MAY 23 1977

MEMORANDUM TO ALL HEADS OF OFFICES, DIVISIONS, BUREAUS AND BOARDS OF THE DEPARTMENT OF JUSTICE

Re: Executive Privilege

The purpose of this memorandum is to outline in a general way the doctrine of Executive privilege as it relates to requests from Congressional committees for Executive branch information and documents.

I. Legal Background

Simply stated, 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 official documents or information from compulsory process of the Legislative branch. 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 a constitutional basis of Executive privilege involved the controversy over the Special Prosecutor's right to 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 issue before the Court in Nixon concerned only the availability of the privilege, and the courts' role in evaluating the assertion of such privilege, in the context of a criminal prosecution. It is conceivable, if the matter could be litigated, that the Court would hold that any demand from the Congress is sufficient, as were the circumstances in Nixon, to overcome the privilege. However, the explicit language of the opinion, as well as the Court's rationale supporting its view of the privilege as one of contitutional dimension, would indicate that in at least some circumstances the privilege is available against the Congress as well as in the courts.

II. The Practice Regarding Executive Privilege

Information or testimony is most often elicited from the Executive branch by the Congress by way of committee requests. In most cases the Executive supplies the requested information voluntarily and without any sort of formal legislative compulsion. Since no compulsory processes are undertaken in this context, no occasion exists for the assertion of Executive privilege. From a legal standpoint, the privilege need only be asserted where the Executive would otherwise be under a legal duty to provide information, and such duty can only attach upon the issuance of a subpoena or other similar compulsory order.

In keeping with this Administration's general policy of complying to the fullest extent with Congressional requests for information, however, such requests should be complied with unless there is reason to believe that Executive privilege would afford a valid basis for not doing so. Thus, while the privilege need not be asserted in response to a Congressional request, the principles underlying the doctrine should provide guidance in considering requests by Congress for information.

In earlier years, the Executive branch practice with respect to assertion of Executive privilege as against Congressional demands was not well defined. During the Congressional investigation involving Senator McCarthy, 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 internal 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.

President Carter has indicated that he will soon issue a memorandum in which he will take the position of Presidents Kennedy, Johnson and Nixon that only the President can assert Executive privilege.

It should be emphasized that the above procedure need only be undertaken if a satisfactory resolution with respect to Congress' demand cannot otherwise be devised. It is often the case that mutually agreeable solutions to Congressional demands can be worked out, and it is of course better to attempt such compromises than to plunge into a constitutional confrontation.

If no such compromise can be reached, the decision whether Executive privilege will be asserted is largely dependent on the particular circumstances involved in the Congressional demand. This determination may depend on such varying factors as the nature and confidentiality of the information sought and the strength of the forces in Congress that are seeking the information. To the extent that any generalizations may be drawn, they are necessarily tentative and sketchy. It has been the position of the Executive branch that the President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee. Lower-level White House officials have been deemed subject to a Congressional subpoena, but might refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President.

The question is somewhat different with respect to the Department of Justice. The Department has been created by an Act of Congress, and administers and enforces many statutes enacted by Congress. These factors are considered to impose on the Department an obligation to furnish knowledgeable witnesses or information pursuant to Congressional demands. Even here, however, the President is thought to have the authority to direct the officials concerned to decline to testify concerning particular matters for "specific reason."

It is not possible, in what is intended to be a brief exposition, to treat at length the "specific reasons" which would, under present practice, call for withholding from the Congress material which does not consist of communications to or from the President or communications of his immediate advisers. The two most obvious areas are foreign relations and military affairs; the Court in Nixon acknowledged that the courts have traditionally shown the "utmost deference" to the President's exercise of his responsibilities in these matters. 418 U.S. at 710.

Another area subject to Executive privilege, more closely related to the Department's normal functions, is information which would jeopardize pending or contemplated litigation or which would impinge on the confidentiality of investigative files. See 40 Op. A.G. 45 (1941). Disclosure of such information would not only hamper the Department's investigative or prosecutorial efforts; it may also discourage sources of information from coming forward and result in the release of unverified information which may be damaging to individuals. Id. at 46-47.

Finally, Executive privilege also protects intra-governmental discussions even below the Presidential level; the purpose is to protect such discussions from an exposure

which would destroy their candor and hence their worth. Given this purpose, however, this aspect of Executive privilege has been deemed to protect only suggestions, advice, recommendations and opinions, rather than factual and investigatory reports, data, or surveys in government files. See United States v. Leggett & Platt, Inc., 542 F.2d 655 (6th Cir. 1976).

These principles of nondisclosure may be relaxed in situations where the public interest would justify it. For example, materials properly subject to claims of Executive privilege may be disclosed to Congress in cases involving Senatorial confirmation of Presidential nominations or in impeachment proceedings. See 40 Op. A.G. 45, 51 (1941).

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