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MEMORANDUM FOR THE HONORABLE JOHN W. DEAN, III
Counsel to the President

Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters.

This memorandum confirms our oral advice (per Leon Ulman) to Fred Fielding of your staff to the effect that the constitutional doctrine of Executive privilege may properly be invoked with respect to, as we understand it, the testimony of a former member of the White House staff concerning advice given to the President on official matters during his employment in the White House. We assume for purposes of this memorandum that the testimony could properly be refused under the doctrine of Executive privilege were the former staff member still employed by the White House.

We have not found any precedent for invocation of the doctrine of Executive privilege with respect to the testimony of a former member of the White House staff. There have been, however, several occasions on which a committee has requested the testimony of other former government officials, and the privilege has been either invoked or the propriety of invoking it asserted. In our view, the policies underlying the doctrine of Executive privilege support its availability where a former official is being asked to testify about advice he gave the President on official matters while he was in office.

I. Previous Committee Requests for the Testimony of Former Officials.

In November 1953, the House Committee on Un-American Activities served former President Harry S. Truman with a subpoena directing him to appear before the Committee, apparently for the purpose of examining Mr. Truman with respect

to his designation of Harry Dexter White to be United States Director of the International Monetary Fund. In a letter to the Committee dated November 12, 1953, Mr. Truman said:

> "The subpoena does not state the matters upon which you seek my testimony, but I assume from the press stories that you seek to examine me with respect to matters which occurred during my tenure of the Presidency of the United States.
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> "In spite of my personal willingness to cooperate with your committee, I feel constrained by my duty to the people of the United States to decline to comply with the subpoena."

The letter then went on to cite precedents in which incumbent Presidents had declined to reply to subpoenas or demands for information by Congress, and continued:

> "It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.
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> "The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.
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> "If your intention, however, is to inquire into any acts as a private individual either before or after my Presidency and unrelated to any acts as President, I shall be happy to appear."[1]

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[1] New York Times, November 13, 1953.

The Committee did not attempt to press the matter to a test, and in a radio speech dealing with the subject, Mr. Truman stated:

> "The separation and balance of powers between the three independent branches of the Government is fundamental in our constitutional form of government. A Congressional committee may not compel the attendance of a President of the United States, while he is in office, to inquire into matters pertaining to the performance of his official duties. If the constitutional principle were otherwise, the office of the President would not be independent.
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> "It is just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President. In either case, the office of President would be dominated by the Congress and the Presidency might become a mere appendage of Congress.
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> "When I became President, I took an oath to preserve, protect and defend the Constitution of the United States. I am still bound by that oath and will be as long as I live. While I was in office, I lived up to that oath--and I believe I passed on to my successor the great office of President of the United States with its integrity and independence unimpaired.
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> "Now that I have laid down the heavy burdens of that office I do not propose to take any step which would violate that oath or which would in any way lead to encroachments on the independence of that great office."[2]

So far as testifying or providing information is concerned, the position which President Truman took in this instance

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[2] New York Times, November 17, 1953, p. 26.

appears to be a reasonable extension of the doctrine of Executive privilege.

Another example is provided by former Justice Tom C. Clark's refusal, on two occasions while he was an Associate Justice of the United States Supreme Court, to testify before a congressional committee about matters relating to his duties as Assistant Attorney General and Attorney General. On June 17, 1953, then Justice Clark declined the invitation of a House Judiciary Subcommittee to testify about some of his activities when he was Attorney General and Assistant Attorney General from 1943 to 1949.[3] Again, on November 13, 1953, Justice Clark refused to honor a subpoena requesting his appearance before the Un-American Activities Committee of the House of Representatives investigating charges that a Soviet spy employed by the Government had been knowingly promoted. In his letter to Congressman Velde, Justice Clark said in part:[4]

> "As you know, the independence of the three branches of our Government is the cardinal principles on which our constitutional system is founded. This complete independence of the judiciary is necessary to the proper administration of justice.
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> "In order to discharge this high trust, judges must be kept free from the strife of public controversy. Since becoming an Associate Justice of the United States Supreme Court, I have scrupulously observed a complete retirement from such matters."

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[3] New York Times, June 18, 1953, pp. 1, 33. However, he gave the subcommittee a point-by-point comment on each of the seven cases about which it wanted to question him, saying that it might be helpful in clearing up its record.

[4] New York Times, November 14, 1953, p. 9. Justice Clark stated, however, that he would give serious consideration, subject only to his duties under the Constitution, to any written questions that might be presented about his personal recollection of the matter.

It is important to note here that Justice Clark's letter rests his refusal to appear on what amounts to an analogous judicial privilege, rather than on any Executive privilege available because of his status as a former Executive official.

A third example we have found involved two former attorneys in the Antitrust Division of the Department of Justice who were asked by a subcommittee to testify about settlement negotiations in a case on which they had worked while employed by the Department of Justice. Assistant Attorney General Hansen in charge of the Antitrust Division advised the two former attorneys that they were free to testify on the matter, but he indicated that the Department could ask the former attorneys not to testify it it believed it appropriate:

> "Under the circumstances peculiar to this case, we do not at the present time think it appropriate or desirable to suggest to you that you assert any privilege on behalf of the Department with regard to any information within your knowledge which is relevant to the negotiations of the decree in the Western Electric case."[5/]

II. Policies Underlying the Privilege Support Its Availability Here.

An examination of the policies underlying the doctrine of Executive privilege also supports our conclusion that the privilege may properly be invoked in the present circumstances. The primary policy justification for the doctrine of Executive privilege as applied to advice given the President by his staff is that frank and candid advice to the President is essential and the President will be more likely to receive such advice if it is kept confidential. If advice from a staff member were protected from congressional and public scrutiny only for so long as the staff member remained employed in the White House, the protection would be significantly reduced. It would only be a question of time when staff

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5/ Consent Decree Program of the Department of Justice, Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary, 85th Cong., 1st & 2d Sess., pts. I & II, at 3576-77, 3647 (1957-58).

turnovers or a change in administration would remove the shield. Perhaps more strikingly, if the privilege were not available to the President with respect to former staff members, a committee could compel testimony from them that could certainly be refused if sought from a current staff member. It is noteworthy that the evidentiary privileges for communications to an attorney, a spouse or a physician, which are also designed primarily to protect candid discussion, do not depend on the continuation of the relationships under which they were made. 6/

We have one caveat with respect to our conclusion. While we believe that an assertion of Executive privilege with respect to specific testimony on the subject of advice given by the former staff member to the President is entirely proper, we have some reservations about the propriety of invoking the privilege to direct the former staff member not to appear at all. This aspect of the Executive privilege has in the past been claimed only for the President and his most intimate, immediate advisers. One of the justifications that has been advanced for an immediate adviser declining to appear is that he is presumptively available to the President 24 hours a day; the necessity to appear before congressional committees therefore could impair that availability. This consideration would obviously not justify a refusal to appear by a former staff member. However, this justification is in our view neither the only nor the best one. An immediate assistant to the President may be said to serve as his alter ego in implementing Presidential policies. On this theory, the same considerations that were persuasive to former President Truman would apply to justify a refusal to appear by such a former staff member, if the scope of his testimony is to be limited to his activities while serving in that capacity.

In conclusion, we believe that an invocation of the privilege with respect to particular testimony by a former staff member on the subject of advice given the President is quite clearly proper; on the other hand, we believe an

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6/ See Wigmore on Evidence, Vol. VIII, §§ 2323, 2341, 2387 (3d ed. 1961).

invocation of the privilege as a basis for a refusal to appear at all is a closer question. An intention to invoke the privilege with respect to particular testimony could certainly be announced. This as a practical matter may solve the problem. If, however, the interrogation is expected to extend to non-privileged matters, a decision that the former staff member should not appear at all would not, in our opinion, be justified.

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