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THE WHITE HOUSE
WASHINGTON

098459 SS
FE 002-01

October 25, 1982

MEMORANDUM FOR THE PRESIDENT

FROM: FRED F. FIELDING 
COUNSEL TO THE PRESIDENT

SUBJECT: Assertion of Executive Privilege

Representative John Dingell, Chairman of the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee, has subpoenaed EPA Administrator Gorsuch to appear before the Subcommittee on October 26, 1982, and produce copies of documents relative to enforcement of the hazardous waste laws (i.e. the Comprehensive Environmental Response, Compensation and Liability Act of 1980) at specific locations. Those locations are Tar Creek, Oklahoma; Stringfellow Acid Pits, California; and Berlin and Farrow, Michigan.

This subpoena followed extensive negotiations between EPA and Department of Justice personnel and Mr. Dingell's staff. Although approximately 40,000 documents regarding this matter have been made available to the Subcommittee, it continues to seek possession of thirty-five documents which contain discussions of EPA's enforcement strategy and legal issues related to EPA's development of enforcement proceedings. These documents (which are described in Tab A) have been made available to the Subcommittee staff for limited review to determine that they are in fact deliberative law enforcement materials. The documents memorialize the internal deliberative processes by which enforcement actions may ultimately be brought, and dissemination of these documents beyond enforcement officials may impair the ability of the EPA and the Department of Justice to effectively enforce the hazardous waste laws.

We are advised that EPA has recently released a few documents which are similar in nature, but which are not subject to this subpoena, to the thirty-five discussed in this memorandum to another congressional subcommittee. However, this apparently occurred as a result of a misunderstanding within EPA of certain instructions. The instructions have been clarified and corrective measures have been taken. While this incident might be cited against an assertion of Executive Privilege over the thirty-five documents now being sought, the Department of Justice believes the error should not be perpetuated or made permanent and it does not believe that a waiver of Executive Privilege, if this incident could be characterized in that fashion, precludes a proper invocation of the privilege in this instance.

These documents have been reviewed by EPA, Justice and the White House. The Department of Justice recommends that you exercise Executive Privilege and direct Administrator Gorsuch not to turn over these documents. (See Tab B.) I concur in this recommendation.

This will be the second instance in which you have asserted Executive Privilege as to the Congress. You may recall that the first assertion of the privilege also involved Congressman Dingell and a subpoena to Secretary Watt to produce Cabinet Council materials and international cables involving Canadian reciprocity under the Mineral Lands Leasing Act.

RECOMMENDATION:

That you initial all pages attached at Tab A.

That you sign the Memorandum to Administrator Gorsuch attached at Tab C.

ITEMS NOT BEING RELEASED

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1. Sections of the Stringfellow Case Development Plan entitled "Anticipated Defenses," Elements of Proof" and "legal Issues/Strategy"; remaining parts of this document have been turned over.
2. Internal EPA Schedule, dated September 12, 1982, labeled "Responsible Party Clean-up Plan".
3. Draft Internal Audit Report for Stringfellow, dated August 25, 1982.
4. Memoranda of EPA Staff Person's Telephone Conversation of Sept. 23, 1982 re: Stringfellow Audit.
5. Draft Timetable for Stringfellow Responsible Party Negotiations, dated Aug. 26, 1982.
6. Enforcement and Funding Strategy Outline for Stringfellow site, with handwritten annotations, dated September 9, 1982.
7. Files of Chief, EPA Enforcement - Waste Division containing Enforcement and Funding Strategy, Strategy Meeting Notes, and Responsible Party Clean-up Plan Draft for Stringfellow, file cover dated September 27, 1982.
8. Personal Stringfellow Notes of EPA Staff person from various Meetings with State and Regional Official re: Clean-up Agreement, undated.
9. Letter dated Aug. 19, 1982 from Regional Counsel to EPA-OLEC re: State remedial investigation and feasibility study for Berlin and Farro site.
10. Undated Handwritten memo from Staff Attorney to Enforcement Counsel re: Superfund Expenditure at Berlin and Farro site, with "Please stamp confidential - Prepaid in Anticipation of Litigation" written across top of document.
11. Undated Strategy noted for reaching Cooperative Agreement with State for Berlin and Farro site.

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12. Notes re: EPA negotiations, with State for Berlin and Farro Clean-up, dated July 29, 1982.

13. Notes of Phone Conversation between Region and Headquarters re: Berlin and Farro Clean-up strategy, dated July 27, 1982.

14. Notes of Meeting with State officials regarding States' proposed remedial action, and reaction of EPA officials to that meeting, dated July 28, 1982.

15-16. Undated Typed Drafts of Doc. #10 (Memorandum from Staff Attorney in Office of Enforcement Counsel to Director of the Office of Waste Programs Enforcement re: Proposed Superfund Expenditure at Berlin and Farro. Four Typed Drafts of Memo from Staff Attorney to Enforcement Counsel Re: Superfund Expenditure at Berlin and Farro.)

17. Notes following negotiations with Generators and Plan for future negotiations, dated July 29, 1982.

18. Undated draft Memorandum evaluating proposed CERCLA Expenditure at Berlin & Farro site.

19. Undated Notes of phone conversation between Headquarters and Regional Personnel.

20. Undated Memorandum from Attorney-Adviser to Enforcement Counsel Regarding Proposed CERCLA expenditure of Berlin and Farro. (Duplicate of Docs. #10, 15-16).

21. Draft of letter stamped "Confidential" from EPA Attorney-Adviser to Enforcement Counsel and General Counsel of EPA regarding initial remedial measures to be taken at Berlin and Farro site.

22. Undated handwritten Memorandum re: Proposed Superfund Expenditure for Berlin and Farro.

23. Handwritten Draft of Memo from Staff Attorney to Enforcement Counsel re: proposed Berlin and Farro Superfund Expenditure, with "Please stamp Confidential - Prepared in Anticipation of Litigation" written across the top.

RR

24. Undated handwritten Memorandum re: Berlin and Farro Negotiation Conditions.

25. Internal Memo dated June 24, 1982 captioned "Berlin and Farro Draft Cooperative Agreement".

26. Notes of Sept. 7, 1982 Meeting Re: Berlin and Farro Generators.

27. Notes of August 26, 1982 Staff Meeting re: Berlin & Farro Generators.

28. Notes of August 2, 1982 Conference Call re: Berlin and Farro Tank Project.

29. Note of July 2, 1982 Conference Call re: Berlin and Farro Tank Project, and June 16 notes from the same file.

30. Notes of July 12, 13, & 14, 1982 Meetings of Enforcement Counsel on Waste Management Division re: Removal of liquids from tanks at Berlin and Farro.

31. Notes of July 9, 1982 "Pre-meeting" for Generators and July 18, 1982 notes.

32. Jan. 11, 1982 Legal Opinion from EPA Staff Attorney to Director of the Office of Emergency and Remedial Response, EPA re: Mining Exclusion language of CERCLA (Tar Creek File).

33. Feb. 5, 1982 Memo from Enforcement Counsel to OERR transmitting reaction to Jan. 11 opinion (Tar Creek).

34. March 9, 1982 Memo from Assistant General Counsel to Acting Assistant Administrator Transmitting Reaction to Jan. 11 opinion (Tar Creek File).

35. Undated Notes Re: Tar Creek Clean-up Negotiations.



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

25 OCT 1982

MEMORANDUM FOR THE PRESIDENT

Re: Assertion of Executive Privilege in Response to Subpoena to Anne M. Gorsuch, Administrator, Environmental Protection Agency - Issued By Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives of the United States.

On October 14, 1982 Chairman Dingell of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives of the United States issued to Administrator Anne M. Gorsuch of the Environmental Protection Agency ("EPA") a subpoena calling for her to appear before the Subcommittee at 11:30 a.m. on October 26, 1982 and to produce at that time the following described documents:

"Copies of all books, records, correspondence, legal and other memoranda, papers and documents relative to the Tar Creek, Oklahoma; Stringfellow Acid Pits, California; and Berlin and Farro, Michigan, hazardous waste sites, excepting shipping records, contractor reports and other technical documents.

The subpoena (Attachment A) was served on the EPA on October 21, 1982 at 11:30 a.m.

Among the documents sought by the subpoena are 35 which were generated within EPA and which contain legal and tactical discussions concerning EPA's development of enforcement actions against three specific hazardous waste dumping sites in Michigan, California and Oklahoma. The case involving the California site has already been referred by EPA to the Department of Justice for commencement of judicial action. Enforcement proceedings relative to the other two sites are still in the case development stage at EPA.

The 35 EPA documents discussed in this memorandum reflect the core deliberative processes leading to enforcement actions against violators of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("hazardous waste law"). Release of these documents to the Subcommittee would give every Member of Congress access to them. There would be nothing to prevent the further dissemination of the contents of the documents, even to those against whom enforcement actions may be brought. Under these circumstances, we believe that it is appropriate for you to assert Executive Privilege against the transmission of these documents to the Subcommittee in response to the subpoena. A memorandum to Administrator Gorsuch for your signature is attached as Attachment B to carry out this recommendation.

A brief history of this dispute is as follows: On September 17, 1982, the Subcommittee requested by letter the production of a substantial volume of documents related to EPA's enforcement of the hazardous waste law. A copy of this letter is attached hereto as Attachment C. By October 15, the Subcommittee had been provided copies of, or access to, all of the documents included within its request. Most of the requested documents (EPA estimates that approximately 40,000 documents were within the scope of the Subcommittee's request) were either copied or made available for copying by the Subcommittee in EPA's regional offices. An exception was made, however, with respect to the 35 documents discussed in this Memorandum. The Subcommittee and its staff were given the opportunity to inspect and take notes regarding these 35 documents, but were not provided with copies. The purpose of limiting Subcommittee access to these documents in that manner was to permit the Subcommittee to confirm, as we had represented to it, that the 35 documents did indeed contain internal deliberative material associated with law enforcement strategy and legal positions to be taken in enforcement actions. Such limited access was also provided in order to enable the Subcommittee to articulate more clearly any particularized need it may have to obtain copies of these specific documents in order to carry out its legitimate legislative responsibilities.

Members of the Subcommittee staff examined the 35 documents on October 14, 1982. To date, the Subcommittee has not articulated any particularized need for the documents or explained why it continues to seek possession of these documents. The Subcommittee has not examined the documents which are being made available to it in EPA's regional offices. Nor has the

Subcommittee explained why the EPA's willingness to turn over to it complete case files in a limited number of closed cases would not meet the Subcommittee's legitimate needs. */

Slightly over one year ago, on October 13, 1981, the Attorney General provided you with a formal legal opinion advising you that documents subpoenaed by this same Subcommittee relative to Secretary of the Interior Watt's then ongoing decisionmaking process regarding Canadian reciprocity under the Mineral Lands Leasing Act were privileged from submission to this Subcommittee and recommended that you assert your Executive Privilege (Attachment F). On that same date, you did so. After Secretary Watt completed his decisionmaking process under the Mineral Lands Leasing Act regarding Canada in February of 1982, the Subcommittee was given an opportunity to examine the documents.

The present situation is similar but also somewhat different from the circumstances which arose a year ago. The instant situation presents, in our view, an even more compelling one as regards an assertion of your privilege to protect the confidentiality of deliberative documents from disclosure to Congress or the public. The Department of Justice, as well as many other federal agencies, develop strategy and legal positions relative to the prosecution of cases, both criminal and civil, which are brought in connection with the important responsibilities of these agencies to act on your behalf to fulfill your constitutional responsibility to "take care that the Laws be faithfully executed." As you can see from the packet of the 35 documents in this case (Attachment G), these documents set forth the tactics, strategy and legal analysis of the attorneys and investigators preparing to bring an enforcement action. These documents consider the strengths and weaknesses of the Government's case, examine legal issues which may arise, set forth lists of potential witnesses and analyze settlement prospects and strategy. These types of documents are necessary to effective law enforcement. Needless to say, they would be quite valuable to potential defendants and possession of these documents by potential defendants could seriously impair law enforcement efforts.

*/ A somewhat more detailed history of this dispute is set forth in the Subcommittee's letter to Administrator Gorsuch (Attachment C), the letter of Assistant Attorney General Robert A. McConnell to Chairman Dingell of October 18, 1982, (Attachment D), and Mr. McConnell's letter to Chairman Dingell of October 25, 1982 (Attachment E).

Under the rules of the House of Representatives, documentary material such as this which is turned over to a congressional committee must be accessible to all Members of the House. Rule XI, cl. 2 (e)(2), Rules of the House of Representatives. Were such documents routinely or even sporadically to be furnished to congressional subcommittees, Members of Congress would be able both to participate in the decisionmaking that occurs in regard to enforcement actions, and could also reveal, with impunity, the Government's case to the targets of the cases under development. The destructiveness to our efforts to enforce the laws under such a system is obvious. In connection with this particular request for documents, the Assistant Attorney General for the Land and Natural Resources Division has advised us that revealing the investigative files and thought processes of the attorneys and other enforcement personnel who have prepared a case for potential prosecution would materially and immeasurably impair her ability to exercise prosecutorial discretion and effectively to enforce the law.

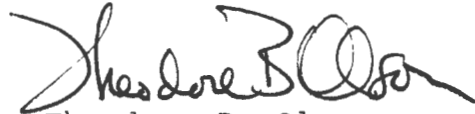
It is possible, of course, that documents similar to the 35 in question here might themselves contain some evidence of unlawful conduct by a government agency or government officials. In such a situation, the overriding importance of furnishing evidence of unlawful behavior would weigh heavily against any assertion of Executive Privilege and we would be most reluctant to recommend that you assert Executive Privilege under such circumstances. However, no such evidence exists in these 35 documents, nor has the Subcommittee suggested, after actual review of the documents by its staff, that the 35 documents are in any way evidence of misconduct by Executive Branch officials. Furthermore, we continue to be willing to allow members of the Subcommittee to examine (without copying) these particular 35 documents so that they may assure themselves that such documents do not reflect misconduct of any sort by any administration officials. This process of making such documents available for inspection, but not copying, by members of the Subcommittee is an extraordinary one which, itself, is generally not a wise or prudent course with respect to open investigative files, but has been pursued in this case solely so that the Subcommittee may satisfy itself that these documents do not contain evidence of wrongdoing.

We have learned that EPA has recently released to another congressional subcommittee a few documents which are not within the scope of the subpoena attached as Attachment A and which relate to different sites, but which are otherwise similar to the 35 discussed in this memorandum. However, this apparently occurred as a result of a misunderstanding within EPA of certain instructions. The instructions have been clarified

and corrective measures have been taken. While this incident might be mentioned as an example of Executive Branch inconsistency, we do not believe that that error should be perpetuated or made permanent. Nor do we believe that a waiver of Executive Privilege, if this incident could be characterized in that fashion, precludes a subsequent proper invocation of the privilege.

Nor does 42 U.S.C. § 9604(e)(2)(D) preclude the assertion of privilege here. That section, which requires production of certain information to Congress, does not override the constitutionally based privilege to withhold Executive Branch deliberative records where necessary to fulfill your constitutional responsibilities.

Based upon the legal analysis contained in the Attorney General's opinion to you of October 13, 1981, and especially in consideration of the grave damage to the ability of the Department of Justice and the EPA to enforce the laws if these 35 documents are furnished to congressional committees, we recommend that you sign the attached memorandum to Administrator Gorsuch. The Administrator concurs in this recommendation.

A handwritten signature in black ink, appearing to read 'Theodore B. Olson', with a stylized flourish at the end.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachments:

- A. Subpoena to EPA Administrator Gorsuch
- B. Memorandum to Administrator Gorsuch
- C. Letter from Chairman Dingell to Administrator Gorsuch of September 17, 1982.
- D. Letter from Assistant Attorney General Robert A. McConnell to Chairman Dingell of October 18, 1982.
- E. Letter from Assistant Attorney General Robert A. McConnell to Chairman Dingell of October 25, 1982.
- F. Letter from Attorney General to President of October 13, 1981.
- G. Packet of 35 EPA documents.

THE WHITE HOUSE
WASHINGTON

October 26, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoena for Executive
Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents relating to the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma.

It is my understanding that in response to requests by this Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced copies or made available for copying by the Subcommittee approximately 40,000 documents. I further understand that a controversy has arisen between the Subcommittee and EPA over EPA's reluctance to permit copying of 35 documents generated by attorneys and other enforcement personnel within EPA in the development of potential civil or criminal enforcement actions against private parties. These documents are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the three sites by EPA or the Department of Justice under CERCLA.

I understand that the Subcommittee Staff was given the opportunity to examine the disputed documents in order to verify the enforcement-sensitive nature of the documents. I further understand that the Subcommittee staff has availed itself of this opportunity and the Subcommittee has not disputed that the documents are deliberative, enforcement-related prosecutorial materials. Nonetheless, the Subcommittee, by issuing its subpoena, has demanded that copies of the 35 documents be physically delivered to it.

Because the 35 documents memorialize the internal, deliberative thought processes of enforcement personnel, because Rules of the House of Representatives require that the documents produced for a Subcommittee be made available to all Members of the House, and because dissemination of these materials outside the Executive Branch would impair the ability of the Executive Branch to enforce the law, I instruct you not to furnish copies of the documents to the Subcommittee in response to its subpoena. I request that you insure that the Subcommittee is advised of my decision.

I also request that you remain willing to meet with the Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.



Ronald Reagan

EPA Executive
Privilege

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THE WHITE HOUSE
WASHINGTON

November 30, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoenas for Executive
Branch Documents

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I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately \$223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

Assertion of Executive Privilege

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The Attorney General, at my direction, has sent the attached letter to Chairman Dingell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

THE WHITE HOUSE

WASHINGTON

November 29, 1982

MEMORANDUM FOR THE PRESIDENT

FROM: FRED F. FIELDING *F. Fielding*
COUNSEL TO THE PRESIDENT

SUBJECT: Assertion of Executive Privilege

As you may recall from your meeting with the Attorney General and me last Tuesday, November 23, Representative John Dingell has renewed his earlier subpoena for an appearance by EPA Administrator Ann Gorsuch before the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee and for the production of certain sensitive documents found in open investigative files. In that same meeting, we also advised that Representative Levitas, Chairman of the Subcommittee on Investigations and Oversight of the House Public Works and Transportation Committee, had subpoenaed the same category of documents.

The deliberative, law enforcement nature of all of the documents being sought by these Congressional Subcommittees has been and will continue to be reviewed by EPA, Justice, and the White House.

At the time of our meeting, we agreed that the Attorney General would prepare letters to Representatives Dingell and Levitas advising them of the views of the Executive Branch regarding the confidentiality of sensitive documents found in open investigative files (Tab A). It was further recommended by the Attorney General and me that if the demands for this category of documents persist, you exercise Executive Privilege and that a memorandum to Administrator Gorsuch, addressing both subpoenas and directing her not to furnish the documents in question to the Subcommittees, be prepared for your signature. Such a Memorandum is attached at Tab B.

RECOMMENDATION:

That you sign the Memorandum to Administrator Gorsuch attached at Tab B.

11/30/82: Pres. sig. Ht. to Admin., EPA
1/30/82: Dianne Holland advised (11 AM) Copy sent.
1/30/82: Orig. Ht. to E.P.A. via receipted WH Asst.

Notes

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DRAFT



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

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your Subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as "law enforcement files") of the Environmental Protection Agency ("EPA"). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982, "[t]he 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. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Nevertheless,

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it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

"It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.

"Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your Subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago:

"the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case" United States v. Nixon, 418 U.S. 683, 693 (1974).

The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

"I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee."

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

"[S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination to the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with 'leaks.' Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents."

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your Subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982 letter, I am sensitive to Rule XI, cl. 2, § 706c of the Rules of the House of Representatives, which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and all Members of the House shall have access thereto" In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, cl. 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your Subcommittee is not equivalent to making the documents "public." But, as is evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the

House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public. ^{1/} To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review (see Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "to say what the law is" with respect to the claim of privilege presented in [any particular] case." United States v. Nixon, 418 U.S. at 705, quoting Marbury v. Madison, 1 Cranch 137, 177 (1803).

^{1/} Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in United States v. Nixon, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under United States v. Nixon would be identical even if the Court had itself not used the word "public" in the relevant passage.

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination. 2/

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you rejected Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

2/ It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

In closing, I emphasize that we have carefully re-examined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,

William French Smith
Attorney General

copies sent to Fielding 4/14/83

2/13

W/S

C.F.

10533155

central files

THE WHITE HOUSE
WASHINGTON

October 26, 1982

FE002-01

FE010-01

FE122

AG033-23

FE007-03

Do not release to
others without
approval of
Counsel.
r.w.]

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: RICHARD A. HAUSER *RAH*
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Assertion of Executive Privilege

The attached materials were reviewed by Jim Baker prior to presentment to the President. Mr. Baker asked that copies be forwarded to you for your records. We are holding the originals in our safe pending their transmittal to Administrator Gorsuch.

Attachment

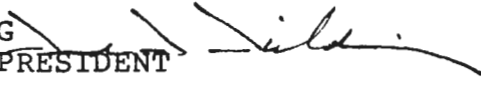
'82 OCT 26 P3:16

THE WHITE HOUSE

WASHINGTON

October 25, 1982

MEMORANDUM FOR THE PRESIDENT

FROM: FRED F. FIELDING 
COUNSEL TO THE PRESIDENT

SUBJECT: Assertion of Executive Privilege

Representative John Dingell, Chairman of the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee, has subpoenaed EPA Administrator Gorsuch to appear before the Subcommittee on October 26, 1982, and produce copies of documents relative to enforcement of the hazardous waste laws (i.e. the Comprehensive Environmental Response, Compensation and Liability Act of 1980) at specific locations. Those locations are Tar Creek, Oklahoma; Stringfellow Acid Pits, California; and Berlin and Farrow, Michigan.

This subpoena followed extensive negotiations between EPA and Department of Justice personnel and Mr. Dingell's staff. Although approximately 40,000 documents regarding this matter have been made available to the Subcommittee, it continues to seek possession of thirty-five documents which contain discussions of EPA's enforcement strategy and legal issues related to EPA's development of enforcement proceedings. These documents (which are described in Tab A) have been made available to the Subcommittee staff for limited review to determine that they are in fact deliberative law enforcement materials. The documents memorialize the internal deliberative processes by which enforcement actions may ultimately be brought, and dissemination of these documents beyond enforcement officials may impair the ability of the EPA and the Department of Justice to effectively enforce the hazardous waste laws.

We are advised that EPA has recently released a few documents which are similar in nature, but which are not subject to this subpoena, to the thirty-five discussed in this memorandum to another congressional subcommittee. However, this apparently occurred as a result of a misunderstanding within EPA of certain instructions. The instructions have been clarified and corrective measures have been taken. While this incident might be cited against an assertion of Executive Privilege over the thirty-five documents now being sought, the Department of Justice believes the error should not be perpetuated or made permanent and it does not believe that a waiver of Executive Privilege, if this incident could be characterized in that fashion, precludes a proper invocation of the privilege in this instance.

These documents have been reviewed by EPA, Justice and the White House. The Department of Justice recommends that you exercise Executive Privilege and direct Administrator Gorsuch not to turn over these documents. (See Tab B.) I concur in this recommendation.

This will be the second instance in which you have asserted Executive Privilege as to the Congress. You may recall that the first assertion of the privilege also involved Congressman Dingell and a subpoena to Secretary Watt to produce Cabinet Council materials and international cables involving Canadian reciprocity under the Mineral Lands Leasing Act.

RECOMMENDATION:

That you initial all pages attached at Tab A.

That you sign the Memorandum to Administrator Gorsuch attached at Tab C.

ITEMS NOT BEING RELEASED

RR

1. Sections of the Stringfellow Case Development Plan entitled "Anticipated Defenses," Elements of Proof" and "legal Issues/Strategy"; remaining parts of this document have been turned over.

2. Internal EPA Schedule, dated September 12, 1982, labeled "Responsible Party Clean-up Plan".

3. Draft Internal Audit Report for Stringfellow, dated August 25, 1982.

4. Memoranda of EPA Staff Person's Telephone Conversation of Sept. 23, 1982 re: Stringfellow Audit.

5. Draft Timetable for Stringfellow Responsible Party Negotiations, dated Aug. 26, 1982.

6. Enforcement and Funding Strategy Outline for Stringfellow site, with handwritten annotations, dated September 9, 1982.

7. Files of Chief, EPA Enforcement - Waste Division containing Enforcement and Funding Strategy, Strategy Meeting Notes, and Responsible Party Clean-up Plan Draft for Stringfellow, file cover dated September 27, 1982.

8. Personal Stringfellow Notes of EPA Staff person from various Meetings with State and Regional Official re: Clean-up Agreement, undated.

9. Letter dated Aug. 19, 1982 from Regional Counsel to EPA-OLEC re: State remedial investigation and feasibility study for Berlin and Farro site.

10. Undated Handwritten memo from Staff Attorney to Enforcement Counsel re: Superfund Expenditure at Berlin and Farro site, with "Please stamp confidential - Prepaid in Anticipation of Litigation" written across top of document.

11. Undated Strategy noted for reaching Cooperative Agreement with State for Berlin and Farro site.

RR

12. Notes re: EPA negotiations, with State for Berlin and Farro Clean-up, dated July 29, 1982.

13. Notes of Phone Conversation between Region and Headquarters re: Berlin and Farro Clean-up strategy, dated July 27, 1982.

14. Notes of Meeting with State officials regarding States' proposed remedial action, and reaction of EPA officials to that meeting, dated July 28, 1982.

15-16. Undated Typed Drafts of Doc. #10 (Memorandum from Staff Attorney in Office of Enforcement Counsel to Director of the Office of Waste Programs Enforcement re: Proposed Superfund Expenditure at Berlin and Farro. Four Typed Drafts of Memo from Staff Attorney to Enforcement Counsel Re: Superfund Expenditure at Berlin and Farro.)

17. Notes following negotiations with Generators and Plan for future negotiations, dated July 29, 1982.

18. Undated draft Memorandum evaluating proposed CERCLA Expenditure at Berlin & Farro site.

19. Undated Notes of phone conversation between Headquarters and Regional Personnel.

20. Undated Memorandum from Attorney-Adviser to Enforcement Counsel Regarding Proposed CERCLA expenditure of Berlin and Farro. (Duplicate of Docs. #10, 15-16).

21. Draft of letter stamped "Confidential" from EPA Attorney-Adviser to Enforcement Counsel and General Counsel of EPA regarding initial remedial measures to be taken at Berlin and Farro site.

22. Undated handwritten Memorandum re: Proposed Superfund Expenditure for Berlin and Farro.

23. Handwritten Draft of Memo from Staff Attorney to Enforcement Counsel re: proposed Berlin and Farro Superfund Expenditure, with "Please stamp Confidential - Prepared in Anticipation of Litigation" written across the top.

RR

24. Undated handwritten Memorandum re: Berlin and Farro Negotiation Conditions.

25. Internal Memo dated June 24, 1982 captioned "Berlin and Farro Draft Cooperative Agreement".

26. Notes of Sept. 7, 1982 Meeting Re: Berlin and Farro Generators.

27. Notes of August 26, 1982 Staff Meeting re: Berlin & Farro Generators.

28. Notes of August 2, 1982 Conference Call re: Berlin and Farro Tank Project.

29. Note of July 2, 1982 Conference Call re: Berlin and Farro Tank Project, and June 16 notes from the same file.

30. Notes of July 12, 13, & 14, 1982 Meetings of Enforcement Counsel on Waste Management Division re: Removal of liquids from tanks at Berlin and Farro.

31. Notes of July 9, 1982 "Pre-meeting" for Generators and July 18, 1982 notes.

32. Jan. 11, 1982 Legal Opinion from EPA Staff Attorney to Director of the Office of Emergency and Remedial Response, EPA re: Mining Exclusion language of CERCLA (Tar Creek File).

33. Feb. 5, 1982 Memo from Enforcement Counsel to OERR transmitting reaction to Jan. 11 opinion (Tar Creek).

34. March 9, 1982 Memo from Assistant General Counsel to Acting Assistant Administrator Transmitting Reaction to Jan. 11 opinion (Tar Creek File).

35. Undated Notes Re: Tar Creek Clean-up Negotiations.



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

25 OCT 1982

MEMORANDUM FOR THE PRESIDENT

Re: Assertion of Executive Privilege in Response to Subpoena to Anne M. Gorsuch, Administrator, Environmental Protection Agency - Issued By Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives of the United States.

On October 14, 1982 Chairman Dingell of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives of the United States issued to Administrator Anne M. Gorsuch of the Environmental Protection Agency ("EPA") a subpoena calling for her to appear before the Subcommittee at 11:30 a.m. on October 26, 1982 and to produce at that time the following described documents:

"Copies of all books, records, correspondence, legal and other memoranda, papers and documents relative to the Tar Creek, Oklahoma; Stringfellow Acid Pits, California; and Berlin and Farro, Michigan, hazardous waste sites, excepting shipping records, contractor reports and other technical documents.

The subpoena (Attachment A) was served on the EPA on October 21, 1982 at 11:30 a.m.

Among the documents sought by the subpoena are 35 which were generated within EPA and which contain legal and tactical discussions concerning EPA's development of enforcement actions against three specific hazardous waste dumping sites in Michigan, California and Oklahoma. The case involving the California site has already been referred by EPA to the Department of Justice for commencement of judicial action. Enforcement proceedings relative to the other two sites are still in the case development stage at EPA.

The 35 EPA documents discussed in this memorandum reflect the core deliberative processes leading to enforcement actions against violators of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("hazardous waste law"). Release of these documents to the Subcommittee would give every Member of Congress access to them. There would be nothing to prevent the further dissemination of the contents of the documents, even to those against whom enforcement actions may be brought. Under these circumstances, we believe that it is appropriate for you to assert Executive Privilege against the transmission of these documents to the Subcommittee in response to the subpoena. A memorandum to Administrator Gorsuch for your signature is attached as Attachment B to carry out this recommendation.

A brief history of this dispute is as follows: On September 17, 1982, the Subcommittee requested by letter the production of a substantial volume of documents related to EPA's enforcement of the hazardous waste law. A copy of this letter is attached hereto as Attachment C. By October 15, the Subcommittee had been provided copies of, or access to, all of the documents included within its request. Most of the requested documents (EPA estimates that approximately 40,000 documents were within the scope of the Subcommittee's request) were either copied or made available for copying by the Subcommittee in EPA's regional offices. An exception was made, however, with respect to the 35 documents discussed in this Memorandum. The Subcommittee and its staff were given the opportunity to inspect and take notes regarding these 35 documents, but were not provided with copies. The purpose of limiting Subcommittee access to these documents in that manner was to permit the Subcommittee to confirm, as we had represented to it, that the 35 documents did indeed contain internal deliberative material associated with law enforcement strategy and legal positions to be taken in enforcement actions. Such limited access was also provided in order to enable the Subcommittee to articulate more clearly any particularized need it may have to obtain copies of these specific documents in order to carry out its legitimate legislative responsibilities.

Members of the Subcommittee staff examined the 35 documents on October 14, 1982. To date, the Subcommittee has not articulated any particularized need for the documents or explained why it continues to seek possession of these documents. The Subcommittee has not examined the documents which are being made available to it in EPA's regional offices. Nor has the

Subcommittee explained why the EPA's willingness to turn over to it complete case files in a limited number of closed cases would not meet the Subcommittee's legitimate needs. */

Slightly over one year ago, on October 13, 1981, the Attorney General provided you with a formal legal opinion advising you that documents subpoenaed by this same Subcommittee relative to Secretary of the Interior Watt's then ongoing decisionmaking process regarding Canadian reciprocity under the Mineral Lands Leasing Act were privileged from submission to this Subcommittee and recommended that you assert your Executive Privilege (Attachment F). On that same date, you did so. After Secretary Watt completed his decisionmaking process under the Mineral Lands Leasing Act regarding Canada in February of 1982, the Subcommittee was given an opportunity to examine the documents.

The present situation is similar but also somewhat different from the circumstances which arose a year ago. The instant situation presents, in our view, an even more compelling one as regards an assertion of your privilege to protect the confidentiality of deliberative documents from disclosure to Congress or the public. The Department of Justice, as well as many other federal agencies, develop strategy and legal positions relative to the prosecution of cases, both criminal and civil, which are brought in connection with the important responsibilities of these agencies to act on your behalf to fulfill your constitutional responsibility to "take care that the Laws be faithfully executed." As you can see from the packet of the 35 documents in this case (Attachment G), these documents set forth the tactics, strategy and legal analysis of the attorneys and investigators preparing to bring an enforcement action. These documents consider the strengths and weaknesses of the Government's case, examine legal issues which may arise, set forth lists of potential witnesses and analyze settlement prospects and strategy. These types of documents are necessary to effective law enforcement. Needless to say, they would be quite valuable to potential defendants and possession of these documents by potential defendants could seriously impair law enforcement efforts.

*/ A somewhat more detailed history of this dispute is set forth in the Subcommittee's letter to Administrator Gorsuch (Attachment C), the letter of Assistant Attorney General Robert A. McConnell to Chairman Dingell of October 18, 1982, (Attachment D), and Mr. McConnell's letter to Chairman Dingell of October 25, 1982 (Attachment E).

Under the rules of the House of Representatives, documentary material such as this which is turned over to a congressional committee must be accessible to all Members of the House. Rule XI, cl. 2 (e)(2), Rules of the House of Representatives. Were such documents routinely or even sporadically to be furnished to congressional subcommittees, Members of Congress would be able both to participate in the decisionmaking that occurs in regard to enforcement actions, and could also reveal, with impunity, the Government's case to the targets of the cases under development. The destructiveness to our efforts to enforce the laws under such a system is obvious. In connection with this particular request for documents, the Assistant Attorney General for the Land and Natural Resources Division has advised us that revealing the investigative files and thought processes of the attorneys and other enforcement personnel who have prepared a case for potential prosecution would materially and immeasurably impair her ability to exercise prosecutorial discretion and effectively to enforce the law.

It is possible, of course, that documents similar to the 35 in question here might themselves contain some evidence of unlawful conduct by a government agency or government officials. In such a situation, the overriding importance of furnishing evidence of unlawful behavior would weigh heavily against any assertion of Executive Privilege and we would be most reluctant to recommend that you assert Executive Privilege under such circumstances. However, no such evidence exists in these 35 documents, nor has the Subcommittee suggested, after actual review of the documents by its staff, that the 35 documents are in any way evidence of misconduct by Executive Branch officials. Furthermore, we continue to be willing to allow members of the Subcommittee to examine (without copying) these particular 35 documents so that they may assure themselves that such documents do not reflect misconduct of any sort by any administration officials. This process of making such documents available for inspection, but not copying, by members of the Subcommittee is an extraordinary one which, itself, is generally not a wise or prudent course with respect to open investigative files, but has been pursued in this case solely so that the Subcommittee may satisfy itself that these documents do not contain evidence of wrongdoing.

We have learned that EPA has recently released to another congressional subcommittee a few documents which are not within the scope of the subpoena attached as Attachment A and which relate to different sites, but which are otherwise similar to the 35 discussed in this memorandum. However, this apparently occurred as a result of a misunderstanding within EPA of certain instructions. The instructions have been clarified

and corrective measures have been taken. While this incident might be mentioned as an example of Executive Branch inconsistency, we do not believe that that error should be perpetuated or made permanent. Nor do we believe that a waiver of Executive Privilege, if this incident could be characterized in that fashion, precludes a subsequent proper invocation of the privilege.

Nor does 42 U.S.C. § 9604(e)(2)(D) preclude the assertion of privilege here. That section, which requires production of certain information to Congress, does not override the constitutionally based privilege to withhold Executive Branch deliberative records where necessary to fulfill your constitutional responsibilities.

Based upon the legal analysis contained in the Attorney General's opinion to you of October 13, 1981, and especially in consideration of the grave damage to the ability of the Department of Justice and the EPA to enforce the laws if these 35 documents are furnished to congressional committees, we recommend that you sign the attached memorandum to Administrator Gorsuch. The Administrator concurs in this recommendation.



Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachments:

- A. Subpoena to EPA Administrator Gorsuch
- B. Memorandum to Administrator Gorsuch
- C. Letter from Chairman Dingell to Administrator Gorsuch of September 17, 1982.
- D. Letter from Assistant Attorney General Robert A. McConnell to Chairman Dingell of October 18, 1982.
- E. Letter from Assistant Attorney General Robert A. McConnell to Chairman Dingell of October 25, 1982.
- F. Letter from Attorney General to President of October 13, 1981.
- G. Packet of 35 EPA documents.

THE WHITE HOUSE

WASHINGTON

October 26, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoena for Executive
Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents relating to the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma.

It is my understanding that in response to requests by this Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced copies or made available for copying by the Subcommittee approximately 40,000 documents. I further understand that a controversy has arisen between the Subcommittee and EPA over EPA's reluctance to permit copying of 35 documents generated by attorneys and other enforcement personnel within EPA in the development of potential civil or criminal enforcement actions against private parties. These documents are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the three sites by EPA or the Department of Justice under CERCLA.

I understand that the Subcommittee Staff was given the opportunity to examine the disputed documents in order to verify the enforcement-sensitive nature of the documents. I further understand that the Subcommittee staff has availed itself of this opportunity and the Subcommittee has not disputed that the documents are deliberative, enforcement-related prosecutorial materials. Nonetheless, the Subcommittee, by issuing its subpoena, has demanded that copies of the 35 documents be physically delivered to it.

Because the 35 documents memorialize the internal, deliberative thought processes of enforcement personnel, because Rules of the House of Representatives require that the documents produced for a Subcommittee be made available to all Members of the House, and because dissemination of these materials outside the Executive Branch would impair the ability of the Executive Branch to enforce the law, I instruct you not to furnish copies of the documents to the Subcommittee in response to its subpoena. I request that you insure that the Subcommittee is advised of my decision.

I also request that you remain willing to meet with the Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

13
copy to S. Emery 5/19/83

Fieldin 6-14-83