17 MAR 1981

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☑ I - INCOMING
Date Correspondence Received (YY/MM/DD) 81/02/23

ID # 006315
FE002-01

Name of Correspondent: Glenn English

☑ MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: Encloses correspondence from former presidents and requests a statement of policy from President Reagan regarding the matter of executive privilege

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
LA FRIE	ORIGINATOR	81/02/24	MF	A	81/03/12
CU FIEL	A	81/03/16		C	82/11/12
	Referral Note:	see below (2)			
CWATOR ~~Buettner~~	D	81/03/24		C	82/11/12
	Referral Note:				
CNFIEL	S	82/11/12	~~MF~~	A	82/11/12
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comments
D - Draft Response
F - Fact Sheet
I - Info Copy
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: (1) For your comments, recommendation and a draft response. (2) See Note

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
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1/81

RECORDS MANAGEMENT ONLY

CLASSIFICATION SECTION

No. of Additional Correspondents: 0001 Media: L Individual Codes: 1230 __.____ __.____

Prime Subject Code: FE 002-01 Secondary Subject Codes: FG 002-34 FG 002-37
FG 002-35 FG 002-38
FG 002-36 __ ____-__

PRESIDENTIAL REPLY

Code	Date	Comment	Form

C __ __ _____ Time: _____ P- _____

DSP _____ Time: _____ Media: _____

SIGNATURE CODES:

CPn - Presidential Correspondence
- n - 0 - Unknown
- n - 1 - Ronald Wilson Reagan
- n - 2 - Ronald Reagan
- n - 3 - Ron
- n - 4 - Dutch
- n - 5 -

CLn - First Lady's Correspondence
- n - 1 - Nancy Reagan
- n - 2 -
- n - 3 -

CBn - Presidential & First Lady's Correspondence
- n - 1 - Ronald Reagan - Nancy Reagan
- n - 2 - Ron - Nancy

MEDIA CODES:

- B - Box/package
- C - Copy
- D - Official document
- G - Message
- H - Handcarried
- L - Letter
- M - Mailgram
- O - Memo
- P - Photo
- R - Report
- S - Sealed
- T - Telegram
- V - Telephone
- X - Miscellaneous
- Y - Study

THE WHITE HOUSE

WASHINGTON

file ltr. prior

November 12, 1982

Dear Mr. Chairman:

Because of the interest of your Subcommittee in this matter, I am enclosing for your information a copy of the President's recent Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

Although the Memorandum attempts to describe in somewhat more detail the procedures that must be followed in reviewing possible claims of executive privilege, the basic rule set forth in the Memorandum -- namely, that executive privilege will be asserted only with specific Presidential authorization -- is consistent with the practice of recent Presidents. This rule has been followed throughout this Administration.

This Memorandum is also being sent to Congressman Kindness.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable Glenn L. English
Chairman
Subcommittee on Government Information
and Individual Rights
Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515

Enclosure

cc: Kenneth M. Duberstein

FFF:PJR:ma 11/11/82
cc: FFFielding Subject
RAHauser Chron.
PJRusthoven

THE WHITE HOUSE

WASHINGTON

November 12, 1982

Dear Congressman Kindness:

Because of the interest of your Subcommittee in this matter, I am enclosing for your information a copy of the President's recent Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

Although the Memorandum attempts to describe in somewhat more detail the procedures that must be followed in reviewing possible claims of executive privilege, the basic rule set forth in the Memorandum -- namely, that executive privilege will be asserted only with specific Presidential authorization -- is consistent with the practice of recent Presidents. This rule has been followed throughout this Administration.

This Memorandum is also being sent to Chairman English.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable Thomas N. Kindness
Ranking Minority Member
Subcommittee on Government Information
and Individual Rights
Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515

Enclosure

cc: Kenneth M. Duberstein

FFF:PJR:ma 11/11/82
cc: FFFielding Subject
RAHauser Chron.
PJRusthoven

THE WHITE HOUSE

WASHINGTON

November 12, 1982

Dear Senator Baker:

Enclosed for your information is a copy of the President's recent Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

Although the Memorandum attempts to describe in somewhat more detail the procedures that must be followed in reviewing possible claims of executive privilege, the basic rule set forth in the Memorandum -- namely, that executive privilege will be asserted only with specific Presidential authorization -- is consistent with the practice of recent Presidents. This rule has been followed throughout this Administration.

Copies of this Memorandum have also been sent to Congressmen English and Kindness of the House Subcommittee on Government Information and Individual Rights, because that Subcommittee has expressed specific interest in this matter. While I am not aware of similar specific inquiries from members of the Senate, I thought you might wish to review the Memorandum and share it with those Senators who may have a particular interest in this subject.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable Howard H. Baker, Jr.
Majority Leader
United States Senate
Washington, D.C. 20510

Enclosure

cc: Kenneth M. Duberstein

FFF:PJR:ma 11/11/82
cc: FFFielding
RAHauser
PJRusthoven
Subject
Chron.

THE WHITE HOUSE

WASHINGTON

November 12, 1982

MEMORANDUM FOR RONALD R. GEISLER
EXECUTIVE CLERK

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Memorandum for General Counsel of Executive Departments and Agencies

Attached is the signed original of a Memorandum for General Counsel of Executive Departments and Agencies (with copy to Assistant Attorney General Olson), which in turn attaches a copy of the President's recent Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

As Peter Rusthoven discussed with you, I would appreciate it if your office would handle the copying and distibution of this Memorandum and attachment. The distribution list should be the same as the one you use for Presidential memoranda for department and agency heads; Assistant Attorney General Olson may be viewed as the "General Counsel" for the Department of Justice in distributing this Memorandum.

Thanks for your help.

Attachments

FFF:PJR:ma 11/11/82
cc: FFFielding
RAHauser
PJRusthoven
Subject
Chron.

THE WHITE HOUSE

WASHINGTON

November 12, 1982

MEMORANDUM FOR GENERAL COUNSEL OF EXECUTIVE DEPARTMENTS
AND AGENCIES

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Presidential Memorandum on
Executive Privilege Procedures

Attached for your review is a copy of the President's recent Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

As directed in the Memorandum, any Congressional request that raises a substantial question of executive privilege must be reviewed by the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel) and by the Counsel to the President before the privilege may be asserted. Also, as in past Administrations, executive privilege may not be asserted without specific Presidential authorization.

Questions about the President's Memorandum should be addressed to the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel) and to this office.

Attachment

cc: The Honorable Theodore B. Olson

FFF:PJR:ma 11/11/82
cc: FFFielding
RAHauser
PJRusthoven
Subject
Chron.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

November 11, 1982

FOR: FRED F. FIELDING

FROM: PETER J. RUSTHOVEN

SUBJECT: Presidential Memorandum on Executive Privilege Procedures

As we discussed, attached for your review and signature are separate letters to Congressman English and Kindness and to Senator Baker, and a Memorandum for General Counsel of Executive Departments and Agencies, all of which forward signed copies of the above-referenced Presidential Memorandum. Ken Duberstein is copied on the Congressional correspondence; Ted Olson is copied on the Memorandum for General Counsel.

With respect to actual copying and distribution of the Memorandum for General Counsel, the Executive Clerk's office -- which handles these tasks for Memoranda for the Heads of Executive Departments and Agencies -- advises that it will be happy to do the same for this Memorandum. Hence, a short cover memorandum for Executive Clerk Ron Geisler is also attached for your review and signature.

Attachments

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

November 5, 1982

FOR: PETER RUSTHOVEN

FROM: DIANNA HOLLAND

Attached is a copy of the President's memo to Heads of Executive Departments and Agencies regarding Executive Privilege. Fred has asked that we prepare a letter to Congressman English for his signature ASAP.

Thank you.

THE WHITE HOUSE

WASHINGTON

November 4, 1982

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Procedures Governing Responses to Congressional Requests for Information

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or

other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.

4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.

5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, and that the request itself does not constitute a claim of privilege.

6. If the President decides to invoke executive privilege, the Department Head shall advise the

requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

Ronald Reagan

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 31, 1981

FOR: FRED F. FIELDING

FROM: PETER J. RUSTHOVEN

SUBJECT: Request from Representatives English and Kindness for Statement of the President's Policy with Respect to Executive Privilege (PSC: FE 00201)

Representatives Glenn English and Thomas N. Kindness, as Chairman and Ranking Minority Member, respectively, of the Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations (the "Subcommittee"), have asked the President to state the "[A]dministration's policy regarding the use of the claim of 'executive privilege' to withhold information from Congress." The Subcommittee's letter was referred to you by Max Friedersdorf.

Summary

I recommend a short letter to English (either under your signature or the President's) stating -- as has been the policy of the last five Administrations -- that executive privilege will be asserted only by or at the direction of the President. The response should also state that possible claims of executive privilege will be reviewed on a case-by-case basis. A draft of the proposed letter (written for the President's signature) is attached as Tab A. Finally, you may wish to send a memorandum to the heads of the executive departments and agencies, as was done by President Nixon, outlining the steps to be followed when a claim of executive privilege is being considered.

Background

The Subcommittee has sent an identical request to each President beginning with President Kennedy. In each instance, save one, the President or members of his Administration have responded that the decision whether to assert a claim of privilege will be made by the President.

President Kennedy's personal letter stated "Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." President Johnson also responded personally, stating that "the claim of 'executive privilege' will continue to be made only by the President."

President Nixon's personal response went further. First, he stated: "Under this Administration, executive privilege will not be asserted without specific Presidential approval." In addition, he gave the Subcommittee a copy of a memorandum (attached as Tab B) he had sent the heads of executive departments and agencies, which outlined the following five-step procedure when a claim of privilege was being considered:

1. When a Congressional request raised a substantial question of executive privilege, the head of the relevant department was to consult with the Attorney General through the Office of Legal Counsel of the Justice Department.

2. If the department head and the Attorney General agreed that the privilege should not be invoked, the information was to be given to Congress.

3. If the department head, the Attorney General or both believed that the privilege should be invoked or a final decision made by the President, the matter was to be submitted to the Counsel to the President, who would advise the department head of the President's decision.

4. If the President determined to invoke the privilege, the department head was to advise Congress that the claim was being made with the specific approval of the President.

5. Pending final Presidential decision, the department head was to ask Congress to hold its request in abeyance, emphasizing that this was to protect the privilege pending Presidential determination, rather than an actual claim of the privilege itself.

Neither Presidents Ford nor Carter directly responded to the Subcommittee. The Subcommittee's letter states, however, that in one dispute with Congress, the decision to invoke the privilege was made personally by President Ford. Similarly, a letter from the Subcommittee to President Carter (reiterating its request for a formal statement) noted that Counsel to the President Lipshutz had indicated "that it is your [Carter's] practice that only the President is authorized to invoke a claim of 'executive privilege.'" Further, a later letter from OLC to a different subcommittee also stated that the Carter Administration adhered to this policy.

Previous Review of Executive Privilege Policies

Neither the Subcommittee requests nor prior Presidential responses have focused on the substantive bases for assertion of executive privilege. However, the law has been summarized in two recent memoranda prepared by OLC for Presidents Ford and Carter. Both memoranda (attached as Tabs C & D, respectively) were written after United States v. Nixon, 418 U.S. 683 (1974), which placed executive privilege on a constitutional footing. A brief review of recent cases (collected in the annotation to U.S. CONST. art. II, § 1, cl. 1 in U.S.C.A.) reveals nothing that undermines the basic legal discussion in these memoranda, and an additional memorandum seems unnecessary unless and until a specific "privilege" issue is presented.

The OLC memoranda also discuss possible procedures for review of specific privilege issues. The OLC memorandum for President Ford recommended following the Nixon policy. It also recommended issuance of a new memorandum to department heads (along the lines of Nixon's) or of an Executive Order formalizing the Nixon procedures. As to the latter, the Ford OLC memorandum noted:

> An Executive Order would have the advantage of clearly giving the provisions [of the Nixon memorandum] 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.

Tab C at 9 (emphasis added).

The OLC Carter memorandum agreed that the Nixon procedures were wise "not [to] specify the standards to be applied in evaluating a Congressional request for information," because requests implicating the privilege required a determination "whether disclosure will be harmful to the national interest, and this necessarily requires a case-by-case analysis." Tab D at 9. However, the memorandum for Carter recommended that "the President's directive on Executive privilege should take the form of an Executive [O]rder," since it would be "a more formal and more public directive, and these factors would more forcefully display [President Carter's] commitment to the policies contained in the order." Id. at 6. President Carter did not, however, issue any such Executive Order.

Proposed Response to the Present Subcommittee Request

The most important considerations are (1) preserving executive privilege and the maximum degree of flexibility in responding to particular incidents as they arise, and (2) fostering good relations with Congress.

The first factor strongly indicates that the President should not attempt to identify situations in which he may assert the privilege. Since this is a sensitive area, and since assertion of the privilege by a Presidential subordinate would reflect upon (and probably be viewed by Congress and the public as a decision of) the President himself, the policy that the President makes any privilege decision should be continued. Further, if you think it appropriate formally to advise department and agency heads of the procedures to be followed when a privilege question arises, I believe the Nixon memorandum approach is preferable to an Executive Order, for the reasons noted in the Ford OLC memorandum.

The Congressional relations factor suggests that a direct response should be made to the Subcommittee and (though less strongly) that the response should come from the President. A direct Presidential response would follow the practice of Presidents Kennedy, Johnson and Nixon, and would probably please the Subcommittee. Substantively, of course, a response by you would be equally effective in setting forth the President's policy on this issue.

Should you wish to send a memorandum to department and agency heads such as that sent by President Nixon, I will prepare a draft for your review.

A

A

Draft of proposed letter from
The President to Chairman English

Dear Mr. Chairman:

Thank you for your letter of February 13, 1981, inquiring about the policy of this Administration with respect to executive privilege.

I appreciate the interest of you and your Subcommittee in cooperative relations between Congress and the Executive, and your concern that executive privilege not be lightly invoked. Under this Administration, as its predecessors, executive privilege will not be asserted without specific Presidential approval, based on a case-by-case review of particular situations in which the issue may arise.

I welcome the opportunity formally to state my policy on this important issue, and to reaffirm our joint commitment to the maximum freedom of information consistent with effective functioning of the Legislative and Executive Branches of our government.

Sincerely,

/s/ Ronald Reagan

The Honorable Glenn English
Chairman, Subcommittee on Government
Information and Individual Rights of
the Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515

bcc: Max L. Friedersdorf
Fred F. Fielding

B

MEMORANDUM FOR THE HEADS OF
EXECUTIVE DEPARTMENTS AND AGENCIES

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

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

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

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

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

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

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

RICHARD NIXON

B

C

Department of Justice
Washington, D.C. 20530

C

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 determinat 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 by 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 testimony before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, identified four areas: foreign relations, military affairs, pending investigations, an 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

emphasized that in [illegible]
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).

C. 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.

D

ASSISTANT ATTORNEY GENERAL

D

Department of Justice
Washington, D.C. 20530

JUN 8 1977

MEMORANDUM FOR ROBERT LIPSHUTZ
Counsel to the President

Re: Executive Privilege

The purpose of this memorandum is to discuss the doctrine of Executive privilege and to make recommendations concerning this Administration's policy as to its assertion.

I. Legal Background

In essence, Executive privilege is the term applied to the invocation by the Executive branch of a legal right, derived from the need for confidentiality of its internal communications and the constitutional doctrine of separation of powers, to withhold its official documents or information from compulsory process of 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 recently 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 (1953).

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 United States v. Nixon, 418 U.S. 683 (1974), held that President Nixon could not invoke Executive privilege 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. The Court rested its ruling, first, on the need for the protection of communications between high government officials and those who assist and advise them:

> 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. 418 U.S. at 705-6.

The Court also acknowledged that the privilege stemmed from the principle of separation of powers:

> * * * The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. 418 U.S. at 708.

The decision in the Nixon case addressed the issues of the availability of Executive privilege, and the courts' role in evaluating the assertion of such privilege, in a judicial proceeding. The Supreme Court, however, has not yet determined these issues in the context of a Congressional demand for information held by the Executive. Assuming the Court would assume jurisdiction over such a case, an assertion of Executive privilege would be evaluated, in our opinion, by the same sort of balancing process that was adopted in Nixon. The privilege would not be considered absolute in this context; if Executive privilege must yield to the demands of a criminal prosecution, then subjecting it to the legislative needs of the Congress in certain particularized situations would seem to follow. However, the explicit recognition in Nixon that the privilege is of constitutional stature, as well as the Court's rationale in reaching this conclusion, indicate that the privilege is not one easily overcome and could be asserted against the Congress. Nixon thus indicates that the needs of one Branch of the government would not automatically prevail over the needs of the other. Rather, the assessment of particular request would depend on the needs presented by that request and could ultimately be resolved only by the balancing process adopted in Nixon.

II. Policy Regarding Executive Privilege with respect to Congress.

In earlier years, the Executive branch practice with respect to assertion of Executive privilege as against Congressional requests for information 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 March 7, 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 Nixon continued the Kennedy-Johnson policy of barring the assertion of Executive privilege without specific Presidential approval, but formalized it procedurally by a memorandum dated March 24, 1969. 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) If the head of a department or agency believes that a Congressional request for information raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney General through the Office of Legal Counsel; (2) if, as a result of that consultation, the department head and the Attorney General agree that Executive privilege should not be invoked in the circumstances, the information shall be released; (3) if either the department head or the Attorney General, or both, believe that the situation justifies the invocation of Executive privilege, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision; (4) if the President decides to invoke Executive privilege, the department head shall advise Congress that the claim of privilege is being made with the specific approval of the President; and (5) pending the procedure outlined above, the department head is to request Congress to hold the request for information in abeyance, taking care to indicate that this request is only to protect the privilege pending determination and that this request does not constitute a claim of privilege.

We think this approach is basically sound and should be retained in any new directive which President Carter may wish to issue. The underlying policy of the Kennedy, Johnson and Nixon administrations -- i.e., to comply to the fullest extent possible with Congressional requests for information -- represents the long-standing position of the Executive branch and also reflects President Carter's position on openness in government. It follows that Executive privilege

should be invoked only where necessary and only after a thorough inquiry into the actual need for doing so.

We also believe it to be of the utmost importance that only the President himself may authorize the assertion of Executive privilege. This has been the practice of the Executive since the Kennedy Administration, and any attempt now to make less stringent the requirement for asserting Executive privilege will be ill-received both by the Congress and the public. It is also in keeping with the constitutional nature of the privilege for its use to be controlled directly by the President. Even apart from these considerations, requiring specific Presidential authorization is the best method to avoid the problems created by allowing the privilege to be claimed by subordinate officials without the sort of screening entailed in a submission to the White House. In the past, assertion of the privilege by subordinate officials absent direct Presidential involvement has resulted in an alienation of Congress and a hostile attitude toward the privilege even when legitimately invoked. Presidential assertion of the privilege, based on the review underlying such an assertion, would alleviate these problems to a certain extent and thereby help avoid unnecessary constitutional confrontations.

The disadvantages in this approach are that it may impose on the President an increased workload and additional political pressures. We doubt that significantly less political pressure would be exerted on the President if, for example, Cabinet officers were authorized to assert the privilege; such assertion would ultimately be deemed the President's responsibility, particularly since past Presidents have personally assumed this role. Although assumption of this responsibility may increase the President's workload, the effect will be substantially lessened by the involvement of both the Attorney General and the Counsel to the President in the recommended process; their review of requests to assert Executive privilege should screen out

unwarranted proposals and ensure that the President is well-advised in those instances which provide a legitimate basis for the invocation of Executive privilege.

We would suggest, however, that the approach taken in the Nixon memorandum be modified in several respects. First, we believe that the President's directive on Executive privilege should take the form of an Executive order rather than a memorandum. An Executive order is a more formal and more public directive, and these factors would more forcefully display the President's commitment to the policies contained in the order. Practical considerations also suggest that an Executive order is the best approach. Even today the Nixon memorandum is unknown in many parts of the Executive branch; an Executive order would receive more attention and would thereby largely avoid this problem. The issuance of an Executive order would also avoid the questions raised about the continuing effect of the Nixon memorandum after former President Nixon left office.

Second, we believe that the emphasis of the Nixon memorandum should be altered. While the Nixon memorandum does adopt a policy of cooperation with Congress, its focus is largely on the procedure whereby disclosure may be denied to Congress. While any directive on Executive privilege must necessarily devote some attention to such matters, we believe that the Nixon memorandum should be restructured to emphasize a policy of cooperation and maximum disclosure and to stress that the procedures adopted are to ensure that the privilege is invoked only where absolutely necessary.

We would also suggest that the Nixon memorandum be expanded in several minor respects in order to promote greater harmony with Congress:

1. The Nixon memorandum makes no mention of attempting to negotiate with Congress in order to arrive at a solution satisfactory to both Congress and the Executive branch.

This approach is necessary in order to avoid unnecessary constitutional confrontations and is in fact often undertaken by the agencies involved. The directive should in some way sanction this practice.

2. The directive should require that Congressional requests for information be handled expeditiously because delay in processing requests is a major irritant to Congress. We do not believe, however, that the establishment of specific time frames is the best way to handle this problem. Often, such deadlines would be unrealistic if large numbers of documents were involved. Also, set time frames create inflexibility that could well be counterproductive as tending to frustrate or to disrupt negotiations.

3. The directive should provide for the President's decision to be in writing and to set forth the reasons for asserting Executive privilege; while this document may be addressed to the pertinent department head, it should ultimately be made available to the Congress. While this may often be what actually happens, the formal adoption of this approach ensures that Congress will be assured of the President's personal involvement and apprised of the reasons for his action.

Finally, we should point out that the Nixon memorandum does not address certain other issues that may arise in the Executive privilege context. In our opinion, these issues should not be formally addressed in any directive that is issued but should await resolution on a case-by-case basis. They include:

1. Congressional request or demand. No distinction is made in the memorandum between a Congressional request and a Congressional demand for information. Theoretically, a simple Congressional request for information would not raise an Executive privilege issue because the privilege

need only be asserted where the Executive would be under a legal duty to provide information, such as in response to a Congressional subpoena. However, past Administrations have not relied on a distinction between a request and a demand in determining whether to invoke Executive privilege. This appears to us to have been a wise course of action and should be continued. To insist upon an approach that often will require Congressional resort to its subpoena power will lead, without much question, to the issuance of subpoenas; initiation of such a formal and public procedure will compromise attempts at negotiation and will, in our opinion, lead to confrontations, both constitutional and political, that might otherwise be avoided. It seems far better to keep Congressional initiatives on an informal basis as much as possible so that the privilege will be asserted only after negotiations have failed and Congress is still pursuing its request for the information.

2. Independent agencies. The memorandum does not address whether Executive privilege may be asserted with respect to information held by independent agencies; we think it best to leave this question unresolved until it actually arises. While the issue has arisen infrequently in the past, the Department of Justice has taken the position that Executive privilege is available with respect to those functions of independent agencies that are executive or quasi-executive in nature. However, Congressional spokesmen have asserted that these agencies, as arms of Congress, have no power to withhold information from it. Moreover, any application by the Executive of Executive privilege to these agencies would be viewed as an extension of that doctrine and would produce an unwelcome response. It thus seems best to continue treating questions in this area on a case-by-case basis and to avoid applying the doctrine here until it becomes necessary.

3. Standards. The Nixon memorandum does not specify the standards to be applied in evaluating a Congressional request for information. We recommend that this approach be continued. Although the grounds for asserting Executive privilege -- that a particular request deals with foreign relations, military affairs, criminal investigations, or intragovernmental discussions -- have been pretty well defined, an assertion of Executive privilege should not and does not merely depend on whether certain information falls within these categories. Rather, a determination must be made whether disclosure will be harmful to the national interest, and this necessarily requires a case-by-case analysis.

In addition, an attempt to establish standards based on what is or would be legally required would be difficult if not impossible; such an endeavor would, in order to cover the numerous contingencies, produce standards so vague and general as to be useless. Also, if standards were prescribed, they would presumably resort to some form of a balancing process between Congress' need to know and the Executive's need for confidentiality. In most cases, attempting to apply such a standard would be an exercise in futility because there is no ascertainable legal test to evaluate the competing interests involved. This is true because the concerns of both the Executive and the Congress are largely political in nature. These political considerations are crucial to the determination whether to assert Executive privilege and should not, and in reality cannot, be excluded from the process by the formulation of "legal" standards. In sum, Congressional requests for information and the Executive's response thereto are an integral part of the political process, subject to the political strengths and weaknesses of each Branch, and they should be left that way.

Attached is a proposed Executive order implementing the suggestions made herein.

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

March 12, 1981

Dear Glenn:

This is to acknowledge and thank you for your February 13 letter to the President, on behalf of the Subcommittee on Government Information and Individual Rights, in which you and Congressman Kindness request a statement of this Administration's policy regarding the use of the claim of "executive privilege" to withhold information from Congress.

Please know that I have forwarded your request, together with the copies of earlier correspondence on this question, to the President's Legal Counsel formprompt attention. I have asked that the Subcommittee be contacted as soon as possible with the appropriate information on President Reagan's policy.

Again, thank you for writing and advising us of your request.

With cordial regard, I am

Sincerely,

Max L. Friedersdorf
Assistant to the President

The Honorable Glenn English
House of Representatives
Washington, D.C. 20515

MLF:CMP:asr

cc: w/incoming, Fred Fielding, General Counsel - for further action.
(Please send copy of response to Max L. Friedersdorf.)

March 12, 1981

Dear Tom:

This is to acknowledge and thank you for your February 13 letter to the President, on behalf of the Subcommittee on Government Information and Individual Rights, in which you and Congressman English request a statement of this Administration's policy regarding the use of the claim of "executive privilege" to withhold information from Congress.

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With cordial regard, I am

Sincerely,

Max L. Friedersdorf
Assistant to the President

The Honorable Thomas N. Kindness
House of Representatives
Washington, D.C. 20515

MLF:CMP:asr

cc: w/incoming, Fred Fielding, General Counsel - for further action.
(Please send copy of response to Max L. Friedersdorf.)