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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Senate Request for Gov. Ridge's Testimony [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 08/28/2025 JLS] - To: Aleberto Gonzales, et al. - From: Edward McNally	1	03/04/2002	
002	Letter	[Letter] [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 08/28/2025 JLS] - To: Arthur Culvahouse - From: C. Boyden Gray	1	06/17/1992	
003	Memorandum	Memorandum [with attachment] [29 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 08/28/2025 JLS] - To: File - From: Michale Small	29	04/29/1994	
004	Letter	[Letter] [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 08/28/2025 JLS] - To: Arthur Culvahouse - From: C. Boyden Gray	1	06/17/1992	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Testimony by Ridge: White House Policy on Testifying Before Congress

FRC ID:

9696

RESTRICTION CODES

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

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

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

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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF HOMELAND SECURITY

WASHINGTON, D.C. 20502

March 4, 2002

MEMORANDUM TO JUDGE ALBERTO GONZALES
TIM FLANIGAN

CC: ADM. STEVE ABBOT, MARK HOLMAN, DAVID
ADDINGTON, BRETT KAVANAUGH

FROM: EDWARD McNALLY *EM*

SUBJECT: SENATE REQUEST FOR GOV. RIDGE'S TESTIMONY

Attached for your information and review is a copy of today's letter to Governor Ridge from Senators Robert Byrd and Ted Stevens of the Senate Appropriations Committee concerning the forthcoming "series of hearings" to "examine closely the Federal response here at home" to the events of September 11th. The letter states:

"As Chairman and Ranking Member of the Committee, we request that you testify before the Committee on April 9th, April 10th, or April 11th, 2002."

Last week I provided you with copies of the 1999 memorandum by the Attorney General which concluded, among other issues, that the Counsel to the President, e.g., was immune from a subpoena to testify. By way of additional background, also attached here are copies of a set of June 1992 letters from Nick Calio and Boyden Gray concerning requests for testimony by Nick Rostow (who then held John Bellinger's position) and Boyden Gray (the Administration declined), and also regarding former presidential Chief of Staff Howard Baker. Also included is a memorandum prepared by OLC in 1994 concerning "Congressional Requests for Testimony of White House Officials", which provides a detailed history of how various administrations have addressed these issues during the past 50 years. I am available to discuss these matters at any time that is convenient to you.

ROBERT C. BYRD, WEST VIRGINIA, CHAIRMAN

DANIEL K. INOUE, HAWAII
 ERNEST F. HOLLINGS, SOUTH CAROLINA
 PATRICK J. LEAHY, VERMONT
 TOM HARKIN, IOWA
 BARBARA A. MIKULSKI, MARYLAND
 MARY R. REID, NEVADA
 HERB KOHL, WISCONSIN
 PATTY MURRAY, WASHINGTON
 DYRON L. DORGAN, NORTH DAKOTA
 DIANNE FEINSTEIN, CALIFORNIA
 RICHARD J. DURBIN, ILLINOIS
 TIM JOHNSON, SOUTH DAKOTA
 MARY L. LANDRIEU, LOUISIANA
 JACK REED, RHODE ISLAND

TED STEVENS, ALASKA
 THAD COCHRAN, MISSISSIPPI
 ARLEN SPECTER, PENNSYLVANIA
 PETE V. DOMENICI, NEW MEXICO
 CHRISTOPHER S. BOND, MISSOURI
 MITCH MCCONNELL, KENTUCKY
 CONRAD BURNS, MONTANA
 RICHARD C. SHELBY, ALABAMA
 JUDD GREGG, NEW HAMPSHIRE
 ROBERT F. BENNETT, UTAH
 BEN Nighthorse CAMPBELL, COLORADO
 LARRY CRAIG, IDAHO
 KAY BAILEY HUTCHISON, TEXAS
 MIKE DEWINE, OHIO

TERRENCE E. SALUVAIN, STAFF DIRECTOR
 STEVEN J. CORTES, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON APPROPRIATIONS
 WASHINGTON, DC 20510-6025

March 4, 2002

The Honorable Tom Ridge
 Assistant to the President for Homeland Security
 Executive Office of the President
 The White House
 Washington, DC 20502

Dear Governor Ridge:

In Securing the Homeland Strengthening the Nation, President Bush concludes that, "the threat of terrorism is an inescapable reality of life in the 21st Century. It is a permanent condition to which America and the entire world must adjust." We share the view that it is essential that Federal, state, and local governments must have a significant and sustained commitment to defend our homeland.

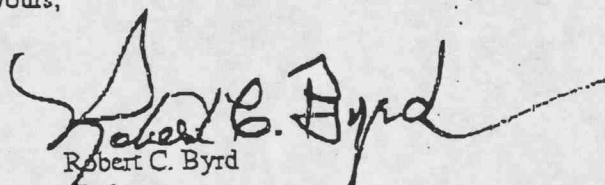
The Senate Appropriations Committee will be holding a series of hearings to examine closely the Federal response here at home to the events of September 11, 2001. The President's Budget for Fiscal Year 2003 includes requests for homeland defense funding in dozens of departments and agencies. In the Executive Order establishing the Office of Homeland Security, President Bush gives you the responsibility to certify that the funding levels contained in the Budget transmitted to the Congress are necessary and appropriate for the homeland security-related activities of the Executive Branch.

Therefore, you are the single Executive Branch official with the responsibility to integrate the many complex functions of the various Federal agencies in the formulation and execution of homeland defense programs. Your views and insights on the policies necessary to meet these objectives are critical to the Committee and the nation. As Chairman and Ranking Member of the Committee, we request that you testify before the Committee on April 9th, April 10th, or April 11th, 2002. The subcommittees of this Committee will address the detailed funding requests for the individual agencies and departments.

Thank you for your attention to this matter. We look forward to your early and positive response.

Sincerely yours,


 Ted Stevens
 Ranking Member


 Robert C. Byrd
 Chairman

RCB/TS:cek

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

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

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'Malley & Myers
555 13th Street, N.W.
Washington, D.C. 20004-1109

Memorandum



Subject Congressional Requests for Testimony of White House Officials	Date April 29, 1994
To File	From ms 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

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. Giuliani, 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

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.

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

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

Several months before his August 1971 testimony, however, Rehnquist had written on the subject of congressional requests for testimony of members of the White House Staff in a February 1971 memorandum to John Ehrlichman, President Nixon's Domestic Policy Adviser. The earliest instance of a congressional request for live testimony of a White House official that is discussed in Rehnquist's memorandum to Ehrlichman is the 1944 Daniels episode. (The 1948 Steelman episode is also discussed in Rehnquist's memorandum to Ehrlichman.) Moreover, the Daniels matter is the earliest congressional request for the testimony of White House officials that is mentioned in all subsequent OLC memoranda on the subject of such requests.

II. Refusals to Testify

Truman Administration

John Steelman. On March 6 and March 8, 1948, the Subcommittee on Executive Expenditures of the House Committee on Education and Labor issued subpoenas to John R. Steelman, an Assistant to President Truman. The subpoenas demanded that Steelman testify before the subcommittee regarding a labor strike by workers in government cafeterias in Washington, D.C. Subcommittee Chairman, Clare Hoffman, a Republican, had charged that the Truman Administration had interfered in the strike on behalf of the union representing the striking workers, and that the officers had failed to comply with the Taft-Hartley Act, which required the filing of certifications stating that the union was not headed by Communists.

Steelman returned both subpoenas with a letter to the subcommittee stating that President Truman had directed him not to testify, in light of his duties as Assistant to the President. A Minority (Democratic) report on the subcommittee's Taft-Hartley investigation stated that the purpose of the subpoenas was to obtain from Steelman the contents of communications between him and President Truman regarding the cafeteria strike, and that congressional committees were not entitled to inquire into private conferences between the President and his principal aides.⁸

1940 request for the testimony of a White House official. Thus, Rehnquist's reference to requests for live testimony beginning in about 1940 may have related to requests for testimony of executive branch officials, other than White House officials.

⁸ The request for Steelman's testimony and his refusal to testify was apparently a minor news story: the New York Times account appeared in a small box on page 18.

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 or 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.

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

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,¹⁰ Kissinger did meet informally with members of the Committee.

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

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.

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.

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.

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.

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

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

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

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 testimony, 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

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.

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

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.

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

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.

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, 1973, 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

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

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.

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: Zbigniew 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)

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.

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 of 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

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.

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

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

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.

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

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.

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."

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.

Roosevelt Administration

Jonathan Daniels

*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 ("Rehnquist Memorandum").

*Memorandum from John Harmon for Margaret McKenna, Deputy Counsel to the President, Re: Dual-purpose Presidential Advisers, Aug. 11, 1977 ("Harmon Memorandum").

*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 ("Olson Memorandum").

*Memorandum Reviewing Inquiries by the Legislative Branch During the Period 1948-53 Concerning the Decision-Making Process and Documents of the Executive Branch ("Memorandum on 1948-53 Inquiries").¹

New York Times, Feb. 29, 1944, at 1, 34.

New York Times, March 5, 1944, at 1, 26.

New York Times, March 7, 1944, at 1, 36.

Truman Administration

John Steelman

*History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. OLC 751 (1982) ("OLC History").

*Memorandum from Joseph Dugan, Assistant Attorney General, Executive Adjudications Division, to the Attorney General, Feb. 19, 1952.

Memorandum on 1948-53 Inquiries.

*Statement of William H. Rehnquist on Executive Privilege, Before the Subcommittee on Separation of

¹ The date of this memorandum is uncertain.

Powers of the Senate Judiciary Committee, Aug. 4, 1971
("Rehnquist Testimony").

Rehnquist Memorandum.

Harmon Memorandum.

Olson Memorandum.

New York Times, March 10, 1948, at 18.

Donald Dawson

Rehnquist Memorandum.

Rehnquist Testimony.

Harmon Memorandum.

Olson Memorandum.

New York Times, May 11, 1951, at 1, 20.

New York Times, May 12, 1951, at 1, 12.

Eisenhower Administration

Sherman Adams/Dixon-Yates

*Congressional Inquiries Concerning the Decision-Making
Process and Documents of the Executive Branch: 1953-60.²

OLC History.

Rehnquist Memorandum.

Rehnquist Testimony.

Harmon Memorandum.

Olson Memorandum.

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).

Sherman Adams/Vicuna Coat

Rehnquist Memorandum.

Rehnquist Testimony.

Harmon Memorandum.

Olson Memorandum.

New York Times, June 17, 1958, at 1, 13.

New York Times, June 18, 1958, at 1, 17.

Johnson Administration

Fortas Confirmation Hearings

OLC History.

Rehnquist Memorandum.

Rehnquist Testimony.

Harmon Memorandum.

Olson Memorandum.

Nixon Administration

Henry Kissinger

Rehnquist Testimony.

*Memorandum from Ralph E. Erickson to Hugh Durham, Re: Congress' Power to Cut-off Appropriations for the Salaries of Government Personnel Refusing to Testify Before Congressional Committees, May 31, 1972.

*Memorandum from Mary Lawton, Deputy Assistant Attorney General for OLC, to Patrick McSweeney, Deputy Assistant Attorney General, Office of Legislative Affairs, Re: Briefing Material on Executive Privilege for Attorney General Designate Elliot Richardson, May 7, 1973 ("Lawton Briefing").

ITT Antitrust Suit/Kleindienst Confirmation Hearings

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.

Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. 93-981, 93d Cong., 2d Sess. (1974).

Lawton Briefing.

Washington Post, March 8, 1972, at A1.

Washington Post, April 13, 1972, at A1, 24.

Washington Post, April 15, 1972, at A1, 11.

Washington Post, April 19, 1972, at A1, 6.

Washington Post, April 21, 1972, at A1, 20.

Washington Post, April 25, 1972, at A3.

Watergate

Samuel Dash, Chief Counsel: Inside the Ervin Committee -- the Untold Story of Watergate (1976).

Stanley Kutler, The Wars of Watergate (1990)

Public Papers of Richard Nixon (1973).

Carl Bernstein and Bob Woodward, All the President's Men (1974)

Transcripts of Hearings Before Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess. (1973).

Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. 93-981, 93d Cong., 2d Sess. (1974).

Articles in the Washington Post and New York Times, March-June 1973.

Carter Administration

Billy Carter

Inquiry Into the Matter of Billy Carter and Libya, S. Rep. 96-1015, 96th Cong., 2d Sess (1980).

Inquiry Into the Matter of Billy Carter and Libya, Transcripts of Hearings Before the Subcommittee to Investigate the Activities of Individuals Representing The Interests of Foreign Governments, 96th Cong., 2d Sess. (1980).

Public Papers of Jimmy Carter (1980).

Selected Newspaper Articles in NEXIS "Major Paper" File, July-October 1980.

Reagan Administration

Martin Anderson/Budget for Domestic Policy Unit

Washington Post, July 10, 1981, at A7.

Fred Fielding/Donovan Inquiry

Olson Memorandum.

Memorandum from Theodore B. Olson to Edward C. Schmults, Deputy Attorney General, July 29, 1982.

Letter from Edward C. Schmults, Deputy Attorney General, to Senators Orrin G. Hatch and Edward M. Kennedy, April 19, 1983.

Meese Confirmation Hearings

New York Times, March 16, 1984, at B4.

Washington Post, March 17, 1984, at A1.

New York Times, April 5, 1984, at B16.

Fred Fielding/Deaver Conflict-of-Interest Hearings

New York Times, June 11, 1986, at A31.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF HOMELAND SECURITY
WASHINGTON, D. C. 20502

March 4, 2002

MEMORANDUM TO JUDGE ALBERTO GONZALES
TIM FLANIGAN

CC: ADM. STEVE ABBOT, MARK HOLMAN, DAVID
ADDINGTON, BRETT KAVANAUGH

FROM: EDWARD McNALLY *gmm*

SUBJECT: SENATE REQUEST FOR GOV. RIDGE'S TESTIMONY

Attached for your information and review is a copy of today's letter to Governor Ridge from Senators Robert Byrd and Ted Stevens of the Senate Appropriations Committee concerning the forthcoming "series of hearings" to "examine closely the Federal response here at home" to the events of September 11th. The letter states:

"As Chairman and Ranking Member of the Committee, we request that you testify before the Committee on April 9th, April 10th, or April 11th, 2002."

Last week I provided you with copies of the 1999 memorandum by the Attorney General which concluded, among other issues, that the Counsel to the President, e.g., was immune from a subpoena to testify. By way of additional background, also attached here are copies of a set of June 1992 letters from Nick Calio and Boyden Gray concerning requests for testimony by Nick Rostow (who then held John Bellinger's position) and Boyden Gray (the Administration declined), and also regarding former presidential Chief of Staff Howard Baker. Also included is a memorandum prepared by OLC in 1994 concerning "Congressional Requests for Testimony of White House Officials", which provides a detailed history of how various administrations have addressed these issues during the past 50 years. I am available to discuss these matters at any time that is convenient to you.

ROBERT C. BYRD, WEST VIRGINIA, CHAIRMAN

DANIEL K. INOUE, HAWAII
 ERNEST F. HOLLINGS, SOUTH CAROLINA
 PATRICK J. LEAHY, VERMONT
 TOM HARKIN, IOWA
 BARBARA A. MIKULSKI, MARYLAND
 HARRY REID, NEVADA
 HERB KOHL, WISCONSIN
 PATTY MURRAY, WASHINGTON
 D'ROH L. DORGAN, NORTH DAKOTA
 DIANNE FEINSTEIN, CALIFORNIA
 RICHARD J. DURBIN, ILLINOIS
 TIM JOHNSON, SOUTH DAKOTA
 MARY L. LANDRIEU, LOUISIANA
 JACK REED, RHODE ISLAND

TED STEVENS, ALASKA
 THAD COCHRAN, MISSISSIPPI
 ARLEN SPECTER, PENNSYLVANIA
 PETE V. DOMENICI, NEW MEXICO
 CHRISTOPHER S. BOND, MISSOURI
 MITCH MCCONNELL, KENTUCKY
 CONRAD BURNS, MONTANA
 RICHARD C. SHELBY, ALABAMA
 JUDD GREGG, NEW HAMPSHIRE
 ROBERT F. BENNETT, UTAH
 BEN NIGHTHORSE CAMPBELL, COLORADO
 LARRY CRAIG, IDAHO
 KAY BAILEY HUTCHISON, TEXAS
 MIKE DEWINE, OHIO

United States Senate

COMMITTEE ON APPROPRIATIONS
 WASHINGTON, DC 20510-6025

March 4, 2002

TERRANCE E. SAUVAIN, STAFF DIRECTOR
 STEVEN J. CONTESE, MINORITY STAFF DIRECTOR

The Honorable Tom Ridge
 Assistant to the President for Homeland Security
 Executive Office of the President
 The White House
 Washington, DC 20502

Dear Governor Ridge:

In Securing the Homeland Strengthening the Nation, President Bush concludes that, "the threat of terrorism is an inescapable reality of life in the 21st Century. It is a permanent condition to which America and the entire world must adjust." We share the view that it is essential that Federal, state, and local governments must have a significant and sustained commitment to defend our homeland.

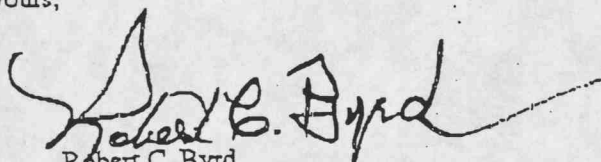
The Senate Appropriations Committee will be holding a series of hearings to examine closely the Federal response here at home to the events of September 11, 2001. The President's Budget for Fiscal Year 2003 includes requests for homeland defense funding in dozens of departments and agencies. In the Executive Order establishing the Office of Homeland Security, President Bush gives you the responsibility to certify that the funding levels contained in the Budget transmitted to the Congress are necessary and appropriate for the homeland security-related activities of the Executive Branch.

Therefore, you are the single Executive Branch official with the responsibility to integrate the many complex functions of the various Federal agencies in the formulation and execution of homeland defense programs. Your views and insights on the policies necessary to meet these objectives are critical to the Committee and the nation. As Chairman and Ranking Member of the Committee, we request that you testify before the Committee on April 9th, April 10th, or April 11th, 2002. The subcommittees of this Committee will address the detailed funding requests for the individual agencies and departments.

Thank you for your attention to this matter. We look forward to your early and positive response.

Sincerely yours,


 Ted Stevens
 Ranking Member


 Robert C. Byrd
 Chairman

RCB/TS:cek

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

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

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'Malley & Myers
555 13th Street, N.W.
Washington, D.C. 20004-1109

Memorandum



Subject
Congressional Requests for Testimony of White
House Officials

Date
April 29, 1994

To
File

From *MS*
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

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. Giuliani, 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

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.

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.

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

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

Several months before his August 1971 testimony, however, Rehnquist had written on the subject of congressional requests for testimony of members of the White House Staff in a February 1971 memorandum to John Ehrlichman, President Nixon's Domestic Policy Adviser. The earliest instance of a congressional request for live testimony of a White House official that is discussed in Rehnquist's memorandum to Ehrlichman is the 1944 Daniels episode. (The 1948 Steelman episode is also discussed in Rehnquist's memorandum to Ehrlichman.) Moreover, the Daniels matter is the earliest congressional request for the testimony of White House officials that is mentioned in all subsequent OLC memoranda on the subject of such requests.

II. Refusals to Testify

Truman Administration

John Steelman. On March 6 and March 8, 1948, the Subcommittee on Executive Expenditures of the House Committee on Education and Labor issued subpoenas to John R. Steelman, an Assistant to President Truman. The subpoenas demanded that Steelman testify before the subcommittee regarding a labor strike by workers in government cafeterias in Washington, D.C. Subcommittee Chairman, Clare Hoffman, a Republican, had charged that the Truman Administration had interfered in the strike on behalf of the union representing the striking workers, and that the officers had failed to comply with the Taft-Hartley Act, which required the filing of certifications stating that the union was not headed by Communists.

Steelman returned both subpoenas with a letter to the subcommittee stating that President Truman had directed him not to testify, in light of his duties as Assistant to the President. A Minority (Democratic) report on the subcommittee's Taft-Hartley investigation stated that the purpose of the subpoenas was to obtain from Steelman the contents of communications between him and President Truman regarding the cafeteria strike, and that congressional committees were not entitled to inquire into private conferences between the President and his principal aides.⁸

1940 request for the testimony of a White House official. Thus, Rehnquist's reference to requests for live testimony beginning in about 1940 may have related to requests for testimony of executive branch officials, other than White House officials.

⁸ The request for Steelman's testimony and his refusal to testify was apparently a minor news story: the New York Times account appeared in a small box on page 18.

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 or 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.

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

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

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.

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.

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.

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.

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

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

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

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 testimony, 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

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.

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

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.

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

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.

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, 1973, 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

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

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.

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: Zbigniew 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)

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.

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 of 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

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.

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

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

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.

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

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.

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."

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.

Roosevelt Administration

Jonathan Daniels

*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 ("Rehnquist Memorandum").

*Memorandum from John Harmon for Margaret McKenna, Deputy Counsel to the President, Re: Dual-purpose Presidential Advisers, Aug. 11, 1977 ("Harmon Memorandum").

*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 ("Olson Memorandum").

*Memorandum Reviewing Inquiries by the Legislative Branch During the Period 1948-53 Concerning the Decision-Making Process and Documents of the Executive Branch ("Memorandum on 1948-53 Inquiries").¹

New York Times, Feb. 29, 1944, at 1, 34.

New York Times, March 5, 1944, at 1, 26.

New York Times, March 7, 1944, at 1, 36.

Truman Administration

John Steelman

*History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. OLC 751 (1982) ("OLC History").

*Memorandum from Joseph Dugan, Assistant Attorney General, Executive Adjudications Division, to the Attorney General, Feb. 19, 1952.

Memorandum on 1948-53 Inquiries.

*Statement of William H. Rehnquist on Executive Privilege, Before the Subcommittee on Separation of

¹ The date of this memorandum is uncertain.

Powers of the Senate Judiciary Committee, Aug. 4, 1971
("Rehnquist Testimony").

Rehnquist Memorandum.

Harmon Memorandum.

Olson Memorandum.

New York Times, March 10, 1948, at 18.

Donald Dawson

Rehnquist Memorandum.

Rehnquist Testimony.

Harmon Memorandum.

Olson Memorandum.

New York Times, May 11, 1951, at 1, 20.

New York Times, May 12, 1951, at 1, 12.

Eisenhower Administration

Sherman Adams/Dixon-Yates

*Congressional Inquiries Concerning the Decision-Making
Process and Documents of the Executive Branch: 1953-60.²

OLC History.

Rehnquist Memorandum.

Rehnquist Testimony.

Harmon Memorandum.

Olson Memorandum.

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).

Sherman Adams/Vicuna Coat

Rehnquist Memorandum.

Rehnquist Testimony.

Harmon Memorandum.

Olson Memorandum.

New York Times, June 17, 1958, at 1, 13.

New York Times, June 18, 1958, at 1, 17.

Johnson Administration

Fortas Confirmation Hearings

OLC History.

Rehnquist Memorandum.

Rehnquist Testimony.

Harmon Memorandum.

Olson Memorandum.

Nixon Administration

Henry Kissinger

Rehnquist Testimony.

*Memorandum from Ralph E. Erickson to Hugh Durham, Re: Congress' Power to Cut-off Appropriations for the Salaries of Government Personnel Refusing to Testify Before Congressional Committees, May 31, 1972.

*Memorandum from Mary Lawton, Deputy Assistant Attorney General for OLC, to Patrick McSweeney, Deputy Assistant Attorney General, Office of Legislative Affairs, Re: Briefing Material on Executive Privilege for Attorney General Designate Elliot Richardson, May 7, 1973 ("Lawton Briefing").

ITT Antitrust Suit/Kleindienst Confirmation Hearings

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.

Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. 93-981, 93d Cong., 2d Sess. (1974).

Lawton Briefing.

Washington Post, March 8, 1972, at A1.

Washington Post, April 13, 1972, at A1, 24.

Washington Post, April 15, 1972, at A1, 11.

Washington Post, April 19, 1972, at A1, 6.

Washington Post, April 21, 1972, at A1, 20.

Washington Post, April 25, 1972, at A3.

Watergate

Samuel Dash, Chief Counsel: Inside the Ervin Committee -- the Untold Story of Watergate (1976).

Stanley Kutler, The Wars of Watergate (1990)

Public Papers of Richard Nixon (1973).

Carl Bernstein and Bob Woodward, All the President's Men (1974)

Transcripts of Hearings Before Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess. (1973).

Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. 93-981, 93d Cong., 2d Sess. (1974).

Articles in the Washington Post and New York Times, March-June 1973.

Carter Administration

Billy Carter

Inquiry Into the Matter of Billy Carter and Libya, S. Rep. 96-1015, 96th Cong., 2d Sess (1980).

Inquiry Into the Matter of Billy Carter and Libya, Transcripts of Hearings Before the Subcommittee to Investigate the Activities of Individuals Representing The Interests of Foreign Governments, 96th Cong., 2d Sess. (1980).

Public Papers of Jimmy Carter (1980).

Selected Newspaper Articles in NEXIS "Major Paper" File, July-October 1980.

Reagan Administration

Martin Anderson/Budget for Domestic Policy Unit

Washington Post, July 10, 1981, at A7.

Fred Fielding/Donovan Inquiry

Olson Memorandum.

Memorandum from Theodore B. Olson to Edward C. Schmults, Deputy Attorney General, July 29, 1982.

Letter from Edward C. Schmults, Deputy Attorney General, to Senators Orrin G. Hatch and Edward M. Kennedy, April 19, 1983.

Meese Confirmation Hearings

New York Times, March 16, 1984, at B4.

Washington Post, March 17, 1984, at A1.

New York Times, April 5, 1984, at B16.

Fred Fielding/Deaver Conflict-of-Interest Hearings

New York Times, June 11, 1986, at A31.

IMMUNITY OF THE COUNCIL TO THE PRESIDENT FROM COMPELLED CONGRESSIONAL TESTIMONY

Executive privilege is assertable in response to a congressional subpoena seeking the testimony of the Counsel to the President because the Counsel serves as one of the President's immediate advisers and is therefore immune from compelled congressional testimony.

September 3, 1996

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

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 advisors 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⁾

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.

CHRISTOPHER H. SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

1. Memorandum for all Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, Re: Executive Privilege at 5 (May 23, 1977).

2. Memorandum for Edward C. Schmults, Deputy Attorney General, 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 for the Honorable John W. Dean, III, Counsel to the President, 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 for Senator Orrin G. Hatch, Chairman, United States Senate, Committee on Labor and Human Resources and Senator Edward M. Kennedy, Ranking Minority Member, United States Senate, Committee on Labor and Human Resources, 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 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 for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Re: Dual-purpose Presidential Advisers, Appendix at 7 (Aug. 11, 1977).

4. Memorandum for the Honorable John D. Ehrlichman, Assistant to the President for Domestic Affairs, 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).