

Withdrawn/Redacted Material

The George W. Bush Library

DOCUMENT No.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Fax Cover Sheet	[Fax Cover Sheet] [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Brett Kavanaugh - From: Paul Colborn	1	09/10/2001	
002	Memorandum	...Subpoena... [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Counsel for the President	2	05/23/1996	
003	Memorandum	...Subpoena... [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Secretary of Defense	1	08/08/1991	
004	Memorandum	...Subpoena... [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS]	2	11/30/1982	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Executive Privilege General [1]

FRC ID:

9802

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
005	Memorandum	...Subpoena... [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Secretary of the Interior	1	10/13/1981	
006	Memorandum	...Subpoena... [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Attorney General	1	N.D.	
007	Memorandum	...Subpoena... [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Attorney General	1	07/26/1991	
008	Memorandum	...Subpoena [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: POTUS - From: C. Boyden Gray	2	07/26/1991	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Executive Privilege General [1]

FRC ID:

9802

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
009	Draft	[Letter] [4 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: POTUS	4	09/06/2001	
010	Draft	[Letter] [3 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: POTUS	3	09/07/2001	
011	Memorandum	[Memorandum] [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: John Ashcroft - From: Dan Burton	2	09/06/2001	
012	Memorandum	Congressional Demands... [22 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Janet Reno - From: Walter Dellinger	22	11/23/1993	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Executive Privilege General [1]

FRC ID:

9802

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
013	Letter	[Letter] [3 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: POTUS - From: Dick Thornburgh	3	07/26/1991	
014	Letter	[Letter] [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: POTUS - From: Dick Thornburgh	2	08/08/1991	
015	Letter	[Letter] [8 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Howard Metzenbaum	8	07/01/1991	
016	Letter	[Letter] [7 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: John Ashcroft - From: Dan Burton	7	08/29/2001	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Executive Privilege General [1]

FRC ID:

9802

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material SUPERSEDED

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Fax Cover Sheet	[Fax Cover Sheet] - To: Brett Kavanaugh - From: Paul Colborn	1	09/10/2001	P5;
002	Memorandum	...Subpoena... - To: Counsel for the President	2	05/23/1996	P5;
003	Memorandum	...Subpoena... - To: Secretary of Defense	1	08/08/1991	P5;
004	Memorandum	...Subpoena...	2	11/30/1982	P5;
005	Memorandum	...Subpoena... - To: Secretary of the Interior	1	10/13/1981	P5;
006	Memorandum	...Subpoena... - To: Attorney General	1	N.D.	P5;
007	Memorandum	...Subpoena... - To: Attorney General	1	07/26/1991	P5;

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Executive Privilege General [1]

FRC ID:

9802

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material

The George W. Bush Library

SUPERSEDED

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	Memorandum	...Subpoena - To: POTUS - From: C. Boyden Gray	2	07/26/1991	P5;
009	Draft	[Letter] - To: POTUS	4	09/06/2001	P5;
010	Draft	[Letter] - To: POTUS	3	09/07/2001	P5;
011	Memorandum	[Memorandum] - To: John Ashcroft - From: Dan Burton	2	09/06/2001	P5;
012	Memorandum	Congressional Demands... - To: Janet Reno - From: Walter Dellinger	22	11/23/1993	P5;
013	Letter	[Letter] - To: POTUS - From: Dick Thornburgh	3	07/26/1991	P5;
014	Letter	[Letter] - To: POTUS - From: Dick Thornburgh	2	08/08/1991	P5;

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Executive Privilege General [1]

FRC ID:

9802

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Withdrawn/Redacted Material **SUPERSEDED**

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
015	Letter	[Letter] - To: Howard Metzenbaum	8	07/01/1991	P5;
016	Letter	[Letter] - To: John Ashcroft - From: Dan Burton	7	08/29/2001	P5;

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Executive Privilege General [1]

FRC ID:

9802

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

Fax Transmission

Paul P. Colborn
Special Counsel
United States Department of Justice
Office of Legal Counsel
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Phone: 202-514-2048
Fax: 202-305-8524

To: Brett Kavanaugh

Date: 9-10-01

Office # () _____

Pages: _____ (including cover sheet)

Fax#: () 456-1647

Subject: _____

Comments:

*Here are some examples
of Presidential memos
asserting e.p.*



THE WHITE HOUSE
WASHINGTON

May 23, 1996

MEMORANDUM FOR THE COUNSEL TO THE PRESIDENT

SUBJECT: Congressional Subpoena for White House Documents

In connection with its investigation of the Travel Office matter, the Committee on Government Reform and Oversight of the House of Representatives issued subpoenas demanding production of certain confidential White House Counsel's Office documents. You advised me that you anticipated continuing your efforts with the Committee to reach an accommodation with respect to these documents. On May 2, 1996, however, the Chairman of the Committee terminated that process and demanded immediate production of all documents captured in the sweep of his Committee's subpoenas. The Chairman informed you that if all documents were not produced on or before May 9, 1996, he would present a resolution to the Full Committee citing you for criminal contempt of Congress.

In light of the Chairman's precipitous action, I was compelled to invoke executive privilege on a protective basis with respect to the entire body of material that had been the subject of the accommodation efforts. This protective assertion was designed to ensure that I would have the opportunity to make a final decision, in consultation with the Attorney General, as to which specific documents I would assert a claim of executive privilege. I instructed you at that time to so advise the Committee.

I understand that the specific review of the documents in consultation with the Justice Department has now been completed. Certain documents are being produced to the Committee as a result of that review. The remaining documents, identified on the executive privilege document index you have provided to me, constitute confidential communications generated in the course of providing advice and assistance to me or senior White House officials with respect to ongoing Congressional and Independent Counsel investigations. The release of these documents would seriously chill the deliberative and analytic process that is integral to the White House Counsel's provision of sound and candid advice and assistance to the President of the United States. I am persuaded that production of this material would significantly impair the ability of the Office of Counsel to the President to provide advice and assistance for years to come.

2

Consequently, production of these documents would frustrate my ability and that of future Presidents to carry out the executive functions prescribed in Article II and would violate fundamental principles of separation of powers.

It is for these reasons that I assert executive privilege with respect to each document identified on the executive privilege document index and instruct you not to release any of these documents to the Committee. Please advise the Committee of my decision.

William J. Clinton

THE WHITE HOUSE

WASHINGTON

August 8, 1991

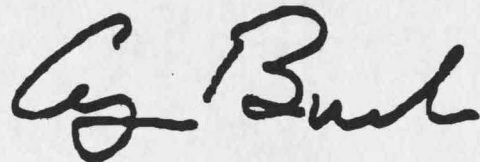
MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: Congressional Subpoena for an Executive Branch Document

I have been advised that the Subcommittee on Legislation and National Security of the Government Operations Committee of the House of Representatives has issued a subpoena commanding you to produce a confidential, deliberative memorandum from the acting Under Secretary of Defense for Acquisition to the Deputy Secretary of Defense, dated February 4, 1991, regarding the deferment of certain financial obligations of a major defense contractor. I understand that the Subcommittee has received testimony from the Department regarding its ultimate decision in this matter, and that the General Accounting Office has concluded that the Department's decision was fully legal and appropriate. I further understand that, among other accommodations, you have offered to permit the Subcommittee's Chairman and Ranking Minority Member to read the memorandum in question.

It is my decision that you should not release this document. Compelled release to Congress of documents containing confidential communications among senior Department officials would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes decisions and recommendations concerning the national defense, including recommendations to me as Commander-in-Chief. In my judgment, the release of this memorandum would be contrary to the national interest because it would discourage the candor that is essential to the Department's decision-making process. Therefore, I am compelled to assert executive privilege with respect to this memorandum and to instruct you not to release it to the Subcommittee.

Please advise the Subcommittee of my decision. I also request that the Department remain willing to meet informally with the Subcommittee to provide such information as it can, consistent with these instructions and without violating the Constitutional doctrine of separation of powers.



THE WHITE HOUSE

WASHINGTON

November 30, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCYSUBJECT: Congressional Subpoenas for Executive
Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately \$223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

The Attorney General, at my direction, has sent the attached letter to Chairman Dinstell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

THE WHITE HOUSE

WASHINGTON

October 13, 1981

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR

SUBJECT: Congressional Subpoena for Executive
Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you to produce documents relating to the issue of reciprocity under the Mineral Lands Leasing Act. I understand that you have provided both documents and testimony on this subject to the Subcommittee.

Nevertheless, it has been brought to my attention that thirty-one documents that may be covered by the subpoena have not been furnished to the Subcommittee. It is my decision that you should not release these documents, since they either deal with sensitive foreign policy negotiations now in process or constitute materials prepared for the Cabinet as part of the Executive branch deliberative process through which recommendations are made to me. Therefore, I am compelled to assert Executive privilege with respect to these documents and to instruct you not to produce them to the Subcommittee. I request that you advise the Subcommittee of my decision in this matter.

I also request that you remain willing to meet informally with the Subcommittee to provide such information as you can, consistent with your obligations of confidentiality to the President, and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

Source: [All Sources](#) > [News](#) > [News Group File, Most Recent 60 Days](#) ⓘTerms: "executive privilege" and clinton and bush ([Edit Search](#))☒ Select for FOCUS™ or Delivery*The Washington Post, December 26, 2001*

Copyright 2001 The Washington Post

The Washington Post

washingtonpost.com

The Washington Post

December 26, 2001, Wednesday, Final Edition

SECTION: EDITORIAL; Pg. A30**LENGTH:** 547 words**HEADLINE:** Executive Privilege -- Again**BODY:**

PRESIDENT **BUSH** has made his first **executive privilege** assertion to resist disclosure of Justice Department documents to the House Government Reform Committee and its chairman, Dan Burton. The privilege claim has provoked howls of protest, both from Mr. Burton (R-Ind.) and from the committee's Democratic minority. Both are united in opposition to what they claim is a White House policy of stonewalling congressional inquiries. The White House, however, is right on this one -- or, at least, mostly right. As a matter of principle, more openness in government is better than less. Presidents from Nixon to **Clinton** have abused **executive privilege**. But in so doing, they also have weakened what can be a legitimate presidential assertion. The current case is a reminder that the privilege is not all bad, and that sometimes congressional oversight is overzealous.

Mr. **Bush** has withheld three groups of documents from Mr. Burton. First, he declined to turn over memoranda written by Justice Department lawyers during the Janet Reno years about whether Ms. Reno should appoint a special counsel in the campaign finance investigation. Ms. Reno herself faced enormous pressure to turn over similar material, and the **Clinton** administration caved several times. As a result lawyers in nonpolitical posts were forced to answer for departmental policies, and the advice they gave the attorney general was put under a microscope. Allowing this was a mistake on her part -- one that permitted career lawyers, who are supposed to be insulated from politics, to be subjected to enormous political pressure from members of Congress committed to particular outcomes in the campaign finance investigation. It is right for Attorney General Ashcroft and Mr. **Bush** to insist that the attorney general can expect candid advice from his aides, and that this advice may remain confidential in the absence of serious suggestions of corrupt decision-making.

Mr. Burton also sought memoranda from the department explaining why indictments in two specific cases were not brought -- decisions with which he disagreed. Again, Mr. **Bush** is right to refuse. Prosecutors around the country should not be worrying about congressional approval when they weigh evidence for a possible indictment. It often takes courage to close a case, particularly one in which there is political interest, yet declining to prosecute is sometimes the right call.

Mr. Burton is on stronger ground in his requests for materials concerning a series of cases in Massachusetts, which he is examining as part of an investigation of the FBI's cozy relationship with its mob informants. In this situation, there is evidence of egregious government misbehavior over a long period. Some of the requested materials, moreover, are decades old, so the **executive privilege** interest in them has waned. On this one the White House should give the committee what it legitimately needs.

No automatic test can dictate where a privilege claim is legitimate. In this situation, the White House is faced with a committee with a long and ugly history of abuse; Mr. **Bush** is right to insist on limits. Reasserting that Justice Department lawyers can expect some minimal level of confidentiality is not a bad place to start.

LOAD-DATE: December 26, 2001

Source: [All Sources](#) > [News](#) > [News Group File, Most Recent 60 Days](#) 

Terms: **"executive privilege" and clinton and bush** ([Edit Search](#))

View: [Full](#)

Date/Time: Thursday, January 3, 2002 - 9:04 AM EST

[About LexisNexis](#) | [Terms and Conditions](#)

Copyright © 2002 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Congressional Subpoena for Executive Branch Documents

I have been advised that the Committee on Government Reform of the House of Representatives has subpoenaed a large number of confidential Department of Justice prosecutorial decisionmaking documents. The documents consist of a memorandum from the Chief of the Campaign Financing Task Force to former Attorney General Janet Reno (along with related memoranda), which recommended that a Special Counsel be appointed to investigate a matter under review by the Task Force, and a large number of deliberative memoranda containing advice and recommendations concerning whether or not certain individuals should be prosecuted. I understand that, among other accommodations the Department has provided the Committee concerning the matters that are the subject of these documents, the Department has provided briefings that included explanations of the reasons for the prosecutorial decisions, and is willing to provide further briefings, but that you believe it would be inconsistent with the constitutional doctrine of separation of powers and the Department's law enforcement responsibilities to release these documents to the Committee or to make them available for review by Committee representatives.

It is my decision that you should not release these documents or otherwise make them available. Disclosure to Congress of confidential advice to the Attorney General and confidential recommendations to Department of Justice officials regarding whether or not to prosecute individuals would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions. Moreover, I am concerned that congressional access to prosecutorial decisionmaking documents of this kind threatens to politicize the criminal justice process. The Founders' fundamental purpose in establishing the separation of powers in the Constitution was to protect individual liberty. Legislative branch political pressure on executive branch prosecutorial decisionmaking is inconsistent with separation of powers and threatens individual liberty. Because I believe that congressional access to these documents would be contrary to the national interest, I am compelled to assert executive privilege with respect to the documents and to instruct you not to release them or otherwise make them available to the Committee.

I request that you advise the Committee of my decision. I also request that the Department remain willing to work informally with the Committee to provide such information as it can, consistent with these instructions and without violating the constitutional doctrine of separation of powers.

THE WHITE HOUSE

WASHINGTON

July 26, 1991

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Congressional Subpoena for Executive Branch Documents

I have been advised that the Subcommittee on Economic and Commercial Law of the Judiciary Committee of the House of Representatives has issued a subpoena requiring you to produce a memorandum of the Office of Legal Counsel regarding the authority of the Federal Bureau of Investigation to make arrests on foreign soil. I understand that, among other accommodations, you have provided oral and written testimony summarizing this memorandum to the Subcommittee and have offered to provide an even more detailed written summary and briefing for individual Members.

It is my decision that you should not release this document. Compelled disclosure to Congress of confidential advice you receive from your subordinates would have a chilling effect on the prosecutorial decisionmaking process. Moreover, I am seriously concerned that disclosure of the memorandum at issue here could compromise the Government's ability to prosecute pending cases against alleged terrorists and drug traffickers. These include not only General Noriega, but also Dr. Alvarez-Machain, who is being prosecuted in connection with the brutal torture and murder of DEA agent Camarena. Therefore, I am compelled to assert Executive privilege with respect to this memorandum and to instruct you not to produce it to the Subcommittee. I request that you advise the Subcommittee of my decision.

I also request that you remain willing to meet informally with the Subcommittee to provide such information as you can, consistent with your obligations of confidentiality to the President, and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

THE WHITE HOUSE

WASHINGTON

July 26, 1991

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY

SUBJECT: Congressman Brooks' Subpoena

Issue: Whether you should assert Executive privilege to prevent the disclosure, to a subcommittee of the House Judiciary Committee, of an internal Justice Department legal memorandum regarding the FBI's authority to make arrests abroad.

Discussion: Congressman Brooks has issued a subpoena to compel production of a highly confidential memorandum to the Attorney General from the Office of Legal Counsel which concluded that the FBI has authority to make arrests in foreign countries. In the attached letter, the Attorney General has requested that you invoke Executive privilege to protect this memorandum from disclosure. I concur.

As a legal matter, I agree with the Attorney General that an assertion of executive privilege is warranted. The memorandum contains highly deliberative legal advice and therefore falls within the category of documents that are presumptively entitled to privilege. Although there is no case law squarely holding that deliberative intra-agency documents are entitled to privilege, such a conclusion is amply supported by long-standing Executive Branch practice as well as by the analysis in Supreme Court and lower court decisions dealing with executive privilege questions in other contexts. The Department has made a good-faith effort to accommodate any legitimate interests the subcommittee might have by summarizing the memorandum in oral testimony and by offering to provide an even more detailed, written summary. The subcommittee has offered no explanation of why it needs the memorandum itself to pursue a legitimate legislative objective. Finally, release of the memorandum at this time could adversely affect ongoing criminal prosecutions, including that of Manuel Noriega.

As a political matter, this seems like a good case in which to invoke the privilege. I doubt Congressional Democrats would want to be seen as jeopardizing the Noriega prosecution. And the Department's prior accommodations preclude any plausible allegations of "cover-up." Moreover, in contrast to several recent disputes, the vote to authorize the subpoena was relatively close (10-6) and was strictly along party lines.

Although it is still possible the subcommittee will abandon its request before the return date of the subpoena (July 31), I

believe it is appropriate for you to make this decision prior to your departure for Moscow. If an assertion of Executive privilege is necessary at that time, I will convey your decision to the Attorney General then.

Recommendation: I recommend you invoke executive privilege, and that you sign the attached memorandum informing the Attorney General of your decision.

_____ Approve _____ Disapprove _____ Discuss



Eugene Scalia

- cover memo
- I have reviewed

Ⓟ

September 6, 2001 Draft

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing to request that you assert executive privilege with respect to a memorandum from the Chief of the Campaign Financing Task Force to former Attorney General Janet Reno (along with related memoranda), which recommended that a Special Counsel be appointed to investigate a matter under review by the Task Force, and a large number of deliberative memoranda containing advice and recommendations concerning whether or not certain individuals should be prosecuted. The Committee on Government Reform of the House of Representatives has issued subpoenas to me demanding these documents.

I strongly believe that releasing or otherwise making these extremely sensitive prosecutorial decisionmaking documents available to Congress would compromise the ability of the Department of Justice to discharge its law enforcement responsibilities. The Attorney General and other Department decisionmakers must have the benefit of candid and confidential advice and recommendations in making investigative and prosecutorial decisions. This is especially necessary for the highly sensitive prosecutorial decision of whether to bring criminal charges against an individual. The Department's attorneys are asked to render unbiased, professional judgments about the merits of potential criminal cases. If their deliberative documents were made subject to congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providing the candid and independent analysis essential to just and effective law enforcement or, just as troubling, that they might err on the side of investigation or prosecution simply to avoid public second-guessing. This in turn would undermine public and judicial confidence in our law enforcement processes.

The Department has long believed that disclosure of documents of this kind would chill the deliberative process that is critical to the discharge of the Department's law enforcement mission and the ability of Attorneys General to receive candid, confidential recommendations from Department personnel. The Department has always sought to ensure that all law enforcement decisions are products of open, frank and independent assessments of the pertinent law and facts -- uninhibited by political and other improper influences that may be present outside the Department. If each attorney's recommendations and views can be dissected by Congress, then the free and candid flow of ideas and recommendations would certainly be jeopardized. A unanimous Supreme Court decision recognized the legitimacy of this "chilling effect" concern: "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).

The Court observed that "the importance of this confidentiality is too plain to require further discussion." Id.

Although the Department's longstanding concerns about "chilling effect" and our need to ensure the free and candid flow of ideas and recommendations clearly apply to deliberative communications at all levels of the Department, they apply with particular force to communications at the Attorney General level, such as the memorandum to former Attorney General Reno (and the responses thereto). Indeed, when the unanimous Supreme Court noted, in United States v. Nixon, that fear of public disclosure may lead officials to "temper candor," 418 U.S. at 705, the Court was referring to "communications between high Government officials and those who advise and assist them." Id. The deliberative confidentiality interests of the executive branch are at their zenith in the context of advice from senior officials to the President or to the heads of departments and agencies. Certainly, the ability of the executive branch to fulfill its constitutional duty to see that the laws are faithfully executed would be substantially undermined if the Attorney General were unable to receive candid and confidential advice from his closest advisers.

The subpoenaed memoranda on whether or not to prosecute individuals were addressed to officials at lower levels in the Department than the Attorney General. We do not believe it is appropriate, however to make these documents available. Congressional access to documents that concern decisions on whether to bring criminal charges presents significant additional concerns beyond the basic chilling effect concern, because it could constitute, or give the appearance of constituting, congressional second-guessing of the exercise of prosecutorial discretion in individual cases, which risks politicizing the prosecutorial process. We simply do not want prosecutors to prepare these types of documents in anticipation of political assessments, which could not only chill their candor but could also potentially influence their decisionmaking. We are concerned that subjecting prosecutors' personal recommendations to congressional inquiry may generate pressures to recommend bringing prosecutions we would not normally bring, or declining appropriate prosecutions, in order to avoid congressional criticism. The criminal law enforcement responsibilities committed to the executive branch should be fulfilled without regard to political considerations. In this respect, our protection of prosecution and declination memoranda is based on the same considerations as our long-standing policy not to make line prosecutors available for congressional interviews or testimony. In both instances, we are trying to preserve the independence and integrity of prosecutorial decisionmaking.

Disclosure of declination memoranda would also implicate significant individual privacy interests. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss.

The Department respects and cooperates with the legitimate exercise of Congress's oversight authority. The oversight process is an important underpinning of the legislative

process. Congressional committees need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary either to rectify practical problems in current law or to address problems not covered by current law. We have significant concerns, however, about oversight requests for prosecution and declination memoranda because they appear to be made for the purpose of second-guessing the exercise of prosecutorial discretion in individual cases. The nexus between such inquiries and oversight's purpose of helping Congress be better informed when it makes legislative decisions is questionable, and from our standpoint this kind of oversight threatens to politicize the criminal justice process. The Founders' fundamental purpose in establishing the separation of powers in the Constitution was to protect individual liberty. Legislative branch political pressure on executive branch prosecutorial decisionmaking is inconsistent with separation of powers and threatens individual liberty.

The memoranda to former Attorney General Reno and the prosecution and declination memoranda clearly fall within the scope of executive privilege. The Supreme Court has expressly recognized that the Constitution gives the President the power to protect the confidentiality of executive branch deliberations. This power is rooted in the "need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." United States v. Nixon, 418 U.S. at 705. Under controlling case law, in order to justify a demand for material protected by executive privilege, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. See McGrain v. Daugherty, 273 U.S. 135, 160 (1927) (Congress has oversight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

As noted above, the nexus between second-guessing the exercise of prosecutorial discretion in individual cases and the purpose of oversight in helping Congress be better informed when it makes legislative decisions is questionable. The Committee's proffered justification of reviewing former Attorney General Reno's decision not to appoint a Special Counsel under the Department's Special Counsel regulations is comparable to the oversight justification regarding decisionmaking under the Independent Counsel Act that was evaluated in a 1986 opinion of the Office of Legal Counsel. See Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Re: Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (1986). That opinion concluded that "[w]ith respect to decisions made by the Attorney General under the Independent Counsel Act, we believe that Congress could not justify [a demand for a decisionmaking document] based on its disagreement with the prosecutorial decision regarding appointment of an independent counsel for a particular individual. Congress simply cannot constitutionally second-guess that decision." Id. at 74.

Similarly, under the same analysis, the Committee cannot justify its demand for prosecution and declination memoranda based on its disagreement with the decisions on whether or not to prosecute the individuals that are the subjects of the memoranda. Rather, Congress's legitimate interest is more general: its "legitimate legislative interest in overseeing the Department's enforcement of [the Special Counsel regulations] and relevant criminal statutes and in determining whether legislative revisions to the [regulations or statutes] should be made." Id. Moreover, it is clear that a generalized oversight interest of the kind articulated by the Committee, see Letter to the Attorney General, from Dan Burton, Chairman, Committee on Government Reform (Aug. 29, 2001), weighs substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation. See Letter to the President, from William French Smith, Attorney General, Re: Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 30 (1981) ("[T]he interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question.").

In any event, even if the Committee has a legitimate oversight interest in these documents, I do not believe its oversight needs would be viewed by the courts as outweighing the Department's interest in the confidentiality of prosecutorial decisionmaking and its concerns about congressional influence on such decisionmaking in individual cases. Accordingly, conducting the balancing required by the case law, see Senate Select Committee, 498 F.2d at 729-30; United States v. Nixon, 418 U.S. at 706-07, I do not believe that access to these prosecutorial decisionmaking documents would be held by the courts to be "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee, 498 F.2d at 731. It is therefore my legal judgment that executive privilege may properly be asserted in response to the Committee's subpoena. I request that you do so.

Sincerely,

John Ashcroft
Attorney General

Womack

Hastert

- Staff Secretary
- 3 Presidents
- Archives
- OLC
- OMB
- this office

September 7, 2001 Draft

The President
The White House
Washington, D.C. 20500

- contempt
↳ Reno, Quinn

Dear Mr. President:

I am writing to request that you assert executive privilege with respect to a memorandum from the Chief of the Campaign Financing Task Force to former Attorney General Janet Reno (along with related memoranda), which recommended that a Special Counsel be appointed to investigate a matter under review by the Task Force, and a large number of deliberative memoranda containing advice and recommendations concerning whether or not certain individuals should be prosecuted. The Committee on Government Reform of the House of Representatives has issued subpoenas to me demanding these documents. *prosecutorial*

The Department has gone to great lengths, consistent with the constitutional and statutory obligations of the Executive Branch, to accommodate the Committee's needs concerning the prosecutorial decisions that are the subject of these documents. The Department has provided briefings that included explanations of the reasons for the decisions, and we are willing to provide further briefings. The Committee is unsatisfied with these accommodations, however, and is pressing for access to the documents themselves.

I strongly believe that releasing or otherwise making these extremely sensitive prosecutorial decisionmaking documents available to Congress would compromise the ability of the Department of Justice to discharge its law enforcement responsibilities. The authority to investigate and prosecute criminal suspects is ~~one of the core executive powers~~ vested in the President by the Executive Power and Take Care Clauses of Article II of the Constitution. In order to assist the President in fulfilling his constitutional duty, the Attorney General and other Department decisionmakers must have the benefit of candid and confidential advice and recommendations in making investigative and prosecutorial decisions.

The need for confidentiality is particularly compelling in regard to the highly sensitive prosecutorial decision of whether to bring criminal charges against an individual. The Department's attorneys are asked to render unbiased, professional judgments about the merits of potential criminal cases. If their deliberative documents were subject to congressional scrutiny, we would face the grave danger that prosecutors would be chilled from providing the candid and independent analysis essential to just and effective law enforcement. Just as troubling, the prospect of congressional review might force prosecutors to err on the side of investigation or prosecution simply to avoid public second-guessing. Such politicization of prosecutorial decisions would undermine public and judicial confidence in our law enforcement processes.

The Department has long believed that disclosure of documents would chill the deliberative process that is critical to the discharge of the Department's law enforcement mission and the ability of Attorneys General to receive candid, confidential recommendations from Department personnel. The Supreme Court has unanimously 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." United States v. Nixon, 418 U.S. 683, 705 (1974). As the Court described its concern about a chilling effect: "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." The Court observed that "the importance of this confidentiality is too plain to require further discussion." Id.

Although the Department's longstanding concerns about "chilling effect" and our need to ensure the free and candid flow of advice clearly apply to deliberative communications at all levels of the Department, they apply with particular force to communications at the Attorney General level, such as the memorandum to former Attorney General Reno (and the responses thereto). The deliberative confidentiality interests of the executive branch are at their zenith in the context of advice from senior officials to the President or to the heads of departments and agencies. We also do not believe it is appropriate to make available other subpoenaed memoranda that were addressed to officials at lower levels in the Department. Congressional access to documents that concern prosecutorial decisions present concerns about both a chilling effect and congressional second-guessing of prosecutorial discretion in individual cases. In this respect, our protection of prosecution and declination memoranda is based on the same considerations as our long-standing policy not to make line prosecutors available for congressional interviews or testimony. In both instances, we are trying to preserve the independence and integrity of prosecutorial decisionmaking.

Disclosure of declination memoranda would also implicate significant individual privacy interests. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss.

The Department respects and cooperates with the legitimate exercise of Congress's oversight authority. Congressional committees need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary. We have significant concerns, however, about oversight requests for prosecution and declination memoranda. The nexus between such inquiries and the purpose of oversight is questionable, and this kind of demand threatens to politicize the criminal justice process. Legislative branch pressure on prosecutorial decisionmaking is inconsistent with the separation of powers and thereby threatens individual liberty.

The memoranda to former Attorney General Reno and the prosecution and declination memoranda clearly fall within the scope of executive privilege. The Constitution clearly gives

the President the power to protect the confidentiality of executive branch deliberations. Under controlling case law, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. See McGrain v. Daugherty, 273 U.S. 135, 160 (1927) (Congress has oversight authority to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

We believe that the Committee has failed to provide a sufficient reason to disclose these sensitive prosecutorial documents. Congress cannot justify a demand for a decisionmaking document based on its disagreement with a prosecutorial decision. See Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Re: Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68 (1986). Rather, Congress's legitimate interests must be more general, such as overseeing the enforcement of criminal statutes and whether legislative revisions to those laws should be made. It is clear that the generalized oversight interest of the kind articulated by the Committee bears substantially less weight than a specific need in connection with the consideration of legislation. See Letter to the President, from William French Smith, Attorney General, Re: Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 30 (1981) ("[T]he interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question.").

In any event, even if the Committee has a legitimate oversight interest in these documents, its oversight needs cannot outweigh the Department's interest in the confidentiality of prosecutorial decisionmaking and our concerns about congressional influence on such decisionmaking in individual cases. I do not believe that access to these prosecutorial decisionmaking documents are "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee, 498 F.2d at 731.

It is my legal judgment that executive privilege may properly be asserted in these circumstances. I request and advise that you do so.

Sincerely,

John Ashcroft
Attorney General

DAN BURTON, INDIANA,
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
CONSTANCE A. MORELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. MCHUGH, NEW YORK
STEPHEN HORN, CALIFORNIA
JOHN L. MICA, FLORIDA
THOMAS M. DAVIS, VIRGINIA
MARK E. SOUDER, INDIANA
JOE SCARBOROUGH, FLORIDA
STEVEN C. LATOURETTE, OHIO
BOB BARR, GEORGIA
DAN MILLER, FLORIDA
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
DAVE WELDON, FLORIDA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
C.L. "BUTCH" OTTER, IDAHO
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051
TTY (202) 225-6852

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
PATSY T. MINK, HAWAII
CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCIENICH, OHIO
ROD R. BLAGOJEVICH, ILLINOIS
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE
JANICE D. SCHAKOWSKY, ILLINOIS
WM. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA

BERNARD SANDERS, VERMONT,
INDEPENDENT

September 6, 2001

*Conrad memo -
no notes after 12:00*

declination memos

satisfies needs

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Tenth & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear General Ashcroft:

*crown jewel memo to AG
core deliberative at highest level of Dept*

Attached to this letter is a subpoena for a number of Justice Department documents, some of which were the subject of my August 29, 2001, letter to you. Specifically, I have subpoenaed:

(1) the memorandum by Robert Conrad regarding the appointment of a special counsel to investigate campaign fundraising matters, as well as all related memoranda; (2) the declination memorandum for Mark Middleton; and (3) a number of memoranda relating to decisions to prosecute, or not to prosecute, a number of individuals involved in the Committee's investigation of the Justice Department's handling of organized crime investigations in New England.

*pros
memos
declination*

I do not issue this subpoena lightly. As I indicated to you when you took office, I had hoped to obtain all necessary information from the Justice Department through letter requests, rather than subpoenas. For the most part, the Justice Department has been very cooperative and responsive to the Committee's requests for information. However, as I indicated in my August 29, 2001, letter, the Department has resisted producing deliberative documents to the Committee. The Department has now announced a policy that it will not produce any internal deliberative documents regarding criminal prosecutions to Congress. As I explained in my letter, I believe that the Department's policy is wrong, both legally and practically, and it will dramatically impact the ability of Congress to conduct effective oversight of the Justice Department.

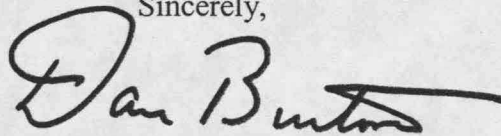
My staff and I have negotiated with you, your staff, and White House staff for several months in an attempt to reach an accommodation over this issue. I have offered a number of different accommodations which would protect the Department's legitimate interests, while still allowing the Committee to conduct effective oversight. You have not accepted any of my offers. Therefore, I have announced a hearing on this matter, and invited you to testify at the hearing. I

am issuing the attached subpoena in advance of the hearing so that the Committee's demand for the documents is clear and legally enforceable.

The attached subpoena also calls for a number of deliberative records relating to the Committee's investigation of the Department's handling of its organized crime investigations in New England. The Committee has already received extensive information indicating that the Department has a deeply troubled past in its handling of a number of confidential informants who were providing the Department with misleading information, and who were also committing serious crimes while under Departmental protection. The records called for by the Committee's subpoena are central to the Committee's investigation of why the Department refrained from prosecuting these individuals for so long.

I remain hopeful that you will reconsider the Department's position and produce the subpoenaed documents before the Committee's hearing.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dan Burton". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Dan Burton
Chairman

cc: Members, Committee on Government Reform

**By Authority of the House of Representatives of the
Congress of the United States of America**

To United States Department of Justice Serve: Attorney General John Ashcroft

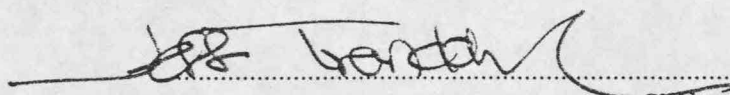
You are hereby commanded to produce the things identified on the attached schedule before the
..... full Committee on Government Reform
of the House of Representatives of the United States, of which the Hon.
..... Dan Burton is chairman, by producing such things in Room 2157 of the
..... Rayburn Building , in the city of Washington, on
..... September 11, 2001 , at the hour of 5:00 PM

To Danleigh Halfast or US Marshals Service
to serve and make return.

Witness my hand and the seal of the House of Representatives
of the United States, at the city of Washington, this
..... 6th day of September, ~~19~~ 2001


.....
Chairman.

Attest:


.....
Clerk.

Subpoena for U.S. Department of Justice

Serve: Attorney General John Ashcroft

Tenth Street & Constitution Avenue N.W.

Washington, D.C. 20530

before the Committee on the

Government Reform

Served To: Faith Burton

By: Danleigh Halfast

via hand delivery

9/6/01

1:00 PM

Danleigh Halfast

House of Representatives

SCHEDULE A

**Subpoena Duces Tecum
Government Reform Committee
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515**

United States Department of Justice
Serve: Attorney General John Ashcroft
Tenth Street & Constitution Avenue N.W.
Washington, D.C. 20530

The Committee hereby subpoenas certain records. Please provide logs which indicate each record's Bates number, author, description, and source file. If you have any questions, please contact Chief Counsel James C. Wilson at (202) 225-5074.

Definitions and Instructions

(1) For the purposes of this subpoena, the word "record" or "records" shall include, but shall not be limited to, any and all originals and identical copies of any item whether written, typed, printed, recorded, redacted or unredacted, transcribed, punched, taped, filmed, graphically portrayed, video or audio taped, however produced or reproduced, and includes, but is not limited to, any writing, reproduction, transcription, photograph, or video or audio recording, produced or stored in any fashion, including any and all activity reports, agendas, analyses, announcements, appointment books, briefing materials, bulletins, cables, calendars, card files, computer disks, cover sheets or routing cover sheets, drawings, computer entries, computer printouts, computer tapes, external and internal correspondence, diagrams, diaries, documents, electronic mail (e-mail), facsimiles, journal entries, letters, manuals, memoranda, messages, minutes, notes, notices, opinions, statements or charts of organization, plans, press releases, recordings, reports, Rolodexes, statements of procedure and policy, studies, summaries, talking points, tapes, telephone bills, telephone logs, telephone message slips, records or evidence of incoming and outgoing telephone calls, telegrams, telexes, transcripts, or any other machine readable material of any sort whether prepared by current or former employees, agents, consultants or by any non-employee without limitation. "Record" or "records" shall also include all other records, documents, data and information of a like and similar nature not listed above.

(2) For purposes of this subpoena, the terms "refer" or "relate" and "concerning" as to any given subject means anything that constitutes, contains, embodies, identifies, mentions, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

(3) This subpoena calls for the production of records, documents and compilations of data

and information that are currently in your possession, care, custody or control, including, but not limited to, all records which you have in your physical possession as well as any records to which you have access, any records which were formerly in your possession, or which you have put in storage or anyone has put in storage on your behalf. Unless a time period is specifically identified, the request includes all documents to the present.

(4) The conjunctions "or" and "and" are to be read interchangeably in the manner that gives this subpoena the broadest reading.

(5) No records, documents, data or information called for by this subpoena shall be destroyed, modified, redacted, removed or otherwise made inaccessible to the Committee.

(6) If you have knowledge that any subpoenaed record, document, data or information has been destroyed, discarded or lost, identify the subpoenaed records, documents data or information and provide an explanation of the destruction, discarding, loss, deposit or disposal.

(7) When invoking a privilege as to any responsive record, document, data or information as a ground for withholding such record, document, data or information, list each record, document, compilation of data or information by data, type, addressee, author (and if different, the preparer and signatory), general subject matter, and indicated or known circulation. Also, indicate the privilege asserted with respect to each record, document, compilation of data or information in sufficient detail to ascertain the validity of the claim of privilege.

(8) This subpoena is continuing in nature. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date shall be provided immediately upon location or discovery subsequent thereto.

Subpoenaed Items

Please produce to the Committee the following records.

1. All records related to decisions either to prosecute, or refrain from prosecuting, Stephen Flemmi, including, but not limited to, records relating to decisions to prosecute, or refrain from prosecuting Flemmi for the bombing assault on attorney John Fitzgerald. Please exclude all records drafted in anticipation of, or subsequent to, the 1995 indictment of Stephen Flemmi.
2. All records related to decisions either to prosecute, or refrain from prosecuting, James J. "Whitey" Bulger. Please exclude all records drafted in anticipation of, or subsequent to, the 1995 indictment of James J. "Whitey" Bulger.
3. All records related to decisions either to prosecute, or refrain from prosecuting, Joseph Barboza.

4. All records related to decisions either to prosecute, or refrain from prosecuting, Vincent J. "Jimmy the Bear" Flemmi.
5. All records related to decisions either to prosecute, or refrain from prosecuting, Raymond L. S. Patriarca.
6. All records related to decisions either to prosecute, or refrain from prosecuting, Gennaro Angiulo.
7. All records related to decisions either to prosecute, or refrain from prosecuting, Theodore J. Sharliss, a.k.a. James Chalmas.
8. All records related to decisions either to prosecute, or refrain from prosecuting, Joseph "J.R." Russo.
9. All records related to decisions either to prosecute, or refrain from prosecuting, H. Paul Rico. Please exclude all records prepared by the Justice Department Task Force led by John Durham.
10. All records related to decisions either to prosecute, or refrain from prosecuting, John Connolly, Jr. Please exclude all records prepared by the Justice Department Task Force led by John Durham.
11. All records related to decisions either to prosecute, or refrain from prosecuting, John Morris.
12. All records related to decisions to prosecute Francis P. Salemme for the bombing assault on attorney John Fitzgerald.
13. All records related to decisions to prosecute, or to refrain from prosecuting, Robert Daddeico.
14. Any report or memorandum by Robert Conrad recommending the appointment of a special counsel to investigate campaign fundraising matters, and all memoranda drafted in response to Mr. Conrad's memorandum, including any replies or rebuttals by Mr. Conrad.
15. All declination memoranda relating to Mark E. Middleton.



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D. C. 20530

November 23, 1993

MEMORANDUM FOR JANET RENO
ATTORNEY GENERAL

From: Walter Dellinger
Assistant Attorney General

Re: Congressional Demands to Interview Prosecutors And Review Deliberative Documents in Closed Cases

At your request, I have prepared this memorandum evaluating a hypothetical legal dispute between a congressional committee and the Department of Justice concerning the committee's demands to interview prosecutors about their deliberations in particular closed criminal cases and to review deliberative documents in those cases.¹ Section I.A. discusses the accommodation process that should be undertaken to avoid an impasse, but the remainder of the memorandum assumes that accommodation has failed, that the committee has subpoenaed the prosecutors to testify at a hearing and the Attorney General to produce the documents to the committee, and that the President has asserted executive privilege and directs the prosecutors and the Attorney General not to comply with the subpoenas.

The most probable forum in which the issue would be joined is a civil action to enforce the subpoenas. The Department would justifiably decline to bring any criminal contempt prosecution referred by Congress, and would also justifiably conclude that there was no legal basis for appointment of an independent counsel. It is theoretically possible, but practically almost inconceivable, that Congress would seek to employ its inherent contempt power by asking its Sergeant-at-Arms to arrest the recipients of the subpoenas.

This memorandum assumes that certain well-established, more specific privileges or protections are not at issue, either because there are not factual bases for asserting them or because the committee has acquiesced in their assertion. Such privileges or protections, which would justify declining to answer specific questions or withholding or redacting particular documents, include the grand jury secrecy requirement of Rule 6(e) of the Federal Rules of Criminal Procedure and the policies protecting confidential sources, the privacy and due process rights of individuals, and the integrity of open investigations or prosecutions. Thus, the dispute has distilled to the question of direct committee questioning and access to documents on the topic of prosecutorial deliberations on specific criminal charges in closed cases.

Once the issue is joined, it is my considered opinion that the Department would prevail. It is possible that the courts would conclude that the question itself is not justiciable, although this seems less likely than their reaching the merits. On the merits, the question becomes one of weighing the competing interests: the Executive's interests in deliberative confidentiality and independence with respect to prosecutorial decisionmaking and the Congress's interests in disclosure of this particular information in order to perform oversight or to consider specific legislative reforms. Once these competing interests are sharply defined, the Executive's interests should be seen as substantial, while the Congressional interests in disclosure should be seen as attenuated. Hence, the claim of privilege should be sustained. (I have not evaluated the quite considerable political and personal impact of any contempt proceeding in Congress, criminal contempt referral, request for appointment of an independent counsel, or litigation.)

Part I of this memorandum considers issues with respect to the various fora in which the Congress might seek to enforce its subpoenas, including the accommodation process that the courts have suggested must be employed to seek voluntary resolution of such Executive-Congressional disputes. Part II analyzes preliminary issues with respect to the existence of an executive privilege applicable to intra-branch or intra-agency deliberations, as opposed to deliberations among the President and his intimate advisors. It also examines the extent of the Congress's legitimate interest in the kind of information the memorandum assumes is being sought. Finally, it confronts the clash of competing interests directly, analyzing their relative strengths.

I. Procedures for Resolving the Dispute

A. Accommodation Process

Before either branch concludes that a dispute over Congressional access to information cannot be resolved, it is well established that the Department and the relevant committees of the Congress should first work together to identify the legitimate institutional and constitutional interests of each branch, seeking to find an accommodation that satisfies each sufficiently to avoid ultimate disagreement. The D.C. Circuit Court of Appeals has insisted on efforts at negotiated settlements in advance of any final judicial resolution of the dispute, suggesting that this is a constitutionally based requirement:

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

optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

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

United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (footnotes omitted). As former Attorney General William French Smith has opined, "[t]he accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." Opinion of the Attorney General for the President, Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) (emphasis added).

Reflecting historical executive branch practice, President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" articulated just such a policy of accommodation when Congress seeks confidential executive branch information:

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

The actual accommodation process followed in an individual case will, of course, depend on the specific circumstances. The basic approach of the Department should be to meet with committee staff to identify their specific information needs and explore alternative ways of satisfying those needs other than interviews of prosecutors or access to deliberative documents. The Department's experience with the accommodation process has demonstrated that good faith communications between Department and congressional staff resolve almost all difficulties as they arise. Only in exceptional circumstances have negotiations broken down and a committee issued a subpoena. This memorandum now addresses that contingency with respect to our hypothetical dispute.

B. Procedures to Test the Subpoena

The Supreme Court has held that the Speech or Debate Clause of the Constitution (art. I, sec. 6, cl. 1) bars a suit to enjoin a congressional subpoena. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). Thus, it appears that the only way to challenge the subpoena would be through the contempt of Congress process or some other enforcement process initiated by Congress.² In order for a recipient of a subpoena to have executive privilege available as a defense in both contempt of Congress proceedings and a subsequent judicial action, the President must assert executive privilege. In order to demonstrate convincingly that a recipient was not in willful default, the President should issue an instruction to assert executive privilege before the return date of the subpoena.³

If Congress refuses to defer to or acquiesce in the President's assertion of executive privilege,⁴ and determines that the recipients of the subpoenas are in contempt of Congress, it might attempt to impose sanctions through any of three methods. First, it might refer the matter to a United States Attorney for criminal prosecution for contempt of Congress. Second, the Sergeant-at-Arms theoretically could be dispatched to arrest the individuals and detain them in the Capitol. Third, and the most likely option due to legal and practical difficulties associated with the first two options, the Senate or House might bring a civil action to obtain a judicial order requiring compliance with the subpoenas.

1. Criminal Contempt of Congress Referral

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

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any

² See United States v. House of Representatives, 556 F. Supp. 150, 153 (D.D.C. 1983) ("Judicial resolution of this constitutional claim [President Reagan's assertion of executive privilege regarding congressional subpoena to Environmental Protection Agency Administrator Anne Burford] will never become necessary unless Administrator [Burford] becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress.").

³ Not only is the President's assertion of executive privilege necessary in order to provide a legal defense, it is also quite important as a political matter. The Department's ability to achieve a successful resolution of the dispute within the Congress, which is fundamentally a political process, would be greatly enhanced by having the visible backing of the President. The privilege claim would make it clear that the controversy involved the interests of the Presidency and not just the Department.

⁴ Our research has revealed only one Presidential executive privilege claim when Congress has neither deferred to or acquiesced in the claim and has attempted to enforce its demand. This incident, involving efforts to enforce the subpoena to Environmental Protection Agency Administrator Anne Burford is discussed at pages 4-7, infra.

matter under inquiry before either House . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than 1 month nor more than 12 months.

Section 194 imposes certain responsibilities on the Speaker of the House or the President of the Senate, and on the United States Attorney, to take actions leading to the prosecution of persons certified by a House of Congress, or a committee of either House, to have failed to comply with a subpoena:

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

The contempt of Congress procedure has been used only once against an executive branch official who refused to comply with a subpoena on executive privilege grounds. In 1982, Anne Burford, Administrator of the Environmental Protection Agency ("EPA"), acting at President Reagan's direction and upon his assertion of executive privilege, refused to release certain enforcement sensitive documents in response to a subpoena from a House subcommittee. The subcommittee, its full committee, and ultimately the full House of Representatives adopted a contempt of Congress resolution, and the Speaker certified the contempt to the United States Attorney for the District of Columbia for prosecution under section 192.

The United States Attorney declined to refer the contempt citation to the grand jury, pending resolution of a lawsuit filed by the executive branch to block enforcement of the subpoena and completion of negotiations between the executive and legislative branches to reach a compromise settlement. The district court dismissed the suit on prudential grounds, calling upon the parties to settle the controversy. United States v. House of Representatives.

556 F. Supp. at 152-53. Agreement ultimately was reached, and the contempt citations withdrawn.⁵

During the course of the EPA matter, the Attorney General relied on oral advice from this Office, since memorialized in a lengthy memorandum, on the applicability of sections 192 and 194 to executive branch officials who assert claims of executive privilege on behalf of the President. Opinion for the Attorney General, Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101 (1984) ("Contempt Memorandum"). Our conclusion was that a United States Attorney is not required to refer a contempt citation to a grand jury or otherwise to prosecute an executive branch official who is carrying out the President's instruction to assert executive privilege.

Our conclusion rested partly on the need to preserve traditional prosecutorial discretion -- i.e., that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion in the Executive to determine whether a violation of the law has occurred. We also concluded more broadly, however, that the contempt of Congress statute simply was not intended to apply and could not constitutionally be applied to an executive branch official who asserts the President's claim of executive privilege. We noted that neither the legislative history nor the subsequent implementation of sections 192 and 194 suggest that Congress intended the statute to apply to executive officials who carry out a presidential assertion of executive privilege. Moreover, as a matter of constitutional law, we concluded that the threat of criminal prosecution would unduly chill the President's ability to protect presumptively privileged executive branch deliberations:

The President's exercise of [executive] privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Since

⁵ As a matter of consistent historical practice, a contempt of Congress vote by a subcommittee is referred to the full committee, although there appears to be no technical requirement to interpose committee approval between a subcommittee contempt resolution and referral to the full House. After full committee action, House Rule XI(m)(2)(B) comes into play. It provides that "[c]ompliance with any subpoena . . . may be enforced only as authorized or directed by the House." Thus, the House would have to vote to approve any action to enforce a subpoena. See In Re Beef Industry Antitrust Litigation, 589 F.2d 786, 790-01 (5th Cir. 1979). Although 2 U.S.C. § 194 authorizes the Speaker to act for the House when Congress is not in session, this House rule may be read to require the Speaker to obtain authorization from the House before making a criminal referral to the United States Attorney. A case decided prior to adoption of the House rule held that despite the apparently mandatory language of section 194, the Speaker is not required to make an automatic criminal referral during recess periods and indeed has the obligation to give the matter additional consideration after action by a full committee. Wilson v. United States, 369 F.2d 198, 201-05 (D.C. Cir. 1966). The D.C. Circuit has emphasized the importance of the procedural safeguards built into the contempt of Congress process, particularly the multiple steps of review. See Wilson v. United States, *id.* at 203; United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1260 (1973); Sanders v. McLellan, 463 F.2d 894 (1972); Ansara v. Eastland, 442 F.2d 751, 754 (1971). As discussed below, we believe that the House is more likely to seek enforcement through a civil action than a criminal referral. Under the House rule, authorization from the full House would also be necessary for a civil action.

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 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.

Contempt Memorandum at 3.

Thus, it is the established position of the Department that Congress cannot successfully invoke the criminal contempt of Congress procedure set out in 2 U.S.C. §§ 192 and 194 against executive branch officials or employees, if they have acted on the instructions of the President to assert executive privilege in response to a congressional subpoena. The Department can simply decline to prosecute the individuals.

It is possible that in light of this established Department position Congress might attempt to invoke the provisions of the Independent Counsel Act, if it is reauthorized. That Act required the Attorney General to conduct an investigation "whenever [she] receives information sufficient to constitute grounds to investigate" that any of the enumerated executive branch officials has committed a violation of any Federal criminal law other than a violation constituting a petty offense. 28 U.S.C. § 591. The crime of contempt of Congress is a non-petty criminal offense. See 2 U.S.C. § 192, 18 U.S.C. § 1. Thus, a contempt citation against a covered official would arguably trigger the Attorney General's obligation under the Act.

I do not believe, however, that invocation of the Act would require the Attorney General to apply for the appointment of an independent counsel. The Attorney General retains discretion with respect to whether to apply for an independent counsel. Since it is our position that the criminal contempt provisions cannot be enforced against an executive branch officer or employee who asserts executive privilege at the direction of the President, the Attorney General could conclude in such circumstances that there was no underlying criminal violation to trigger the Act.

2. Congress' Inherent Contempt Power

A second alternative would be for the House of Congress to instruct its Sergeant-at-Arms to arrest the executive branch official or employee and detain him in the Capital guardroom. The arrest could then be challenged by petition for a writ of habeas corpus. 28 U.S.C. §§ 2241 *et seq.*

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

Congress has not attempted to use this authority for over fifty years, and it seems most unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an executive branch official or employee acting at the direction of the President. Moreover, while these older Supreme Court precedents do support the right of Congress to imprison individuals for contempt, there is some question whether such authority would continue to be upheld. The Supreme Court has become more wary of Congress' exercising judicial authority:

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

United States v. Lovett, 328 U.S. 303, 317 (1946); see also United States v. Brown, 381 U.S. 437 (1965); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 962, 966 (1983) (Powell, J., concurring). The Court has also been careful in recent cases to restrict Congress to its legislative functions and not to permit it to exercise authority belonging to another branch. See generally Bowsher v. Synar, 478 U.S. 714 (1986), INS v. Chadha, and Buckley v. Valeo, 424 U.S. 1 (1976). The current Court therefore may not afford Congress the same latitude with respect to its inherent contempt power that was provided during the 19th and early 20th centuries.

In any event, the same considerations that inform the analysis of the applicability of the criminal contempt of Congress statute to executive branch officials are relevant to an exercise of Congress's inherent contempt power. In the memorandum addressing the EPA controversy, we noted that the reach of the criminal contempt statute was intended to be coextensive with Congress's inherent contempt powers (except with respect to the penalties imposed), and we concluded that "the same reasoning that suggests that the statute could not constitutionally be applied against a presidential assertion of privilege applies to Congress's inherent contempt powers as well." Contempt Memorandum at 62, n. 58.

3. Civil Action to Enforce Subpoenas

In light of the difficulties with the first two options, the most likely route for Congress to take would be to file a civil action seeking enforcement of the subpoenas. The initial obstacle to this option is that there is no statute that expressly grants the federal courts jurisdiction over such suits. There are, however, at least two precedents for bringing such civil suits under the federal question jurisdiction in 28 U.S.C. § 1331. In 1973 the Senate

Select Committee on Presidential Campaign Finances sought civil enforcement of its subpoena of presidential tapes and documents: the Committee urged, inter alia, that section 1331 provided subject matter jurisdiction. The district court found that the \$10,000 jurisdictional amount in controversy requirement was not satisfied and held that jurisdiction was therefore lacking under section 1331; it did not suggest that there was any other basis for denying federal question jurisdiction. Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 59-61 (D.D.C. 1973). Legislation was subsequently enacted to authorize jurisdiction over that particular suit. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (en banc). Section 1331 has since been amended to eliminate the \$10,000 amount in controversy limitation in actions brought against the United States. Pub. L. No. 96-486, Section 2(a), 94 Stat. 2369 (1980).

General federal question jurisdiction was also used as a basis for the civil suit filed by the Department of Justice against the House of Representatives in the EPA matter. See United States v. House of Representatives, supra. The Department took the position in that case that the controversy arose under the Constitution and laws of the United States, because resolution "depend[ed] directly on construction of the Constitution [and the] Court has consistently held such suits are authorized by [section 1331]." Powell v. McCormick, 395 U.S. 486, 516 (1969), quoted in Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss ("Department Brief") at 22. Citing the decision in United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976), which held that an action brought by the United States to block a response by a third party to a congressional subpoena met the threshold jurisdictional requirements of section 1331, the Department argued that subject matter jurisdiction similarly exists in a suit to halt enforcement of a subpoena addressed directly to the executive branch. Id. at 19-21.⁶ The rationale used by the Department in this suit would appear to apply equally to suits filed by a House of Congress seeking enforcement of its subpoena against executive privilege claims.

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

⁶ As mentioned above, the district court dismissed the Department's suit on prudential grounds. The court noted that a variety of legal arguments for dismissing the case had been presented, including the assertion that there was no subject matter jurisdiction, 556 F. Supp. at 152, but it decided to encourage settlement between the political branches and therefore found "that to entertain this declaratory judgment action would be an improper exercise of the discretion granted by the Declaratory Judgment Act, 28 U.S.C. § 2201." Id. at 153.

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

418 U.S. at 691-692.

Thus, a court might find that it had jurisdiction to consider a civil enforcement suit under 28 U.S.C. § 1331. In that event, the Department might argue that the suit should be barred by the "political question" doctrine, see Baker v. Carr, 369 U.S. 186 (1962), because "[t]he question . . . whether or not the legislative need for information outweighs the executive need for confidentiality . . . is the very type of 'political question' from which, even under Baker v. Carr [citation omitted], the courts abstain" since there would be a "lack of judicially discoverable and manageable standards for assessing the relative importance of a congressional need for information and an executive requirement of secrecy." Executive Privilege -- Secrecy in Government: Hearings on S. 2170, S. 2378, S. 2420 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 117 (1976) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel).

Although I believe that the Department could make a good argument that the courts should decline to take jurisdiction because of the political question doctrine,⁷ that argument would have difficulty surmounting the precedent of United States v. Nixon, in which the Supreme Court clearly asserted its role as ultimate arbiter of executive privilege questions. 418 U.S. at 703-705. See also Nixon v. Sirica, 487 F.2d 700, 712-716 (D.C. Cir. 1973) (en banc) (per curiam). Moreover, the D.C. Circuit Court of Appeals has resolved on the merits an executive privilege dispute between a congressional committee and the executive branch, see Senate Select Committee v. Nixon, *supra*, and the need for judicial review was emphasized by this Department in the United States v. House of Representatives litigation as a basis for the court to entertain the suit: "Only judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of government operations . . . [J]udicial intervention is now urgently needed, because it is the only way left to resolve in an acceptable fashion the critically important issues that give rise to this unique suit." Department Brief at 2-3.

⁷ See Memorandum for Dick Thornburgh, Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, re: Rocky Flats Document Dispute, at 11, n.7 (Jan. 29, 1990); Memorandum for C. Boyden Gray, Counsel to the President, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, re: Congressional Access to Presidential Communications, at 11 n.11, 13 n.14 (Dec. 21, 1989).

In summary, although it is possible that the courts would consider this matter non-justiciable, I believe it is more likely that the courts would reach the merits. This memorandum now turns to the merits.

II. Resolving the Dispute on the Merits

There are two possible grounds for a decision on the merits that would enable a court to avoid a decision on the competing interests of the Congress and the Executive. A court might decide that Congress lacked oversight jurisdiction sufficient to make its demand for the information legitimate. Conversely, it might decide that executive privilege did not extend to the deliberations of lower-level executive officials. These two potentially dispositive questions are analyzed in the first two sections of this part. Neither outcome seems likely. Therefore, a court hearing this dispute will ultimately be faced with a direct resolution of the conflict between two competing, legitimate claims. The final section of this part analyzes that conflict.

A. Extent of Congressional Oversight Jurisdiction

Congress's investigative power, while broad, is not unlimited. Thus, it may be possible in certain cases to argue that the congressional committee has no jurisdiction to request the interviews or documents, either because Congress as a whole has no authority to inquire into the matter or because Congress has not given the committee the requisite authority.

The Supreme Court has not articulated with precision whether there are particular limits to the jurisdiction of Congress to request information from the executive branch. Nonetheless, Congress must at a minimum be able to articulate a legitimate legislative purpose for its inquiry. Thus, if the matter either falls exclusively within the province of another branch or Congress cannot point to some rational nexus between the inquiry and its legislative power, see Barenblatt v. United States, 360 U.S. 109, 111-112 (1959), a subpoena and any resulting contempt citation should be held invalid for lack of authority. Moreover, the committee must also have been specifically authorized to conduct the investigation. Since defiance of a subpoena raises the possibility of criminal prosecution, "a clear chain of authority from the House to the questioning body is an essential element of the offense." Gojack v. United States, 384 U.S. 702, 716 (1966). It "must appear that Congress empowered the Committee to act, and further that at the time the witness allegedly defied its authority, the Committee was acting within the power granted to it." Id. Thus, a witness cannot be compelled to answer questions that fall outside the investigative jurisdiction of a committee or subcommittee. See United States v. Rumely, 345 U.S. 41 (1953).

While these general principles are well established, in practice the courts have given considerable deference to a congressional committee's definition of its jurisdiction.⁴ The courts have suggested that the power of either the witness or the court to define the scope of a committee's jurisdiction is limited. In Barenblatt, the Court noted that it "goes without saying that the scope of the Committee's authority was for the House, not a witness, to determine, subject to the ultimate reviewing responsibility of this Court." 360 U.S. at 124. Similarly, "it is appropriate to observe that just as the Constitution forbids the Congress to enter fields reserved to the Executive and Judiciary, it imposes on the Judiciary the reciprocal duty of not lightly interfering with Congress' exercise of its legitimate powers." Hutcheson v. United States, 369 U.S. 599, 622 (1962). See also Tenney v. Brandhove, 341 U.S. 367, 378 (1951) (limited prerogative of the judiciary to determine whether investigation is within jurisdiction of a particular committee).

A congressional demand to interview prosecutors and review case files may present the relatively rare case where Congress lacks congressional oversight jurisdiction, because the exercise of prosecutorial discretion in a particular case might not be a proper subject of a congressional oversight inquiry. "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive." Barenblatt v. United States, 360 U.S. at 111-112.

The exercise of prosecutorial discretion has been recognized as a peculiarly executive branch function. In United States v. Nixon, the Court repeated without disagreement the President's argument that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." 418 U.S. at 693. Other cases contain similar language. See, e.g., Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("the decision of a prosecutor . . . not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed'").

This does not mean, however, that Congress lacks oversight authority in this area. The constitutional role of Congress is to adopt general legislation that will be implemented -- "executed" -- by the executive branch. The Supreme Court has recognized that this general legislative interest carries with it an implied authority "to make investigations and exact testimony to the end that [Congress] may exercise its legislative function advisedly and effectively." McGrain v. Daugherty, 273 U.S. 135, 161 (1927). It is quite pertinent to the present discussion to note that the Supreme Court held in McGrain v. Daugherty that

⁴ In cases in which the courts have actually refused to enforce a subpoena because the inquiry fell outside of the committee's jurisdiction, the primary defect was that the investigative authority given to the committee was simply so broad and ill-defined that it gave the witness no fair notice of the scope of the inquiry. See, e.g., Watkins v. United States, 354 U.S. 178, 204 (1957); United States v. Rumely, 345 U.S. 41, 46-47 (1953).

Congress has the authority to investigate the failure of the Department of Justice to bring criminal prosecutions:

[T]he subject to be investigated was the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers -- specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

273 U.S. at 177-78.⁹

No issue was raised in McGrain regarding congressional access to confidential executive branch information, and there was no consideration of the doctrine of prosecutorial discretion or the limits on the manner in which Congress might review an alleged Justice Department failure to prosecute cases. Notwithstanding the differences in the type of information sought in McGrain compared to our hypothetical dispute, McGrain stands for the proposition that Congress can have legitimate purposes for inquiring into the subject matter of criminal prosecutions by the Department. In light of this, the significance of the peculiarly executive nature of the exercise of prosecutorial discretion in particular cases would seem to relate not to the issue of the legitimacy of Congress's purpose, but rather to the strength of the Executive's interest concerning the manner in which Congress inquires into the subject. We return to this point in the final part of this section.¹⁰

⁹ McGrain concerned a congressional subpoena to the brother of Attorney General Harry Daugherty, as part of an investigation of "Teapot Dome" allegations that the Department had improperly declined to bring certain prosecutions.

¹⁰ Both Heckler and Nixon can be read consistently with McGrain. Each involved the question of whether prosecutorial discretion in specific cases was judicially reviewable. Judicial review always carries with it the potential of judicial overruling, and it may be that the Court was using the term "discretion" in these cases simply to indicate that the executive had the final say in specific cases. When Congress conducts oversight, it typically does not claim to be seeking to overrule prosecutorial judgments in specific cases. Instead, it claims to be evaluating the exercise of that discretion for purposes of future decisions the Congress might make, such as reductions or increases in budget allocations, amendments to underlying legislation, or restructuring of governmental functions. Heckler and Nixon might well mean that Congress cannot reverse an executive prosecutorial decision, but they do not seem to preclude Congress from examining the exercise of prosecutorial

B. Executive Privilege for Prosecutorial Deliberations

Executive privilege is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution. It has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the unanimous Supreme Court in United States v. Nixon, 418 U.S. 683, 705-06 (1974). "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." Id. at 708.

Explaining the rationale for an executive privilege for deliberative communications, the Supreme Court stated in United States v. Nixon that

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.

Id. at 705. Often, someone's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. People may change their views, or make mistakes that which others correct; this is indeed the purpose of internal debate. If participants in such deliberations must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context, they are likely to be inhibited in engaging in candid debate. Some may hesitate -- out of self-interest -- to make remarks that might later be used against their colleagues or superiors.

United States v. Nixon concerned a judicial branch demand for privileged executive branch material, but the courts have also recognized a privilege for confidential executive branch communications in the specific context of congressional requests for such communications. "The presumption against any judicially compelled intrusion into presidential confidentiality, and the showing requisite to its defeat, hold with at least equal force" in the context of a subpoena from a congressional committee. Senate Select Committee v. Nixon, 498 F.2d at 731.¹¹ Indeed, in my view the prospect that predecisional deliberative communications will be disclosed to Congress is, if anything, more likely to chill internal debate among executive branch advisers than the possibility of

discretion when relevant to valid Congressional purposes.

¹¹ See also United States v. AT&T, 567 F.2d at 129 (executive privilege may be asserted against a congressional subpoena even where a third party corporation has possession of the subpoenaed documents).

disclosure to the judicial branch. When the Supreme Court held that the need for presidential communications in the criminal trial of President Nixon's close aides outweighed the constitutional privilege, an important premise of its decision was that it did not believe that "advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712. By contrast, congressional requests for executive branch deliberative information are anything but infrequent. Moreover, compared to a criminal prosecution, a congressional investigation is usually sweeping, its issues are seldom narrowly defined, and the inquiry is not restricted by the rules of evidence. Finally, when Congress is investigating, it is by its own account often in an adversarial position to the executive branch. Its interest, generally, is in checking the executive branch and initiating action to override judgments made by the executive branch. This increases the likelihood that candid advice from executive branch advisers will be taken out of context or misconstrued.

United States v. Nixon is the only Supreme Court case law on the applicability of executive privilege to deliberative communications, and it focused on Presidential communications rather than the intra-agency deliberations at issue in the hypothetical dispute. Within the executive branch, however, executive privilege has long been understood to extend to deliberative communications throughout the executive branch. For example, during the so-called Army-McCarthy hearings in 1954, President Eisenhower sent a letter to the Secretary of Defense, directing that executive privilege be claimed for communications not involving the President himself, citing the need for "employees of the Executive Branch [to] be in a position to be completely candid in advising with each other on official matters" The Public Papers of the Presidents, Dwight D. Eisenhower, 1954, at 483 (emphasis added).

President Kennedy reaffirmed the applicability of executive privilege to communications not involving the President by asserting executive privilege in response to a request from Senator Thurmond asking for the names of government employees who had recommended changes in speeches prepared by lower-level Department of Defense employees for delivery by military personnel. A letter from the President to Secretary of Defense Robert McNamara made plain that the assertion of privilege covered communications that did not personally involve the President or his close advisors:

[I]t would not be possible for you to maintain an orderly Department and receive the candid advice . . . 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.

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 (1962). Chairman Stennis sustained the claim of executive privilege, and the Subcommittee

upheld his ruling. See History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. O.L.C. 751, 777 (1982).

In 1980, President Carter authorized the assertion of executive privilege to protect executive branch deliberative documents concerning the decision to impose a conservation fee on imports of crude oil and gasoline. The withheld documents included not only documents reflecting the presidential deliberative process on that decision, but also documents relating solely to the internal deliberative process of the Department of Energy. See id. at 779-80.

In 1981, President Reagan asserted executive privilege and directed the Secretary of Interior to withhold certain documents requested by the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives. Although some of the documents concerned communications from foreign officials or deliberations of the President's Cabinet, the bulk of the documents

reflect[ed] internal deliberations within the Department of the Interior Some of these documents [were] staff level advice to policymakers containing recommendations regarding decisions which ha[d] not yet become final. Others contain[ed] internal Interior Department deliberations regarding its participation in [Cabinet deliberations]. Still other documents reflect[ed] tentative legal judgments In addition, the subpoena encompass[ed] 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, [were] of a highly deliberative nature and involve[d] an ongoing decisional process of considerable sensitivity.

Opinion of the Attorney General for the President, Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 28-29 (1981).¹²

The case law that exists on the subject of executive privilege fully supports the executive branch's tradition position that executive privilege protects intra-agency deliberations. Most significantly, the Supreme Court's unanimous decision in United States v. Nixon 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" 418 U.S. at 705 (emphasis added). In addition, in one of the principal cases leading up to United States v. Nixon, the D.C. Circuit Court of Appeals appears to have assumed that executive privilege applies throughout the executive branch. In its per curiam opinion in Nixon v. Sirica, the court, sitting en banc, stated:

¹² President Bush asserted executive privilege in response to congressional subpoenas for intra-agency deliberative documents on two occasions in 1991: first with respect to an Office of Legal Counsel opinion for the Attorney General regarding the extraterritorial arrest authority of the Federal Bureau of Investigation, and next with respect to a Defense Department memorandum setting forth advice and recommendations for a decision by the Deputy Secretary on the A-12 aircraft program.

We of course acknowledge the long-standing judicial recognition of Executive privilege. Courts have . . . responded to Executive pleas to protect from the light of litigation "intra-governmental documents reflecting . . . deliberations comprising part of a process by which governmental decisions and policies are formulated." In so doing, the Judiciary has been sensitive to the considerations . . . [that] the candor of Executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public.

487 F.2d at 713, quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, 40 F.R.D. 318, 324 (D.D.C. 1966). See also Nixon v. Sirica, 487 F.2d at 730-37 (MacKinnon, J., concurring in part and dissenting in part) (surveying history of Presidential assertions of executive privilege to Congress).

Thus, although the Supreme Court has not yet had occasion to consider an executive privilege claim covering intra-agency deliberation communications, it seems clear on the basis of the holding and rationale in United States v. Nixon and the lower court case law illustrated by Nixon v. Sirica that the Court would hold that such communications are within the scope of the privilege.¹³ There would appear to be no logical basis to conclude that although the President has a confidentiality interest in his own communications that can be protected by executive privilege against demands by the coordinate branches, the privilege may not be used to protect the deliberations of the executive branch officials upon whom he relies in discharging his constitutional responsibilities, especially the core function of enforcing the criminal laws.

C. Executive Privilege vs. Congressional Interests

As United States v. Nixon makes clear, the executive privilege for deliberative communications is a "qualified" privilege, one which can be outweighed by competing interests of a coordinate branch of government. Judicial decisions have not expressly defined the methodology for weighing these competing interests. In Senate Select Committee, the D.C. Circuit adjudicated a congressional-executive dispute using the standard of "whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." 498 F.2d at 731. Later, a different panel of the same court characterized Senate Select Committee simply as a decision in which the court "balanc[ed] executive and legislative interests . . . weigh[ing] . . . the President's claim of privilege against the interest that would be served by disclosure . . ." United States v. American Telephone and Telegraph, 567 F.2d at 128-29. In United States v. Nixon, the Supreme Court concluded that "[t]he generalized assertion of privilege must yield to the demonstrated,

¹³ In recognizing the validity of an executive privilege to protect the deliberative process, the courts have drawn analogies to the deliberative privileges afforded members of Congress and their aides and to the privileges among judges and between judges and their law clerks. See Nixon v. Sirica, 487 F.2d at 717; Senate Select Committee, 498 F.2d at 729.

specific need for evidence in a pending criminal trial," in a situation where the evidence sought was "specific and central to the fair adjudication of a particular criminal case in the administration of justice." 418 U.S. at 713.

Whatever the verbal formulations of the methodology, the judicial decisions involving these disputes have resolved them by analyzing the governmental interest in nondisclosure, any private interests in nondisclosure, the critical nature of the need for disclosure, and the availability of information from other sources. This section examines each of these factors.

The specific decision in United States v. Nixon -- that the subpoenaed materials must be turned over -- was based on the Court's conclusion that the compelling and specific need for that information for a criminal trial outweighed the President's generalized confidentiality interest. Thus, while crediting the President's "broad interest in confidentiality," the Court seemed ultimately to give less weight to President Nixon's claim of privilege because it was but a "generalized assertion of privilege." 418 U.S. at 713.

United States v. Nixon's analysis suggests two separate dimensions to the governmental interest in non-disclosure. First, the President's claim was "generalized," suggesting that it would have been accorded greater weight if the President had adduced a particularized need for confidentiality or a particularized harm that would ensue from disclosure. The case might have been differently decided, for instance, had President Nixon been able to assert that the taped conversations revealed state secrets. Second, the intrusion into the admittedly valid interest in confidentiality was narrow because it was confined to specific facts whose contours were defined by an underlying criminal investigation. This meant that the "broad" interest in confidentiality would be relatively unaffected, because "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712.

When compared with Nixon, the hypothetical dispute with Congress under review here presents a much stronger case for non-disclosure on both dimensions. First, the claim of protection for prosecutorial deliberations is not merely "generalized," because the core executive function of making prosecutorial decisions is directly affected. Decisions whether to charge individuals for crimes and which ones to charge are among the most weighty that the government can make because of their severe impact on the individuals involved.

In addition to the long historical practice of recognizing the autonomy of prosecutors to make such decisions, the protection of such decisions from congressional intrusion was a particular concern of the framers of the Constitution. Quoting Montesquieu, Federalist 47 explained that

"[w]hen 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."

Federalist 47. The Federalist 326 (Jacob E. Cooke ed. 1961) (emphasis in original). In advancing this claim, there is no need to assert that the Constitution contemplates the complete removal of prosecutorial decision making from all legislative oversight -- indeed, Federalist 47 asserts that Montesquieu did not mean "that these departments ought have no partial agency in, or no controul over the acts of each other." Id. (emphasis in original). However, the framers did believe that the executive prerogative was an essential component to the structure of liberty erected by the Constitution, and they endeavored to preserve the "fundamental principle under consideration," by avoiding "too great a mixture, and even a consolidation of the different powers" of government. Id. at 331. Consonant with that concern, the courts should display a special solicitude for a claim of executive privilege that asserts confidentiality in order to preserve the relative autonomy of prosecutorial discretion.

In short, if intra-agency deliberations generally warrant some protection, but specific sorts of deliberations fall along a continuum within that zone of protection, prosecutorial decisions ought to be at the upper end of protected communications.

Second, the impact of a single incident of oversight disclosure would create a precedent much less narrow than that at issue in Nixon, because oversight is a wide-ranging and on-going congressional activity. It is predictable, therefore, that the harm to intra-agency candor caused by such disclosure would be far more extensive and intrusive. The precedent of that incident would conceivably move all prosecutors to "temper the candor of their remarks" with respect to all prosecutorial decisions, because all of them would be potentially subject to disclosure later -- and, as remarked upon above, congressional oversight would be a much more common prospect to anticipate than compelled disclosure in a discrete criminal proceeding, as Nixon involved. It thus seems fair to say that the "broad interest" in prosecutorial candor would be adversely affected by disclosure in this instance.

The adverse effects of such disclosure would touch directly the value that the constitutional separation of powers aims to protect: individual liberty. The framers viewed the division of responsibility among the coordinate branches of government as an "essential precaution in favor of liberty." Id. at 325. Were prosecutors routinely to fear disclosure of their deliberations before a committee of the Congress, what Carl Frederick long ago identified as the "law of anticipated reactions" would come to influence those deliberations themselves.¹⁴ In order to avoid rebuke or embarrassment by such a body, prosecutors would incline those deliberations, at least to some degree, toward what they anticipated to be the committee's preferences. As a result, those decisions would be filtered through a lens concentrated on determining their short-term political significance to the very branch of government that had enacted the laws. While not the same thing as the direct Congressional

¹⁴ See Carl J. Frederick, "Public Policy and the Nature of Administrative Responsibility," Public Policy, vol. 1 (1940), pp. 3-24.

control of prosecutorial decisions that Federalist 47 warns against, the results would tend in that direction, perhaps especially for prosecutions perceived to have immediate political salience. The framers warned against this sort of merger of legislative and executive prerogative. It should entitle the claim of executive privilege to heightened regard.¹⁵

These concerns were recently voiced by former Attorney General Benjamin Civiletti:

When the framers [of the Constitution] divided governmental function into three co-equal branches, they effectively gave the citizens of this country a three-step check on arbitrary use of power. First, citizens may petition their legislature to pass or repeal laws affecting the rights and responsibilities of all citizens; second, if a person is targeted for investigation into a violation of law, he or she can attempt to persuade the prosecutor not to prosecute the case; third, upon indictment, the defendant has the opportunity to persuade the judge or jury of his or her innocence. Not until the entire process is exhausted can any individual be deprived of their liberty.

Thus, the discretion entrusted to the prosecutor is a vital component in the system safeguarding individual liberty. . . .

Now, imagine that [an individual seeking to persuade a prosecutor not to prosecute], to be heard by the prosecutor, has to shout over the loud protestations of members of Congress urging indictment of this very individual; or that members of Congress are standing ready to chastise the prosecutor if no indictment is brought. To imagine such a scenario is to understand why congressional involvement in prosecutorial decisions can be perilous to civil liberty.

Civiletti, "Justice Unbalanced: Congress and Prosecutorial Discretion," before Heritage Foundation, 11-12 (Aug. 19, 1993) ("Civiletti Speech") (emphasis added).

Finally, the availability of other sources of information -- and hence the attenuated claim for these specific sources of information -- counsels against compelling disclosure. In Senate Select Committee, the D.C. Circuit analyzed the question of availability of alternative sources in light of the legitimate needs of the Congress. That case involved a demand for

¹⁵ Support for these separation of powers concerns may be found in recent Supreme Court decisions. The Court has repeatedly indicated that "the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" Morrison v. Olson, 487 U.S. 654, 693 (1988), quoting Buckley v. Valeo, *supra*, 424 U.S. at 122. See also Bowsher v. Synar, *supra*, 478 U.S. at 727; INS v. Chadha, *supra*, 462 U.S. at 958. Because of their threat to the independence of prosecutorial decisionmaking, congressional demands to interview prosecutors and review deliberative documents can certainly be challenged as a congressional encroachment or aggrandizement.

access to the Nixon tapes themselves, when transcripts had already been provided. The court held that the Committee had not made a sufficient showing to justify receiving the actual tape recordings of conversations for which President Nixon had already provided transcripts. After observing that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events" (*id.* at 732), the court concluded that the Committee had "point[ed] to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes" and therefore "the need demonstrated by the Select Committee . . . [was] too attenuated and too tangential to its functions" to override the President's constitutional privilege (*id.* at 733).

A precise analysis of whether sufficient information is available through other sources must ultimately await a more precise framing of what "specific legislative decisions" the requesting committees contemplate, but several general considerations can be examined now. First, General Civiletti, in the speech just quoted, took the position that "the prosecution of specific cases [is not] the proper subject of Congressional oversight inquiry" and that "Congress can collect all the information it needs to carry out its legislative function without questioning line attorneys or inquiring into specific cases." Civiletti Speech at 17. I am doubtful that the categorical claim that such inquiry is always improper can be sustained, see pages 12-15, *supra*, but it does seem likely that general oversight functions will very often, if not always, be adequately illuminated by access to information short of direct questioning of line prosecutors or review of deliberative documents such as prosecution memoranda.

If, for example, the general oversight question is whether prosecutors are exercising their discretion in a manner consistent with the committee's interpretation of existing law (or consistent with the committee's sense of what the law ought to be, in a case where a divergence might prompt the committee to seek amendment to existing law), conclusions on that subject can be made after the committee staff has reviewed substantive, non-deliberative aspects of closed cases and compared final prosecutorial actions to the underlying factual profiles. A conclusion that laws are being under-enforced, or enforced without proper regard to the selection criteria the committee considers relevant, or otherwise enforced in a discriminatory manner, as well as a number of other judgments about prosecutorial patterns, can be drawn, at least *prima facie*, on the basis of such comparisons. Such comparisons might then prompt an interest in determining whether there existed alternative explanations for whatever patterns emerged, but these could be sought in the first instance through the normal means of questions posed to responsible supervisory officials.

This manner of proceeding might, in particular circumstances, be less efficient than direct and immediate interrogation of line prosecutors, but part of the process of accommodation of the competing interests consists of Congress's accepting some substitute sources of information where those sources are adequate, even if not exactly what Congress wants. Any decrease in the quality of information that the Congress ultimately obtains through alternative means will normally be quite small when judged against Congress's institutional interests, because a focus on patterns of enforcement and explanations of those patterns typically ought to match well with the prospective, legislative and general lawmaking

orientation of the Congress. Thus, Congress can "responsibly fulfill" its functions, in the words of Senate Select Committee, without direct interrogation of prosecutors, or access to their deliberative documents, and its need for such interrogation or access will be "too attenuated and too tangential" to those functions to outweigh executive privilege. At the same time, that focus minimizes the intrusions into deliberative prosecutorial candor that could well have the effect of bending prosecutorial decisions in light of short-term political considerations extraneous to merits of the case, and would thus also protect the private liberty interests that the constitutional separation of functions was intended to preserve.

To summarize, the compelled disclosure of deliberative documents or prosecutorial testimony would seriously undermine the exercise of that core prosecutorial function that is committed to the executive branch -- the decision to charge or indict in an individual case. Such compelled disclosure to congressional oversight committees will produce a predictable pressure on prosecutors to handle these decisions so as to anticipate short-term political reaction to them. As a consequence, the constitutionally created structures for protecting individual liberty will be weakened. The chilling effect on the candid exchange of views that can result from congressional review of deliberative communications in any context is thus considerably exacerbated in the criminal justice context. While it is understood that the Department will on occasion be questioned by Congress about its prosecutorial decisions or actions, it would be greatly more intrusive and corrosive for Congress to inject itself into the performance of the Department's prosecutorial functions by conducting a plenary review of the advice, options and recommendations that may have been considered before the Department makes a decision. To paraphrase the Supreme Court's discussion of the application of executive privilege to Presidential deliberations, "[an Attorney General] and those who assist [her] must be free to explore alternatives in the process of . . . making [prosecutorial] decisions and to do so in a way many would be unwilling to express except privately." United States v. Nixon, 418 U.S. at 708.

CONCLUSION

I believe that the Department would prevail in a legal contest with a congressional committee over the committee's demands for interviews of prosecutors and access to prosecutorial deliberative documents. The interests in maintaining confidentiality are strong and specific and they include significant personal liberty interests that would be adversely affected if prosecutors came to anticipate having to respond to such demands. The committee would have to persuade the court that access to these specific sources of information was central to the discharge of its legislative functions and perhaps that its inquiry was focussed or limited in some specific way so that its scope was well-defined and hence the expectation of similar, recurring demands small -- a showing that appears unlikely absent some exceptional circumstances -- and even then the Department would stand a very good chance of prevailing.



Office of the Attorney General
Washington, D. C. 20530

July 26, 1991

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing to request that you assert executive privilege with respect to a confidential legal opinion provided to me by the Justice Department's Office of Legal Counsel concerning the authority of the Federal Bureau of Investigation to arrest suspects abroad. The Subcommittee on Economic and Commercial Law of the Committee on the Judiciary of the House of Representatives has issued a subpoena to me demanding the opinion. The legal opinion contains advice provided to me to serve as the basis for the Department's advice to the White House and the national security community.

Apart from classified information, there is no category of documents in the Department's possession that I consider more confidential than legal opinions from the Office of Legal Counsel. One of the chief functions of the Attorney General is to serve as legal advisor to the President, and the Office of Legal Counsel assists me in that capacity. It is essential to the discharge of my responsibilities as legal advisor to the President and chief law enforcement officer of the United States that legal advice from the Office of Legal Counsel be treated as confidential. That has been the consistent policy and practice of prior Attorneys General.

Moreover, the public interest is clearly best served when government officials seek legal advice in the performance of their official duties. If confidential legal advice were subject to disclosure, officials would be less likely to seek legal advice and government lawyers would not be able to give candid and full assessments of complex legal issues. As a consequence, the public interest would suffer.

In addition to the need for confidentiality that exists with respect to all legal advice provided by the Office of Legal Counsel, the subpoenaed opinion implicates particularly compelling confidentiality interests. The opinion provides legal advice for my use in making decisions regarding the arrest and prosecution of criminal suspects. I am seriously concerned that

its disclosure to Congress could compromise the Government's ability to prosecute pending cases involving terrorists and drug traffickers. Four criminal prosecutions are currently proceeding against defendants who were arrested outside the United States. These include the case against Manuel Noriega, and the prosecution of two Mexican citizens for the torture murder of Special Agent Camarena. Release of this confidential advice would reveal the theories and legal strategies of our prosecutors in those cases, and could seriously prejudice our ability to prosecute the cases effectively.

I am also concerned that disclosure of the opinion could interfere with the conduct of our foreign affairs. These issues are extremely sensitive diplomatically. The legal advice on which I relied in advising you on these matters is correspondingly sensitive.

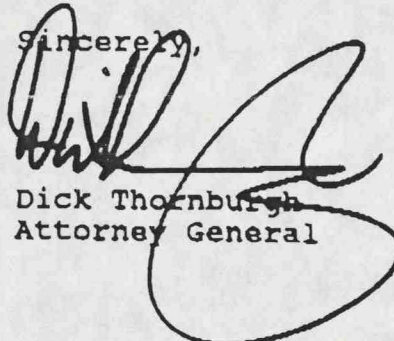
The Department has gone to great lengths to accommodate the Subcommittee's interest in the legal issues addressed by the opinion. We have provided oral and written testimony summarizing the opinion. We have offered to provide an even more detailed written summary of the opinion's conclusions and reasoning. And we have offered detailed briefings for individual Members. We believe these good faith accommodations go substantially beyond what is required by existing court precedent, fully satisfy the Subcommittee's needs, and underscore the good faith of the Department on this issue.

Under controlling case law, the Subcommittee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Prior to the issuance of the subpoena, the only justification advanced was the desire to show the opinion to others who would then testify about the legal issues involved. That proffered justification is insufficient under the circumstances; moreover, the accommodations we have provided to date fully satisfy the Subcommittee's interest in providing witnesses with a detailed understanding of the Department's legal reasoning and conclusions.

It is my legal judgment that executive privilege may properly be asserted in these circumstances. The Supreme Court has expressly recognized that the Constitution gives the President the power to protect the confidentiality of Executive Branch deliberations. This power is rooted in the "need for protection of communications between high Government officials

and those who advise and assist them in the performance of their manifold duties." United States v. Nixon, 418 U.S. 683, 705 (1974). The Subcommittee has provided no statement of need that meets the judicial standard for determining whether a committee has adequately justified a request for Executive Branch deliberative documents.

Sincerely,

A large, stylized handwritten signature in black ink, likely belonging to Dick Thornburgh, is written over the typed name.

Dick Thornburgh
Attorney General



Office of the Attorney General
Washington, D.C. 20530

August 8, 1991

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

You have requested my legal advice whether executive privilege may properly be asserted in response to a subpoena issued on August 1, 1991 to the Secretary of Defense by the Subcommittee on Legislation and National Security of the House Committee on Government Operations. Secretary Cheney has requested that you assert the privilege with respect to the subpoena.

The subpoena demands the production to the Subcommittee of a memorandum, dated February 4, 1991, addressed to the Deputy Secretary of Defense from the Acting Under Secretary of Defense for Acquisition. The memorandum requests that the Deputy Secretary approve recommendations to take certain actions with respect to the administration of various defense contracts. This confidential document not only sets forth the Acting Under Secretary's advice and recommendations, but also contains the Deputy Secretary's approval and includes handwritten notations from other senior Department of Defense ("DOD") officials, setting forth their own advice and recommendations.

The subpoenaed document thus represents the development of the consensus within DOD on the recommended actions. The nature of the memorandum and the reasons the Secretary of Defense believes it should remain confidential are more fully described in the Secretary's letter to you dated August 8, 1991.

The Secretary's letter also describes the extensive efforts that DOD has made to accommodate the Subcommittee's need to understand the basis for the DOD decision. Those efforts have included testifying at two Subcommittee hearings and offering to permit the Chairman and Ranking Minority Member of the Subcommittee to read the memorandum in order to satisfy themselves that the publicly stated rationale for DOD's decision was consistent with the rationale contained in the memorandum. DOD's offer has been rejected. Moreover, the Subcommittee has not explained why it needs the information contained in this document, and in rejecting the opportunity to read the

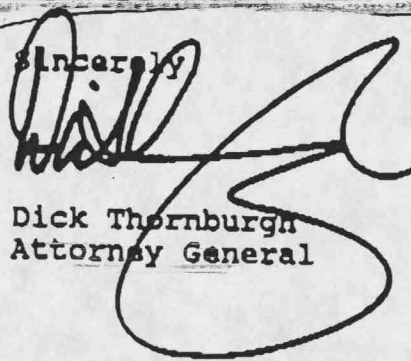
memorandum, the Subcommittee has stated only that it needs a copy of the document in order to compare it with other documents in its possession.

Executive privilege may properly be asserted in these circumstances. The Supreme Court has expressly recognized that the Constitution gives the President the power to protect the confidentiality of Executive Branch deliberations. This power is rooted in the "need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." United States v. Nixon, 418 U.S. 683, 705 (1974).

Under controlling case law, in order to justify a demand for Executive Branch deliberative documents, a committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). The Subcommittee has provided no statement of need that meets this judicial standard. Review of the memorandum by the Chairman and Ranking Minority Member would fully satisfy any Subcommittee need to assure itself that the publicly stated rationale for the decision in question was consistent with the rationale set forth in the document. Moreover, that offered accommodation would satisfy the Subcommittee's articulated need to compare the document with other documents, because DOD is willing to allow the review to take whatever time is necessary to accomplish that task. In sum, I do not believe that actual possession of the document would be held by the courts to be "demonstrably critical" for the Subcommittee's work.

In conclusion, it is my legal judgment that executive privilege may properly be asserted in response to the Subcommittee's subpoena.

Sincerely,


Dick Thornburgh
Attorney General



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 1, 1991

The Honorable Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510

Dear Senator Metzenbaum:

This letter is in response to your letter of June 6, 1991, to the Attorney General relating to Michael Luttig's views concerning the applicability of executive privilege to intra-departmental communications. In particular, you have inquired as to the role, if any, that Mr. Luttig has played in formulating an Administration position that executive privilege extends to such communications. As explained in greater detail below, Mr. Luttig has not formulated or advanced a position on the applicability of the privilege to intra-departmental communications that is new or different from that taken by past Administrations of both parties for many years. Nor has the Office of Legal Counsel under his direction departed from its longstanding position on the scope of the privilege -- a position that is supported by historical practice, scholarly commentary and caselaw.

The Executive has long taken the position that executive privilege extends not only to communications to and from the President, but to deliberative communications between the President's subordinates and those who, in turn, advise them. Indeed, we are not aware of any Administration, Republican or Democratic, that has taken a contrary position. Presidents from George Washington through President Bush have asserted a right of executive privilege. We have enclosed for your review a representative group of documents reflecting this fact.

The doctrine of executive privilege was recognized as early as the Presidency of George Washington. In 1792, a House Committee requested letters and instructions from Secretary of War Knox pertaining to a failed military expedition led by General St. Clair. The President and his Cabinet concluded that "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of

which would injure the public" 1 The Writings of Thomas Jefferson 303-04 (Lipscomb ed. 1905). The documents were ultimately delivered to the Committee after an accommodation was reached.

The principles articulated by President Washington have been consistently applied by more contemporary Presidents in the context of deliberations among lower-level Executive branch officials. During the so-called Army-McCarthy hearings in 1954, President Eisenhower sent a letter to the Secretary of Defense, directing that executive privilege be claimed for communications not involving the President himself, citing the need for "employees of the Executive Branch [to] be in a position to be completely candid in advising with each other on official matters" The Public Papers of the Presidents, Dwight D. Eisenhower, 1954, at 483 (emphasis added).

President Kennedy reaffirmed the applicability of executive privilege to communications not involving the President by asserting executive privilege in response to a request from Senator Thurmond asking for the names of government employees who had recommended changes in speeches prepared by lower-level Department of Defense employees for delivery by military personnel. A letter from the President to Secretary of Defense Robert McNamara, dated February 8, 1962, made plain that the assertion of privilege covered communications that did not personally involve the President or his close advisors:

[I]t would not be possible for you to maintain an orderly Department and receive the candid advice . . . 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.

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 (1962). Chairman Stennis sustained the claim of executive privilege, and the Subcommittee upheld his ruling. See History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. Off. Legal Counsel 751, 777 (1982).

In 1980, President Carter authorized the assertion of executive privilege to protect Executive branch deliberative documents concerning the decision to impose a conservation fee on imports of crude oil and gasoline. The documents being withheld included not only documents reflecting the presidential deliberative process on that decision, but also documents relating solely to the internal deliberative process of the Department of Energy. See History of Refusals by Executive

Branch Officials to Provide Information Demanded by Congress, 6
Op. Off. Legal Counsel 751, 779-80 (1982).

And, in 1981, President Reagan asserted executive privilege and directed the Secretary of Interior to withhold certain documents requested by the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives. Although some of the documents concerned communications from foreign officials or deliberations of the President's Cabinet, the bulk of the documents

reflect[ed] internal deliberations within the Department of the Interior Some of these documents [were] staff level advice to policymakers containing recommendations regarding decisions which ha[d] not yet become final. Others contain[ed] internal Interior Department deliberations regarding its participation in [Cabinet deliberations]. Still other documents reflect[ed] tentative legal judgments In addition, the subpoena encompass[ed] 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, [were] of a highly deliberative nature and involve[d] an ongoing decisional process of considerable sensitivity.

Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. Off. Legal Counsel 27, 28-29 (1981).

The Department of Justice has long asserted this position on behalf of the Executive branch, either through the Attorney General or through the Office of Legal Counsel. President Carter's Assistant Attorney General for the Office of Legal Counsel, John M. Harmon, for example, opined that executive privilege extends

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 Government. In other contexts the courts have long recognized the importance of protecting the confidentiality of lower executive officials' deliberative communications, and so too has Congress.

Memorandum Opinion for the General Counsel of the Department of Commerce, 1 Op. Off. Legal Counsel 269, 271-72 (1977).

Assistant Attorney General Harmon's opinion was supported by numerous prior opinions and statements of the Office of Legal Counsel. For example, in 1971 William H. Rehnquist, then Assistant Attorney General for the Office of Legal Counsel, testified on the subject of executive privilege before the Senate Subcommittee on Separation of Powers of the Committee on the Judiciary. Mr. Rehnquist stated that "Congress has recognized the validity of claims of executive privilege" as applied to "intragovernmental discussions," and observed that such claims have extended not only to conversations with the President, but to the confidentiality of the "process of decision-making at a high governmental level" because of "the necessity of safeguarding frank internal advice within the executive branch." Statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel on Executive Privilege and S. 1125 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92nd Cong., 1st Sess. 11, 15 (Aug. 4, 1971). We have enclosed copies of the Harmon opinion and the Rehnquist testimony, and two other memoranda of the Office of Legal Counsel that include detailed summaries of the Executive's invocation of executive privilege.

This longstanding view of the scope of the privilege discussed above is widely recognized among scholars and commentators. The Committee on Civil Rights of the Association of the Bar of the City of New York, for example, has expressed its

strong opinion that any advice given by any agency employee as to any legitimate governmental functions or activities must be protected against disclosure if the agency is to be able to count on the candid and forthright advice it requires for its proper functioning and the employee is not to be subjected to the danger of harassment or punishment based on the advice given.

Committee on Civil Rights, Executive Privilege: Analysis and Recommendations for Congressional Legislation 27 (1974) (second emphasis added).

Professor Laurence Tribe similarly acknowledges a "generic privilege for internal deliberations" within the Executive branch and explains that the privilege "encourag[es] candid intragovernmental communications and honor[s] the justified expectations of privacy of governmental advisors and decisionmakers." He observes: "[t]hat an enforceable promise of secrecy may well be the cost of candor has been recognized by the Supreme Court: '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.'" L. Tribe, American

Constitutional Law 276 (2d ed. 1988) (footnotes omitted) (quoting United States v. Nixon, 418 U.S. 683, 705 (1974)).

Other commentators also have said that the privilege extends to communications among lower-level government officials, even as against requests from Congress:

The disclosure of [intragovernmental communications] is considered to be contrary to the public interest because the nation has an overriding interest in the ability of Government officials below the decision-making level to discuss matters freely among themselves and with their superiors, and because this objective is not likely to be achieved if these inferior officials must anticipate that some day their discussions, comments, and advice would be disclosed, and that then they would have to justify them before Congress.

Kramer & Marcuse, Executive Privilege -- A Study of the Period 1953-1960, 29 Geo. Wash. L. Rev. 827, 912 (1961) (footnote omitted). These commentators have recognized that executive privilege is broad in scope because it arises from the constitutional functions of the Executive:

The same logic which holds that Congress has the power to investigate so that it may effectively exercise its legislative functions, supports the proposition that the President has the power to withhold information when the use of the power is necessary to exercise his Executive functions effectively, i.e., where it is required . . . generally, for the furtherance of the efficiency and integrity of the Executive branch, such as the safeguarding of frank internal advice and discussion

Id. at 899 (emphasis added).

The caselaw that exists on the subject of executive privilege fully supports the position historically taken by the Executive. Most significantly, the Supreme Court's unanimous decision in United States v. Nixon 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." 418 U.S. 683, 705 (1974) (emphasis added). See also id. at 706 (recognizing "the need for confidentiality of high-level communications"). Courts have recognized the need for confidential Executive branch communications, even in the face of congressional requests for such communications. See Senate Select Committee v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[t]he presumption against any judicially compelled intrusion into presidential confidentiality, and the showing requisite to its defeat, hold

with at least equal force" in the context of a subpoena from a Congressional committee); see also United States v. AT&T, 567 F.2d 121, 129 (D.C. Cir. 1977) (the Executive branch may assert executive privilege against a legislative subpoena even where a third party corporation has possession of the subpoenaed documents). In fact, in recognizing the validity of an executive privilege to protect the deliberative process, the courts have drawn analogies to the deliberative privileges afforded members of Congress and their aides and to the privileges among judges and between judges and their law clerks. See Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973) (en banc) (per curiam); Senate Select Committee, 498 F.2d at 729.

In sum, Mr. Luttig has not formulated any new legal position or policy on the applicability of executive privilege to intra-departmental communications. The Office of Legal Counsel, under his direction, has provided to the Executive departments and agencies the same advice on this issue that has been provided by that Office for years and consistently by the Department of Justice throughout our history.

It bears emphasis that during Mr. Luttig's service at OLC, the Office has adhered to the longstanding policy of this and past Administrations of complying with congressional requests for information to the fullest extent possible, consistent with the constitutional and statutory responsibilities of the Executive. The Office has never viewed the privilege as it relates to intra-departmental communications as absolute and, as required by existing caselaw, see generally United States v. AT&T, 567 F.2d 121, it has counseled all departments and agencies to accommodate Congress' needs and interests to the fullest extent possible, even when the most confidential communications are sought. As you no doubt are aware, President Bush has not asserted executive privilege with respect to any congressional request for information.

Because the Executive branch position on the applicability of executive privilege to intra-departmental communications is so well developed, there has been little new thinking on the subject in recent years. For example, the request in your letter is focused on documents prepared by Mr. Luttig or at his request or direction. Mr. Luttig has not authored any formal or informal opinions or memoranda of law on the subject of the application of executive privilege to intra-departmental communications. Nor have any such opinions or memoranda been prepared by any OLC attorney acting at Mr. Luttig's request or instruction, or by anyone outside of the Office of Legal Counsel acting at Mr. Luttig's request or instruction.

Advice on this subject has been rendered by Mr. Luttig and by attorneys acting at his direction during the relevant time period, but that advice has been provided orally, or in such

forms as suggested inserts for correspondence or draft memoranda, to be sent by others within the Executive branch. This was the case, for example, with respect to the recently resolved dispute between the House Subcommittee on Human Resources and Intergovernmental Relations and the Department of Education to which your letter makes reference. There was no written opinion or memorandum of law -- formal or informal -- prepared by Mr. Luttig or any attorney acting at his direction during the course of that dispute.

At various times throughout the pendency of that dispute, OLC drafted text for possible or proposed letters, memoranda, and talking points, all of which merely reiterated or applied the longstanding Executive branch view of executive privilege set forth above. As it relates to the subject you have inquired about, however, that language -- all of which was in draft form -- said nothing more in substance (and rarely more in terms) than that executive privilege extends to communications between and among high government officials and those who advise and assist them. Indeed, the most extensive language proposed by OLC during that entire dispute that concerned the application of executive privilege to intra-departmental communications was adopted by the Education Department and appeared, together with a series of historical examples also provided by OLC, in the following passage of the May 22, 1991, letter from that Department to Chairman Weiss: "The Supreme Court has recognized a constitutional privilege for confidential 'communications between high Government officials and those who advise and assist them in the performance of their manifold duties.' 418 U.S. 683, 705 (1974). That language recognizes the longstanding practice of the Executive Branch." A copy of that letter is enclosed for your review.

Your letter, we recognize, requests all "documents" or "materials" prepared by Mr. Luttig or by anyone acting at his request or instruction, which relate to the application or assertion of executive privilege in response to congressional requests for intra-departmental communications. The Office of Legal Counsel is charged with assisting all of the Executive agencies and departments in responding to congressional requests, which the Office does when asked to do so by the recipient of a request. Thus, from March 1989 to the present, the Office provided advice with respect to many such requests. Almost all of this advice was provided by staff attorneys within the Office, without either the knowledge or involvement of Mr. Luttig. Moreover, almost all of this advice was provided orally by the staff.

By its terms, your request could be construed to extend to every note, proposed or contemplated draft letter or memorandum, and all other draft and working materials. The personal files of the individual attorneys who handled particular requests for

assistance and perhaps general correspondence files would contain such attorney notes, draft memoranda, draft letters or inserts, scheduling information for meetings, correspondence and other miscellaneous working materials that would relate at least tangentially to the applicability of the privilege in the context of the particular disputes, and would arguably be responsive to your request because they were prepared at least technically under Mr. Luttig's supervision. We have not undertaken a review of all of these files for such miscellaneous working materials, however, because of the volume involved and because we are certain these materials would not include or reflect any view of Mr. Luttig's different in substance from that set forth above, if indeed they reflected or bore upon Mr. Luttig's personal view of the applicability of executive privilege to intra-departmental communications at all. Should you wish, we would undertake a search of all such files for any possibly responsive documents, even including informal notes and draft materials of the kind that we have described. We trust, however, that the foregoing is responsive to your concern as to whether Mr. Luttig, during his tenure at OLC, has formulated a new theory on the applicability of executive privilege to intra-departmental communications.

In response to Mr. Harvie's oral request as to whether we might provide an example of a document that recites general Executive privilege principles that could relate to intra-departmental communications (even one not written by Mr. Luttig), we have included for your information a copy of a June 1989 memorandum from William P. Barr to the General Counsels' Consultative Group on the deliberative process privilege in general. As we informed Mr. Harvie, Mr. Luttig did not author this memorandum, direct its preparation or participate in its preparation. Nor does the memorandum discuss intra-departmental communications in particular. However, the memorandum does provide a broad overview of the legal principles underlying application of Executive privilege to the deliberative process.

We look forward to working with you and the other Members of the Judiciary Committee. Please let us know if we can be of any further assistance.

Respectfully,



W. Lee Rawls
Assistant Attorney General

DAN BURTON, INDIANA,
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
CONSTANCE A. MORELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. McHUGH, NEW YORK
JOHN HORN, CALIFORNIA
L. MICA, FLORIDA
S. M. DAVIS, VIRGINIA
E. SOUDER, INDIANA
JOE SCARBOROUGH, FLORIDA
STEVEN C. LATOURETTE, OHIO
BOB BARR, GEORGIA
DAN MILLER, FLORIDA
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
DAVE WELDON, FLORIDA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
C.L. "BUTCH" OTTER, IDAHO
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051
TTY (202) 225-6852

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER
TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
PATSY T. MINK, HAWAII
CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
ROD R. BLAGOJEVICH, ILLINOIS
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE
JANICE D. SCHAKOWSKY, ILLINOIS
Wm. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA

BERNARD SANDERS, VERMONT,
INDEPENDENT

September 6, 2001

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Tenth & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear General Ashcroft:

Attached to this letter is a subpoena for a number of Justice Department documents, some of which were the subject of my August 29, 2001, letter to you. Specifically, I have subpoenaed: (1) the memorandum by Robert Conrad regarding the appointment of a special counsel to investigate campaign fundraising matters, as well as all related memoranda; (2) the declination memorandum for Mark Middleton; and (3) a number of memoranda relating to decisions to prosecute, or not to prosecute, a number of individuals involved in the Committee's investigation of the Justice Department's handling of organized crime investigations in New England.

I do not issue this subpoena lightly. As I indicated to you when you took office, I had hoped to obtain all necessary information from the Justice Department through letter requests, rather than subpoenas. For the most part, the Justice Department has been very cooperative and responsive to the Committee's requests for information. However, as I indicated in my August 29, 2001, letter, the Department has resisted producing deliberative documents to the Committee. The Department has now announced a policy that it will not produce any internal deliberative documents regarding criminal prosecutions to Congress. As I explained in my letter, I believe that the Department's policy is wrong, both legally and practically, and it will dramatically impact the ability of Congress to conduct effective oversight of the Justice Department.

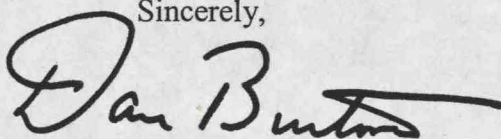
My staff and I have negotiated with you, your staff, and White House staff for several months in an attempt to reach an accommodation over this issue. I have offered a number of different accommodations which would protect the Department's legitimate interests, while still allowing the Committee to conduct effective oversight. You have not accepted any of my offers. Therefore, I have announced a hearing on this matter, and invited you to testify at the hearing. I

am issuing the attached subpoena in advance of the hearing so that the Committee's demand for the documents is clear and legally enforceable.

The attached subpoena also calls for a number of deliberative records relating to the Committee's investigation of the Department's handling of its organized crime investigations in New England. The Committee has already received extensive information indicating that the Department has a deeply troubled past in its handling of a number of confidential informants who were providing the Department with misleading information, and who were also committing serious crimes while under Departmental protection. The records called for by the Committee's subpoena are central to the Committee's investigation of why the Department refrained from prosecuting these individuals for so long.

I remain hopeful that you will reconsider the Department's position and produce the subpoenaed documents before the Committee's hearing.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dan Burton", with a long horizontal flourish extending to the right.

Dan Burton
Chairman

cc: Members, Committee on Government Reform

By Authority of the House of Representatives of the
Congress of the United States of America

To United States Department of Justice Serve: Attorney General John Ashcroft

You are hereby commanded to produce the things identified on the attached schedule before the
full Committee on Government Reform

of the House of Representatives of the United States, of which the Hon.

Dan Burton is chairman, by producing such things in Room 2157 of the
Rayburn Building, in the city of Washington, on

September 11, 2001, at the hour of 5:00 PM

To Danleigh Halfast or US Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives

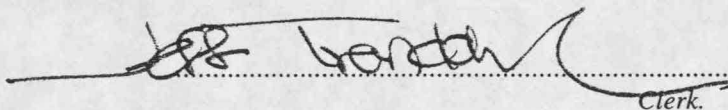
of the United States, at the city of Washington, this

6th day of September, 2001



Chairman.

Attest:


Clerk.

Subpoena for U.S. Department of Justice
Served Attorney General John Ashcroft
Tenth Street & Constitution Avenue N.W.
Washington, D.C. 20530

before the Committee on the
Government Reform.....

Served To Faith Burton
By: Danleigh Halfast
via hand delivery
9/16/01 1:00 PM
Danleigh Halfast

.....
..... House of Representatives

SCHEDULE A

**Subpoena Duces Tecum
Government Reform Committee
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515**

United States Department of Justice
Serve: Attorney General John Ashcroft
Tenth Street & Constitution Avenue N.W.
Washington, D.C. 20530

The Committee hereby subpoenas certain records. Please provide logs which indicate each record's Bates number, author, description, and source file. If you have any questions, please contact Chief Counsel James C. Wilson at (202) 225-5074.

Definitions and Instructions

(1) For the purposes of this subpoena, the word "record" or "records" shall include, but shall not be limited to, any and all originals and identical copies of any item whether written, typed, printed, recorded, redacted or unredacted, transcribed, punched, taped, filmed, graphically portrayed, video or audio taped, however produced or reproduced, and includes, but is not limited to, any writing, reproduction, transcription, photograph, or video or audio recording, produced or stored in any fashion, including any and all activity reports, agendas, analyses, announcements, appointment books, briefing materials, bulletins, cables, calendars, card files, computer disks, cover sheets or routing cover sheets, drawings, computer entries, computer printouts, computer tapes, external and internal correspondence, diagrams, diaries, documents, electronic mail (e-mail), facsimiles, journal entries, letters, manuals, memoranda, messages, minutes, notes, notices, opinions, statements or charts of organization, plans, press releases, recordings, reports, Rolodexes, statements of procedure and policy, studies, summaries, talking points, tapes, telephone bills, telephone logs, telephone message slips, records or evidence of incoming and outgoing telephone calls, telegrams, telexes, transcripts, or any other machine readable material of any sort whether prepared by current or former employees, agents, consultants or by any non-employee without limitation. "Record" or "records" shall also include all other records, documents, data and information of a like and similar nature not listed above.

(2) For purposes of this subpoena, the terms "refer" or "relate" and "concerning" as to any given subject means anything that constitutes, contains, embodies, identifies, mentions, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

(3) This subpoena calls for the production of records, documents and compilations of data

and information that are currently in your possession, care, custody or control, including, but not limited to, all records which you have in your physical possession as well as any records to which you have access, any records which were formerly in your possession, or which you have put in storage or anyone has put in storage on your behalf. Unless a time period is specifically identified, the request includes all documents to the present.

(4) The conjunctions "or" and "and" are to be read interchangeably in the manner that gives this subpoena the broadest reading.

(5) No records, documents, data or information called for by this subpoena shall be destroyed, modified, redacted, removed or otherwise made inaccessible to the Committee.

(6) If you have knowledge that any subpoenaed record, document, data or information has been destroyed, discarded or lost, identify the subpoenaed records, documents data or information and provide an explanation of the destruction, discarding, loss, deposit or disposal.

(7) When invoking a privilege as to any responsive record, document, data or information as a ground for withholding such record, document, data or information, list each record, document, compilation of data or information by data, type, addressee, author (and if different, the preparer and signatory), general subject matter, and indicated or known circulation. Also, indicate the privilege asserted with respect to each record, document, compilation of data or information in sufficient detail to ascertain the validity of the claim of privilege.

(8) This subpoena is continuing in nature. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date shall be provided immediately upon location or discovery subsequent thereto.

Subpoenaed Items

Please produce to the Committee the following records.

1. All records related to decisions either to prosecute, or refrain from prosecuting, Stephen Flemmi, including, but not limited to, records relating to decisions to prosecute, or refrain from prosecuting Flemmi for the bombing assault on attorney John Fitzgerald. Please exclude all records drafted in anticipation of, or subsequent to, the 1995 indictment of Stephen Flemmi.
2. All records related to decisions either to prosecute, or refrain from prosecuting, James J. "Whitey" Bulger. Please exclude all records drafted in anticipation of, or subsequent to, the 1995 indictment of James J. "Whitey" Bulger.
3. All records related to decisions either to prosecute, or refrain from prosecuting, Joseph Barboza.

4. All records related to decisions either to prosecute, or refrain from prosecuting, Vincent J. "Jimmy the Bear" Flemmi.
5. All records related to decisions either to prosecute, or refrain from prosecuting, Raymond L. S. Patriarca.
6. All records related to decisions either to prosecute, or refrain from prosecuting, Gennaro Angiulo.
7. All records related to decisions either to prosecute, or refrain from prosecuting, Theodore J. Sharliss, a.k.a. James Chalmas.
8. All records related to decisions either to prosecute, or refrain from prosecuting, Joseph "J.R." Russo.
9. All records related to decisions either to prosecute, or refrain from prosecuting, H. Paul Rico. Please exclude all records prepared by the Justice Department Task Force led by John Durham.
10. All records related to decisions either to prosecute, or refrain from prosecuting, John Connolly, Jr. Please exclude all records prepared by the Justice Department Task Force led by John Durham.
11. All records related to decisions either to prosecute, or refrain from prosecuting, John Morris.
12. All records related to decisions to prosecute Francis P. Salemme for the bombing assault on attorney John Fitzgerald.
13. All records related to decisions to prosecute, or to refrain from prosecuting, Robert Daddeico.
14. Any report or memorandum by Robert Conrad recommending the appointment of a special counsel to investigate campaign fundraising matters, and all memoranda drafted in response to Mr. Conrad's memorandum, including any replies or rebuttals by Mr. Conrad.
15. All declination memoranda relating to Mark E. Middleton.

DAN BURTON, INDIANA
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
CONSTANCE A. MORELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
JAMES ROS-LENTINEN, FLORIDA
JIM MC HUGH, NEW YORK
JEN HORN, CALIFORNIA
JIM L. MICA, FLORIDA
THOMAS M. DAVIS, VIRGINIA
MARK E. SOUDER, INDIANA
JOE SCARBOROUGH, FLORIDA
STEVEN C. LATOURCETTE, OHIO
BOB BARR, GEORGIA
DAN MILLER, FLORIDA
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATT, PENNSYLVANIA
DAVE WELDON, FLORIDA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
C. L. "BUTCH" OTTER, IDAHO
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN JR., TENNESSEE

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3874
MINORITY (202) 225-5051
TTY (202) 225-6852

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNE, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
PATSY T. MINK, HAWAII
CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
ROD R. BLAGOJEVICH, ILLINOIS
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE
JANICE D. SCHAKOWSKY, ILLINOIS
WM. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA

BERNARD SANDERS, VERMONT
INDEPENDENT

August 31, 2001

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Tenth & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear General Ashcroft:

Pursuant to Rules X and XI of the Rules of the House of Representatives, the Committee on Government Reform is holding a hearing entitled "The Need for Congressional Oversight of the Justice Department." The hearing is scheduled for September 13, 2001, in room 2154 of the Rayburn House Office Building at 1:00 p.m. I would like to invite you to testify at this hearing.

The Committee will inquire about the Justice Department's new policy to refuse to provide to Congress deliberative documents pertaining to criminal investigations. As I expressed to you in my August 29, 2001, letter, I believe that this new policy will, in some cases, make Congressional oversight of the Justice Department impossible. The Committee will ask you to provide further information regarding your new policy, including, but not limited to:

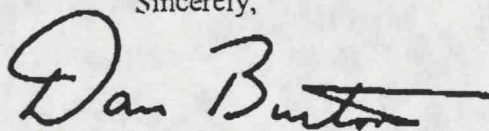
- What precedent exists for the Department's policy;
- Whether there is any legal or prudential support for your policy;
- Whether previous Administrations have reached accommodations with Congress over the types of documents under consideration; and
- What impact the policy will have on Congressional oversight of the Justice Department.

If you wish to make an opening statement, it is requested that you provide 100 copies of your written testimony to the Committee no later than 24 hours prior to the time of the hearing. To facilitate printing of the hearing record, you should also provide a computer disk containing a copy of your written testimony. At the hearing, we ask you to summarize your testimony in five minutes to allow the maximum time for discussion and questions.

The Honorable John Ashcroft
Page 2 of 2

Under the Congressional Accountability Act, the House of Representatives must be in compliance with the Americans with Disabilities Act. Persons requiring special accommodations should contact Robert Briggs at (202) 225-5074 at least four days prior to the hearing.

Sincerely,

A handwritten signature in black ink that reads "Dan Burton". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Dan Burton
Chairman

cc: The Honorable Henry A. Waxman, Ranking Minority Member

WYNTON, INDIANA,
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
CONSTANCE A. MORELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
ILIANA ROS-LENTINEN, FLORIDA
JOHN M. MCCLEUGH, NEW YORK
STEPHEN HORN, CALIFORNIA
JOHN L. MICA, FLORIDA
THOMAS M. DAVIS, VIRGINIA
MARK E. SOUDER, INDIANA
J. SCARBOROUGH, FLORIDA
STEVEN C. LATOURETTE, OHIO
BOB BARR, GEORGIA
DAN MILLER, FLORIDA
GREGORY OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
DAVE WELDON, FLORIDA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
CL. "BUTCH" OTTER, IDAHO
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-6074
FACSIMILE (202) 225-3874
MINORITY (202) 225-5051
TTY (202) 225-6052

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KARLORSKI, PENNSYLVANIA
PATSY T. MINK, HAWAII
CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES MORTON,
DISTRICT OF COLUMBIA
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
ROD R. BLAGOJEVICH, ILLINOIS
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE
JANICE D. SCHAKOWSKY, ILLINOIS
WILLIAM LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA

BERNARD SANDERS, VERMONT,
INDEPENDENT

8/30/01

NOTICE

TO: Members of the Government Reform Committee

There will be a hearing scheduled for

Thursday, September 6, 2001

at 1:00 p.m. in Room 2154 of the Rayburn House Office Building

Topic of Hearing:

"The Need for Congressional Oversight of the Justice Department"

The Department of Justice has announced a new policy: no deliberative documents pertaining to criminal investigations will be provided to Congress. For obvious reasons, this trend towards less disclosure is alarming. More important, however, the new, inflexible position makes it impossible for Congress to conduct oversight. For example, the Committee's investigation of the FBI's use of informants in organized crime prosecutions in Boston will be negatively impacted by this new policy.

The Justice Department's policy is unprecedented. Indeed, all previous Administrations found ways to reach accommodations with Congress. It is the Committee's position that this new standard cannot be accepted by Republicans or Democrats. For these reasons, the Attorney General will be asked to testify regarding this policy and its impact on Congressional oversight of the Justice Department.

** If you are in need of special accommodations based on a disability, please contact the committee at least 4 business days prior to the hearing (202/225-5074) **

BENJAMIN A. GILMAN, NEW YORK
CONSTANCE A. MORELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LENTINE, FLORIDA
JOHN M. MC HUGH, NEW YORK
STEPHEN HORN, CALIFORNIA
JOHN L. MICA, FLORIDA
THOMAS M. DAVIS, VIRGINIA
MARK E. SOUDER, INDIANA
JOE SCARBOROUGH, FLORIDA
STEVEN C. LATOURETTE, OHIO
BOB BARR, GEORGIA
DAN MILLER, FLORIDA
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
DAVE WELDON, FLORIDA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
C.L. "BUTCH" OTTER, IDAHO
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 825-6674
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051
TTY (202) 225-8652

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER
TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
PATSY T. MINK, HAWAII
CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
ROD R. BLAGOJEVICH, ILLINOIS
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE
JANICE D. SCHAKOWSKY, ILLINOIS
WM. LACY CLAY, MISSOURI
DUANE E. WATSON, CALIFORNIA

BERNARD SANDERS, VERMONT,
INDEPENDENT

NOTICE

8/30/01

TO: Members of the Government Reform Committee

There will be a hearing scheduled for

Thursday, September 6, 2001

at 12:00 noon in Room 2154 of the Rayburn House Office Building

Topic of Hearing:

*"Oversight of the Justice Department's Handling of Confidential Informants in Boston:
Why Document Requests Matter"*

* If you are in need of special accommodations based on a disability, please contact the committee at least 4 business days prior to the hearing (202/225-5074) **

DAN BURTON, INDIANA,
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK
CONSTANCE A. MORELLA, MARYLAND
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. McHUGH, NEW YORK
JOHN HORN, CALIFORNIA
L. MICHAEL, FLORIDA
JAMES M. DAVIS, VIRGINIA
J. E. SCUDER, INDIANA
JOE SCARBOROUGH, FLORIDA
STEVEN C. LATOURETTE, OHIO
BOB DARR, GEORGIA
DAN MILLER, FLORIDA
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
DAVE WELDON, FLORIDA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
C.L. "BUTCH" OTTER, IDAHO
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051
TTY (202) 225-6852

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
PATSY T. MINK, HAWAII
CAROLYN E. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
ROD R. BLAGOJEVICH, ILLINOIS
DANNY F. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
JIM TURNER, TEXAS
THOMAS H. ALLEN, MAINE
JANICE D. SCHAKOWSKY, ILLINOIS
Wm. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA

BERNARD SANDERS, VERMONT,
INDEPENDENT

August 29, 2001

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Tenth Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear General Ashcroft:

Over the past four years, the Committee on Government Reform has been one of the primary bodies conducting oversight of the Department of Justice. In the course of its oversight, the Committee has uncovered a number of **troubling facts about the Justice Department's work**. The Committee would not have been able to conduct vigorous oversight had it not obtained or reviewed a number of internal Justice Department documents. Indeed, I have repeatedly called Justice Department officials to public hearings, and the Committee even had to hold Attorney General Reno in contempt in order to vindicate the right of Congress to receive significant records.

The fundamental question now before us is relatively simple: how does Congress conduct oversight of investigations conducted by the Justice Department without access to deliberative material? An inflexible adherence to the position that Congress should never receive such material eviscerates a very important duty required of Congress by the Constitution. I do understand the underlying concerns of the Department of Justice. That is precisely why I attempted to reach an accommodation regarding the Committee's requests for the Conrad memorandum and two declination memoranda. Unfortunately, rather than meet me halfway – as other Administrations have done and as you yourself have demanded in the past – you have elected to follow a course that makes Congress subservient to the Executive branch. This I cannot accept.

I have great confidence in the integrity and ability of you and your staff, and I am optimistic that the Department of Justice will not have the same problems which plagued it

during the tenure of Attorney General Reno.¹ However, my personal confidence in you does not diminish the responsibility of this Committee to conduct vigorous oversight of the Department of Justice. Similarly, it does not lessen the Committee's need to obtain records from the Department.

It is with great concern, therefore, that I address your refusal to produce records requested and subpoenaed by the Committee. On May 22, 2001, the Committee subpoenaed all declination memoranda relating to an investigation of former DEA Special Agent in Charge Ernest Howard.² On May 21, 2001, the Committee requested all declination memoranda relating to former Clinton White House aide Mark Middleton. In addition, I have brought to your attention my subpoena for the memoranda by former Campaign Financing Task Force Chief Robert Conrad regarding the decision to appoint a Special Counsel for various campaign fundraising abuses, and all related memoranda, which I originally subpoenaed on August 24, 2000.

In a meeting on July 18, 2001, Assistant Attorney General Michael Chertoff informed me that the Department would not produce any internal, deliberative materials to the Committee, and as a result, would not produce the Conrad memorandum, or the Howard or Middleton declination memoranda to the Committee.³ His position was cast in absolute, inflexible terms. I know that the decision to withhold these documents was not an easy one for you, and I know that you have made it with the best of intentions. However, the decision to establish an inflexible policy to withhold deliberative materials from Congress is the wrong one, for both legal and prudential reasons. As I indicated earlier, it is unfortunate that we have not been able to reach an accommodation.

The legal right of Congress to review declination memoranda, or other internal deliberative Justice Department materials like the Conrad, Freeh, or La Bella memoranda, cannot be seriously disputed. The Committee spent a great deal of time reviewing applicable legal precedent during its two-year long effort to obtain the Freeh and La Bella memoranda. The relevant cases made it clear that absent a valid claim of executive privilege,⁴ Congress has a right to obtain these materials, a right which has been exercised frequently over the years. I have outlined these precedents in detail in both the Committee's August 1998 contempt report⁵ as well

¹ I hold this optimistic view despite public statements from individuals affiliated with the Bush Justice Department transition effort, who indicated that the new Administration would not follow up on investigations relating to the Clinton Administration. After James Riady was sentenced in January 2001, *The New York Times* reported that: "[I]t is unclear what might happen to the investigation of campaign finance abuses after George W. Bush becomes President on Jan. 20. Some advisers to the Bush transition team have said the new administration will let it come to a close." It was highly troubling that anyone associated with the Bush transition would suggest that the Administration should ignore evidence of illegal activity in the interest of "moving on." I would have objected if Al Gore's advisers had made this suggestion, and I object just as strongly when such suggestions are made by the current Administration or its advisors.

² While the Committee initially made a letter request for these documents, it was at your staff's suggestion that a subpoena was issued. It is, at a minimum, disturbing that your Department would suggest that Congress issue a subpoena and then deliberately fail to produce the subpoenaed material.

³ Your staff has provided very helpful briefings on the declinations of the Howard and Middleton cases. However, your staff has refused to provide any access to the declination memoranda themselves.

⁴ No claim of Executive Privilege has been made over any of the three categories of records currently being sought by the Committee, nor could such a claim properly be made, given the nature of these records.

⁵ Attachment 1.

as in the Committee's December 2000 report regarding the Justice Department.⁶ These cases, ranging from the Palmer Raids investigation in the 1920s to the Iran-Contra investigation in the 1980s, establish the right of Congress to receive internal deliberative materials from the Department of Justice. Indeed, you yourself understood this principle when you served in the United States Senate. In August 1998, you appeared on CNN Late Edition, and were asked if you thought that this Committee was right to hold Attorney General Reno in contempt over her refusal to provide the Committee with the Freeh and La Bella memoranda. An exchange between Wolf Blitzer and yourself on national television went as follows:

Blitzer: You know that in the House of Representatives, Congressman Dan Burton and others are moving with contempt proceedings against Attorney General Janet Reno. For refusing to hand over certain FBI documents, and others involving allegations of Democratic campaign fund-raising abuses during the '96 campaign. Do you want to see this kind of contempt charge against Attorney General Janet Reno?

Senator Ashcroft: No, I would like to see her deliver the documents, these are appropriately requested [and] there are only two reasons the House doesn't have a lot of options here in my judgment. [There are] only two reasons why a person can fail to respond to a subpoena from the House. One is that there is no jurisdiction in the committee, this committee clearly has jurisdiction here. Secondly, executive privilege would be asserted. Neither of those items has been raised by the Attorney General. The Attorney General has just learned from the President a technique we call stonewalling, and I don't think the House has much option. I think the House simply has to say, either our subpoenas are respected, or they are challenged on appropriate grounds. And if they are not, stonewalling won't do it, we have to say, contempt is the appropriate citation, it is regrettable, we need the information.

Your position in 1998 was unambiguous and it was correct. Thus, I am at a loss as to why you would take a contradictory position just a few years later.

As you probably also know, recent precedent also clearly confirms Congress' right to receive these materials. During the past six years alone, the Committee has received or reviewed 10 different declination memoranda. While the Committee has usually reached an accommodation with the Department whereby the memoranda are reviewed by Committee staff, rather than physically produced to the Committee, at least one declination memorandum has been produced to the Committee and published in a Committee report.⁷ The precedent on other deliberative documents is just as clear. The Committee began its efforts to obtain the Freeh, La Bella, and other related memoranda in December 1997. In August 1998, the Committee held Attorney General Reno in contempt over this precise issue. Finally, in May 2000, the Committee received the memoranda which it had subpoenaed. All of these documents were subsequently made public. The Committee obtained these records from Attorney General Reno, who was

⁶ Attachment 2.

⁷ This document was obtained and made public by Chairman Clinger during the 104th Congress.

widely recognized as one of the most recalcitrant Attorneys General in recent memory. You have now staked out a position that is even more restrictive than Attorney General Reno's.

At the same time that you are attempting to erect a restrictive new policy shielding deliberative Justice Department documents from Congressional scrutiny, you have already departed from that policy by providing deliberative Justice Department documents to the Senate Judiciary Committee. Indeed, you appear to have done so after the head of the Criminal Division provided me with a clear statement of the Justice Department's new policy. In July 2001, you provided staff of the Senate Judiciary Committee with access to records relating to Justice Department investigations of allegations relating to improper actions by FBI officials in the Ruby Ridge and Waco matters. Included in the materials which you provided to the Senate Judiciary Committee are internal, deliberative memoranda discussing investigations of Justice Department personnel. These memoranda are indistinguishable from the materials you are withholding from this Committee.⁸ Obviously, I am concerned that you have embarked upon a course that sets different standards for different Congressional committees.

The practical concerns you have outlined regarding the Committee's access to deliberative documents like the Conrad memorandum or declination memoranda are serious, but they do not outweigh the need of the Committee to review this information. Again, this is why I have attempted to reach an accommodation. The only concern that you or your staff have articulated as a reason to withhold these records from Congress is that the production of the records will have a chilling effect on the ability of Department personnel to share their opinion with their superiors. When this argument was first made by Attorney General Reno, in response to the Committee's subpoenas for the Freeh and La Bella memoranda, the Committee examined it, and rejected it. The Department has never produced any evidence that Congressional review of deliberative documents has a chilling effect on Department personnel. Rather, there is every indication that Justice Department personnel have continued to offer their candid advice in written memoranda despite decades of Congressional oversight. This has certainly been the Committee's experience with documents relating to the campaign fundraising investigation. For example, despite the fact that the Committee subpoenaed the Freeh memorandum, several months later Charles La Bella drafted his lengthy memorandum regarding the appointment of an independent counsel. Then, despite the fact that the Committee subpoenaed the La Bella memorandum, and held the Attorney General in contempt over her refusal to provide it to the Committee, a number of Justice Department personnel wrote lengthy, candid memoranda expressing their advice regarding the appointment of an independent counsel.⁹ Even after the

⁸ Some Justice Department staff claim that the internal deliberative memoranda relating to the Ruby Ridge and Waco matters can be made available to Congress because they relate to investigations by the Office of Professional Responsibility, not the Criminal Division. Such a distinction is meaningless. As some of the memoranda relating to Ruby Ridge and Waco make clear, FBI personnel were being investigated for serious matters, including altering 302s and intimidating potential witnesses. These actions could have resulted in criminal prosecution. Therefore, these memoranda regarding Ruby Ridge and Waco contain detailed deliberations regarding investigations that could result in criminal prosecution. As such, they are virtually identical to the Freeh, La Bella, and Conrad memoranda.

⁹ In perhaps the best example of the hollowness of the Department's claims of a "chilling effect," on the same day that the Attorney General was held in contempt over her refusal to provide the Committee with the Freeh and La Bella memoranda, Lee Radek drafted a memorandum in which he clearly contemplated the public release of those memoranda, stating "[i]t is inexcusable, and I believe clearly calculated, that they [La Bella and De Sarno] have

Freeh, La Bella, and a number of other memoranda were provided to the Committee, and released publicly, Justice Department personnel like Campaign Fundraising Task Force Chief Robert Conrad have continued to offer their candid advice in memoranda. As the Committee found in its report regarding the Reno Justice Department:

Indeed, the only practical consequence of the committee's release of the Freeh and La Bella memoranda is probably the message that one should not commit dishonest views to paper. The committee does not feel the need to protect malign advice.¹⁰

In addition, I believe that you should weigh against your concerns about Congressional access to these documents the substantial benefits that arise from Congressional oversight of the prosecutorial function. There are a number of troubling facts about the Justice Department that Congress would have never learned if it had not forced the Department to turn over the kinds of deliberative materials you are now trying to withhold:

- The public would never have learned that Charles La Bella, the lead prosecutor investigating the 1996 campaign fundraising scandal, believed that the Department created a double standard for investigating President Clinton: "[i]f these allegations involved anyone other than the President, Vice President, senior White House, or DNC and Clinton/Gore '96 officials, an appropriate investigation would have commenced months ago without hesitation." La Bella also concluded that "the contortions the Department has gone through to avoid investigating these allegations are apparent. . . . It is time to approach these issues head on, rather than beginning with a desired result and reasoning backwards."
- La Bella also wrote that "one could argue that the Department's treatment of the Common Cause allegations has been marked by gamesmanship rather than an even-handed analysis of the issues. That is to say, since a decision to investigate would inevitably lead to a triggering of the [Independent Counsel Act], those who are hostile to the triggering of the Act had to find a theory upon which we could avoid conducting an investigation." This is of particular consequence when put in the context of a Justice Department that was prepared to allow a senior official to denigrate the Independent Counsel Act in a widely circulated newspaper.¹¹
- Steve Clark, another Justice Department attorney investigating the campaign fundraising matter wrote: "that, to date, we have been unable to investigate the Common Cause allegations in a straightforward way has been a great personal and professional disappointment. But, I believe the public has been most dis-served [sic] by the way in which the 'whether to investigate' issue has been approached, debated, and resolved. Never did I

chosen to communicate their views about others within the Department in a memorandum that is the subject of such intense public interest, and is therefore likely to be leaked or become public through some other route."

¹⁰ Janet Reno's Stewardship of the Justice Department: A Failure to Serve the Ends of Justice, 139, H. Rep. 106-1027 (2000). It was particularly important to learn from one of the memoranda that one senior Justice Department official made misrepresentations so severe that the then-Assistant Attorney General for the Office of Legal Counsel was compelled to write a memorandum which pointed out the misrepresentations. It is difficult for the Committee to understand why such communications should be cloaked in secrecy.

¹¹ See Jeffrey Goldberg, "The Mystery of Janet Reno: What is Janet Reno Thinking?" *The New York Times* (July 6, 1997).

dream that the Task Force's effort to air this issue would be met with so much behind-the-scenes maneuvering, personal animosity, distortions of fact, and contortions of law. . . . All this, not to forestall an ill-conceived indictment, not to foreclose a report making an independent counsel referral, but to prevent any investigation of a matter involving a potential loss of more than \$180 million to the federal treasury."

- The Committee learned that each of the top investigators charged with investigating the 1996 campaign fundraising matter – Charles La Bella, his deputy Judy Feigin, Task Force Chief David Vicinanza, FBI Director Louis Freeh, FBI General Counsel Larry Parkinson, Associate Deputy Attorney General Robert Litt, and even Public Integrity Section Chief Lee Radek – all recommended the appointment of an independent counsel at least once during the three-year debate within the Justice Department. Yet, the Attorney General ignored all of their advice and insisted on investigating the President and her own political party herself, with disastrous consequences.

You have publicly acknowledged that you are trying to restore public trust in the Justice Department and the Federal Bureau of Investigation. It is hard to believe that public confidence in our investigators and prosecutors can be restored by an inflexible policy that prevents Congress from discharging a constitutionally-mandated duty. Rather, Congress has a right to review and evaluate certain prosecutorial decisions, especially those that go to the core of public confidence in the integrity of the Justice Department. For example, this Committee is currently conducting an investigation of the Department's handling of informants in its organized crime investigations. The Committee recently heard testimony from Joseph Salvati, who was imprisoned for 30 years for a crime he did not commit. While Mr. Salvati sat in prison, the FBI had substantial information pointing to his innocence, yet the FBI continued to take steps to assist and protect the man whose testimony put Salvati in prison. The Committee's investigation of the Salvati matter, and a number of other equally disturbing matters, will require access to internal deliberative Department memoranda much like the Conrad memorandum. I fear that the policy you are so intent on establishing will act to prevent the Committee from learning the full truth about these matters. What the Committee has learned so far in its investigation shows that mistakes like the Salvati case are the result of a lack of accountability in the Department's decisionmaking. I fail to see how your new policy – which will cloak the Department's decisionmaking in even more secrecy – will improve the operation of the Department.

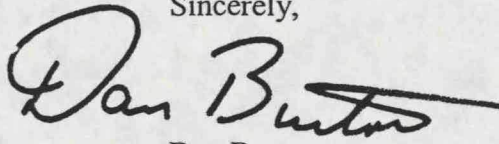
To summarize, the Committee asks only to receive the records it has received in the past. Specifically, the Committee has requested two declination memoranda relating to Ernest Howard and Mark Middleton, the Conrad memorandum regarding the need for a special counsel to investigate campaign fundraising abuses, and other related memoranda. There is no valid legal or practical reason why these records should be withheld from the Committee.

Attorney General Ashcroft, just three years ago, you agreed with my position, and you demanded that Attorney General Reno turn over the Freeh and La Bella memoranda. You said "I would like to see her [Attorney General Reno] deliver the documents . . . we need the information." I believe that your analysis of Attorney General Reno's actions was exactly right, and I am concerned that you have one standard for a Democrat Attorney General and another standard for yourself. This appears to be inexplicable. Therefore, I respectfully request that you

The Honorable John Ashcroft
Page 7 of 7

reconsider your position, and produce to the Committee the documents which I have requested. If you do not produce the requested records, I will have no choice but to ask you to appear before the Committee to explain your position publicly.

Sincerely,

A handwritten signature in black ink that reads "Dan Burton". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Dan Burton
Chairman

cc: Members, Committee on Government Reform

Congressional Requests for Confidential Executive Branch Information

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

June 19, 1989

MEMORANDUM OPINION FOR THE GENERAL COUNSEL'S CONSULTATIVE GROUP

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

I. Congress' Oversight Authority

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

is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution

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

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

II. Executive Privilege

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

Executive privilege is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution.¹ It has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683, 705-06 (1974).

There are at least three generally-recognized components of executive privilege: state secrets, law enforcement, and deliberative process. Since most disputes with Congress in this area in recent years have concerned the privilege for executive branch deliberations, this memorandum will focus on that component. See generally *Confidentiality of the Attorney General's Communications in Counseling the President*, 8 Op. O.L.C. 481, 484-90 (1982).

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

The first congressional request for information from the executive branch occurred in 1792, in the course of a congressional investigation into the failure of an expedition under the command of one General St. Clair. President Washington called his Cabinet together to consider his response, stating that he could conceive that there might be papers of so secret a nature that they ought not be given up. The President and his Cabinet concluded "that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." 1 *Writings of Thomas Jefferson* 304 (1803) (emphasis added). While President Washington ultimately determined in the St. Clair case that the papers requested could be furnished without injury to the public, he refused four years later to comply with a House committee's request for copies of instructions and other documents employed in connection with the negotiation of a treaty with Great Britain.

The practice of refusing congressional requests for information, on the ground that the national interest would be harmed by the disclosure, was employed by many Presidents in the ensuing years. See generally *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part I - Presidential Invocations of Executive Privilege Vis-a-Vis Congress*, 6 Op. O.L.C. 751 (1982). The privilege was most frequently asserted in the areas of foreign affairs and military and national security secrets; it was also invoked in a variety of other contexts, including executive branch investigations. In 1951, in instructing the Secretary of Defense concerning a Senate investigation, President Eisenhower asserted that the privilege extends to deliberative communications within the executive branch:

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

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

The Supreme Court has recognized that the Constitution gives the President the power to protect the confidentiality of executive branch deliberations. See generally *Nixon v. Administrator of Gen. Servs.*, 433

U.S. 425, 446-55 (1977). This power is independent of the President's power over foreign affairs, national security, or law enforcement; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *United States v. Nixon*, 418 U.S. at 708.

It necessarily follows — and the Supreme Court so held in *United States v. Nixon* — that communications among the President and his advisers enjoy "a presumptive privilege" against disclosure in court. *Id.*² The reasons for this privilege, the *Nixon* Court explained, are "plain." "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Id.* at 705. Often, an adviser's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisers change their views, or make mistakes which others correct; this is indeed the purpose of internal debate. The result is that advisers are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisers may hesitate — out of self-interest — to make remarks that might later be used against their colleagues or superiors. As the Court stated, "[a] president and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708.

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information. The possibility that deliberations will be disclosed to Congress is, if anything, more likely to chill internal debate among executive branch advisers. When the Supreme Court held that the need for presidential communications in the criminal trial of President Nixon's close aides outweighed the constitutional privilege, an important premise of its decision was that it did not believe that "advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* at 712. By contrast, congressional requests for executive branch deliberative information are anything but infrequent.

² The *Nixon* Court explained that the privilege is constitutionally based:

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

418 U.S. at 708-09 (footnote omitted). The Court also acknowledged that the privilege stems from the principle of separation of powers: "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708.

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

The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional demands. During the Watergate investigation, the Court of Appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices. The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (*en banc*). Indeed, the court held that the committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." *Id.* at 731 (emphasis added).³

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

III. Accommodation Process

Where Congress has a legitimate need for information that will help it legislate, and the executive branch has a legitimate, constitutionally recognized need to keep certain information confidential, at least one court

³ The Supreme Court has assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. See *United States v. Nixon*, 418 U.S. at 712 n.10. Moreover, the Court held in *Administrative of General Services*, that the constitutional privilege protects executive branch deliberations from disclosure to members of the same branch in a later administration; the Court rejected the specific claim of privilege in the case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. See 433 U.S. at 418-55. Since the Court has held that the privilege protects executive branch communications against compelled disclosure to the judicial branch and to later members of the executive branch, there is every reason to believe that the Court would hold that it protects against compelled disclosure to Congress.

has referred to the obligation of each branch to accommodate the legitimate needs of the other. This duty to accommodate was described by the D.C. Circuit in a case involving a House committee's request to a private party for information which the executive branch believed should not be disclosed. The court said:

The framers ... expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

....

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

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

In an opinion he issued in connection with a 1931 executive privilege dispute involving a committee of the House of Representatives and the Department of Interior, Attorney General William French Smith captured the essence of the accommodation process:

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

Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1931) ("Smith Opinion").

The process of accommodation requires that each branch explain to the other why it believes its needs to be legitimate. Without such an explanation, it may be difficult or impossible to assess the needs of one branch and relate them to those of the other. At the same time, requiring such an explanation imposes on great burden on either branch. If either branch has a reason for needing to obtain or withhold information, it should be able to express it.

The duty of Congress to justify its requests not only arises directly from the logic of accommodation between the two branches, but it is established in the case law as well. In *United States v. Nixon*, the Supreme Court emphasized that the need for evidence was articulated and specific: 418 U.S. at 700-02, 713. Even more to the point is *Senate Select Committee on Presidential Campaign Activities*. In that case, the D.C. Circuit stated that the sole question was "whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." 408 F.2d at 731. The court held that the Committee had not made a sufficient showing. It pointed out that the President had already released transcripts of the conversations of which the Committee was seeking recordings. The Committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. *Id.* at 723-24. But the court answered that, in order to legislate, a committee of Congress seldom needs a "precise reconstruction of past events." *Id.* at 732. The court concluded:

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

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

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

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

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

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

[T]he congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances. It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached. Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances. Congressional demands, under the

guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on the Executive Branch's function of executing the law. At the same time, the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing.

Id. at 30-31.

IV. Procedures

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

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

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

In practice, disputes with Congress in this area typically commence with an informal oral or written request from a congressional committee or subcommittee for information in the possession of the executive branch. Most such requests are honored promptly; in some cases, however, the executive branch official may resist supplying some or all of the

requested information either because of the burden of compliance or because the information is of a sensitive nature. The executive branch agency and the committee staff will typically negotiate during this period to see if the dispute can be settled in a manner acceptable to both sides. In most cases this accommodation process is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued. At that point, if further negotiation is unavailing, it is necessary to consider asking the President to assert executive privilege.

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

WILLIAM P BARR
Assistant Attorney General
Office of Legal Counsel



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2000

The Honorable John Linder
Chairman, Subcommittee on Rules and
Organization of the House
Committee on Rules
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We have carefully reviewed the testimony presented to the Subcommittee on Rules and Organization of the House at its hearing on July 15, 1999, on "Cooperation, Comity, and Confrontation: Congressional Oversight of the Executive Branch." The Department of Justice appreciates the Subcommittee's interest in this area, and we would like to take this opportunity to present in this letter, for the benefit of both Members of Congress and the public at large, the approach we take to the issues raised at the hearing. As always, we are committed to cooperating with your Subcommittee, and all committees of Congress, with respect to the oversight process.

The testimony presented at the hearing suggests to us that there is a need for improved communication and sensitivity between the Executive and Legislative Branches regarding our respective institutional needs and interests. It also suggests that there is considerable misunderstanding about the principles that govern the Department's longstanding positions and practices on responding to congressional oversight requests. We hope that this discussion of those governing principles will be helpful to the Committee and foster an improved understanding of the Department's interests in responding to oversight requests.

General Approach

The oversight process is, of course, an important underpinning of the legislative process. Congressional committees need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary either to rectify practical problems in current law or to address problems not covered by current law. By helping Congress be better informed when it makes legislative decisions, oversight promotes the accountability of government. The information that committees gather in this oversight capacity is also important for the Executive Branch in the future implementation of the law and its participation in the legislative process. We have found that the oversight process can shed

valuable light on Department operations and assist our leadership in addressing problems that might not otherwise have been clear.

President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" sets forth the longstanding Executive Branch policy on cooperating with Congressional oversight:

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

The D.C. Circuit Court of Appeals has recognized the obligations of Congress and the Executive Branch to seek to accommodate the legitimate needs of the other:

The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977). Attorney General William French Smith captured the essence of the accommodation process in a 1981 opinion: "The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." Opinion of the Attorney General for the President, Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981).

In implementing the longstanding policy of the Executive Branch to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch, the Department's goal in all cases is to satisfy legitimate legislative interests while protecting Executive Branch confidentiality interests. Examples of confidential information include national security information, materials that are

protected by law (such as grand jury information pursuant to Rule 6(c) of the Federal Rules of Criminal Procedure and taxpayer information pursuant to 26 U.S.C. § 6103); information the disclosure of which might compromise open criminal investigations or prosecutions or civil cases or constitute an unwarranted invasion of personal privacy; and predecisional deliberative communications (such as internal advice and preliminary positions and recommendations).

We believe that it must be the Department's efforts to safeguard these important Executive Branch institutional interests that have led to the frustrations expressed during the Subcommittee's hearing. We hope that we can reduce those frustrations in the future by setting forth here our perspective on some of the more important institutional interests that are implicated during the course of Congressional oversight.

Open Matters

Much of the testimony at the hearing addressed oversight of ongoing Department investigations and litigation. Although Congress has a clearly legitimate interest in determining how the Department enforces statutes, Congressional inquiries during the pendency of a matter pose an inherent threat to the integrity of the Department's law enforcement and litigation functions. Such inquiries inescapably create the risk that the public and the courts will perceive undue political and Congressional influence over law enforcement and litigation decisions. Such inquiries also often seek records and other information that our responsibilities for these matters preclude us from disclosing. Consequently, we have sought whenever possible to provide information about closed, rather than open, matters. This enables Congress to analyze and evaluate how statutory programs are handled and the Department conducts its business, while avoiding the potential interference that inquiries into open matters entail.

The open matters concern is especially significant with respect to ongoing law enforcement investigations. The Department's longstanding policy is to decline to provide Congressional committees with access to open law enforcement files. Almost 60 years ago, Attorney General Robert H. Jackson informed Congress that:

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

40 Op. Att'y. Gen. 45, 46 (1941). Attorney General Jackson's position was not new. His letter cited prior Attorney General letters taking the same position dating back to the beginning of the 20th century (*id.* at 47-48).

The rationale for this policy is set forth in a published opinion of the Office of Legal Counsel issued by Charles J. Cooper, Assistant Attorney General for the Office of Legal Counsel

during part of the Reagan Administration. See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76-77 (1986). Mr. Cooper noted that providing a Congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases. Id. at 76. Congress would become, "in a sense, a partner in the investigation," id., and could thereby attempt to second-guess tactical and strategic decisions, question witness interview schedules, debate conflicting internal recommendations, and generally attempt to influence the outcome of the criminal investigation. Such a practice would significantly damage law enforcement efforts and shake public and judicial confidence in the criminal justice system. Id. at 76-77.

Decisions about the course of an investigation must be made without reference to political considerations. As one Justice Department official noted 30 years 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 proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Submission of Open CID Investigation Files 2 (Dec. 19, 1969).

In addition to the problem of Congressional pressure and the appearance of such pressure, the disclosure of documents from our open files could also provide a "road map" of the Department's ongoing investigations. The documents, or information that they contain, could come into the possession of the targets of the investigation through inadvertence or a deliberate act on the part of someone having access to them. The investigation would be seriously prejudiced by the revelation of the direction of the investigation, information about the evidence that the prosecutors have obtained, and assessments of the strengths and weaknesses of various aspects of the investigation. As Attorney General Jackson observed:

Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a 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. Atty. Gen. at 46. The Department has similar interests in the confidentiality of internal documents relating to its representation of the United States in civil litigation. Our litigation files usually contain confidential correspondence with client agencies as well as the work product of our attorneys in suits that frequently seek millions of tax dollars. They also contain "road maps" of our litigation plans and preparations, as well as confidential reports from experts and consultants. Those plans could be seriously jeopardized and our positions in litigation compromised if we are obliged to disclose our internal deliberations including, but not limited to,

our assessments of the strengths and weaknesses of evidence or the law, before they are presented in court. That may result in an unfair advantage to those who seek public funds and deprive the taxpayers of confidential representation enjoyed by other litigants.

In addition, the reputations of individuals mentioned in internal law enforcement and litigation documents could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution or other legal action. The Department takes very seriously its responsibility to respect the privacy interests of individuals about whom information is developed during the law enforcement process or litigation.

Internal Department Deliberations

With respect to oversight on closed matters, the Department has a broad confidentiality interest in materials that reflect its internal deliberative process. In particular, we have sought to ensure that all law enforcement and litigation decisions are products of open, frank and independent assessments of the pertinent law and facts -- uninhibited by political and improper influences that may be present outside the Department. We have long been concerned about the chilling effect that would ripple throughout government if prosecutors, policy advisors at all levels and line attorneys believed that their honest opinion -- be it "good" or "bad" -- may be the topic of debate in Congressional hearings or floor debates. These include assessments of evidence and law, candid advice on strengths and weaknesses of legal arguments, and recommendations to take or not to take legal action against individuals and corporate entities.

The Department must seek to protect this give-and-take process so that the participants in the process can vigorously debate issues before them and remain able to provide decisionmakers with complete and honest counsel regarding the conduct of the Department's business. If each participant's contribution can be dissected by Congress in a public forum, then the free and candid flow of ideas and recommendations would certainly be jeopardized. The Supreme Court has recognized the legitimacy of this "chilling effect" concern: "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). Our experience indicates that the Department can develop accommodations with Congressional committees that satisfy their needs for information that may be contained in deliberative material while at the same time protecting the Department's interest in avoiding a chill on the candor of future deliberations.

The foregoing concerns apply with special force to Congressional requests for prosecution and declination memoranda and similar documents. These are extremely sensitive law enforcement materials. The Department's attorneys are asked to render unbiased, professional judgments about the merits of potential criminal and civil law enforcement cases. If their deliberative documents were made subject to Congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providing the candid and independent analysis essential to just and effective law enforcement or, just as troubling, that

they might err on the side of prosecution simply to avoid public second-guessing. This in turn would undermine public and judicial confidence in our law enforcement processes, untoward consequences we are confident that Congress, like the Department, wishes to avoid.

Privacy

In addition to these concerns, disclosure of declination memoranda would implicate significant individual privacy interests as well. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss. We try to accommodate Congressional needs for information about declinations whenever possible by making appropriate Department officials available to brief Committee Members and staff. This affords us an opportunity to answer their questions, which can be helpful because it can include the context and process that accompanied the decision. Hence, the discussion with staff may provide useful information and minimize the intrusion on individual privacy and the chill on our attorneys' preparation of future deliberative documents.

Line Attorneys

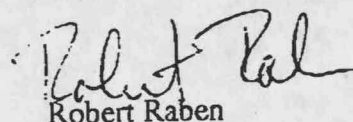
The Department also has a strong institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional questions about Department actions. This is based in part upon our view that supervisory personnel, not line employees, make the decisions that are the subjects of congressional review, and therefore they should be the ones to explain the decisions. More fundamentally, however, we need to ensure that our attorneys and agents can exercise the independent judgment essential to the integrity of law enforcement and litigation functions and to public confidence in those decisions. Senator Orrin Hatch has recognized the legitimacy of the Department's practice in this area, observing that Congressional examination of line attorneys "could chill career Department of Justice lawyers in the exercise of their daily duties." See Letter to Attorney General Janet Reno from Senator Orrin Hatch, dated September 21, 1993. Representative Henry Hyde has likewise opposed Congressional interviews of line prosecutors. See Letter of Representative Hyde to Representative Carlos Moorhead, dated September 7, 1993. By questioning supervisors and ultimately the Department's Senate-confirmed leadership, Congress can fulfill its oversight responsibilities without undermining the independence of line attorneys and agents.

* * *

In sum, the Department recognizes that the process of Congressional oversight is an important part of our system of government. We are committed to cooperating with oversight requests to the fullest extent consistent with our constitutional and statutory responsibilities.

We welcome your suggestions about how we should work together to accommodate the needs of our respective branches of government. Please do not hesitate to contact me if you would like to discuss these matters further. I intend at all times to work diligently with you toward satisfying the respective needs of our coordinate branches.

Sincerely,



Robert Raben

Assistant Attorney General

cc: The Honorable Tony Hall
Ranking Minority Member

THE WHITE HOUSE
WASHINGTON

November 4, 1982

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS
AND AGENCIES

SUBJECT: Procedures Governing Responses to
Congressional Requests for Information

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or

-2-

other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.
3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.
4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.
5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, and that the request itself does not constitute a claim of privilege.
6. If the President decides to invoke executive privilege, the Department Head shall advise the

-3-

requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

Ronald Reagan

THE WHITE HOUSE
WASHINGTON

September 28, 1994

MEMORANDUM FOR ALL EXECUTIVE DEPARTMENT AND AGENCY
GENERAL COUNSELS

FROM: LLOYD N. CUTLER
SPECIAL COUNSEL TO THE PRESIDENT *LNC*

SUBJECT: Congressional Requests to Departments and Agencies
for Documents Protected by Executive Privilege

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives.

The doctrine of executive privilege protects the confidentiality of deliberations within the White House, including its policy councils, as well as communications between the White House and executive departments and agencies. Executive privilege applies to written and oral communications between and among the White House, its policy councils and Executive Branch agencies, as well as to documents that describe or prepare for such communications (e.g., "talking points"). This has been the view expressed by all recent White House Counsels. In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.

Executive privilege must always be weighed against other competing governmental interests, including the judicial need to obtain relevant evidence, especially in criminal proceedings, and the congressional need to make factual findings for legislative and oversight purposes.

In the last resort, this balancing is usually conducted by the courts. However, when executive privilege is asserted against a congressional request for documents, the courts usually decline to intervene until after the other two branches have exhausted the possibility of working out a satisfactory accommodation. It is our policy to work out such an accommodation whenever we can, without unduly interfering with the President's need to conduct frank exchange of views with his principal advisors.

Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege.

Executive privilege belongs to the President, not individual departments or agencies. It is essential that all requests to departments and agencies for information of the type described above be referred to the White House Counsel before any information is furnished. Departments and agencies receiving such requests should therefore follow the procedures set forth below, designed to ensure that this Administration acts responsibly and consistently with respect to executive privilege issues, with due regard for the responsibilities and prerogatives of Congress:

First, any document created in the White House, including a White House policy council, or in a department or agency, that contains the deliberations of, or advice to or from, the White House, should be presumptively treated as protected by executive privilege. This is so regardless of the document's location at the time of the request or whether it originated in the White House or in a department or agency.

Second, a department or agency receiving a request for any such document should promptly notify the White House Counsel's Office, and direct any inquiries regarding such a document to the White House Counsel's Office.

Third, the White House Counsel's Office, working together with the department or agency (and, where appropriate, the Department of Justice), will discuss the request with appropriate congressional representatives to determine whether a mutually satisfactory accommodation is available.

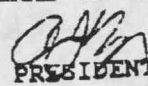
Fourth, if efforts to reach a mutually satisfactory accommodation are unsuccessful, and if release of the document would pose a substantial question of executive privilege, the Counsel to the President will consult with the Department of Justice and other affected agencies to determine whether to recommend that the President invoke the privilege.

We believe this policy will facilitate the resolution of issues relating to disclosures to Congress and maximize the opportunity for reaching mutually satisfactory accommodations with Congress. We will of course try to cooperate with reasonable Congressional requests for information in ways that preserve the President's ability to exchange frank advice with his immediate staff and the heads of the executive departments and agencies.

Please call my successor, Abner Mikva, or Joel Klein, Deputy Counsel to the President, to discuss any questions relating to this policy.

THE WHITE HOUSE
WASHINGTON

November 10, 1994

MEMORANDUM FOR ALL EXECUTIVE BRANCH DEPARTMENT
AND AGENCY GENERAL COUNSELSFROM: ABNER J. MIKVA 
COUNSEL TO THE PRESIDENTSUBJECT: FOLLOW-UP GUIDANCE ON RESPONDING TO CONGRESSIONAL
REQUESTS TO DEPARTMENTS AND AGENCIES FOR DOCUMENTS
THAT MAY BE SUBJECT TO EXECUTIVE PRIVILEGE CLAIMS

By memorandum dated September 28, 1994, my predecessor Lloyd Cutler set forth certain policies with respect to Congressional requests for information that may be subject to claims of executive privilege.

This follow-up memorandum is intended to provide further guidance in response to certain questions we have received.

While Mr. Cutler's September 28 memorandum makes reference to general principles applicable to claims of executive privilege, the policies set forth in the memorandum apply to Congressional requests to departments and agencies for documents reflecting intra-White House decisions (including decisions of White House policy councils) or communications between the White House (including its policy councils) and a department or agency: e.g., documents originating in the White House, delivered from the White House to an agency, or concerning White House-agency decisions. Mr. Cutler's memorandum did not address other contexts in which issues of executive privilege arise.

Mr. Cutler's memorandum observed that "[e]xecutive privilege must always be weighed against other competing governmental interests, including . . . the congressional need to make factual findings for legislative oversight purposes." This statement, of course, does not purport to change the longstanding position of the Executive Branch that communications involving or reflecting state secrets are subject to an unqualified privilege.

Please do not hesitate to contact me or Joel Klein, Deputy Counsel to the President, with any questions about these policies.