

DAY BOOK

Jan 13, 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

RE: The Constitutional Privilege for Executive
Branch Deliberations: The Dispute with a
House Subcommittee over Documents Concerning
the Gasoline Conservation Fee

This memorandum presents our views on the response of the executive branch to a House Subcommittee's demand for certain documents. While inquiring into the Gasoline Conservation Fee imposed by Presidential Proclamation No. 4744, the Subcommittee on Environment, Energy, and Natural Resources of the House Committee on Government Operations requested and then subpoenaed certain documents from the Department of Energy. These documents reflected deliberations about many of the legal and policy issues involved in the President's decision to impose the fee. The Subcommittee's request therefore raised questions about the President's privilege to withhold deliberative materials from Congress and the public. For several weeks, representatives of the executive branch -- from the Office of the Counsel to the President, the Department of Energy, and this office -- negotiated with the Subcommittee about releasing the documents. Ultimately, some but not all of the documents were given to the Subcommittee. This office advised the Office of the Counsel to the President and the Department of Energy throughout. This memorandum confirms our views about the legality of the course followed by the executive branch.

I

On April 2, 1980, the President issued Proclamation No. 4744. It imposed a fee on imports of crude oil and gasoline and attempted to cause the entire cost of that fee to fall on gasoline consumed in the United States. The President predicted that the effect would be to raise the price of each gallon of gasoline by ten cents. The Subcommittee on Environment, Energy, and Natural Resources began an inquiry into this Gasoline Conservation Fee. On April 8, 1980, the Subcommittee wrote to Administrator Rollins of the Economic Regulatory Administration in the Department of Energy, and to Assistant Secretary Lewis of the Office of Policy and Evaluation in the Department of Energy. Subcommittee Chairman Moffett asked both Administrator Rollins and Assistant

Secretary Lewis to produce "(1) [t]he final version or prior drafts of all memoranda, letters, studies, briefing papers or any other documents prepared by you or any member of [your] staff pertaining to a petroleum import fee [and] (2) [a]ny other documents pertaining to the role played by DOE in the President's decision to impose an import fee." Deputy General Counsel Newkirk of the Department of Energy testified before the Subcommittee on April 16, 1980, and advised it that its request implicated the President's constitutional power to withhold documents that reflect deliberations within the executive branch. The General Counsel's Office, having recognized that these questions about the President's power were involved, consulted with the Office of the Counsel to the President and with this office. Both offices reviewed the documents.

On April 23, 1980, Secretary of Energy Duncan formally responded to the Subcommittee's letters. ^{1/} He gave the Subcommittee a number of the documents it had requested. He described them as "factual memoranda, work plans, talking points, correspondence with persons outside the Executive Branch and similar materials." Secretary Duncan also gave the Subcommittee a written summary of the issues raised in the other documents it had requested and, more generally, in debate about the Gasoline Conservation Fee. This summary recounted arguments made on both sides of the issues -- the side the Administration ultimately adopted and the side it rejected -- both inside and outside the Department of Energy. Secretary Duncan told the Subcommittee that he and other responsible officials of the Department were prepared to appear before the Subcommittee "formally or informally, to describe the contribution the Department made in developing the Gasoline Conservation Fee Program and the factual, legal, and policy issues involved in the program." Secretary Duncan also said:

There are a substantial number of documents which I have not provided. These documents consist of memoranda setting out policy and legal advice to senior advisors of the Department and the Executive Office of the President, meeting notes, and drafts of documents. The disclosure of

^{1/} The Subcommittee's letters, Secretary Duncan's response, and the other correspondence discussed in this memorandum are reprinted as appendices to H.R. Rep. No. 1099, 96th Cong., 2d Sess. 33-53 (1980) [hereinafter House Report].

memoranda of policy and legal advice, meeting notes and drafts would affect adversely the free and frank exchange of opinions in future deliberations within the Department and the Executive Branch as a whole, depriving the President and me of a robust exchange of ideas in derogation of the public interest in candid and objective expressions of advice to the President and Cabinet Officers as to policy issues.

Secretary Duncan said that he was attempting "to accommodate the Subcommittee's interest," and that he hoped to do so "without the necessity of invoking" any privilege.

On April 24, 1980, representatives of the Department of Energy and this office testified before the Subcommittee. Members of the Subcommittee said that they were not satisfied with what Secretary Duncan had provided -- all the requested documents that did not reflect executive branch deliberations, a summary of the issues, and a commitment to testify about all relevant matters. The executive branch representatives attempted to explain further their reasons for not immediately giving the Subcommittee all the documents it requested. They also attempted to explain the relationship between those reasons and the executive branch's constitutional privilege to withhold deliberative materials. Administration policy, they said, was that only the President himself could invoke the constitutional privilege against a congressional request for deliberative materials. They said that instead of invoking the privilege, the executive branch wanted to continue to seek an accommodation with the Subcommittee.

The Subcommittee immediately voted to subpoena the documents. The subpoena required "[c]opies of all memoranda, letters, studies, meeting notes, briefing papers and any other documents or drafts thereof prepared by the Secretary of Energy or any employee of the Department of Energy after January 1, 1978 pertaining to a petroleum import fee." This description covered many documents unrelated to the Gasoline Conservation Fee. The subpoena was the first indication that the Subcommittee was interested in those other documents. It required a response by April 29, 1980.

After the hearing on April 24, attorneys from the Department of Energy, the Office of the Counsel to the President, and this office met with Subcommittee staff. Staff members

asked for a written description of each of the documents that Secretary Duncan had not given to the Subcommittee. Executive branch attorneys suggested instead -- and the Subcommittee staff agreed -- that Department of Energy representatives describe these documents orally to the Subcommittee staff and, if possible, answer the staff's and the Subcommittee's questions about particular documents. The executive branch attorneys suggested that, after this oral briefing and questioning, the Subcommittee's representatives could explain more specifically which documents the Subcommittee needed. The executive branch representatives said they made this suggestion because they thought that in oral discussion both sides could be more flexible and forthcoming.

Accordingly, attorneys from the Department of Energy and this office met again with the Subcommittee staff on April 25. Department of Energy attorneys described in some detail each of the documents dealing with the Gasoline Conservation Fee that had not already been given to the Subcommittee. They identified the author, recipients, date, ^{2/} subject, nature, and, briefly, the contents of each document. The executive branch representatives offered to discuss further any particular documents about which the staff had questions, and to discuss the Subcommittee's need for particular documents. The Subcommittee representatives declined to engage in any further discussions. The executive branch representatives said that they remained available for further discussions about the Subcommittee's need for particular documents. The Subcommittee representatives also said that the Subcommittee was indeed interested in all the documents identified by the subpoena, not just in those dealing with the Gasoline Conservation Fee.

On April 28, 1980, one day before the return date of the subpoena, Chairman Moffett wrote to the Counsel to the President. He asked that Secretary Duncan "by 5:00 p.m. this afternoon . . . tender to the Subcommittee . . . all the documents which you are now willing to produce pursuant to the subpoena." He asked that all other documents responsive to the subpoena be "identified." He also asked that the executive branch explain its "intention not to produce them That is, do you intend to assert a privilege, do

^{2/} Sometimes the author, recipients, or date did not appear on a document.

you claim the need for additional time to complete your file search for documents, or do you wish to suggest that the Subcommittee has no need for certain documents since they may be redundant to those being produced." Chairman Moffett acknowledged that the Subcommittee had received oral descriptions of the documents from executive branch representatives. He said he was "distressed" that "[n]o commitment has yet been made or even offered to turn over the documents withheld from the Subcommittee since the voting of the subpoena." He declined to explain why the Subcommittee needed any or all of the documents. Chairman Moffett also said that the Subcommittee's subpoena had been issued to Secretary Duncan, and he questioned the involvement of representatives of the Office of the Counsel to the President and of this office.

Acting Secretary of Energy Lynn R. Coleman answered Chairman Moffett's letter on the same day. He proposed, "without setting a precedent for other situations," that Chairman Moffett and the ranking minority member of the Subcommittee examine, in confidence, all the documents listed in the index. Acting Secretary Coleman said that the purpose of the examination would be "to assist you in further narrowing and defining the scope of your inquiry." He enclosed an index of the documents dealing with the Gasoline Conservation Fee. He said that each of the documents "falls within the ambit of communications that the Supreme Court has held are properly subject to the claim of Governmental privilege. They constitute legal and policy advice underlying a major Presidential decision and their disclosure would tend to inhibit the full and frank discussion essential to informed decisionmaking." He acknowledged that each branch had a duty to attempt to accommodate the legitimate needs of the other. He recounted the executive branch's efforts to achieve such an accommodation, and he said that his offer of an informal review was a further attempt at a resolution.

On April 29, 1980, the return date of the subpoena, Secretary Duncan appeared before the Subcommittee. In his testimony, he asked "if it is the subcommittee's position that no further discussions [are] appropriate at this time." Stenographic Transcript of Hearings Before the Subcommittee on Environment, Energy, and Natural Resources, Committee on Government Operations, House of Representatives: DOE Response to Subcommittee Subpoena, April 29, 1980 [hereinafter Transcript], at 11. Chairman Moffett recounted some of the earlier negotiations between the Subcommittee and representatives of the executive branch, and said: "[T]he only issue at hand today is your

compliance with the Subcommittee's subpoena." Id. at 12. After further exchanges, Secretary Duncan said: "[T]he President has instructed me to pursue all reasonable grounds of accommodation. If there are no further reasonable avenues of negotiation, the President has instructed me to assert a privilege with respect to these documents." Id. at 21. He repeated this statement in substance several times. See id. at 20, 30, 31. Representative McCloskey suggested that in camera review by the entire Subcommittee might be an acceptable accommodation. Secretary Duncan said he would consider that offer, consult with the President about it, and answer the Subcommittee on the following day. The Subcommittee nevertheless voted to recommend that Secretary Duncan be held in contempt.

Responding to Representative McCloskey's suggestion, the Counsel to the President and other executive branch representatives met with Chairman Moffett in the next two days and offered to allow all the Subcommittee members to review the documents in camera. The executive branch representatives said again that the purpose of the in camera examination would be to allow the Subcommittee to explain its specific reasons for needing particular documents. In his letter to the Counsel to the President on May 2, 1980, Chairman Moffett refused this offer. He again said, "The Subcommittee expects these documents to be produced." He said that the Subcommittee would listen to the views of the Department of Energy before deciding to make any of the documents public. He also said:

I would also remind you of the nature of the Subcommittee's concern. We are attempting to address the merits of a \$10 billion import fee. Our concern is to evaluate the workability of that action. To do so, we manifestly need those internal Department of Energy documents, specifically identified in the list given the Subcommittee, which analyze or discuss the import fee or its implementation. The Subcommittee cannot acquiesce in the assertion of a privilege which would immunize internal Department of Energy documents from Congressional scrutiny.

Despite the Subcommittee's apparent rejection of the offer made by executive branch representatives, the Counsel to the President wrote to Chairman Moffett on May 5, 1980. He

again explained why, in his view, the documents requested by the Subcommittee were "not appropriate for unqualified disclosure," but again acknowledged the duty of each branch to attempt to accommodate the legitimate interests of the other. The Counsel's letter recognized that the constitutional privilege might yield to a "strong and particularized demonstration of need, such as the need for evidence in the course of a criminal proceeding." The Counsel also renewed and clarified the executive branch's offers of April 28 and May 2; he proposed that every member of the Subcommittee and a limited number of staff examine the documents -- with certain exceptions -- in confidence. The Counsel reiterated that the purpose of this examination was to aid the Subcommittee in articulating its needs. He said:

Once you have advised us of those documents you need and the reasons supporting their disclosure, we will respond promptly. While we cannot determine in advance of this process what our responses would be, we wish to make clear that we would of course approach this process in the spirit of accommodation between our Branches.

The Counsel excepted from this offer four categories of documents: drafts of documents, if the final version was made available to the Subcommittee; documents covered by the subpoena but not bearing on the Gasoline Conservation Fee, at least until the search for those very numerous documents had been completed; legal opinions used in the deliberative process; and documents reflecting advice exchanged between the Department of Energy and the Executive Office of the President.

In his May 5 letter the Counsel noted that the executive branch had already given the Subcommittee a document which it had said was particularly important to its work. This was a memorandum dated March 28, 1980, and entitled "Recoupment by Refiners of Post-Entitlement Costs of the Crude Oil Import Fee." 3/ The Subcommittee had expressed a particular interest in

3/ The letter stated: "Although this document was, in our view, covered by the privilege, it was written after the close of the President's deliberative process and its confidentiality appears to have been compromised in any event."

three other documents. The Counsel said that the executive branch would be inclined to give these documents to the Subcommittee, as an aspect of the final resolution of the dispute, "out of deference to your assessment of your needs and out of a strong desire to arrive at a mutually satisfactory accommodation."

The Subcommittee apparently reconsidered its earlier rejection of this offer and, after a further exchange of letters, began its in camera examination of the documents, subject to the exceptions listed by the Counsel to the President. In a letter to Chairman Moffett on May 7, 1980, the Counsel to the President conditioned his offer, which the Subcommittee then accepted, on the understanding that:

Because the purpose of this inspection is a limited one . . . the Subcommittee will not use the information so acquired until such time as particular documents are produced under the subpoena. Particularly, we understand that Subcommittee members will not question witnesses about the contents of any documents which have not been so produced.

The Subcommittee apparently withdrew its request for documents that reflected deliberations directly involving the Executive Office of the President. The Subcommittee acquiesced in the executive branch's excluding documents that contained legal advice from the material it examined, but it stated its view that it was entitled to those documents.

Both sides explicitly agreed -- the executive branch in letters of May 5 and May 7 to Chairman Moffett, Chairman Moffett in his May 6 letter to Secretary Duncan -- that even if the Subcommittee specifically requested a document it had reviewed in camera, the executive branch could assert a privilege over that document and decline to produce it. 4/

4/ Thus the statement of the House Report that "[t]hose arrangements . . . insured that once the subcommittee had made the determination, based upon actual document examination, that particular documents were necessary to the subcommittee inquiry, they would be produced forthwith to the subcommittee for its possession and unrestricted use, as required by the

Both sides also agreed that the purpose of the examination was to enable the Subcommittee to be more specific about its interest in the subpoenaed documents and its need for them. The Counsel's letter of May 7, 1980, to Chairman Moffett, which concluded the agreement, said: "The purpose of this inspection is to assist you in identifying those documents for which the Subcommittee has a particular legislative need that could outweigh the public interest in the President's ability to obtain frank advice from other officials of the Executive Branch." In his May 6 letter to Secretary Duncan, Chairman Moffett had apparently accepted this view.

After reviewing the documents the Subcommittee specified that it had a particular legislative need for twenty-eight of them. The Department of Energy gave those documents to the Subcommittee. The Subcommittee withdrew its recommendation that Secretary Duncan be held in contempt.

II

A

The Constitution gives the President the power, in certain circumstances, to protect the confidentiality of deliberations within the executive branch. See Nixon v. Administrator of General Services, 433 U.S. 425, 446-55 (1977); United States v. Nixon, 418 U.S. 683, 708 (1974). This is independent of the President's power over foreign affairs or national security; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." Id. at 708. The Supreme Court has held that, for this reason, presidential communications enjoy "a presumptive privilege against disclosure in court."

4/ (Continued from p. 8.)
subpoena," House Report at 28, is in error. See also House Report at 55 (remarks of Rep. Maguire) ("[T]he Subcommittee agreed to an in camera review . . . under conditions set by the Executive and with the documents still under its control, which meant quite explicitly that it could still choose to withhold documents after our review.").

Id. Even in a criminal case, the Court held, the party seeking the privileged material cannot obtain it merely by showing that it satisfies the requirements of relevance and admissibility that ordinarily suffice to compel the production of evidence. Instead, the party must "demonstrate that the Presidential material [is] 'essential to the justice of the [] case.'" Id. at 713, quoting United States v. Burr, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694). See also Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc).

The reasons for this privilege, the Court said, are "plain." "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." United States v. Nixon, 418 U.S. 683, 705 (1974). Often, an adviser's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisers change their views, or make mistakes which others correct; this is indeed the purpose of internal debate. The result is that advisers are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisers may hesitate -- out of loyalty or perhaps, as the Supreme Court suggested, out of self-interest -- to make remarks that might later be used against their colleagues or superiors. In general, as the Supreme Court recognized, an adviser who expects his audience to include persons not involved in the deliberations -- and particularly persons whose interests differ from those of the people he advises -- may tailor, temper, or otherwise modify his arguments, in a way that detracts from the advice he gives. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." Id. at 708.

In order to avoid these dangers to the integrity of the operation of the executive branch, the President must maintain a climate in which executive branch advisers do not feel compelled to write and speak for a larger audience. That is, he must be able to assure his advisers that their deliberations will be made public, if at all, only in exceptional circumstances. Anything that undermines this assurance

impairs, to a degree, the ability of the executive branch to perform its constitutional functions. This is the basis of the constitutional privilege for executive branch deliberations.

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information. The possibility that deliberations will be disclosed to Congress is, if anything, more likely to chill internal debate among executive branch advisers. When the Supreme Court held that the need for presidential communications in the criminal trial of President Nixon's close aides outweighed the constitutional privilege, an important premise of its decision was that advisers would not "be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." United States v. Nixon, 418 U.S. 683, 712 (1974). By contrast, "the occasions upon which Congress may demand information are virtually unlimited." Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1426 (1974). The Supreme Court has suggested that Congress is authorized to inquire into any subject "on which legislation could be had." See McGrain v. Daugherty, 273 U.S. 135, 177 (1927). See also Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504-07 (1975). Congressional investigations are far more common than criminal trials involving presidential aides. Moreover, compared to a criminal prosecution, a congressional investigation is sprawling and sweeping; its issues are seldom narrowly defined, and the inquiry is not restricted by the rules of evidence. Finally, when it is investigating, Congress is by its own account often somewhat adversary to the executive branch. Its interest, generally and properly, is in checking the executive branch and initiating action to correct judgments made by the executive branch. This increases the likelihood that candid advice from executive branch advisers will, in good faith, be taken out of context or misconstrued. For all of these reasons, the constitutional privilege that protects executive branch deliberations against judicial subpoenas must also apply to Congress's demands for information.

Indeed, the United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional demands. During the Watergate investigation the Court of Appeals rejected a Senate Committee's efforts to

obtain tape recordings of conversations in President Nixon's offices. It held that the tapes were constitutionally privileged and that the Committee had not made a strong enough showing to overcome the privilege. Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en Banc). Indeed, it held that the Committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." Id. at 731 (emphasis added). The Supreme Court has apparently assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. See United States v. Nixon, 418 U.S. 683, 712 n.19 (1974). Moreover, in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Court held that the constitutional privilege protects executive branch deliberations from disclosure to members of the same branch in a later administration; the Court rejected the specific claim of privilege in that case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. See id. at 446-55. Since the privilege protects executive branch communications against compelled disclosure to the judicial branch and to later members of the executive branch, there is no reason to doubt that it protects against compelled disclosure to the legislative branch. Finally, many Presidents, beginning with George Washington, have withheld from Congress documents that reflected deliberations within the executive branch. Often this material was withheld precisely to ensure that executive branch advisers would be assured of confidentiality. See Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess. 63-146 (1958) (memorandum of Attorney General Rogers). This history, too, suggests that the constitutional privilege extends to congressional demands for information.

X The only remaining question is whether a rigid line must be drawn between "presidential" communications -- presumably, discussions among the President's aides and officials in the Executive Office of the President -- and those involving only officials in the executive departments. All of the documents sought by the Subcommittee reflected significant deliberations leading up to the President's decision to impose the Gasoline Conservation Fee. But many of these documents were communications between or among high-ranking officials of the Department of Energy. Before it accepted the accommodation proposed

by the executive branch the Subcommittee apparently took the position that the constitutional privilege does not extend to such materials. We disagree. There are, of course, differences in degree; it is especially important to protect the integrity of deliberations involving the President himself and his closest advisers. In accommodating Congress's legitimate need for certain information, the executive branch should be least willing to reveal deliberations directly involving the President and his closest advisers, and more willing to disclose material from within the executive departments. In their offers to the Subcommittee, executive branch representatives recognized this principle. But we see no basis for a rigid distinction that leaves no protection at all for deliberations among officials of a Cabinet department who are participating in a major presidential decision.

First, the language of the Supreme Court opinions countenances no such distinction. The Court based the constitutional privilege on "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." United States v. Nixon, 418 U.S. 683, 705 (1974). It spoke of the "legitimate governmental interest in the confidentiality of communications between high officials, e.g., those who advise the President." Nixon v. Administrator of General Services, 443 U.S. 425, 446 n.10 (1977). This language is inconsistent with the view that the privilege is limited to deliberations in which the President or his closest personal advisers are themselves directly involved.

Moreover, as a practical matter, the contribution of the executive departments to a presidential decision can be at least as important as that of advisers in the President's office. The role of the Cabinet officers is explicitly recognized by the Constitution; section 2 of article II provides that the President "may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon a subject relating to the Duties of their respective Offices." The expertise of Cabinet officers and their departments is often vital to presidential decisions. Department officials frequently function, in fact, much like White House advisers. A major presidential decision is often the joint product of deliberations among the President, his personal and executive office advisers, and officials of the departments most directly concerned. Consequently, we believe it would be artificial to draw an inflexible line between the Cabinet departments and the

President's office and to say that the constitutional privilege reaches only the latter. 5/

Finally, the justifications for the constitutional privilege remain valid throughout the executive branch. Advisers in the Cabinet departments, no less than those in the President's office, "may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process" if they "expect public dissemination of their remarks." See United States v. Nixon, 418 U.S. 683, 705 (1974). The contribution which advisers in the executive departments make to a presidential decision is

5/ It is sometimes argued that since Congress "created" the Cabinet departments, those departments cannot withhold their deliberations from Congress. This argument is inconsistent with the decided cases and misunderstands the separation of powers. The Constitution creates only the office of the President and the office of the Vice President. All the other offices of the executive branch were created by Congress. The bulk of the powers exercised by the President were delegated to him by Congress. Where the President is exercising his inherent powers under the Constitution, Congress's power to interfere is at a minimum. But when the Supreme Court held that the constitutional privilege applies to the deliberations of the President and certain of his subordinates, it did not inquire into whether they were exercising delegated powers or powers granted to the President directly by the Constitution. See Nixon v. Administrator of General Services, 433 U.S. 425, 446-55 (1977); United States v. Nixon, 418 U.S. 683, 703-16 (1974). The confidentiality of deliberations is "fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." See United States v. Nixon, 418 U.S. 683, 708 (1974). To the extent the President is prevented from receiving candid advice from other members of the executive branch, his ability to supervise the executive branch and to exercise "[t]he executive Power," art. II, § 3, is impaired. These are among the President's constitutional responsibilities; within their proper scope, no act of Congress may interfere with them. See Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). For these reasons, there are constitutional limits on Congress's power to interfere even with executive branch communications that concern the exercise of delegated powers.

as likely to be enhanced by robust debate as the contribution of advisers in the President's office. Especially in dealing with decisions made by the President, officials in the executive departments, like others who "assist him[,] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." See id. at 708.

These sorts of practical concerns -- not formal distinctions among offices -- determine the extent to which other privileges protect communications by advisers within the government. The speech or debate clause of the Constitution, article I, section 6, clause 2, refers only to "Senators and Representatives," but for practical reasons the Supreme Court has extended the speech or debate clause immunity to the aides of members of Congress as well. "[I]t is literally impossible, in view of the complexities of the modern legislative process . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." Gravel v. United States, 408 U.S. 606, 616-17 (1972). Any other approach, the Court said, would cause the constitutional privilege to be "inevitably . . . diminished and frustrated." Id. at 617. The "complexities" faced by the executive branch are at least as great, and the "day-to-day work" of officials in the executive departments is similarly critical to the President's performance in office. The Supreme Court's speech or debate clause-decisions suggest, therefore, that the President's constitutional privilege cannot be limited in a way that gives advisers in the Cabinet departments no protection.

The Court has taken a comparable, practical approach to defining the immunities of executive branch officials. In Barr v. Matteo, 360 U.S. 564 (1959), a plurality of the Court ruled that the official immunity against common law torts committed within the scope of federal employment was not limited to Cabinet officers. The plurality reasoned:

The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority

as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

Id. at 572-573. A similar realistic concern for "the effectual functioning of government" and for the need to have contributions from many "rank[s] in the executive hierarchy" requires that the constitutional privilege against the compelled disclosure of deliberations not be limited to communications among the President and his White House advisers. The privilege must extend at least to the sorts of documents that the Subcommittee sought -- those reflecting discussions among high-ranking officials of executive departments who were participating in a presidential decision. 6/

B

To say that the privilege extends to those documents, however, is not to say that the executive branch is automatically entitled to withhold them. Congress has a legitimate need for information that will help it to legislate, just as the executive branch has a legitimate, constitutionally recognized need to assure its officials that their deliberations will generally be kept confidential. We believe that each branch has a duty to attempt to accommodate the legitimate needs of the other.

6/ These arguments also show that there is no basis for a rigid distinction between presidential decisions and other major decisions made by agencies in the executive branch. In our view, the deliberations underlying all these decisions are to some extent protected by the constitutional privilege. Again, there are differences in degree. Presidential decisions often have a special status. But as the plurality in Barr v. Matteo said, "privilege is not a badge or emolument of exalted office. . . . [W]e cannot say that . . . functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." More important, the President has the constitutional duty to oversee the functioning of the executive branch and to ensure that the laws are faithfully executed. Congress may not inquire into executive branch deliberations in a manner, or to an extent, that interferes with the proper discharge of these constitutional responsibilities.

This duty is implicit in the Supreme Court's leading decision. See United States v. Nixon, 418 U.S. 683, 705-16 (1974). There the Court held that the Constitution established "a presumptive privilege" against the compelled disclosure of executive branch communications, but that "[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." Id. at 708, 713. The duty to accommodate was made explicit by the United States Court of Appeals for the District of Columbia Circuit in a case involving a House subcommittee's request for information which the executive branch believed should not be disclosed. The court of appeals said:

The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

. . .

[I]t was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations[. Thus] the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (footnotes omitted). Accommodation is, therefore, not simply an exchange of concessions or a test of political strength. It is a principled effort by each branch to acknowledge, and if possible to meet, the legitimate needs of the other.

The duty to accommodate has at least two distinct aspects. First, each branch may be able entirely to satisfy its legitimate needs; each may discover, after discussion and negotiation, that Congress's legitimate need for information can be fully met in a way that does not impair the ability of the executive branch to assure its advisers of confidentiality. The constitutional privilege does not excuse the executive branch from satisfying Congress's legitimate requests for information as completely as it can without jeopardizing the integrity of executive branch deliberations. The executive branch may find, for example, that the information Congress needs can be released to it in a form that does not disclose internal deliberations. But in order to perform this duty, the executive branch must be enlightened about the information Congress needs. Otherwise it cannot explore alternative ways of providing the information that might satisfy both branches. Thus Congress has a correlative duty to explain, as fully as possible, what information it needs and why.

Such a resolution, in which each branch is fully satisfied, will of course not always be possible. If it is not, then the second phase of accommodation must involve some concessions by one or both branches. As we said, among the deliberations covered by the constitutional privilege, some are more important than others to the discharge of the constitutional functions of the executive branch. In addition, disclosing certain kinds of deliberations might be more likely to deter candid debate. If the executive branch's interest in maintaining the confidentiality of certain materials is relatively weak, and Congress's need for them is strong -- if it cannot perform its legislative functions without those particular materials, for example -- the executive branch must in certain circumstances be prepared to disclose them. On the other hand, if a committee's or subcommittee's need for certain privileged materials is relatively weak -- if, for example, they are only marginally relevant to the committee's legislative mission, or substitutes are available that are almost as useful -- the committee or subcommittee must be prepared to forgo them.

This conclusion simply follows from the principle that the Constitution protects to some degree the integrity of executive branch deliberations. Again, however, this phase of accommodation cannot proceed unless Congress explains, with some specificity, why it needs the materials it has requested. Without such an explanation, it may be difficult or impossible to assess Congress's needs and weigh them against those of the executive branch. At the same time, requiring such an explanation places no great burden on Congress. If it has a reason for requesting the information, it should be able to express it.

Not only does Congress's duty to explain its demands follow from the logic of accommodation between the two branches; it is established in the case law. The Supreme Court has not decided a case arising from a congressional demand for executive branch information, but in holding that the executive branch's constitutional privilege had to yield to the need for certain evidence in a criminal prosecution, the Court emphasized that the need for evidence was articulated and specific. See United States v. Nixon, 418 U.S. 683, 713 (1974). As we have said, Congress's power to investigate is often very broad; this suggests that it is even more important that Congress specify the reason it is demanding certain information from the executive branch. The United States Court of Appeals for the District of Columbia Circuit has decided cases involving congressional demands for executive branch deliberations. In one such case, the court said, in language we have quoted, that an accommodation between the branches would be achieved "through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977). This strongly suggests that each branch must be prepared to articulate and to explain its particular needs in a particular case.

Even more in point is the refusal of the Court of Appeals for the District of Columbia Circuit, in 1974, to enforce a subpoena issued by the Senate Select Committee on Presidential Campaign Activities. The subpoena was for tape recordings of conversations in President Nixon's offices. As we said, the court held that the recordings were protected by the constitutional privilege, and that this privilege "can be defeated only by a strong showing of need by another institution of government -- a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974) (en banc). The court said

that the sole question was "whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." Id. at 731. The court held that the Committee had not made a sufficient showing. It pointed out that the President had already released transcripts of the conversations of which the Committee was seeking recordings. The Committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts; to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events." Id. at 732. "While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." Id. The court concluded:

The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain.

Id. at 733. For this reason, the court said, "the need demonstrated by the Select Committee . . . is too attenuated and too tangential to its functions" to override the President's constitutional privilege. Id. We believe this case establishes Congress's duty to articulate its need for particular materials -- to "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in" the privileged document it has requested. Moreover, this case suggests that Congress will seldom have any legitimate legislative interest in knowing the precise positions and statements of particular executive branch officials. When Congress demands such information, it must explain its need carefully and convincingly.

III

A

We believe that the executive branch adhered to these principles in responding to the Subcommittee's request for documents concerning the Gasoline Conservation Fee. First, the executive branch viewed the problem as one of accommodating interests that were divergent but not necessarily irreconcilable. From the beginning -- his April 23 letter, written before the Subcommittee had even served a subpoena -- Secretary Duncan acknowledged the Subcommittee's legitimate interest in information about the Gasoline Conservation Fee, including some of the information contained in the disputed documents. Secretary Duncan said that he wanted to accommodate that interest and took several steps toward doing so. In the April 25 meeting, executive branch representatives described the documents in detail and offered to take the further step of discussing their contents with Subcommittee staff members. Acting Secretary Coleman's letter of April 28 took yet another step, offering an in camera examination. In his testimony on April 29 Secretary Duncan offered to consider an expanded in camera examination. In his letter of May 5, the Counsel to the President suggested an even more expanded in camera examination and filled out its details. Thus every major communication from the executive branch 7/ to the Subcommittee acknowledged that the Subcommittee had a legitimate interest in the information it sought and offered a possible accommodation.

7/ As executive branch representatives advised the Subcommittee, every Administration at least since President Kennedy's has taken the position, as a matter of policy, that only the President can assert the constitutional privilege over executive branch deliberations in response to a congressional request. The procedures for asserting this privilege were further elaborated in a memorandum issued by President Nixon on March 24, 1969. That memorandum states that if the head of a department or agency believes that a congressional request for information substantially implicates the privilege, he should consult the Attorney General through this office. If the department head and the Attorney General agree that the privilege should not be invoked, the requested information will be released to Congress. If either the department head or the Attorney General, or both, believe that the privilege should be invoked, they must consult the Counsel to the

Second, the executive branch gave the Subcommittee as much material as it could without compromising the integrity of executive branch deliberations. In his first written response to the Subcommittee's request, Secretary Duncan gave the Subcommittee outright all the documents that did not reflect deliberations. He also summarized the deliberative material in a way that revealed its substance but not those aspects disclosure of which would threaten the atmosphere that must be maintained if executive branch officials are to receive candid advice in the future. As the Counsel to the President recounted in his May 5 letter to Chairman Moffett, the executive branch released other material to the Subcommittee as soon as it became clear that doing so would not impair the confidential relationship among executive branch advisers. At the April 25 meeting, executive branch representatives offered to discuss specific documents with Subcommittee representatives. And Secretary Duncan made available responsible Department of Energy officials to testify about the Gasoline Conservation Fee and about the Department's consideration of it.

Third, the executive branch was prepared to release additional documents to the extent that the Subcommittee's legitimate interest in them outweighed the executive branch's interest in maintaining their confidentiality. On several

7/ (Continued from p. 21.)

President, who will advise the department head of the President's decision. If the President decides to invoke the privilege, the department head should advise Congress that the privilege is being asserted with the specific approval of the President. Until this process is completed, the department head should ask Congress to hold its request for information in abeyance, taking care to indicate that he is doing so only to protect the privilege pending the President's determination and is not claiming privilege.

In addition, as we have said, the President should not assert the privilege -- and the Attorney General should not advise that the privilege be asserted -- until both are satisfied that the executive branch has discharged its duty to accommodate Congress's legitimate interests. For this reason, it is fully appropriate -- Chairman Moffett's comments in his April 28 letter to the Counsel to the President notwithstanding -- that advisers to the President and the Attorney General participate in efforts to understand Congress's needs and accommodate its interests.

occasions, the executive branch stated its willingness to do so. But for a number of reasons, the executive branch repeatedly and consistently asked the Subcommittee to explain its need for particular documents and declined to disclose deliberative materials until the Subcommittee had done so.

To begin with, the executive branch had given the Subcommittee all the purely factual material underlying the Gasoline Conservation Fee which it requested and a substantive summary -- reflecting both sides of the issues -- of all the deliberative material. It had offered the Subcommittee the testimony of responsible officials. Thus even without the disputed materials the Subcommittee could have inquired into any of the factual or economic bases of the fee and its implementation and into any of the arguments favoring or opposing the fee. The Subcommittee's legitimate legislative interest in the remaining, disputed documents was, therefore, not obvious. Those documents revealed little that was not already available to the Subcommittee, except the identities of the executive branch officials who held particular views on particular issues and the manner in which they advanced their views. It is difficult to see why the Subcommittee had a legitimate interest in this information. It is, at most, the "precise reconstruction of past events" that, as the United States Court of Appeals for the District of Columbia Circuit has said, is seldom needed for "legislative judgments." See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc); p. 20 supra. At a minimum, the Subcommittee was under an obligation to explain why it needed this information, or what other information it thought it might gain from the disputed materials. Moreover, even if the Subcommittee had identified some legitimate legislative need for these materials, it was obligated, as we have said, to seek some alternative means -- testimony or summaries or expurgated versions of the documents, for example -- of meeting that need. Without an explanation of the Subcommittee's particular needs, it was impossible to determine if alternatives might have sufficed. Finally, even if the Subcommittee had needed these particular materials for its task, the Constitution would have required both branches to decide whether the Subcommittee's needs outweighed those of the executive branch. No such evaluation would have been possible without a full explanation of the Subcommittee's particular needs.

Most of the efforts of the executive branch were devoted to helping the Subcommittee explain why it needed particular disputed documents. Executive branch representatives gave Subcommittee representatives a detailed briefing about the documents and offered further discussions, which the Subcommittee representatives declined. The Department of Energy also gave the Subcommittee a written index of the documents. The executive branch proposed that the chairman and ranking minority member of the Subcommittee review the documents in confidence in order to help the Subcommittee be more specific about its request. On the suggestion of Subcommittee members, the executive branch expanded that offer of in camera review to include all Subcommittee members. Then the executive branch expanded the offer still further to include some staff members. Always, the purpose of the in camera examination -- explicitly stated -- was to aid the Subcommittee in explaining its need for particular documents. 8/ Repeatedly -- in the discussions of

8/ As the Counsel to the President and other executive branch representatives said in making these proposals to the Subcommittee, an in camera inspection, even for this limited purpose, will not always be appropriate. The possibility that materials will be disclosed to members of Congress -- even if the disclosure is made in camera and for a limited purpose -- may deter executive branch advisers from being completely candid. Moreover, examination by the very members of Congress who have requested the documents, and who emphasize, correctly, their somewhat adversary role in scrutinizing the actions of members of the executive branch, is obviously not comparable to in camera review by a judge who is impartial between the party requesting material and the party seeking to withhold it. For this reason and because, as we said, the inquiry of a criminal prosecution or civil suit is generally far more focused than that of a congressional investigation, one cannot apply to a congressional request for documents the Supreme Court's statement that:

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.

April 25, Secretary Duncan's testimony of April 29, and the letters of April 28, May 5, and May 7 -- the executive branch invited the Subcommittee to particularize its need for the documents. Until May 6, the Subcommittee refused to do so. We believe its refusal was the primary reason that the dispute lasted so long and was so difficult to resolve.

Finally, after May 6, the Subcommittee did begin to particularize its request, at least to the point of specifying the documents that were most relevant to its legislative mission. The executive branch then promptly gave the Subcommittee most, but not all, of the documents it said it particularly needed. In our view the executive branch could justifiably have insisted on a more thorough explanation of the way in which particular documents would help the Subcommittee perform particular legislative functions; it could have demanded that the Subcommittee "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in" the documents covered by the constitutional privilege. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc). In the spirit of accommodation it chose not to do so.

The executive branch did, however, withhold certain categories of documents from the Subcommittee. First, it withheld, even from the in camera examination, deliberations involving the Executive Office of the President. We have explained that the integrity of these deliberations is even more important than the integrity of deliberations involving only the officials of Cabinet departments, although the difference is one of degree. In addition, the executive branch withheld documents reflecting legal advice to high government officials. It took the position that the Subcommittee would have to make an especially strong showing of need in order to obtain these materials. In his May 12, 1980, letter to Secretary Duncan, Chairman Moffett, apparently believing that the executive branch was asserting the

8/ (Continued from p. 24.)

United States v. Nixon, 418 U.S. 683, 706 (1974). Whether an in camera examination is nevertheless in order depends on factors that vary in each case. Sometimes the materials may be too sensitive; sometimes an annotated index of the documents, or an oral discussion, will give the Subcommittee a sufficient opportunity to explain its particular needs.

common law attorney-client privilege, see House Report at 27, said that the Subcommittee did not accept this position of the executive branch. But the executive branch persisted in its refusal to allow the Subcommittee to examine documents reflecting legal advice, and we believe the position of the executive branch was correct.

Specifically, to whatever extent the customary attorney-client privilege applies to government attorneys, we believe that the reasons for the constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved. None of the President's obligations is more solemn than his duty to obey the law. The Constitution itself places this responsibility on him, in his oath of office and in the requirement of article II, section 3 that "he shall take Care that the Laws be faithfully executed." Because this obligation is imposed by the Constitution itself, Congress cannot lawfully undermine the President's ability to carry it out. Moreover, legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, objective, expert advice. As crucial as frank debate on policy matters is, it is even more important that legal advice be "candid, objective, and even blunt or harsh," see United States v. Nixon, 418 U.S. 683, 708 (1974), where necessary. Any other approach would jeopardize not just particular policies and programs but the principle that the government must obey the law. For these reasons, it is critical that the President and his advisers be able to seek, and give, candid legal advice and opinions free of the fear of compelled disclosure.

B

The Subcommittee's approach to the dispute over the documents differed in at least two important ways from that of the executive branch. First, in the early stages of the dispute -- until May 5 -- the Subcommittee acknowledged no duty to attempt to accommodate its needs to those of the executive branch. Second, partly because it did not appreciate the importance of accommodation, the Subcommittee misunderstood the scope of the constitutional privilege.

Before May 5, the Subcommittee persistently refused to accommodate the interests of the executive branch in the integrity of its internal deliberations. The Subcommittee

responded to Secretary Duncan's April 23 letter and offers not by proposing some alternative accommodation of the two branches' conflicting interests but by converting its request for documents into a subpoena. The subpoena, moreover, covered not only the requested documents but documents in which the Subcommittee had never before expressed a specific interest. 9/ The Subcommittee staff responded to the April 25 briefing by declining any further discussion and reiterating its interest in the broader class of documents. Acting Secretary Coleman's April 28 letter, proposing an in camera examination, requested that the Subcommittee postpone the return date of the subpoena; the Subcommittee refused Acting Secretary Coleman's offer, refused to postpone the return date, and made no offer of an accommodation in reply. On the next day, when Secretary Duncan reiterated his willingness to reach an accommodation, the Subcommittee Chairman said repeatedly that "the only issue . . . is your compliance with the subcommittee's subpoena." Transcript at 11, 12. Representative McCloskey proposed a possible accommodation, which Secretary Duncan said he would seriously consider and discuss with the President overnight; the Subcommittee's response was to recommend that Secretary Duncan be held in contempt. When the executive branch representatives offered the documents for an in camera examination similar to that suggested by Representative McCloskey, the Subcommittee rejected the offer and said, "The Subcommittee expects these documents to be produced Full compliance with the subpoena is urgently necessary." Only after May 5 did the Subcommittee begin to accommodate its interests to those of the executive branch by agreeing to narrow its request to those particular documents that were especially important to its legislative functions. For the reasons we gave in Part II B, we believe that the Subcommittee's prolonged failure to attempt an accommodation was not consistent with its constitutional responsibilities.

9/ These documents were related to the Gasoline Conservation Fee peripherally or not at all. Without ever seeing them, the Subcommittee -- in Chairman Moffett's May 12, 1980, letter to Secretary Duncan -- subsequently disclaimed its interest in them.

Although the Subcommittee refused to accommodate in this way, it did not unequivocally deny that the executive branch had a legitimate interest in protecting the integrity of its deliberations. Instead, the Subcommittee apparently believed that the executive branch had to decide which materials it would reveal, and which it would withhold, before discussing with the Subcommittee its need for particular documents. In his April 28 letter to the Counsel to the President, for example, Chairman Moffett rejected the suggestion that the Subcommittee particularize its needs and insisted instead that, with respect to every material document, the executive branch either "assert a privilege" or give the document to the Subcommittee at once. In the hearing on April 29, many other members of the Subcommittee also seemed to subscribe to this view.

We believe that this view -- that the executive branch must decide, without discussions with Congress about its particular needs, whether to withhold a document because it is "privileged" or to disclose it to Congress at once -- is neither good government nor good law. While it does recognize the interest of the executive branch in the integrity of its deliberations, it precludes an accommodation based on "a realistic evaluation of the needs of the conflicting branches in the particular fact situation" -- something the United States Court of Appeals for the District of Columbia Circuit has called "an implicit constitutional mandate." See United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977). For the reasons we have given, all the executive branch deliberations requested by the Subcommittee were potentially privileged. But the executive branch never insisted that it would withhold all the documents requested by the Subcommittee, no matter what the Subcommittee's needs. Instead, as the executive branch made clear, if certain material was vital to the Subcommittee's legislative interests, the Subcommittee's need for it might outweigh the constitutional privilege for deliberative material; if the Subcommittee's need were only "tangential to its functions," see Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc), there would be, as the United States Court of Appeals for the District of Columbia Circuit held, no reason for a Subcommittee subpoena to take priority over the executive branch's constitutional interest. Of

course it was impossible to know what the Subcommittee's needs were until it explained them. For this reason, the Subcommittee's insistence that the executive branch, before any discussion or particularization of needs, divide all the documents into those which were privileged and those which it would disclose at once was inconsistent with the constitutional duty to accommodate. 10/

10/ The constitutional privilege for executive branch deliberations is not the only possible justification for a refusal, by the executive branch, to reveal materials to a committee or subcommittee of Congress. Another constitutional privilege -- over national security information or perhaps, for example, over certain law enforcement information, see, e.g., 40 Op. Att'y Gen. 45 (1941) -- might justify such a refusal. A statute might prohibit the disclosure of certain material even to Congress. See, e.g., 43 Op. Att'y Gen. No. 21 (September 8, 1978). The executive branch might find, strictly as a practical matter, that it is impossible to comply in the time or under the conditions set by the committee or subcommittee. The executive branch might assert that the requested information is not relevant to any legitimate legislative task. Or the subpoena or request for information might exceed the authority given to the committee or subcommittee by Congress. See generally Watkins v. United States, 354 U.S. 178, 200-01 (1957); United States v. American Tel. and Tel. Co., 551 F.2d 384, 393 & n.16 (D.C. Cir. 1976).

As we have said, Congress has a constitutional obligation to respect the integrity of executive branch deliberations, unless Congress's own legitimate need for information overrides. In addition, Congress has a constitutional obligation to attempt to accommodate its needs to those of the executive branch, in the ways we have discussed. Congress cannot, of course, authorize its committees to act in a way inconsistent with these obligations.

Therefore, if the executive branch believes a committee is violating its constitutional obligations to the executive branch, the executive branch may refuse to disclose subpoenaed material on the ground that the committee has exceeded its authority. In those circumstances, the executive branch is not required to assert a constitutional privilege in response to

The Subcommittee's excessively rigid view of the relationship between the branches appears to have led it to its second significant disagreement with the executive branch -- its position about the breadth of the constitutional privilege. The House Report summarizing the dispute insisted that the privilege cannot apply to what it called "purely internal DOE documents," even if those documents reflected deliberations underlying a major presidential decision. House Report at 20. During the dispute, Subcommittee members often made statements to the same effect, although of course the Subcommittee eventually retreated from this position by agreeing to particularize its request for such documents after an in camera review. For example, in his letter of May 2, 1980, Chairman Moffett said that the "Subcommittee cannot acquiesce in the assertion of a privilege which would immunize internal Department of Energy documents from Congressional scrutiny."

As we said in Part II A, the Subcommittee's stated view is unsound. There may be differences of degree; the integrity of deliberations among the President's immediate advisers is especially important. But there is no good reason, in the case law or in logic, to draw a rigid distinction between deliberations involving the Executive Office of the President and deliberations involving high officials of the Cabinet departments, and to say that only the former are covered by the privilege. The Subcommittee did not suggest a reason for its initial contrary view.

The Subcommittee apparently feared that such a constitutional privilege which extended to "communications between high Government officials and those who advise and assist them,"

10/ (Continued from p. 29.)

a committee subpoena. It can instead assert the committee's failure to take the steps toward accommodation of the needs of the executive branch required by the Constitution. If the whole Congress -- or perhaps the parent house of the committee -- ratifies the subpoena or request in some suitable way, the executive branch can no longer claim simply that the committee has exceeded its authority; any refusal to disclose must then be justified by a constitutional privilege or a supervening statute.

see United States v. Nixon, 418 U.S. 683, 705 (1974), would prevent Congress from ever seeing executive branch deliberative materials, no matter how great its need. Thus Chairman Moffett spoke of a privilege which would "immunize" certain documents, and the House Report said that without access to these documents it would be impossible for Congress to investigate the executive branch effectively. House Report at 19, 20-21. But, as we have said, the executive branch made clear from the outset its willingness to accommodate Congress's legitimate interest in investigating the Gasoline Conservation Fee. Executive branch representatives never asserted that there were no circumstances under which the Subcommittee would be allowed to see the documents in dispute; the final accommodation demonstrated that this was not the view of the executive branch. It was only the Subcommittee's static view of the relationship between the branches that led it to believe that all documents are either to be permanently withheld because they are "privileged" or immediately and unqualifiedly given to Congress because they are "unprivileged." This view failed to take into account the "implicit constitutional mandate to seek . . . accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation," United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977) -- a mandate, which the executive branch tried to carry out.

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