AUG 11 1977

MEMORANDUM FOR MARGARET McKENNA
Deputy Counsel to the President

Re: Dual-purpose Presidential Advisers

This responds to your request for our opinion on the effect of the proposed reorganization of the Executive Office of the President on the status of certain Presidential advisers. If not disapproved by either House of Congress, the President's Reorganization Plan No. 1 of 1977 would reorganize the Executive Office of the President (EOP) by eliminating certain specialized units. In some instances the functions of the discarded units would be continued by ad hoc interagency planning groups, chaired by Presidential advisers or assistants on the White House Staff. It has been suggested that there may be some congressional concern as to this restructuring because such use of White House personnel would restrict congressional access to the individuals primarily involved in the reorganized activities. As a possible means of allaying such concern, it has been proposed that a commitment be made to allow such "dual-purpose" advisers, in their roles as group members, to make themselves available to Congressional call. In view of this proposed arrangement you have requested our views. The request can be capsuled in the following two questions: (1) Whether this arrangement would erode the principle of Presidential privilege and thus threaten the confidentiality that exists between the President and his advisers. (2) Whether there is a historical or constitutional basis for such an arrangement.

First, we state briefly the historical foundation for the privilege. Second, we place Presidential advisers into classes. Third, we note and discuss possible legal problems

with language used in the President's Reorganization Plan. Fourth, we state the effect of the Reorganization Plan on unqualified advisers. Fifth, we respond to the two questions stated at the outset.

The practice of not calling Presidential advisers to testify before Congress is predicated on the doctrine of what is frequently termed "executive privilege." This particular application of the privilege takes the form of "executive immunity" which is primarily derived from the close relationship between the President and his advisers, and from the President's personal immunity from testimonial compulsion. Presidential immunity is firmly grounded in the fundamental constitutional doctrine of separation of powers. 1/ (Attached as an appendix is a detailed historical survey of the concept of executive privilege and its extension regarding executive immunity, which may prove helpful as background material for this memorandum.)

Generally, and historically, there are two classes of Presidential advisers. First, there are those in the Executive Branch whose sole function is to advise the President relative to his statutory and constitutional responsibilities, as well as to general policy decisions. This class can be referred to as "unqualified advisers." These advisers generally work in the White House Office and they act at the direction of the President. Second, there are those individuals who not only advise the President and act at his direction, but who also have statutory obligations. This class can be referred to as "qualified advisers." This group traditionally consisted of the heads of departments or agencies, or their delegees. They often can and do act independently. In recent years a third class of advisers

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1/ Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 591 (1866).

which does not fit squarely into the second class, but which has some of its characteristics, has developed. This class has resulted from the creation of special units in the EOP and the Congress' desire to have the heads of these units and their staff accountable to it as well. Thus, the heads of these units serve as nonstatutory assistants to the President, but often have statutory obligations. An example of such a unit is the Office of Drug Abuse Policy. Its head is also a special assistant to the President for health matters.

Looking at the three classes in terms of executive privilege, one finds that there is general recognition that the first class of advisers is not subject to Congressional call. The second class and third class of advisers can be summoned before Congress to testify relative to their statutory obligations; however, they too are protected by executive privilege relative to any advice given to or any conversations with the President.

Under the President's Reorganization Plan the statutory functions of some EOP units would be transferred to or vested in the President. In the summary of the President's message submitting the Reorganization Plan to Congress, it is stated that the functions of various units will be transferred or vested in the President for "redelegation," apparently, in some instances, to an ad hoc interagency planning group chaired by Presidential assistants on the White House Staff. We think it necessary to briefly address the legal implications of the term "redelegation." Key, of course, is what the term is used to denote; the Reorganization Plan lends no assistance.

If by "redelegation" it is meant that the President will delegate the statutory responsibilities transferred to or vested in him under the Reorganization Plan to others, such delegation should be accomplished in accordance with

3 U.S.C. §301. 2/ That statutory provision provides that the President can delegate any functions vested in him by law to "the heads of any department or agency in the executive branch, or any officer thereof who is required to be appointed by and with the advice and consent of the Senate." This language, of course, generally describes the second and third classes of advisers noted above. And, our research on the applicable provision of the Reorganization Act of 1977 did not unearth any language which can be interpreted as amending or repealing 3 U.S.C. §301, or as giving the President any new delegation powers. 3/ Thus, we conclude that the President may not redelegate any statutory responsibilities transferred to or vested in him pursuant to the Reorganization Act of 1977 to an adviser who does not meet the requirements of 3 U.S.C. §301, i.e., an adviser who was not an advise and consent appointee.

If Congress accepts the President's Reorganization Plan, Presidential assistants who gain additional responsibilities as a result thereof will merely continue their present roles of Presidential advisers, albeit ad hoc interagency advisory groups are used as forums in which such advice may be formulated. 4/ In the case of those advisers who presently serve as the heads of special units in EOP

2/ Although 3 U.S.C. §303 states that this statute "shall not be deemed to limit or derogate from any existing or inherent right of the President" to delegate, we believe that it would not be appropriate in this context to depart from the requirements set forth in 3 U.S.C. §301.

3/ See Public Law 95-17, §907.

4/ If the terms "dual-purpose advisers" and "dual-office holders" are meant to identify White House assistants who would gain new responsibilities under the President's Reorganization Plan they are misnomers; these assistants will remain unqualified advisers, nothing more.

with statutory obligations and who also serve as assistants to the President, their statutory responsibilities will be transferred to or vested in the President; they will be relieved of their statutory obligations and continue, if retained, as Presidential assistants, i.e., unqualified advisers. 5/

As we have stated, unqualified Presidential advisers do not have to honor requests to appear before Congressional committees while qualified Presidential advisers are subject to Congressional call relative to their statutory obligations. Thus, the only reason for making a commitment to allow these advisers, in the instant matter, to appear before Congressional committees would be to assure congressional acceptance of the President's Reorganization Plan. The first and most obvious question is whether such a commitment would erode the doctrine of executive privilege and threaten the confidentiality that exists between the President and his adviser. Should the President establish this precedent, there is certainly some risk that the concept of executive privilege and its extension, executive immunity, may be diminished.

The very fact of such an arrangement would erode the doctrine. Except for their presence on the ad hoc emergency advisory groups, these advisers will have few, if any,

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5/ An excellent example to illuminate this point is the case of Dr. Peter Bourne. In his role as Director of the Office of Drug Abuse Policy, an office created by statute, he is responsible to Congress; he also functions as a Presidential adviser in his capacity as a Special Assistant to the President. Under the President's Reorganization Plan the Office of Drug Abuse Policy would be abolished and its statutory responsibilities vested in the President. If retained, Dr. Bourne's sole role would be that of an unqualified Presidential adviser.

characteristics distinguishable from other unqualified advisers. Moreover, it is conceivable that Congress may use Presidential permission for access to this group of advisers as a means of attempting to make all Presidential advisers answerable to its inquiries.

On the other hand, there is little real danger that the time-honored doctrine of executive privilege will be lost; Congress cannot take it away. As we stated earlier it is deeply rooted in the separation of powers principle. In our view, the major problem which the President would face under such an arrangement would be where to draw the line on Congressional call and inquiry.

Finally, is there a historical or constitutional basis for such an arrangement? The President as holder of the privilege has the power to waive it, and there are precedents for this. As we point out in the appendix, several Presidents have permitted their advisers to appear and give testimony before the Congress. The arrangement proposed, however, would go far beyond those precedents; but in the final analysis it is the President's decision as to how far he wants to go in waiving his privilege. Should there be further questions on this matter, please let me know.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Appendix

Re: Executive Privilege for Presidential Advisers

In general, the investigative power of Congressional committees is extremely broad -- as extensive as the power of Congress to enact legislation. 1/ And the power to investigate carries with it the power to compel persons to appear before a committee and to respond to questioning. These powers are well established by decisions of the Supreme Court. 2/

Thus, if a Presidential assistant can refuse to appear and testify before a Congressional committee with respect to matters within its legislative jurisdiction, it is because he is in a position to invoke "executive immunity" or "executive privilege." Both concepts are grounded in the constitutional doctrine of separation of powers. The rights and privileges emanating therefrom are the President's and the decision whether a Presidential assistant on his personal staff should or should not appear or assert executive privilege is solely a matter of Presidential discretion. While the doctrines of executive immunity and executive privilege are tools to protect the President himself from Congressional call or inquiry, logic dictates, as indicated below, that these doctrines also be available to the President's personal staff. Thus, there is general recognition that a Presidential assistant need not appear in response to an invitation or subpoena from a Congressional committee provided that the President directs him not to.

1/ Barenblatt v. United States, 360 U.S. 109 (1959).

2/ McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

The primary underpinning of the doctrine of executive privilege in this area is that frank and candid discussions between the President and his personal staff are essential to the effective discharge of the President's executive responsibilities and that such Presidential discussions can take place only if their contents are kept confidential. 3/ While justifying the refusal of a Presidential assistant to answer Congressional requests for information relating to the discharge of the President's executive responsibilities, this rationale, standing alone, does not appear to excuse Presidential assistants from appearing at all. However, a corollary of this rationale, based more on policy than on constitutional law, is that Presidential assistants need not appear, if so directed by the President, because all of their official responsibilities are subject to a claim of privilege.

A further rationale based on the doctrine of separation of powers is that a personal assistant to the President generally acts as an agent of the President in implementing Presidential instructions. He therefore functions as the President's alter-ego. If such an assistant could be called before a congressional committee for the purpose of questioning him about his actions on behalf of the President, the same inroads on separation of powers and independence of the Presidency would result were the President himself subject to testimonial compulsion. As President Truman said in a

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3/ The doctrine of executive privilege has historically been confined to the areas of foreign relations and military affairs. See, e.g., New York Times v. United States, 403 U.S. 713 (1971); United States v. Reynolds, 345 U.S. 1 (1953); United States v. Curtiss-Wright Export, 299 U.S. 304 (1936). See also, Army-McCarthy hearings of 1954, Special Senate Investigation, Hearing before the Special Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 83d Cong., 2d Sess. 770 (1954).

radio address when he refused to appear pursuant to a request of the House Unamerican Activities Committee, if a President or former President could be called and questioned about his official duties, 'the office of President would be dominated by the Congress and the Presidency might become a mere appendage of Congress." 4/

Past Presidents who have been faced with the rare request for the appearance of personal staff members uniformly have considered the appearance to be a matter of Presidential discretion. 5/ It is a right which may be asserted or waived by the President. On two occasions during the Administration of President Truman, a subcommittee of the House Committee on Education and Labor issued subpoenas to John R. Steelman, who held the title "Assistant to the President." In both instances he returned the subpoena with a letter stating that "[i]n each instance the President directed me, in view of my duties as his assistant, not to appear before your subcommittee." 6/

In 1951, Donald Dawson, an Administrative Assistant to President Truman, was requested to testify before a Senate subcommittee investigating the Reconstruction Finance

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4/ New York Times, November 17, 1953 at p. 26.

5/ See generally, Statement of Richard G. Kleindienst, Attorney General, before the Separation of Powers Subcommittee of the Committee on the Judiciary and the Intergovernmental Relations Subcommittee of the Committee of Government Operations, United States Senate, April 10, 1973.

6/ Investigation of the GSI Strike, Hearings before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 80th Cong., 2d Sess. 347-353 (1948).

Corporation, one aspect of which concerned Mr. Dawson's alleged misfeasance. Although the President believed that this request constituted a violation of the constitutional principle of the separation of powers, he nevertheless 'reluctantly' permitted Mr. Dawson to testify so that he could clear his name. 7/

In 1944, Jonathan Daniels, an Administrative Assistant to President Roosevelt, refused to respond to a subcommittee subpoena requiring him to testify concerning his alleged attempts to force the resignation of the Rural Electrification Administrator. He based his refusal on the confidential nature of his relationship to the President. The subcommittee then recommended that Daniels be cited for contempt. Thereafter, Daniels wrote the subcommittee that although he still believed he was not subject to subpoena, the President had authorized him to appear and respond to the subcommittee's questions. 8/

During the Eisenhower Administration Sherman Adams declined to testify before a committee investigating the Dixon-Yates contract because of his confidential relationship to the President. However, at a later date he volunteered to testify concerning his dealings with Bernard Goldfine who was charged with violation of Federal criminal statutes. 9/

7/ See Study of the Reconstruction Finance Corporation, Hearings before the Subcommittee of the Committee on Banking and Currency, United States Senate, 82d Cong., 1st Sess. 1709, 1795, 1810 (1951). See also New York Times, May 5, 1951, p. 75; May 11, 1951, pp. 1, 26; May 12, 1951, pp. 1, 12.

8/ See Administration of the Rule Electrification Act, Hearings before a Subcommittee of the Committee on Agriculture and Forestry, United States Senate, 78th Cong., 1st Sess. 515-529, 595-740 (1943).

9/ See Investigation of Regulatory Commissions and Agencies, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess. 3711-3740 (1958).

During the hearings on the nomination of Justice Abe Fortas as Chief Justice, the Senate Judiciary Committee requested W. DeVier Pierson, then Associate Special Counsel to the President, to appear and testify regarding the participation of Justice Fortas in the drafting of certain legislation. Pierson declined to appear, writing the Committee as follows:

> As Associate Special Counsel to the President since March of 1967, I have been one of the 'immediate staff assistants' provided to the President by law. (3 U.S.C. 105, 106). It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore, respectfully decline the invitation to testify in the hearings. 10/

It is not clear whether this action was taken with the specific approval of the President.

The broad application of executive privilege and executive immunity discussed above is not available to all Presidential advisers. In the case of advisers who may be vested with statutory obligations the President is limited in the extent he can invoke these doctrines. While the

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10/ Nominations of Abe Fortas and Homer Thornberry, Hearings before the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess. 1347-1348 (1968).

President can invoke the doctrine of privilege to keep these advisers from testifying with respect to any matter arising in the course of their official position of advising or formulating advice for the President, he cannot prevent them from testifying relative to their statutory obligations. Privilege has been invoked with respect to the confidentiality of conversations with the President, the decisional process as exercised by the President and the necessity of safeguarding the process of frank internal advice within the Executive Branch. In United States v. Nixon, 11/ the Supreme Court recognized the concept of confidentiality of executive communications as one facet of the broader constitutional doctrine of executive privilege, stemming from the principle of separation of powers.

In 1962, President Kennedy directed the Secretaries of Defense and State not to disclose the names of individuals with respect to speeches they had reviewed. Senator Stennis, Chairman of the Special Preparedness Subcommittee of the Committee on Armed Forces, upheld this claim of executive privilege. In June of 1970, President Nixon through the Attorney General invoked executive privilege in his refusal to release certain investigative files of the FBI to Chairman Fountain of the Intergovernmental Relations Subcommittee of the House Committee on Government Operations. On August [illegible], 1971, President Nixon declined to make available to the Senate Foreign Relations Committee the Executive Branch Five-Year Plan for the Military Assistance Program. 12/ On March 15, 1972, President Nixon directed the Secretary of State and the Director, USIA, not to release to the Senate

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11/ 418 U.S. 683 (1974).

12/ See Hearings on S. 1125 Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 92d Cong., 1st Sess. 46 (1971).

Foreign Relations Committee and the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee USIA country program memoranda and the 1973 Country Field Submission for Cambodia.

To summarize, it can be said that the President may properly regard his personal staff immune from testimonial compulsion by Congress. Not only can the President invoke executive privilege to protect them from the necessity of answering questions posed by a congressional committee, but he can also direct them not even to appear before the committee. The President can also invoke executive privilege to protect his cabinet officers and other officials in their role as advisers from Congressional inquiry. However, he cannot invoke this doctrine or the doctrine of executive immunity to insulate them from Congressional call relative to the normal performance of their statutory obligations.