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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Congressional Requests for Testimony... [28 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - From: Michael Small	28	04/29/1994	
002	Draft	Executive Branch Requests... [14 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Andrew Card, et al. - From: Alberto Gonzales, et al.	14	07/24/2001	
003	Memorandum	Requests by Ranking Minority Members [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS]	1	N.D.	
004	Memorandum	Congressional Information Requests [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - From: Larry Thompson	1	N.D.	

COLLECTION TITLE:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
Executive Privilege General [2]
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]
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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
005	Memorandum	Talking Points on Executive Privilege for Cabinent Meeting [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS] - To: Albert Hawkins - From: Alberto Gonzales	1	08/02/2001	
006	Talking Points	Suggested Talking Points... [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/17/2025 JLS]	1	08/02/2001	

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SUPERSEDED

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001	Memorandum	Congressional Requests for Testimony… - From: Michael Small	28	04/29/1994	P5;
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003	Memorandum	Requests by Ranking Minority Members	1	N.D.	P5;
004	Memorandum	Congressional Information Requests - From: Larry Thompson	1	N.D.	P5;
005	Memorandum	Talking Points on Executive Privilege for Cabinent Meeting - To: Albert Hawkins - From: Alberto Gonzales	1	08/02/2001	P5;
006	Talking Points	Suggested Talking Points…	1	08/02/2001	P5;

COLLECTION TITLE:
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Memorandum

Subject
Congressional Requests for Testimony of White House Officials

Date
April 29, 1994

To
File

From
Michael Small
Office of Legal Counsel

It has been long-standing White House policy to decline requests from Congress for the testimony of White House officials before congressional committees. This memorandum provides an historical overview of the application of that policy.[1]

The memorandum covers congressional requests for testimony of then-current White House officials, as well as requests for testimony of former White House officials.[2] The officials in question are the President's immediate advisers and others who work

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[1] The basis of the policy is not discussed in this memorandum. It is, however, set forth in several previous OLC memoranda. See, e.g., Memorandum from William H. Rehnquist for John D. Ehrlichman, Assistant to the President for Domestic Affairs, Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff," Feb. 5, 1971; Memorandum from Ralph E. Erickson to John W. Dean, III, Counsel to the President, Re: Appearance of Presidential Assistant Peter M. Flanigan Before a Congressional Committee, March 15, 1972; Memorandum from Roger C. Cramton to John W. Dean, III, Counsel to the President, Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters, Dec. 21, 1972; Memorandum from John Harmon for Margaret McKenna, Deputy Counsel to the President, Re: Dual-purpose Presidential Advisers, Aug. 11, 1977; Memorandum from Theodore B. Olson to Fred Fielding, Counsel to the President, Re: Congressional Testimony by Presidential Assistants, April 14, 1981; Memorandum from Theodore B. Olson to Rudolph W. Guiliani, Associate Attorney General, Re: Congressional Demand for Deposition of Counsel to the President Fred F. Fielding, July 23, 1982; Memorandum from Theodore B. Olson to Edward C. Schmults, Deputy Attorney General, July 29, 1982.

[2] When requests have been made for the testimony of White House officials who served in former Administrations, the then-current Administration apparently has had the responsibility for deciding how to respond to the requests.

closely with him or his immediate advisers. This encompasses officials who are in contact with the President on a regular or frequent basis, such as the White House Chief of Staff; the White House Counsel; the National Security Adviser; the Legal Adviser to the National Security Council; the President's Domestic Policy Adviser(s); the White House Communications Director; the President's Appointment Secretary; and other key administrative aides and deputies to the President. The memorandum does not cover congressional requests for the testimony of the Chairman of the Council of Economic Advisers or the Director of the Office of Management and Budget, both of whom routinely appear before Congress. It also does not cover congressional requests for the testimony of the Vice President or members of the Vice President's staff.[3]

In addition, the memorandum only covers requests for testimony that Congress has made in its oversight or investigative capacity. Thus, the memorandum does not discuss requests for testimony of White House officials on legislative initiatives. Because it has not been the focus of our review, we have not researched the extent to which Congress has made such requests in the past, or how the White House has responded. We are aware, however, that First Lady Hillary Rodham Clinton testified before several Senate and House committees on the Clinton Administration's proposed health care legislation in September and October 1993, and she apparently did so as a senior White House official.[4]

The memorandum is divided into four parts. The first part is a background section. It discusses the sources that were used in preparing the memorandum, and the historical roots of congressional

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[3] We are aware of at least one request for the testimony of a Vice President and a member of the Vice President's staff: In November 1991, the Subcommittee on Health and Environment of the House Committee on Energy and Commerce invited Vice President Quayle to testify regarding the activities of the Council on Competitiveness, which the Vice President chaired. Mr. Quayle declined to testify. A member of his staff who served as Staff Director of the Council also declined an invitation to testify before the Subcommittee.

[4] Because of her role in formulating the Administration's health care plan, Mrs. Clinton was held to be a senior White House official in a case that posed the question whether the Federal Advisory Committee Act applied to President Clinton's Health Care Task Force. See Ass'n of American Physicians and Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993). The press accounts of Mrs. Clinton's testimony do not indicate whether she was invited to appear by the Committees, or whether the Administration contacted the Committees and stated that Mrs. Clinton would be made available to testify about the health care plan.

requests for the testimony of White House officials.

Part II of the memorandum sets forth instances in which White House officials have refused requests to testify before congressional committees. This part of the memorandum reveals that, in some of the instances in which White House officials refused to testify, the White House proposed alternative arrangements by which White House officials would be made available to meet informally with members of the requesting committees or committee staffers. As the memorandum indicates, we know of some instances in which such meetings did take place.[5]

Part III of the memorandum sets forth those instances in which White House officials have testified. The fourth and final part provides a brief analysis of the circumstances surrounding the instances in which White House officials testified.

I. Background

A. Sources

The memorandum is based on a review of the following sources: (i) OLC memoranda contained in the OLC precedent bank; (ii) other materials, including White House documents, that are contained in OLC's executive privilege files; (iii) transcripts of hearings at which White House officials testified, and congressional reports on the matters about which the officials testified; (iv) accounts in books and newspapers; and (v) relevant portions of the public papers of Presidents Nixon, Carter, and Reagan.

The memorandum itself does not contain citations. However, there is a bibliography in the appendix to the memorandum. The bibliography sets forth the particular sources that were used in preparing the descriptions of each of the congressional requests for the testimony of White House officials that appear in the memorandum.

The memorandum does not purport to identify every instance in which Congress requested the testimony of a White House official. There may be other instances that are not set forth in the memorandum.

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[5] There may be instances other than those mentioned in the memorandum in which the White House proposed alternative arrangements for informal meetings in lieu of testimony before a committee, and in which such meetings took place.

B. Historical Roots

The earliest instance of a congressional request for the testimony of a White House official that is documented in this memorandum -- a February 1944 request for the testimony of Jonathan Daniels, an aide to President Franklin Roosevelt -- may have been the first such request in our history.[6] (The request for Daniels' testimony is discussed in Part III of the memorandum.) The Daniels matter is the earliest instance of a congressional request for the testimony of a White House official that is mentioned in an OLC document entitled, "Memorandum Reviewing Inquiries by the Legislative Branch During the Period 1948-53 Concerning the Decision-Making Process and Documents of the Executive Branch," which was apparently prepared in the late 1950s. Perhaps because the focus of that memorandum is on the period 1948-53, it does not discuss the 1944 Daniels episode in any detail; it briefly contrasts the Daniels episode with the 1948 congressional request for the testimony of Truman aide John Steelman. The request for Daniels' testimony is, however, the subject of a short, one paragraph 1948 OLC memorandum. No other request is mentioned in that memorandum.

In testifying on executive privilege in August 1971 before a subcommittee of the Senate Judiciary Committee, then-Assistant Attorney General for OLC William Rehnquist stated that prior to the 1940s, Congress normally obtained information from the executive branch through document requests, not through requests for live testimony of executive branch officials. The first request for live testimony that Rehnquist discussed is the 1948 Steelman incident. Rehnquist did not mention the 1944 request for the testimony of Daniels.[7]

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[6] A contemporaneous newspaper account of the request for Daniels' testimony suggests as much. We did not do a comprehensive check to verify whether the Daniels matter was the first request for the testimony of a White House official. I did, however, review the computerized (Congressional Information Service, Congressional MasterFile) list of witnesses who testified at the Senate hearings on the "Teapot Dome" scandal in 1923 and 1924. The list reveals that no White House officials testified, although the Chief White House telephone operator and a White House doorkeeper did testify.

[7] Rehnquist's focus was on requests for testimony of executive branch officials generally, which includes White House officials. Rehnquist suggested that Congress began to request live testimony of executive branch officials more routinely beginning in about 1940; however, he did not refer to any particular requests that were made in 1940. As indicated above, the earliest request that he discussed was the 1948 Steelman episode. I have seen no reference in the OLC precedent bank to a

Eisenhower Administration

Sherman Adams/Dixon-Yates Contract. In July 1955, White House Chief of Staff Sherman Adams declined to testify before the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee in connection with an investigation of the "Dixon-Yates Contract" -- a contract between the Atomic Energy Commission and the Mississippi Valley Generating Company ("MVGC") for the construction of an electric power plant and for the sale of generated electric power to the United States government.[9] The Eisenhower Administration supported the contract. Many congressional Democrats, by contrast, were hostile to the contract because it was seen as a Republican device to cripple the Tennessee Valley Authority.

The subcommittee, which was chaired by Senator Estes Kefauver of Tennessee, was particularly interested in allegations that Adams had pressured the Chairman of the Securities and Exchange Commission to delay a hearing before that body on the financing of the Dixon-Yates contract in order to prevent disclosure of certain information that might have an adverse effect on upcoming consideration by the House of Representatives regarding appropriations for the contract. The SEC Chairman testified before the subcommittee as to his conversations with Adams about postponing the SEC's hearing on Dixon-Yates; but the SEC Chairman refused (on the grounds of executive privilege) to state whether Adams had talked with him about the House appropriation hearings. Following the testimony of the SEC Chairman, the subcommittee invited Adams to appear. In a July 21 reply, Adams stated that because all of the facts as to which he might testify either had been our could be obtained through the testimony of other government officials, and because of his official and confidential relationship with President Eisenhower, he would decline the subcommittee's invitation. At a news conference on July 27, President Eisenhower defended Adams' refusal to testify.

Johnson Administration

Fortas Nomination. During its 1968 hearings on the nomination of Abe Fortas to be Chief Justice, the Senate Judiciary Committee requested that W. DeVier Pierson, Associate Special Counsel to the President, testify regarding allegations that, while an Associate Justice on the Supreme Court, Fortas had assisted the Johnson Administration in the drafting of legislation. In a letter to the Committee, Pierson stated that he would not testify, on the grounds that he was a member of President Johnson's immediate staff.

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9 The contract was referred to as the Dixon-Yates contract because those were the names of the two principals of MVGC.

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Nixon Administration

Henry Kissinger. At some point in 1971 (but apparently prior to August of that year), the Senate Foreign Relations Committee requested the appearance of Henry Kissinger, who, at that time, was National Security Adviser to President Nixon. Kissinger declined the request. Apparently, Kissinger did meet informally with members of the Committee.[10]

Watergate. The Watergate burglary took place on June 17, 1972. In August 1972, the Chairman of the House Banking and Currency Committee, Rep. Wright Patman, asked Committee staff to investigate links between the Watergate burglary and President Nixon's reelection campaign. Republican members of the Committee, joined by some Democrats, refused to authorize a full-blown investigation with public hearings.[11] Nevertheless, acting on his own authority, Rep. Patman invited White House Counsel John Dean (as well as former Attorney General John Mitchell and Finance Chairman for the Reelection Committee Maurice Stans) to appear before the Committee in October 1972. Dean declined, invoking executive privilege. Patman went ahead and staged a "hearing" anyway, with empty chairs for witnesses. On October 31 (shortly before Nixon won reelection), Patman released the report of the Committee staff, which linked officials of the Nixon campaign to the Watergate burglary.

On January 6, 1973, Senate Majority Leader Mike Mansfield called for a congressional investigation of Watergate by a Select Committee. Mansfield proposed that the Committee be chaired by Senator Sam Ervin. With Ervin as Chair, the Committee was formally established in early February. Meanwhile, the trial of the Watergate burglars began on January 10, 1973, with Judge John Sirica presiding. Five of the defendants pleaded guilty before the end of the trial. G. Gordon Liddy and James McCord were convicted on January 30 for their roles in the burglary.

In February, the Senate Judiciary Committee commenced hearings on President Nixon's nomination of L. Patrick Gray to be the

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10 A 1972 OLC memorandum indicates that Kissinger apparently had declined similar requests from other congressional committees. There is no indication in that memorandum (or other OLC memoranda that mention the requests for Kissinger's testimony) as to the subject matter that the Senate Foreign Relations Committee and the other committees wanted Kissinger to address.

11 Subsequently, it was revealed that White House officials, particularly John Dean, the Counsel to the President, took an active role in efforts to hinder the investigation of the Patman Committee.

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Director of the FBI. At that time, Gray was Acting Director of the FBI. Gray had been serving in that position since before the Watergate break-in. On March 1, 1973, Senator John Tunney, a member of the Judiciary Committee, suggested that he might ask the Committee to request the testimony of John Dean at the Gray confirmation hearings. Senator Tunney's statement followed revelations by Gray himself of his contacts with Dean regarding the FBI's investigation of Watergate. When asked about Senator Tunney's statement at a press conference on March 2, President Nixon said that he would object to any request for testimony of Dean or others on the White House staff.

At his March 2 press conference, President Nixon said that the White House would cooperate with Senator Ervin's Select Committee. However, Dean later revealed that in February-March 1973, the White House made every effort to restrain the Select Committee and make it as difficult as possible for the Committee to get information and witnesses, notwithstanding the public posture of cooperation. In particular, the President directed Dean and Domestic Policy Adviser John Ehrlichman to check the precedents for invoking executive privilege. In that vein, in a statement on executive privilege that was released on March 12, President Nixon said that current and former members of his White House staff would decline requests for formal appearances before congressional committees. On March 13, the Senate Judiciary Committee invited Dean to appear at the Gray confirmation hearings. The next day, Dean said that he would decline to appear at the hearings, but that he would agree to accept written interrogatories.

On March 20, 1973, James McCord sent a letter to Judge John Sirica, who had scheduled a sentencing hearing for March 23. McCord told Judge Sirica that campaign officials were involved in planning the burglary, that Administration officials were involved in the cover-up operation, and that pressure had been applied to maintain the Watergate burglars' silence. On March 23, Judge Sirica read McCord's letter in open court. The same day, McCord's attorney contacted the Ervin Committee and offered to provide information to the Committee. On March 26, the New York Times reported more details about McCord's linkage of the reelection campaign to the Watergate burglary. Particular focus was on the role of Jeb Magruder, Deputy Director of the Reelection Campaign and formerly the top Deputy to White House Chief of Staff H.R. Haldeman.

On April 1, Senator Ervin said that he would challenge President Nixon's claims of executive privilege in order to gain the testimony of key White House officials before the Watergate Select Committee. On April 10, Attorney General Richard Kleindienst told a group of Senators, including Senator Ervin, that presidential aides could not be compelled to testify before Congress.

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Ultimately, the Nixon Administration relented. The testimony of Nixon White House officials before the Watergate Select Committee is discussed in Part III.

Reagan Administration

Martin Anderson/Budget for Domestic Policy Unit. Sometime between January 1981 and July 1981, a subcommittee of the House Appropriations Committee requested that Martin Anderson, the Domestic Policy Adviser to President Reagan, testify on funding for the office of the Domestic Policy Adviser. Anderson refused to testify before the subcommittee, citing separation of powers concerns. In response, the Appropriations Committee voted to deny all funds to Anderson's office.[12]

Fred Fielding/Donovan Inquiry. In 1982-83, the Reagan Administration refused a Senate Labor and Human Resources Committee request to obtain the testimony of White House Counsel Fred Fielding with respect to matters surrounding the 1981 confirmation hearings of Labor Secretary Raymond Donovan. In a letter to the Committee, the Administration (per the Deputy Attorney General) stated that Presidents had historically resisted efforts to obtain sworn testimony from their closest and most immediate advisers on the White House staff, and that Congress had customarily honored the President's wishes. The letter stated that Fielding would answer appropriate written inquiries from the Committee.

Meese Confirmation Hearings. In February 1984, President Reagan nominated Edwin Meese, then the Counselor to the President, to be Attorney General. One of the issues that the Senate Judiciary Committee explored during Meese's testimony at his confirmation hearings in early March 1984 was the appointment to positions in the Reagan Administration of persons who previously had provided Meese with financial assistance. After Meese's initial round of testimony, Democratic members (the Republicans were the majority party at the time) sought the testimony of several White House officials on the subject of the Administration's hiring of alleged Meese benefactors. The White House officials whose testimony was sought were as follows: Chief of Staff James Baker; Deputy Chief of Staff Michael Deaver; White House Counsel Fred Fielding; and former White House Personnel Director E. Pendelton James.

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12 The only reference to the Anderson episode that I have identified appears in a July 10, 1981 story in the Washington Post. It is unclear whether Anderson testified in the end or whether the Appropriations Committee backed off and voted to fund Anderson's office.

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On March 16, White House spokesman Larry Speakes suggested that the officials would not testify, but that a final decision would be made if and when a formal request for their testimony was received. It is unclear whether the full Committee ever made such a request. In April 1984, an independent counsel (Jacob Stein) was appointed to investigate Meese's failure to include on a financial disclosure form a $15,000 interest-free loan that he had received from a person who was appointed to a post in the Reagan Administration. In an article on the appointment of an independent counsel, the New York Times mentioned in passing that White House Counsel Fielding had invoked executive privilege in March in refusing a request from a member of the Judiciary Committee that he testify at the Meese confirmation hearings.

Bush Administration

POW/MIA. In 1992, it appears that National Security Adviser Brent Scowcroft declined to testify before the Senate Select Committee on POW/MIA affairs regarding POW/MIA matters that arose while he was serving on the National Security Council Staff during the Nixon and Ford Administrations, but indicated that he was willing to meet informally. In addition, the White House refused to authorize former White House Chief of Staff Howard Baker and former National Security Adviser Frank Carlucci to testify before that Committee regarding POW/MIA conversations in which they may have participated with H. Ross Perot and others from outside the White House while serving in the Reagan Administration. The White House did, however, authorize Baker and Carlucci to meet informally with Committee staff to discuss such conversations.

Iraqgate. In 1992, the House Judiciary Committee and the House Banking Committee requested the appearance of White House Counsel Boyden Gray and NSC Legal Adviser Nicholas Rostow in connection with the Committees' inquiries into Bush Administration policies towards Iraq before the Persian Gulf War of 1990-91. The White House rejected the Committees' requests, stating that it was the long-standing practice of the White House to decline requests for testimony by members of the President's personal staff. The White House said that it would be willing to work out an alternative mechanism for making available Gray and Rostow to members of the Committees in informal discussions.

III. Testimony by White House Officials

Franklin Roosevelt Administration

Jonathan Daniels. On February 28, 1944, Jonathan Daniels, an Administrative Assistant to President Roosevelt, was subpoenaed to testify before a subcommittee of the Senate Agricultural Committee

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regarding allegations that he had attempted to force the resignation of the head of the Rural Electrification Administration, Harry Slattery. Daniels appeared before the subcommittee, but stated that he would refuse to testify. Daniels told the subcommittee that given his confidential relationship with President Roosevelt, it was in the public interest that he refuse to testify. Daniels further stated that he would refuse to testify even if the subcommittee held a closed session. Daniels maintained this position, even though the subcommittee counsel explained that he could be held in contempt for refusing to testify.

On March 4, Daniels wrote to the subcommittee and stated that he would agree to testify on the Slattery matter. In his letter, Daniels said that he had conferred with President Roosevelt, and that the President had advised him to testify because his testimony posed no threat to the public interest. Daniels also stated that the President had told Daniels that he would be happy to meet with the subcommittee himself to discuss the Slattery matter.

The New York Times reported that Daniels' decision to testify was based, in part, on a White House move to avoid further conflict with Congress, which had overridden a presidential veto of a tax bill by a wide margin the previous week.

On March 7, Daniels testified before the subcommittee. Daniels explained that he had sought Slattery's resignation because, after an investigation undertaken at President Roosevelt's request, he had concluded that internal strife at the Rural Electrification Administration could only be ended if Slattery stepped aside.[13]

Truman Administration

Donald Dawson. On May 10-11 1951, Donald Dawson, an Administrative Assistant to President Truman, appeared before a subcommittee of the Senate Committee on Interstate and Foreign Commerce that was investigating influence and favoritism in the lending operations of the Reconstruction Finance Corporation ("RFC"). The New York Times account of Dawson's appearance stated that Dawson advised President Truman on "patronage" matters.

Dawson stated at the outset of his testimony that he was voluntarily appearing before the subcommittee. When asked by subcommittee members about earlier invitations to testify that had

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[13] In his own testimony before the subcommittee, Slattery said that Daniels asked him to resign over a particular decision that Slattery had made.

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been ignored,[14] Dawson stated that he wanted to appear, but that there was a question as to whether presidential advisers should testify before congressional committees. Dawson explained that when the subcommittee had sent its most recent invitation setting a specific date for his testified, he conferred with President Truman, who consented to his appearance.

Dawson testified that he had accepted free accommodations at a fashionable Miami Beach hotel that had received an RFC loan. He also testified that he had had social contacts with prospective borrowers, as well as with RFC directors who made the agency's lending decisions. Dawson further testified that he frequently made appointments for loan applicants with agency personnel, and that he referred loan requests to the agency. However, Dawson denied that he had ever exercised influence or had any influence over the directors or lending operations of the RFC. He also said that he was unaware that the hotel at which he accepted free accommodations had applied for and received an RFC loan.

In questioning Dawson, two members of the subcommittee, J. William Fulbright, the subcommittee Chairman, and Paul Douglas, expressed the view that, as patronage adviser to President Truman, Dawson plainly had a role in the appointment of RFC Directors. The two Senators further stated that given Dawson's position, his acceptance of free accommodations at the Miami Beach hotel, his referrals of loan applications, and his social contacts with RFC directors, could not but help to create the impression that he had influence with respect to the RFC's lending decisions.

Eisenhower Administration

Sherman Adams/Vicuna Coat. On June 16, 1958, the House Special Subcommittee on Legislative Oversight invited White House Chief of Staff Sherman Adams to appear to answer questions on his relationship with the New England industrialist Bernard Goldfine, and his contacts to the FTC and the SEC on behalf of Goldfine. Adams' contacts to the FTC had drawn particular attention: newspapers reported that after Adams contacted the FTC, the agency rejected a staff recommendation that criminal charges be brought against Goldfine.

On June 16, Adams announced that he would agree to testify before the subcommittee, and that President Eisenhower approved of

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[14] The reference to these invitations is in the New York Times account. No such reference appears in the various OLC memoranda that discuss the Dawson episode.

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his decision.[15] The next day, Adams appeared before the subcommittee. Adams testified that he had known Goldfine for many years, and that he had a close personal relationship with Goldfine. Adams said that Goldfine had paid several hotel bills for him, and had given him a vicuna coat. Adams further testified that he had called the FTC and the SEC to inquire about cases involving Goldfine. Adams denied that he had made those calls to influence the agencies; rather, he said that he was only seeking information. However, Adams did admit that he made mistakes in judgment in contacting the agencies on behalf of Goldfine, given his position as Chief of Staff to President Eisenhower.

In addition to Adams' denials, the former Chairman of the FTC testified that Adams' calls on behalf of Goldfine had not influenced the agency's actions. Nevertheless, the controversy over Adams' relationship with Goldfine and his contacts to the FTC continued to rage over the summer of 1958. On September 22, 1958, Adams resigned as Eisenhower's Chief of Staff.

Nixon Administration

ITT Antitrust Suit/Kleindienst Confirmation Hearings. In February 1972, the Senate Judiciary Committee was considering the nomination of Richard Kleindienst to be Attorney General. On February 29, 1972, the columnist Jack Anderson published a memorandum attributed to ITT lobbyist Dita Beard that linked the settlement of a Justice Department antitrust suit against ITT in 1971 to a $200,000 pledge by the company to help bring the 1972 Republican National Convention to San Diego. At the time of the settlement of the ITT suit, Kleindienst was Deputy Attorney General, with supervisory authority over the suit. After Anderson published the memorandum, witnesses at the Kleindienst confirmation hearings told the Judiciary Committee that Peter Flanigan, an assistant to President Nixon,[16] had served as a conduit in arranging a written financial analysis of the ITT suit for the Justice Department by an outside investment consultant whom

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15 The New York Times account of Adams' decision to testify stated that Adams had previously turned down several invitations to appear before congressional committees, on the grounds of executive privilege. The Times account did not specify what the previous requests entailed. The only other request for Adams' testimony that I have identified came in connection with the Dixon-Yates contract; that episode is discussed in Part II of the memorandum.

16 At the time of the Kleindienst confirmation hearings, Flanigan was the head of the White House Council on International Economic Policy. A March 1972 Washington Post story on Flanigan described him as an influential aide to President Nixon.

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Flanigan knew. The witnesses told the Committee that the consultant's analysis contributed to the Department's decision to settle the suit against ITT.

On March 7, 1972, Senator John Tunney, a member of the Judiciary Committee, stated that he would ask the Committee to request that Flanigan testify at the Kleindienst confirmation hearings about his role in the settlement of the ITT suit. Flanigan told reporters that he would decline to testify, on the grounds of executive privilege. In a March 15, 1972 memorandum to White House Counsel John Dean regarding the possible request for Flanigan's testimony, OLC concluded that it was entirely appropriate and consistent with past White House practice for Flanigan to decline to testify if he were invited to appear before the Judiciary Committee. In a letter to Senator James Eastland, Chairman of the Judiciary Committee, that was released on April 12, 1972, Dean wrote that Flanigan's refusal to testify was consistent with the doctrine of separation of powers and long-established historical precedent. In response, some Democrats on the Committee threatened to block Kleindienst's nomination unless Flanigan agreed to testify.[17]

On April 14, Flanigan sent a letter to Senator Eastland stating that he would testify before the Senate Judiciary Committee, but that his testimony would be limited to his role in soliciting the financial analysis of the ITT suit and meetings that he attended with the President of ITT. The Washington Post reported that the White House's decision to permit Flanigan to testify was intended to save the Kleindienst nomination. On April 20, Flanigan appeared before the Judiciary Committee. Flanigan explained his role in securing the financial analysis and passing it along to the Assistant Attorney General for the Antitrust Division. He denied that he attempted to affect the outcome of the analysis, and denied any knowledge of the selection of the site for the 1972 Republican Convention. On April 24, Flanigan sent a follow-up letter to the Committee stating that, shortly before the settlement of the ITT suit, he had told Kleindienst that ITT director Felix Rohatyn had told Flanigan that the company would reject a particular Justice Department settlement proposal.

Watergate. On April 17, 1973, President Nixon announced an agreement between the White House and the Watergate Select Committee concerning the testimony of White House officials before

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17 It is unclear whether the Committee ever formally invited Flanigan to testify. On April 12, the Committee rejected two motions: one to subpoena Flanigan to testify, and a second to invite Flanigan to testify in a closed session.

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the Committee. The President stated that White House officials would appear voluntarily when requested to appear by the Committee, and that they would testify under oath. The President further stated that White House witnesses would appear in closed sessions in the first instance, if appropriate, and that he was expressly reserving the right of the witnesses to invoke executive privilege in the course of questioning.

On April 19-20, the press reported that Jeb Magruder had talked to federal prosecutors and linked John Dean and former Attorney General John Mitchell, among others, to a Watergate cover-up. Dean himself told federal prosecutors his story around that time as well. In late April, the press reported revelations about the role of the White House "plumbers" in the burglary of Daniel Ellsberg's office. It also reported that, in the summer of 1972, Acting FBI Director Gray had destroyed key Watergate-related documents that had been in the safe of Watergate conspirator E. Howard Hunt, and given to Gray by Dean and White House Domestic Policy Adviser John Ehrlichman. Gray resigned as Acting FBI Director, having already withdrawn his name for consideration as permanent Director.

On April 30, President Nixon announced the resignations of Haldeman, Ehrlichman, and Dean. On May 17, 1993, the Watergate Select Committee held its initial hearing. The first witness was Robert Odle, former director of President Nixon's 1972 reelection campaign. The first White House witness was Bruce Kehrli, a Special Assistant to President Nixon, who had been the White House Staff Secretary from January 1972 until February 1973, and before that, an aide to Haldeman. Kehrli testified as to the organizational structure of the White House. The first major witness, Watergate burglar James McCord, appeared before the Committee on May 18. Also on May 18, Acting Attorney General Elliot Richardson announced the appointment of Archibald Cox as Watergate Special Prosecutor. On May 22, former White House aide Jack Caulfield, who reported to both Dean and Ehrlichman, testified before the Select Committee and stated that Dean had directed him to offer executive clemency to McCord in exchange for McCord's silence.

In a statement released on May 22, President Nixon said that he would not claim executive privilege in connection with the investigations of Special Prosecutor Cox and the Watergate Select Committee. Throughout the spring and summer of 1973, and into the fall of that year, numerous former White House officials testified before the Select Committee. Those officials included: Dean; Haldeman; Ehrlichman; Magruder; Alexander Butterfield, a former

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Deputy Assistant to the President who served under Haldeman;[18] Robert Reisner, formerly an administrative assistant to Magruder; Fred LaRue, former Special Consultant to the President; Hugh Sloan, a former Staff Assistant to the President, who worked for Haldeman in connection with scheduling and appointments; Herbert Porter, a former aide to the White House Director of Communications (Herbert Klein); and Gordon Strachan, a former Staff Assistant to Haldeman.[19] The Committee also heard from the following then-current White House officials: Patrick Buchanan, Special Consultant to President Nixon; and Richard Moore, Special Counsel to the President.

Carter Administration

Billy Carter. In an interview with the media on July 15, 1980, Billy Carter, President Carter's brother, provided information about his contacts with the Libyan Government. Stories about those contacts previously had been reported. In the days that followed, the press reported about White House and Justice Department involvement with Billy Carter in connection with his Libyan contacts. On July 16, Ronald Reagan was nominated as the candidate of the Republican Party in the 1980 presidential election. At that time, Reagan was ahead of President Carter in the opinion polls.

On July 23, 1980, Senate leaders agreed that there should be a bipartisan Senate investigation into Billy Carter's contacts with Libya. In response to the announcement of the Senate leaders' agreement, White House Press Secretary Jody Powell said that the White House had nothing to hide and was eager to respond in a responsible way to whatever questions may arise from the press or members of Congress. Powell stopped short of saying that the White House would waive executive privilege and permit presidential aides to appear before congressional committees.

On July 24, the Senate approved the creation of a nine-member special panel to inquire into the Billy Carter affair specifically, and into the activities of individuals representing foreign nations generally. The panel was established as a Subcommittee of the Senate Judiciary Committee. Its members included seven members of the Judiciary Committee itself, and two members of the Senate

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18 It was Butterfield who revealed in his testimony before the Committee the existence of a telephone conversation taping system in the White House.

19 Several of the officials (Magruder; Reisner; Porter; Sloan; and LaRue) had also worked for the Committee to Reelect President Nixon, and testified about their work for that entity.

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Foreign Relations Committee. Senator Bayh was named Chairman of the Subcommittee, and Senator Thurmond Vice Chairman. The Senate directed the Subcommittee to issue a report by October 4, a full month before the presidential election.

In response to the creation of the Subcommittee, the White House issued a statement indicating that President Carter would instruct all members of the White House staff to cooperate fully with the subcommittee and to testify if the subcommittee determined that oral testimony was necessary. The statement also indicated that the President did not expect to assert executive privilege with respect to the matters under investigation.

The Subcommittee hearings began on August 4, 1980. That day, pursuant to an earlier request from the Subcommittee, President Carter submitted a report on the Billy Carter matter. President Carter also gave a news conference at which he pledged his cooperation with the Subcommittee.

The initial witnesses at the Subcommittee hearings were not White House officials. The first White House official to testify was Lloyd Cutler, Counsel to the President. Cutler appeared on September 10. In addition to Cutler, the following officials in the Carter White House testified before the subcommittee in September 1980: Zbignew Brezinski, the President's National Security Adviser; Phillip Wise, the President's Appointments Secretary; and William Quandt and Karl Richard Inderfurth, former members of the NSC Staff.[20] Of particular note, Cutler and Brezinski testified about conversations with President Carter on the Billy Carter matter.[21] Committee members and press accounts noted that the appearance of Brezinski marked the first time that a National Security Adviser had testified in public hearings before a congressional committee.

Reagan Administration

Fred Fielding/Deaver Conflict-of-Interest Hearings. In May-June 1986, the Subcommittee on Oversight Investigations of the House Energy and Commerce Committee (chaired by Rep. John Dingell)

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20 In addition, at least nine other officials of the Carter White House, including former Chief of Staff Hamilton Jordan and the President's Personal Secretary, Susan Clough, gave sworn testimony in depositions that were conducted by members of the Subcommittee staff.

21 Cutler invoked executive privilege when Senator DeConcini asked him whether he had advised President Carter on whether to assert executive privilege.

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investigated the lobbying activities of former Deputy Chief of Staff Michael Deaver, who had left the White House in May 1985 to form a lobbying firm that represented foreign governments in connection with matters on which Deaver had worked while at the White House. On May 29, 1986, an independent counsel, Whitney North Seymour, was appointed to look into whether Deaver's conduct violated conflict-of-interest laws. The Subcommittee continued its investigation, however.

As part of its inquiry, the Subcommittee requested the testimony of Fred Fielding, former Counsel to the President, regarding possible conflict-of-interest concerns arising out Fielding's role in the preparation of a White House memorandum on the ethical implications of Deaver's lobbying activities. The White House memorandum had been sent to the Office of Government Ethics under Fielding's signature on February 28, 1986. The memorandum concluded that Deaver's activities did not violate conflict-of-interest laws. At the time the memorandum was being prepared, Fielding was considering leaving the White House. On February 27, the day before he signed the memorandum, Fielding had met with the Vice-President of Deaver's lobbying firm to discuss his possible employment with that firm. Sometime thereafter, Deaver contacted Fielding about joining the lobbying firm. On March 12, Fielding recused himself from further work on the White House's probe of Deaver, and he eventually left the White House on March 31 to join a law firm.

Fielding agreed to testify before the Subcommittee. There is no indication that the White House objected. Appearing at a closed hearing on June 10, Fielding defended himself against charges that he should have recused himself from anything to do with the White House memorandum on Deaver's activities, notwithstanding his contacts with Deaver's firm about employment opportunities there. Fielding told the Subcommittee that his staff prepared the memorandum and he merely signed it. Apparently, Fielding also testified that he had never seriously considered joining Deaver's firm, but that he had recused himself on March 12 out of an abundance of caution after Deaver had contacted him about working at the lobbying firm.[22]

Iran-Contra. In early November, the U.S. press reported that a Lebanese publication alleged that the United States had sold arms to Iran in an effort to gain the release of U.S. hostages in Lebanon. On November 10, White House Chief of Staff Donald Regan

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22 Deaver testified before the Subcommittee at closed hearings in mid-May. Although Deaver had been a senior White House official, his testimony is not listed in this memorandum because it apparently only concerned his lobbying activities after leaving the White House -- not his conduct at the White House.

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said that President Reagan might invoke executive privilege if Congress tried to investigate the Administration's contacts with Iran to free the hostages in Lebanon. White House officials said that the invocation of executive privilege was one of several possible actions that might be taken in the event of such an investigation.

On November 25, Attorney General Edwin Meese announced that Justice Department investigators looking into the arms sales to Iran had discovered documents indicating that proceeds from the sales had been diverted to the Nicaraguan Contras. That day, John Poindexter resigned as President Reagan's National Security Adviser, and Oliver North resigned from his position at the NSC.

On November 28, the White House announced that Poindexter and North had apparently destroyed sensitive documents the previous weekend regarding the sale of arms of Iran and the transfer of the proceeds to the Contras. The same day, the Senate Select Committee on Intelligence opened an investigation into the Iran-Contra affair, and announced that it would call numerous Administration witnesses to testify, including former officials of the National Security Council, John Poindexter, Robert McFarlane, and Oliver North. On November 29, an anonymous White House official was quoted in the Washington Post as saying that the question of whether former Poindexter should appear before the Senate Committee had not been addressed yet, and that the question implicated executive privilege concerns. The Post story went on to note, however, that the official indicated that given President Reagan's statements that he wanted to get all the facts out, he might waive executive privilege with respect to Poindexter. Also on November 29, White House spokesperson Dan Howard stated that the White House might not invoke executive privilege or resist congressional efforts to question former officials of the NSC, including Poindexter, McFarlane, and North, provided that suitable ground rules were established.

On December 5, President Reagan met with leaders of Congress, and said that he would consider the recommendations of Senator Dole and others for a special session of Congress. The President told the leaders that it was important to expedite and consolidate the number of congressional inquiries being planned. He stressed his commitment to cooperate with the Congress in the conduct of its investigation and to get all the facts so that the issue could be put to rest.

In mid-December, the White House announced that President Reagan would not assert executive privilege in connection with a Senate Select Intelligence Committee request for the testimony of White House Chief of Staff Donald Regan, who went on to appear before that Committee voluntarily.

On January 6, the Senate established the Select Committee on

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Secret Military Assistance to Iran and the Nicaraguan Opposition. The following day, the House established the Select Committee to Investigate Covert Arms Transactions with Iran. The two Committees began working independently. Eventually, the Committees agreed to conduct a joint investigation and hold joint hearings.

In the spring and summer of 1987, several former White House officials testified (under subpoena) before the House and Senate Committees. Those officials included former National Security Advisers McFarlane and Poindexter; several former members of the NSC staff, such as Oliver North; and former Counselor to the President (and then- Attorney General) Meese. The officials testified as to their conversations and contacts with President Reagan regarding Iran-Contra.[23]

On November 18, 1987, the House and Senate Committees released their joint Report. The preface to the Report noted that President Reagan had cooperated with the investigation, and had not asserted executive privilege.[24]

Bush Administration

October Surprise. In June-July 1992, Richard Allen and Robert McFarlane, former National Security Council Advisers to President Reagan, testified in a closed session of the Senate Foreign Relations Committee in connection with the Committee's investigation of the "October Surprise" matter. The investigation stemmed from allegations that in 1980, officials of the Reagan Presidential Campaign, including then-Vice-Presidential candidate George Bush, struck a deal with Iran to delay the release of Americans being held hostage in that country until after the U.S. presidential election. Although the investigation touched on events that occurred after President Reagan took office in January 1981, the thrust of the investigation -- and similarly, the focus of the testimony of Allen and McFarlane -- was on events that took place during the presidential campaign of 1980.

I have not identified any documents or news accounts that indicate whether the Bush Administration, as the Administration in

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23 In addition, over a dozen other White House officials, including former Chief of Staff James Baker and key officials on the NSC staff and Vice-President Bush's staff, gave sworn testimony in depositions that were conducted by members of the Committees' staff.

24 The "Minority" (dissenting) report issued by eight GOP members of the Committees faulted President Reagan for waiving executive privilege.

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office at the time of the October Surprise investigation, formally assented to the requests for the testimony of the former Reagan White House officials Allen and McFarlane.

IV. Circumstances Surrounding Testimony by White House Officials

Jonathan Daniels

Daniels initially refused to comply with a congressional subpoena for testimony. After Congress threatened to seek a contempt order against him, Daniels agreed to testify. Daniels stated that President Roosevelt had authorized him to testify, after concluding that the testimony would not compromise the public interest. In addition, it appears that the White House may have authorized the testimony to make peace with Congress, which had recently overridden a Roosevelt veto of a tax bill.

Daniels' initial refusal to testify and his subsequent decision to testify were lead stories (but not the main stories) on the front-page of the New York Times on February 29, 1944 and March 5, 1944.

Donald Dawson and Sherman Adams

Both Dawson and Adams testified in connection with alleged personal transgressions: they had been charged with improperly influencing independent agencies, in exchange for personal favors and other gifts. Over the years in several memoranda, OLC has explained the Dawson and Adams cases as examples of instances in which White House officials testified about personal (as opposed to official) matters in order to clear their names.

Dawson's testimony was a lead story (but not the main story) on the front-page of the New York Times on March 11 and 12, 1951. The Adams "vicuna coat" affair was one of the major news stories of 1958. The announcement of his decision to testify and his appearance before the Committee earned banner headlines on the front-page of the New York Times on June 17 and June 18, 1958. The controversy over his relationship with Bernard Goldfine remained in the news throughout the summer of 1958, and in September of that year, Adams resigned as Eisenhower's Chief of Staff.

Peter Flanigan

After resisting requests to testify for over a month, Flanigan agreed to appear at the Senate Judiciary Committee's hearings on the nomination of Richard Kleindienst to be Attorney General. However, as a condition of his agreement to appear, Flanigan stated that he would only testify as to his role in the settlement of the

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ITT antitrust suit and his meetings with ITT officials. The White House's decision to permit Flanigan to testify was probably motivated by a desire to save the Kleindienst nomination, which Democrats had threatened to block unless Flanigan testified.

Flanigan's refusal to testify and his eventual agreement to appear before the Committee made the front-page of the Washington Post in April 1972, but neither event was a lead story.

Fielding/Deaver Conflict-of-Interest Hearings

Fred Fielding, who left his post as Counsel to President Reagan on March 31, 1986, testified before a closed session of a House subcommittee on June 10, 1986. Fielding's testimony was apparently limited to his role in a February 1986 White House probe of the lobbying activities of former Deputy Chief of Staff Michael Deaver, and his contacts with Deaver's lobbying firm about employment opportunities there. There is no indication that the White House objected to Fielding's decision to testify. The apparent lack of White House objection may stem from the fact that Deaver's affairs had become rather controversial, and an independent counsel had just been appointed (May 29) to look into the matter.

The request for Fielding's testimony and his appearance before the subcommittee were not major news stories.

October Surprise

Former Reagan Administration National Security Advisers Richard Allen and Robert McFarlane testified in a closed session of the Senate Foreign Relations Committee in June-July 1992 about the "October Surprise" allegations. The thrust of the Allen and McFarlane testimony was on events that took place during the 1980 presidential campaign -- not events that took place after President Reagan took office in January 1981.

The October Surprise allegations were a recurring news story in 1991, and then into the spring and summer of 1992, during President Bush's bid for reelection that year. Particular attention was paid to allegations that when he was a candidate for Vice-President in 1980, George Bush had met with Iranian officials as part of a deal to delay the release of the Americans being held hostage at that time in Iran.

Watergate, Billy Carter, and Iran-Contra

White House officials testified before congressional committees looking into the Watergate, Billy Carter, and Iran-Contra affairs, because each of the matters was perceived as a threat to the Nixon, Carter, and Reagan presidencies, respectively.

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At first, however, officials of the Nixon White House refused to testify before congressional committees on Watergate-related matters. In particular, White House Counsel John Dean refused to testify before Rep. Patman's Banking Committee in the fall of 1972, and he refused to testify before the Senate Judiciary Committee in mid-March 1973 in connection with the nomination of L. Patrick Gray Nixon to be FBI Director in March 1973. President Nixon himself declared on March 2 and March 12 that White House officials would not testify, and Attorney General Kleindienst said as much on April 10. It was not until April 17, 1973 that President Nixon indicated that he would permit White House officials to appear before the Select Committee; but even then, he sought to have the official testify in closed session, and he reserved the right to assert executive privilege. After further developments in late April and May, President Nixon announced on May 22 that he would not assert executive privilege in connection with the Select Committee and Special Prosecutor investigations, clearing the way for the subsequent testimony before the Select Committee of Haldeman, Ehrlichman, Dean, and others.

By contrast, Presidents Carter and Reagan announced early-on in the Billy Carter and Iran-Contra affairs that White House officials would be made available for congressional testimony, and that executive privilege would not be invoked.

It is an understatement to say that Watergate and Iran-Contra were big news stories. For a time in the summer of 1980, so was the Billy Carter affair. On their merits, Watergate and Iran-Contra were clearly more serious than the Billy Carter affair. Nevertheless, at the time of the Senate hearings on Billy Carter, President Carter was facing an uphill fight for reelection. Ronald Reagan had just been nominated as the Republican candidate at the party's convention, and was far ahead of President Carter in the opinion polls. Furthermore, President Carter was heading towards his party's convention, still facing a challenge from Edward Kennedy. Indeed, there were rumblings among Democrats that Carter delegates to the Convention should be allowed to throw their votes to other candidates, and there was even talk of a "draft Ed Muskie movement."

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APPENDIX: BIBLIOGRAPHY

This bibliography sets forth the sources that were used in preparing the foregoing memorandum. The sources that are part of the OLC precedent files are marked with an asterisk; except where indicated, the authors of those documents were, at the time the documents were written, the Assistant Attorney General for OLC.

The bibliography is organized by reference to presidential Administrations. This differs from the memorandum, which is organized according to the response (refusal or acceptance) of the White House to the congressional request for testimony of White House officials.

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[1] The date of this memorandum is uncertain.

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[2] The date of this memorandum is uncertain. It was later published as a law review article under a different title. See R. Kramer & H. Marcuse, Executive Privilege: a Study of the Period 1953-1960, 29 Geo. Wash. L. Rev. 623 (1961).

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Terms: **"presidential communications" and privilege and "deliberative process"** (Edit Search)

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OPINION OF THE OFFICE OF LEGAL COUNSEL

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

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

August 2, 1982

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

SYLLABUS:
[*1]

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

ADDRESSEE:
Memorandum for the Attorney General

OPINIONBY: OLSON

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

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

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

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

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

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

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

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

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

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

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

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

disclosure of military, diplomatic, or national security secrets:

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

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

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

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

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

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

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

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

n5 Although assertion of the state secrets **privilege** clearly requires that the claim be made

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

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

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

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

I. Executive **Privilege**

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

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

A. Constitutional and Practical Bases of the ***Privilege***

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

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

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

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

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

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

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

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

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

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

The expectation of a President to the confidentiality of his conversations and correspondence . . . is [grounded on] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive **privilege** for **Presidential communications. The privilege** is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

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

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

B. Limitations on the Scope of the ***Privilege***

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

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

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

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

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

See also 1981 Attorney General Opinion, *supra,* 5 Op. O.L.C. at 30 ("The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[T]o whatever extent the customary attorney-client **privilege** applies to government attorneys, we believe that the reasons for the constitutional **privilege** against the compelled disclosure of executive branch deliberations have special force when legal advice is involved. None of the President's obligations is more solemn than his duty to obey the law. The Constitution itself places this responsibility on him, in his oath of office and in the requirement of article II, section 3 that "he shall take care that the laws be faithfully executed." Because this obligation is imposed by the Constitution itself, Congress cannot lawfully undermine the President's ability to carry it out. Moreover, legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, objective, expert advice. As crucial as frank debate on policy matters is, it is even more important that legal advice be "candid, objective, and even blunt or harsh," *see* United States v. *Nixon,* 418 U.S. 683, 708 (1974), where necessary. Any other approach would jeopardize not just particular policies and programs but the principle that the government must obey the law. For these reasons, it is critical that the President and his advisers be able to seek, and give, candid legal advice and opinions free of the fear of compelled disclosure.

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

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

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

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

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

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

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

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

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

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

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

A. ***"Deliberative Process" Privilege***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. **[*33]**

B. Attorney-Client ***Privilege***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

A. Informant's ***Privilege***

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

B. Law Enforcement Investigatory Files ***Privilege***

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

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

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

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

C. FOIA Exemption 7

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

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

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

IV. Conclusion

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

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

THEODORE B. OLSON

Assistant Attorney General

Office of Legal Counsel

Source: All Sources > Federal Legal - U.S. > Administrative Agency Materials > **US Attorney General Opinions**
Terms: **"presidential communications" and privilege and "deliberative process"** (Edit Search)
View: Full
Date/Time: Thursday, July 19, 2001 - 11:35 AM EDT

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THE WHITE HOUSE

WASHINGTON

June 15, 2001

MEMORANDUM FOR ALBERTO GONZALES
TIM FLANIGAN
BRETT KAVANAUGH

FROM: BRAD BERENSON

SUBJECT: CONGRESSIONAL OVERSIGHT REQUESTS

Attached please find the materials we discussed yesterday with Paul Colborn concerning the response of the Executive Branch to congressional oversight requests.

wilkey concurrence - political question

Source: All Sources > Federal Legal - U.S. > Combined Federal Court Cases > US Court of Appeals & District Court Cases - DC Circuit
Terms: "executive privilege" and senate select committee (Edit Search)

*162 U.S. App. D.C. 183; 498 F.2d 725, *;*
*1974 U.S. App. LEXIS 8499, **

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, SUING IN ITS OWN NAME AND IN THE NAME OF THE UNITED STATES, ET AL., APPELLANTS v. RICHARD M. NIXON, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES

No. 74-1258

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

162 U.S. App. D.C. 183; 498 F.2d 725; 1974 U.S. App. LEXIS 8499

May 23, 1974, Decided

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the District of Columbia.

DISPOSITION: Affirmed.

CORE TERMS: subpoena, tape, subpoenaed, presidential, confidentiality, conversations, public interest, grand jury, involvement, disclosure, premised, duty, investigate, claim of privilege, in camera, particularized, recordings, probable cause, deliberation, responsibly, declaration, fulfillment, electronic, inspection, memorandum, oversight, weighing, election, failed to demonstrate, subpoena duces tecum

COUNSEL: Samuel Dash, Chief Counsel, **Senate Select Committee** on Presidential Campaign Activities, with whom Rufus Edmisten, Deputy Counsel, James Hamilton, Assistant Chief Counsel, Richard B. Stewart, Special Counsel, Ronald D. Rotunda, Assistant Counsel, **Senate Select Committee** On Presidential Campaign Activities, Sherman Cohn, Eugene Gressman and Jerome A. Barron were on the brief, for Appellants.

Joseph J. Chester, with whom Charles Alan Wright was on the brief, for Appellee. George P. Williams also entered an appearance, for Appellee.

Philip A. Lacovara, Counsel to the Special Prosecutor, with whom Leon Jaworski, Special Prosecutor and Peter M. Kreindler, Executive Assistant to the Special Prosecutor were on the brief, for the Special Prosecutor as Amicus Curiae.

Irving Jaffee, Acting Assistant Attorney General, Robert E. Kopp and Thomas G. Wilson filed a brief on behalf of the United States as Amicus Curiae.

JUDGES: Bazelon, Chief Judge, Wright, McGowan, Leventhal, Robinson, MacKinnon, and Wilkey, Circuit Judges MacKinnon, Circuit Judge, concurring. Wilkey, Circuit Judge. **[**2]** Opinion for the Court filed by Chief Judge Bazelon. Concurring opinion filed by Circuit Judge MacKinnon. Concurring opinion filed by Circuit Judge Wilkey.

OPINIONBY: BAZELON

OPINION: [*726] BAZELON, Chief Judge:

In this suit, the United States **Senate Select Committee** on Presidential Campaign Activities seeks a declaration that President Richard M. Nixon has a legal duty to comply with its subpoena *duces tecum*, directing him to produce "original electronic tapes" of five conversations between the President and his former Counsel, John W. Dean, III. By memorandum and order of February 8, 1974, the District Court for the District of Columbia denied the Committee's motion for summary judgment and dismissed the suit without prejudice. n1 The Committee appeals. For the reasons stated herein, we affirm.

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n1 **Senate Select Committee** on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

I.

The Select Committee was created on February 7, 1973, by a resolution of the Senate **[**3]** empowering the Committee to investigate "illegal, improper or unethical activities" occurring in connection with the presidential campaign and election of 1972, and "to determine . . . the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." n2 In testimony before the Committee on July 16, 1973, Alexander Butterfield, a former Deputy Assistant to the President, stated that certain presidential conversations, presumably including those about which Mr. Dean and others had previously testified, had been recorded on electronic tapes. The Committee thereupon attempted informally to obtain certain tapes and other materials from the President. When these efforts proved unsuccessful, the Committee issued the **[*727]** subpoena that is the subject of this appeal. n3

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n2 Senate Resolution 60, 93rd Cong., 1st Sess. § 1(a) (1973).

n3 Section 3(a) (5) of Senate Resolution 60, *supra*, empowers the Committee:

> * * * to require by subpoena * * * any department, agency, officer, or employee of the executive branch of the United States Government * * * to produce for its consideration or for use as evidence in its investigation and study any * * * tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control * * *.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**4]**

This subpoena directed the President to make available to the Committee taped recordings of five conversations that had occurred on specified dates "between President Nixon and John Wesley Dean, III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972." n4 The subpoena was duly served on the President, together with a second subpoena *duces tecum*, requiring production of all records that concerned, directly or indirectly, the "activities, participation, responsibilities or involvement" of twenty-five named persons "in any alleged criminal acts related to the Presidential election of 1972." n5 Both subpoenas were returnable on July 26. By letter dated July 25, 1973, addressed to Senator Ervin as chairman of the Select Committee, the President declined to comply with either subpoena, asserting in justification the doctrine of **executive privilege.** The President

stated that, although he had directed "that **executive privilege** not be invoked with regard to testimony by present and former members of [his] staff concerning possible criminal conduct," **executive privilege** was being asserted with respect to "documents and recordings that cannot **[**5]** be made public consistent with the confidentiality essential to the functioning of the Office of the President." n6

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n4 Joint Appendix at 26-27.

n5 Joint Appendix at 29-33.

n6 Joint Appendix at 35.

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The Committee, in its own name and in the name of the United States, then brought this action to enforce the subpoenas. It alleged in its complaint that "the subpoenaed electronic tapes and other materials are vitally and immediately needed if the Select Committee's mandate and responsibilities . . . are to be fulfilled." n7 On August 29, the Committee filed a motion for summary judgment, seeking a declaration that the subpoenas were lawful and that the President's refusal to honor them, on the ground of **executive privilege** or otherwise, was illegal. On October 17, the District Court dismissed the Committee's action for want of statutory subject matter jurisdiction. n8 The Committee appealed to this Court.

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n7 Complaint of the **Senate Select Committee** on Presidential Campaign Activities, et al., at 8; Joint Appendix at 8. **[**6]**

n8 Senate Select Comm. on Presidential Campaign Activities et al., v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

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While the appeal was pending, the Senate on November 2 passed a resolution stating that the Select Committee is authorized to subpoena and sue the President and that the Committee, in subpoenaing and suing the President, was acting with valid legislative purposes and seeking information vital to the fulfillment of its legitimate legislative functions. n9 The Select Committee asked this Court to hold its appeal in abeyance pending action on a bill, then before Congress, which conferred jurisdiction on the District Court for the District of Columbia in any civil action that the Committee theretofore or thereafter brought "to enforce or secure a declaration concerning the validity of any subpoena." This bill was enacted by Congress and the President having failed to exercise his veto, took effect on December 19, 1973. n10 On December 28, in light of this new jurisdictional statute, **[*728]** we remanded the case to the District Court for further consideration. n11

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n9 Senate Resolution 194, 93rd Cong., 1st Sess. (1973). **[**7]**

n10 Pub. L. No. 93-190 (Dec. 19, 1973), to be codified as 28 U.S.C. § 1364.

n11 Order, No. 73-2086 (D.C. Cir., Dec. 28, 1973) (*en banc*).

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Following the remand, on January 25, 1974, the District Court issued an order quashing the Committee's subpoena concerning twenty-five individuals. The Court found the subpoena "too vague and conclusory to permit a meaningful response" and, referring to our intervening opinion in Nixon v. Sirica, n12 held the subpoena "wholly inappropriate given the stringent requirements applicable where a claim of **executive privilege** has been raised." n13 No appeal was taken from this order and the matter is not before us.

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n12 159 U.S. App. D.C. 58, 487 F.2d 700, 716-18 (1973).

n13 Order, C.A. 1593-73 (D.D.C. Jan. 25, 1974); Joint Appendix at 148.

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At the same time, the District Court issued two orders concerning the subpoena of the five identified **[**8]** tapes. In the first, the Court requested the Watergate Special Prosecutor to submit a "statement concerning the effect, if any, that compliance with [the subpoena] would, in his opinion, be likely to have upon pending criminal cases or imminent indictments under his supervision." n14 In the second order, finding the President's claim of **executive privilege** "too general and not sufficiently contemporaneous to enable the Court to determine the effect of that claim under the doctrine of Nixon v. Sirica," the Court requested the President to submit "a particularized statement addressed to specific portions of the subpoenaed tape recordings indicating whether he still wishes to invoke **executive privilege** as to these tapes and, with regard to those portions as to which the privilege is still asserted, if any, the factual ground or grounds for his determination that disclosure to the Select Committee would not be in the public interest." n15 The President responded to this order by letter dated February 6, 1974. Rather than setting forth the particularized claims and reasons for which the District Court had called, the President reasserted **executive privilege** generally as to all of the **[**9]** subpoenaed material, citing as the bases for his claim the need for confidentiality of conversations that take place in the performance of his constitutional duties, and the possibly prejudicial effects on Watergate criminal prosecutions should the contents of the subpoenaed conversations become public. n16 The latter concern was raised with reference to the President's constitutional duty to see that the laws are faithfully executed.

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n14 Order, C.A. 1593-73 (D.D.C. Jan. 25, 1973); Joint Appendix at 144.

n15 Order, C.A. 1593-73 (D.D.C. Jan. 25, 1974); Joint Appendix at 139-140.

n16 Joint Appendix at 162-63.

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On February 8, the District Court entered the order at issue here. In the memorandum accompanying the order, the Court dealt first with the President's assertion that the matter before it constituted a non-justiciable political question. Finding the reasoning of this Court in Nixon v. Sirica, which concerned a grand jury subpoena, "equally applicable to the subpoena of a congressional committee, **[**10]** " the District Court held that, under that case and the relevant Supreme Court precedents, the issues presented to it were justiciable. n17 The Court then turned, in the terms of Nixon v. Sirica, to a weighing of "the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance." The Court found, first, that the Select Committee had failed to demonstrate either "a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those

tapes will at this time serve the public interest." At the same time, however, the Court rejected the President's claim of privilege insofar as it was premised on the public interest in confidentiality, because, in its view, "the President's unwillingness **[*729]** to submit the tapes for the Court's *in camera ex parte* inspection or in any other fashion to particularize his claim of **executive privilege** precludes judicial recognition of that privilege on confidentiality grounds." n18 The Court then, in the discharge of its duty as a court of equity, undertook independently to weigh the **[**11]** public interest in safeguarding pending criminal prosecutions from possibly prejudicial pretrial publicity, against the Committee's asserted need for the subpoenaed tapes. In the particular circumstances of this case, including the fact that the tapes had already been made available to the June, 1972, grand jury of this district, the Court found it necessary to assign priority to the public interest in "the integrity of the criminal process, rather than the Committee's need." It therefore dismissed the Committee's suit without prejudice.

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n17 370 F. Supp. at 522.

n18 *Id.*

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II.

The Select Committee contends that, once having determined that the President's general confidentiality privilege failed, the District Court had no authority to engage in a balancing of interests, where the result was to pass judgment on the magnitude of need underlying the Committee's decision to authorize and issue a subpoena. Alternatively, the Committee argues that any such balancing must favor, as more urgently **[**12]** affected with the public interest, the Committee's asserted need over the public interest in the fairness of the criminal process. We find it unnecessary to reach either contention. Neither the Committee's position nor, if we read it correctly, that of the District Court accurately reflects the doctrines of Nixon v. Sirica, doctrines that, at least by analogy, we think controlling here.

In Nixon v. Sirica, we were confronted with a challenge to an order of the District Court, entered as a means of enforcing a grand jury subpoena, requiring the President to produce the subpoenaed items to enable the Court to determine by *in camera* inspection whether the items were exempted from disclosure by evidentiary privilege. n19 In his challenge to this order, the President argued that the District Court had acted beyond its jurisdiction. He contended that he is absolutely immune in all cases from the compulsory process of the courts, and that whenever, in response to a grand jury subpoena, he interposes a formal claim of privilege, that claim without more disables the courts from inquiring by any means into whether the privilege is applicable. We rejected both contentions, holding, **[**13]** contrary to the President, that at least with respect to grand jury subpoenas, it is the responsibility of the courts to decide whether and to what extent **executive privilege** applies. n20 And we held further that, generally, "application of **Executive privilege** depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." n21

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n19 487 F.2d at 704.

n20 487 F.2d at 708-16.

n21 487 F.2d at 716.

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As in the present case, our attention in Nixon v. Sirica was directed solely to one species of **executive privilege** -- that premised on "the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties." n22 We recognized this great public interest, analogizing the privilege, on the basis of its purpose, "to that between a congressman and his aides under the Speech and Debate Clause; to that among **[**14]** judges, and between judges and their law clerks; and . . . to that contained in the fifth exemption to the Freedom of Information Act." n23 We recognized, moreover, that protection of the presidential decision-making process requires a promise that, as a general matter, its confidentiality would not be **[*730]** invaded, even to the limited extent of a judicial weighing in every case of a claimed necessity for confidentiality against countervailing public interests of the moment.

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n22 487 F.2d at 717.

n23 *Id.*

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We concluded that presidential conversations are "presumptively privileged," even from the limited intrusion represented by *in camera* examination of the conversations by a court. n24 The presumption can be overcome only by an appropriate showing of public need by the party seeking access to the conversations. In Nixon v. Sirica, such a showing was made by the Special Prosecutor:

> We think that this presumption of privilege premised on the public interest in confidentiality **[**15]** must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case. The function of the grand jury, mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function -- evidence for which no effective substitute is available. The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority. n25

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n24 487 F.2d at 705, 717-18.

n25 487 F.2d at 717 (citations omitted).

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We concluded that this strong showing of need was sufficient to overcome the general presumption of privilege premised on the public interest in the confidentiality of the presidential decision-making process. We held that it was within the power of the District Court "[to] order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury's investigations, unless the Court judges that the public interest served by non-disclosure of *particular* statements or information outweighs the need for that information demonstrated by the grand jury." n26 It became, therefore, incumbent upon the President to make particularized showings in justification of his claims of privilege, and upon the District Court to follow procedures, including *in camera* inspection, requiring careful deliberation before even the demonstrated need of the grand jury might be satisfied. n27

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n26 487 F.2d at 718.

n27 487 F.2d at 718-22.

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III.

The staged decisional **[**17]** structure established in Nixon v. Sirica was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential. So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government -- a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations -- we believed in Nixon v. Sirica, and continue to believe, that the effective functioning of the presidential office will not be impaired. n28 Contrary, therefore, to the apparent understanding of the District Court, n29 we think that Nixon v. Sirica requires a showing of the order made by the grand jury before a generalized claim of confidentiality can be said to fail, and before the President's **[*731]** obligation to respond to the subpoena is carried forward into an obligation to submit subpoenaed materials to the Court, together with particularized claims that the Court will weigh against whatever public interests disclosure **[**18]** might serve. The presumption against any judicially compelled intrusion into presidential confidentiality, and the showing requisite to its defeat, hold with at least equal force here.

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n28 487 F.2d at 722.

n29 *See* text and note at note 18, *supra*.

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Particularly in light of events that have occurred since this litigation was begun and, indeed, since the District Court issued its decision, we find that the Select Committee has failed to make the requisite showing. In its papers below and in its initial briefs to this Court, the Committee stated that it seeks the materials in question in order to resolve particular conflicts in the voluminous testimony it has heard, conflicts relating to "the extent of malfeasance in the executive branch," and, most importantly, the possible involvement of the President himself. n30 The Committee has argued that the testimony before it makes out "a *prima facie* case that the President and his closest associates have been involved in criminal conduct, **[**19]** " that "the materials sought bear on that involvement," and that these facts alone must defeat any presumption of privilege that might otherwise prevail. n31

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n30 Brief of the **Senate Select Committee,** et al., at 27-28.

n31 *E.g.*, Supplemental Memorandum of the **Senate Select Committee,** et al., at 2.

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It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing. n32 The Congress learned this as to its own privileges in Gravel v. United States, n33 as did the judicial branch, in a sense, in Clark v. United States, n34 and the executive branch itself in Nixon v. Sirica. But under Nixon v. Sirica, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, n35 but, instead, on the nature and **[**20]** appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires, and our decision implies, no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions.

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n32 Committee for Nuclear Responsibility v. Seaborg, 149 U.S. App. D.C. 385, 463 F.2d 788, 794 (1971). *See* Gravel v. United States, 408 U.S. 606, 627, 33 L. Ed. 2d 583, 92 S. Ct. 2614 (1972).

n33 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972).

n34 289 U.S. 1, 53 S. Ct. 465, 77 L. Ed. 583 (1933).

n35 487 F.2d at 718.

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In its initial briefs here, the Committee argued that it has shown exactly this. It contended that **[**21]** resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it "would aid in a determination whether legislative involvement in political campaigns is necessary" and "could help engender the public support needed for basic reforms in our electoral system." n36 Moreover, Congress has, according to the Committee, power to oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view. The Committee says that with respect to Watergate-related matters, this power has been delegated to it by the **[*732]** Senate, and that to exercise its power responsibly, it must have access to the subpoenaed tapes. n37

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n36 Brief of **Senate Select Committee,** et al., at 27-28.

n37 *E.g.*, Reply Brief of **Senate Select Committee,** et al., at 21-23.

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We turn first to the latter contention. In the circumstances of this case, we need neither deny

that the Congress may have, quite **[**22]** apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee's constituent resolution. Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source. n38 Moreover, so far as these subpoenaed tapes are concerned, the investigative objectives of the two committees substantially overlap: both are apparently seeking to determine, among other things, the extent, if any, of presidential involvement in the Watergate "break-in" and alleged "cover-up." And, in fact, the Judiciary Committee now has in its possession copies of each of the tapes subpoenaed by the Select Committee. Thus, the Select Committee's immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees. We **[**23]** have been shown no evidence indicating that Congress itself attaches any particular value to this interest. In these circumstances, we think the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the Committee's subpoena.

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n38 U.S. Const., art. I, § 2, P5.

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The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. **[**24]** In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. If, for example, as in Nixon v. Sirica, one of those crimes is perjury concerning the content of certain conversations, the grand jury's need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable. n39 We see no comparable need in the legislative process, at least not in the circumstances of this case. Indeed, whatever force there might once have been in the Committee's argument that the subpoenaed materials are necessary to its legislative judgments has been substantially undermined by subsequent events.

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n39 *See* 487 F.2d at 718.

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By order of May 2, 1974, this Court took judicial notice of the President's public release of transcripts, with partial deletions, of each of the tapes at issue here. In light of the President's action **[**25]** we requested the Select Committee to file a supplemental memorandum stating whether the Committee "has a present sense of need for the materials subpoenaed" and, if so, in what specific respects the transcripts now available to the Committee, and to the public generally, are deficient in meeting that need. In its response to this order, the Committee states, first, that it needs access to the tapes in order to verify the accuracy of the public transcripts. In fact, **[*733]** however, the originals of four of the five

tapes subject to the Committee's subpoena have been transmitted by the President to the District Court, pursuant to that Court's order, n40 and are now in the District Court's possession. Thus, as the Committee's counsel acknowledged at oral argument, the subpoena now applies only to the copies of the tapes that remain in the President's possession. This being so, however, the Committee would encounter, in some measure, the same problem of verification with respect to four of the five tapes as it claims now to confront in the transcripts.

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n40 *See* In re Grand Jury Subpoena Duces Tecum to Nixon, 360 F. Supp. 1 (D.D.C. 1973).

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The Committee also says that certain portions of the conversations have been deleted from the transcripts, with notations that they contain material "unrelated to Watergate" or "unrelated to Presidential action," n41 and that, were the tapes played on highly sensitive equipment, portions that the transcripts designate as "inaudible" might be understood. Finally, the Committee argues that inflection and tone of voice that the tapes would supply are indispensable to a correct construction of the conversations. The Committee has, however, 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. More importantly, perhaps, insofar as such ambiguities relate to the President's own actions, there is no indication that the findings of the House Committee on the Judiciary and, eventually, the House of Representatives itself, are so likely **[**27]** to be inconclusive or long in coming that the Select Committee needs immediate access of its own.

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n41 Supplemental Memorandum of the **Senate Select Committee** in Response to this Court's Order of May 2, 1974, at 3.

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IV.

In approaching our judicial function, we have no doubt that the Committee has performed and will continue to perform its duties fully in the service of the nation. We must, however, consider the nature of its need when we are called upon, in the first such case in our history, to exercise the equity power of a court at the request of a congressional committee, in the form of a judgment that the President must disclose to the Committee records of conversations between himself and his principal aides. We conclude that the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is **[**28]** required to comply with the Committee's subpoena. We therefore affirm the order dismissing the Committee's action without prejudice, although on grounds that differ from those announced by the District Court.

Affirmed.

CONCURBY: MACKINNON; WILKEY

CONCUR: MACKINNON, Circuit Judge, concurring:

I concur in the result reached by the foregoing opinion but have some additional comments.

As I argued in dissent in Nixon v. Sirica, 159 U.S. App. D.C. 58, 487 F.2d 700, 729-62 (1973), the President, as distinct from the executive establishment generally, possesses a constitutionally founded privilege enabling him to protect the confidentiality of conferences with his advisors. Recognition of that presidential privilege would dispose of the demands made by the instant subpoena, but failing majority consensus on this point I concur generally in the reasoning of the foregoing opinion as embracing an accurate analysis and sound **[*734]** application of the principles established in Nixon v. Sirica. This position evidences no retreat from my previously expressed views on the force, validity and importance of congressional subpoenas, *id.* 487 F.2d at 737-38, **[**29]** nor does it reflect a comparatively higher esteem for judicial subpoenas. Rather, my concurrence today is premised on the basic proposition that enforcement of any subpoena, whether congressional or judicial, depends in the first instance upon an assessment of the immediate purpose, object and need which prompted its issuance. Thus, even though recognizing that the legislative function is no less important than the prosecutorial, I agree that the Senate Committee has failed to demonstrate a present need of sufficient urgency to overcome even the qualified presidential privilege recognized by the majority in Nixon v. Sirica. Additionally, while I would not characterize the Senate Committee's need as "merely cumulative," it bears particular emphasis that legislation involves a cooperative effort of both the House and the Senate, that the House Committee on the Judiciary already possesses the recordings sought here, and that these materials more than likely eventually will be released to the public.

WILKEY, Circuit Judge:

On my own analysis our logical first conclusion should be that the constitutional principle of separation of powers makes the issue here a political question and **[**30]** therefore not justiciable (Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962); Powell v. McCormack, 395 U.S. 486, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1968), and Nixon v. Sirica, 159 U.S. App. D.C. 58, 487 F.2d 700, 762-99 (1973) (Wilkey, J., dissenting)); however, I agree that, taking the majority opinion in Nixon v. Sirica as still prevailing, Chief Judge Bazelon's opinion is likewise a sound basis for the action we take, and I therefore join therein without further reservation.

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BRAD

DRAFT #1: July 20, 2001

July 24, 2001

MEMORANDUM FOR ANDREW CARD
KAREN HUGHES
KARL ROVE
NICHOLAS CALIO
JOSH BOLTEN

FROM: ALBERTO GONZALES
BRADFORD A. BERENSON

SUBJECT: EXECUTIVE BRANCH RESPONSE TO OUTSIDE INFORMATION REQUESTS

(1) terminology & privilege claims
(2) IC statute
(3) need for clear rules stated up front + consistently invoked + maintained
(4) need for position on contempt statute
(5) Pres / Sec in contempt
(6) attach Bar memo

With the recent change of control in the Senate, the need for a common understanding of what general approach the Administration will take in responding to outside requests for information, particularly congressional oversight requests, has become more pressing. Within the past several weeks, Senator Lieberman, the new Chairman of the Senate Governmental Affairs Committee, has begun threatening to issue subpoenas in connection with his ongoing efforts to conduct oversight of the Administration's regulatory review activities. Acting at the behest of Congressman Dingell and Congressman Waxman, the General Accounting Office has been attempting to force the Office of the Vice President to turn over documents detailing the internal workings of the National Energy Policy Development Group, a matter that may shortly end up in litigation. And Congressman Conyers and Congressman Nadler have sent letters to John DiIulio and Karl Rove demanding information concerning allegations of a deal between the Office of Faith-Based and Community Initiatives and the Salvation Army, explicitly threatening to instigate a GAO investigation if their questions are not answered.

These are merely the first shots in what will likely be a continuous battle between the executive and legislative branches throughout the Administration. The ground over which this battle will be fought is effective control of the executive branch; the President's principal weapons are his constitutional executive powers and the legal privileges that protect them. Since the Watergate era, however, the term "executive privilege" has assumed negative connotations, and the public relations and political costs of withholding documents and other information from Congress, even under the most compelling circumstances, are often high. Thus, Congress will attempt to use its investigative powers and a sympathetic media to attempt to seize the upper hand in pressuring the federal bureaucracy to work its will. In response, the President will only be able to rely upon principle and resolve in attempting to maintain the appropriate bounds of congressional oversight and investigation authority and to preserve the legitimate prerogatives of the executive branch. The stakes in this battle are high: if not handled appropriately, the battle could either inflict serious political damage on the Administration or result in serious injury to institutional executive branch interests that are essential to the robust and effective functioning of the government. In the worst case, it could do both.

In order to avoid the worst case, it is important to discuss how much political capital the Administration should be willing to invest in resisting congressional overreaching and other demands for presumptively privileged information. Only if there is close fit between the positions taken in negotiations with Congress and the Administration's political will to see them through can the benefits of either a forceful or passive approach to this issue be fully realized. Thus, the question presented for consideration is as important as it is general: how aggressive should the Administration be in defending executive prerogatives and insisting that Congress and others respect what the executive believes to be the appropriate bounds of oversight?

Because these conflicts arise in such varied contexts and are driven so much by the specific factual circumstances surrounding them – including the specific entity or Member of Congress making the request, the details of the documents sought, the underlying issue to which they relate, the balance of power in the two Houses of Congress, and other competing priorities on the national political agenda – it is impossible in advance to decide upon a specific set of positions to take in such conflicts. Rather, our goal is to discuss the issue in general terms and reach consensus on how broad a view of executive branch interests this Administration should advance, and how steadfastly it should defend that view.

This memorandum provides a brief overview of the issue. It begins by describing the components of executive privilege, the executive branch interests it safeguards, and the categories of information it could be claimed to cover. It then presents a generic description of the usual course of events involved in an escalating conflict with Congress over information requests. The memorandum goes on to outline the various general approaches the Administration might take to dealing with oversight risks and attempts to identify the risks and benefits of each. Finally, the memorandum provides some historical perspective on the way in which these issues have been dealt with in previous administrations and suggests one possible approach for consideration.

What is executive privilege?

Executive privilege is an outgrowth of the constitutional separation of powers which permits the President to safeguard the confidentiality of certain information integral to the proper functioning of the executive branch. Under a broad view, the privilege at least potentially applies to a wide array of different categories of information. These include communications between and among the President and his advisers; military, diplomatic, and national security information; pre-decisional deliberative communications within the executive branch whose disclosure might tend to chill the frank exchange of ideas and opinions; communications between the President or White House Staff and the senior political appointees in the departments and agencies; law enforcement and investigative information; and information subject to common law privileges, including the attorney-client and work product privileges.

Many of the public and governmental interests served by executive privilege are obvious from the categories of information potentially covered by the privilege. In addition to the numerous specific executive branch confidentiality interests that can be implicated by oversight requests, an overarching institutional interest that is important to keep in mind is the separation

of powers "unitary executive" question of who will control the executive branch agencies: the President or the committees of Congress. Pervasive, continuing and intrusive oversight of an executive branch agency can interfere with the President's exercise of his constitutional authority to supervise and guide the agency. This concern is especially significant in the context of oversight of ongoing matters, where congressional oversight seeking to influence executive branch decisionmaking can compromise the effectiveness and integrity of the decisionmaking process. Although most Members of Congress would agree with the proposition that congressional oversight of ongoing law enforcement actions should be avoided because of the appearance of political influence on law enforcement decisions, there is considerably less support in Congress for the view that oversight committees should not involve themselves in ongoing executive branch policymaking, especially in the area of agency rulemaking, which the Congress is prone to regard as delegated lawmaking. The executive branch view has been that congressional oversight needs can generally be satisfied by reviewing completed executive branch decisions.

With respect to oversight on closed matters, the principal executive branch confidentiality interest has concerned materials that reflect the internal deliberative process. Most agencies have sought to protect, to one degree or another, the confidentiality of their decisionmaking processes so that participants in the process can vigorously debate issues before them. 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).

There is considerable disagreement over whether executive privilege is grounded in the constitution, in common law principles deriving from sound considerations of policy, or both. NO There is also considerable uncertainty whether the privilege provides absolute protection from disclosure or qualified protection, which can be overridden by sufficiently compelling congressional or other interests in disclosure. The best view, and the one reflected in the relatively sparse case law on the subject, is that the answer depends upon the type of information at issue and the purpose for which it is sought by investigators.

Thus, for example, the military/diplomatic/foreign relations component of the privilege is generally considered to derive from common law principles but is nonetheless absolute, not yielding to any countervailing interest no matter how compelling. If the President determines that Congress or a court may not have specific information because disclosure of that information would present grave risk to his ability to conduct the foreign relations of the United States, that is generally thought to be the end of the matter. In re United States, 872 F.2d 472 (D.C. Cir. 1989). The privilege covering communications between and among the President and his advisers has been held by the courts, beginning with the decision in United States v. Nixon, 418 U.S. 683, 705 (1974), to be constitutionally-based but qualified: while invocation of this privilege by the President presumptively shields the information from disclosure, that presumption can be overcome by a sufficient showing of need. In re Sealed Case (Espy), 121

F.3d 729 (D.C. Cir. 1997). Deliberative process information is subject to a straightforward, ad hoc balancing of interests in particular circumstances.

With respect to the purpose for which information is sought, the interest in disclosure is at its weakest in the case of an ordinary civil lawsuit and becomes stronger as one moves, in ascending order, to congressional oversight of executive branch policy decisions, congressional factfinding in support of legislation, congressional investigations of potentially serious wrongdoing in the executive branch, and criminal grand jury investigations. As a general rule, a claim of executive privilege will almost never be sustained against a well-founded grand jury subpoena and should almost never be asserted. Likewise, where Congress is investigating serious and credible allegations of executive branch wrongdoing or malfeasance, claims of executive privilege are usually not well-founded, because the public interest, which is the hallmark of any sound claim of privilege, is best served by disclosure rather than secrecy.

agree

How is information potentially subject to a claim of executive privilege protected?

While the categories of information described above might all be theoretically subject to a valid claim of privilege, the degree of protection each will receive as a practical matter depends far more on bare-knuckle politics than it does on careful legal analysis. The nature and mechanics of these disputes are such that the judiciary rarely becomes involved in a meaningful way, especially when the confrontation involves an inter-branch dispute between the executive and the legislature.

These disputes typically begin with an informal request from a Member of Congress to a department or agency of government seeking documents. Such requests are usually made by letter. If the request comes from an individual Member without any majority-party leadership role, the agency typically responds as it would to a FOIA request – that is, the agency provides only such information as would be made available to the public, although it does so on an accelerated timetable. If the Member in question is dissatisfied with this response, he or she may (1) attempt either to stimulate a Committee with jurisdiction to formally espouse the request, (2) attempt to instigate an investigation by the GAO, as Congressman Dingell and Congressman Waxman recently have, or (3) attempt to generate enough press interest to place political pressure on the Administration to furnish a more thorough response.

If the request comes from a Member who is the Chairman of a Committee with jurisdiction, the Administration regards that as an official request of the Committee and furnishes more information. Typically, however, the Administration withholds information that might be subject to a claim of executive or other privilege and merely provides notice to the Committee that it has done so. A period of negotiation often follows, in which the Committee and the Department discuss ways in which the Committee's oversight needs might be met without sacrificing the executive's interests.

If this fails to produce complete agreement, the next step is for a majority of the Committee to vote to issue a subpoena. If this does not occur, the conflict is over. If a subpoena is issued, then the Administration must make a decision about what, if any, additional

information to furnish. Either before or after this decision is made (or both), more negotiations typically take place in which further accommodations and compromises are discussed. The issuance of subpoenas was formerly regarded as a significant step that carried with it the risk of substantial adverse publicity; during the Clinton Administration, however, subpoenas became so common that the risk of significant adverse public reaction from the mere issuance of a congressional subpoena is now less than it once was.

However, it is at this stage that the Administration must decide whether the President should make a formal assertion of executive privilege and direct the department or agency involved not to comply with the subpoena. Such an assertion almost always *will* generate substantial publicity and interest and does represent a meaningful escalation of the conflict. Of course, it is not always necessary to make a formal invocation of privilege: the Administration could simply elect not to comply – thus daring the Committee to enforce the subpoena and weakening the subsequent position of the department or agency head responsible – while maintaining its objections to the subpoena. Failure by the President to support the withholding of information by making a formal invocation of executive privilege will, however, increase the chance that the Committee will decline to respect the executive's asserted interest in withholding the information and continue to press forward.

At this point, if the Committee remains unsatisfied and unwilling to acquiesce, the conflict escalates to a new and more dangerous phase for both sides: the Committee must attempt to enforce its subpoena. Successful efforts to enforce the subpoena, because they typically involve holding cabinet members or agency heads in contempt of Congress, will almost always result in significant publicity and some form of eventual executive branch acquiescence or accommodation. On the other hand, failure by the Committee to enforce its subpoena is humiliating to the Chairman and substantially weakens the Chairman, the Committee, and indeed the entire Congress in future conflicts of a similar nature.

As a theoretical matter, there are four available options for enforcing a congressional subpoena, although in oversight or investigative conflicts with the executive branch there is, as a practical matter, only one. The three options that are theoretically available but almost never used are as follows. *First*, Congress might bring a free-standing civil suit in federal district court seeking an order enforcing the subpoena over the executive branch's privilege objections. The legal authority for taking this step is in considerable doubt, and during the Anne Gorsuch Burford controversy in the Reagan Administration, the Administration's efforts to obtain a judicial ruling on the privilege claims through this means were unsuccessful. United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983). *Second,* Congress could dispatch the Sergeant-At-Arms to arrest the offending cabinet or agency head to bring them to the floor of the Congress to be punished by Congress's inherent summary contempt powers. This method has not been attempted since approximately the 1920s, and recent case law casts some doubt on Congress's authority to employ it. *Third,* the Committee members or other interested Members of Congress could attempt to block action on confirmations, legislation, budgetary authorizations, or other items desired by the Administration until the Administration complies. This is feasible as a practical matter only with the strong support of leadership and in the highest profile cases where public sympathy is running strongly with the Congress and against the Administration.

The sole method of enforcement that is regularly employed is to hold the cabinet secretary or agency head who is responsible for complying with the subpoena in contempt of Congress. This requires a vote of the relevant Committee, followed by a vote of the relevant House of Congress as a whole. Should the House or Senate vote to hold the officer in question in contempt, a federal statute, 2 U.S.C. § 194, purports to require that the U.S. Attorney for the District of Columbia empanel a grand jury for the purpose of indicting that officer. If a criminal contempt indictment were brought against an executive branch official, that official could defend against the charges by litigating the validity of the privileges protecting the withheld documents, but if the court disagrees with the executive branch, the consequence would be a criminal conviction. There are extremely compelling arguments that this statute is unconstitutional, and the U.S. Attorney has never in fact enforced it, although on one occasion during the Reagan Administration (again involving Anne Gorsuch Burford) matters did reach this point.[1]

Enforcing congressional subpoenas against executive branch officials is thus a high-stakes proposition, especially for the officials in question. Even if there is no prosecution, significant stigma and injury to reputation may be associated with a vote of contempt, either in committee or by the entire House or Senate, and the process of seeking contempt votes usually attracts a great deal of press and public attention. Congress, too, faces risks from this course of action. Failure to obtain contempt votes can embarrass and undercut the congressional actors, and forcing matters to an ultimate resolution in court could result in a weakening of Congress's legal position in future cases. A finding of contempt also does not actually result in production of the documents originally sought. Further negotiations between the branches can, and usually do, take place at any stage of this process, and because of the risks on both sides, controversies that have proceeded to a finding of contempt have invariably resulted in some form of compromise solution involving limited access by Congress to the materials at issue, i.e., some form of partial surrender by the executive branch. Compromise solutions (at this or any other stage) can involve such things as confidentiality agreements; inspection and review, with or without note-taking, by Committee staff of documents that remain in the custody of the executive branch; inspection and review, with or without note-taking, by Members or Committee Chairmen and Ranking Minority members of documents that remain in the custody of the executive branch; written summaries of the contents of the documents withheld; or oral briefings concerning the contents of the documents withheld.

When all is said and done, which party controls the two Houses of Congress and the margins of their control are the keys to predicting who will "win" these battles – and thus to determining how aggressive a stance may safely be taken by the executive branch in the first instance. If the Democrats have sufficient control to assure passage of motions to hold executive branch officials in contempt of Congress for withholding privileged materials, then the executive branch will likely have little success in permanently depriving Congress of the information that it

[1] The process works slightly differently if the GAO is investigating. The net effect is that GAO investigations are somewhat less threatening. When the GAO investigates, a statute controls many of the options available to each side and ensures that in the event of an intractable disagreement, the courts may referee the dispute without exposing any executive branch official to contempt proceedings. 31 U.S.C. § 716. Alternatively, the statute provides that the President or Director of OMB may terminate the controversy over particular documents by formally certifying that they are deliberative materials whose disclosure could reasonably be expected to substantially impair the operations of government and explaining why this is the case. 31 U.S.C. § 716(d)(1)(C).

seeks, at least where Congress assigns a high priority to its inquiries. Vigorous resistance at late stages in the conflict will thus result in significant political costs in return for little ultimate institutional benefit. If the Republicans are in control, or control is, as a practical matter, evenly divided, then the Administration is far more likely to be able to resist a contempt motion and maintain the confidentiality of documents we believe to be subject to a valid claim of privilege. Political and institutional benefits can thereby accrue.

What general approaches might we take to this process, and how are those approaches likely to impact the Administration?

The general approach the Administration takes to these problems involves three separate components: (1) the categories of materials we make an initial effort to protect from routine disclosure, (2) how far in the conflict process we are willing to go before compromising over each of these categories, and (3) the type of compromise that would ultimately be acceptable to us with respect to each category. There are hundreds of ways to blend these three factors, and thus the three approaches outlined below are meant to be merely illustrative of the way in which different degrees of political will might be translated into action.

Aggressive approach

Characteristics:

- Withhold all possible categories of privileged documents as an initial matter;
- Force the issuance of subpoenas before agreeing to compromise on most categories;
- Protect most sensitive categories absolutely – even at the risk of provoking contempt findings against cabinet officers and forcing matters into litigation;
- Provide access to less sensitive categories only with fairly stringent safeguards against broader disclosure;
- Fairly forthright and explicit assertions of executive privilege by the President.

Benefits:

- Maximum protection of sensitive executive branch materials;
- Fosters frank and open communication within departments and agencies and between departments and agencies and the President;
- Enhances presidential control over executive branch and impedes Congress's efforts to intrude into executive branch decisionmaking;
- Enhances overall powers and standing of executive branch;
- Creates disincentives for Congress to undertake oversight or political fishing expeditions lightly.

Detriments:

- Maximizes negative publicity and political damage;
- Places heads of departments and agencies in difficult positions and at legal risk;

- Generates distrust on Capitol Hill and fosters adversarial relations with Congress.

Passive Approach

Characteristics:

- Adopt a cooperative attitude and surrender almost all potentially privileged documents early in the process;
- Seek to minimize the issuance of subpoenas or the escalation of conflict at all costs;
- Protect no general category of documents absolutely and fight hard only over specific documents likely to prove damaging in some way to the Administration;
- Compromise over all documents before contempt votes;
- Avoid conflict by not insisting on stringent safeguards against further disclosure;
- Never formally invoke executive privilege.

Benefits:

- Minimizes negative publicity and political damage from satellite disputes;
- Reduces risk the we incur bad publicity and political damage and end up surrendering material anyway;
- Protects heads of departments and agencies;
- Reduces friction with Congress and fosters cooperative relations that may help to change the tone and allow more energy to be focused on substantive policymaking.

Detriments:

- Sacrifices legitimate interests of executive branch and allows Congress maximum latitude to exert policy pressure on agencies;
- Results in public disclosure of large volumes of executive branch materials in close to real time;
- Chills frank and open communication and evaluation of wide range of policy options within executive branch and forces all officials to speak and write at all times as though their words will be made public;
- Emboldens Congress to make numerous oversight requests and to use Committee powers in an unfocused search for material from which to manufacture political issues.

Moderate Approach

Characteristics:

- Surrender less significant categories of potentially privileged information early in the process, while protecting more sensitive categories longer;
- Negotiate aggressively but compromise on most categories before any contempt votes;

- Risk contempt only for core categories of presidential communications and military/diplomatic/foreign relations information;
- Compromise over such documents only after contempt votes;
- Insisting on moderate safeguards against further disclosure for more sensitive categories of documents;
- Attempt to finesse the issue of executive privilege, except in clearest cases.

Benefits:

- Steers middle course and allows executive branch to capture some of the benefits of a more aggressive approach without constant friction and regular stories about interbranch conflict;
- Ensure that departments and agencies are exposed to difficult situations only when most necessary;
- Permits (but does not necessarily foster) reasonably cooperative relations with Congress.

Detriments:

- Unlikely to privilege against ultimate disclosure any category – merely ensures that some protections will attach to more sensitive categories after some prolonged conflict;
- May still result in some acute confrontations but without highest level of protection or likelihood of success.

How have these issues been handled historically, and what lessons can we draw from the experiences of past administrations?

The executive branch has asserted and defended the prerogative to withhold information from Congress in appropriate circumstances since the first presidential administration of George Washington. Historically, most claims of executive privilege have involved foreign affairs and military or national security information. However, the privilege has also regularly been invoked to protect deliberative materials, law enforcement materials, and presidential communications as well.

As a matter of formal executive branch policy, it has long been the case that an overall policy of accommodation, interest-balancing, and rare and judicious invocation of executive privilege has been in place. In practice, however, different presidents have implemented this general policy in different ways.

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). William French Smith, President Reagan's first Attorney General, 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 the wake of Watergate, and confronting a heavily-Democratic Congress, President Ford took an extremely cautious, non-confrontational approach to executive privilege, rarely invoking the privilege and backing down from most, but not all, confrontations. President Ford surrendered the requested information prior to any votes on contempt in all but two cases. Among the items he surrendered merely upon subpoena were sensitive NSC, CIA, and FBI documents relating to South Vietnam and covert action and his own live testimony before Congress concerning the Nixon pardon. The two exceptions were an initial committee vote of contempt against Secretary of Commerce Rogers Morton relating to confidential export reports of American companies, after which the Administration promptly allowed the Committee Chairman access to the documents, and a final committee vote of contempt against Secretary of State Henry Kissinger relating to State Department recommendations concerning covert intelligence activities, after which the Administration compromised by providing an oral briefing to committee members and staff. The Ford Administration also went to court to prevent disclosure to Congress by AT&T of records relating to national security wiretaps, a step that also eventually resulted in a compromise solution after the D.C. Circuit upheld an injunction against disclosure.

President Carter, too, followed a policy of early compromise and avoidance of formal assertions of privilege. In part because Democrats controlled the Congress and in part because he surrendered almost everything sought, President Carter largely avoided even the issuance of subpoenas. Two controversies did proceed to the contempt stage, however. Both HEW Secretary Califano and the Secretary of Energy Charles Duncan suffered contempt votes, Califano over documents that contained trade secrets and Duncan over deliberative process documents relating to President Carter's imposition of an oil importation fee. Compromises were reached in both cases shortly after the contempt votes.

The Reagan Administration took a somewhat schizophrenic approach to the issue. On one hand, the Reagan Administration made a number of forthright assertions of executive privilege and defended them more vigorously than previous administrations. This approach resulted in some notable imbroglios, including the effort to obtain from EPA Administrator Anne Gorsuch Burford documents relating to the Administration's enforcement of the Superfund law, in which Burford became the first agency head ever to be held in contempt by a full House of Congress and Rita Lavelle, the Superfund Administrator, was prosecuted criminally for perjury. This controversy also spawned the Independent Counsel investigation of Ted Olson for an alleged lack of candor with Congress in explaining his role in supporting the assertion of executive privilege. President Reagan's Secretary of the Interior James Watt also was voted in contempt, although only by a Committee, for asserting privilege against a subpoena seeking documents relating to possible efforts by Canadian interests to artificially depress commodity prices in the U.S. to facilitate takeovers of American companies. On the other hand, President Reagan also surrendered some extremely sensitive documents at the core of executive privilege, including his own personal diaries in the midst of the Iran-Contra investigation.

President Bush (41) pursued a non-confrontational strategy of delayed disclosure through negotiation and accommodation. With limited exceptions, the Bush (41) Administration surrendered in whole or in part at an earlier stage of proceedings than had many previous administrations. In the vast majority of circumstances, President Bush never formally invoked executive privilege (even when his subordinates wished him to) and he surrendered the information being requested either shortly before or shortly after a subpoena was issued but before any vote on contempt took place. This pattern was followed with respect to Persian Gulf War documents, the INSLAW controversy involving the Department of Justice, the OLC memorandum regarding the authority to arrest individuals on foreign soil without permission of the foreign government, the Quayle Council on Competitiveness documents relating to streamlining the FDA new drug approval process, and the Department of Education documents pertaining to the role played by "diversity" in a private accrediting organization's decisions on accrediting private colleges and universities. During the controversy involving Congress's attempt to conduct oversight of the plea bargain in the environmental criminal case against Rockwell International involving the Rocky Flats nuclear weapons facility, President Bush declined to support the Department of Justice's invocation of executive privilege with respect to testimony by prosecutors and FBI agents regarding the Rocky Flats investigation, and the Administration relented and waived all privilege claims in the face of a threat to hold the U.S. Attorney in Colorado in contempt. President Bush did formally invoke executive privilege following a subpoena to Secretary of Defense Cheney for a document regarding cost overruns in

the McDonnell Douglas A-12 aircraft program, and Congress backed down and failed to seek enforcement.

Finally, the Clinton Administration made rather profligate use of executive privilege. The privilege was asserted not, in the main, to defend legitimate executive branch prerogatives in the context of regulatory oversight but to prevent disclosure of evidence of official misconduct or personal scandal to investigators. This delayed and frustrated investigators but ultimately did not shield the information from disclosure, and it had the effect of bringing executive privilege into further disrepute and weakening it in the courts. Among other things, President Clinton claimed executive privilege against a congressional subpoena seeking information relating to the Travel Office firings, which was swiftly abandoned after the House Committee voted to hold White House Counsel Jack Quinn in contempt. The Clinton White House also invoked privilege in order to withhold from a grand jury White House Counsel documents relating to an internal investigation of alleged gratuity violations by Secretary of Agriculture Espy. This claim was largely lost in the courts. Executive privilege was also repeatedly asserted against grand juries to prevent disclosure of conversations taking place within the White House relating to political strategy and scandal control efforts involving the President's behavior during the Lewinsky scandal. President Clinton did succeed in asserting privilege in one context: he invoked the privilege to prevent Congress from obtaining documents sent from the National Security Adviser to the President involving U.S. policy in Haiti. In that case, Congress relented following the formal invocation of privilege.

During the Clinton era, because of the prevalence of scandal, Congress departed from the traditional focus of its oversight activities, which had been the administration of statutory programs by the agencies, and turned much of its attention to the President and the White House. In an ordinary oversight context, this focus would raise heightened separation of powers concerns by infringing upon the operation of the Presidency. Moreover, Congress's authority to conduct oversight of presidential activities is not always clear. The Supreme Court has held that 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). Thus, the executive branch has taken the position that Congress lacks authority to investigate the President's discharge of his constitutional (as opposed to statutory) responsibilities. Congress's oversight of President Clinton's exercise of the pardon power, for example, is in conflict with that position.

Overall, the history suggests that when Congress has the will and the votes for contempt, both in Committee and in a full House of Congress, it prevails in these contests, almost no matter what sort of information is at stake. In such circumstances, aggressive resistance is costly and produces only the benefit of slightly more protective conditions for the information released.

The will and the votes to sustain contempt proceedings, in turn, depend upon both the balance of political forces in Congress and the circumstances surrounding the withholding of documents. Presidential assertions of executive privilege are most likely to succeed when (1) the

President's party controls the relevant House of Congress or the President can command majority support in that House, (2) the privilege is asserted over documents lying at the core of the privilege, especially matters in the national security and foreign relations realm or matters directly involving presidential decisionmaking, (3) the President personally invokes the privilege, and (4) the President has a strong argument on the merits that maintaining confidentiality is in the public interest. Note that the latter condition is almost always impossible to satisfy if Congress is convinced that it is investigating a legitimate issue of potential wrongdoing by government officials.

What approach should we take?

It is especially important at the beginning of the Administration to work to establish the appropriate positions on accommodating congressional and executive branch interests, because those positions will serve as precedents that will be cited for the rest of the Administration. Particular attention should be paid to establishing appropriate lines regarding congressional oversight of ongoing decisionmaking: we can expect a considerable amount of oversight of regulatory decisions, because the Democratic Senate may be inclined to review, or second-guess, the deregulatory actions of a Republican Administration. One of our goals should also be to work with Congress to redirect oversight back to agency activities, rather than to activities within the White House itself.

Given that Republicans control the House of Representatives and that there is effective balance in the Senate, the Administration can afford to be reasonably aggressive in defending executive branch prerogatives. As in many other areas, the moderates in both parties will be the key: as long as we can persuade them that the Administration is acting in good faith and in the public interest, we should be able to ensure that appropriate invocations of privilege are not overridden by contempt votes in either the House or the Senate.

Successful implementation of a reasonably aggressive strategy will, however, require close attention to the merits of each particular circumstance. We must ensure that at each stage of the process, the categories of documents at issue become more obviously and centrally related to the core interests protected by the privilege.

As an initial matter, we should virtually never attempt to withhold documents that may contain evidence of malfeasance, misconduct, or criminal wrongdoing. With respect to investigations that raise such issues, we must work cooperatively with the committees to share information with appropriate safeguards. This requires discipline because it may be contrary to short-term political interests, but it is far better, as a matter of both politics and principle, than the alternative. The principal difficulty in this area is making the threshold determination that there is a substantial enough allegation of wrongdoing to put a matter in this category. Too relaxed a standard could obviously put the Administration at a serious disadvantage politically by encouraging partisan witch-hunts. In this regard, the Counsel to the President and the Assistant Attorney General for the Office of Legal Counsel should be responsible for making the threshold determination.

With respect to ordinary oversight or legislative activity, we recommend that the departments and agencies initially withhold almost everything that might be subject to a valid claim of privilege, while remaining willing to cooperate to accommodate the legitimate needs of the Congress. Some negotiation and compromise can take place at a relatively early stage with respect to less sensitive categories of documents. Some moderately sensitive categories (e.g., those subject to claims of attorney-client or work privilege in litigation with private parties) might also be made available for inspection but not produced. No moderately or highly sensitive documents (e.g., high-level deliberative documents, military/diplomatic/foreign relations information, presidential communications, substantive communications between the White House and top levels of an agency) should be produced unless and until a subpoena issues. Upon issuance of a subpoena, more accommodation should take place, so that the only items that remain subject to dispute as congressional committees approach a decision on whether to seek contempt votes are those that are truly sensitive and lie at the heart of the interests executive privilege is designed to protect.

With respect to such documents, a request should be made to the committee chair to postpone any committee votes on contempt to permit the Justice Department and White House Counsel's Office to review the documents again and offer an explanation in writing concerning the reasons why the documents must withheld if that is their decision. This could be coupled in appropriate circumstances with a formal invocation of executive privilege by the President. In general, such formal invocations of the privilege should occur only when (1) the claim is strong, and (2) the formal invocation appears likely to have some influence in persuading the committee not to proceed further with a contempt vote.

In the unlikely event that a full committee or a full House of Congress votes to hold a department or agency head in contempt, we should expeditiously negotiate some form of limited compromise access. Only in the rarest, most compelling circumstance should any consideration be given to pressing contempt matters into litigation.

J-057

REQUESTS BY RANKING MINORITY MEMBERS

The Department's accommodation policies for providing Congress with access to non-public information are available only with respect to authorized requests on behalf of either chamber of Congress or one of either chamber's authorized committees, acting through its chairman. Individual Members, including ranking minority members, are provided the same access that members of the public are afforded under the Freedom of Information Act. This practice is consistent with the requirements of the Privacy Act.

* The principle underlying both our accommodation policies and the Privacy Act is that the investigative and oversight authority of Congress is generally exercised by each house of Congress through delegations of authority to congressional committees, which act on behalf of the full body either through requests by the committee itself or by chairman, speaking on behalf of the committee.

* Only in rare cases do committees authorize the ranking minority member to make requests on behalf of the committee. The duty to accommodate congressional requests, which the executive branch owes as a matter of comity to a coordinate branch of government, is thus generally triggered only by committee requests made by chairmen.

* Similarly, the Privacy Act, which prohibits executive agencies from releasing information on individuals without the consent of the individual, contains an exception for Congress, but that exception is clearly limited to either house or its committees and is not available for individual members such as ranking minority members. See 5 U.S.C. § 552a(b)(9) (authorizing disclosure "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee").

THE WHITE HOUSE

WASHINGTON

June 16, 1992

Dear Mr. Chairman:

I am writing in response to your letter of June 11 to the President regarding your June 23 scheduled hearing. In that letter, you invited the Administration to send appropriate Administration officials to testify. We would propose to send Mr. Robert Mueller, Assistant Attorney General, Criminal Division, Department of Justice, and Mr. Laurence Urgenson, Acting Deputy Assistant Attorney General, Criminal Division, Department of Justice. In addition, I would note that the Administration has previously testified in great detail regarding pre-Desert Storm Iraq policy, the administration of the relevant programs and related investigations. I attach a copy of this testimony and ask that it be made available to all Committee Members before the hearing.

Your letter also requested the appearance of Mr. Nicholas Rostow, Special Assistant to the President and Senior Director for Legal Affairs, National Security Council; and Mr. C. Boyden Gray, Counsel to the President. As I advised the Chairman of the Committee on Banking, Finance and Urban Affairs in response to a similar request, it is the longstanding practice of the Executive Branch to decline requests for testimony by members of the President's personal staff. For that reason, I must decline your request for personal testimony by Messrs. Gray and Rostow. In light of the unusual circumstances presented here, however, the Administration is prepared to work with you to develop an alternative, mutually acceptable mechanism for making available to Members of the Committee the White House officials whose testimony you have sought.

Finally, attached to your letter was a request for documents from the Department of Agriculture, the State Department, the Department of Justice, the White House, the Department of the Treasury/U.S. Customs Service, and the Department of Commerce. In order to expedite a response to that request, we have forwarded it to the listed Departments outside the White House, and have directed them to respond directly to the Committee. In light of the large number of documents requested, it is unlikely that they or the White House will be able to meet the June 18

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response date, but we have requested that they respond as quickly as possible.

Sincerely,

Nicholas E. Calio

Nicholas E. Calio
Assistant to the President for
Legislative Affairs

Chairman Jack Brooks
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6218

cc: The Honorable Hamilton Fish, Jr.

attachments

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OUR FILE NUMBER
600,000-012

June
11th
1992

The Honorable C. Boyden Gray
Counsel to the President of the
United States
The White House
Washington, D.C. 20500

Dear Boyden:

Thank you for the clarification today. As I understand it, Senator Howard Baker, Frank Carlucci and similarly situated senior advisors to President Reagan are authorized to meet informally with Members and staff of the Senate Select Committee on POW/MIA affairs to discuss conversations they may have had with Mr. Perot and other non-White House personnel about events in 1986 or 1987, but that such discussions shall not disclose conversations with the President, the Vice President or other White House officials.

In addition, consistent with longstanding White House policy, Senator Baker, Frank Carlucci and other former White House officials are not authorized to provide formal testimony to the Committee about matters occurring during their White House service.

We understand your office is continuing to study this matter and that we may receive additional guidance.

I would appreciate receiving written confirmation of the foregoing. Thank you very much.

Sincerely,

Arthur B. Culvahouse, Jr.

cc: The Honorable Howard H. Baker, Jr.

THE WHITE HOUSE

WASHINGTON

June 17, 1992

Dear A.B.:

Thank you for your letter. We do not object to Senator Baker and other similarly situated former advisors to the President meeting informally with Members and staff of the Senate Select Committee on POW/MIA Affairs to discuss conversations they may have had with Mr. H. Ross Perot and other non-Executive branch officials. We are not prepared, however, to make a general waiver of Executive privilege with respect to their conversations with the President, the Vice President or other Executive branch officials, including those outside the White House.

In addition, it is long-standing White House policy not to assent to formal testimony to Congressional committees by former White House officials about matters occurring during their White House service.

Finally, we are reserving the option to assert Executive privilege on a specific matter to protect the Presidency. However, as you know, such decisions are not made in the abstract without a specific matter in dispute.

I hope this clarifies our policy. If you have any questions, please call me.

Sincerely,

C. Boyden Gray
Counsel to the President

Mr. Arthur B. Culvahouse
O'Melveny & Myers
555 13th Street, N.W.
Washington, D.C. 20004-1109

U.S. Department of Justice
Office of the Deputy Attorney General

OAC

The Deputy Attorney General

Washington, D.C. 20530

April 19, 1983

Senator Orrin G. Hatch
Chairman
United States Senate
Committee on Labor
and Human Resources
Washington, D. C. 20510

Senator Edward M. Kennedy
Ranking Minority Member
United States Senate
Committee on Labor and
Human Resources
Washington, D. C. 20510

Dear Chairman Hatch and Senator Kennedy:

This is in response to your letter of March 23, 1983 reiterating your desire to obtain testimony from the Counsel to the President, Fred F. Fielding, with respect to your ongoing investigation of the process, in January and February of 1981, surrounding the confirmation by the United States Senate, of Secretary of Labor Raymond J. Donovan.

Before responding directly to your request for sworn testimony from the Counsel to the President, I believe that it is appropriate to note that, as I am sure you will agree, the Administration has made every effort to cooperate with your Committee's lengthy investigation of this matter. The Department of Justice, including the Federal Bureau of Investigation, has provided vast quantities of information to your Committee, including in many instances, access to raw data in the Bureau's possession. The Bureau has also answered numerous written questions, provided you with summaries and other data relative to its internal investigations and has made two of its officials available to your Committee at hearings for lengthy sworn testimony regarding this matter. In addition, the White House has provided your Committee with copies of documents in its possession and has prepared and supplied you with a detailed chronology of relevant events. We are not aware of any previous occasion when so much information has been provided by the Executive Branch to a Senate Committee relative to an appointee's confirmation in either the pre- or post-confirmation period.

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In addition to the information which the Administration has supplied to you directly, we understand that you have been given access to the fruits of the investigation of Special Prosecutor Leon Silverman, an exhaustive investigation into all allegations regarding Mr. Donovan that consumed months of the time of numerous investigators, involved the assistance of a grand jury, and cost hundreds of thousands of dollars.

In short, we believe that the Administration has been most cooperative with your investigation and that your Committee has been provided an extraordinary and unprecedented quantity of information regarding Mr. Donovan and his confirmation. We, of course, remain willing to assist you and your Committee in any reasonable way.

As you know, our concern regarding your desire for the sworn testimony of Mr. Fielding is based upon important principles relative to the powers, duties and prerogatives of the Presidency. We share with previous Presidents and their advisers serious reservations regarding the implications for established constitutional doctrines arising from the separation of powers of a Congressional demand for the sworn testimony of close presidential advisers on the White House staff.

Presidents have historically resisted efforts to obtain sworn testimony from their closest and most immediate advisers on the White House Staff. Congress has customarily honored the President's wishes relative to such matters as a matter of comity toward a respected co-equal branch of government. As you know, these principles do not spring from partisan considerations or any other transitory concerns. The position to which we adhere has been taken consistently by Presidents of either party and has been respected by Congress irrespective of the party in control or the subject matter of the inquiry.

The Counsel to the President serves the President solely and exclusively. He is available for and provides legal advice to the President. His professional responsibility is directly to the President. The President must be able to count on the constant availability of his Counsel, and on the total confidentiality of his services. As an institutional matter, the President cannot permit his Counsel to provide sworn testimony to the Legislative Branch regarding the performance of his duties.

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The Administration wishes to continue to cooperate with your Committee's inquiry and we support your effort to bring this inquiry to a close. To accomplish this, if you feel that you need information beyond that already supplied to you relating to the White House's actions during the confirmation process, we have suggested that Mr. Fielding, consistent with the foregoing principles, would be willing to provide written responses to a reasonable number of relevant written inquiries which you may wish to pose in concluding your inquiry. If this alternative is agreeable to you, I urge that you articulate such a set of questions in a letter and I will undertake to arrange for you to receive written responses to those questions.

Sincerely,

Edward C. Schmults
Deputy Attorney General

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U.S. Department of Justice

Office of Legal Counsel

LLS

Office of the
Assistant Attorney General

Washington, D.C. 20530

29 JUL 1982

MEMORANDUM TO EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL

This summarizes the reasons why I believe that Counsel to the President Fred F. Fielding should not submit to a subpoena or a request to testify before the Senate Labor and Human Resources Committee relative to the performance of his duties on behalf of the President relative to the investigation of Raymond J. Donovan prior to and during the confirmation process.

A. Historical Precedents.

1. As far as can be determined, the President and his close advisers have generally not testified before Congressional Committees with respect to the performance of their official duties. As Assistant Attorney General for the Office of Legal Counsel William H. Rehnquist expressed it in 1971, "The President and his immediate advisers, that is, those who customarily meet with him on a regular or frequent basis - should be deemed absolutely immune from testimonial compulsion by a congressional committee." (emphasis added.) On the few occasions when presidential advisers have testified, it has been in connection with their private affairs.

2. President Jefferson rejected a subpoena issued by John Marshall sitting as circuit justice (for documents, Aaron Burr trial).

3. 1806. Three cabinet members rejected a judicial subpoena.

4. 1905. A.G. Opinion rejected a judicial subpoena to a Cabinet officer.

5. President Roosevelt yielded to one congressional subpoena addressed to an Administrative Assistant.

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6. President Truman rejected a congressional subpoena to an Assistant to the President. (On another occasion he reluctantly yielded to a subpoena to an Administrative Assistant, although it related to alleged wrongdoing on the part of the individual subpoenaed.

7. President Eisenhower rejected a congressional subpoena to Sherman Adams. (Adams testified voluntarily on another occasion with respect to alleged personal wrongdoings.)

8. Associate Special Counsel to President rejects invitation to testify during Johnson administration relative to Fortas appointment. ("It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government.")

B. Reasons why appearance by presidential advisers unwise.

1. Generally

(a) The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President.

(b) Such appearances tend to create, regardless of disclaimers, the impression among Congressmen that such testimony is a matter of legislative right, not executive grace. As a matter of experience, yielding once tends to ultimately produce subsequent, more frequent, more vigorous demands.

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(c) As a legal matter, there are no clear, fully applicable judicial precedents (although decisions on the subject of Executive privilege are strongly supportive of the President's position in this regard). Therefore, custom or practice tends to become a legal precedent when, as and if such an issue is submitted to the courts. Thus an appearance in response to a subpoena or request would tend to create damaging legal precedent.

(d) Appearances by a Presidential adviser before Congressional committees on some occasions will leave the President open to the charge, however unfounded, that a subsequent refusal to provide testimony is because there is something to hide.

(e) Other Presidents have resisted such testimony. A capitulation by this President will be perceived by many - including members of Congress who are aware of the historical practice - as a sign of weakness.

2. --Specifically

(a) There is a substantial possibility that this Committee investigation will not stop with Fred Fielding and will move on to Ed Meese or Jim Baker as well (perhaps, although surely unlikely, the President himself).

(b) This Committee (and its leadership) has shown a propensity towards public gestures, leaks and efforts to embarrass the Administration.

(c) The réason for the request for the testimony is a sham. This Committee knew of and considered allegations of organized crime allegations regarding Secretary Donovan during the confirmation process. Even if a particular specific detailed unsubstantiated allegation was not furnished to the Committee, that would not have affected the hearings. All charges against the Secretary have been fully explored. All White House and FBI documents generated during the confirmation process have been furnished. A detailed chronology of events has been supplied.

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(d) The deposition process - particularly as contemplated to be conducted by the individual selected - is unsatisfactory for a variety of reasons.

C. Possible Compromises.

1. Before going further, let the Committee examine Mullen and Adamski at a public hearing (or in a private briefing). Thereafter, if, but only if, the Committee can articulate serious, unanswered questions, additional measures will be considered.

2. Confidential, off the record briefing by Fielding for Committee leadership.

3. Let the Committee prepare written factual questions, if there are any, and submit them to the Administration for response.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

bcc: Rudolph W. Giuliani
Robert A. McConnell
✔Larry L. Simms
Mark B. Rotenberg

JUL-10-2001 12:29 DOJ/OFC OF LEGAL COUNSEL 202 305 8524 P.12/14

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

September 3, 1996

The Honorable John M. Quinn
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Quinn:

You have asked whether it would be consistent with precedent and governing legal principles to assert executive privilege should a subpoena be issued by a congressional committee to you, in your capacity as Counsel to the President, to compel your testimony at a committee hearing concerning the performance of your official duties. We believe that executive privilege would be assertable on the basis that you serve as an immediate adviser to the President and are therefore immune from compelled congressional testimony.

It is the longstanding position of the executive branch that "the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee."[1] This position is constitutionally based:

> The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President.[2]

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[1] Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Re: Executive Privilege, at 5 (May 23, 1977).

[2] Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, at 2 (Jul. 29, 1982) (discussing subpoena for testimony of the Counsel to the President). See also Memorandum from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters, at 6 (Dec. 21, 1972) (since "[a]n immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman [when he declined to comply with a congressional subpoena for his testimony] would apply to justify a refusal to appear by . . . a former staff member"); Letter from Edward C. Schmults, Deputy Attorney General, at 2 (Apr. 19, 1983) ("[O]ur concern regarding your desire for the sworn testimony of [the Counsel to the President] is based upon important principles relative to the powers, duties and prerogatives of the Presidency. We share with

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Accordingly, "[n]ot only can the President invoke executive privilege to protect [his personal staff] from the necessity of answering questions posed by a congressional committee, but he can also direct them not even to appear before the committee."[3]

An often-quoted statement of this position is contained in an opinion by Assistant Attorney General William Rehnquist:

> The President and his immediate advisers -- that is, those who customarily meet with the President on a regular or frequent basis -- should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.[4]

There is no question that the Counsel to the President falls within Assistant Attorney General Rehnquist's description of the type of Presidential advisers who are immune from testimonial compulsion.

Sincerely,

Christopher H. Schroeder
Acting Assistant Attorney General

---

previous Presidents and their advisers serious reservations regarding the implications for established constitutional doctrines arising from the separation of powers of a Congressional demand for the sworn testimony of close presidential advisers on the White House staff.").

[3] Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Re: Dual-purpose Presidential Advisers, Appendix at 7 (Aug. 11, 1977).

[4] Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff", at 7 (Feb. 5, 1971).

MEMORANDUM

TO: GENERAL COUNSELS OF THE DEPARTMENTS AND AGENCIES

FROM: LARRY D. THOMPSON
DEPUTY ATTORNEY GENERAL

RE: CONGRESSIONAL INFORMATION REQUESTS

In June 1989, the members of the General Counsels Consultative Group were provided with the attached Office of Legal Counsel memorandum summarizing the principles and practices governing congressional requests for confidential executive branch information. The Attorney General and the Counsel to the President plan to establish a similar general counsels group later this year for the purpose of discussing issues of common interest to general counsels throughout the executive branch. One such issue that general counsels are already considering on a regular basis is the subject of congressional requests for information. It would be useful for the general counsels to have the attached memorandum available now as reference material, because it sets forth the longstanding executive branch approach to this subject. The basic approach is to attempt to accommodate congressional information needs ~~to the fullest extent consistent~~ in a manner consistent with the constitutional and statutory responsibilities and prerogatives of the executive branch.

If you or your staff have any questions about the attached memorandum or the congressional-executive branch accommodation process, please feel free to contact Paul Colborn of the Office of Legal Counsel (at 514-2048) or Brett Kavanaugh of the White House Counsel's Office (at 456-7984). (?)

Attachment

THE WHITE HOUSE

WASHINGTON

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Time: _____

To: Paul Colborn

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From: Brett Kavanaugh

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Message:

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THE WHITE HOUSE

WASHINGTON

August 2, 2001

MEMORANDUM TO: ALBERT HAWKINS

FROM: ALBERTO R. GONZALES ag

SUBJECT: TALKING POINTS ON EXECUTIVE PRIVILEGE FOR CABINET MEETING

Here are some suggested talking points on executive privilege we discussed. Time permitting, I think it would be helpful for the President to touch on this subject in his meeting with the cabinet.

Suggested Talking Points on Executive Privilege for Cabinet Meeting

- I'm very concerned with protecting the constitutional powers of the President and the executive branch against overreaching by the Congress in the oversight setting. Frank and candid discussion and advice may be inhibited if such communications cannot be kept confidential.

- There are going to be times in the coming years when each of you may need to help me protect those powers by resisting improper congressional requests for information, irrespective of whether the information is benign. I know this may frustrate Congress, and may generate adverse publicity, and thus may be politically painful for you, but I consider it an important part of your job.

- Please be alert, and ask your general counsels to be alert, to congressional oversight requests that call for sensitive executive branch materials whose disclosure could impair the effective functioning of the executive branch or interfere with the proper exercise of my constitutional responsibilities. Some examples include high-level communications between your departments and me or my staff; sensitive military, diplomatic, or foreign relations information; materials relating to pending decisions and open regulatory matters; materials relating to open enforcement matters; and information used to make decisions at high levels of your departments.

- If you get Congressional requests that call for you to produce information of this kind, please make sure to inform my Counsel, Al Gonzales, so he and his staff, along with the Department of Justice, can advise you on how to respond. It is important that we are consistent in responding to these types of inquiries.

August 2, 2001
8:10 am