The original documents are located in Box 13, folder "Executive Privilege (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

25 FEB 1975

MEMORANDUM FOR HONORABLE PHILIP BUCHEN
COUNSEL TO THE PRESIDENT

Phil —

In the coming months the Congressional ardor for information, documents and witnesses from the Executive Branch will surely escalate. This is especially true once the Select Committee to Study Governmental Operations With Respect to Intelligence Activities gets under full steam.

The Departments and Agencies of the Executive Branch would benefit from an expression by the President on executive privilege. A general statement by him at this time, before any confrontation arises, would be preferable to addressing the subject after a controversial demand has been made.

Attached are copies of documents and correspondence issued by the past three Presidents.

Marty

Martin R. Hoffmann

Attachments

THE WHITE HOUSE,
Washington, May 3, 1973.

The President desires that the invocation of Executive Privilege be held to a minimum. Specifically:

1. Past and present members of the President's staff questioned by the FBI, the Ervin Commitee, or a Grand Jury should invoke the privilege only in connection with conversations with the President, conversations among themselves (involving communications with the President) and as to Presidential papers. Presidential papers are all documents produced or received by the President or any member of the White House staff in connection with his official duties.

2. Witnesses are restricted from testifying as to matters relating to national security not by executive privilege, but by laws prohibiting the disclosure of classified information (e.g., some of the incidents which gave rise to concern over leaks). The applicability of such laws should therefore be determined by each witness and his own counsel.

3. White House Counsel will not be present at FBI interviews or at the Grand Jury and, therefore, will not invoke the privilege in the first instance. (If a dispute as to privilege arises between a witness and the FBI or the Grand Jury, the matter may be referred to White House Counsel for a statement of the President's position.)

THE WHITE HOUSE,
Washington, May 4, 1973.

The following is a supplement to the Memorandum of May 3, 1973 regarding the invocation of Executive Privilege:

White House Counsel will be present at informal interviews of White House personnel by Ervin Committee Staff, but only for the purpose of observing and taking notes. Privilege will be invoked by White House Counsel, if at all, only in connection with formal hearings before the Ervin Committee.

FOR IMMEDIATE RELEASE MARCH 12, 1973

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

During my press conference of January 31, 1973, I stated that I would issue a statement outlining my views on executive privilege.

The doctrine of executive privilege is well established. It was first invoked by President Washington, and it has been recognized and utilized by our Presidents for almost 200 years since that time. The doctrine is rooted in the Constitution, which vests "the Executive Power" solely in the President, and it is designed to protect communications within the executive branch in a variety of circumstances in time of both war and peace. Without such protection, our military security, our relations with other countries, our law enforcement procedures and many other aspects of the national interest could be significantly damaged and the decision-making process of the executive branch could be impaired.

The general policy of this Administration regarding the use of executive privilege during the next four years will be the same as the one we have followed during the past four years and which I outlined in my press conference: executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest.

I first enunciated this policy in a memorandum of March 24, 1969, which I sent to Cabinet officers and heads of agencies. The memorandum read in part:

> "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."

In recent weeks, questions have been raised about the availability of officials in the executive branch to present testimony before committees of the Congress As my 1969 memorandum dealt primarily with guidelines for providing information to the Congress and did not focus specifically on appearances by officers of the executive branch and members of the President's personal staff, it would be useful to outline my policies concerning the latter question.

During the first four years of my Presidency, hundreds of Administration officials spent thousands of hours freely testifying before Committees of the Congress. Secretary of Defense Laird, for instance, made 86 separate appearances before Congressional committees, engaging in over 327 hours of testimony. By contrast, there were only three occasions during the first term of my Administration when executive privilege was invoked anywhere in the executive branch in response to a Congressional request for information. These facts speak not of a closed Administration but of one that is pledged to openness and is proud to stand on its record.

Requests for Congressional appearances by members of the President's personal staff present a different situation and raise different considerations. Such requests have been relatively infrequent through the years, and in past administrations they have been routinely declined. I have followed that same tradition in my Administration, and I intend to continue it during the remainder of my term.

(OVER)

Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.

This tradition rests on more than Constitutional doctrine: it is also a practical necessity. To insure the effective discharge of the executive responsibility, a President must be able to place absolute confidence in the advice and assistance offered by the members of his staff. And in the performance of their duties for the President, those staff members must not be inhibited by the possibility that their advice and assistance will ever become a matter of public debate, either during their tenure in Government or at a later date. Otherwise, the candor with which advice is rendered and the quality of such assistance will inevitably be compromised and weakened. What is at stake, therefore, is not simply a question of confidentiality but the integrity of the decision-making process at the very highest levels of our Government.

The considerations I have just outlined have been and must be recognized in other fields, in and out of government. A law clerk, for instance, is not subject to interrogation about the factors or discussions that preceded a decision of the judge.

For these reasons, just as I shall not invoke executive privilege lightly, I shall also look to the Congress to continue this proper tradition in asking for executive branch testimony only from the officers properly constituted to provide the information sought, and only when the eliciting of such testimony will serve a genuine legislative purpose.

As I stated in my press conference on January 31, the question of whether circumstances warrant the exercise of executive privilege should be determined on a case-by-case basis. In making such decisions, I shall rely on the following guidelines:

(1). In the case of a department or agency, every official shall comply with a reasonable request for an appearance before the Congress, provided that the performance of the duties of his office will not be seriously impaired thereby. If the official believes that a Congressional request for a particular document or for testimony on a particular point raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969. Thus, executive privilege will not be invoked until the compelling need for its exercise has been clearly demonstrated and the request has been approved first by the Attorney General and then by the President.

(2). A Cabinet officer or any other Government official who also holds a position as a member of the President's personal staff shall comply with any reasonable request to testify in his non-White House capacity, provided that the performance of his duties will not be seriously impaired thereby. If the official believes that the request raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969.

(3). A member or former member of the President's personal staff normally shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress. At the same time, it will continue to be my policy to provide all necessary and relevant information through informal contacts between my present staff and committees of the Congress in ways which preserve intact the Constitutional separation of the branches.

# # #

THE WHITE HOUSE

WASHINGTON

March 24, 1969

MEMORANDUM FOR THE HEADS OF

EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: 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.

GC 55-2

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

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.

JOHN A. BLATNIK, MINN.
TORBERT H. MACDONALD, MASS.
CORNELIUS E. GALLAGHER, N.J.

EIGHTY-NINTH 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

CAPITOL 5-3741

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

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.

JOHN E. MOSS, CALIF., CHAIRMAN
WHITE M. FASCELL, FLA.

CLARE E. HOFFMAN, MICH.

CAPITOL 4-3121
EXTENSION 3121

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 214, 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

Executive Privilege

Feb. 17, 1975

To: Dudley Chapman

From: Phil Buchen

Materials on Executive Privilege returned, along with the book by Raoul Berger.

THE WHITE HOUSE

WASHINGTON

February 13, 1975

NOTE FOR: PHIL BUCHEN

FROM: DUDLEY CHAPMAN DC

SUBJECT: Executive Privilege Materials

Attached are:

(1) President Ford's statement before the Hungate Subcommittee;

(2) A copy of my note to Phil Areeda on this subject;

(3) Raoul Berger's book on Executive Privilege;

(4) The Supreme Court Opinion in United States v. Nixon;

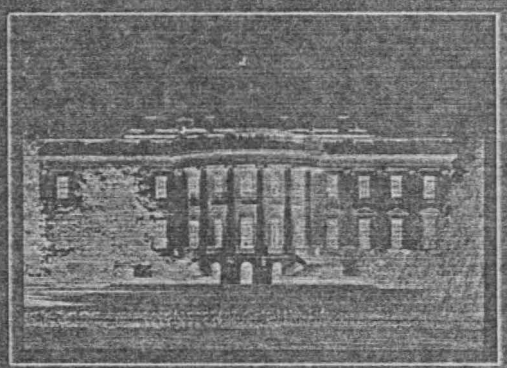
(5) A recent article by Archibald Cox;

(6) An article on legislative privilege which provides some interesting comparisons (see my note attached); and

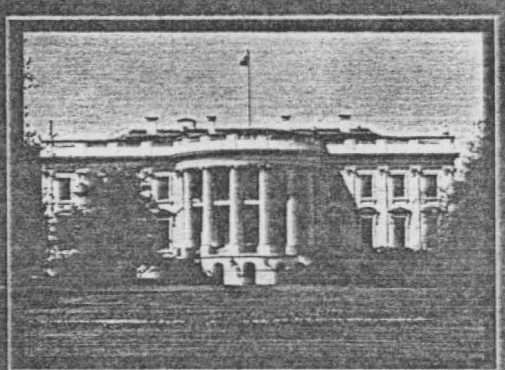
(7) A notebook I have collected containing some older materials.

Raoul Berger

Executive Privilege:



A Constitutional Myth



Also by Raoul Berger

Impeachment: The Constitutional Problems

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1478

Alfred A. Knopf, Inc.,
Victor L. Marchetti,
John D. Marks,

Appellees,

versus

William Colby, as Director of Central Intelligence of the United States; and Henry Kissenger, as Secretary of State of the United States,

Appellants.

No. 74-1479

Alfred A. Knopf, Inc.,
Victor L. Marchetti,
John D. Marks,

Appellants,

versus

William Colby, as Director of Central Intelligence of the United States; and Henry Kissinger, as Secretary of State of the United States,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued June 3, 1974. Decided February 7, 1975

Before Haynsworth, Chief Judge and Winter and Craven, Circuit Judges.

Floyd Abrams (Eugene R. Scheiman, Loretta A. Preska and Cahill Gordon and Reindel on brief) for Appellant, Alfred A. Knopf, Inc., in No. 74-1479 and for Appellee, Alfred A. Knopf, Inc., in No. 74-1478; Melvin L. Wulf (John H. F. Shattuck, American Civil Liberties Union Foundation, on brief) for Appellants Marchetti and Marks in No. 74-1479, and for Appellees Marchetti and Marks in No. 74-1478; Irwin Goldbloom, Attorney, United States Department of Justice, (Carla A. Hills, Assistant Attorney General, Brian P. Gettings, United States Attorney, David J. Anderson and Raymond D. Battocchi, Attorneys, United States Department of Justice, John S. Warner, General Counsel, Lawrence R. Houston and John K. Greeney, Attorneys, Central Intelligence Agency, Mark B. Feldman, Deputy Legal Adviser, and K. Eugene Malmborg, Assistant Legal Adviser, Department of State, on brief) for Appellants in No. 74-1478 and for Appellees in No. 74-1479).

HAYNSWORTH, CHIEF JUDGE:

This is a sequel to United States v. Marchetti, 4 Cir. 466 F.2d 1309 in which, because of a secrecy agreement he had executed, we upheld an injunction prohibiting Marchetti's public disclosure of classified information acquired by him during the course of his employment by the Central Intelligence Agency and requiring him to submit any material he intended to publish to that agency for its review in advance of publication.

After our earlier decision, Marchetti, in collaboration with John Marks, a former employee of the State Department who had bound himself not to disclose classified information acquired by him during the course of his employment, prepared the manuscript of a book which the plaintiff, Alfred A. Knopf, Inc. intended to publish. After review in the CIA, a letter was written specifying the deletion of 339 items said to contain classified information. Later, after a conference with Marchetti and his lawyer, the CIA agreed to release 114 of the deletions. Later another 29 deletion items were released and still later another 57, leaving 168 deletion items upon which the CIA stood fast.

This action was filed by Alfred A. Knopf, Inc., Marchetti and Marks in the United States District Court for the Southern District of New York, seeking an order which would permit the publication of the then remaining deletion items. On motion of the defendants, the action was transferred to the Eastern District of Virginia where the Marchetti case had been tried and where it could come before the same judge who had tried Marchetti.

I.

At the trial, the four deputy directors of the CIA were presented as witnesses. Collectively they covered all of the 168 deletion items, each covering certain of them. Each testified, in effect, that the deletion item revealed information which was classified, that the information was classified from the inception of the program or from the time of the witness' first contact with it and was still classified. With respect to most, if not all of the items, however, the witness was unable to say who classified the information, for Executive Order No. 10501[1], in effect in the relevant times, did not require the classifying officer to record his identity, as Executive Order No. 11652[2] now does. Nor were they certain

1. November 10, 1953, 18 Fed. Reg. 7049.

2. March 10, 1972 as amended April 26, 1973, 38 Fed. Reg. 10245.

about when a particular matter had been classified except certain of the items with respect to which the witness stated the information had been classified from the beginning or from the time of his first contact with it.

These witnesses were questioned about the manner in which they determined that particular items had been classified. Typically, the response was that the witness read the Marchetti-Marks manuscript, marked passages which he thought revealed classified information and then called upon members of the staff for research assistance. The witness indicated that he wished to be certain of his grounds and to make no mistake. The witness then reviewed classified documents produced by the staff, and, after consultation with staff assistants, made his determination or judgment that particular information was, indeed, classified. There were indications that the witness considered his own recollection, institutional history, reports of staff members and classified documents in deciding whether or not particular information was classified.

The District Judge was persuaded that information, which might be sensitive to our national defense or to our relations with foreign nations, is not classified until a classifying officer makes a conscious determination that the governmental interest in secrecy outweighs a general policy of disclosure and applies a label of "Top Secret" or "Secret" or "Confidential" to the information in question. The testimony of the deputy directors, with its imprecision and the

generality of the considerations which they said underlaid their determinations seemed insufficient to persuade him that undisclosed individuals had gone through such conscious processes during the time of Marchetti's employment. It seemed to him that the deputy directors were making ad hoc classifications of material after having read the Marchetti-Marks manuscript, though he recognized that the deputy directors denied that they were doing any such thing.

Late in the trial, the United States offered a batch of documents, most of them bearing "Top Secret" stamps and collectively containing information relating to the deletion items. Some of these documents dealt with the actual classification of certain information. When a document, for instance, specified that certain information relating to a particular program should be classified as "Top Secret" while other information respecting that program should be classified as "Secret", the Judge accepted the document as showing that someone had gone through the conscious process of deciding whether, and in what degree, particular information should be classified. On this basis the District Judge found that the information embodied in 26 of the 168 items was classified during the time of Marchetti's employment. As to the remainder of the 168 deletion items, however, he found the submitted documents of no persuasive value. He was of that opinion because he had been told that a document properly classified as "Top Secret" may contain some bits of information which are not classifiable at all. His difficulty was compounded by the

fact that many of the documents marked "Top Secret" had been reproduced with all of their contents blocked out except for one paragraph, sentence or message relating to a deletion item. He reasoned that only the classifying officer could say what information in a particular document led him to classify the entire document "Top Secret" and that a limited disclosure of something extracted from a document classified as "Top Secret" did not establish classification of that information as "Top Secret" or even as being classified in any degree. Recognizing that the deputy directors, at the very least, had testified that the disclosed information was classifiable, he still was of the view that the testimony and the documents in combination did not prove that the disclosed classifiable information had in fact been classified by the unidentified and possibly unidentifiable classifying officer. Though recognizing that some or much of the disclosed information, revealed in the deletion items, was "sensitive", the District Judge concluded that the United States had not shown that the remaining 142 deletion items had been classified. He felt, in short, since reasonableness of classification was proscribed, as we held in Marchetti, appropriate recognition of the first amendment rights of Marchetti and of Marks required strict proof of classification which he found wanting under the standards developed at the trial.

When writing in Marchetti, we did not foresee the problems as they developed in the district court. We had not envisioned any problem of identifying classified information embodied in a document produced from the files of such an agency as the CIA and marked "Top Secret", "Secret" or "Confidential". Of course, a document containing the results of tests of highly secret equipment may contain an incidental reference to the weather on a given day at a designated place in the United States, but we foresaw no particular problem in separating the grain from such chaff. With our strictures against inquiry into the reasonableness of any classification, however, we perhaps misled the District Judge into the imposition upon the United States of an unreasonable and improper burden of proof of classification.

When the earlier case was before us, we had supposed that all information in a classified document in the possession of the CIA, except rather obvious chaff of the sort we have mentioned, should be held to be classified and not subject to disclosure. We were influenced in substantial part by the principle that executive decisions respecting the classifying of information are not subject to judicial review. See, e.g., EPA v. Mink, 410 U.S. 73 (1972). The October 1974 amendments [3] to the Freedom of Information Act introduced new considerations.

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3. Pub. L. No. 93-502, 88 Stat. 1561.

Title 5, Section 552 (b)(1) of the United States Code has been amended to provide for non-disclosure of matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." Furthermore, a new subsection was introduced into Section 552(a), paragraph (B) of the new subsection now numbered (4) specifically providing for judicial review de novo and specifically providing that the judge "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." The legislative history makes it clear that the Congress intended to overthrow the result of Mink. See, e.g., Conference Report No. 93-1200, U. S. Code Cong. & Admin. News, 93rd Cong., 2d Sess. 6221 at 6223, 6226. That history also discloses a congressional intention that the judge need not inspect the document in camera or require its production. He may act on the basis of testimony or affidavits but, in appropriate cases, he now has a right by virtue of the statute to require production of the document for his inspection in camera.

Since the Freedom of Information Act as now amended clearly provides for judicial review of questions of classifiability, any citizen now can compel the production of information actually classified if its classification was not authorized by the Executive Order.[4] These plaintiffs should not be denied the right to publish information which any citizen could compel the CIA to produce and, after production, could publish. We thus move to the conclusion that the deletion items should be suppressed only if they are found both to be classified and classifiable under the Executive Order.

We observed in Marchetti that the Congress has required the Director of the CIA to protect intelligence sources and methods from unauthorized disclosure.[5] In keeping with the Congressional directive, Executive Order No. 11652, Classification and Declassification of National Security Information and Material, as amended by Executive Order No. 11714[6] provides in § (1)(A) that information shall be

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4. §552(b)(3) was not amended. It exempts matters "specifically exempted from disclosure by statute " The statutory direction to the Director to protect intelligence sources and methods from unauthorized disclosure may be such a statute, but such information is also clearly authorized to be classified by the Executive order. The problems that will arise therefore will be concerned with the application of (b)(1) rather than (b)(3).

5. 50 U.S.C.A. §403(d)(3). See Marchetti, 466 F.2d 1309 at 1316.

6. 38 Fed. Reg. 10245.

classified "Top Secret" if its disclosure would disrupt "foreign relations vitally affecting the national security," would compromise "vital national defense plans * * * communications intelligence systems," would reveal "sensitive intelligence operations" or disclose "scientific or technological developments vital to national security." Subparagraph B provides that information shall be classified as "Secret" if it reveals "significant military plans or intelligence operations." This would encompass any significant intelligence operations not otherwise classifiable under Subparagraph A as "Top Secret." Subparagraph C requires the classification as "Confidential" of all other information the unauthorized disclosure of which might reasonably be expected to damage the national security.

The author of this opinion has examined some, but not all, of the 142 deletion items. The information in at least some of them does relate to sensitive intelligence operations and to scientific and technological developments useful, if not vital, to national security. Such items would seem clearly to be classifiable under the authorization of the Executive Order; others may relate to intelligence sources or methods, the protection of which Congress has decreed in the National Security Act of 1947[7] and classifiable under the Executive Order.

7. 50 U.S.C.A. § 403(d)(3).

The statutory requirement is not directed to any procedure. It simply requires protection of intelligence sources and methods against unauthorized disclosure, and provision of such protection may require a variety of activity. One obviously appropriate tool in providing that protection, however, is a system of classification required under a succession of Executive orders. Under the statute and those orders, a classifying officer is required to classify a document containing classifiable information and to determine the degree under the guidelines of the current Executive order. Under Executive Order No. 10501, he performed his duty by affixing the appropriate stamp, "Top Secret", "Secret" or "Confidential."

There is a presumption of regularity in the performance by a public official of his public duty. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U.S. at 14, 15. That presumption leaves no room for speculation that information which the district court can recognize as proper for top secret classification was not classified at all by the official who placed the "Top Secret" legend on the document. This is so whether or not the document contains or may contain other information which should have been classified in the same degree. Under the prevailing practice of classifying a document in accordance with the most sensitive

information it contains, the presumption, in the absence of affirmative proof to the contrary, requires the conclusion that all information within it, required by the Executive Order to be classified, was classified when the legend was affixed to the document, even though the particular bit of relevant information, alone, may be properly classified only in a lower degree than the document's classification. In short, the government was required to show no more than that each deletion item disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp.

The presumption dispenses with another problem which bothered the District Judge, the time of classification. He took the view that the government must show that the document was classified before Marchetti left the service. We are dealing, however, with information acquired by Marchetti during his employment by the CIA. It simply cannot be supposed that no one performed the duty of classification until after his employment had terminated.

It would have been nice, of course, if, in each instance, the government could have identified and produced the classifying officer who, from other records or extra-ordinary memory, could have testified that he classified the document on a certain day and that, in doing so, he consciously intended to classify the relevant item of information. That was a practical impossibility, but, in light of the presumption,

unnecessary. The office of the presumption, however, is supported by the testimony of the deputy directors that information was classified from the beginning of the operation to which it relates or from the time the Agency first received it.

Nor was it necessary for the government to disclose to lawyers, judges, court reporters, expert witnesses and others, perhaps, sensitive but irrelevant information in a classified document in order to prove that a particular item of information within it had been classified. It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have. The national interest requires that the government withhold or delete unrelated items of sensitive information, as it did, in the absence of compelling necessity. It is enough, as we have said, that the particular item of information is classifiable and is shown to have been embodied in a classified document. This approach is consistent with the Freedom of Information Act which, as we have noticed, provides the judge only with discretionary authority even to require production of the document for his in camera inspection; he may find the information both classified and classifiable on the basis of testimony or affidavits.

It is said, however, that some classifiable information is not classified. Reference is made to disclosure of this country's development of Multiple Independently Targeted Reentry Vehicles and the release of information about North Vietnamese forces operating in South Vietnam, including the identity of units, their strength and the routes they took to reach their operating areas. These disclosures, however, were the result of high level executive decisions that disclosure was in the public interest, to counter popular and congressional pressure for more missiles, in the first instance, and, in the second instance, to bolster domestic support for our own military effort in South Vietnam. They are instances of declassification by official public disclosure. There has been no such disclosure of any of the information with which we are concerned, and there is nothing in the record to suggest that any of this classified information has, otherwise, been officially declassified. In the absence of declassification and of any countervailing evidence, the testimony of the deputy directors and the presumption of regularity compel a finding that information properly classified under the guidelines of the applicable Executive Order and embodied in a document bearing a classification stamp was classified at the time the information first came into the possession of the Agency or Department.

Moreover, if the documents in evidence, the testimony of the deputy directors and the presumptions compel a judicial finding that the material is both classifiable and

classified, the plaintiffs are not without an avenue of relief within the Executive Branch. Under §7 of Executive Order 11,652, the National Security Council was given the responsibility of monitoring the implementation of the Order. To assist the Council, an Interagency Classification Review Committee was created. It is authorized to consider and act upon suggestions and complaint from persons within and without government. Composed of representatives of the Departments of State, Defense, and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the Staff of the Security Council, it would not be expected to serve any parochial interest of a particular agency unless it coincided with the national interest. The members of the Review Committee, far more than any judge, have the background for making classification and declassification decisions. If, therefore, any of the items in dispute are thought to be properly declassifiable now, there appears to be an available administrative remedy which is far more effective than any the judiciary may provide, which can function without threat to the national security and which can act within the Executive's traditional sphere of autonomy.

For such reasons, we conclude that the burden of proof imposed upon the defendants to establish classification was far too stringent and that it is appropriate to vacate the judgment and remand for reconsideration and fresh findings imposing a burden of proof consistent with this opinion and including the additional element of classifiability.

II.

We decline to modify our previous holding that the First Amendment is no bar against an injunction forbidding the disclosure of classifiable information within the guidelines of the Executive Orders when (1) the classified information was acquired, during the course of his employment, by an employee of a United States agency or department in which such information is handled and (2) its disclosure would violate a solemn agreement made by the employee at the commencement of his employment. With respect to such information, by his execution of the secrecy agreement and his entry into the confidential employment relationship, he effectively relinquished his First Amendment rights.

III.

The District Judge properly held that classified information obtained by the CIA or the State Department was not in the public domain unless there had been official disclosure of it. This we strongly intimated in our earlier opinion. Rumors and speculations circulate and sometimes get into print. It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so. The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability, but it would not be inclined to discredit reports of sensitive information revealed by an official of the United

States in a position to know of what he spoke. The problem is highlighted and the appropriateness of the answer we reach emphasized by the fact that Marks, on Fifth Amendment grounds, on five different occasions declined to answer whether he was the undisclosed source of information contained in five magazine articles offered by the plaintiffs to show that the information was in the public domain. A public official in a confidential relationship surely may not leak information in violation of the confidence reposed in him and use the resulting publication as legitimating his own subsequent open and public disclosure of the same information. The same rule must apply though there be no basis for suspicion that one of the plaintiffs was the undisclosed source of the previously published information, for security of all official secrets would break down if speculative and unattributed reports were held to have removed all of their protection from them.

It is true that others may republish previously published material, but such republication by strangers to it lends no additional credence to it. Marchetti and Marks are quite different, for their republication of the material would lend credence to it, and, unlike strangers referring to earlier unattributed reports, they are bound by formal agreements not to disclose such information.

One may imagine situations in which information has been so widely circulated and is so generally believed to be true, that confirmation by one in a position to know

would add nothing to its weight. However, appraisals of such situations by the judiciary would present a host of problems and obstacles. It may readily be done by the Inter-agency Classification Review Committee. If a particular item is held by the court to be not in the public domain because not officially disclosed, the Review Committee may still find that it has so far entered the public domain that it should be declassified. As long as it remains classified, however, there should be no further judicial inquiry.

IV.

On the basis of what the District Judge described as "an extremely subjective judgment" he found that seven of the deletion items contained information which was either learned by them outside of their employment or was learned both during their employment and afterwards and would have been learned afterwards "in any event." He concluded that they could publish the information contained in those items.

The agreement, of course, covers only information learned by them during their employment and in consequence of it. It does not cover information gathered by them outside of their employment or after its termination. They may not publish information first received by them during the course of their employment even though they later learned of it by communications which did not place the information in the

public domain. In a sense, they may be said to have later learned all of the information contained in articles and other materials offered by them in an attempt to show that certain information was in the public domain, but that is not the kind of knowledge acquisition which places the material beyond the reach of the secrecy agreements. Information later received as a consequence of the indiscretion of overly trusting former associates is in the same category. In short, the individuals bound by the secrecy agreements may not disclose information, still classified, learned by them during their employments regardless of what they may learn or might learn thereafter.

Moreover, neither should be heard to say that he did not learn of information during the course of his employment if the information was in the Agency and he had access to it. At least, a substantial presumption should be raised against him in those circumstances. With whatever apparent sincerety a fallible recollection may be expressed, one in Marchetti's high position in the CIA should be presumed to have been informed of all important items of information to which he had access.

On remand the District Judge should review these general findings in light of this opinion, authorizing disclosure of those items of information only which first came to them unofficially after the termination of their employment.

V.

The judgment is affirmed in part, vacated in part and remanded for such further proceedings as may be necessary in accordance with this opinion.

AFFIRMED IN PART;
VACATED IN PART;
REMANDED.

THE WHITE HOUSE

WASHINGTON

2-6-75

PHIL:

Attached is an excerpt on Executive Privilege from an earlier memo.

Ken

demonstrates a responsible and constitutional approach of condemning only that property necessary for the public use.

II. EXECUTIVE PRIVILEGE

A. Executive Privilege as a Constitutional Right.

In United States v. Nixon, ____ U. S. ____ (1974) 42 U. S. L. W. 5237, 5244 (decided July 24, 1974), the Supreme Court unanimously recognized the existence of a constitutionally based Executive Privilege.

Executive privilege may be considered to have three aspects -- first, with reference to a judicial demand for information or materials; second, with reference to a Congressional demand; and third, with reference to the public at large. Further, the judicial demand aspect may be separated into cases where the demand is for evidence relevant to a criminal trial, e.g., United States v. Nixon, supra, and cases where the demand is merely for discovery material in a civil case, e.g., Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F. 2d 788 (D. C. Cir. 1971); Nader v. Butz, 60 F. R. D. 381 (D. D. C. 1973), appeal pending. The thrust of Nixon was that in a criminal case if the evidence was indeed determined to be relevant after in camera inspection, then the privilege would be defeated. In Seaborg, however, a civil case,

the in camera inspection was merely to determine if the privilege was rightfully claimed, in which case the material would remain confidential and the privilege would be upheld.

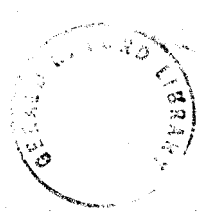
Congressional demands for material also may fall into two categories. The first would be a normal committee request, demand, or subpoena for material which may be rejected on the basis of Executive Privilege where it is deemed by the President that the production of such material would be detrimental to the functioning of the Executive Branch. This at least has been the consistent practice by practically every administration and acceded to by Congress. This should be contrasted with a demand for material pursuant to an impeachment inquiry, which some presidents have acknowledged would require production of any and all executive material. See e.g., Washington's statement, 5 Annals of Congress 710-12 (1796). Finally, there is the demand by statute for general public access to information. This last is the situation presented by S. 4016.

The analysis of the different situations in which Executive Privilege may be invoked and its differing weight and treatment is instructive, for it, not surprisingly, reveals that the more particularized and the more compelling the demand for material is, the less weight Executive Privilege has. Thus, in Nixon, the Court acknowledged that

a general claim of privilege depends "on the broad, undifferentiated claim of public interest in the confidentiality of such conversations. . .," 42 U.S.L.W. at 5244, and it was for that reason that the privilege would fail against a showing of particularized need in a criminal trial. The importance of that public interest in confidentiality, nevertheless, was emphasized. "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. /citing cases/." Id. at 5245. The conclusion, therefore, is clear that absent such a particularized need for evidence in a criminal trial, the public interest in fostering free and frank discussion, by protecting it with confidentiality, would serve to sustain a claim of Executive Privilege. The device of in camera inspection reflects this understanding. Yet S. 4016 would jettison this acknowledged public interest and authorize general public access to all presidential conversations without any showing of need for that access, particularized or otherwise.

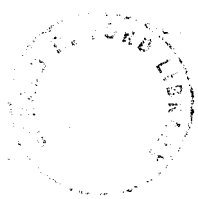
B. Disclosure of Privileged Material.

S. 4016 contemplates that former President Nixon's presidential tapes and materials shall be made available "for use in any judicial proceeding or otherwise subject to court subpoena or other legal process." (Section 3(b)). Moreover, Section 6 of the Bill directs the



Administrator to issue regulations governing access to the tapes so as to authorize him to allow general public access to each and every Presidential conversation recorded between 1969 and 1974 with but three restrictions -- if national security is involved, if the Special Prosecutor determines that an individual's right to a fair and impartial trial will be prejudiced, or if a court determines that a person's right to a fair and impartial trial would be prejudiced.

The scheme envisaged by S. 4016, therefore, would in effect reverse both United States v. Nixon, supra, and Committee for Nuclear Responsibility, Inc. v. Seaborg, supra. This is so first because Section 3(b) directs that materials simply "shall . . . be made available for use in any judicial proceeding. . . . " No provision is made for in camera inspection which the Court required in both Nixon and Seaborg. In fact the clear intent of the language is to do away with that judicially derived requirement. The decision in Nixon, however, is constitutionally based, and the requirement of an in camera inspection is the result of a careful balancing of competing constitutional interests. 42 U.S.L.W. at 5244-45. This careful balancing is destroyed by S. 4016, and instead all material subpoenaed or otherwise shall be made available. Not only does S. 4016 eliminate the constitutional balancing the Supreme Court required in criminal cases, but it also repudiates the decision in Seaborg, a civil case.



In Seaborg the District of Columbia Circuit acknowledged the importance of confidentiality in contributing substantially to the effectiveness of government decision-making. 463 F. 2d at 792. Thus, a demand for materials in discovery proceedings would not defeat Executive Privilege, rather the court would inspect the material to see if the privilege was rightfully invoked. If it was, then the material would not be produced, even if relevant. See Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F. 2d 796, 799 (D. C. Cir. 1971). Thus, S. 4016 not only eliminates the need for in camera inspection, but more importantly it overrules the holding that material for which Executive Privilege is rightfully claimed is indeed privileged from production in a civil case. Again S. 4016 attempts to overrule a judicial, constitutional decision by statute.

What S. 4016 does to violate Executive Privilege vis-a-vis judicial demands for presidential materials, however, is minor compared to its provision for general public access to all the materials except national security information. To give authority to the Administrator to allow general public access would be to negate Executive Pribilege altogether with no concomitant public interest being served in its stead, rather catering only to the gross curiosity

of the public. To open all the most personal aspects of any person's life to the public for no legitimate reason is a violation of privacy if nothing else, but when that person is also a President it is a most virulent attack on the Separation of Powers.

In United States v. Nixon, supra, the Supreme Court unanimously held that presidential communications are "presumptively privileged."

* * *

> "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. 42 U.S.L.W. at 5245.

* * *

The effect of the presumption is to give the privilege effect until it is challenged by a particularized demand for certain materials. Only then is the presumption overcome. S. 4016's general authority for public access, however, ignores the presumption and provides no opportunity for the invocation of the privilege. In short, the

constitutionally based privilege, acknowledged by the Supreme Court and given effect by lower courts, is to be eliminated by a mere statute. Because executive privilege is constitutionally based, however, it is not subject to repeal or restriction by statutes. Rather statutes must themselves conform to the constitutional right of Executive Privilege.

Even commentators who have expressed a very circumscribed view of Executive Privilege, for example, Raoul Berger, have never suggested that Congress has the power to make each and every presidential paper and conversation public, willy-nilly without regard to the confidences upon which many such conversations and papers were based. Rather, these commentators have merely expressed the opinion that calls by Congress for particular materials necessary for its consideration of legislation or by the judiciary for relevant evidence have a higher public interest than the executive's generalized need for confidential communications. This weighing of the conflicting public interests is precisely the approach that was utilized in Senate Select Committee v. Nixon, 370 F. Supp. 521, 522 (D.D.C. 1974). See also Nixon v. Sirica, 487 F. 2d 700, 716-18 (D.C. Cir. 1973). And it was recognized in Senate Select Committee v. Nixon, 370 F. Supp. at 524, that even Congress' right to demand information by subpoena is limited

to proceedings in aid of its legislative function. The conclusion to be drawn, therefore, from both the cases and the commentators is that there is no authority for Congress to require the publication of all presidential papers and conversations. Such an action would violate the Doctrine of Separation of Powers and render the President but a servant of Congress.

The United States Court of Appeals for the District of Columbia circuit recognized this full well in Nixon v. Sirica, 487 F. 2d at 715;

* * *

> We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch.

* * *

Such could be the result of S. 4016, and for that reason it is of extremely dubious Constitutional validity.

C. Former Presidents' Rights to Invoke Executive Privilege.

The question may be raised whether a former President has the authority to invoke Executive Privilege for materials generated during his presidency, but the rationale behind Executive Privilege and the interest it serves compels the answer that a former President may indeed invoke Executive Privilege in the same manner as a sitting

President. This is so because the public interest in the confidentiality of executive discussions requires that those discussions remain confidential indefinitely, not to be publicized as soon as the President leaves office, for if these discussions were to become public after the President leaves office, future discussions with future Presidents would ever after be chilled by the knowledge that within at least eight years those discussions could be public. Viewed another way, the invocation of Executive Privilege is not so much to protect the content of the particular discussions demanded as it is to protect the expectation of confidentiality which enables future discussions to be free and frank. That expectation of confidentiality would be destroyed, and the public interest which it serves with it, if the mere leaving of office would destroy that confidentiality. As early as 1846 this principle was recognized and honored by President Polk. Richardson, Messages and Papers of the Presidents, Vol. IV, 433-34.

Harry S. Truman in 1953, having returned to private life, was subpoenaed by a House committee to testify concerning matters that transpired while he was in office. Refusing by letter, he explained that to subject former Presidents to inquiries into their acts while President would violate the separation of powers.

* * *

> It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occuring while he is President.
>
> The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

* * *

The House committee accepted the letter and did not attempt to enforce the subpoena, indicating perhaps its concurrence with President Truman's claim of privilege.

D. Custody as an Element of the Privilege.

The above discussion has dealt with the constitutional violation of Executive Privilege committed by the disclosure provisions of S. 4016. In addition, however, serious constitutional questions are raised by the mere custody provisions set forth in the bill. That is, while it is clear that Executive Privilege limits the ability of Congress or courts to <u>disclose</u> presidential materials, it may also be that Executive Privilege extends to attempts merely to wrest custody of privileged materials from a President or former President even with supposed safeguards against their disclosure.

There are no cases on point or examples of similar actions to answer this question, but the policy considerations are telling to support a claim that privileged materials cannot even be wrested from the custody of the President unless and until a court has determined that they may at least be examined in camera.

The policy served by Executive Privilege is advanced most effectively by maintaining the custody of the privileged materials in the person entrusted with the right of asserting that privilege, for without custody he is unable to insure that attempts to gain access to privileged material will be resisted or tested by the courts. Thus, separation of custody from the person responsible for safeguarding the confidentiality of the materials separates the function from the responsibility for it in violation of the most elementary laws of management efficiency. The President or former President is the one individual with the interest in assuring continuing confidentiality; the Administrator has no such interest and therefore is not the proper person to maintain custody. Moreover, the President is the person with the knowledge of what needs to be maintained as confidential and what not.

All these considerations suggest that the President or former President should retain custody of the privileged materials, and that

a statute which wrests this privileged material completely from his control violates the Separation of Powers by removing executive material from the executive and by undermining the privilege by separating the custodian of the materials from the defender of the privilege.

III. RIGHT OF PRIVACY

Section 6 of S. 4016 presents another constitutional issue. It would result in an abridgement of the constitutionally guaranteed right of privacy with respect to all persons whose conversations were the subject of the tape recordings to be condemned and made public by the bill.

Section 6 of the bill gives to the Administrator authority to release the tape recordings to the public subject to only three restrictions. These restrictions are: (1) "information relating to the Nation's security shall not be disclosed" (section 6(1)); (2) there shall be no release if "the Office of Watergate Special Prosecution Force certifies in writing that such disclosure or access is likely to impair or prejudice an individual's right to a fair and impartial trial" (section 6(3)(A)); and (3) there shall be no release "if a court of competent jurisdiction determines that such disclosure or access is likely to impair an individual's right to a fair and impartial trial" (section 6(3)(B)).

[ca. 11/1975]

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

cys went to Wheaton Byers + Jim Wilderotter

MEMORANDUM

Re: Privilege of the Executive Branch to Withhold Information from Congressional Committees

Several agencies are exploring the possibility of refusing to provide the Senate and House Select Committees access to documents that are considered highly sensitive. While an informal agreement has been reached with the House Select Committee to govern the publication or de-classification of Executive branch documents -- an agreement to which the Senate Select Committee also apparently subscribes -- no general agreement has been adopted to determine what documents or information may be withheld from the Committees. Each agency, of course, has attempted to fashion some arrangements with the Committees to protect the sensitivity of certain information, e.g., by excising especially sensitive information or by offering a briefing in lieu of furnishing the actual documents. There is no assurance, however, that the Committees will not press further. The only basis for withholding or denying access to especially sensitive documents is to assert a privilege.

The issue of privilege could also arise once the documents have been furnished since, under the agreement, if a Committee desires to make a document public and the President certifies that the interests of the government require that the document be kept in confidence, the document must be returned. The Committee could then assert their unbridled claim to the document by taking their case to the courts. The defense of the Executive branch would be that the document is covered by a privilege from disclosure. It should be pointed out that there is some slight risk the agreement to return the document under such circumstances might be treated by the courts as an effort -- perhaps unsuccessful -- to create a case or controversy. It is also possible that a committee, in spite of the agreement, might not return the document and might proceed to (1) publish it, which would leave the Executive without an effective remedy or, (2) announce that it was going to publish, which, in my view, would make a difficult case for the

Executive to succeed in getting court action.

It is important that we approach this assertion of privilege in a systematic fashion, both in order to enable your decisions to be more consistent and also in order to provide some guidance to the agencies as to which documents they may reasonably submit for your consideration. The following discussion is intended to facilitate the construction of a framework for future actions.

Executive privilege has traditionally been asserted with respect to four general categories of information: defense secrets, foreign affairs secrets, materials relating to criminal investigations, and internal advice-giving within the Executive branch. The third category, criminal investigative materials, is not generally involved in the present inquiry. We have attempted in the table that follows this memorandum to establish for the other three categories what seems to us an appropriate scale of importance, on the basis of representative documents provided by various agencies. Documents falling into some of the categories are furnished as examples.

Several caveats are in order:

(1) You should be aware that your decision as to the level at which executive privilege will be asserted at this time with respect to this particular Congressional inquiry does not commit you or the Executive branch to a determination that the privilege may be asserted in the future only at that level of importance. Obviously, in any situation the validity of invoking the privilege depends not merely upon the information to be protected but also upon the need and justification for the request. The present Congressional inquiry is of an extraordinary sort, which cannot feasibly be conducted without a large amount of confidential information, and it is undoubtedly appropriate in this case to go far beyond what would normally be presented to other committees of the Congress.

(2) A distinctive feature of the present situation is the fact that your failure to assert privilege at the initial stage will not necessarily result in public disclosure of the information in question. As noted above, all documents are being provided on the agreed-upon condition that they will not be disclosed beyond the Committees if we object. Thus, initially the decision is merely whether to make it available to the Committees; not whether the information should be furnished to the public or even the rest of the Congress. Certain types of information which would be withheld from a Congressional com-

mittee that made no such non-disclosure commitment -- for example, material in category I (4) of the table covering present evaluations of U.S. and foreign military strength -- might well be provided in the present case. On the other hand, there may still be items which you would wish to withhold despite the non-disclosure commitment -- either because such commitment does not provide adequate assurance against leaks (for example, with respect to certain information in category I (2) covering highly secret weapons systems) or because disclosure to the Committee itself, even without further dissemination, would compromise the interest in question (for example, certain material in category II (5) covering information provided in confidence by a foreign government.

(3) The categories in the following table necessarily overlap, since two of them (defense information and foreign affairs information) are directed at the protection of content, while the third (advice-giving within the Executive branch) is directed at protection of a process. Thus, the third category is established without regard to any such differentiation of content. For example, a particular communication between a President and a foreign head of state (the highest level of privilege under category III) may involve highly sensitive military or foreign affairs secrets, or may be the most innocuous expression of social sentiment. You may wish to decide that all confidential communications between presidents and foreign heads of state must be kept confidential in order that the process of such exchanges may in the future remain uninhibited by any possibility of disclosure to the Congress. Or you may decide that such communications should be withheld in the present circumstances only if they also involve material which is sensitive for military or foreign affairs reasons (though the level of sensitivity may be lower than that required to warrant withholding the same information contained in a document from a low level of the Executive branch.)

(4) The levels in category III -- Confidentiality of Executive decision-making -- are established without regard to whether the particular communication in question compromises the integrity of the Executive branch decision-making process. The matter could be treated differently. That is to say, instead of protecting, for example, all advice-giving from Presidential advisers to the President (category III (2)) you might decide to protect only those communications that would positively embarrass particular individuals. This approach would significantly reduce the scope of privilege claimed under category III -- especially if names are deleted. One difficulty with a selective application of category III is that each isolated

withholding may appear to be an admission of something to hide. This concern can be obviated in large part by providing an explanation to the Committee as to the reason why the information is excised. (Indeed, whenever excisions are made, the nature of the information should be described to justify the excisions and thereby overcome any suspicions.) While it is also true that it may not suffice to preserve the frankness of NSC discussions merely to assure the participants that future Presidents will consider carefully what releases of information might embarrass them, participants cannot always be certain that other participants who are Executive officials will forever preserve the confidentiality of the discussions.

(5) Although it is believed that the categories listed under each of these topics in the following table are generally in descending order of importance with respect to the assertion of Executive privilege, it is undoubtedly true that most categories cover such a wide range of material that the less significant matters in a higher category may well be less important than the most significant in a lower. For example, the items which consist of present evaluations of U.S. and foreing military strength (category I (4)) may range all the way from an assessment of Russian missile capacity to an evaluation of the Indian navy.

(6) It is not necessary, or even desirable, to make a decision as to the assertion of Executive privilege on a document-wide basis. That is to say, in most cases, portions of a document can be released with deletions that will protect the sensitive information. This principle has its least force with respect to category III (although deletion of names of participants in meetings or authors of policy papers may be adequate), since it is there that the entire process, rather than individual items of information, must be protected.

It should be evident from the foregoing discussion that the present exercise cannot provide definitive answers with respect to the production or non-production of any particular documents. This decision can obviously be made only on a case-by-case basis, applying judgments relative to all of the categories set forth below.

CATEGORIES

I. Defense Secrets -- Information the disclosure of which would impair our national defense

(1) Present contingency military planning for war

(2) Highly secret weapons systems

(3) Highly sensitive intelligence sources and methods for collection of defense-type information

(4) Present evaluation of U.S. and foreign military strength

(5) Military action taken or planned in past international crises

(6) Past contingency military planning for war

(7) Past evaluations of U.S. and foreign military strength

II. Foreign Affairs Secrets -- Information the disclosure of which will impair our conduct of foreign relations

(1) Present secret military or intelligence arrangements with foreign nations

(2) Present interventions in domestic affairs of foreign nations

(3) Cooperation of present foreign political figures with U.S.

(4) Highly sensitive intelligence sources and methods for collection of foreign affairs-type information

(5) U.S. activity (whether known or unknown to the foreign nation) whose public disclosure would require retaliatory response

(6) Information of any sort provided in confidence by a foreign government

(7) Evaluation of present foreign leaders

(8) Assessment of present foreign intentions

(9) Past intervention in domestic affairs of foreign nations

(10) Past military or intelligence arrangements with foreign nations

(11) Cooperation of former foreign political figures with U.S.

III. Confidentiality of Executive Decision-Making -- Information the disclosure of which (anticipated by future officials) would impair the frankness and integrity of the consultative process

(1) Confidential communications between the President and foreign heads of state

(2) Intimate, spontaneous discussions between a President and his top advisers

(3) Written views of a President on policy matters

(4) Written advice by individual advisers to the President

(5) Institutional policy recommendations to the President

(6) Agenda items for meetings with the President

(7) Policy discussions among individual advisers to the President in preparation of their recommendations to him

(8) Policy views of lower-level officials presented to Presidential adviers in preparation for the latter's recommendations to the President

(9) Policy views of lower-level officials on issues not destined for Presidential decision

(10) Agenda items for meetings below Presidential level

(11) Background documents interpreting Presidential decisions

(12) Unsigned policy discussions

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 00695

Collection/Series/Folder ID No. ..... : 001900176
Reason for Withdrawal ..... : NS,National security restriction
Type of Material ..... : MEM,Memo(s)
Creator's Name ..... : Attorney General
Description ..... : re privilege of the Executive Branch to withhold information from congressional committees
Creation Date ..... : 1975
Volume (pages) ..... : 2
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III. Confidentiality of Executive Decision-Making -- information the disclosure of which (anticipated by future officials) would impair the frankness and integrity of the consultative process

(1) Confidential communications between the President and foreign heads of state (list of Presidential letters beginning in 1950)

(2) Intimate, spontaneous discussions between a President and his top advisers (minutes of NSC meeting April 20, 1963)

(3) Written views of a President on policy matters

(4) Written advice by individual advisers to the President (Roger Hilsman memorandum to President, dated 30 May 1962)

(5) Institutional policy recommendations to the President (OMB memorandum to President on 1976 budget decisions)

(6) Agenda items for meetings with the President (PFIAB Agenda items from 1961-1975)

(7) Policy discussions among individual advisers to the President in preparation of their recommendations to him (no example)

(8) Policy views of lower-level officials presented to Presidential advisers in preparation for the latter's recommendations to the President (Memo for the DCI, 21 Feb. '64, subject: Responsibilities in the para-military field)

(9) Policy views of lower-level officials on issues not destined for Presidential decisions (no example)

(10) Agenda items for meetings below Presidential level (PFIAB meeting of 3 October 1974)

(11) Background documents interpreting Presidential decisions (Minutes of meeting of 40 Committee, 8 June 1971)

(12) Unsigned policy discussions (NSC Staff Memo for 303 Committee, 5 April 1965)

FBI Relationships with the Senate and House Select Committees

Senate Select Committee

FBI relationships with the Senate Select Committee generally have been harmonious with responses to the Committee requests delivered promptly. When difficulties have occurred they have been overcome by negotiation and tolerance on both sides. Future difficulties that may be confronted and require similar resolution include the scope of any public hearing regarding electronic surveillance of foreign nationals or their agents and establishments.

House Select Committee

In the past the FBI has experienced the following difficulties with the House Select Committee:

(1) It has held public hearings which were orchestrated to present adverse views without an opportunity for prepared rebuttal, such as occurred on October 9, 1975, regarding electronic surveillance matters;

(2) It has demanded delivery of documents on unreasonably short notice considering the time necessary to locate and prepare for deliver the enormous quantity of documents called for;

(3) It has interviewed employees, former employees and confidential sources of the FBI without first advising the FBI of the proposed interview and has demanded the appearance of agents below the policy-making level.

A large number of documents dealing with electronic surveillance conducted without a warrant between 1970 and July 30, 1975, were furnished to the Committee on Friday, October 10, 1975. Certain excisions in these documents were made and it remains to be seen whether the Committee will accept the determinations made as to what types of information, e.g., identities of subjects who were monitored, should have been excised.

The overriding concern for the future is the need to establish an understanding on both sides of the policies to be followed by each in responding to the Committee's mandate. General agreement to specified operating procedures would alleviate the suspicion on the part of the Committee and the fear of Committee reesponsibility on the part of the FBI.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 24, 1974

MEMORANDUM FOR PHILLIP E. AREEDA, PHILIP W. BUCHEN,
WILLIAM E. CASSELMAN II, DUDLEY H. CHAPMAN
STANLEY EBNER, KENNETH A. LAZARUS,
BARRY ROTH, ANTONIN SCALIA, LEON ULMAN

SUBJECT: Executive Privilege

Attached is the House report accompanying H.R. 12462, a bill to amend the Freedom of Information Act to require that information be made available to Congress. There have been hearings on this bill as well as on related bills in the Senate. I have been told informally that the House Government Operations Committee has plans to move this bill early in the next Congress.

Robert P. Bedell

Robert P. Bedell
Assistant General Counsel

Attachment

THE WHITE HOUSE

WASHINGTON

December 13, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP BUCHEN

SUBJECT: Enrolled Bill: S. 4016 -- Nixon Papers and Tapes

Friday, December 20, is the last day for action on the referenced bill. This is to outline its anticipated impact and to furnish my views on an appropriate course of action.

Title I

1. General. Title I governs the possession, security and accessibility of tape recordings and other materials of former President Nixon. Three separate stages of implementation are involved.

2. First Stage. Upon enactment, the following provisions of Title I would have to be implemented.

   (a) Possession. The Administrator of GSA is directed to take complete control and possession of all tapes and other materials of the former President. [Sec. 101]

   (b) Preservation. None of the tapes or other materials could ever be destroyed absent affirmative congressional consent. [Sec. 102(a)]

   (c) Access. (i) The tapes and other materials would be made available immediately, subject to any rights, defenses or privileges which may be asserted for "subpoena or other legal process." Thus, the papers and tapes would be subject to subpoena by the Special Prosecutor, by Congress, by state law enforcement officials and by private parties in administrative, civil or criminal proceedings before either a state or Federal tribunal. Moreover, the materials would also be discoverable incident to a state or Federal court action or appropriate administrative proceeding. [Sec. 102(b)]

(ii) President Nixon or his designate would be denied any access to the tapes or other materials within the possession of GSA until the issuance of protective regulations as discussed below. (See 3 infra.) Although there is no express provision for notice from GSA to the former President regarding requests for access, this would be consistent with legislative intent in order to allow him to assert any privilege in opposition to such a request. [Sec. 102(c)]

(iii) Any agency or department in the Executive branch of the Federal government would be authorized access to the tapes and other materials for "lawful Government use." Here too, there is no express provision for notice to allow consideration of a competing privilege but such notice would be consistent with legislative history. [Sec. 102(d)]

3. Second Stage. The Administrator of GSA is directed to issue protective regulations "at the earliest possible date" governing the possession, security and custody of tapes and other materials. On a theoretical plane, some of these tapes and other materials could have been already accessed as discussed above. As a practical matter, however, the regulations can be issued within a week from date of enactment. Therefore, the only real import of this stage is that it triggers access to the tapes and materials by the former President or his designate subject to the restraints of this title. [Sec. 103]

4. Third Stage. The third stage of implementation under Title I involves the establishment of regulations governing general public access to the tapes and other materials.

(a) Timing. Within ninety (90) days after enactment of the subject bill, the Administrator of GSA will submit to both Houses of Congress proposed regulations governing public access to the tapes and other materials [Sec. 104(a)]. These regulations

shall take effect upon the expiration of ninety (90) legislative days after submission to the Congress unless disapproved by either House. [Sec. 104(b)(1)]

(b) Standards. In drafting these regulations, the Administrator is directed to take into account a series of specified needs: (1) to provide the public with the full truth on the abuses of governmental power incident to "Watergate"; (2) to make the tapes and materials available for judicial proceedings; (3) to guarantee the integrity of national security information; (4) to protect individual rights to a fair trial; (5) to protect the opportunity to assert available rights and privileges; (6) to provide public access to materials of historical significance; and (7) to provide the former President with tapes or materials in which the public has no interest as set forth above. [Sec. 104(a)]

5. Judicial Review. A provision is included to allow for expedited judicial review of the constitutional issues which will be raised. [Sec. 105(a)]

6. Compensation. The bill authorizes compensation to the former President if it is determined that he has been deprived of personal property under its provisions.

7. Constitutional Issues. Although Title I is probably constitutional on its face, it will no doubt be substantially cut back as various provisions for access are applied in the face of competing claims, primarily Executive Privilege.

The seven major issues presented by the measure involve: (1) the novel type of eminent domain which it contemplates; (2) the appropriate scope of Executive Privilege; (3) relevant rights of privacy; (4) its impact upon First Amendment rights; (5) the Fifth Amendment privilege against self-incrimination; (6) the claim that it constitutes a Bill of Attainder; and (7) Fourth Amendment claims relating to unreasonable searches and seizures. The bill itself provides the opportunity to litigate each of these possible objections.

Title II

Title II would establish a "Public Documents Commission" to study problems with respect to the control, disposition and preservation of records produced by or on behalf of "Federal officials", defined to include virtually all officers and employees of the three branches of government.

This 17-member commission would be composed of two Members of the House of Representatives; two Senators; three appointees of the President, selected from the public on a bipartisan basis; the Librarian of Congress; one appointee each of the Chief Justice of the United States, the White House, the Secretary of State, the Secretary of Defense, the Attorney General, and the Administrator of General Services; and three other representatives, one each appointed by the American Historical Association, the Society of American Archivists, and the Organization of American Historians.

The Commission would be directed to make specific recommendations for legislation and recommendations for rules and procedures as may be appropriate regarding the disposition of documents of Federal officials. The final report is to be submitted to the Congress and the President by March 31, 1976.

Discussion

1. Should the bill be enacted? There are essentially three arguments against the enactment of the subject bill. First, it is inherently inequitable in singling out one President and attempting to reduce the traditional sphere of Presidential confidentiality only as to him. Second, it holds some potential for political exploitation and could lead to more sensational and destructive exposures of the former President's dealings and the confidential statements or writings of other parties with no purpose other than the satisfaction of idle curiosity. Third, it could require a great deal of unnecessary litigation, depleting further the financial resources of Mr. Nixon and drawing the judiciary further into the quagmire of "Watergate".

On the other hand, there are four factors that support enactment of the bill. First, as noted above, it does provide a remedy for Mr. Nixon

to pursue in asserting relevant rights and privileges. Second, it will introduce some element of finality to White House involvement in the various tapes disputes. Third, a veto would be interpreted as "more cover-up" which would undermine your efforts to put "Watergate" behind us. Fourth, it could enhance the likelihood of an agreement between Henry Ruth and counsel for Mr. Nixon governing access to the tapes and other materials, thereby expediting the mission of the Special Prosecutor.

2. Should the bill be signed or merely allowed to become law? Assuming that you believe the bill should be enacted, I see no reason for you to withhold your signature. Since this is purely a question of form, there would appear to be no significant reason to risk any political losses that could be incurred.

3. Should a public statement be issued? In my opinion, a statement should be issued. The statement would be shaped along the following lines. First, the existence of constitutional issues might only be noted -- no opinion would be expressed on the relative merits of competing claims. Second, you could indicate your understanding of Congressional intent to the effect that the former President be given every opportunity to litigate any claims of privilege which may be available to him. Third, you would request the Administrator of GSA to move promptly to discharge his duties in accordance with the spirit and the letter of the law. Finally, you would indicate that a talent search is underway to recruit Presidential appointees to the "Public Documents Commission" and that you are hopeful the commission will be able to suggest even-handed and uniform rules governing access to the documents of all Federal officials.

4. Agency Views. The Domestic Council and OMB make no recommendations concerning this measure. The view of the Department of Justice is that S. 4016 should be allowed to become law.

Action

1. S. 4016 should be enacted into law.

   Approve _____ Disapprove _____

2. The bill should be signed.

   Approve _____ Disapprove _____

3. A public statement should be issued.

   Approve _____ Disapprove _____

4. The statement should follow the format noted above.

   Approve _____ Disapprove _____

See Me _____