The original documents are located in Box 13, folder "Executive Privilege (4)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

April 7, 1975

Mr. Hills

Sir:

Attached are two copies of my attempted summary of the discussion held on Friday, Apr. 4.

I have also enclosed a copy of part of a comment by Professor Freund from the Harvard Law Review which may be of interest.

Robert L. Keuch

MEMORANDUM REPORT

Consideration of the Doctrine of Executive Privilege With Respect to Congressional Demands for Information

(First Discussion)

April 7, 1975

An informal discussion was held in the office of the Deputy Counsel to the President on the concept and application of the doctrine of Executive Privilege in the context of Congressional demands for information. Participating were Mr. Rod Hills and Mr. James Wilderotter of the President's staff, the Solicitor General, Mr. Robert Bork, the Assistant Attorney General for the Office of Legal Counsel, Mr. Antonin Scalia, Mr. Martin Richman, who had been a Presidential adviser to Presidents Kennedy and Johnson, and Mr. Robert Keuch of the Department of Justice.

Used as a basis for the discussion were the hypotheticals set forth at Tab B. Insofar as each of the situations described in the hypotheticals was, in fact, discussed, the comments made are set forth following each hypothetical at Tab A.

In addition to the considerations set forth in Tab A, the following general observations were made:

(a) Executive Privilege should be exercised by the President or at his express direction;

(b) Many of the same bases which are appropriate for the invocation of Executive Privilege can be made, in the first instance, at the agency level including, for example, such claims as the sensitivity of the information and the need to protect candid communication between the President and his advisers;

(c) The actual invocation of the Privilege is usually the last step in attempted negotiation and agreement between the Executive and Congress, with the possibility of its invocation as important as the claim itself;

(d) The present course and mood of the Congress is towards exercising more power and control and towards broader claims of power and jurisdiction;

(e) While a jurisdictional basis is not clear, the judiciary would, following the tapes cases, probably accept jurisdiction over litigation involving a confrontation between Congress and the Executive brought about by a claim of Executive Privilege; and

(f) As made clear by the following comments, there are no precise guidelines governing the scope or use of Executive Privilege and the considerations involved are more political and practical than legal.

Summary of Views

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;

Comments: Classification in and of itself, is not conclusive. The information must, in fact, be sensitive national security or foreign affairs information. The view was expressed that only the most sensitive information could be withheld, in light of Congress' view that they are entitled to and regularly receive classified information. However, note was taken of the constant leaks by Congressional committees and their staffs and the Congressional view that, once they received the information, they would decide what should be made public.

(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;

Comments: While classification is not conclusive, in the absence of classification such a claim would be most difficult to sustain. The view was expressed that such material could be classified, if properly classifiable, even after a Congressional demand.

(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;

Comments: There was general consensus that this type of situation presents the strongest case for Executive Privilege (See also the comments under II(a).)

(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;

There was no specific discussion of this situation.

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

Comments: There was a general consensus that Executive Privilege is not "waived", but recognition must be given to the practical effect of yielding information and then attempting to protect information of same type and impact. Recommendations were made that, if material which was properly within the scope of Executive privilege was released, it be done with a statement that recognized the privilege character of the information and noted that, while the privilege would not be invoked in this instance, such a claim was specifically reserved.

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

Comments: There was general agreement that this would not materially effect the claim. However, it was strongly felt that, if the information had been produced to parties and/or their counsel under a protective order, it would be difficult and unwise to deny the information to Congress.

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;

Comments: There was a general consensus that the material most clearly within the ambit of Executive Privilege was prepared specifically for the President and at his request and prepared by his closest advisors. However, the view was expressed that a distinction existed between factual material and material that constituted the expression of views and/or recommendations. There was no consensus on this aspect of the question. It was also noted that factual reports to the President could be denied because they were primarily reports not based on a full investigation or because the individual preparing the factual report, or the information itself, would be otherwise available to Congress. It was noted that the latter consideration would raise the charge that the report made to the President contained additional or different information.

The view was expressed that surrender of this type of material would seriously impair attempted future claims of the privilege and such material should only be surrendered with a strong statement that the privilege existed as to the material or if there were other factors present such as previous Presidential indicators that the report was to be released publicly. (See also the discussion under IV(c).)

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

Comments: There was no extended discussion of this situation. The consensus appeared to be that it fell within the concepts of (a) just discussed but, of course, not so clearly.

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

There was no specific discussion of this situation, but there was a general recognition that the protection of individuals, either on privacy grounds, in recognition of the fact that disclosure would discourage candid reporting by subordinates, or to protect their rights to a fair trial, would be an appropriate basis for invocation of the privilege.

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

There was no specific discussion of this situation, but the comments under I(a) would be applicable (classification is not in and of itself conclusive).

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

There was no specific discussion of this situation, but the comments under I(a) would be applicable (classification is not in and of itself conclusive).

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;

There was no specific discussion of this situation. However, the comments under II(a) and I(c) would be applicable.

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

There was no specific discussion of this situation. However, the comments under II(a) and (b) and I(c) would be applicable.

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

There was no specific discussion of this situation. However, the comments under II(a) and (b) and I(c) would be applicable.

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;

See the comments under (c) below.

(b) The personnel records of such individuals;

See the comments under (c) below.

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

Comments: The views expressed as to this situation, and the considerations raised by (a) and (b) above, can best be described in the context of a more specific hypothetical raised during the discussion. This hypothetical was that there had been charges made that Secret Service agents had been used for improper purposes and that the head of the Service had asked the agents to report any instance which was thought to be an example of such improper use and had had an investigation conducted by an inspector general. As a result, the head of the Service had disciplined certain agents, had made certain changes in the organization and made a full report to the Secretary of the Treasury who, in turn, had reported to the President.

The consensus was that Congress would be entitled to a summary of the report of the inspector general and testimony, or a report, by an appropriate Treasury official as to what problems had existed and what remedial action had been taken.

Again, (see comments under II(a)), the view was expressed that Congress may be entitled to factual materials, including investigative reports made in the normal course of business, but not for "secondary" materials such as a compilation of such reports for a report to the agency head, etc. Or, expressed another way, Congress was not entitled to the report of the results of the investigation prepared for use by the

President or the agency head, but was probably entitled to the same source documents. There was no general agreement on this view.

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

There was no discussion of this situation.

(e) The testimony of such officials.

There was no discussion of this situation.

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;

See the comments under II(a).

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

There was no specific discussion of this situtation. However, there was a general consensus that the privilege would cover preparatory documents of the nature of "attorney's work product". See also the comments under IV(c).

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

There was no specific discussion of this situation. However, there was a general consensus that the privilege would cover preparatory documents of the nature of "attorney's work product". See also the comments under IV(c).

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.

Exec. Privilege

Thursday 4/24/75

8:00 Dr. Marrs called to say that the State Dept. has advised Senator Kennedy's Committee that Ambassador Brown should not come over and testify because he is a member of the White House staff.

Devon (sp. ? ?) from Senator Kennedy's office called and asked if there were any possibility that this could be considered as an exception because of the exceptional circumstances and allow the Ambassador to testify. He also said that although there might be small areas of disagreement that he didn't think there were any overwhelming ones and he wanted to be sure there was someone there who could "answer the questions."

Dr. Marrs doesn't take sides in this and he is only the delivery boy. He would appreciate guidance so he can get back to tell him that it will or will not be given consideration or whatever. Hearings are 9:30 or 10:00 tomorrow (Friday 4/25).

Called Mr. Buchen at the University Club and he will call Dr. Marrs; so advised Dr. Marrs.

Executive Privilege
See WH aides testimony

THE WHITE HOUSE

WASHINGTON

May 29, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS

SUBJECT: Power of Congressional Committees to Compel Appearance or Testimony of Presidential Assistants

This is in response to your request for a discussion of historical precedents and policy on appearances or testimony before congressional committees by Presidential assistants not confirmed by the Senate.

Introductory Note

In his press briefing of April 25, regarding Senator Kennedy's request to have Ambassador Brown testify before a Judiciary Subcommittee, Ron Nessen stated: " . . . traditionally appointees of the President who are not subject to confirmation by the Senate are not called to testify." Actually, a complete reading of the transcript (Tab A) makes clear that Ron was talking about a narrower category of Presidential "assistants" rather than "appointees".

On May 2, 1975, Senator John Sparkman sent a letter to the President in order ". . . to keep the record straight." (Tab B) He noted:

* * *

> "Among the Presidential appointees not confirmed by the Senate who have testified before congressional committees are Peter Flanigan, Richard Goodwin, Sherman Adams, Robert Cutler, Robert E. Merriam, Gerald D. Morgan, Lawrence F. O'Brien, General E. R. Quesada, Roger L. Stevens, Dr. Stafford L. Warren, and Dr. Jerome Wiesner."

* * *

Historical Precedents

There have been numerous instances in which White House Staff members declined to appear before congressional committees.

1. On two occasions during the administration of President Truman, a subcommittee of the House Committee on Education and Labor issued subpoenas to John R. Steelman, who held the title "Assistant to the President". In both instances he returned the subpoena with a letter stating that "In each instance the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee."

2. In 1951, Donald Dawson, an Administrative Assistant to President Truman, was requested to testify before a Senate Subcommittee investigating the Reconstruction Finance Corporation, one aspect of which concerned Mr. Dawson's alleged misfeasance. Although the President believed that this request constituted a violation of the constitutional principle of the separation of powers, he nevertheless "reluctantly" permitted Mr. Dawson to testify so that he could clear his name.

3. In 1944, Jonathan Daniels, an Administrative Assistant to President Roosevelt, refused to respond to a subcommittee subpoena requiring him to testify concerning his alleged attempts to force the resignation of the Rural Electrification Administrator. He based his refusal on the confidential nature of his relationship to the President. The subcommittee then recommended that Daniels be cited for contempt. Thereupon Daniels wrote the subcommittee that although he still believed that he was not subject to subpoena, the President had authorized him to respond to the subcommittee's questions.

4. During the Eisenhower Administration Sherman Adams declined to testify before a committee investigating the Dixon-Yates contract because of his confidential relationship to the President. However, at a later date in the administration he

volunteered to testify concerning his dealings with Bernard Goldfine who was charged with violations of federal criminal statutes.

5. During the hearings on the nomination of Justice Fortas as Chief Justice the Senate Judiciary Committee requested W. DeVier Pierson, then Associate Special Counsel to the President, to appear and testify regarding the participation of Justice Fortas in the drafting of certain legislation. Pierson declined to appear, writing the Committee as follows:

> "As Associate Special Counsel to the President since March, 1967, I have been one of the 'immediate staff assistants' provided to the President by law. (3 U.S.C. 105, 106) It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore, respectfully decline the invitation to testify in the hearings."

6. Similar incidents occurred during the Nixon Administration in connection with attempts of Congressional Committees to obtain the testimony of Dr. Kissinger and Mr. Flanigan. It is my recollection that Kissinger never testified as a Presidential assistant, but that Flanigan did appear during the course of the Kleindienst nomination with the approval of the President and under certain ground rules limiting the scope of the inquiry to his personal role in the ITT-Hartford merger.

It thus appears that at least since the Truman Administration Presidential Assistants have appeared before congressional committees only where the inquiry related to their own private affairs or where they had received Presidential permission. In the Dawson case both conditions were met.

Relevant Doctrine

Although I am not aware of any judicial pronouncements on this issue, two areas of Constitutional doctrine are relevant.

1. Executive Privilege. While an assertion of Executive Privilege with respect to specific testimony or documents on the subject of advice given by a staff member to the President would be entirely proper, the propriety of invoking the privilege to direct the staff member not to appear at all would be questionable.

Requests to the White House to furnish official documents in its custody to a congressional committee clearly can be resisted on the basis of Executive Privilege (notwithstanding Nixon v. Sirica). But the claim of privilege for documents would not appear to be co-extensive with the claim of personal immunity from subpoena. A claim for official documents in the custody of the Executive Branch necessarily involves Executive business, whereas it cannot be said to a certainty in advance that a White House adviser will necessarily be interrogated only on matters pertaining to his official duties.

2. Separation of Powers. A more persuasive rationale for denying the appearance or testimony of Presidential assistants before congressional committees is the doctrine of separation of powers. An immediate assistant to the President in the normal situation acts as an agent of the President in implementing Presidential functions. If a congressional committee could compel the attendance of a Presidential adviser for the purpose of inquiring into the discharge of functions constitutionally committed to the President, the independence of the Presidency would be impaired for the same reason that such congressional power to compel the attendance of the President himself would impair that independence. As President Truman said in a radio address on the occasion of his refusal to appear pursuant to a request of the House Un-American Activities Committee, if a President or former President could be called and questioned about his official duties, "the office of President would be dominated by the Congress and the Presidency might become a mere appendage of Congress." New York Times, Nov. 17, 1953 at p. 26.

The issue at hand is treated comprehensively in the attached Memorandum on Power of Congressional Committee to Compel Appearance or Testimony of Presidential Assistants -- Constitutional and Statutory Aspects (Tab C) and the Statement

of William H. Rehnquist, Assistant Attorney General, before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate (Tab D).

Recommendation

I would suggest that you not respond to the letter of Senator Sparkman at this time. In this regard, it would be best to leave sleeping dogs lie.

Executive Privilege

June 9, 1975

To: Mr. Hills

From: Eva

The Attorney General's secretary checked with him and he knows nothing about the meeting tomorrow with the Vice President and the Murphy Commission and the fact that he should have a statement on Executive Privilege.

Is quite concerned.

I told her we would check with you again and be back in touch.

~~CONFIDENTIAL~~
WITH ATTACHMENT

Exec Privilege
NSC Tucker in NSC
Freedom of Information File

THE WHITE HOUSE

WASHINGTON

June 12, 1975

MEMORANDUM FOR: JIM CANNON

THROUGH: PHIL BUCHEN P.W.B.

FROM: DUDLEY CHAPMAN DC

SUBJECT: Release of White House Memorandum Concerning Energy

The memorandum in question, dated July 7, 1972, was from Peter Flanigan to John Ehrlichman, George Shultz, Rogers Morton, Bill Timmons and Clark MacGregor. It is classified Confidential. The memo discusses both the merits and politics of natural gas deregulation, as well as certain foreign policy implications. The foreign policy discussion, particularly insofar as it relates to policy toward imports from Canada, is properly classifiable.

The paper is, in addition, an internal White House memorandum to which the Freedom of Information Act does not apply. Even if the Act did apply, it would be exempt because it consists of internal recommendations and advice that would exempt it from disclosure under exemption 5. The memorandum is so totally made up of internal policy discussion that it would not be practical to excise only portions of it.

The document is also clearly protected by executive privilege, though the above grounds are sufficient in themselves to withhold it.

~~CONFIDENTIAL~~
WITH ATTACHMENT

Relevant "Executive Privilege"

THE WHITE HOUSE

WASHINGTON

August 8, 1975

MEMORANDUM FOR: WILLIAM NICHOLS

FROM: DUDLEY CHAPMAN DC

SUBJECT: Executive Privilege: Agriculture Letter

Your memorandum to Barry Roth of August 1, 1975, asked whether OMB and Agriculture are authorized to withhold a document requested by the Chairman of the House Agriculture Committee on the ground of executive privilege.

Barry and I have discussed this with Phil Buchen and our conclusion is that the document should be furnished on the ground that the disclosure by Justice of its own internal recommendation amounts to a waiver of executive privilege in this specific instance.

cc: Phil Buchen ✓
Barry Roth

THE WHITE HOUSE

WASHINGTON

August 5, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: DUDLEY CHAPMAN
BARRY ROTH

SUBJECT: Assertion of Executive Privilege for Departmental Position on Legislation

The Administration has opposed H.R. 5493 which would require packers or other persons buying livestock or poultry to provide adequate bonding or other security to pay the producers of such commodities. Agriculture's proposed letter to the Chairman of the House Agriculture Committee, which it submitted to OMB for clearance, would have favored the bill (Tab A). Justice, in a letter by Assistant Attorney General Michael M. Uhlmann addressed to Jim Lynn, gave its reasons for disagreeing with Agriculture (Tab B). After the President had decided in favor of the Justice view, Bruce Wilson of the Antitrust Division testified before the House Agriculture Committee and, in the course of that testimony, furnished a copy of Uhlmann's letter to the Committee. The Justice/Administration position received a hostile reception from the Committee which has asked for a copy of the original Department of Agriculture's proposed letter in support of the bill. The Justice letter specifically refers to the Agriculture letter both in its arguments and for facts not repeated by Justice. OMB has asked whether the Department of Agriculture's proposed reply should be withheld on grounds of executive privilege (Tab C).

On the merits, the Agriculture letter, although framed as a communication to the House Committee on Agriculture, is an internal recommendation that was not accepted, and is, therefore, covered by executive privilege.

Two factors weigh against asserting privilege in this instance:

(1) The fact that Justice has already released its own internal recommendation in support of the Administration's position would make our position inconsistent if we assert the privilege as to Agriculture but not Justice. Since the Justice letter was not prepared as a communication to the Committee, but as an internal recommendation to OMB, it is clearly a privileged document. Justice felt warranted in releasing it because its position had been embraced by the Administration and it appears to have been either an oversight or a shortage of time that resulted in submission of a document in this form rather than in a more conventional departmental comment on legislation.

(2) While I am told by Bill Nichols that there is not any notable precedent for releasing unsuccessful recommendations submitted to OMB for clearance, there is precedent for authorizing departments and agencies whose recommendations have been rejected to state their views to a Congressional Committee. This is normally done when there are severe differences within the Administration, and that appears to be the case here.

Two ways of handling the request would be:

(A) Refuse the request on grounds of privilege; or

(B) Comply with the request on the ground that the Administration has effectively waived privilege on this subject.

We recommend Option B for the reasons stated above.

Approve Option A _____

Approve Option B P. W. B.

See Me _____

Exec Priv.

THE WHITE HOUSE

WASHINGTON

For file

August 15, 1975

MEMORANDUM FOR: PHILIP BUCHEN

FROM: ROBERT GOLDWIN RG

Thank you for your memorandum suggesting how I might answer the personal letter of James Q. Wilson about executive privilege. I have done so, just as you suggested.

THE WHITE HOUSE

WASHINGTON

August 4, 1975

MEMORANDUM FOR THE PRESIDENT

THROUGH: DONALD RUMSFELD

FROM: ROBERT GOLDWIN RG

Professor Wilson, Department of Government at Harvard, sent me the attached letter on the subject of executive privilege.

I phoned him to amplify the meaning of several words and phrases in the letter, with the following results:

> By "the court-supported principle of executive privilege" Wilson is referring to the Supreme Court's opinion in the case to force release of the Nixon tapes. By an 8-0 vote, the Court recognized the validity of the claim to executive privilege, but found it not applicable in the case before them.
>
> By "whipsawing the agencies" Wilson means that one official is asked for raw data and is reluctant to supply it, whereupon another official, when asked for similar information, complies. Then the first official is recalled and is in an awkward and perhaps untenable position if he refuses.
>
> By "aggressive leadership" Wilson means that the White House must give prompt and firm guidance to agencies on questions such as revealing the raw data in the files, whether names of some persons ought to be deleted, whether the names of all citizens ought to be deleted, and so on.

Most important, Wilson argues, is that there be an understanding that executive privilege is a valid principle and necessary to be maintained in appropriate circumstances.

Attachment

cc: Philip Buchen
James Lynn

July 31, 1975

PERSONAL

Dr. Robert Goldwin
The White House
1600 Pennsylvania Avenue
Washington, D. C. 20500

Dear Bob:

The Congressional hearings now underway with respect to the FBI, CIA, and DEA have evoked a dangerous situation for the doctrine of executive privilege and for the maintenance of that minimum level of confidentiality essential to the operation of law enforcement and intelligence agencies.

My observation, based on current research in and close familiarity with the FBI and DEA, coupled with the experiences of a colleague now doing research in the CIA and DOD, is that these simultaneous Congressional hearings are whipsawing the agencies--one is played off against another--and inducing among some key officials an imprudent desire to accommodate to the demand for publicity even at the expense of the operations and morale of the agencies.

I believe that there is a Presidential interest that ought to dominate these independent agency reactions. That interest is in protecting the court-supported principle of executive privilege and the necessary ability of important agencies to serve vital national interests.

It would appear that there is now no strong central direction being given by the White House to these agency reactions to Congressional inquiries such that legitimate Congressional and Presidential interests are kept in balance. This requires, it seems to me, not merely casual communication or meetings, but aggressive leadership by a high-level Presidential aide.

Sincerely,

James Q. Wilson

DEPARTMENT OF STATE
THE LEGAL ADVISER
WASHINGTON

August 20, 1975

The Honorable Philip Buchen
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Buchen:

Some time ago you expressed an interest in seeing the ultimate result of Gordon Baldwin's research on whether there is a legal basis for declining to submit certain types of executive agreements to Congress under the Case Act.

Enclosed for your information is Gordon Baldwin's best effort to make such a case. I will be interested in having your reaction as a lawyer.

Very sincerely,

Monroe Leigh

Enclosure

Executive Agreements and Disclosing Defense Intelligence Agreements

ISSUE: May the Executive Branch constitutionally refuse to inform Congress of certain classified "defense intelligence agreements" despite the provisions of the Case Act.

I. Summary and Conclusion

This memorandum concludes that the statutory obligation to inform Congress of classified "defense intelligence agreements" is unconstitutional in the following circumstances, and that a refusal to disclose them would be upheld by the Supreme Court:

a) the "defense intelligence agreement" is withheld from Congress at the specific request of the foreign party; and,

b) the foreign party would be entitled under international law to terminate the agreement if it is disclosed to Congress; and,

c) the President, or his appropriate agent, certifies that the agreement only involves the exchange of intelligence information and does not involve breaches of constitutional rights; or in the alternative to "a" and "b";

d) the Executive Department shows specific facts which imperatively support non-disclosure (see p. 18 of this memorandum for examples).

II. The Statute

The Case Act requires the Secretary of State to transmit the texts of all international agreements to Congress. However, the Act allows some agreements to receive limited distribution in stating that:

> "any agreement, the immediate public disclosure of which would in the opinion of the President, be prejudicial to the security of the United States, shall not be transmitted to the Congress, but shall

be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President (86 Stat. 619, 1 U.S.C.A. Sec. 112 b, effective 23 August 1972)."

The statute is not retroactive, and its legislative history reveals that Congress heard doubts as to its constitutionality if applied rigidly. The late Professor Alexander Bickel of Yale advised the Committee on Foreign Relations of his doubts of the difficulty of drafting to meet the constitutional problem: "I don't know that there is a draftsman who would be equal to the task of putting that shadowy doctrine [i.e. Executive privilege] into acceptable and comprehensible words."* A deputy legal adviser (Carl Salans) also suggested some constitutional doubts, but his views were rejected also.

---

* Hearings before the Committee on Foreign Relations, U.S. Senate 92nd Congress, 1st Session on S. 596, Oct. 20-21, 1971 (Transmittal of Executive Agreements to Congress.) at pp. 27-28.

"The only possible difficulty I can see with S. 596, therefore, is that the President might decline to transmit an agreement which he views as executed in exercise of his own independent power and of no proper concern to Congress. I would seriously doubt the wisdom of a President taking such a position in any circumstances I can now imagine short of full-scale hostilities, but I should suppose that if his function as commander responsible for the safety of troops was involved, he might well be on sound constitutional ground in involving executive privilege and withholding a document from Congress. Yet I would see no need to attempt to write the doctrine of executive privilege into S. 596, and I don't know that there is a draftsman who would be equal to the task of putting that shadowy doctrine into acceptable and comprehensible words. It would seem to me that without now attempting prospectively to settle some future case that might arise in circumstances not now easily foreseeable, the legislative history might make clear the understanding of the Congress that nothing in S. 596 was intended to deny the President the benefit of the doctrine of executive privilege in the conditions in which he would be constitutionally entitled to invoke it."

Although the statute is drafted so as to include all international agreements, its primary purpose was to require the disclosure of those agreements which involved significant national commitments of a kind that might create "tensions and irritations between the Congress and the Executive branch."* Congress, says the House Report, "does not want to be inundated with trivia."** Therefore, insofar as a "defense intelligence agreement" is "trivial" the statute does not apply. Unfortunately, Congress gives us no test of what constitutes the important or the insignificant.

III. Assumptions

This memorandum assumes that:

a) the "defense intelligence agreements" do create binding agreements between nations and are not informal interagency understandings not reaching the dignity of an international agreement;

b) that the agreements do not specifically authorize unconstitutional behavior. Two examples of unconstitutional agreements which must be disclosed follow:

1. An agreement by which "Ruritania" will tap the telephone of U.S. Senator Erehwon and exchange information with the United States which taps the telephone of the Ruritanian Congress Minority Leader Savonarola would clearly be unconstitutional. Both Congress and the judiciary might have a legitimate constitutional claim to information showing such a violation of the 4th Amendment.

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* See House Report 92-1301, in 1972 U.S. Code Cong. & Admin. News, pp. 3067, 3068.

** Id. p. 3069.

2. An agreement with Ruritania by which the President undertook to return fugitives from Ruritanian justice who are captured in the United States. Such an undertaking by an Executive Agreement is unconstitutional -- according to Factor v. Laubenheimer 290 U.S. 276 (1933) and Valentine v. U.S. 5 (1936).* Hence, Congress -- not to mention the victim and the Courts -- might have a legitimate interest in the agreement, however confidential the President might wish it to be."*

IV. Discussion

To prevail against the Congress's claim, the Executive Department must prevail on two points:

A) that the agreements are authorized by the Constitution; and,

B) that Congress lacks constitutional power to insist that the Senate and House committees be given copies of agreements.

It is easier to establish the first than the second.

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* Arguably the reliability of such a firm statement as is found in Valentine

> "***[although extradition is] a national power, it is not confined to the Executive in the absence of treaty or legislative power."

is weakened by the Pink-Belmont decisions (U.S. v. Belmont, 301 U.S. 324 (1937); U.S. v. Pink 315 U.S. 203 (1942)) which sustained Executive agreements in language that might, if taken literally, offend the 5th Amendment's protection of property from taking without compensation. The Supreme Court has not reconciled the two sets of cases, both of which involve 5th Amendment claims, one of which upholds Executive agreements and the other of which forbids them.

A. Executive Power to Make Secret Agreements

No one seriously claims the President lacks power to make agreements with foreign powers that will be kept secret from the public. Draftsmen of the Constitution foresaw such a need when they allocated advice and consent power to the Senate rather than the House. Secret undertakings are commonly negotiated by all nations, and in our history there appears to be, until very recently, acquiescence by Congress to secret processes.* The military agreements during and after World War II at Cairo, Quebec, Tehran, Yalta, and Potsdan remained secret for several years and Congress made no contemporaneous objections, but the insistence on secrecy has lead to legislative efforts to require disclosure. The issue is whether any agreements involving military-diplomat intelligence exchanges made hereafter can be withheld from Senate and from House committees.

If the subject of "defense intelligence agreements" involved a power constitutionally committed to the President such as the power to receive an ambassador, or the power to grant pardons, the President's claim to withhold would be paramount because the powers are specifically vested exclusively in the President, (See Schick v. Reed 419 U.S. 256, (1974), and neither the Congress nor the judiciary can interfere. An agreement, therefore, to obtain intelligence information in return for a secret pardon or involving the exchange of emissaries would clearly be within the President's exclusive perogative.

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* In 1924 an examination of President Theodore Roosevelt's private papers revealed several secret exchanges with Japan, Germany and France, which today might be within the terms of the Case Act. See Corwin, The President, His Office and Powers, p. 443 (4th Ed. 1957).

Although the House in 1948 passed a joint resolution purporting to require the Executive to furnish any information required by Congressional Committees, the Senate let the resolution die in Committee. H.R.J. Res. 342, 80th Cong. 2d Sess. Some Representatives expressed the view that the President need not disclose agreements made with the British Prime Minister, 98 Cong. Rec. 1205, 1215.

B. Power To Withhold From Congress

1. The Constitutional Power to Defy Congress

The core issue here is whether the President can ignore the express direction of Congress. When he does so according to the Supreme Court, his power "is at its lowest ebb;"

> "When the President takes measures incompatible with the expressed *** will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Jackson concurring in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 637 (1952).

Examples of outright refusal of the Executive to follow an act of Congress in foreign affairs matters are relatively rare, and some examples suggested by scholars turn out to be erroneous because examination of facts reveal compliance rather than defiance.*

A "defense intelligence agreement" is negotiated pursuant to the President's powers as Commander-in-Chief, (intelligence information is essential to consider, to plan and to execute military action), his power to represent the United States in foreign relations, and his duty to faithfully execute the laws (those establishing the Central Intelligence Agency and the National Security Council).

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* Two scholars claim that "In 1940 President Roosevelt sent troops to Greenland and Iceland in the face of legislation that seemed to forbid it." Henkin, Foreign Affairs and the Constitution 106 (1972); Schlesinger, The Imperial Presidency, Ch. 9 (1973). Professors Henkin and Schlesinger are mistaken! The legislation was the Selective Service Act of 1940 which forbade sending inducted men outside the hemisphere (54 Stat. 886), but the troops which were stationed in Iceland were Marines who were, at the time, entirely composed of volunteers No forces including inductees arrived in Iceland until 1942. Only 486 Army troops were sent to Greenland, mostly engineers none were inducted. Indeed, the legal restrictions imposed on troop assignment by the Selective Service Act did influence planning. General Marshall had directed that selectees not be in any contingent sent abroad. (See Matloff & Snell, Strategic Planning for Coalition Warfare 1941-42, (U.S. Army in World War II, 1953 p. 50, 111)).

However, Congress also has constitutional functions which blend, overlap, and possibly conflict with Presidential functions. Hence, in order to achieve a workable government, a balancing of the respective constitutional interests is necessary.

2. The Balancing Test

To prevail on the second point the Executive Department must show the separation of powers doctrine demands total confidentiality. That doctrine is not absolute as the history of Presidential-Congressional relations shows, and as the Supreme Court in U.S. v. Nixon reaffirms. Ordinarily, conflicts between the Executive and the Legislative branch are settled through the political process which calls for the forebearance of the judiciary. In a proper case, however, the Supreme Court may act as an umpire. When the Court so acts, its opinions form the raw material by which future non-justiciable controversies are evaluated. It is appropriate, therefore, to examine the opinions of the Supreme Court which might be relevant to the application of the Case Act.

The Supreme Court opinion in U.S. v. Nixon suggests an instructive test to determine whether or not a valid claim to withhold information exists. The Court noted and rejected the underlying premise and two further grounds advanced to protect the Nixon tapes from in camera inspection by the District Court.

a) The need to protect communications between government officials.*

b) That the doctrine of separation of powers requires secrecy.

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* Marbury v. Madison, 1 Cranch 137, 143-45 (U.S. 1803) contains the first judicial consideration of a confidentiality claim by the Executive. The Attorney General refused to testify to anything relating to his official transactions. Chief Justice John Marshall recognized that there might be a privilege to refuse if confidential undertakings were involved, stating: "if he thought that anything was communicated to him in confidence he was not bound to disclose it." Subsequent cases indicate that the threshold issue of whether or not the issue is confidential is a question for the Courts.

The underlying premise turned out to be the major weakness in the brief submitted on behalf of the President, namely; insistence that Executive claims should be honored simply because the Executive said so. "The ultimate authority over all Executive decisions is, under Article II, vested exclusively in the President of the United States."*

The process by which these claims were rejected in the Nixon case is applicable to the Case Act problem. The Court instead of accepting or totally rejecting the asserted claims engaged in a balancing-functional analysis rather than in a doctrinal mechanical approach.**

> "We address *** the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence to criminal trials." 418 U.S. 683, 712, footnote 19, (1974).

In so speaking the Court rejected the President's (Nixon's) major premise that his opponents had to establish a compelling need before the Court could engage in balancing. The Court struck the balance by contrasting the specific need for the information in a criminal trial with "the [President's] broad, undifferentiated claim of public interest in confidentiality." At critical points in the opinion the Court indicated that it might have ruled in favor of confidentiality if the

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* Brief for respondent at pp. 27-28; see Westin & Friedman, ed. United States v. Nixon p. 337 (1974). The authorities cited on the brief for this proposition in reality support the opposite, namely that ultimate authority rests in no single branch of the government. See Federalist #48; 1 Stor The Constitution 530 (4th ed.).

** Significant in the opinion is its omission of any reference to the diligent work of Raoul Berger, Executive Privilege, A Constitutional Myth (1974). Berger rejected a functional analysis of what is needed to make the Constitution work in favor of a firm doctrinal and mechanical support of total legislative supremacy. For a criticism of Berger's approacl see Soefer, 88 Harvard Law Review 181 (1974). Professor Soe concludes that Berger's work is wholly one-sided, "incomplet and biased," despite his impressive research. The same can said for the brief submitted on behalf of President Nixon's claims. The Court's opinion is a compromise which rejects the extreme claims of advocates of legislative supremacy (Berger) and of Presidential supremacy (the St. Clair brief)

interest in disclosure in a criminal trial had been less strong and the need for confidentiality more specific. A major weakness of the President's position was the broad and undifferentiated nature of his claims. A need for confidentiality might arise and might be honored, said the Court, if the subject matter sought involved military-diplomatic or "sensitive" material.

> "Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material of in camera inspection ***."

The Court was not called upon to tell what matter might fall within the classification of diplomatic or military matters, and hence only case-by-case adjudication will supply definitions. However, in these areas the deference to Executive needs for confidentiality will be entitled to the "utmost deference."

> "In this case the President *** does not place his claim of privilege on the ground [that the material involves] military or diplomatic secrets. As to these areas of Article II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. 683, 710.*

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* The Court only cited C & S Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948). Wherein the Court stated:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." Id. at 111. This is dicta which is qualified by the Nixon and Reynolds cases. See also U.S. v. Curtiss-Wright Export, 299 U.S. 304, 320 (1936); Zemel v. Rusk 381 U.S. 1, 17 (1963).

To support confidentiality in the face of a competing claim the Nixon case required a showing that the confidentiality claim "relates to the effective discharge of a President's power." (418 U.S. at 711.) How can such a showing be made? Older cases supply helpful hints.

A naked claim that military or diplomatic matter would be divulged is not enough to avoid balancing the particulars. The Nixon opinion cited U.S. v. Reynolds 345 U.S. 1 (1953) wherein the Court confronted a plaintiff's demand for certain classified material relating to a crashed B-29. The Court, Black, Frankfuter, and Jackson dissenting, reversed an order that classified material be tendered to the trial judge in camera inspection because:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. 1 at 10. [Emphasis supplied].

The Reynolds test does require balancing in that the trial judge must be satisfied that national security required confidentiality. The courts have not told us precisely how satisfaction will be achieved, but leave the issue for case-by-case determination. It is clear that legislative interests differ from judicial claims and must be examined.* Here unlike the Nixon, the Reynolds and the C & S Airlines cases which involved claims for disclosure by the judiciary in civil or criminal litigation:

1. Congress seeks information, not the courts, and Congress, unlike the courts has significant authority in the area of military and diplomatic affairs;

2. Congress does not seek substantive intelligence information; it wishes to know about the process by which information is obtained, and what price, if any, is extracted from the United States; **

3. The information sought will not, says the Case Act, be "published to the world." It will remain confidential and within the Congress (in theory at any rate).

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* Robert Jackson, while Attorney General, and with the President's approval, refused to disclose FBI reports to a House Committee. See 40 Op. A.G. 45 (1941) which contains many examples of similar refusals to furnish specific substantive information. None of the examples, however, involve an inquiry into whether or not a secret agreement existed.

** Congress, over the President's veto allows the judiciary to determine de novo whether or not material is properly declassified. See PL 93-502 Act of November 21, 1974 amending the Freedom of Information Act, 5 U.S.C. 552. The constitutionality of this power has not been determined.

Therefore the reasons that allowed an Executive claim to prevail or be subordinate to a judicial claim, do not automatically apply to overcome or be inferior to a legislative claim.*

The supremacy of Congress has strong advocates today whose arguments must be conquered if the Executive is to establish authority to withhold. Raoul Berger in his recent book Executive Privilege insists that the Executive must disclose the products of intelligence exchange agreements.** The surrender he asserts, is required to fulfill Congress's legislative responsibilities to support and maintain the defense establishment, and because Congress created the Central Intelligence Agency and the National Security Council. To aid its legislative task in supervising these agencies and in overseeing their ability to fulfill their statutory mandate, he claims, that Congress must have these data.

Berger confuses the obligation to disclose the agreements with the right to the substantive content of intelligency information. He claims, without differentiation, that Congress has a right to both. But the claim to substantive information raises different constitutional questions than a claim of access by both Houses of Congress to international agreements. If the Case Act only obliged the disclosure of the agreements to the Senate or to a Senate committee then the Executive claim would be weaker, because of the constitutional commitment only to the Senate of power to advice and consent to treaties.

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* The privilege of withholding state secrets has long been recognized by courts: see Totten v. U.S. 92 U.S. 105 (1825); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318 (D.D.C.), aff'd sub nom V.E.B. Carl Zeiss, Jena v. Clark, 384 F. 2d 979 (D.C. Cir. 1967), cert. denied 389 U.S. 952 (1967), and in camera inspection has been denied; see U.S. v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944); Pallen v. Ford Instrument Co. 26 F. Supp. 583 (E.D. N.Y. 1939); Firth Sterlin Co. v. Bethlehem Steel, 199 F. 2d 353 (E.D. Pa. 1912). But see Halpern v. U.S. 258 F. 2d 36 (2d Cir. 1958) and Cresmer v. U.S., 9 F.R.D. 203 (E.D. N.Y. 1949).

** Berger, Executive Privilege 154 (1974).

One of the earliest constitutional precedents for refusing to disclose treaty-type information to Congress was when President Washington declined to furnish the House of Representatives with copies of instructions to John Jay who negotiated a treaty with Great Britain. President Washington claimed that this inspection would not be asked by the House because it was only the responsibility of the Senate.* The Case Act, however, purports to require surrender of agreements to both Houses - it represents, therefore, an undifferentiated claim of legislative power. A number of bills presented in 1975 are making more sweeping claims to disapprove of Executive Agreements by concurrent resolutions.**

In our early history the Congress was more diffident. In 1790 Congress appropriated a lump sum for the conduct of foreign affairs, and required the President to account specifically for all expenditures "as in his judgment may be made public."*** Frequently in the early days Congress would request the President to send foreign affairs information to Congress, but with qualifications that allowed withholding of material which might prejudice national interests.****

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* 5 Annals of Congress 760-762 (1796) President Washington's position is frequently cited as authority for denying information to Congress generally. Actually he was only resisting the House of Representatives.

** See for example, the proposed Executive Agreements Review Act, H.R. 7051, 94th Cong. 1st Sess.

*** Act of 1 July 1790, 1 Stat. 128-9.

**** See 4 Annals of Congress 251 (1849) Madison's statement of January 1794 indicating that the President might give "reasons" for refusing to disclose communications received from Great Britain.

10 Annals of Congress 773 (1851). On January 20, 1800 the Senate requested the President to give "such information *** as *** may in his opinion be proper" to give the Senate regarding a treaty with Francy.

15 Annals of Congress 67, 70 (1852). On January 22, 1806 a request that the President disclose a letter from James Monroe to the Secretary of State was modified by the qualification that the President should first judge it "proper."

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> "[The President] not the Congress *** has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

Because the President has facilities to obtain information necessary to fulfill the foreign affairs responsibilities of both the Congress and the Executive, and because those facilities may be jeopardized by disclosure, the President can properly claim that it is in the mutual interest of both branches of the Government to protect confidentiality. That mutuality is supported by two statutes which recognize the need for foreign intelligence and for its protection.

a) Sec. 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 which states that Congress did not intend "to limit the constitutional power of the President to *** obtain foreign intelligence information ***."*

b) The Central Intelligence Act of 1949 (50 U.S.C. 403(d)(3)) stating that: "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

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* "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by the authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

Arguably the preceding statutes conflict with the Case Act. However, courts seek to construe statutes harmoniously and hesitate to ignore or strike one down if it is possible to preserve all.*

It is an appropriate rule of statutory construction, therefore, to construe a general obligation as qualified by more specific limitations. The general and undifferentiated language of the Case Act is constitutional only if it is qualified, therefore, by the constitutional power of the President recognized in the Safe Streets Act to obtain foreign intelligence information, and by the specific obligation of the Director of Central Intelligence to protect it from disclosure. The Case Act, furthermore, on its face is only directed at the Secretary of State. Nothing in the history of the Case Act reveals any specific concern about "defense intelligence agreements" which are not ordinarily negotiated by the Department of State and which by definition are likely to be both sensitive and classified. Furthermore, if disclosure constituted a breach of an international agreement, and hence a breach of international law, there is additional ground for qualifying the broad language of the Case Act.** A recent lower federal court supports this argument in refusing access to documents because granting access would breach an international understanding.***

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* See Regional Rail Reorganizational Cases, 419 U.S. 102 at 133 (1974) "repeals by implication are disfavored;" also FAA v. Robertson. 43 L.W. 4833, 24 June 1975.

** While Congress has the power to breach an agreement by a subsequent statute (see the Chinese Exclusion Cases 130 U.S. 581 (1889). Courts seek to avoid such a result.

*** Wolfe v. Froehlke. 358 F. Supp. 1318 (D.D.C. 1973), aff'd 510 F. 2d 654 (D.C. Cir. 1974) where the Army refused to disclose documents requested under the Freedom of Information Act because the British with whom the requested file had been jointly created did not agree to declassification. The court upheld the Army.

The Executive must concede Congress's general interest in learning about significant international agreements. That Congressional power must, in general terms, be recognized because of the following delegated powers:

a) authority to regulate foreign commerce (Art. 1 Sec. 7 cl. 3);

b) authority to appropriate funds and require an account of their use (Art. 1 Sec. 9 cl. 7, cf. U.S. v. Richardson 418 U.S. 166 (1974));

c) it is authorized to seek ways to reduce waste and inefficiency by investigating the behavior of those receiving government funds, and it may examine the national defense posture including the wisdom of commitments that might involve the United States in foreign conflicts.

d) Congress, not the President, may constitutionally consent to States seeking to "enter into any Agreement or Compact with *** a foreign Power." (Art. 1 Sec. 10, cl. 3).

However, the general interest of Congress can be overcome by the more specific needs of the Executive branch, already recognized by statute and rooted in Article II of the Constitution.

4. Balancing -- The Role of the Judicial Branch

The resolution of the competing Executive and Legislative Department claims, presented in a case or controversy (a contempt of Congress citation or a prosecution against an Executive Department official) is a judicial function.* Several important recent cases reveal that the Supreme Court is not reluctant to act as an umpire in cases involving competing separation of powers claims: U.S. v. Nixon (Executive vs. Judiciary); Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952) (Executive vs. Congress); Powell v. McCormick 395 U.S. 486 (1969) (Congressman vs. Congress); N.Y. Times v. U.S. (the Pentagon Papers case) 403 U.S. 713 (1971) (Executive vs. First Amendment), Gravel v. U.S. 408 U.S. 606 (1973).** In all of these cases the Court rejected an argument that the separation of powers doctrine forbade judicial inquiry. In all of these the proponent of absolute power to forbid judicial review lost!

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* Professor Freund points this out in On Presidential Privilege, 88 Harvard Law Review 13, 38 (1974).

** See also Sun Oil Co. v. U.S. 514 F. 2d 1020 (Ct. Cl. 1975).

To replace separation of powers as an absolute doctrine, the Court in Nixon approved Justice Jackson's observation that:

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

A major function of the Supreme Court is, through the adjudication of cases and controversies, to develop doctrines that "integrate the dispersed powers into a workable government." "Executive privilege" is one of those doctrines - the Constitution contains no reference to it, it must be implied and its parameters described incrementally as experience dictates. The evidence that the Court needs in shaping applicable doctrines here must be facts showing precisely how the proper functions of both the Executive and Legislative branches will be frustrated by disclosure of "defense intelligence agreements" to committees of Congress. One critical fact is that compliance with the demand will force Congress to breach an international agreement. The justification for preferring one constitutional claim against another is always that the interests of all will be served by honoring the demand of one. That justification underlies the Court's opinions in civil rights litigation. When an individual's claim to liberty or property is supported, it is because of an overriding conclusion that the public interest is served by protecting that private interest in liberty or property. Similarly a government agency's claim for confidentiality can only prevail over an act of Congress by showing that there is a larger public interest favoring total confidentiality. Confidentiality frequently is favored in other contexts. For example, there is a community interest in the inviolability of the jury room; in the privileges of a judicial conference; in the common law of privileged communications; and in a prohibition against disclosure of judicial rulings until authorized by the Court. Any legislation seeking to forbid secret jury or judicial deliberation would be totally unconstitutional because it would impinge upon the ability of judge and jury to function effectively.

C. Facts Which Support Confidentiality

The following hypothetical situations illustrate the kinds of facts that a Court would find persuasive in permitting non-compliance with the Case Act.

1. An assurance to the foreign party to the agreement that its contents would NOT be disclosed to another branch of our Government, coupled with some solid reasons for that assurance, for example:

   i. the Ruritanian Government wishes to maintain a public posture of neutrality among so-called super powers, and the disclosure of any benefit given to the United States would trigger comparable demands from a third power;

   ii. the Ruritanian Government in power would suffer a severe political embarrassment if the agreement were disclosed, and it is in the United States' interest that this government not be so embarrassed. Such an agreement, however, must be made clearly within the lawful power of the United States Government.

   It may not be enough that the Executive Department alone wants to keep the agreement secret without specifying reasons.

2. The agreement involves the location, duties and safety of military and other personnel who are under the orders of the President -- i.e., their direction is based on the President's power as Commander-in-Chief.

3. That inextricably linked with the agreement is information supplied by associates and advisers of the President which was intended to help the President in international policy planning. Here the President can rely directly on the opinion of the Court in Nixon v. U.S.; and on Marbury v. Madison.

4. A showing that disclosure of one agreement will trigger demands on the United States to enter into similar agreements with other nations. Example: that if the agreement with Ruritania, by which Ruritania obtains certain technical advice, were disclosed, then Lilliput, Ruritania's adversary, will make similar demands which for some stated reasons (cost too much, Rurtanians are friends and gentlemen, Lilliputians are bastards, etc.) the United States does not wish to honor.

5. That the agreement was achieved by "bribing" the President, King or whatever, of Ruritania in such a manner that U.S. law was not violated although Ruritanian law might have been.

To mention these possible facts does not exclude the possibility of other persuasive facts, but they must be persuasive facts, not naked assertions!

Gordon B. Baldwin
Counselor on International Law

Exec. Privilege

THE WHITE HOUSE

WASHINGTON

August 21, 1975

MEMORANDUM FOR: BILL SEIDMAN

FROM: PHIL BUCHEN P.W.B.

SUBJECT: Confidentiality of EPB Executive Committee Documents

In response to your inquiry, we should, as a general rule, be able to maintain the confidentiality of agendas, discussion papers and minutes of the Economic Policy Board (EPB) Executive Committee in response to Congressional, GAO, and Freedom of Information Act requests.

I. Executive Privilege

With respect to Congressional and GAO requests, the only basis at law for withholding documents is a formal claim of executive privilege. Although not specifically mentioned in the Constitution, executive privilege is derived from the concept of the separation of powers between the three co-equal branches of our Federal Government.

The basic rationale for executive privilege is to protect the effectiveness of the Presidency. One threat to this effectiveness is the restraint on the free flow of advice from the President's closest advisers if disclosure of such advice is required. For this reason, the privilege is available with respect to various internal documents which are relevant to the Presidential decision-making process. On the other hand, materials of a purely factual nature or those outside the legitimate sphere of the President's decision-making process do not normally require protection and ordinarily would have to be disclosed. Agendas, discussion papers and minutes of the EPB are each a part of the internal, decision-making process of the Executive, and are advisory rather than factual in nature. Thus, ordinarily they would not need to be disclosed.

However, it is the President's preference to invoke executive privilege only when it is absolutely necessary. Thus, any Congressional requests for EPB documents should normally be the subject of negotiation at the staff level, in the hopes of avoiding a confrontation, while still preserving the privilege.

II. FOIA: Scope

In amending the Freedom of Information Act (FOIA) last year, Congress demonstrated its awareness of a sphere of Executive confidentiality. Although the FOIA now specifically includes the Executive Office of the President, the legislative history indicates that the FOIA was not intended to extend to the principal personal advisers and assistants to the President.*/ The test here is basically the closeness of the operations of the persons in question to the President, and whether such persons are involved only in advising the President.

Executive Order 11808, as amended by Executive Order 11865, establishes the EPB for the purpose of advising the President on all facets of domestic and international economic policy. The Civil Division of the Department of Justice shares the view of my office that a strong case can be made that the EPB is not an agency for purposes of the FOIA, and is not subject to its mandatory disclosure provisions. In terms of EPB documents that are found at the Departments and agencies of the EPB members, our office believes that such documents remain outside the FOIA, regardless of location. However, both of these positions have been formulated in the absence of precedents under the newly amended FOIA. What treatment the courts will give to these positions remains subject to at least some uncertainty at this time.

III. FOIA: Exemptions

Even if the EPB is subject to the FOIA, the FOIA exempts from mandatory disclosure internal communications, consisting of advice, recommendations, opinions, and other materials reflecting deliberative or policy-making processes. Purely factual information or reports may be protected only if they are inextricably intertwined with policy-making processes. On the basis of various court decisions,

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*/ House Report No. 93-1380, 93rd Cong., 2d Sess., page 15.

you should be able to withhold minutes of meetings and agendas, as well as the advisory portions of discussion papers.

While it is not possible to predict with absolute certainty the outcome of any litigation that may result from Congressional or FOIA requests, we believe that we will be able to protect these documents.

Should you have additional questions in this regard, or in the event any requests are in fact made for these documents, please do not hesitate to contact either myself or members of my staff.

THE WHITE HOUSE

WASHINGTON

July 29, 1975

MEMORANDUM FOR PHILIP W. BUCHEN

FROM: L. WILLIAM SEIDMAN LWS

SUBJECT: CONFIDENTIALITY OF THE WORKING PAPERS OF THE EPB EXECUTIVE COMMITTEE

As you know, the Economic Policy Board Executive Committee meets daily to coordinate domestic and international economic policy within the U.S. Government.

The standard procedures under which the Executive Committee operate is the publication in advance of a weekly agenda, supplemented as necessary by daily agenda. In most instances, the lead department or agency will deliver a paper on a scheduled agenda item to my office for distribution to Executive Committee members 24 hours in advance. Minutes of each meeting are written and distributed to the Executive Committee which record the decisions made.

Please advise me as to the confidentiality of our agenda, discussion papers, and minutes if requested under the Freedom of Information Act, by the Congress, or the GAO.

I would appreciate a response by August 15, 1975