The original documents are located in Box 13, folder "Executive Privilege (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

NINETY-THIRD CONGRESS

Congress of the United States

House of Representatives

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-371-B
WASHINGTON, D.C. 20515

August 13, 1974

The Honorable Gerald R. Ford
President of the United States
The White House
1600 Pennsylvania Avenue, N. W.
Washington, D. C. 20500

Dear Mr. President:

Enclosed are copies of correspondence between the former chairman of this subcommittee and each of the three previous Presidents, relating to their Administration's policies to limit the use of so-called "Executive Privilege" only upon personal invocation by the President himself.

As you know, this subcommittee has conducted both investigative and legislative hearings on this subject during the past two Congresses and on March 14, 1974, favorably reported H. R. 12462, a bipartisan bill sponsored by Representative Erlenborn, myself, and other Members of both parties. A similar bill was passed by the Senate last December. A copy of our hearings and report on this measure is also enclosed.

In view of the then pending litigation over the tapes involving President Nixon and the Special Prosecutor, in which this issue was indirectly involved, we decided not to press for a rule on H. R. 12462 until after the Supreme Court had ruled in that case. Our staff analysis of the July 24, 1974, decision of the Court indicates that the ground rules for the use of "Executive Privilege" established in H. R. 12462 are not inconsistent with that decision since it did not deal directly with Congress' right to information from the Executive. We have since requested a rule on the measure and are awaiting the scheduling of a hearing by the Rules Committee.

As you were a long-time Member of the House, it is not necessary to spell out to you details about the steady erosion in the flow of information from the Executive to the Congress which has taken place over the past generation. You are well aware of such problems and of the disastrous effect which the wholesale withholding of information from the Congress under "Executive Privilege" has had on the credibility of our government and its leaders. Last Friday's New York Times quoted remarks you made on this subject more than a decade ago: "Congress cannot help but conclude that executive privilege is most often used in opposition to the public interest."

Before you make any decision with respect to an exchange of correspondence on the use of "Executive Privilege" in your Administration, we would appreciate the opportunity to meet with you to discuss this issue and your position on H. R. 12462.

With best wishes and highest regards,

Sincerely,

William S. Moorhead
Chairman

John N. Erlenborn
Ranking Minority Member

Enclosures

JOHN E. MOSS, CALIF., CHAIRMAN
DANTE B. FASCELL, FLA.

CLARE E. HOFFMAN, MICH.

CAPITOL 4-3121
EXTENSION 3741

EIGHTY-SEVENTH CONGRESS

Congress of the United States

House of Representatives

SPECIAL GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
HOUSE OFFICE BUILDING
ROOM 218, GEORGE WASHINGTON INN
WASHINGTON, D.C.

February 15, 1962

The Honorable
John F. Kennedy
The President of the United States
The White House
Washington, D. C.

Dear Mr. President:

In your letter of February 8, 1962 to Secretary McNamara you directed him to refuse certain information to a Senate Subcommittee. The concluding paragraph of your letter stated:

> "The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its merits."

A similar letter from President Eisenhower on May 17, 1954 also refused information to a Senate Subcommittee, setting forth the same arguments covered in your letter. President Eisenhower did not, however, state that future questions of availability of information to the Congress would have to be answered as they came up.

I know you are aware of the result of President Eisenhower's letter. Time after time Executive Branch employees far down the administrative line from the President fell back on his letter of May 17, 1954 as authority to withhold information from the Congress and the public.

Some of the cases are well known -- the Dixon-Yates matter and the investigation of East-West trade controls, for instance -- but many of the refusals based on President Eisenhower's letter of May 17, 1954 received no public notice. A report of the House Committee on Government Operations covering the five years from June, 1955 through June, 1960 lists 44 cases of Executive Branch officials refusing information on the basis of the principles set forth in the May 17, 1954 letter.

I am confident that you share my belief that your letter of February 8, 1962 to Secretary McNamara should not be seized upon by Executive Branch employees -- many of them holding the same policy-making positions of responsibility they did under the Eisenhower Administration -- as a new claim of authority to withhold information from the Congress and

the public. A Subcommittee staff study indicates that during the year between the time you took office and February 8, 1962, the claim of an "executive privilege" to withhold government information was not used successfully once, compared to the dozens of times in previous years administrative employees held up "executive privilege" as a shield against public and Congressional access to information.

Although your letter of February 8, 1962 stated clearly that the principle involved could not be applied automatically to restrict information, this warning received little public notice. Clarification of this point would, I believe, serve to prevent the rash of restrictions on government information which followed the May 17, 1954 letter from President Eisenhower.

Sincerely,

/s/ John E. Moss
Chairman

THE WHITE HOUSE
Washington

March 7, 1962

Dear Mr. Chairman:

This is in reply to your letter of last month inquiring generally about the practice this Administration will follow in invoking the doctrine of executive privilege in withholding certain information from the Congress.

As your letter indicated, my letter of February 8 to Secretary McNamara made it perfectly clear that the directive to refuse to make certain specific information available to a special subcommittee of the Senate Armed Services Committee was limited to that specific request and that "each case must be judged on its merits".

As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval. Your own interest in assuring the widest public accessibility to governmental information is, of course, well known, and I can assure you this Administration will continue to cooperate with your subcommittee and the entire Congress in achieving this objective.

Sincerely,

/s/ John F. Kennedy

Honorable John E. Moss
Chairman
Special Government Information
Subcommittee of the Committee
on Government Operations
House of Representatives
Washington, D. C.

March 31, 1965

The Honorable
Lyndon B. Johnson
President of the United States
The White House
Washington, D. C.

Dear Mr. President:

The use of the claim of "executive privilege" to withhold government information from the Congress and the public is an issue of importance to those who recognize the need for a fully informed electorate and for a Congress operating as a co-equal branch of the Federal Government.

In a letter dated May 17, 1954, President Eisenhower used the "executive privilege" claim to refuse certain information to a Senate Subcommittee. In a letter dated February 8, 1962, President Kennedy also refused information to a Senate Subcommittee. There the similarity ends, for the solutions of "executive privilege" problems varied greatly in the two Administrations.

Time after time during his Administration, the May 17, 1954 letter from President Eisenhower was used as a claim of authority to withhold information about government activities. Some of the cases during the Eisenhower Administration involved important matters of government but in the great majority of cases Executive Branch employees far down the administrative line from the President claimed the May 17, 1954 letter as authority for withholding information about routine developments. A report by the House Committee on Government Operations lists 44 cases of Executive Branch officials refusing information on the basis of the principles set forth in President Eisenhower's letter.

President Kennedy carefully qualified use of the claim of "executive privilege". In a letter of February 8, 1962 refusing information to a Senate Subcommittee, he stated that the " principle which is at stake here cannot be automatically applied to every request for information." Later, President Kennedy clarified his position on the claim of "executive privilege", stating that --

> "...this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval."

As a result of President Kennedy's clear statement, there was no longer a rash of "executive privilege" claims to withhold information from the Congress and the public. I am confident you share my views on the importance to our form of government of a free flow of information, and I hope you will reaffirm the principle that "executive privilege" can be invoked by you alone and will not be used without your specific approval.

Sincerely,

JOHN E. MOSS
Chairman

JEM:ab

NINETY-FIRST CONGRESS

Congress of the United States

House of Representatives

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B371-B
WASHINGTON, D.C. 20515

January 28, 1969

The Honorable Richard M. Nixon
The President of the United States
The White House
Washington, D. C.

Dear Mr. President:

The claim of "executive privilege" as authority to withhold government information has long been of concern to those of us who support the principle that the survival of a representative government depends on an electorate and a Congress that are well informed.

As you know, some administrations in the past made it a practice to pass along to Executive branch subordinates a discretionary authority to claim "executive privilege" as a basis to refuse information to the Congress. The practice of delegating this grave Presidential responsibility was ended by President John F. Kennedy when he restored a policy similar to that which existed under previous strong administrations, including those of Presidents George Washington, Thomas Jefferson and Theodore Roosevelt. In a letter to the Foreign Operations and Government Information Subcommittee, dated March 7, 1962, he enunciated the policy as follows:

> " . . .this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval."

President Lyndon B. Johnson informed the Subcommittee by letter, dated April 2, 1965, he would continue the

policy enunciated by President Kennedy. He stated:

> "Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of 'executive privilege' will continue to be made only by the President."

In view of the urgent need to safeguard and maintain a free flow of information to the Congress, I hope you will favorably consider a reaffirmation of the policy which provides, in essence, that the claim of "executive privilege" will be invoked only by the President.

Sincerely,

/s/ John E. Moss

JOHN E. MOSS
Chairman

JEM:jmj

THE WHITE HOUSE

Washington

April 7, 1969

Dear Mr. Chairman:

Knowing of your interest, I am sending you a copy of a memorandum I have issued to the heads of executive departments and agencies spelling out the procedural steps to govern the invocation of "executive privilege" under this Administration.

As you well know, the claim of executive privilege has been the subject of much debate since George Washington first declared that a Chief Executive must "exercise a discretion."

I believe, and I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval.

I want to take this opportunity to assure you and your committee that this Administration is dedicated to insuring a free flow of information to the Congress and the news media -- and, thus, to the citizens. You are, I am sure, familiar with the statement I made on this subject during the campaign. Now that I have the responsibility to implement this pledge, I wish to reaffirm my intent to do so. I want open government to be a reality in every way possible.

This Administration has already given a positive emphasis to freedom of information. I am committed to ensuring that both the letter and spirit of the

Public Records Law will be implemented throughout the Executive Branch of the government.

With my best wishes,

Sincerely,

Richard Nixon

Honorable John E. Moss
Chairman
Foreign Operations and Government
Information Subcommittee
House of Representatives
Washington, D. C.

MEMORANDUM FOR THE HEADS OF
EXECUTIVE DEPARTMENTS AND AGENCIES

(Establishing a Procedure to Govern Compliance with Congressional Demands for Information)

The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest. This Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval. The following procedural steps will govern the invocation of Executive privilege:

1. If the head of an Executive department or agency (hereafter referred to as "department head") believes that compliance with a request for information from a Congressional agency addressed to his department or agency raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney general through the Office of Legal Counsel of the Department of Justice.

2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that Executive privilege shall not be invoked in the circumstances the information shall be released to the inquiring Congressional agency.

3. If the department head and the Attorney General agree that the circumstances justify the invocation of Executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

4. In the event of a Presidential decision to invoke Executive privilege, the department head should advise the Congressional agency that the claim of Executive privilege is being made with the specific approval of the President.

5. Pending a final determination of the matter, the department head should request the Congressional agency to hold its demand for the information in abeyance until such determination can be made. Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request does not constitute a claim of privilege.

RICHARD NIXON

8/27/74

To: Mr. Buchen
From: Eva

This came to us for action; has been acknowledged by Friedersdorf.

Can someone be drafting a reply?

Or shall it be held in abeyance?

If so, how long before it should be again brought to your attention?

(8/15/74 letter to the President from Cong. Moss re executive priv.)

August 16, 1974

Dear Mr. Moss:

On behalf of the President, I wish to thank you for providing him, under date of August 15, a detailed report and background information of the matter of insuring a free flow of information from the Executive Branch to the Legislative Branch and to the public.

You may recall that, as Vice President, he addressed himself to this vital matter. It will be pursued fully by his Administration.

I do want to assure you that I will make certain it is received by the President at the earliest opportunity. It will also be shared with his advisers who have been developing recommendations and proposals in this area over the past several months.

With kind regards,

Sincerely,

Max L. Friedersdorf
Deputy Assistant
to the President

The Honorable John E. Moss
Ranking Majority Member
Subcommittee on Foreign Operations
and Government Information
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

cc w/incoming to Philip W. Buchen for ACTION
bcc w/incoming to letter to Bill Timmons - FYI

MLF:VO:jk

8-16

JOHN E. MOSS
3RD DISTRICT
SACRAMENTO, CALIFORNIA

ADMINISTRATIVE ASSISTANT
JACK MATTESON

WASHINGTON OFFICE:
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CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

GOVERNMENT OPERATIONS COMMITTEE:
RANKING MAJORITY MEMBER SUBCOMMITTEES ON
FOREIGN OPERATIONS & GOVERNMENT INFORMATION
CONSERVATION & NATURAL RESOURCES

INTERSTATE AND FOREIGN COMMERCE COMMITTEE:
CHAIRMAN,
COMMERCE & FINANCE SUBCOMMITTEE

DEMOCRATIC STEERING AND POLICY COMMITTEE

August 15, 1974

The President
The White House
Washington, D.C.

Dear Mr. President:

I know that you are aware of the efforts made over the years by the House Committee on Government Operations to insure a free flow of information from the Executive Branch of the Federal Government to the Legislative Branch and to the public. I know that during your service in Congress you supported those efforts. I am confident that your support will continue as you lead the government during these next few years.

For those reasons, I want to bring to your attention a most important problem in government information -- a problem which I brought to the attention of Presidents Kennedy, Johnson and Nixon while I served as chairman of the subcommittee investigating government information matters. I bring it to your attention while serving as ranking majority member of that same subcommittee.

That problem is the abuse of the claim of "executive privilege" by officials far down the administrative line from the President. After World War II as the Executive Branch grew in size and power the claims of "executive privilege" grew in number. Unfortunately, the great, great majority of those claims were advanced

by middle level bureaucrats and high level appointees, not by the President nor by his personal staff.

President Kennedy promised to limit the exercise of "executive privilege" to a personal claim by the President, not to be invoked without his approval. The invocation was to be limited to each specific request for information from the Congress. President Johnson agreed to a similar limitation on the abuse of the claim of "executive privilege". President Nixon agreed to the same limitation and he took one step further. He issued a memorandum to the heads of executive departments and agencies setting up a procedure to govern the invocation of "executive privilege" which required coordination through the Attorney General and the Counsel to the President for obtaining Presidential approval for each specific invocation of "executive privilege".

Enclosed are copies of the statements limiting the claim of "executive privilege" issued by Presidents Kennedy, Johnson and Nixon, including a copy of the procedural memorandum from President Nixon. Unfortunately, neither the statements nor the memorandum were accepted at face value by the bureaucracy.

I am also enclosing a statement from the Congressional Record by Congressman William S. Moorhead, chairman of the Foreign Operations and Government Information Subcommittee which reports on a study prepared by the Library of Congress listing the extensive claims of "executive privilege" to withhold information from Congress advanced without presidential approval in spite of the directives against such a procedure issued by three Presidents.

The study covers the period from 1962, when President Kennedy first limited the use of "executive privilege" to a personal, Presidential claim, through 1972. It shows that in spite of three Presidents ordering limits to exercise of the claim, in at least 20 instances Executive Branch officials used the claim to refuse information to the Congress without Presidential approval.

I do not believe this means the policies set by your three immediate predecessors were ineffective. If Presidents Kennedy, Johnson and Nixon had not limited the use of the claim of "executive privilege", there would have been dozens of additional attempts by the bureaucracy to raise the claim as a shield against Congressional inquiry.

In view of the urgent need to safeguard and maintain a free flow of information to the Congress, I hope you will reaffirm the policy that the claim of an "executive privilege" against the Congress can be invoked only by the President or with specific Presidential approval in each instance.

Sincerely,

John E. Moss
Ranking Majority Member
Subcommittee on Foreign Operations
and Government Information

JEM:k

THE WHITE HOUSE
Washington

March 7, 1962

Dear Mr. Chairman:

This is in reply to your letter of last month inquiring generally about the practice this Administration will follow in invoking the doctrine of executive privilege in withholding certain information from the Congress.

As your letter indicated, my letter of February 8 to Secretary McNamara made it perfectly clear that the directive to refuse to make certain specific information available to a special subcommittee of the Senate Armed Services Committee was limited to that specific request and that "each case must be judged on its merits".

As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval. Your own interest in assuring the widest public accessibility to governmental information is, of course, well known, and I can assure you this Administration will continue to cooperate with your subcommittee and the entire Congress in achieving this objective.

Sincerely,

/s/ John F. Kennedy

Honorable John E. Moss
Chairman
Special Government Information
Subcommittee of the Committee
on Government Operations
House of Representatives
Washington, D. C.

THE WHITE HOUSE

WASHINGTON

April 2, 1965

Dear Mr. Chairman:

I have your recent letter discussing the use of the claim of "executive privilege" in connection with Congressional requests for documents and other information.

Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of "executive privilege" will continue to be made only by the President.

This administration has attempted to cooperate completely with the Congress in making available to it all information possible, and that will continue to be our policy.

I appreciate the time and energy that you and your Subcommittee have devoted to this subject and welcome the opportunity to state formally my policy on this important subject.

Sincerely,

s/ Lyndon B Johnson

The Honorable John E Moss, Chairman
Foreign Operations and Government
Information Subcommittee
of the
Committee on Government Operations
House Office Building
Washington, D.C.

THE WHITE HOUSE

Washington

April 7, 1969

Dear Mr. Chairman:

Knowing of your interest, I am sending you a copy of a memorandum I have issued to the heads of executive departments and agencies spelling out the procedural steps to govern the invocation of "executive privilege" under this Administration.

As you well know, the claim of executive privilege has been the subject of much debate since George Washington first declared that a Chief Executive must "exercise a discretion."

I believe, and I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval.

I want to take this opportunity to assure you and your committee that this Administration is dedicated to insuring a free flow of information to the Congress and the news media -- and, thus, to the citizens. You are, I am sure, familiar with the statement I made on this subject during the campaign. Now that I have the responsibility to implement this pledge, I wish to reaffirm my intent to do so. I want open government to be a reality in every way possible.

This Administration has already given a positive emphasis to freedom of information. I am committed to ensuring that both the letter and spirit of the

Public Records Law will be implemented throughout the Executive Branch of the government.

With my best wishes.

Sincerely,

/s/ Richard Nixon

Honorable John E. Moss
Chairman
Foreign Operations and Government
Information Subcommittee
House of Representatives
Washington, D. C.

received from a State, Federal, or local civil service or similar pension system.

It seems to me that we should reward the years of public service devoted by our governmental employees, instead of taxing their small pensions. Certainly most have faced hardship as a result of the rapidly escalating cost increases over the past several years. Many can no longer afford adequate diets, housing, or other necessities. Often their income falls below the official poverty level. Because of advanced age they cannot work to supplement these pensions. By ending this unfair taxation, we can enable former governmental employees to live more rewarding lives during their retirement years.

Presently, all they receive is a partial tax credit for their public service retirement income. Equity demands that they receive total exemption from taxation instead. I hope that this legislation receives the prompt attention of my colleagues.

A section-by-section analysis follows:

SECTION-BY-SECTION ANALYSIS

Section 1. Part (a) adds a new Section 124 to the Internal Revenue Code setting forth a general rule that gross income does not include amounts received by an individual as a pension, annuity, or similar retirement benefit under a public retirement system. A public retirement system is presently defined under section 37(f) as a pension, annuity, retirement, or similar fund or system established by the U.S., a State, a Territory, a possession of the United States, any political subdivision of the foregoing, or the District of Columbia.

Part (b) is a conforming amendment to the code adding the new Section 124 to the table of sections.

Section 2. Parts (a) and (b) terminate the existing partial credit for public service retirement income under Section 37 of the code effective January 1, 1973, so that Section 37 will be compatible with the new Section 124 which completely excludes all such income from taxation effective on that date.

Parts (c) and (d) are conforming changes to cross-reference the new Section 124.

DETAILED STUDY SHOWS NIXON SETS NEW ONE-TERM "EXECUTIVE PRIVILEGE" RECORD

(Mr. MOORHEAD of Pennsylvania asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I am sorry to report that the Nixon administration has set a new one-term record in Government-by-secrecy, using the claim of an executive privilege to hide the facts of Government from the Congress in 19 instances during these first 4 years.

This record is detailed in a study by the Government and General Research Division of the Library of Congress. For the first time since the use of executive privilege supposedly was limited to a claim of Presidential power in 1962, we have a complete record of how executive privilege actually has been used against the Congress. Not only has President Richard M. Nixon wielded this claim of power as a personal weapon at a rate far in excess of his predecessors, but he has permitted administrative officials far down the line from the President to withhold information from the Congress. The Library of Congress study shows:

President Nixon personally used the claim of executive privilege to hide information from the Congress in four instances during the first 4 years of his administration, not three instances as the President and his congressional apologists have claimed.

Nixon administration officials in agencies directly responsible to the Congress have refused testimony or documents to congressional committees in 15 additional instances since President Nixon promised to limit the claim of power to withhold information from Congress to a personal, Presidential use.

These Nixon administration officials who have wrapped themselves in the cloak of executive privilege 15 times were either appointed with the advice and consent of the Senate to run agencies created by the Congress or they held jobs in agencies created by Congress, serving under officials appointed with the Senate's consent.

Not even included in this sorry record of secrecy are at least eight instances in which White House aides appointed by the President have refused testimony or documents to the Congress. Certainly a problem arises when the President's personal White House aides withhold information from the Congress, but an even more pressing problem is posed by officials throughout the executive branch claiming that they have a privilege to refuse information to the Congress.

The 15 instances of executive branch secrecy reported in the Library of Congress study are not minor cases where an individual Member of Congress has been refused information. They are major cases where a committee of Congress has officially requested testimony or documents and has been turned down.

And they are in addition to the four instances—not three as the President and his supporters claim—in which President Richard M. Nixon has personally hidden information from the Congress. To come up with its phony figure of "three," the White House cleverly lumped two cases together by refusing both of the requests on a single day.

On March 15, 1972, a memorandum from President Nixon directed the State Department to withhold studies of the fiscal year 1973 AID program which had been requested by the House Foreign Operations and Government Information Subcommittee. The same memorandum directed the U.S. Information Agency to withhold all USIA country program memoranda which had been requested by the Senate Foreign Relations Committee. Thus, two clear and separate congressional requests for information were covered by one Presidential memorandum, just as two other clear and separate requests for information had earlier been refused by President Nixon—a total of four Presidential assertions of Executive privilege, not three.

The two earlier instances were on November 21, 1970, when President Nixon directed the Department of Justice to withhold evaluations of potential appointees which had been requested by the House Intergovernmental Subcommittee and on August 30, 1971, when President Nixon directed the Department of Defense to withhold foreign military assistance plans which had been requested by the Senate Foreign Relations Committee.

But these four Presidential assertions of Executive privilege are merely the tip of the secrecy iceberg in the Nixon administration, when you look at the 15 other refusals of information to congressional committees outlined in the Library of Congress report.

I do not mean to imply that the Nixon administration is the only administration which has wrapped itself in the broad cloak of executive privilege, claimed as a power to withhold information from the Congress. The Eisenhower administration holds the unenviable record—so far with 34 instances of the use of "executive privilege" in two terms. And even the Kennedy and Johnson administrations, in which both Presidents promised to limit the use of the claim to a personal, Presidential power, did not actually limit the claim. The Library of Congress study above shows that President John F. Kennedy personally claimed Executive privilege against the Congress in one instance, but information was refused to the Congress by executive branch officials in the Kennedy administration three additional times after he promised to limit executive privilege to a Presidential power. Although President Lyndon B. Johnson did not personally use the claim of executive privilege against the Congress, in two instances executive branch officials in the Johnson administration refused information to the Congress after he said executive privilege would be used only as a Presidential power.

Presidents in earlier administrations have, of course, claimed a power rooted in the Constitution to withhold information from the Congress, but this has most often been a personal exercise of a Presidential power, not a broad cloak of executive privilege wrapping all of the executive branch in secrecy. And often the historic claims of executive privilege cited by modern administrations as precedents for secrecy have not, in fact, been exercises of the claim.

As the Library of Congress study points out, the first instance of executive privilege in President Washington's first administration did not result in withholding information from Congress. Although President Washington claimed a power to withhold information about General St. Clair's military disaster from the Congress he did not, in fact, use that power but turned over all of the information to the Congress.

There will be additional studies of the conflict between the executive branch and the legislative branch over access to Government information, and they will cover additional areas—for instance, the refusal of White House aides to testify before Congress, or the withholding of documents from the General Accounting Office serving as the auditing arm of Congress—but the current study by the Library of Congress highlights the seri-

ousness of the problem, pointing out the extent to which Nixon administration officials throughout the executive branch claim an immunity from congressional scrutiny. Following is the complete study:

THE PRESENT LIMITS OF "EXECUTIVE PRIVILEGE"

(A study prepared under the guidance of the House Foreign Operations and Government Information Subcommittee)

May 17, 1954, was an important day on Capitol Hill. On that day, two separate political battles shifted emphasis, and the new emphasis of each controversy still is causing political problems.

In the Supreme Court Building Chief Justice Earl Warren issued the court's unanimous decision in *Brown* v. *Board of Education* holding that separate education is not equal education. In the Senate Office Building John Adams, the Army's general counsel, delivered a copy of a letter from President Dwight D. Eisenhower to Secretary of Defense Charles Wilson directing the Secretary to tell all his subordinates not to testify about advisory communications during the hearings of a special subcommittee of the Senate Government Operations Committee.[1]

Both important developments of May 17, 1954, had roots deep in the history of the United States. In the future both would effect the political development of the nation. The results of the Supreme Court's school desegregation decision are widely discussed in popular literature and scholarly studies and have become a part of current history. But there is comparatively little current knowledge about the developments that flowed from President Eisenhower's May 17, 1954, letter. Possibly, that letter and the political conflict of which it is part are more important to the study of the American form of democratic government with three branches than is the widely studied school desegregation issue.

President Eisenhower's May 17, 1954, letter brought a new dimension to the interactions between the Legislative and Executive Branches of the Federal government which are part of our separate-but-coordinate system. His letter, and its accompanying memorandum purporting to list historic examples of Presidential assertion of the right of "executive privilege," became the basis for an extension of the claim of "executive privilege" far down the administrative line from the President.[2] Eight years later there was an attempt to bring "executive privilege" back into proper perspective, but the effort has not been a complete success even though it involved three Presidents.

There are many privileges exercised by the executive head of the United States Government, ranging from the free use of the mountain retreat at Camp David (or Shang-ri-la as President Franklin D. Roosevelt christened it) to a funeral with full military honors. But *the* "executive privilege" has come to mean a claim of authority to control government information.[3] This "executive privilege" to control the dissemination of information has been asserted against the public [4] and against the courts,[5] but the claim of an "executive privilege" which was the basis of the President's May 17, 1954,. letter is the claim of authority to withhold information from the Legislative Branch of the Federal government. And the authority claimed in President Eisenhower's May 17, 1954, letter was extended throughout the Executive Branch to include agencies administered by persons appointed by the President with the advice and consent of the U.S. Senate. This claim of control over government information is in addition to the power exercised by Presidents to protect their immediate White House staff—their personal advisers, in effect, over whose appointment the Congress has no confirming power.

Footnotes at end of article.

The Separation of Powers and the Control of Information.

The conflict between the Legislative and Executive Branches of the Federal government over access to information begins with the first clause of the first section of the first article of the Constitution of the United States. Article I, Section I states that "all legislative Powers herein granted shall be vested in a Congress of the United States. . . ." The power to legislate carries with it the power to investigate [6] and the clash between the executive and the legislature over access to information almost always has occurred in connection with a Congressional investigation.

In fact, the earliest attempt by the Congress to investigate brought on a conflict over the authority of the executive to withhold information. The House of Representatives in 1792 appointed a committee to investigate General St. Clair's military disaster in the Northwest and empowered the committee to "call for such persons, papers, and records, as may be necessary to assist their inquiries." [7] This demand for information by the first Congress and the reaction to it by the first President was brought up 162 years later in connection with President Eisenhower's letter of May 17, 1954. A memorandum from the Attorney General which accompanied the letter listed the call for information in the St. Clair caper as the first example of Presidential assertion of "executive privilege." [8] The memorandum states that President Washington called a Cabinet meeting and the group decided that "neither the committee nor House had a right to call upon the head of a Department who and whose papers were under the President alone." [9]

Not only did this first Congressional investigation result in a confrontation over legislative access to Executive Branch information but it also provided a vehicle for the first major factual error in the memorandum accompanying the May 17, 1954, letter, discussing what has come to be called "executive privilege." Far from being an example of Presidential assertion of "executive privilege", the St. Clair episode was an example of Congress effectively asserting its right of access to information. A Cabinet meeting was held and the question of Presidential power over records was discussed, as reported in the memorandum, but the full text of Thomas Jefferson's notes of that meeting shows that it was decided "there was not a paper which might not be properly produced." [10] In fact, an historian-newsman who analyzed the precedents listed in the memorandum for withholding information from the Congress concluded that, in most of the examples, "the Congress prevailed, and got precisely what it sought to get." [11]

The assertion of an "executive privilege" to withhold information from the legislature is rooted in the opening words of Article II of the Constitution: "The executive power shall be vested in a President of the United States of America" and in the last clause in Section 3 of Article II: "He shall take care that the laws be faithfully executed." [12]

This Constitutional grant of power is both vague and complicated, the language raising more questions of how the power shall be exercised than it answers.[13] In the past 18 years, however, there have been some major changes in Congressional-Executive relationships which clarify the practice—if not the principle—of "executive privilege".

THE RECENT GROWTH OF "EXECUTIVE PRIVILEGE"

After May 17, 1954, the Executive Branch answer to nearly every question about the authority to withhold information from the Congress was "yes", they had the authority. And the authority most often cited was the May 17, 1954, letter from President Eisenhower to Secretary of Defense Wilson.[14] Not only was the letter cited, but usually the claim of authority included the accompanying memorandum from Attorney General Herbert Brownell, supposedly prepared in the Department of Justice.

The letter and the memorandum were involved in a controversy between Senator Joseph McCarthy (R., Wis.) and the United States Army over the propriety of the Senator's pressure tactics as chairman of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. During two days of testimony at special hearings called to give McCarthy and the Army a forum for their fight, Army Counsel John Adams mentioned a meeting in the Attorney General's office attended by top White House staff members.[15]

When Subcommittee members tried to get more information from Adams about what went on at the high-level meeting, Joseph N. Welch of Boston, the Army's special counsel for the Army-McCarthy hearings, said Adams had been instructed not to testify any further about the meeting.[16] That was on Friday, May 14, 1954. When Subcommittee members insisted that Adams testify, Welch asked for and was granted a recess until the following Monday.

On Monday, Adams gave the Subcommittee the letter of instructions from the President to the Secretary of Defense, accompanied by a memorandum supposedly prepared officially in the Department of Justice over the weekend. In fact, the memorandum consisted only of excerpts and paraphrases from a 1949 article printed in the *Federal Bar Journal* and written by Herman Wolkinson, a Justice Department research lawyer.[17] Two years later the Justice Department presented to another Congressional subcommittee what appeared to be an expanded memorandum supporting their position on "executive privilege",[18] but it was merely the text of the Wolkinson article.[19]

There was a favorable public response to President Eisenhower's firm stand against disclosing conversations in his official family. Newspapers which were later to inveigh against the excesses of "executive privilege" praised the President's letter of May 17, 1954. The *New York Times*, for instance, editorialized against Senator McCarthy's use of legislative powers to encroach upon the Executive Branch "in complete disregard of the historic and Constitutional division of powers that is basic to the American system of Government." [20] And the *Washington Post* called the memorandum which was made public in connection with the President's letter "an extremely useful document," concluding that the President's authority under the Constitution to withhold information from Congress "is altogether beyond question." [21]

But the May 17, 1954, letter from the President, with its accompanying memorandum, soon became the major vehicle for spreading a claim of Presidential authority throughout the Executive Branch. The letter referred only to a specific series of conversations between Presidential appointees, restricting access to information about those conversations only to one specific Subcommittee of the Congress. Four months later, however, the May 17, 1954, letter was extended to cover more than the President's personal appointees and more than the specific Subcommittee's hearings.

In August, 1954, the U.S. Senate established a select committee to determine whether Senator McCarthy was guilty of conduct "unbecoming a member of the United States Senate" and asked two Army generals to testify about their conversations in connection with McCarthy's activities. Major General Kirke B. Lawton refused to testify on the advice of counsel that the May 17, 1954, "directive" applies to "this or any other" committee.[22] Senator Arthur V. Watkins (R., Utah), the chairman of the select committee, asked Secretary of Defense Charles Wilson for clarification and received a letter stating:

"As a matter of legal application, the Attorney General advises me that the principles

of the Presidential order of May 17, 1954 are as completely applicable to any committee as they were to the Committee on Government Operations.[23]

Telford Taylor, in his study of Congressional investigatory powers at the time of the Army-McCarthy controversy, commented:

"If President Eisenhower's [May 17, 1954] directive were applied generally in line with its literal and sweeping language, congressional committees would frequently be shut off from access to documents to which they are clearly entitled. . . . It is unlikely, therefore, that this ruling will endure beyond the particular controversy that precipitated it." [24]

He proved a poor prophet, in this case. President Eisenhower's May 17, 1954, letter became the major authority cited for the exercise of "executive privilege" to refuse information to the Congress for the next seven years of his administration [25] and it established a pattern which the three Presidents after Eisenhower have followed.

"EXECUTIVE PRIVILEGE" LIMITED

President John F. Kennedy bent, although he did not break, the pattern of "executive privilege" claims by officials far down the administrative line from the President. He had been in office for one year when a special Senate subcommittee held hearings on the Defense Department's system for editing speeches of military leaders. When the Subcommittee asked the identity of the military editors who had handled specific speeches, President Kennedy wrote a letter to Secretary of Defense Robert S. McNamara directing him and all personnel under his jurisdiction "not to give any testimony or produce any documents which would disclose such information." [26] The similarity of President Kennedy's letter of February 8, 1962, and President Eisenhower's letter of May 17, 1954, stopped there, for Kennedy added:

"The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its own merits." [27]

There was no legal memorandum attached to President Kennedy's letter, although one was available. A 169-page study of "executive privilege" cases through 1960 had been prepared by two lawyers in the Department of Justice and printed in two issues of the *George Washington Law Review*.[28] The study, reminiscent of Herman Wolkinson's article in the *Federal Bar Journal* which was used as the back-up memorandum for President Eisenhower's May 17, 1954, letter, discussed executive responses to legislative inquiries from 1953 through 1960 and described some of the cases in which "executive privilege" was claimed. The new study called the exercise of "executive privilege" awkward and embarrassing—but not improper—and concluded:

"This power, like most other Presidential powers, therefore, must be delegated to other officials. The question is how far down the administrative line can this delegation proceed." [29]

President Kennedy's answer was: it cannot. His position was clarified in an exchange of correspondence with Congressman John E. Moss (D., Calif.) who, as chairman of the Foreign Operations and Government Information Subcommittee and its predecessor special subcommittee, had been leading the fight against government secrecy for nearly six years. Moss wrote that President Kennedy's letter of February 8, 1962, "clearly stated that the principle involved could not be applied automatically to restrict information", but he urged clarification "to prevent the rash of restrictions on government information which followed the May 17, 1954, letter from President Eisenhower." [30] President Kennedy, whose staff had gone over a draft of the Moss letter before it was sent formally, replied on March 7, 1962:

"Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." [31]

Soon after Lyndon B. Johnson was elected President, Congressman Moss asked him to limit the use of "executive privilege" as had President Kennedy. In a letter of March 31, 1965, Moss discussed the spread of the use of "executive privilege" following President Eisenhower's letter and contended that, as a result of President Kennedy's limitation of the use of the authority, "there was no longer a rash of 'executive privilege' claims to withhold information from the Congress and the public." Moss expressed to President Johnson the hope that "you will reaffirm the principle that 'executive privilege' can be invoked by you alone and will not be used without your specific approval." [32] President Johnson, in a letter of April 2, 1965, to Congressman Moss, reaffirmed the principle, stating flatly that "the claim of 'executive privilege' will continue to be made only by the President." [33]

Congressman Moss repeated the procedure soon after President Richard M. Nixon took office, asking him to "favorably consider a reaffirmation of the policy which provides, in essence, that the claim of 'executive privilege' will be invoked only by the President." [34] Two months after receiving the letter from Congressman Moss, President Nixon issued a memorandum to the heads of all executive departments and agencies stating that "executive privilege will not be used without specific Presidential approval." He buttressed his memorandum with a letter to Congressman Moss stating:

"I believe, as I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval.[35]

President Nixon's memorandum of March 24, 1969, spelled out procedural steps to govern the invocation of "executive privilege". First, he stated, anyone who wanted to invoke "executive privilege" in answer to a request for information from a "Congressional agency" had to consult the Attorney General. If the Attorney General and the department head agreed that "executive privilege" should not be invoked, the information requested should be released to the Congress. If, however, either or both of them wanted the issue submitted to the President, "the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision." If the President decided to invoke "executive privilege", the memorandum concluded, "the department head should advise the Congressional agency that the claim of Executive privilege is being made with the specific approval of the President." [36]

This was the first time that a step-by-step procedure was set up for invoking "executive privilege" against Congressional inquiries. It was not, of course, the first time that a President had promised to make the final decisions on the use of "executive privilege", but neither was President Kennedy's decision that only he should refuse information to the Congress, a Presidential first. On April 14, 1909, President William H. Taft issued Executive Order 1062 stating:

"In all cases where, by resolution of the Senate or House of Representatives, a head of a Department is called upon to furnish information, he is hereby directed to comply with such resolution, except when, in his judgment, it would be incompatible with the public interest, in which case he should refer the matter to the President for his direction."

No information is available on the results of President Taft's Executive Order 1062, but there is information from public sources on the results of the Kennedy-Johnson-Nixon limitation of the use of "executive privilege."

THE LIMITS OF LIMITATION

Has the Executive Branch claim of power to refuse information to Congress been severely limited since President Kennedy exercised "executive privilege" but said it would be used only by the President, judging each case on its merits? To answer the question, public sources were researched from 1962 through 1972 to determine the instances in which the Executive Branch refused documents or testimony to Congressional committees. The instances of invocation of "executive privilege" covered might or might not involve the issuance of a subpoena or a formal resolution requesting information. What has been focused upon is a publicly-recorded request for information by a Congressional committee and a publicly-reported refusal by an Executive Branch official to grant that request. That which was sought might be a document, a witness, or both. The refusal may or may not have been accompanied by a reason for the denial. The invocation of "executive privilege" has been interpreted for the purposes of this study to refer to a refusal of information to a Congressional committee or subcommittee by an Executive Branch agency or official. It does *not* include instances in which Presidential aides, serving in the White House Office, have refused to appear before Congressional committees.

Sources used in this study were the *New York Times*, the *Washington Post*, the *Washington Evening Star*, the *Congressional Record*, the *Congressional Quarterly* reports and almanacs, and printed hearings of Congressional committees. Following is the result:

Kennedy administration

Exercise of "executive privilege" by the President:

1. State and Defense Department witnesses directed not to give testimony or produce documents at hearings of the Senate Special Preparedness Subcommittee on Military Cold War Education which would identify individuals who reviewed specific speeches. (Committee on Armed Services, United States Senate, *Military Cold War Education and Speech Review Policies*, 87th Congress, Second Session, pp. 338, 369–370, 508–509, 725, 730–731 and 826).

Refusal by Executive Departments and Agencies To Provide Documents or Testimony

1. The Food and Drug Administration refuses to comply with a request from the House Interstate and Foreign Commerce Committe for files on MER–29 drug (*New York Times*, 6/21/62).

2. The State Department refuses to provide a copy of a working paper on the "mellowing" of the Soviet Union to the Senate Foreign Relations Committee (*New York Times*, 6/27/62).

3. General Maxwell D. Taylor appears before the House Subcommittee on Defense Appropriations and refuses to discuss the Bay of Pigs invasion as "it would result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned." (*Congressional Record* 4/4/63, p. 5817).

Johnson administration

Refusals by Executive Departments and Agencies to provide documents or testimony

1. The Department of Defense refuses (April 4, 1968) to supply a copy of the Command Control Study of the Gulf of Tonkin incident to the Senate Foreign Relations Committee (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Ex-*

Footnotes at end of article.

ecutive, 92nd Congress, First Session, p. 39). This source hereafter cited as Senate Judiciary Committee hearings, *Executive Privilege*.

2. Treasury Under Secretary Joesph W. Barr refuses to testify before Senate Judiciary Committee on the nomination of Abe Fortas to be Chief Justice (*Congressional Record*, 9/18/68, p. 27518 and *Washington Post*, 9/17/68).

Nixon administration

Exercise of "executive privilege" by the President:

1. The Attorney General refuses (November 21, 1970) to give Congressman L. H. Fountain, chairman of the Intergovernmental Relations Subcommittee of the House Government Operations Committee, reports furnished by the Federal Bureau of Investigation to evaluate scientists nominated to serve on advisory boards of the Department of Health, Education and Welfare (Committee on Government Operations, U.S. House of Representatives, *U.S. Government Information Policies and Practices—The Pentagon Papers*, Part 2, 92nd Congress, First Session, pp. 362–363).

2. The Department of Defense refuses (August 30, 1971) to supply foreign military assistance plans to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 45–46).

3. The State Department refuses (March 15, 1972) to give the House Foreign Operations and Government Information Subcommittee the Agency for International Development country field submissions for Cambodian foreign assistance for the fiscal year 1973 (*New York Times*, 3/17/72; *Congressional Record*, 3/16/72, pp. H2148–H2149).

4. The United States Information Agency refuses (March 15, 1972) to give the Senate Foreign Relations Committee all USIA Country Program Memoranda (*Congressional Record*, 3/16/72, pp. H2148–H2149).

Refusals by Executive Departments and Agencies To Provide Documents or Testimony

1. The Department of Defense refuses (June 26, 1969) to supply the five-year plan for military assistance programs to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 40).

2. The Defense Department refuses to provide a copy of "Commitment Plan 1964" between U. S. and Thailand to the Senate Foreign Relations Committee (*New York Times*, 8/9/69).

3. The Department of Defense refuses (December 20, 1969) to supply the "Pentagon Papers" to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 37–38).

4. Secretary of Defense Melvin Laird declines invitation to appear before Senate (Foreign Relations) Disarmament Subcommittee (*New York Times*, 3/19/70).

5. Department of Defense General Counsel J. Fred Buzhardt refuses in hearings (March 2, 1971) to release an Army investigation report on the 113th Intelligence Group requested by Senate Constitutional Rights Subcommittee (Senate Judiciary Committee hearings, Executive Privilege, pp. 402–405).

6. The Department of Defense refuses (April 10, 1971) to supply continuous monthly reports on military operations in Southeast Asia to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, Executive Privilege, p. 47).

7. The Department of Defense refuses (April 10, 1971) to allow three designated generals to appear before the Senate Constitutional Rights Subcommittee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 402).

8. The Department of Defense refuses (June 9, 1971) to release computerized surveillance records and refuses to agree to a Senate Constitutional Rights Subcommittee report on such records (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 398–399).

9. The State Department refuses (March 20, 1972) to supply Senate Foreign Relations Committee with a copy of "Negotiations, 1964–1968: The Half-Hearted Search for Peace in Vietnam" (*Washington Post*, 3/20/72).

10. Treasury Secretary John Connally refuses to testify before Joint Economic Committee on matter of the Emergency Loan Guarantee Board refusing to supply requested records on the Lockheed loan to the Government Accounting Office (*Washington Evening Star*, 4/27/72).

11. Benjamin Forman, Department of Defense Assistant General Counsel, appears before the Senate Foreign Relations Committee but refuses to discuss weather modification efforts in Southeast Asia (Washington Post, 7/27/72).

12. Henry Ramirez, chairman of Cabinet Committee on Opportunities for the Spanish Speaking, refuses to testify before House Judiciary Subcommittee on Civil Rights (*Congressional Quarterly*, 8/12/72, p. 2017).

13. SEC Chairman William J. Casey refuses to turn over Commission investigative files on ITT to the House Interstate and Foreign Commerce investigative subcommittee (*Washington Evening Star/Daily News*, 11/1/72).

14. HUD Secretary George Romney declines invitation to appear before the Joint Economic Committee to testify on Federal housing subsidies (*Washington Post*, 12/6/72).

15. Department of Defense refuses to turn over documents requested by the House Armed Services Committee on unauthorized bombing raids of interest to the committee as part of hearings on the firing of Gen. John D. Lavelle (*Washington Post*, 12/19/72).

CONCLUSIONS

President Kennedy exercised the Presidential claim of "executive privilege" one time when he directed witnesses not to identify speech reviewers in testimony before the Senate subcommittee investigating military cold war education policies. Six separate refusals to provide information to the subcommittee were involved in the President's single action.

After the Kennedy directive, however, Executive Branch officials in his administration refused to provide information to Congressional committees three times, apparently without Presidential authority.

In the Johnson Administration "executive privilege" was not claimed by President Johnson, but there were two refusals by appointees in his administration to provide information to Congressional committees after President Johnson's letter of April 2, 1965, stating that "the claim of 'executive privilege' will continue to be made only by the President."

President Nixon personally and formally invoked the claim of "executive privilege" against Congressional committees four times after his memorandum of March 24, 1969, stating that "executive privilege" will not be used without specific Presidential approval. After the memorandum was issued there were, however, 15 other instances in the Nixon Administration in which documents or testimony were refused to Congressional committees without Presidential approval.

This public record of the controversies over Congressional access to Executive information after three Presidents limited the use of "executive privilege", raises a number of questions. Were the Executive Branch officials who apparently refused information to Congressional committees 20 times in violation of the orders of three Presidents, actually acting under orders? Is it possible that three Presidents ordered information withheld 20 times from Congressional committees and left no evidence of their orders?

Contrariwise, is it possible that, in 20 instances, Executive Branch officials were ignoring the clear orders of three Presidents? Or possibly, is there some of both: Executive Branch officials refusing information to Congressional committees with the tacit understanding—at least by the White House staff if not the President, himself—of what was going on?

There are many other problems which can be raised in addition to these three alternatives, such as the question of what formal action the Congress or one of its constituent units must take to assert the Legislative Branch's right of access to information by the Constitution, and the question of whether the Legislative vs. Executive conflict over access to government information may be regarded as a partisan political fight having little to do with the evolution of a system of government based on three coordinate branches.

The fact that there is much more conflict over Congressional access to Executive Branch information when the two branches are controlled by different political parties gives substance to the view that "executive privilege" is a partisan problem. There were, for example, 19 cases of refusal of information to Congressional committees under the first four years of the Republican Nixon Administration working with a Democratic Congress, but there were only six refusals of information in seven years of the Kennedy and Johnson Administrations when both branches were controlled by the same political party. An additional indication of the partisan nature of the conflict is that there were some 34 instances of information refused in response to Congressional requests during the last five years of the Eisenhower Administration, after he issued his letter of May 17, 1954.[37] In that period, the Executive and Legislative Branches were under control of different political parties.

Partisan the problem is, but not purely partisan. It can come up when both branches are under control of the same political party—witness the six cases in the Kennedy and Johnson Administrations—and the partisan makeup of the two branches may merely sharpen the conflict and not make it less of a problem to be solved as the governmental system evolves.

President Nixon, in fact, did more to regularize the flow of information to Congress on controversial subjects than did his predecessors. He issued the first orders setting up a step-by-step procedure to be followed in his administration before "executive privilege" could be invoked. And his memorandum of March 24, 1969, moved toward an answer to the question of what type of formal action the Congress must take to demand information before "executive privilege" would be asserted.

His memorandum referred throughout to a "Congressional agency"[38] requesting Executive Branch information. By this language, apparently he was recognizing that a Congressional committee or subcommittee—or, possibly, the chairman of either—could make a formal request for information that might result in the claim of "executive privilege". He did not require a resolution of the House or Senate, as did President Taft, nor did he leave the problem completely in limbo, as did Presidents Kennedy and Johnson.

There is some additional information to indicate which of three alternatives—violation of a Presidential order, secret Presidential approval or both—explain the fact that the limitation on the use of "executive privilege" apparently has been ignored. It is possible that the five cases in the Kennedy and Johnson Administrations in which information was refused, apparently without Presidential approval, in fact had Presidential approval but this fact has been kept from public knowledge.

This is not the case in the Nixon Administration. President Nixon's memorandum requires a potential "executive privilege"

Footnotes at end of article.

case to go through the Office of Legal Counsel in the Department of Justice. The "executive privilege" expert in that office is Herman Marcuse, one of the authors of the *George Washington Law Review* study of "executive privileges" from 1953 to 1960 (see footnote 28). Marcuse has stated that only the cases of "executive privilege" listed above were handled in the office and approved by President Nixon since his memorandum.[39]

There is a possibility that, in all three administrations, the cases of refusal of information to Congress, apparently in violation of Presidential orders, did not result from formal confrontations between the two branches of government. Assistant Attorney General William H. Rehnquist, who was in charge of the Office of Legal Counsel, testified after two years' experience under President Nixon's "executive privilege" memorandum that "agencies which seek to withhold information are complying with the procedures set forth in the memorandum."[40] By the time of his testimony, there already had been one formal Presidential use of the claim of "executive privilege" and eight other cases in which, public records show, testimony or documents had been refused to Congressional committees.

Rehnquist downgraded refusals of information to Congress which had not had the stamp of Presidential approval, arguing that no real confrontation over access to information occurs in many cases because they are mere discussions at the staff level between Executive agencies and Congressional committees. And in other cases, he testified, a witness would mention the possibility that a request for particular information might raise the spectre of "executive privilege." Rehnquist added:

"But such a statement, of course, is by no means tantamount to the President's authorizing the claim of privilege. It is simply a statement by a department head or his representative that he is prepared to recommend a claim of privilege to the President should the demand for information not be settled in a mutually satisfactory manner to both the agency and the chairman of the committee or subcommittee involved."[41]

None of the 15 Nixon Administration cases of refusal of information to a Congressional committee without the formal, Presidential citation of "executive privilege" seems to fit the Rehnquist criteria. While the committees or subcommittees involved may not have taken a formal vote to demand the testimony or documents in each case the request for information did come up in hearings or as part of a formal request from the chairman.

If the 15 Nixon Administration cases involved formal, direct requests for information and if there are no secret Presidential orders directing the invocation of "executive privilege", it seems that Executive Branch officials violated the Presidential directive 15 times. When interpreting orders in government administration, however, one bureaucrat's violation may be another bureaucrat's compliance. Those who want to withhold information from the Congress will do everything possible to make it difficult for Congress to get what it needs. That is apparent from the 34 instances occurring in five years when the Executive Branch wrapped itself in President Eisenhower's letter of May 17, 1954, as a cloak of "executive privilege". That cloak no longer exists, but the bureaucracy that used it is little changed. And the top-level policy makers apparently are happy to use the bureaucracy's tactics of delay and obfuscation to prevent Congress from getting at information which might embarrass their agency or their administration.

While the Kennedy-Johnson-Nixon statements limiting the invocation of "executive privilege" may state clearly to Congressional readers that information will not be refused without specific Presidential approval, they may also state to Executive Branch readers that they should be careful when claiming "executive privilege" but they can use other techniques to block Congressional access to information.

Thus, the use of the claim of "executive privilege" has been severely limited but the limitation has not opened new file drawers to Congress. In fact, the Presidential statements have been limitations in name only.

FOOTNOTES

[1] U.S. Congress. Senate, Committee on Government Operations. Special Subcommittee on Investigations. *Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr.* Hearings, 83rd Congress, 2d session. Washington: U.S. Govt. Print. Off., 1954, pp. 1169–1172.

[2] H. Rept. 84–2947, p. 90.

[3] H. Rept. 86–2084, p. 37.

[4] *Ibid.*, p. 36.

[5] *Marbury v. Madison* (1 Cranch 137) and the conspiracy trial of Aaron Burr are the classic historical cases. *Kilbourn v. Thompson* (103 U.S. 168), *McGrain v. Daugherty* (273 U.S. 135), *ex rel. Touhy v. Ragan* (340 U.S. 462) and *U.S. v. Reynolds* (345 U.S. 1) are modern cases which have considered court access to Executive Branch information. When President John F. Kennedy limited the use of "executive privilege" to the President alone (see below), he was asked by the Attorney General whether the limitation applied only to congressional requests for information. Theodore C. Sorenson, Special Counsel to the President, replied in a letter of March 30, 1962, to the Attorney General that the policy "relates solely to inquiries directed by the Congress or its committees to the Executive Branch" and does not have any application to "demands, made in the course of a judicial or other adjudicatory proceeding, for the production of papers or other information in the possession of the Government."

[6] Library of Congress. Legislative Reference Service. *The Constitution of the United States of America—Analysis and Interpretation.* Washington: U.S. Govt. Print. Off., 1964, p. 105.

[7] *Ibid.*

[8] U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *Availability of Information from Federal Departments and Agencies.* Hearings, 85th Congress, 2d session. Washington: U.S. Govt. Print. Off., 1958, p. 3911.

[9] *Ibid.*

[10] J. Russell Wiggins, "Government Operations and the Public's Right to Know," *Federal Bar Journal,* XIX (January, 1959), p. 76.

[11] *Ibid.*, p. 82.

[12] Senator Sam Ervin (D.-N.C.), the United States Senate's acknowledged constitutional expert, explains:

"Although the Constitution is silent with regard to the existence of executive privilege, its exercise is asserted to be an inherent power of the President. Its constitutional basis allegedly derives from the duty imposed upon the President under article II section 3 to see that the laws are faithfully executed. The President claims the power on the grounds that it is necessary in order to provide the executive branch with the autonomy needed to discharge its duties properly. Inasmuch as the "President alone and unaided could not execute the laws * * *" but requires "the assistance of subordinates" (*Myers* v. *U.S.*, 272 U.S. 117 (1926)), the alleged authority to exercise executive privilege has thereby been extended in practice to the entire executive branch." *

* U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *Executive Privilege: The Withholding of Information by the Executive.* Hearings, 92d Congress, 1st session. Washington: U.S. Govt. Print. Off., 1971, p. 2.

[13] Edward S. Corwin. *The President: Office and Powers.* New York: New York University Press, 1968, pp. 4 and 5.

[14] H. Rept. 86–2084, p. 117.

[15] U.S. Congress. Senate. Committee on Government Operations. Special Subcommittee on Investigations. *op. cit.*, p. 1059.

[16] *Ibid*, pp. 1169–1172.

[17] H. Rept. 86–234, p. 64, note 1.

[18] U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information. *op. cit.*, p. 2894; another, modified version and the original also found in U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. *Freedom of Information and Secrecy in Government.* Hearings, 85th Congress, 2d session. Washington: U.S. Govt. Print. Off., pp. 63–270.

[19] Herman Wolkinson, "Demands of Congressional Committees for Executive Papers," *Federal Bar Journal,* X (April, July, October, 1949), pp. 103–150.

[20] New York *Times,* May 18, 1954, p. 28.

[21] Washington *Post,* May 18, 1954, p. 14.

[22] U.S. Congress. Senate. Select Committee to Study Censure Charges Against Senator Joe McCarthy. *Hearings, Select Committee to Study Censure Charges Against Senator Joe McCarthy, August 31 through September 17, 1954.* 83rd Congress, 2d session. Washington: U.S. Govt. Print. Off., 1954, p. 167.

[23] *Ibid.*, p. 434.

[24] Telford Taylor. *Grand Inquest.* New York: Simon & Schuster, 1955, p. 133.

[25] H. Rept. 86–2084, p. 177.

[26] U.S. Congress. Senate. Committee on Armed Services. Special Preparedness Subcommittee. *Military Cold War Education and Speech Review Policies.* Hearings, 87th Congress, 2d session. Washington: U.S. Govt. Print. Off., 1962, pp. 508 and 509.

[27] *Ibid.*

[28] Robert Kramer and Herman Marcuse, "Executive Privilege—A Study of the Period 1953–1960," *George Washington Law Review,* XXIX (April, June, 1961), pp. 623–718, 827–916.

[29] *Ibid.*, p. 911.

[30] U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *op. cit.*, p. 34.

[31] *Ibid.*

[32] *Ibid.*, p. 35.

[33] *Ibid.*

[34] *Ibid.*, p. 36.

[35] *Ibid.*

[36] *Ibid.*, p. 37.

[37] H. Rept. 86–2084, pp. 5–35.

[38] U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *op. cit.*, p. 36.

[39] Telephone interview, August 22, 1972.

[40] U.S. Congress. House. Committee on Government Operations. Foreign Operations and Government Information Subcommittee. *U.S. Government Information Policies and Practices—The Pentagon Papers.* Hearings, 92d Congress, 1st session. Washington: U.S. Govt. Printing Office, 1971, p. 365.

[41] *Ibid.*, p. 366.

WHAT TO DO TOGETHER

(Mr. SYMINGTON asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. SYMINGTON. Mr. Speaker, as SALT II proceeds and the peace dividend for our tortured economy is absorbed by the requirements of World War III, we should be moved to new reflections. For a number of years it has seemed to me that peace would be better served if the superpowers agreed not merely what not to

Congress of the United States
House of Representatives
Washington, D.C. 20515

OFFICIAL BUSINESS

M.C.

The President
The White House
Washington, D. C.

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

September 24, 1974

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: Phil Buchen

FROM: Doug Metz

SUBJECT: Executive Privilege

Congressmen Moorhead, Erlenborn and Moss and Senators Ervin, Muskie and Roth have written the President requesting his views on proposed legislation to establish procedures for resolving disputes between Congress and the President concerning Presidential assertions of executive privilege. S. 2432 passed the Senate. H. R. 12462 has been reported in the House with a request for a rule pending.

Although differing in some important details, both bills prescribe legislative and judicial guidelines to deal with situations in which the Executive branch withholds information from the Congress by creating an additional remedy for Congress to use against a resisting Executive.

In summary the legislation:

- Establishes a procedure for formalizing Congressional requests for Executive information.
- Provides procedures for Congressional recourse to the courts via a civil action in the event that Executive privilege is invoked.
- Prescribes the general conditions and form by which the privilege may be invoked.

- Fixes a time period for Executive response to a formal Congressional request.

The Executive has traditionally resisted erosion of the privilege. The last position of the Justice Department was stated by Mary C. Lawton, Deputy Assistant Attorney General, on April 3, 1973 in Congressional testimony: "In summary, we opposed [this bill] primarily because it represents an attempt by Congress to regulate an independent Constitutional prerogative of the Executive."

It seems clear, however, that Congress can constitutionally legislate on certain matters germane to executive privilege, e.g., conferral of jurisdiction on one or more courts to hear and resolve such disputes, determination of who can bring suit, and prescription of the form in which executive privilege shall be recognized for purposes of contest by the Congress.

In addition to seeking the President's views and, hopefully, support for H.R. 12462, Congressmen Moorhead and Erlenborn have requested that the President provide them with a letter of the type sent by Presidents Kennedy, Johnson and Nixon. The letters have pledged that executive privilege will be invoked only by the President personally and only after rigorous scrutiny of its justification. President Nixon, however, went one step further by issuing a memorandum to the Executive establishment prescribing procedures for subordinates requesting Presidential invocation of the privilege.

I recommend the following course of action:

(1) <u>The President should move very deliberately in formulating a position on this subject and consult extensively with the Congressional leadership</u>.

The proposed legislation is born of Watergate; yet, on its face, represents a sincere attempt to establish an objective and structured process for resolution of Executive/Congressional disputes over access to Executive branch information. Apart from the merits of the legislation, I believe that the Congress and significant segments of the public would react adversely to (1) a simple reaffirmation by the President of the traditional responses of his immediate predecessors and (2) a response made without evidence of open consultation on a subject so closely related to Watergate.

Accordingly, [illegible] the following steps:

A. The President after prior staff briefing, should meet personally with Congressmen Moorhead and Erlenborn.

This meeting should take place during this session of Congress, preferably before the October 11 recess for elections. A special briefing memorandum should be prepared for the President based on this memorandum and subsequent staff discussions.

B. The meeting with Congressmen Moorhead and Erlenborn should be followed by other Congressional consultation, as appropriate.

C. The President should reply formally to Congressmen Moorhead and Erlenborn, and immediately thereafter, to the members of Congress who have written him.

(2) The substance of the President's response on Executive privilege can follow these basic approaches.

Any approach adopted by the President, however, should, in style and form, be positive and consistent with his pledge of openness in communications with the Congress and preferably contain some new and distinctive element not present in prior Presidential statements.

The three options are:

A. Simply reaffirm the position of immediate past Presidents and the traditional opposition to legislative encroachment.

Despite the virtue of consistency, this course of action fails to reconcile well-documented justification for a stronger Congressional claim to information needed to perform its Constitutional duties and for a corresponding recognition by the Executive that an attitude of "absolutism" in assertions of independent prerogatives is counter-productive of the public interest.

The most [illegible] of the Congress and the public lead both to expect [illegible] from the new President than "standing-pat" on a [illegible] inextricably bound up with Watergate.

THE WHITE HOUSE

WASHINGTON

5. Takes more limited view of ~~exec~~ executive privilege' to those situations involving high level advice

D. Would prefer to ~~do~~ have policy instead of proceeding on an ad hoc. basis

B. Affirm the traditional commitment to personal prudence in the exercise of the privilege, but formulate a response which deals more directly and broadly with Congressional concerns about withholding information.

Pursuit of this option might involve:

- Issuance of an Executive order (Attachment A) giving the force of law to procedures for claiming the privilege contained in the Nixon memorandum on the subject. Note that the draft Executive order does not deal with White House employees.

- Circulation of a letter (Attachment B) to all Federal employees urging strict adherence to the provisions of Executive Order 11652 tightening the system of classification and declassification of documents. In the alternative, Executive Order 11652 itself might be amended.

This approach has the advantage of preserving to the Executive the right of determining the terms and conditions for assertion of the privilege; yet demonstrates a commitment to formal, self-imposed procedural restraints with the Executive in withholding information from the Congress. The principal disadvantage is that it fails to address directly the nature of the information rights of Congress and power of the courts to resolve irreconcilable conflicts. Although Option B undoubtedly would be viewed by many as more of a rear-guard action than creative statecraft, it has the appeal of being in the historical mainstream of notions of Presidential/Congressional relationships on this subject.

C. Make a commitment to the need for a legislative approach, cite objections to the pending bills and direct that legislation be drafted for consideration by the Congress next session.

The principal defects of the proposed legislation (apart from the Constitutionality of certain provisions) are:

- The permissible grounds for assertion of executive privilege are imprecise, fail to allow for the four historic grounds for invoking the claim; and do not

permit adequate flexibility to accommodate future unforeseen situations which may justify invocation of the claim.

- As a guide for court determination of the validity of a claim of privilege, the legislation is imprecise and appears to place too great a burden of proof on the Executive to justify assertion of the privilege.

The legislative approach has the appeal of clarifying the procedural ground rules for resolving a perennially troublesome issue. Yet clarification of the process might tend to "automate" conflict and hence tempt the Congress to resort to the courts with undesirable frequency. Moreover, even if the Executive could fashion acceptable legislation there is no assurance that the legislative process would yield a bill acceptable to the President. A veto could exacerbate the issue and spark public divisiveness.

My current preference is for option B. It demonstrates substantial commitment to constraint in assertions of the privilege, preserves flexibility for this and future Presidents, and allows for the traditional "pull and tug" between the branches to shape the scope of the privilege and the process for resolution of conflicts and confrontations.

Next Steps

- Discussion of this memorandum and determination of basic approach to be taken.

- Development of more detailed backup and formal position paper for the President.

- Scheduling of requested meeting between Congressmen Moorhead and Erlenborn and the President.

Give me a call when you are ready to discuss this. My files contain additional materials which may be helpful including Congressional hearings, various legal opinions and a study by the Library of Congress.

DWM/crs

Attachments

A. Draft Executive order
B. Draft Presidential Letter to Federal Employees

Attachment A

Discussion draft

EXECUTIVE ORDER

ESTABLISHING A PROCEDURE FOR DETERMINING WHETHER EXECUTIVE PRIVILEGE SHOULD BE REVOKED IN

By virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

SECTION 1. Executive departments and agencies should recognize that Congress must be fully informed if it is to perform its legislative and oversight functions. These departments and agencies are directed to cooperate in providing information to the Congress. Information requested by the Congress may be refused only in instances where: (a) such disclosure is prohibited or restricted by statute; or (b) the President determines that the public interest in maintaining secrecy or confidentiality requires non-disclosure.

SEC. 2. (a) When the head of an Executive department or agency believes that information requested by the Congress should be withheld because the public interest in maintaining secrecy or confidentiality requires nondisclosure, he shall consult the Attorney General through the Office of Legal Counsel of the Department of Justice.

(b) If the Attorney General concurs that the information should be withheld, he shall advise the President, in writing, of the congressional request, the nature of the information sought, the specific reasons why the public interest militates against disclosure, and the estimated period of time during which disclosure must be withheld.

(c) If the Attorney General does not concur, he shall so advise the head of the Executive department or agency with a memorandum setting forth his nonconcurrence. If the head of the Executive department or agency does not acquiesce in such memorandum, he may transmit to the President an appropriate memorandum together with the memorandum of the Attorney General.

(d) If the President determines that the information should be withheld, the head of the Executive department or agency shall notify the Congress of that determination.

(e) If the President disapproves the withholding of the information, the head of the Executive department or agency shall provide the requested information to the Congress forthwith.

SEC. 3. Pending a final determination by the President, the head of the Executive department or agency should request the Congress to hold its request for information in abeyance, stating that a determination under this Order is being sought. Care shall be taken to indicate that the purpose of this request is to protect executive privilege pending the determination, and that the request does not constitute a claim of privilege.

* SEC. 4. Reference to "Congress" in this Order includes Committees of the Senate and House of Representatives, Joint Committees, Subcommittees of all the foregoing, and the Comptroller General, with respect to information requests connected with their authorized inquiries.

* Provision for inclusion of heads of agencies in the Executive Office of the President and of members of the White House office staff can be inserted here. Procedures would be parallel as for heads of Executive departments and agencies, except White House Counsel, rather than the Attorney General, would advise the President

Dick

Draft letter to be circulated to all federal employees

Dear Federal employee:

I want to take this opportunity to thank each of you personally for carrying forward the work of the Federal government during the difficult times through which we have passed. Never before has your dedication been more evident.

Your further effort and cooperation is needed in an area of particular concern to me. On March 8, 1972 my predecessor issued Executive Order 11652 to tighten up the system of government classification of documents and provide new procedures for declassification. Individual agencies subsequently issued revised regulations on the same subject. I am determined that the Order and implementing regulations will be fully complied with.

I ask that you familiarize yourself with the terms of the Order and with the regulations issued by your agency, that you adhere scrupulously to the letter and spirit of both, that you call violations to the attention of the appropriate official in your agency, and that you question and challenge documents which come into your hands that

you consider improperly classified by requesting declassification review. Only if each of us makes it his personal responsibility can we assure the open government our Constitution promises.

Sincerely,

Gerald R. Ford

October 3, 1974

MEMORANDUM FOR: William Timmons

FROM: Phil Buchen

SUBJECT: Requests from the Hill for meeting with the President on Executive Privilege bill

Please see attached memorandum of Dudley Chapman and his summaries of H. R. 12462 and S. 2432. Also copy of memorandum to me from Doug Metz.

Attachments

THE WHITE HOUSE

WASHINGTON

September 25, 1974

MEMORANDUM FOR: PHILIP BUCHEN

FROM: DUDLEY CHAPMAN DC

SUBJECT: Executive Privilege

Attached are (1) the memo I promised you on our various privilege problems, and (2) Doug Metz's memo on the same subject which Jay brought me this morning. (Metz's memo attached at Tab D.)

Doug and I both recommend that adoption of any policy be defered to a careful review and consultation process with Congress. The thrust of Doug's substantive recommendations (p. 4 et seq of his memo) is consistent with mine, though he does not include some of the specific suggestions that I have proposed.

cc: Phillip Areeda
Bill Casselman

THE WHITE HOUSE

WASHINGTON

September 25, 1974

MEMORANDUM FOR: PHILIP W. BUCHEN
PHILLIP AREEDA
BILL CASSELMAN

FROM: DUDLEY CHAPMAN dlc

SUBJECT: Policy on Executive Privilege, Freedom of Information and Classified Information

1. Pending Requests

Four pending Congressional inquiries raise issues of Executive Privilege and policy toward the Freedom of Information Act. These are:

(a) A joint request of August 13, 1974 by Representatives William S. Moorhead and John N. Erlenborn that the President sign a directive like Presidents Kennedy, Johnson and Nixon before him, that no claim of Executive Privilege may be asserted against the Congress without the President's express approval. Tab A.

(b) A joint request of Representatives Moorhead and Erlenborn of August 13, 1974 to meet with the President on H.R. 12462 concerning Congressional access to information in the executive branch. Tab B.

(c) A joint request of August 22, 1974 by Senators Muskie, Ervin and Roth for the President's support or recommendations on S. 2432, the Congressional Right to Information Act, which has passed the Senate and is pending in the House. Tab C.

(d) Counsel Buchen's requested testimony before the Hungate subcommittee concerning the Nixon pardon.

In addition, we have carry over requests from the prior administration for (i) access by GAO to documents of CIEP and NSC for use in a self generated study of the decision making process on East-West trade; and (ii) Congressman Vanick's request for access to the internal working papers of the Oil Import Task Force.

2. Background: The Essence of the Problem

Few people quarrel with the principle that executive officials, Congressmen, Senators and judges are entitled to confidential internal communications. The conflict arises because the process of decision making in the executive branch channels much essential factual information into the same documents that contain internal, confidential types of communication. Congress is frustrated because much of the information it needs to appraise executive policies is buried in memoranda for which confidentiality is claimed.

This occurs because for many years it has been the universal assumption that the internal communications of the executive branch were sacrosanct and officials felt no need to separate confidential from purely factual data. Now, when faced with Freedom of Information Act claims or congressional requests for waiver of executive privilege, it is necessary for some person with policy making judgement to cull the files and separate the truly confidential material from that which is not. Since persons qualified to do this inevitably play important operational roles, there is a serious practical problem of time demands posed by requests for the release of information.

This problem, as well as all the contentious issues of privilege, will remain as long as factual information is routinely buried in confidential files and released on an ad hoc basis. In my view, the Freedom of Information Act, the unfavorable connotations of executive privilege and the present mood of Congress dictate a sharp break from traditional practice. To be effective, this will require:

(a) Announcement of a new policy that privilege will be asserted only for those truly candid views and recommendations that should be protected in all cases. The prior practice of treating all Presidential documents as confidential would be replaced by a rule making available to Congress all but the most intimate Presidential communications.

(b) A directive should be issued requiring that such truly confidential information be physically segregated from factual information.

The latter should be available to Congress, and segregated at the very inception, when documents are written. The confidential information should be so designated so that it can be readily separated from factual information much as is done with classified information. It should be understood that the rest will be available to Congress.

(c) A category of confidentiality should be created for internal, operational, decision making documents that will be available on a confidential basis to Congress but not to the public.

(d) An affirmative policy should be adopted to prepare as much factual information for public release as is possible at the time decisions are made. This should specifically call for extracting and making public as much information as possible from truly confidential material.

(e) Decisions on releasability of documents should be based as much as possible on guidelines such as the foregoing and with minimal use of ad hoc waiver decisions. Ad hoc decisions always put the executive in a bad light when the decision is not to release, since it is interpreted as a sign that the information is damaging. Ad hoc decisions have been necessary in the past because the general rule was non-disclosure. If the general rule is reversed, exceptions will not be necessary in most cases.

3. General Recommendations

The working out of these or other policies should be done through a comprehensive review of existing policy and legislation in full cooperation with the Congress. This obviously cannot be done in time to act on any of the above requests, and to react to them now would risk continuing the ongoing confrontation between executive and Congress. I would therefore recommend that a general statement of Presidential policy be released forthwith, reaffirming the dedication to candor, and proposing a specific joint executive-Congressional review of existing and proposed legislation with a specific, short reporting deadline, and a deferral of any position on these questions until then. The requests for meetings with Senators and Congressmen should, of course, be granted as part of the information process.

4. Specific Recommendations

(a) The Moorhead-Erlenborn request for a new directive requiring affirmative Presidential approval of privilege claim. I would respond to this letter now by affirming that the prior Presidential directives remain

in force without the need for a specific renewal, and deferring action until a more comprehensive policy is formulated by this administration. I question whether it makes sense to continue this tradition of getting a new memorandum from each successive President. Why not issue an executive order if this is to be the standing rule?

(b) The Moorhead-Erlenborn request to meet on HR 12462. This should be agreed to right away, the session being informational only, with no prior administration position or commitment to be made at that time. (Summary attached.)

(c) The Muskie-Ervin-Roth request for recommendations on S. 2432. This should be acknowledged again, with a commitment to make a recommendation after the comprehensive administration position is formulated, and requesting that action be deferred in the meantime. (Summary attached.)

(d) Buchen testimony before the Hungate subcommittee. The best course here would appear to be that recommended in 2(c) above--decline to testify specifically as to what advice was given the President, but provide as much factual information as possible. In fact, this testimony would be an ideal model for a new policy of informing Congress and the public as fully as possible about matters that involve some necessary residue of confidentiality. Holding back substantive information on this subject matter would be politically unacceptable; and the testimony affords an opportunity to deal in detail with the various criticisms of this action--especially the equal justice issue. That explanation should include a primer on the purpose and use of the pardon power with examples based on past practice. The Pardon Attorney, Lawrence Traylor, should be consulted for assistance in preparation.

APPENDIX: SUMMARIES of HR 12462 and S. 2432

HR 12462

This bill would specifically provide for access to Presidential documents which the existing Freedom of Information Act avoids. It imposes a short 30 day deadline, and provides procedures for the Congress to determine whether the national interest requires disclosure. It would formalize into law the existing practice that only the President may authorize an assertion of privilege against Congress.

Comment. The bill is predicated in the case by case, ad hoc policy followed in the past which makes a potential issue out of every request. The policy recommended above would seek instead to use guidelines that strictly limit privilege to those matters that should be protected in virtually all cases, thus making waivers unnecessary in most cases. Since this bill tends to set in concrete the case by case approach, it should be deferred to the working out of a more satisfactory solution. It also raises a constitutional question by giving Congress a power of decision on the release of confidential Presidential documents.

S. 2432

This act also provides a formal procedure for the assertion of Presidential privilege and an override by Congress with a power of subpoena to enforce it. It would create an obligation on the part of all heads of agencies to appear before Congress and provide requested information within specified deadlines and require that agency heads affirmatively inform appropriate committees and subcommittees on all matters within the respective committees' jurisdiction.

Comment. Much of what is in this bill appears unavoidable, though the regulation of Presidential privilege should be deferred for the reasons stated above.

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

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FROM: Doug Metz

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Pursuit of this option might involve:

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This approach has the advantage of preserving to the Executive the right of determining the terms and conditions for assertion of the privilege; yet demonstrates a commitment to formal, self-imposed procedural restraints with the Executive in withholding information from the Congress. The principal disadvantage is that it fails to address directly the nature of the information rights of Congress and power of the courts to resolve irreconcilable conflicts. Although Option B undoubtedly would be viewed by many as more of a rear-guard action than creative statecraft, it has the appeal of being in the historical mainstream of notions of Presidential/Congressional relationships on this subject.

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DWM/crs

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B. Draft Presidential Letter to Federal Employees

Attachment A

Discussion draft

EXECUTIVE ORDER

ESTABLISHING A PROCEDURE FOR DETERMINING WHETHER EXECUTIVE PRIVILEGE SHOULD BE REVOKED IN

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DCM

Draft letter to be circulated to all federal employees

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I want to take this opportunity to thank each of you personally for carrying forward the work of the Federal government during the difficult times through which we have passed. Never before has your dedication been more evident.

Your further effort and cooperation is needed in an area of particular concern to me. On March 8, 1972 my predecessor issued Executive Order 11652 to tighten up the system of government classification of documents and provide new procedures for declassification. Individual agencies subsequently issued revised regulations on the same subject. I am determined that the Order and implementing regulations will be fully complied with.

I ask that you familiarize yourself with the terms of the Order and with the regulations issued by your agency, that you adhere scrupulously to the letter and spirit of both, that you call violations to the attention of the appropriate official in your agency, and that you question and challenge documents which come into your hands that

you consider improperly classified by requesting declassification review. Only if each of us makes it his personal responsibility can we assure the open government our Constitution promises.

Sincerely,

Gerald R. Ford

October 3, 1974

MEMORANDUM FOR: William Timmons

FROM: Phil Buchen

SUBJECT: Requests from the Hill for meeting with the President on Executive Privilege bill

Please see attached memorandum of Dudley Chapman and his summaries of H. R. 12462 and S. 2432. Also copy of memorandum to me from Doug Metz.

Attachments

October 3, 1974

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Attachments

Cong - Exec Prov

Wednesday 10/9/74

Meeting
10/10/74
12:00-12:15

10:20 Nancy Brazelton in the Congressional Relations office advises the President will meet with Congressman Moorhead and Congressman Erlenborn from 12:00 to 12:15 on Thursday 10/10, and asked if you could sit in on the meeting.

Accepted for you.

They will send a memo of talking points.

THE WHITE HOUSE
WASHINGTON

Date 10/9

TO: Philip Buchen

FROM: VERN C. LOEN

Please Handle _____

For Your Information X

Per Our Conversation _____

Other:

THE WHITE HOUSE

WASHINGTON

October 9, 1974

MEETING WITH REPS. WILLIAM S. MOORHEAD (D-PA.)
AND JOHN ERLENBORN (R-ILL.)
October 10, 1974
12:00 Noon (15 Minutes)
The Oval Office

Via: William E. Timmons
Max L. Friedersdorf MLF.

From: Vern Loen VL

I. PURPOSE To discuss the President's policy in regard to the use of Executive Privilege.

II. BACKGROUND, PARTICIPANTS & PRESS PLAN

A. Background:

1. Rep. Moorhead is Chairman of the House Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations. Rep. Erlenborn is ranking minority member.

2. By letter dated August 13, 1974, they jointly requested a meeting with the President before he makes any decision with respect to an exchange of correspondence on this question (see Tab A).

3. The Senate already has passed a bill on this subject and H.R. 12462, co-sponsored by Reps. Moorhead, Erlenborn and others, is pending before the House. This measure has been under study by Counsel Philip Buchen.

B. Participants: The President
Rep. Moorhead
Rep. Erlenborn
Counsel Philip Buchen
Vern Loen (Staff)

C. Press Plan: Announce meeting: White House photo only.

III. TALKING POINTS

1. I know you gentlemen have given a great deal of consideration to the Executive Privilege question during the past two Congresses.

2. Both of you know that I want my Administration to be as open and as cooperative with the Congress as possible, as demonstrated by my own intention to appear before the House Judiciary Committee next week.

3. My counsel, Philip Buchen, and I would be most interested in having your views and recommendations.

NINETY-THIRD CONGRESS

Congress of the United States

House of Representatives

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-371-B
WASHINGTON, D.C. 20515

August 13, 1974

The Honorable Gerald R. Ford
President of the United States
The White House
1600 Pennsylvania Avenue, N. W.
Washington, D. C. 20500

Dear Mr. President:

Enclosed are copies of correspondence between the former chairman of this subcommittee and each of the three previous Presidents, relating to their Administration's policies to limit the use of so-called "Executive Privilege" only upon personal invocation by the President himself.

As you know, this subcommittee has conducted both investigative and legislative hearings on this subject during the past two Congresses and on March 14, 1974, favorably reported H. R. 12462, a bipartisan bill sponsored by Representative Erlenborn, myself, and other Members of both parties. A similar bill was passed by the Senate last December. A copy of our hearings and report on this measure is also enclosed.

In view of the then pending litigation over the tapes involving President Nixon and the Special Prosecutor, in which this issue was indirectly involved, we decided not to press for a rule on H. R. 12462 until after the Supreme Court had ruled in that case. Our staff analysis of the July 24, 1974, decision of the Court indicates that the ground rules for the use of "Executive Privilege" established in H. R. 12462 are not inconsistent with that decision since it did not deal directly with Congress' right to information from the Executive. We have since requested a rule on the measure and are awaiting the scheduling of a hearing by the Rules Committee.

As you were a long-time Member of the House, it is not necessary to spell out to you details about the steady erosion in the flow of information from the Executive to the Congress which has taken place over the past generation. You are well aware of such problems and of the disastrous effect which the wholesale withholding of information from the Congress under "Executive Privilege" has had on the credibility of our government and its leaders. Last Friday's New York Times quoted remarks you made on this subject more than a decade ago: "Congress cannot help but conclude that executive privilege is most often used in opposition to the public interest."

Before you make any decision with respect to an exchange of correspondence on the use of "Executive Privilege" in your Administration, we would appreciate the opportunity to meet with you to discuss this issue and your position on H. R. 12462.

With best wishes and highest regards,

Sincerely,

William S. Moorhead
Chairman

John N. Erlenborn
Ranking Minority Member

Enclosures

THE WHITE HOUSE

WASHINGTON

October 9, 1974

MEETING WITH REPS. WILLIAM S. MOORHEAD (D-PA.)
AND JOHN ERLENBORN (R-ILL.)
October 10, 1974
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Via: William E. Timmons
Max L. Friedersdorf MLF.

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JIM WRIGHT, TEX.
BILL ALEXANDER, ARK.
BELLA S. ABZUG, N.Y.
JAMES V. STANTON, OHIO

CHARLES THONE, NEBR.
RALPH S. REGULA, OHIO

225-3741

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