

APR 10 1972

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MEMORANDUM

Re: Executive privilege

cc: Files
Ulman
Marcuse
Gauf

*2e [unclear]
4/10/72*

Executive privilege in its essence is the descriptive term for the constitutional authority of the President, as head of the Executive branch of the Federal government, to withhold information or documents from the Legislative branch. The doctrine finds its legal basis in the separation of powers established by the Constitution.

Concededly, the Constitution does not expressly refer either to the power of Congress to obtain information in order to perform its legislative function nor to the power of the President to withhold information the disclosure of which would in his judgment impair the proper exercise of his constitutional obligations.

Although the Constitution is silent, there is no doubt that the power of Congress to legislate necessarily implies the power to obtain the information it needs to legislate effectively and intelligently. McGrain v. Daugherty, 273 U.S. 135, 175 (1927). Similarly, the right of the Executive to withhold information from the other branches of the Government has been equally well recognized. That right of the Executive as against Congress goes back to the origins of the Nation. In 1792, President Washington refused the demand of the House to produce the government's papers relating to the expedition of General St. Clair into the Northwest Territory. It was his opinion that to do so would be contrary to the public interest. The Writing of George Washington (GPO Ed. 1939), Vol. 32, p. 15. Washington took similar action in 1796 concerning the Jay Treaty. Since that time virtually every President has exercised the doctrine which has come to be known as Executive privilege.

In United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-321 (1936), the Supreme Court based its decision in part on the authority of the President to withhold information from Congress (here involving foreign relations) and referred

to some of the instances in which Congress had acknowledged this authority. As early as 1816, a report of the Foreign Relations Committee pointed out the need for secrecy in the conduct of foreign relations (see 299 U.S. 304, at 319). In 1905, Senator Teller, in discussing this question, stated that "if he [the President] thinks it is incompatible with the public interest, it is his right so to state to the Senate, and the Senate has always bowed to such a suggestion from the Executive." 40 Cong. Rec. 22. In 1906, Senator Spooner explained on the floor of the Senate that the doctrine of Executive privilege also extended to confidential investigations in the various departments of the government. 41 Cong. Rec. 97-98.

It is useful to give some practical applications of Executive privilege. It has been invoked with respect to the confidentiality of conversations with the President, the decisional process as exercised at a high governmental level, and the necessity of safeguarding the process of frank internal advice within the Executive branch. In 1951, General Omar Bradley refused to testify about a conversation with President Truman concerning General MacArthur's dismissal. Senate hearings, Committee on Armed Services and Committee on Foreign Relations, 82d Cong., 1st Sess., pp. 763, 832-872. In 1962, President Kennedy directed the Secretaries of Defense and State not to disclose the names of individuals with respect to speeches they had reviewed. Senator Stennis, as Chairman of the Special Preparedness Subcommittee of the Committee on Armed Forces, upheld this claim of Executive privilege. In June 1970, President Nixon through the Attorney General invoked Executive privilege as against a committee demand for investigative reports of the FBI.

In order fully to protect the effective functioning of his advisers, the Presidents have invoked the doctrine of Executive privilege with respect to committee requests for the appearance of those men. Examples include Presidential Assistant John Steelman in the Truman Administration, Sherman Adams in the Eisenhower Administration, and DeVier Pierson in the Lyndon Johnson Administration. All these refusals

were grounded on the principle that Presidential Assistants cannot be interrogated as to their discussions with the President, or their advice or recommendations to the President.

The underlying rationale is that in the area of executive decision-making the President must be free to receive from his advisers their candid opinions without the fear that they will be second-guessed either by Congress, the press, or the public. The aim here is not to achieve secrecy as such, but rather to preserve the ability of the President to make sound decisions. It is clear that that process cannot be conducted in a fishbowl. It is appropriate to note that the decision of the Founding Fathers to conduct in secret all of their deliberations at the Constitutional Convention was similarly motivated.

It is true that some may dispute the propriety of particular invocations of Executive privilege. On the other hand, most would agree that the doctrine itself is an essential condition for the faithful discharge by the President of his constitutional duties. It is as surely implied in the Constitution as is the power of Congress to compel testimony.