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cc: Mr. Gavin
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JUN 8 1977

Ans 6/8/77 @ 5:25pm

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