges in litigation, the D.C. Circuit stated:

[T]he analysis contained in Exemption 5 cases is applicable [to common law discovery cases] because Exemption 5 exempts only those documents normally privileged in the civil discovery context. *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 148-49 . . . (1975); *EPA* v. *Mink,* . . . 410 U.S. at 85-86 . . . (1973); *Vaughn* v. *Rosen,* . . . 523 F.2d at 1143 (1975). Thus in effect Exemption 5 is co-extensive with the common law discovery privileges: Exemption 5 shields from a member of the public seeking a document under FOIA that which would be shielded from a litigant seeking discovery from an agency. There is, however, an additional factor to be considered in the discovery context that is not considered in the FOIA context. . . . When a party seeks discovery against the Government and the Government interposes a claim of privilege, it is appropriate for the court to consider the litigant's need for the material. But when a member of the public seeks access to material under FOIA and the Government claims that the material comes within the purview of Exemption 5, disclosure is permitted of that which would "routinely be disclosed" in private litigation. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). *Stated differently, the extent of the requester's need is not considered in the FOIA context.*

McClelland v. *Andrus, supra,* at 1287, n.54 (emphasis supplied). **[*27]**

A. "Deliberative Process" Privilege

The "deliberative process" privilege under FOIA is substantially similar in scope and purpose to the deliberative process aspect of **executive privilege, [**492]** discussed above. Although both privileges apply generally to the same types of documents, the primary differences between the two privileges lie in their respective applications. First, **executive privilege** traditionally has been invoked only by the President to shield documents from disclosure to Congress, and by the President or the head of any executive department or agency in judicial proceedings. n21 FOIA exemptions, in contrast, may be claimed by the head, or other designated official, of any government agency in possession of documents for which a request has been made by a member of the public. Second, as noted above, claims of **executive privilege** for deliberative documents must be balanced against the public interest in disclosure, which is frequently analyzed in terms of the requesting government institution's ability to perform its functions responsibly -- whether legislative investigations or judicial resolution of disputes -- without gaining access to the disputed **[*28]** materials. In considering the claims of exemptions under FOIA, however, the requestor's interest in or need for the documents is irrelevant. *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *McClelland* v. *Andrus, supra.* Notwithstanding these differences, the analyses involved in the applications of the two privileges are very similar.

n21 *See* nn. 4, 5, *supra.*

As in the case of **executive privilege,** the "deliberative process" privilege embraced by exemption 5 was intended to protect the integrity of the decision-making process and to promote full and frank deliberations during that process. However, consistent with the strong disclosure policy of FOIA, the privilege is to be considered "'as narrowly as [is] consistent with efficient Government operation.'" *Coastal States, supra,* 617 F.2d at 868, quoting from S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). *See also FBI* v. *Abramson,* 456 U.S. 615, 629-32 (1982); *Department of Air Force* v. *Rose,* 425 U.S. 352, 360-62 (1976). The privilege exempts documents which are advisory or recommendatory in nature, reflecting "the give-and-take of the consultative process . . ., weighing the **[*29]** pros and cons of agency adoption of one viewpoint or another," *Coastal States, supra,* 617 F.2d at 866, and "other subjective documents that reflect the personal opinions of the writer prior to the agency's adoption of a policy." *Taxation With Representation, supra,* 646 F.2d at 677. *See also NLRB* v. *Sears, supra,* 421 U.S. at 150; *Brinton* v. *Department of State, supra,* 636 F.2d at 604-06. In the words of the D.C. Circuit, which has developed a considerable body of law construing the deliberative process privilege:

[The privilege] was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. . . . Such consultations are an integral part of [an agency's] deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.

[493]** *Ryan* v. *Department of Justice,* 617 F.2d 781, 789-90 (D.C. Cir. 1980) (footnote omitted). In addition, the privilege was designed to

protect against premature disclosure of proposed policies **[*30]** before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States, supra, 617 F.2d at 866.

Applying this standard to the materials discussed in this memorandum, documents reflecting the internal details involved in the preparation of formal Attorney General opinions or Office of Legal Counsel opinions, as well as the more informal predecisional working papers which pass between and within the Attorney General's Office and the Office of the President, would be included in this category of deliberative documents protected by exemption 5. *See, e.g., Brinton* v. *Department of State, supra* (holding that opinions prepared by the Office of the Legal Adviser for the Secretary of State fell within the deliberative process privilege of exemption 5).

The courts have held, however, that "deliberative process" privilege does *not* protect documents which reflect final opinions, statements of reasons supplying the bases for decisions, or policies actually **[*31]** adopted, or documents that otherwise constitute the "working law" of an agency. *See NLRB* v. *Sears, supra,* 421 U.S. at 152-53; *Taxation With Representation, supra,* 646 F.2d at 678; *Coastal States, supra,* 617 F.2d at 866-68. The rationale underlying the "final opinion" exception to the deliberative process privilege is to prevent agencies from developing a body of "secret law" veiled by the exemption 5 privilege -- the maintenance of which "would weigh heavily against the public interest." *Sterling Drug, Inc.* v. *FTC,* 450 F.2d 698, 715 (D.C. Cir. 1971). *See Brinton* v. *Department of State, supra,* 636 F.2d at 605. Thus, decision documents of the Office of the President, deliberative materials "incorporated" into those documents, and opinions of the Attorney General which have been "incorporated" into the President's final document, would be subject to disclosure under FOIA. *See EPA* v. *Mink,* 410 U.S. 73 (1973). n22

n22 "Final opinions" of the Office of Legal Counsel or the Attorney General, which were written for the President and form part of the basis of the President's final action, but which have not been "incorporated" into the President's final decision document, would be protected from disclosure under exemption 5's privilege for attorney-client communications, as well as the deliberative process privileges. *See* Brinton v. *Dep't of State, supra; Mead Data Central, supra.*

If the "final opinions" from the Attorney General's Office are *not* of a legal advisory nature -- or are otherwise ineligible for a claim of attorney-client privilege -- an analysis must be made regarding the purpose of the opinion documents in issue. If the opinion is a predecisional document -- *i.e.*, the document presents the Attorney General's views on a particular matter which will be considered by the President in taking final executive action, or in the case where final executive action has already been taken but the Attorney General submits a document which "provide[s] guides for decisions of similar or analogous cases arising in the future" -- the Supreme Court has stated that the document is exempted from FOIA's disclosure mandate as a deliberative document. *NLRB* v. *Sears, supra,* 421 U.S. at 152, n.19. If the Attorney General's "final opinion" is postdecisional, as are most final opinions -- *i.e.*, communications which "look[] back on and explain[] . . . a decision already reached or a policy already adopted" -- the opinion would *not* be exempt from FOIA's disclosure mandate, since disclosure would pose "a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions." *Id.*

In its companion case to *NLRB* v. *Sears, supra, Renegotiation Bd.* v. *Grumman Aircraft Engineering Corp.,* 421 U.S. 168, 184-85 (1975), the Court set forth the additional consideration of whether the author of the "final opinion" possesses decisional authority with reference to matters addressed in the opinion. Thus, if the subject of the Attorney General's opinion, or other Department of Justice communication, involves a matter over which the Office of the President has final decisional authority, the opinion necessarily is predecisional, and therefore exempt from disclosure, even if the opinion represents the "final" view or disposition of the Department of Justice on the matter. Of course, the final action taken by the Office of the President may incorporate the Attorney General's advisory opinion -- in which case, it would lose its predecisional character and become subject to disclosure. *See also Brinton* v. *Dep't of State, supra,* 636 F.2d at 605 (holding that legal opinions prepared by the Office of the Legal Adviser for the Secretary of State were properly withheld on the ground that the Legal Adviser's opinions were not "final opinions" as contemplated by the FOIA, inasmuch as the Legal Adviser "has no authority to make final decisions concerning United States policy . . . [;] [i]nstead, his role is to give advice to those in the State Department who do make the policy decisions."). **[*32]**

[494]** Nor does the privilege extend to documents of a purely factual nature. In the case of documents of a mixed factual/deliberative nature, factual materials which can reasonably be severed from the deliberative or advisory segments of the document without compromising the confidential remainder of the document must be disclosed. *EPA* v. *Mink, supra,* 410 U.S. at 91. However, "factual segments [of advisory documents] are protected from disclosure as not being purely factual if the manner of selecting or presenting those facts would reveal the deliberate process, or if the facts are 'inextricably intertwined' with the policymaking process." *Ryan* v. *Department of Justice, supra,* 617 F.2d at 790 (footnotes omitted). *See Playboy Enterprises* v. *Department of Justice, supra.* n23

n23 The D.C. Circuit recently rejected the Department's claim of privilege for a 302-page document prepared by a task force of the Office of Professional Responsibility of the Department of Justice for the Attorney General. The document reported the results of an eight-month investigation into the circumstances surrounding the infiltration of an FBI informant into the Ku Klux Klan. *Playboy Enterprises* v. *Dep't of Justice, supra,* 677 F.2d 931. Against the Department's claim that the entire report "reflect[ed] the 'choice, weighing and analysis of facts' by the task force and [was] therefore protected as a part of the deliberative process," 677 F.2d at 935, the court of appeals held that the report was, for the most part,

not exempt from disclosure, and remanded to the district court for a determination of those limited portions of the report which were properly exempt, as containing conclusions, recommendations, or opinions and were severable from the factual portions of the document. The court stated:

We are not persuaded by the Department's argument. Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as part of the deliberative process.

Id. **[*33]**

B. Attorney-Client Privilege

Exemption 5 of FOIA also embraces the common law evidentiary privilege for attorney-client communications. 5 U.S.C. § 552(b)(5); Fed. R. Civ. P. 26; Fed. R. Evid. 501. n24 *See NLRB* v. *Sears, supra,* 421 U.S. at 154; *Mead Data Central, supra.* The attorney-client privilege protects confidential disclosures of a client to his or her attorney, which were made in order to obtain legal assistance and not for the purpose of committing a crime or tort. 8 Wigmore, Evidence § 2290-2329 **[**495]** (McNaughton rev. 1961). *See Upjohn* v. *United States,* 449 U.S. 383 (1981); *Fisher* v. *United States,* 425 U.S. 391 (1976). Notwithstanding its overall purpose to protect the *client's* factual disclosures, the privilege has been extended by federal courts to include an attorney's communications to his or her client in order to prevent inadvertent disclosure, 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. *Coastal States, supra,* 617 F.2d at 862; *Mead Data Central, supra,* 566 F.2d **[*34]** at 254 n.25.

n24 The attorney-client privilege is a common law evidentiary privilege which has been codified in Rule 501 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure for use in civil litigation and discovery. While the Rules are not applicable to congressional subpoenas, the interests implicated by the attorney-client privilege generally are subsumed under a claim of **executive privilege** when a dispute arises over documents between the Executive and Legislative Branches, and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege.

Like the executive and deliberative process privileges, the attorney-client privilege is designed to encourage full and frank discussions among the persons whose communications are protected and thereby to "promote [the] broader public interests in the observance of law and administration of justice." *Upjohn, supra,* 449 U.S. at 389. To this end, "[t]he privilege recognizes that sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client." *Id. See also Mead Data Central, supra,* **[*35]** 566 F.2d at 252 ("The opinion of even the finest attorney . . . is no better than the information which his client provides. In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent."). *See generally* 2 J. Weinstein and M. Berger, Weinstein's Evidence P503 (1982).

Although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector. *See Brinton* v. *Department of State, supra,* 636 F.2d at 603-04; *Mead Data Central, supra,* 566 F.2d at 252-55; *Jupiter Painting Contracting Co.* v. *United States,* 87 F.R.D. 593, 598 (E.D. Pa. 1980); *Falcone* v. *Internal Revenue Service,* 479 F.Supp. 985, 989-

90 (E.D. Mich. 1979). *See also* Office of Legal Counsel, "Memorandum **[*36]** for Helen S. Lessin, Director, Federal Legal Council, re: OLC Policies Regarding Issuance and Release of Opinions" (Sept. 10, 1980). n25

n25 In addition, Government attorneys, no less than private attorneys, are bound by the ABA Code of Professional Responsibility's disciplinary rule DR 4-101(B), which provides that a lawyer shall not knowingly reveal a confidence or secret of his client unless the client consents to such disclosure.

The Supreme Court's recent opinion in *Upjohn, supra,* analyzing the scope of the corporate "client" for purposes of the attorney-client privilege, is helpful to our consideration of the privilege in the context of the Attorney General and the Office of the President. In *Upjohn, supra,* the Court discarded the restrictive "control group" test n26 for determining which communications are within the scope of the privilege in a corporate setting, in favor of a broader scope of "client," more suited to the purposes of the privilege. The Court noted that the **[**496]** privilege was designed to protect both the giving of professional advice to those who are charged with the actual implementation of the client corporation's policies, as well as **[*37]** the communication of information to the attorney sufficiently specific to enable him or her to provide sound, practical, and informed legal advice. *Id.* at 390. These purposes were frustrated by the narrow scope of privileged communications recognized by the "control group" test.

n26 The control group test restricts the definition of "client" for purposes of the privilege to "upper-echelon management" officials "responsible for directing [the client corporation's] actions in response to legal advice." 449 U.S. at 388, 391.

While the *Upjohn* decision studiously avoided setting forth a precise formulation of the scope of the attorney-client privilege in the corporate or governmental setting, the Court was nonetheless insistent in its view that application of the privilege had to be determined in each case to serve the purposes of the privilege. In view of the criticism expressed in the *Upjohn* decision of the control group test, it is likely that, in most instances, the "client" in the context of communications between the President and the Attorney General, and their respective aides, would include a broad scope of White House advisers in the Office of the President. **[*38]** The "functional" analysis suggested by *Upjohn* focuses on whether the privilege would encourage the communication of relevant and helpful information from advisers most familiar with the matters on which legal assistance is sought, as well as whether the privilege is necessary to protect and encourage the communication of frank and candid advice to those responsible for executing the recommended courses of action. A corollary to this expanded concept of the "client," which reflects the realities of the governmental setting, is that the "attorney" whose communications are subject to the attorney-client privilege may, in fact, be *several* attorneys responsible for advising the "client" agency or division regarding the prudence and propriety of proposed courses of conduct. Thus, advice given by the various Assistant Attorneys General and their staffs may be subject to the privilege. *See, e.g., Brinton* v. *Department of State, supra.* n27

n27 Although the *Brinton* decision was ultimately decided on deliberative process grounds, the attorney-client privilege aspect of exemption 5 was discussed at length by the court.

Notwithstanding these notions of "attorney" **[*39]** and "client" which the Court has expanded to implement fully the purposes of the privilege, the actual operation of the privilege continues to be governed by the traditional guidelines and procedures. n28 As in the traditional attorney-client context, once the privilege has attached, only the client, in this case the President or some other high level official in the Office of the President who is responsible for receiving and acting on the legal advice, may waive it. Thus, for example, a FOIA request lodged with the Department of Justice for information communicated to the Office of the President by the Attorney General which is protected by the attorney-client privilege should not be honored unless the Office of the President consents to release of the

information. *See* Office of Legal Counsel, "Memorandum for Helen S. Lessin," *supra. See generally* Harmon, Memorandum for Patricia M. **[**497]** Wald, Assistant Attorney General, Office of Legislative Affairs, "Formulation of Policy on Disclosure of Information to Congress" at 8, 10 (July 19, 1977).

n28 *See* United States v. *Anderson,* 34 F.R.D. 518, 523 (D. Colo. 1963), for application of the traditional attorney-client privilege formulation in the governmental context:

[T]he documents are privileged insofar as they do not comment or report on information coming from persons outside the government or from public documents, or are summaries of conferences held with or in the presence of outsiders, and were produced with the idea of obtaining or receiving legal advice. **[*40]**

In addition, the person seeking to assert the privilege -- either the client or the attorney on the client's behalf -- must be able to demonstrate that the confidential disclosures "might not have been made absent the privilege," *Fisher* v. *United States, supra,* at 403, and that the underlying facts for which the privilege is claimed have *remained* confidential. *Mead Data Central, supra,* at 253. *See also Permian Corp.* v. *United States,* 665 F.2d 1214 (D.C. Cir. 1981); *Brinton* v. *Department of State, supra.* n29 Applying this rule to President-Attorney General communications, the circulation of advisory documents outside the operative circle of officials responsible for giving or receiving advice in the Office of the President or the Department of Justice, or, the reporting of factual information acquired from persons or sources outside the privileged relationship, would constitute a waiver, whether express or implied, of the privilege with respect to those documents and would subject them to disclosure, unless exempt from the Freedom of Information Act pursuant to some other exemption. *See Permian Corp.* v. *United States, supra;* n30 *Brinton* **[*41]** v. *Department of State, supra.* Advisory documents from the Attorney General which have been turned over to congressional committees are presumed to be no longer confidential and may not be the basis of a claim of attorney-client privilege. *See generally* Harmon, "Formulation of Policy on Disclosure of Information to Congress," *supra.* n31 *See also Permian Corp.* v. *United States, supra,* at 1220-22. However, these same documents may be subject to the deliberative process privilege under exemption 5. n32

n29 The requirement that the confidential disclosures for which the privilege is sought have remained confidential does not preclude the privilege's proper attachment to communications which have been circulated in a limited fashion beyond the attorney and the person within the group requesting legal advice. *See Upjohn* v. *United States, supra,* at 395; *Coastal States, supra,* at 863; *Mead Data Central, supra,* at 253 n.24. This broader scope of the confidentiality requirement is particularly appropriate in the corporate and governmental contexts. *See discussion, infra.*

n30 In *Permian Corp., supra,* the D.C. Circuit held that the voluntary disclosure of confidential materials to a third party outside the privileged relationship, in this case, the SEC, constituted a waiver of the privilege with respect to those documents, notwithstanding the SEC's agreement to protect the documents from further disclosure. Thus, the court rejected the rule of "limited waiver," followed by the Eighth Circuit in *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (1977) *(en banc),* and concluded that the privilege could no longer be invoked to protect the documents from being disclosed by the SEC to another government agency:

The Eighth Circuit's "limited waiver" rule has little to do with [the] confidential link between the client and his legal advisor. Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency.

* * *

[T]he attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.

665 F.2d at 1220-21, 1222 (footnote omitted).

n31 Former Assistant Attorney General Harmon suggested that even the "limited disclosure" involved in disclosing privileged materials to an executive session of Congress, or in a nonpublic administrative hearing, "would appear to undermine the theoretical predicate of the privilege," as applied in the civil discovery context. "The purpose of a privilege is to protect confidential communications necessary to promote certain relationships; once this confidentiality is breached, the rationale for granting the privilege no longer applies." "Formulation of Policy on Disclosure of Information to Congress," *supra,* at 5 (citations omitted).

n32 There is an additional privilege available under exemption 5 which may be invoked, when appropriate, to protect communications from the Office of the Attorney General to the Office of the President -- the work-product privilege. The work-product privilege under exemption 5 of the FOIA protects documents prepared in contemplation of litigation which reflect the "mental processes" of attorneys. The work-product privilege is distinct from the attorney-client privilege in that "it provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *Coastal States, supra,* at 864. While the attorney-client privilege is designed to protect the client's interest in confidentiality, the purpose of the work-product privilege is to protect "the adversary trial process itself." *Id.*

Because it is limited to documents prepared in contemplation of litigation, the work-product privilege is the least invoked of the exemption 5 privileges in the context of President-Attorney General communications. The broad advisory role that the Attorney General plays vis-a-vis the President, together with the President's general lack of involvement in litigation strategies, makes their communications far more suited to the deliberative process and attorney-client privileges as a basis for nondisclosure in litigation or under FOIA. **[*42]**

[498]** III. The "Governmental" Evidentiary Privileges -- and Their Freedom of Information Act Counterparts

The so-called "governmental" evidentiary privileges are common law privileges, now incorporated into the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which have traditionally been available exclusively to the government as a litigant. Daniel, Assistant Attorney General, Civil Division, "Memorandum to All Civil Division Attorneys re: Asserting Claims of Official Government Privilege in Litigation" (Nov. 1980). *See generally McClelland* v. *Andrus, supra,* at 1286, n.53, quoting *Association for Women in Science* v. *Califano,* 566 F.2d 339 (D.C. Cir. 1977). These privileges -- the informant's privilege, the law enforcement investigatory files privilege, n33 and the privilege for confidential information on required reports n34 -- supplement the deliberative process, attorney-client and work-product privileges discussed above which are available to governmental as well as private parties in the civil litigation and discovery contexts. *See* Fed. R. Civ. P. 26; Fed. R. Evid. 501. These "governmental" privileges are necessary to protect **[*43]** the ability of the Executive Branch to discharge its duties under the Constitution and the laws of the United States, but because their assertion in litigation does not raise the problems of a constitutional conflict with a coequal branch, these privileges may be invoked by the head of the executive department in possession or control of the requested documents, or his or her delegate. n35 *See Association for Women in Science* v. *Califano, supra. See also McClelland* v. *Andrus, supra;* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation" (Nov. 1980). These privileges also have **[**499]** analogues in the Freedom of Information Act under exemptions 6 and 7, 5 U.S.C. §§ 552(b)(6),(7), to shield documents of the same general

type from disclosure to members of the public. As noted in the foregoing discussion of the evidentiary privileges incorporated into exemption 5 of the FOIA, the court must strike a balance between "the public concern in revelations facilitating the just resolution of legal disputes [on the one hand,] and, on the other, occasional but compelling needs for confidentiality," *McClelland* v. *Andrus, supra* at 1287, n.55, in deciding **[*44]** claims of privilege in the litigation context.

n33 The investigatory files privilege -- which frequently encompasses information which might reveal the identity or statements of informants -- protects interests which may be asserted under a claim of **executive privilege** also, if the interests are sufficiently strong in a particular case to implicate constitutional concerns. *See* 40 Op. Att'y Gen. 45. *See also* Office of Legal Counsel, "**Executive Privilege** in Litigation for Investigative Files" (September 18, 1981); Harmon, "Memorandum to All Heads of Offices, Divisions, Bureaus, and Boards of the Department of Justice," (May 23, 1977); Rehnquist Testimony, *supra.* However, because these interests rarely impinge on the performance of constitutional functions of the Executive Branch to the same degree as the "state secrets" or deliberative process components of the privilege, the privilege is generally asserted simply as an evidentiary privilege in litigation.

n34 The privilege for confidential information on required government reports is similar to the informant's privilege, *see* discussion at 31, *infra,* in that it protects information solicited by the government for its purposes on a promise of confidentiality. This privilege, like its FOIA-exemption 6 counterpart, protects accident reports, employment history reports, financial disclosures, conflict-of-interest reports, and other information, the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *See Dep't of State* v. *Washington Post Co.,* 456 U.S. 595 (1982). *Dep't of the Air Force* v. *Rose,* 425 U.S. 352 (1976); *Ass'n for Women in Science, supra.* Of the privileges discussed in this memorandum, this is the least likely privilege to be invoked in the context of President-Attorney General communications.

n35 *See generally* n.5, *supra.* **[*45]**

A. Informant's Privilege

The informant's privilege permits the government to withhold the identity of persons who furnish information concerning violations of the law, or otherwise render assistance, to officers charged with law enforcement responsibilities. *See* 8 C. Wright & A. Miller, Federal Practice & Procedure, § 2019 at 155 (1970); *Roviaro* v. *United States,* 353 U.S. 53 (1957); *Black* v. *Sheraton Corp. of America,* 47 F.R.D. 263 (D.D.C. 1969), *aff'd* 564 F.2d 550 (D.C. Cir. 1977). The informant's privilege recognizes that prospective informants usually condition their cooperation with law enforcement officers on an assurance of anonymity in order to protect against physical harm or other undesirable consequences to themselves and their families which would very likely result as a consequence of disclosure. *United States* v. *Tucker,* 380 F.2d 206, 213 (2d Cir. 1967). Although this privilege protects only the identity of the informant, information provided by the informant may also be shielded under this privilege if its disclosure would reveal the informer's identity. *Rovario* v. *United States, supra,* at 60. The informant's privilege, **[*46]** like the other privileges discussed above, is qualified; therefore, the government must show that its interest in effective law enforcement outweighs the litigant's need for the information. *See Rovario* v. *United States, supra; In re Attorney General of United States,* 596 F.2d 58 (2d Cir. 1979); 2 J. Weinstein and M. Berger, Weinstein's Evidence P510[02] at 510-18 (1982).

B. Law Enforcement Investigatory Files Privilege

Like the informant's privilege, the privilege for law enforcement investigatory files is necessary to protect against the harm that would flow from public disclosure of information contained in the files and to facilitate the government's law enforcement process. *See Black*

v. *United States,* 564 F.2d 531 (D.C. Cir. 1977); *Brown* v. *Thompson,* 430 F.2d 1214 (5th Cir. 1970). Disclosure of open investigatory files n36 would undercut the government's efforts to prosecute criminals by disclosing investigative techniques, forewarning suspects under investigation, **[**500]** deterring witnesses from coming forward, and prematurely revealing facts supporting the government's case. n37 The privilege for law enforcement investigatory files is a **[*47]** qualified privilege, and may be overcome by a strong showing of need or interest in disclosure of the information. *See Black* v. *United States, supra.*

n36 As is apparent from the reasons underlying the privilege, the law enforcement investigatory files privilege does not apply to files pertaining to investigations which have been closed, although information protected by another privilege, *e.g.,* the informant's privilege, would continue to be shielded. *See* 2 Weinstein's Evidence P509(07) at 509-52-58 (1982). *Cf.* Supreme Court's recent discussion of FOIA exemption 7 in *FBI* v. *Abramson,* 456 U.S. 615 (1982).

n37 *See also* former Attorney General Jackson's opinion at 40 Op. Att'y Gen. 45 (1941), concluding that premature disclosure of law enforcement investigative reports to Congress or the public could prejudice the rights of prospective defendants whose investigations are the subject of the reports.

C. FOIA Exemption 7

Exemption 7 of the Freedom of Information Act incorporates these privileges for law enforcement records to protect the information contained therein from compulsory disclosure to members of the public. Exemption 7 exempts **[*48]** from the general disclosure mandate of the FOIA those matters which are

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel[.]

5 U.S.C. § 552(b)(7). The subparts of § 552(b)(7) make clear that the interests protected therein are roughly analogous to those protected by the "governmental" privileges in litigation for informant's identity and law enforcement investigatory files. *See generally FBI* v. *Abramson, supra; NLRB* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214 (1978); *Lesar* **[*49]** v. *Department of Justice,* 636 F.2d 472 (D.C. Cir. 1980), *Church of Scientology of Calif.* v. *Department of Justice,* 612 F.2d 417 (9th Cir. 1979).

IV. Conclusion

The privileges available to protect the confidentiality of the Attorney General's communications with the Office of the President can be roughly categorized into three classes, depending upon the nature of the communications for which the privilege is asserted, the interests which are sought to be protected by the claim of privilege, and the persons against whom the claim is made. This memorandum represents an effort by this Office to provide the Attorney General with a general outline of the privileges available to him to protect his confidential communications **[**501]** and working papers from compulsory disclosure when he believes that disclosure would be against the interests of the Department, the President, or the broader "public," and to provide guidelines for the assertion of those privileges. While the foregoing discussion should prove helpful in providing a framework for analysis of potential claims of privilege, we would caution that the applicability of any

privilege to a given set of circumstances **[*50]** will almost always involve a judgment of competing values. While the Attorney General or the client must decide initially whether to assert the privilege, the task of resolving conflicts arising out of such competing values, in the final analysis, is one that is reserved to the courts.

THEODORE B. OLSON

Assistant Attorney General

Office of Legal Counsel

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*1981 OLC LEXIS 7, *; 5 Op. O.L.C. 27, **

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

ASSERTION OF **EXECUTIVE PRIVILEGE** IN RESPONSE TO A CONGRESSIONAL SUBPOENA

1981 OLC LEXIS 7; 5 Op. O.L.C. 27; Also reported at 43 Op. Atty Gen. 327

October 13, 1981

CORE TERMS: oversight, subpoena, deliberative, withheld, foreign policy, deliberations, staff, energy, deliberative process, predecisional, ongoing, accommodation, generalized, disclosure, advice, accommodate, principled, legislate, supplied, Mineral Lands Leasing Act, decisionmaking process, subpoena issued, strong public, present time, correspondingly, reciprocity, candor, stress, stock, large number

SYLLABUS:
[*1]

Executive privilege can and should be asserted to withhold deliberative, predecisional documents from Congress, where release of the documents would seriously impair the deliberative process and the conduct of foreign policy, and where Congress' only stated interest in obtaining the documents is for general oversight purposes.

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 information confidential, each branch has an obligation to make a principled effort to accommodate the needs of the other.

ADDRESSEE:
The President the White House

OPINIONBY: SMITH

OPINION:
[27]** DEAR MR. PRESIDENT: You have requested my advice concerning the propriety of an assertion of **executive privilege** in response to a subpoena issued by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (Subcommittee). The subpoena was issued on September 28, 1981, and served on the Department of the Interior on October 2, 1981. * It demands the production of certain documents by October 14, 1981. It seeks "[a]ll documents relative to the determination of reciprocity under the Mineral Lands **[*2]** Leasing Act, 30 U.S.C. § 181, including documents relating to the general matter of reciprocity and the specific question of the status of Canada, utilized or written by officials and staff of the Department of Interior on or before September 18, 1981." n1 The Office of Legal Counsel of the Department of Justice has examined documents embraced by the subpoena and identified by the Department of the Interior as being potentially subject to a claim of **executive privilege,** and has concluded that a proper claim of privilege may be asserted with respect to all of the documents identified in the attachment hereto. I **[**28]** concur in that conclusion. I believe that the documents identified are properly subject to a claim of **executive privilege** and that the privilege should be asserted with respect to those documents.

* NOTE: The full text of the subpoena and related correspondence can be found in *Contempt of Congress: Hearings on the Congressional Proceedings Against Interior Secretary James G.*

Watt Before the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. (1982). Ed.

n1 The Mineral Lands Leasing Act (Act) provides, in pertinent part, that "citizens of another country, the laws, customs or regulations of which deny similar or like privileges to citizens of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act." 30 U.S.C. § 181. **[*3]**

I.

I understand that on September 24, 1981, the Department of the Interior supplied the Subcommittee with a large number of the materials presently demanded by the subpoena, including a list of 36 published sources and copies of 143 documents. Once the subpoena was issued, the Department of the Interior, in consultation with other departments having an interest in the matter, including the Departments of State, Commerce, Treasury, Justice, and the Offices of the United States Trade Representative and the White House Counsel, once again reviewed the documents which had not previously been provided to the Subcommittee. In an effort to make every reasonable accommodation to the legitimate needs of the Legislative Branch, the Department of the Interior released an additional 31 documents to the Subcommittee on October 9, 1981. One document was shown to the Subcommittee staff at that time but was not released. In addition, the Subcommittee was provided with a written list and oral description of the 31 documents which had been withheld. The Subcommittee staff was permitted to ask questions concerning the nature of those documents, a procedure designed to provide the Subcommittee **[*4]** with enough information to assure itself that the documents are not essential to the conduct of the Subcommittee's legislative business. Finally, the Subcommittee was informed that an additional 5-10 documents would be released once the Department of the Interior had concluded its deliberations regarding the status of Canada under the Act.

All of the documents in issue are either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations. Several of the documents reflect views of officials of the Canadian government transmitted in confidence to United States officials as well as statements regarding the status of Canada by officials of the Department of State. Other documents, prepared for the Cabinet Council on Economic Affairs and the Cabinet-level Trade Policy Committee, are predecisional, deliberative memoranda which have been considered by officials at the highest levels of government. Both the Cabinet Council and the Trade Policy Committee prepare recommendations for presidential action; in addition, you personally attend some Cabinet Council meetings and chair these meetings when **[*5]** you do attend. Finally, a large portion of the documents being withheld reflect internal deliberations within the Department of the Interior regarding the status of Canada under the Act. Some of these documents are staff level advice to policymakers containing recommendations regarding decisions which have not yet **[**29]** become final. Others contain internal Interior Department deliberations regarding its participation in the Trade Policy Staff Committee and the Cabinet Council on Economic Affairs. Still other documents reflect tentative legal judgments regarding questions arising under the Act. In addition, the subpoena encompasses preliminary drafts of congressional testimony by the Secretary of the Interior. These latter documents, although generated at levels below that of the Cabinet and subcabinet, are of a highly deliberative nature and involve an ongoing decisional process of considerable sensitivity.

II.

The Office of Legal Counsel of the Department of Justice has examined each of these documents and has concluded that they may properly be withheld from the Congress at this time. These documents are quintessentially deliberative, predecisional materials. Each of **[*6]** the agencies which generated the documents has stated that their release to the

Subcommittee would seriously interfere with or impede the deliberative process of government and, in some cases, the Nation's conduct of its foreign policy. Because the policy options considered in many of these documents are still under review in the Executive Branch, disclosure to the Subcommittee at the present time could distort that decisional process by causing the Executive Branch officials to modify policy positions they would otherwise espouse because of actual, threatened, or anticipated congressional reaction. Moreover, even if the decision at issue had already been made, disclosure to Congress could still deter the candor of future Executive Branch deliberations, because officials at all levels would know that they could someday be called by Congress to account for the tentative policy judgments which they had earlier advanced in the councils of the Executive Branch. As the Supreme Court has noted, "[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 **[*7]** decisionmaking process." *United States v. Nixon,* 418 U.S. 683, 705 (1974). You must have access to complete and candid advice in order to provide the soundest basis for presidential decisions. I have concluded that release of these documents would seriously impair the deliberative process and the conduct of foreign policy. There is, therefore, a strong public interest in withholding the documents from congressional scrutiny at this time.

Against this strong public interest I must consider the interest of Congress in obtaining these documents. The Subcommittee, in its letter to Secretary Watt of August 13, 1981, stated that it was conducting a "legislative oversight inquiry" into the impact of Canadian energy policies upon American companies. The Subcommittee's next formal communication to Secretary Watt, the subpoena issued on September 28 **[**30]** and served October 2, did not further explain the Subcommittee's need for the information. I therefore presume that the Subcommittee's interest in obtaining these documents is one of legislative oversight. n2

n2 The House Committee on Energy and Commerce does have pending before it several bills, H.R. 4033, H.R. 4145, and H.R. 4186, which would amend the Act in certain respects. The pendency of these bills has not been formally asserted as a reason for obtaining the documents. Moreover, the documents requested appear to have a tangential relevance at best to the subject matter of the bill. **[*8]**

Congress does have a legitimate interest in obtaining information to assist it in enacting, amending, or repealing legislation. This interest extends beyond information bearing on specific proposals for legislation; it includes, as well, the congressional "oversight" function of being informed regarding the manner in which the Executive Branch is executing the laws which Congress has passed. Such oversight enables the Legislative Branch to identify at an early stage shortcomings or problems in the execution of the law which can be remedied through legislation.

While I recognize the legitimacy of the congressional interest in the present case, it is important to stress two points concerning that interest. First, the interest of Congress in obtaining information for oversight purposes is, I believe, 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 **[*9]** 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 will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information. *See United States v. Nixon, supra; Senate Select Committee on Presidential Campaign Activities v. Nixon,* **498** F.2d 725, 731-33 (D.C. Cir. 1974) *(en banc).*

Second, the 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 **[*10]** 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 **[**31]** 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 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.

Applying the balancing process required by the Supreme Court, it is my view that the Executive Branch's interests in safeguarding the integrity of its deliberative processes and its conduct of the Nation's foreign policy outweigh the stated interest of the Subcommittee in obtaining this information for oversight purposes. It is, therefore, my view that these documents **[*11]** may properly be withheld from the Subcommittee at the present time.

III.

Finally, a brief word is in order concerning the negotiations between the Department of the Interior and the Subcommittee during this dispute. In cases in which the 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. *American Tel. & Tel. Co.*, 567 F.2d 121, 127, 130 (D.C. Cir. 1977); *see generally* United States v. *Nixon, supra.* 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.

It is my view that the Executive Branch has made such a principled effort at accommodation in the present case. Prior to the issuance of the subpoena, the Department of the Interior supplied the Subcommittee with a large number of the documents subsequently requested **[*12]** by the subpoena. In response to the subpoena, the interested Executive Branch departments reviewed those documents which had been withheld and identified documents that could be supplied in an effort to further accommodate the Subcommittee's needs. Substantial additional materials were released to the Subcommittee on October 9, 1981, despite the fact that at least some of these materials were deliberative in nature and therefore presumptively subject to a claim of privilege. Moreover, the Department of the Interior has promised to release additional material once its deliberations regarding the status of Canada under the Act are completed. Finally, members of the Subcommittee staff were provided **[**32]** a comprehensive list of the materials being withheld from disclosure, and were briefed orally by the various federal agencies regarding the nature of those documents.

In contrast, the Subcommittee has not to date shown itself sensitive to the legitimate needs of the Executive Branch. As noted, it has never formally stated its need for the materials beyond a generalized interest in "oversight." It responded to the submission of documents by the Executive Branch on September 24 **[*13]** by issuing a subpoena four days later -- a subpoena which was broader in scope than the Subcommittee's original August 13 request. To date, the Subcommittee has shown little interest in accommodating legitimate interests of the Executive Branch in safeguarding the privacy of its deliberative processes and conducting

the Nation's foreign policy. This lack of accommodation on the Subcommittee's part lends further support to my conclusion that the documents in question may properly be withheld.

In conclusion, it is my opinion that the documents now being withheld are well within the scope of **executive privilege.** The process by which the President makes executive decisions and conducts foreign policy would be irreparably impaired by production of these documents at this time. I recommend that **executive privilege** be asserted.

Sincerely,

WILLIAM FRENCH SMITH

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*43 Op. Atty Gen. 327; 1981 U.S. AG LEXIS 1, **

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

43 Op. Atty Gen. 327; 1981 U.S. AG LEXIS 1; Also reported at 5 Op. O.L.C. 27

October 13, 1981

CORE TERMS: oversight, subpoena, withheld, foreign policy, deliverative, staff, deliberations, deliberative, energy, accommodation, generalized, disclosure, advice, predecisional, supplied, ongoing, Mineral Lands Leasing Act, decisionmaking process, subpoena issued, strong public, present time, correspondingly, reciprocity, accommodate, principled, legislate, stress, candor, deliberative process, large number

ADDRESSEE:
[*1]

The President,

The White House

Washington, D.C. 20500

OPINIONBY: SMITH

OPINION:
Dear Mr. President:

You have requested my advice concerning the propriety of an assertion of **executive privilege** in response to a subpoena issued by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (Subcommittee). The subpoena was issued on September 28, 1981, and served on the Department of the Interior on October 2, 1981. It demands the production of certain documents by October 14, 1981. It seeks "all documents relative to the determination of reciprocity under the Mineral Lands Leasing Act, 30 U.S.C. § 181, including documents relating to the general matter of reciprocity and the specific question of the status of Canada, utilized or written by officials and staff of the Department of Interior on or before September 18, 1981." n1 The Office of Legal Counsel of the Department of Justice has examined documents embraced by the subpoena and identified by the Department of the Interior as being potentially subject to a claim of **executive privilege,** and has concluded that a proper claim of privilege may be asserted with respect to all of the documents identified in **[*2]** the attachment hereto. I concur in that conclusion. I believe that the documents identified are properly subject to a claim of **executive privilege** and that the privilege should be asserted with respect to those documents.

n1 The Mineral Lands Leasing Act (Act) provides, in pertinent part, that "citizens of another country, the laws, customs or regulations of which deny similar or like privileges to citizens of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act."

I

I understand that on September 24, 1981, the Department of the Interior supplied the Subcommittee with a large number of the materials presently demanded by the subpoena,

including a list of 36 published sources and copies of 143 documents. Once the subpoena was issued, the Department of the Interior, in consultation with other Departments having an interest in the matter, including the Departments of State, Commerce, Treasury, Justice, and the Offices of the United States Trade Representative and the White House Counsel, once again reviewed the documents which had not previously been provided to the Subcommittee. **[*3]** In an effort to make every reasonable accommodation to the legitimate needs of the Legislative Branch, the Department of the Interior released an additional 31 documents to the Subcommittee on October 9, 1981. One document was shown to the Subcommittee staff at that time but was not released. In addition, the Subcommittee was provided with a written list and oral description of the 31 documents which had been withheld. The Subcommittee staff was permitted to ask questions concerning the nature of those documents, a procedure designed to provide the Subcommittee with enough information to assure itself that the documents are not essential to the conduct of the Subcommittee's legislative business. Finally, the Subcommittee was informed that an additional 5-10 documents would be released once the Department of the Interior had concluded its deliberations regarding the status of Canada under the Act.

All of the documents in issue are either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations. Several of the documents reflect views of officials of the Canadian Government transmitted **[*4]** in confidence to United States officials as well as statements regarding the status of Canada by officials of the Department of State. Other documents, prepared for the Cabinet Council on Economic Affairs and the cabinet-level Trade Policy Committee, are predecisional, deliberative memoranda which have been considered by officials at the highest levels of government. Both the Cabinet Council and the Trade Policy Committee prepare recommendations for Presidential action; in addition, you personally attend some Cabinet Council meetings and chair these meetings when you do attend. Finally, a large portion of the documents being withheld reflect internal deliberations within the Department of the Interior regarding the Status of Canada under the Act. Some of these documents are staff level advice to policymakers containing recommendations regarding decisions which have not yet become final. Others contain internal Interior Department deliberations regarding its participation in the Trade Policy Staff Committee and the Cabinet Council on Economic Affairs. Still other documents reflect tentative legal judgments regarding questions arising under the Act. In addition, the subpoena encompasses **[*5]** preliminary drafts of congressional testimony by the Secretary of the Interior. These latter documents, although generated at levels below that of the Cabinet and subcabinet, are of a highly deliberative nature and involve an on-going decisional process of considerable sensitivity.

II.

The Office of Legal Counsel of the Department of Justice has examined each of these documents and has concluded that they may properly be withheld from the Congress at this time. These documents are quintessentially deliverative, predecisional materials. Each of the agencies which generated the documents has stated that their release to the Subcommittee would seriously interfere with or impede the deliverative process of government and, in some cases, the Nation's conduct of its foreign policy. Because the policy options considered in many of these documents are still under review in the Executive Branch, disclosure to the Subcommittee at the present time could distort that decisional process by causing the Executive Branch officials to modify policy positions they would otherwise espouse because of actual, threatened, or anticipated congressional reaction. Moreover, even if the decision **[*6]** at issue had already been made, disclosure to Congress could still deter the candor of future Executive Branch deliberations, because officials at all levels would know that they could someday be called by Congress to account for the tentative policy judgments which they had earlier advanced in the councils of the Executive Branch. As the Supreme Court has noted, "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. 683, 705

(1974). You must have access to complete and candid advice in order to provide the soundest basis for presidential decisions. I have concluded that release of these documents would seriously impair the deliberative process and the conduct of foreign policy. There is, therefore, a strong public interest in withholding the documents from congressional scrutiny at this time.

Against this strong public interest I must consider the interest of Congress in obtaining these documents. The Subcommittee, in its letter to Secretary Watt of August 13, 1981, stated that **[*7]** it was conducting a "legislative oversight inquiry" into the impact of Canadian energy policies upon American companies. The Subcommittee's next formal communication to Secretary Watt, the subpoena issued on September 28 and served October 2, did not further explain the Subcommittee's need for the information. I therefore presume that the Subcommittee's interest in obtaining these documents is one of legislative oversight. n2

n2 The House Committee on Energy and Commerce does have pending before it several bills, H.R. 4033, H.R. 4146, and H.R. 4186, which would amend the Act in certain respects. The pendency of these bills has not been formally asserted as a reason for obtaining the documents. Moreover, the documents requested appear to have a tangential relevance at best to the subject matter of the bill.

Congress does have a legitimate interest in obtaining information to assist it in enacting, amending, or repealing legislation. This interest extends beyond information bearing on specific proposals for legislation; it includes, as well, the congressional "oversight" function of being informed regarding the manner in which the Executive Branch is executing the **[*8]** laws which Congress has passed. Such oversight enables the Legislative Branch to identify at an early stage shortcomings or problems in the execution of the law which can be remedied through legislation.

While I recognize the legitimacy of the congressional interest in the present case, it is important to stress two points concerning that interest. First, the interest of Congress in obtaining information for oversight purposes is, I believe, 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 will weigh substantially more heavily in the **[*9]** constitutional balancing than a generalized interest in obtaining information.See United States v. Nixon, supra; Senate Select Committee on Presidential Compaign Activities v. Nixon, **498** F.2d 725, 731-33 (D.C. Cir. 1974) (en banc).

Second, the 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 decision 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 **[*10]** 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.

Applying the balancing process required by the Supreme Court, it is my view that the Executive Branch's interests in safeguarding the integrity of its deliverative processes and its conduct of the Nation's foreign policy outweigh the stated interest of the Subcommittee in obtaining this information for oversight purposes. It is, therefore, my view that these documents may properly be withheld from the Subcommittee at the present time.

III.

Finally, a brief word is in order concerning the negotiations between the Department of the Interior and the Subcommittee during this dispute. In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a **[*11]** legitimate, constitutionally recognized need to keep information confidential, the court have referred to the obligation of each Branch to accommodate the legitimate needs of the other. See United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977); see generally United States v. Nixon, supra. 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.

It is my view that the Executive Branch has made such a principled effort at accommodation in the present case. Prior to the issuance of the subpoena, the Department of the Interior supplied the Subcommittee with a large number of the documents subsequently requested by the subpoena. In response to the subpoena, the interested Executive Branch departments reviewed those documents which had been withheld and identified documents that could be supplied in an effort to further accommodate the Subcommittee's needs. Substantial additional materials were released to the Subcommittee on October **[*12]** 9, 1981, despite the fact that at least some of these materials were deliverative in nature and therefore presumptively subject to a claim of privilege. Moreover, the Department of the Interior has promised to release additional material once its deliverations regarding the status of Canada under the Act are completed. Finally, members of the Subcommittee staff were provided a comprehensive list of the materials being withheld from disclosure, and were briefed orally by the various federal agencies regarding the nature of those documents.

In contrast, the Subcommittee has not to date shown itself sensitive to the legitimate needs of the Executive Branch. As noted, it has never formally stated its need for the materials beyond a generalized interest in "oversight." It responded to the submission of documents by the Executive Branch on September 24 by issuing a subpoena four days later -- a subpoena which was broader in scope than the Subcommittee's original August 13 request. To date, the Subcommittee has shown little interest in accommodating legitimate interests of the Executive Branch in safeguarding the privacy of its deliverative processes and conducting the Nation's foreign **[*13]** policy. This lack of accommodation on the Subcommittee's part lends further support to my conclusion that the documents in question may properly be withheld.

In conclusion, it is my opinion that the documents now being withheld are well within the scope of **executive privilege.** The process by which the President makes executive decisions and conducts foreign policy would be irreparably impaired by production of these documents at this time. I recommend that **executive privilege** be asserted.

Sincerely,

William French Smith, Attorney General

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*1977 OLC LEXIS 67, *; 1 Op. O.L.C. 269, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

77-67 THE DISCLOSURE OF DOCUMENTS TO THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS-BOYCOTTS-EXPORT ADMINISTRATION ACT

1977 OLC LEXIS 67; 1 Op. O.L.C. 269

December 7, 1977

CORE TERMS: subcommittee, confidentiality, disclosure, subpoena, withheld, secret, grand jury, deliberative, legitimately, Export Administration Act, chairman, disclose information, court of appeals, accommodation, deliberations, interagency, commenting, effective, cooperate, override, damaging, founded, information requested, documents relating, authorization, memorandum, withhold, inspect, pledge, impair

ADDRESSEE:
[*1]

Memorandum Opinion for the General Counsel of the Department of Commerce

OPINIONBY: HARMON

OPINION:
[269]** This is in response to your request for the opinion of this Office on the legal basis for your Department's refusal to provide to a subcommittee of the House Committee on Government Operations certain documents relating to the antiboycott amendments to the Export Administration Act. It is our understanding that, while your Department has provided the subcommittee with much of the information requested, it felt constrained to withhold documents containing communications from foreign governments, notes of meetings with foreign government officials, and documents from other Agencies containing comments on proposed regulations implementing the Export Administration Act. You have offered, however, to provide the subcommittee with detailed summaries of all these documents, and, in addition, have offered to allow the subcommittee chairman to inspect the original documents under certain conditions. Under these circumstances, we believe that, upon a proper authorization by the President, the documents may be legally withheld from the Congress.

Our conclusion is founded on the proposition, as stated **[*2]** in the Supreme Court's opinion in *United States* v. *Nixon,* 418 U.S. 683 (1974), that the executive branch may, as a matter of constitutional law, decline to reveal information in certain instances where such action is necessary to the performance of the Executive's constitutional responsibilities. While the decision in *Nixon* was rendered in a context involving a grand jury subpoena, as opposed to a congressional request, the Court's rationale indicates that it would, at least in certain situations, uphold the Executive's authority to decline to disclose information to Congress. One factor the Court relied on -- that of the principle of separation of powers -- is certainly applicable in cases involving congressional requests; such requests, no less than a grand jury subpoena, can infringe **[**270]** on the "independence of the Executive Branch within its own sphere." *Id.,* at 706. Similarly, the other factor underlying the court's decision -- the need for confidentiality of communications between high Government officials and their advisers -- can be undermined just as much by a congressional request as by a subpoena from the grand jury.

While the Executive's authority **[*3]** to decline to disclose information to Congress has not been a subject of extensive litigation, the cases decided thus far are in accord with our construction of *Nixon.* In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* **498** F. 2d 725, 731 (D.C. Cir. 1974), the court of appeals held that a generalized claim of confidentiality operated to preclude the need to respond to a congressional subpoena, at least in the absence of a showing that the subpoenaed evidence was "demonstrably critical to the responsible ful-fillment of the Committee's functions." The *A.T. & T.* case [*United States* v. *American Telephone & Telegraph Company,* 419 F. Supp. 454 (D.D.C. 1976), *remanded for further efforts at settlement,* 551 F.2d 384 (D.C. Cir. 1976), *remanded for further efforts at accommodation,* No. 76-1712 (D.C. Cir. 1977)], further supports this proposition. While the court of appeals has not reached a final decision in favor of either the Executive or Congress, its opinion leaves no doubt that congressional subpoenas do not peremptorily override the Executive's duty to maintain the confidentiality of information the disclosure of which would be damaging **[*4]** to the national interest.

Of course, the fact that the Executive may at times refuse to disclose information to the congress does not necessarily mean that it may do so in this instance. Rather, the justification for withholding information here must depend on whether the particular information at issue is subject to legitimate claims of confidentiality. Another factor that the courts might consider relevant is whether Congress' need for the information might be satisfied by means other than compliance with its initial request. We believe that both these conditions are met here.

There seems little doubt that the information requested by the subcommittee is the sort generally subject to legitimate claims of confidentiality by the executive branch. The subcommittee, first, has requested communications from foreign governments and notes of meetings with representatives of foreign governments. It is our understanding that the statements made by the foreign governments were given under a pledge of confidentiality, either explicit or implicit. We also understand that some of the statements, if associated with the particular government making them, could be damaging to that government. **[*5]** The disclosure of these documents by our Government could thus impair our relations with the foreign governments involved, both by breaching a pledge of confidentiality and by releasing information possibily detrimental to the interests of the other governments. The documents accordingly could be properly termed "state secrets," *i.e.,* "matters the disclosure of which would endanger the nation's governmental requirements *or its* **[**271]** *relations of friendship and profit with other nations."* 8 Wigmore on Evidence, § 2212a (McNaughton revision 1961) [emphasis added].

As such, the documents here are of the sort the Executive may protect from disclosure. The courts have long recognized the authority of the executive branch to protect "diplomatic secrets." *See, United States* v. *Nixon, supra,* at 706, 710; *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319-21 (1936); *Republic of China* v. *National Union Fire Insurance Company,* 142 F. Supp. 551 (D. Md. 1956). Mr. Justice Stewart, in commenting on this matter in his concurrence in *New York Times Co.* v. *United States,* 403 U.S. 713, 727, 728 (1971), stated:

. . . [I]t is elementary **[*6]** that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept.

Furthermore, the courts have recognized that the need for confidentiality may even require the withholding of information from Congress. In commenting on President Washington's refusal to comply with a congressional request for documents relating to negotiations with foreign countries, n1 the Supreme Court stated that it was "a refusal the wisdom of which was recognized by the House itself and has never since been doubted." *United States* v. *Curtiss-Wright Export Corp., supra,* at 320. The same result is also supported by the *A.T. & T.*

case, which involves the Executive's efforts to withhold from Congress another form of "state secret."

n1 The executive branch has on other occasions withheld from Congress information similar to that requested here. *See, e.g.,* instances cited in Kramer & Marcuse, "**Executive Privileges** -- A Study of the Period 1953-1960," 29 Geo. Wash. L. Rev. 623, 667-68, 841-44 (1961). **[*7]**

The other documents in question are interagency communications from the Departments of State and Treasury to the Department of Commerce. We believe that the executive branch can also legitimately refuse to provide these documents to the Congress. The Supreme Court in *Nixon* recognized that there was a "valid need for protection of communications between high Government officials and those who advise and assist them." 418 U.S., at 705. The court in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon, supra,* made clear that this need for confidentiality might be asserted and upheld visa-vis the Congress. While both of these decisions were rendered in the context of Presidential communications, in our opinion, the same principle would apply with respect to communications containing the policy deliberations of executive officials at a level below that of the President. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decisions of the Government. *See, United States* v. *Nixon, supra,* at 705-6. This need exists not only at the Presidential level, but also at other levels in the **[*8]** **[**272]** Government. In other contexts the courts have long recognized the importance of protecting the confidentiality of lower executive officials' deliberative communications. *See, Davis* v. *Braswell Motor Freight Lines, Inc.,* 363 F. 2d 600, 603 (5th Cir. 1966); *Kaiser Aluminum & Chemical Corporation* v. *United States,* 157 F. Supp., 141 Ct. Cl. 38 (Ct. Cl. 1958) (Reed, J.), and so too has Congress. *See* 5 U.S.C. § 552(b)(5); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). We thus believe that the constitutional principle announced in *Nixon* and *Senate Select Committee* can properly extend to lower officials' deliberative communications whose disclosure would harm the decisionmaking process of the executive branch. If the President determines that disclosure would be harmful to the effective functioning of the executive branch, the documents may legitimately be withheld from the Congress.

Of course, the fact that the documents requested may legitimately be withheld from Congress does not mean that the executive branch may refuse completely to cooperate with Congress. The recent *A.T. & T.* decision commands that with respect to requests for state **[*9]** secrets, the Executive must cooperate with Congress in a "concerted search for accommodation between the two branches." Slip op., at 21; *see, also* slip op., at 13. The same would appear to be true with respect to interagency policy deliberations. The executive branch's presumptive authority to protect this sort of information is a qualified one, and may be overcome by a showing that Congress' needs may not be responsibly fulfilled without disclosure. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon, supra,* at 730. While no such showing has yet been made in this case, it would seem incumbent on the Executive, in order to ensure that it could protect the documents themselves, that it accommodate Congress' needs through other means, if possible.

We believe that the arrangements proposed by the Department of Commerce in its November 21, 1977, reply to the subcommittee meet the Executive's obligations in this regard. You have advised us that your Department has offered to make available to the subcommittee detailed summaries of all the documents, and that these summaries will place before the subcommittee all of the substantive information it has requested, **[*10]** but in such a way as not to impair our relations with foreign governments or disrupt the decisionmaking processes of the executive branch. In addition, you have offered to allow the subcommittee chairman to inspect *all* the original documents in order to verify the accuracy of the summaries. This proposal should satisfy the subcommittee's needs; it will be furnished with all the substantive information it requested, along with a check by the subcommittee chairman to make sure that nothing is omitted or misrepresented in the summaries. We would note that the court in the *A.T. & T.* case suggested a similar, and even more limited,

approach. It proposed there that the executive branch furnish the pertinent subcommittee expurgated documents, and that the subcommittee staff be allowed to select only 10 unedited **[**273]** memorandums for comparison with the originals. n2 While this suggestion, of course, was founded on the particular circumstances of that case, it does provide guidance as to what the court believed was a reasonable accommodation of both branches' needs.

n2 This is out of a total of 217 documents. Another difference between the two proposals is that, in *A.T. & T.,* the court suggested a substitution procedure whereby, upon review and approval by the district court, a particularly sensitive memorandum selected at random might be replaced; no such condition has been imposed by the Department of Commerce here. One other difference is that the court in *A.T. & T.* suggested that the staff be allowed to take notes, while your Department's proposal would not allow this. However, because the notes in *A.T. & T.* are to remain with the Federal Bureau of Investigation or the district court, there is little significant difference between this proposal and your Department's approach. **[*11]**

Finally, we recognize that Congress has recently amended § 7(C) (§ 11360) of the Export Administration Act of 1969 to provide that "any information obtained under this Act . . . shall be made available upon request to any committee or subcommittee of Congress of appropriate jurisdiction." Pub. L. No. 95-52, § 113, 91 Stat. 241. We would note, initially, that it is not entirely clear whether this provision is intended to apply to the materials in question here. In any event, we do not believe that this provision can override the Executive's authority to protect information where such is necessary to the performance of its constitutional functions. For the reasons discussed above, we believe that the documents at issue here may, upon the President's authorization, be lawfully withheld from disclosure to the Congress.

JOHN M. HARMON

Assistant Attorney General

Office of Legal Counsel

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