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Department of Justice
Washington, D.C. 20530

MEMORANDUM

Re: Executive Privilege

I. Legal Background

Simply stated, Executive privilege is the term applied to the invocation by the Executive branch of a legal right, derived from the constitutional doctrine of separation of powers, to withhold official information from the Legislative branch or from parties in litigated proceedings. The privilege has a long history, having been first asserted by President Washington against a Congressional request and thereafter by almost every Administration. It aroused relatively little controversy in our early history, but since about 1950 it has become a matter of considerable dispute between the Executive and Legislative branches. Despite its long history, the doctrine until this year had received no authoritative judicial acknowledgment. The right of the Executive to withhold information from the courts in the process of litigation had been recognized by the Supreme Court, but only as a rule of evidence and not as a constitutional prerogative. Even in that context, the claim was held to be assertable only by "the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. 1, 8 (1962).

The first and only Supreme Court decision affirming the constitutional basis of Executive privilege was provoked by the controversy over the Special Prosecutor's access to the Nixon tapes. The Court's unanimous decision in July 1974, United States v. Nixon, ___ U.S. ___, 94 Sup. Ct. 3090,



held that Executive privilege could not be used to thwart the production of the tapes pursuant to the Watergate grand jury's subpoena. The opinion established, however, in the clearest terms, that the privilege is of constitutional stature:

"In support of his claim of absolute privilege, the President's counsel urges two grounds one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings.

"The second ground asserted * * * rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere * * * insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

"However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain



an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

* * * * *

"* * * The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

"[The President] does not place his claim of privilege on the ground they [the communications] are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. * * *." (94 Sup. Ct. at 3106-08).

The issue before the court in Nixon concerned the existence of the privilege as against the Judicial branch. It is conceivable that the court would hold that any request from the legislature is sufficient, as were the circumstances in Nixon, to overcome the privilege. The language of the opinion, however, clearly implies that, at least in some circumstances, the privilege may be asserted against the Congress as well as against the courts. The Executive branch position with respect to assertion of the privilege



against the Congress was described in 1971 by Assistant Attorney General William Rehnquist (then head of the Office of Legal Counsel and now a Justice of the Supreme Court) in testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. Mr. Rehnquist stated that the doctrine of Executive privilege was constitutionally based (as subsequently held by the Supreme Court) and that the Executive would invoke it against the Congress only in those rare instances in which the public interest required the withholding of information regarding foreign relations, military affairs, pending criminal investigations, and intragovernmental discussions. (United States v. Nixon, supra, expressly referred to each of these areas except that of criminal investigations.) Mr. Rehnquist concluded his general discussion with the following statement:

"While reasonable men may dispute the propriety of particular invocations of executive privilege by the various Presidents during the nation's history, I think most would agree that the doctrine itself is an absolutely essential condition for the faithful discharge by the executive of his constitutional duties. * * *"

II. The Practice Regarding Executive Privilege
A. With Respect to Congressional Demands

In earlier years, the Executive branch practice with respect to assertion of Executive privilege as against Congressional requests was not well defined. During the McCarthy investigations, President Eisenhower, by letter to the Secretary of Defense, in effect prohibited all employees of the Defense Department from testifying concerning conversations or communications embodying advice on official matters. This eventually produced such a strong Congressional reaction that on February 8, 1962, President Kennedy wrote to Congressman Moss stating that it would be the policy of his Administration that "Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." Mr. Moss sought and received a similar commitment from President Johnson. (President's letter of April 2, 1965).



President Nixon continued the Kennedy-Johnson policy but formalized it procedurally by a memorandum dated March 2, 1969 (attached as Exhibit A), addressed to all Executive branch officials. The memorandum begins by stating that the privilege will be invoked "only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise." It specifies the following procedural steps: (1) the head of the agency involved must consult the Office of Legal Counsel; (2) if the Attorney General supports the agency, the matter is to be submitted to the President through his counsel, the latter to advise the agency of the President's decision; (3) if the Attorney General disagrees with the agency head, the latter may submit the matter to the President; (4) pending final determination, the agency is to ask the Congress to hold the demand in abeyance until a determination can be made.

As for the standards that have been applied in determining when executive privilege will be asserted: The following advice from Assistant Attorney General Rehnquist to Presidential Assistant Ehrlichman embodies the last Administration's practice with respect to testimony by White House staff and Cabinet officers:

"To the extent that any generalizations may be drawn . . . they are necessarily tentative and sketchy. I offer the following:

"(1) The President and his immediate advisers . . . should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee . . .

(2) . . . lower level White House staff members ought to have some form of testimonial privilege . . . But I think it far more in accordance with related doctrines in the law to say that such a privilege is not one which enables them to wholly disregard a subpoena, or to entirely refuse to appear before a congressional committee; instead, it is a privilege to refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President.

(3) With respect to Cabinet members, the role of the Legislative Branch is somewhat more substantial; all hold offices and administer departments which are created by Act of Congress. The Justice Department for example, administers and enforces hundreds of statutes which are enacted by Congress. Whether or not the Attorney General himself may be compelled to appear as a witness before a congressional committee to testify as to the manner in which the Department performs these tasks, I think there is no question but that the Department is obligated to furnish some knowledgeable witness in response to a congressional request for testimony on this subject. On the other hand, I think it equally clear that no Cabinet officer could be interrogated at all with respect to what took place at a Cabinet meeting, or as to any portion of conferences or meetings which were called for the purpose of advising or formulating advice for the President.

Mr. Rehnquist's memorandum did not deal with testimony by lower level officials of the Executive branch, but the principle which has been assumed to be governing is that they must appear pursuant to congressional subpoena, but may decline to testify concerning particular matters where the President for "specific reason" (discussed below) so directs.

Corresponding principles would be applicable where the congressional request seeks not testimony but documentary material. Communications between and among the President and his immediate advisers would be withheld, as would other documents which embody advice provided directly to the President or his response. Documents relating to other deliberations and advice-giving would be withheld only when there is "specific reason" to do so.

It is not possible, in what is intended to be a brief exposition, to treat at length the "specific reasons" which would, under present practice, call for withholding from the Congress material which does not consist of communications to or from the President or communications of his immediate advisers. As noted above, Assistant Attorney General Rehnquist's testimony before the Subcommittee on Separation of Powers the Senate Judiciary Committee, identified four areas: foreign relations, military affairs, pending investigations, and intragovernmental discussions. The first three of these are self-explanatory; the last requires further specification. It is meant to protect the process of advice-giving, even below the Presidential level, from the risk of exposure that can ultimately destroy its frankness and hence its worth.



The decision whether to assert one of the specific reasons to decline the provision of information has depended largely upon the particular circumstances. Certain military information has been provided to the Joint Committee on Atomic Energy, for example, which would not be provided to other committees of the Congress. Or again, the need to protect advice giving at the lower levels was doubtless greater during the so-called "McCarthy era" than it is today (so that President Eisenhower's direction to the Department of Defense, described above, may not really be drastically out of accord with present practice).

One further point must be appreciated: Except perhaps in the case of congressional requests for testimony by Presidential order, the principles described above have been used more frequently in anticipation of the assertion of executive privilege than in its actual exercise. That is to say, they have formed the basis for polite declinations to provide information which have rarely been pursued to the point of congressional subpoena. The principles are nonetheless important for that. Without some certainty of the location of the last line of defense, the preliminary skirmishing cannot be conducted very intelligently.

B. With respect to the Judicial Branch

After President Kennedy announced that Executive privilege could be invoked only by the President, there was some uncertainty as to whether the policy also governed its invocation in the courts. The matter was clarified by a letter from the Special Counsel to the Attorney General dated March 30, 1962. The letter stated that --

"the President had authorized him to advise the Attorney General that his instruction that only the President could invoke Executive privilege was not intended to have, and does not have, any application to demands made in the course of a judicial or other adjudicatory proceeding, for the production of papers or other information in the possession of the Government."

In June 1962 the Civil Division of the Department of Justice by internal directive (Directive No. 1-62, Supplement No. 12) established a Civil Division Privilege Committee to pass on the question whether an Executive privilege claim should be asserted in any litigated case handled by the division. The directive pointed out that the privilege was to be asserted "only after the most



careful consideration" because it raised serious separation of powers issues whose litigation should be avoided. It emphasized that in light of the Supreme Court's discussion in United States v. Reynolds, 345 U.S. 1, supra, the privilege could be asserted only "by means of a formal claim, signed by the head of the department concerned, in which he states that (1) he has personally examined the matters at hand, (2) he declines to authorize disclosure because he has determined that disclosure would be contrary to the public interest, and (3) he is protecting in this fashion a specific public interest (e.g., protection of confidential informants, investigative techniques, defense information, intra-agency advice, etc.)"

The above practice is that followed by the Department of Justice in litigated matters, although we understand that the Civil Division Privilege Committee itself no longer functions as such.

The above practice is that followed by the Civil Division in matters which it litigates. It does not apply to litigation conducted by other divisions of the Department, (Antitrust, Criminal, Lands, Civil Rights) in which any claim of privilege would normally relate to Justice Department information, and require, under internal regulations, the approval of the Attorney General. Nor does the Civil Division's procedure apply to litigation which some agencies have the power to conduct on their own (SEC, ICC, FPC, FTC).

III. Issues for Consideration.

A. Procedure for asserting Executive privilege with respect to Congressional requests.

The most immediate issue for consideration is whether the procedure established by President Nixon's memorandum to Department Heads of March 2, 1969 is to be reaffirmed. This was the subject of an inquiry from Congressman Moss to the President dated August 15, 1974, which as far as we know, has not been substantively answered. (Letter and initial White House reply attached as Exhibit B.)

As far as the Justice Department is aware, the present procedure has worked smoothly and efficiently, though we are not familiar with its operation once a particular matter has passed the stage of Justice Department involvement. Unless some difficulties have arisen in the White House stage, we would recommend continuation of the procedure there described.

There is at least some question whether the Memorandum from President Nixon remains effective in a new Administration. This doubt should be eliminated, either by issuing a new Memorandum or by embodying the provisions in a formal Executive Order. (Attached as



Exhibit C. is a draft of such an Order.) An Executive Order would have the advantage of clearly giving the provisions continuing effect, despite changes in Administration. This strength is also a weakness, since no change could be made by future Administrations (at a time, perhaps, when the Congress is less sensitive to this issue) without affirmative action--and affirmative action of a highly visible nature.

It might be considered whether, in addition to the Memorandum (or Executive Order) directed to the agencies, there should be some established White House procedure for processing Executive privilege requests after the Justice Department stage has been completed. Our impression is that in the past the decision at the White House stage has been governed less by considerations of consistency than by whether the agency head appealing the Justice Department's disapproval happens to have the ear of the President or his closest advisors. There is perhaps no way in which this problem (assuming you accept the characterization) can be completely avoided; but an advisory structure for these matters established in advance might help.

B. Standards for asserting Executive privilege with respect to Congressional requests.

The next issue presented is that of the standards which this Administration will apply in determining when to assert Executive privilege against the Congress. This is assuredly not a matter that can be determined with complete definitiveness in the abstract, but it may nevertheless be desirable to agree in advance upon some general guidelines.

Here again, the general approach adopted in the past seems to us sound--whatever may be said of the manner in which it has been applied. That is to say, the following requests should routinely be declined--and, if pressed, be met with assertions of Executive privilege:

(1) Requests for testimony by immediate Presidential staff concerning their official activities.

(2) Questions asked, in the course of testimony by other individuals, with respect to the advice they furnished directly to the President or the content of discussions with him.

(3) Requests for documents embodying advice given directly to the President or his response to such advice.

All other requests will ordinarily be honored, except that



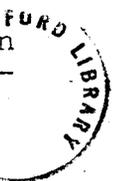
Executive privilege may be asserted when the content of the document or testimony requested would, for some specific reason, be harmful to our national security or foreign relations, impair the due execution of the laws, or impede the sound functioning of the Executive branch.

We should not delude ourselves that even these general principles will be uniformly applied. The doctrine of Executive privilege is (and probably should be) subject to the tugging and hauling of power between the branches of Government. In some instances, the Congress may care enough about receiving particular testimony by a Presidential aide that it may withhold action on other matters unless such testimony is provided. (This happened in the last Administration, when the confirmation of Richard Kleindienst was held up until Peter Flanigan agreed to testify.) Nonetheless, as general principles to be departed from only when necessary, the foregoing seem to us desirable.

C. Standards and procedures for asserting Executive privilege in judicial proceedings.

The following discussion of Executive privilege in the context of judicial proceedings is meant to apply to run-of-the-mine Government litigation. The bulk of this consists of suits under the Freedom of Information Act, routine criminal proceedings, and suits enforcing or seeking to overturn agency action. (In most Freedom of Information Act cases assertion of the privilege will be unnecessary, since the Act's exemptions will generally cover the situations in which the need for the privilege arises.) Criminal proceedings involving alleged abuse of power by federal officers and civil proceedings concerning Congressional requests for information (if such occur) are special cases which can be reserved for later consideration; they will be prominent enough to attract high-level attention when they are commenced.

With respect to the standards to be applied for assertion of the privilege in the general run of litigation: A significant factor to recall is that, in a litigation context, the prerogative of the Executive branch to withhold information is not necessarily identical with the Constitutional doctrine of Executive privilege. As noted above, it has been treated as a rule of evidence rather than Constitutional law--similar to the doctor-patient or attorney-client privilege. Moreover, the political pressures to restrict the assertion of privilege are sometimes entirely nonexistent in the judicial context. The courts, unlike the Congress, are not seeking the information on their own behalf and are thus not personally affronted by the assertion of privilege. These factors suggest that the



standards to be applied for the assertion of privilege in the courts can be somewhat broader (in favor of the Executive) than for its assertion against the Congress. If the present standards with respect to Congressional requests are continued, we would suggest that with respect to the courts the same categorical exemptions should be applied (i.e., no appearance by Presidential staff; no testimony by any official with respect to discussions with the President; no provision of documents embodying advice to the President and his response) and that the more discretionary exemptions ("special reason" to protect military, foreign affairs, investigative or intragovernmental material) should be interpreted somewhat more expansively than in the Congressional context. Basic fairness should be the test.

As for the procedure to be used with respect to assertion of privilege in the courts: It should be apparent from the description above that the present procedure is highly decentralized, compared with the rigid White House control asserted in the Congressional context. Realistically, the Civil Division's clearance procedure is calculated to prevent the assertion of privilege where it will not succeed--not to establish a government-wide standard of restraint. The latter could probably only be achieved (as it is achieved with respect to Congressional requests) by the force of White House involvement. Moreover, as noted above, even the limited Civil Division clearance policy does not apply to litigation conducted by other divisions of the Department or by independent agencies.

On February 5, 1973 John Dean proposed to Roger Cramton, then head of OLC, the adoption by the Attorney General of a policy statement on use of Executive privilege in judicial proceedings (copy attached as Exhibit D). This would have established within the Department of Justice a committee to advise on all situations involving a claim of Executive privilege in the courts. Nothing came of the proposal. Our view is that it does not deserve resurrection because of the factors mentioned above: Both in its scope and in its political visibility the use of the privilege in courts is significantly different from its use against the Congress. Consistency of application is much less important, and there is more reason to give the various agencies relative discretion. It seems likely that sensitive cases, in which assertion of the privilege would reflect upon the President, would come to the White House's attention early in their progress and could be accorded special treatment. (This happened, for example, in the Networks suit filed by the Antitrust Division.) Finally, it may in the long run



be positively undesirable to encourage the notion that the Government's privilege against production in the courts and Executive privilege are one and the same. In short, we are aware of no present need, either in theory or in practice, to establish more structured procedures with respect to the assertion of privilege in litigation.



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THE WHITE HOUSE
WASHINGTON

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OFFICE OF LEGAL COUNSEL

March 24, 1969

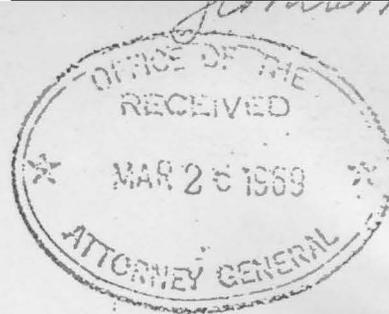


EXHIBIT A

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.



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



JOHN E. MOSS
3RD DISTRICT
SACRAMENTO, CALIFORNIA

ADMINISTRATIVE ASSISTANT
JACK MATTESON



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PHONE (916) 443-3543

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

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

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

DEMOCRATIC STEERING AND POLICY COMMITTEE

August 15, 1974

The President
The White House
Washington, D.C.

Dear Mr. President:

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

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

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

EXHIBIT B



August 15, 1974

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

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

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

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

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



The President

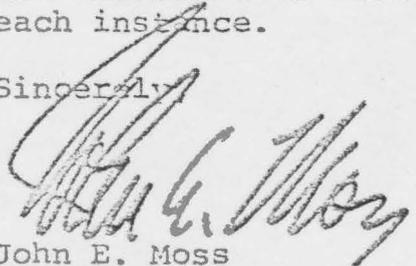
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August 15, 1974

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

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

Sincerely,



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

JEM:k



August 16, 1974

Dear Mr. Moss:

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

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

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

With kind regards,

Sincerely,

Max L. Friedersdorf
Deputy Assistant
to the President

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

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

PLF:VO:jk



EXECUTIVE ORDER

ESTABLISHING A PROCEDURE FOR DETERMINING WHETHER
EXECUTIVE PRIVILEGE SHOULD BE REVOKED

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

SECTION 1. Executive departments and agencies should recognize that Congress must be fully informed if it is to perform its legislative and oversight functions. These departments and agencies are directed to cooperate in providing information to the Congress. Information requested by the Congress may be refused only in instances where:

(a) such disclosure is prohibited or restricted by statute; or (b) the President determines that the public interest in maintaining secrecy or confidentiality requires non-disclosure.

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



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

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

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

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



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

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



THE WHITE HOUSE

WASHINGTON

February 5, 1973

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OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR: ROGER C. CRAMTON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

FROM: JOHN W. DEAN, III
COUNSEL TO THE PRESIDENT

SUBJECT: Policy Statement on Judicial
Executive Privilege

As a corollary of the current effort to produce the statement on executive privilege promised by the President at his January 31 press conference, I would appreciate your drafting a separate policy statement on the procedures for invoking executive privilege in judicial proceedings. This document, to be issued by the Attorney General, would be briefly mentioned in the Presidential statement, which would be primarily concerned with congressional demands for testimony and information. The general outline of the procedure which I would suggest follows:

1. A committee would be established within the Department of Justice, chaired by the Assistant Attorney General for the Civil Division. It would consist of two additional members from the Civil Division, and one representative each from the Office of Legal Counsel and Solicitor General's Office, who would be designated by their respective offices.

2. This committee would serve as the advisory body within the Executive Branch for all situations involving a possible claim of judicial executive privilege. No formal claim of privilege by the head of a department or agency during a judicial proceeding would be asserted without the prior approval of the committee. All similar problems which involve administrative proceedings would also be submitted to the committee for consultation and advice.



EXHIBIT D

3. The Chairman of the Committee would keep the Attorney General advised of all significant matters before the committee. The Attorney General, in turn, would consult with the Counsel to the President whenever necessary.

4. All other available evidentiary privileges, including those protecting state secrets and intergovernmental advice, must be exhausted before any formal claim of executive privilege will be considered by the committee.

5. In testimonial situations, if grounds exist for the formal invocation of executive privilege, the witness would be instructed to decline to testify further on the subject, pending immediate notification of the committee so that a formal claim may be lodged. The courts would be informed that the government attorneys in these instances are following the explicit orders of the Attorney General.

6. This policy statement would contain a reference to the President's directive and be circulated to the heads of the executive departments and agencies, the general counsels of the same, and to all United States Attorneys.

Your response would be appreciated no later than c. o. b. February 6.

Thank you.



I. A Congressional demand is made for information considered by the President to be sensitive as involving national security or foreign affairs, and

(a) The information has been classified pursuant to Executive Order 11652; or

(b) The information has not been classified but is in the custody and control of the Executive branch and has not been released to the general public; or

(c) The information, classified or not classified, is generated by an individual or group of individuals whose assigned function is solely to provide recommendations and advice to the President; or

(d) The information, either classified or not classified, has been reported in the press or otherwise circulated in the public domain, but there has been no official disclosure of it; or

(e) There has been no claim of privilege with regard to other information relating to the same subject matter; or

(f) During the course of litigation, the information has been provided to the judiciary in camera.



II. A Congressional demand is made for a report complied by an agency or bureau head concerning allegations made by the press or Congressional spokesmen of possible improper or illegal acts committed by the organization or its employees or agents, and

(a) The report is made at the request of the President and delivered to him; or

(b) The report is made at the request of a cabinet officer and delivered to him; or

(c) Under either circumstance, the report contains an analysis of the possible civil and criminal liability of individual employees; or

(d) Under either situation (a) or situation (b), the report is not classified; or

(e) Under either situation (a) or (b), the report is classified pursuant to E. O. 11652.



III. A Congressional demand is made for the identity of individuals who participated in an action taken or a policy announced by the Executive Branch, and

(a) The action or policy was taken or announced by the President; or

(b) The action or policy was taken or announced by a cabinet officer or agency head; or

(c) Under either circumstance, the Congressional demand is modified to request only the recommendations made without identifying the officials or employees making them.



IV. Following public disclosures or allegations of improper conduct by public officials or employees, they resign or are removed from office and a Congressional demand is made for:

(a) All documents of the appropriate agency relating to the removal; or

(b) The personnel records of such individuals; or

(c) All reports of any investigative agency which has investigated the events surrounding such resignation or removal; or

(d) Following such removal or resignation, an explanation of why criminal prosecution has not been undertaken; or

(e) The testimony of such officials.



V. In preparation for Congressional hearings, reports and recommendations are made to the President's personal staff and a Congressional demand is made for such reports and recommendations which constitute:

(a) A factual report of the activities conducted by Executive Branch agencies; or

(b) An analysis of the relative sensitivity, from a national security viewpoint, of documents demanded by Congress; or

(c) A legal analysis of the authority or lack of authority or agencies of the Executive Branch to conduct certain operations.



Outline of considerations for exercising restraint in disclosure
of information on governmental intelligence activities to Congressional
investigating Committees

I. "National security" considerations

A. Types of operations which require secrecy to be effective.

- 1) Use of friendly national official intelligence
- 2) Use of covers to disguise human assets -- other U. S.
government agencies and private American firms or organizations.
- 3) Defector efforts
- 4) Persuading foreign officials to serve as secret sources of information
- 5) Electronic on-site penetrations here and abroad
- 6) Remote photographic and signal surveillance
- 7) Expenditures to control or alter the course of events in a
foreign country
- 8) Covert propaganda for the same purpose
- 9) Other activities for that purpose.

B. Purposes for which Committees would claim information on
such operations, all ostensibly related to the possibility of
regulatory or prohibitory legislation.

- 1) To learn by whom and on what grounds they are authorized
and with what operational controls or limitations -- for purpose
of correcting loose management practices.



- 2) To judge their effectiveness in relation to costs, to national security needs, or to the diplomatic risks incurred.
 - 3) To judge their legality (under the act establishing the agency involved or where applicable under general domestic laws or international treaty) or their propriety (by standards of American moral principles or traditions).
- C. Reasons why President may want to deny or restrict Committee access to such information.
- 1) Irrelevancy or immateriality for any of the purposes in "B".
 - 2) Risk of jeopardy to lives or welfare of persons, firms, or organizations not part of the U.S. government
 - 3) Risk that exposure will pre-emptively abort existing operations of a particular type and preclude future ones because of:
 - a) Responsive countermeasures by target countries, or
 - b) Diplomatic repercussions, or
 - c) Loss of existing or potential assets or opportunities, or
 - d) Public reaction before there is time or opportunity to provide justification
- D. Legal grounds for Presidential limitations on delivery to Committee of information



- 1) Objection for irrelevancy or immateriality is supportable under Senate Select Committee v. Nixon (CCA, D.C., 1974) 498 F. 2d 725 at 732 and by general principles which control the enforcement of subpoenas duces tecum.
- 2) Implied contract or detrimental reliance theory could support confidentiality of third-party relationships to intelligence agencies, the making of, and adherence to, such contracts being within the Article II powers of the President.
- 3) If the mere exposure of intelligence operations and covert activities may nullify or thwart Presidential actions under Article II powers, then this effect occurs prior to any legislative act by the Congress as a whole to curb or regulate the President's powers in serving national security interests, and so it conflicts with the Constitution.

II. Presidential decision-making considerations.

- 1) General principle from United States v. Nixon at 23rd page of opinion:

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution."



- 2) Grounding principle on value of candid interchange of alternatives leaves open question as to whether communications to or from the President whey they are not "option papers" but factual reports to the President or directions issued to reflect his decisions are presumptively privileged.
- 3) Once a decision is made and it is intended to be acted upon, then the communication by which it is conveyed to the implementers, if it does not also reflect options considered and rejected by the President, probably cannot come within the principle.
- 4) Any factual report intended as a basis for a Presidential decision may have been prepared in a way different from how it would have been done if the preparer had known it was to be made public; but the value of protecting freedom of presentation would seem to justify invoking executive privilege only as a means of avoiding a retrospective evaluation of the President's decision-making process in particular cases where the exigencies of the situation may have required action on less than full and objective reports or as a means of avoiding reliance on the report for other than its originally intended purpose.



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Department of Justice
Washington, D.C. 20530

DRAFT

MEMORANDUM

Re: Executive Privilege

I. Legal Background

Simply stated, Executive privilege is the term applied to the invocation by the Executive branch of a legal right, derived from the constitutional doctrine of separation of powers, to withhold official information from the Legislative branch or from parties in litigated proceedings. The privilege has a long history, having been first asserted by President Washington against a Congressional request and thereafter by almost every Administration. It aroused relatively little controversy in our early history, but since about 1950 it has become a matter of considerable dispute between the Executive and Legislative branches. Despite its long history, the doctrine until this year had received no authoritative judicial acknowledgment. The right of the Executive to withhold information from the courts in the process of litigation had been recognized by the Supreme Court, but only as a rule of evidence and not as a constitutional prerogative. Even in that context, the claim was held to be assertable only by "the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. 1, 8 (1962).

The first and only Supreme Court decision affirming the constitutional basis of Executive privilege was provoked by the controversy over the Special Prosecutor's access to the Nixon tapes. The Court's unanimous decision in July 1974, United States v. Nixon, ___ U.S. ___, 94 Sup. Ct. 3090,



held that Executive privilege could not be used to thwart the production of the tapes pursuant to the Watergate grand jury's subpoena. The opinion established, however, in the clearest terms, that the privilege is of constitutional stature:

"In support of his claim of absolute privilege, the President's counsel urges two grounds one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings.

"The second ground asserted * * * rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere * * * insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

"However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain



an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

* * * * *

"* * * The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

"[The President] does not place his claim of privilege on the ground they [the communications] are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. * * *." (94 Sup. Ct. at 3106-08).

The issue before the court in Nixon concerned the existence of the privilege as against the Judicial branch. It is conceivable that the court would hold that any request from the legislature is sufficient, as were the circumstances in Nixon, to overcome the privilege. The language of the opinion, however, clearly implies that, at least in some circumstances, the privilege may be asserted against the Congress as well as against the courts. The Executive branch position with respect to assertion of the privilege



against the Congress was described in 1971 by Assistant Attorney General William Rehnquist (then head of the Office of Legal Counsel and now a Justice of the Supreme Court) in testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. Mr. Rehnquist stated that the doctrine of Executive privilege was constitutionally based (as subsequently held by the Supreme Court) and that the Executive would invoke it against the Congress only in those rare instances in which the public interest required the withholding of information regarding foreign relations, military affairs, pending criminal investigations, and intragovernmental discussions. (United States v. Nixon, supra, expressly referred to each of these areas except that of criminal investigations.) Mr. Rehnquist concluded his general discussion with the following statement:

"While reasonable men may dispute the propriety of particular invocations of executive privilege by the various Presidents during the nation's history, I think most would agree that the doctrine itself is an absolutely essential condition for the faithful discharge by the executive of his constitutional duties. * * *"

II. The Practice Regarding Executive Privilege
A. With Respect to Congressional Demands

In earlier years, the Executive branch practice with respect to assertion of Executive privilege as against Congressional requests was not well defined. During the McCarthy investigations, President Eisenhower, by letter to the Secretary of Defense, in effect prohibited all employees of the Defense Department from testifying concerning conversations or communications embodying advice on official matters. This eventually produced such a strong Congressional reaction that on February 8, 1962, President Kennedy wrote to Congressman Moss stating that it would be the policy of his Administration that "Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." Mr. Moss sought and received a similar commitment from President Johnson. (President's letter of April 2, 1965).



President Nixon continued the Kennedy-Johnson policy but formalized it procedurally by a memorandum dated March 2, 1969 (attached as Exhibit A), addressed to all Executive branch officials. The memorandum begins by stating that the privilege will be invoked "only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise." It specifies the following procedural steps: (1) the head of the agency involved must consult the Office of Legal Counsel; (2) if the Attorney General supports the agency, the matter is to be submitted to the President through his counsel, the latter to advise the agency of the President's decision; (3) if the Attorney General disagrees with the agency head, the latter may submit the matter to the President; (4) pending final determination, the agency is to ask the Congress to hold the demand in abeyance until a determination can be made.

As for the standards that have been applied in determining when executive privilege will be asserted: The following advice from Assistant Attorney General Rehnquist to Presidential Assistant Ehrlichman embodies the last Administration's practice with respect to testimony by White House staff and Cabinet officers:

"To the extent that any generalizations may be drawn . . . they are necessarily tentative and sketchy. I offer the following:

"(1) The President and his immediate advisers . . . should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee . . .

(2) . . . lower level White House staff members ought to have some form of testimonial privilege . . . But I think it far more in accordance with related doctrines in the law to say that such a privilege is not one which enables them to wholly disregard a subpoena, or to entirely refuse to appear before a congressional committee; instead, it is a privilege to refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President.



(3) With respect to Cabinet members, the role of the Legislative Branch is somewhat more substantial; all hold offices and administer departments which are created by Act of Congress. The Justice Department for example, administers and enforces hundreds of statutes which are enacted by Congress. Whether or not the Attorney General himself may be compelled to appear as a witness before a congressional committee to testify as to the manner in which the Department performs these tasks, I think there is no question but that the Department is obligated to furnish some knowledgeable witness in response to a congressional request for testimony on this subject. On the other hand, I think it equally clear that no Cabinet officer could be interrogated at all with respect to what took place at a Cabinet meeting, or as to any portion of conferences or meetings which were called for the purpose of advising or formulating advice for the President.

Mr. Rehnquist's memorandum did not deal with testimony by lower level officials of the Executive branch, but the principle which has been assumed to be governing is that they must appear pursuant to congressional subpoena, but may decline to testify concerning particular matters where the President for "specific reason" (discussed below) so directs.

Corresponding principles would be applicable where the congressional request seeks not testimony but documentary material. Communications between and among the President and his immediate advisers would be withheld, as would other documents which embody advice provided directly to the President or his response. Documents relating to other deliberations and advice-giving would be withheld only when there is "specific reason" to do so.

It is not possible, in what is intended to be a brief exposition, to treat at length the "specific reasons" which would, under present practice, call for withholding from the Congress material which does not consist of communications to or from the President or communications of his immediate advisers. As noted above, Assistant Attorney General Rehnquist's testimony before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, identified four areas: foreign relations, military affairs, pending investigations, and intragovernmental discussions. The first three of these are self-explanatory; the last requires further specification. It is meant to protect the process of advice-giving, even below the Presidential level, from the risk of exposure that can ultimately destroy its frankness and hence its worth.



The decision whether to assert one of the specific reasons to decline the provision of information has depended largely upon the particular circumstances. Certain military information has been provided to the Joint Committee on Atomic Energy, for example, which would not be provided to other committees of the Congress. Or again, the need to protect advice giving at the lower levels was doubtless greater during the so-called "McCarthy era" than it is today (so that President Eisenhower's direction to the Department of Defense, described above, may not really be drastically out of accord with present practice).

One further point must be appreciated: Except perhaps in the case of congressional requests for testimony by Presidential aides, the principles described above have been used more frequently in anticipation of the assertion of executive privilege than in its actual exercise. That is to say, they have formed the basis for polite declinations to provide information which have rarely been pursued to the point of congressional subpoena. The principles are none the less important for that. Without some certainty of the location of the last line of defense, the preliminary skirmishing cannot be conducted very intelligently.

B. With respect to the Judicial Branch

After President Kennedy announced that Executive privilege could be invoked only by the President, there was some uncertainty as to whether the policy also governed its invocation in the courts. The matter was clarified by a letter from the Special Counsel to the Attorney General dated March 30, 1962. The letter stated that the President had authorized him

"to advise the Attorney General that his instruction that only the President could invoke Executive privilege was not intended to have, and does not have, any application to demands made in the course of a judicial or other adjudicatory proceeding, for the production of papers or other information in the possession of the Government."

In June 1962 the Civil Division of the Department of Justice by internal directive (Directive No. 1-62, Supplement No. 12) established a Civil Division Privilege Committee to pass on the question whether an Executive privilege claim should be asserted in any litigated case handled by the division. The directive pointed out that the privilege was to be asserted "only after the most



careful consideration" because it raised serious separation of powers issues whose litigation should be avoided. It emphasized that in light of the Supreme Court's discussion in United States v. Reynolds, 345 U.S. 1, supra, the privilege could be asserted only "by means of a formal claim, signed by the head of the department concerned, in which he states that (1) he has personally examined the matters at hand, (2) he declines to authorize disclosure because he has determined that disclosure would be contrary to the public interest, and (3) he is protecting in this fashion a specific public interest (e.g., protection of confidential informants, investigative techniques, defense information, intra-agency advice, etc.)"

The above practice is that followed by the Department of Justice in litigated matters, although we understand that the Civil Division Privilege Committee itself no longer functions as such.

The above practice is that followed by the Civil Division in matters which it litigates. It does not apply to litigation conducted by other divisions of the Department, (Antitrust, Criminal, Lands, Civil Rights) in which any claim of privilege would normally relate to Justice Department information, and require, under internal regulations, the approval of the Attorney General. Nor does the Civil Division's procedure apply to litigation which some agencies have the power to conduct on their own (SEC, ICC, FPC, FTC).

III. Issues for Consideration.

A. Procedure for asserting Executive privilege with respect to Congressional requests.

The most immediate issue for consideration is whether the procedure established by President Nixon's memorandum to Department Heads of March 2, 1969 is to be reaffirmed. This was the subject of an inquiry from Congressman Moss to the President dated August 15, 1974, which as far as we know, has not been substantively answered. (Letter and initial White House reply attached as Exhibit B.)

As far as the Justice Department is aware, the present procedure has worked smoothly and efficiently, though we are not familiar with its operation once a particular matter has passed the stage of Justice Department involvement. Unless some difficulties have arisen in the White House stage, we would recommend continuation of the procedure there described.

There is at least some question whether the Memorandum from President Nixon remains effective in a new Administration. This doubt should be eliminated, either by issuing a new Memorandum or by embodying the provisions in a formal Executive Order. (Attached as



Exhibit C is a draft of such an Order.) An Executive Order would have the advantage of clearly giving the provisions continuing effect, despite changes in Administration. This strength is also a weakness, since no change could be made by future Administrations (at a time, perhaps, when the Congress is less sensitive to this issue) without affirmative action--and affirmative action of a highly visible nature.

It might be considered whether, in addition to the Memorandum (or Executive Order) directed to the agencies, there should be some established White House procedure for processing Executive privilege requests after the Justice Department stage has been completed. Our impression is that in the past the decision at the White House stage has been governed less by considerations of consistency than by whether the agency head appealing the Justice Department's disapproval happens to have the ear of the President or his closest advisors. There is perhaps no way in which this problem (assuming you accept the characterization) can be completely avoided; but an advisory structure for these matters established in advance might help.

B. Standards for asserting Executive privilege with respect to Congressional requests.

The next issue presented is that of the standards which this Administration will apply in determining when to assert Executive privilege against the Congress. This is assuredly not a matter that can be determined with complete definitiveness in the abstract, but it may nevertheless be desirable to agree in advance upon some general guidelines.

Here again, the general approach adopted in the past seems to us sound--whatever may be said of the manner in which it has been applied. That is to say, the following requests should routinely be declined--and, if pressed, be met with assertions of Executive privilege:

(1) Requests for testimony by immediate Presidential staff concerning their official activities.

(2) Questions asked, in the course of testimony by other individuals, with respect to the advice they furnished directly to the President or the content of discussions with him.

(3) Requests for documents embodying advice given directly to the President or his response to such advice.

All other requests will ordinarily be honored, except that



Executive privilege may be asserted when the content of the document or testimony requested would, for some specific reason, be harmful to our national security or foreign relations, impair the due execution of the laws, or impede the sound functioning of the Executive branch.

We should not delude ourselves that even these general principles will be uniformly applied. The doctrine of Executive privilege is (and probably should be) subject to the tugging and hauling of power between the branches of Government. In some instances, the Congress may care enough about receiving particular testimony by a Presidential aide that it may withhold action on other matters unless such testimony is provided. (This happened in the last Administration, when the confirmation of Richard Kleindienst was held up until Peter Flanigan agreed to testify.) Nonetheless, as general principles to be departed from only when necessary, the foregoing seem to us desirable.

C. Standards and procedures for asserting Executive privilege in judicial proceedings.

The following discussion of Executive privilege in the context of judicial proceedings is meant to apply to run-of-the-mine Government litigation. The bulk of this consists of suits under the Freedom of Information Act, routine criminal proceedings, and suits enforcing or seeking to overturn agency action. (In most Freedom of Information Act cases assertion of the privilege will be unnecessary, since the Act's exemptions will generally cover the situations in which the need for the privilege arises.) Criminal proceedings involving alleged abuse of power by federal officers and civil proceedings concerning Congressional requests for information (if such occur) are special cases which can be reserved for later consideration; they will be prominent enough to attract high-level attention when they are commenced.

With respect to the standards to be applied for assertion of the privilege in the general run of litigation: A significant factor to recall is that, in a litigation context, the prerogative of the Executive branch to withhold information is not necessarily identical with the Constitutional doctrine of Executive privilege. As noted above, it has been treated as a rule of evidence rather than Constitutional law--similar to the doctor-patient or attorney-client privilege. Moreover, the political pressures to restrict the assertion of privilege are sometimes entirely nonexistent in the judicial context. The courts, unlike the Congress, are not seeking the information on their own behalf and are thus not personally affronted by the assertion of privilege. These factors suggest that the

standards to be applied for the assertion of privilege in the courts can be somewhat broader (in favor of the Executive) than for its assertion against the Congress. If the present standards with respect to Congressional requests are continued, we would suggest that with respect to the courts the same categorical exemptions should be applied (i.e., no appearance by Presidential staff; no testimony by any official with respect to discussions with the President; no provision of documents embodying advice to the President and his response) and that the more discretionary exemptions ("special reason" to protect military, foreign affairs, investigative or intragovernmental material) should be interpreted somewhat more expansively than in the Congressional context. Basic fairness should be the test.

As for the procedure to be used with respect to assertion of privilege in the courts: It should be apparent from the description above that the present procedure is highly decentralized, compared with the rigid White House control asserted in the Congressional context. Realistically, the Civil Division's clearance procedure is calculated to prevent the assertion of privilege where it will not succeed--not to establish a government-wide standard of restraint. The latter could probably only be achieved (as it is achieved with respect to Congressional requests) by the force of White House involvement. Moreover, as noted above, even the limited Civil Division clearance policy does not apply to litigation conducted by other divisions of the Department or by independent agencies.

On February 5, 1973 John Dean proposed to Roger Cramton, then head of OLC, the adoption by the Attorney General of a policy statement on use of Executive privilege in judicial proceedings (copy attached as Exhibit D). This would have established within the Department of Justice a committee to advise on all situations involving a claim of Executive privilege in the courts. Nothing came of the proposal. Our view is that it does not deserve resurrection because of the factors mentioned above: Both in its scope and in its political visibility the use of the privilege in courts is significantly different from its use against the Congress. Consistency of application is much less important, and there is more reason to give the various agencies relative discretion. It seems likely that sensitive cases, in which assertion of the privilege would reflect upon the President, would come to the White House's attention early in their progress and could be accorded special treatment. (This happened, for example, in the Networks suit filed by the Antitrust Division.) Finally, it may in the long run



be positively undesirable to encourage the notion that the Government's privilege against production in the courts and Executive privilege are one and the same. In short, we are aware of no present need, either in theory or in practice, to establish more structured procedures with respect to the assertion of privilege in litigation.



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ATTORNEY GENERAL

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March 24, 1969

OFFICE OF LEGAL COUNSEL

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.

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... 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



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CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES -
WASHINGTON, D.C. 20515

GOVERNMENT OPERATIONS COMMITTEE:
MAJORITY MEMBER SUBCOMMITTEES ON
OPERATIONS & GOVERNMENT INFORMATION
ENERGY & NATURAL RESOURCES

INTERSTATE AND FOREIGN COMMERCE COMMITTEE:
CHAIRMAN,
COMMERCE & FINANCE SUBCOMMITTEE
DEMOCRATIC STEERING AND POLICY COMMITTEE

August 15, 1974

The President
The White House
Washington, D.C.

Dear Mr. President:

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

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

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



EXHIBIT B

August 15, 1974

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

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

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

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

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



August 15, 1974

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

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

Sincerely,



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

JEM:k



August 16, 1974

Dear Mr. Moss:

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

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

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

With kind regards,

Sincerely,

Max L. Friedersdorf
Deputy Assistant
to the President

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

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

MLF:VO:jk



EXECUTIVE ORDER

ESTABLISHING A PROCEDURE FOR DETERMINING WHETHER
EXECUTIVE PRIVILEGE SHOULD BE REVOKED

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

SECTION 1. Executive departments and agencies should recognize that Congress must be fully informed if it is to perform its legislative and oversight functions. These departments and agencies are directed to cooperate in providing information to the Congress. Information requested by the Congress may be refused only in instances where:

(a) such disclosure is prohibited or restricted by statute; or (b) the President determines that the public interest in maintaining secrecy or confidentiality requires non-disclosure.

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

EXHIBIT C



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

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

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

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



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

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



THE WHITE HOUSE
WASHINGTON

February 5, 1973

RECEIVED
2 24 PM '73
OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR:

ROGER C. CRAMTON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

FROM:

JOHN W. DEAN, III
COUNSEL TO THE PRESIDENT

SUBJECT:

Policy Statement on Judicial
Executive Privilege

As a corollary of the current effort to produce the statement on executive privilege promised by the President at his January 31 press conference, I would appreciate your drafting a separate policy statement on the procedures for invoking executive privilege in judicial proceedings. This document, to be issued by the Attorney General, would be briefly mentioned in the Presidential statement, which would be primarily concerned with congressional demands for testimony and information. The general outline of the procedure which I would suggest follows:

1. A committee would be established within the Department of Justice, chaired by the Assistant Attorney General for the Civil Division. It would consist of two additional members from the Civil Division, and one representative each from the Office of Legal Counsel and Solicitor General's Office, who would be designated by their respective offices.
2. This committee would serve as the advisory body within the Executive Branch for all situations involving a possible claim of judicial executive privilege. No formal claim of privilege by the head of a department or agency during a judicial proceeding would be asserted without the prior approval of the committee. All similar problems which involve administrative proceedings would also be submitted to the committee for consultation and advice.

EXHIBIT D



3. The Chairman of the Committee would keep the Attorney General advised of all significant matters before the committee. The Attorney General, in turn, would consult with the Counsel to the President whenever necessary.

4. All other available evidentiary privileges, including those protecting state secrets and intergovernmental advice, must be exhausted before any formal claim of executive privilege will be considered by the committee.

5. In testimonial situations, if grounds exist for the formal invocation of executive privilege, the witness would be instructed to decline to testify further on the subject, pending immediate notification of the committee so that a formal claim may be lodged. The courts would be informed that the government attorneys in these instances are following the explicit orders of the Attorney General.

6. This policy statement would contain a reference to the President's directive and be circulated to the heads of the executive departments and agencies, the general counsels of the same, and to all United States Attorneys.

Your response would be appreciated no later than c. o. b. February 6.

Thank you.

