U.S. Department of Justice
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Office of the
Assistant Attorney General

FEB 27 1984

Washington, D.C. 20530

MEMORANDUM TO ATTORNEY GENERAL DESIGNATE
EDWIN MEESE III

RE: CONFIDENTIALITY OF COMMUNICATIONS BETWEEN
THE PRESIDENT AND HIS IMMEDIATE ADVISERS

During your confirmation hearings, you will surely be asked questions which intentionally or inadvertently seek disclosure of advice which you (or other top level members of the President's immediate advisory circle) have given to the President. */ Unfortunately, there is no simple solution to the dilemma raised by these questions. Like so many other decisions you will be making in the months ahead, this one must be considered not only in the context of the moment, but with due regard for the consequences in the future for the President and the presidency.

On the one hand, the Senators have a legitimate interest in you, your character and your opinions. The advice you have given to the President on the sensitive issues of the last three years (as well as during your earlier roles as adviser to President Reagan in his capacity as a candidate or governor) is a source of much relevant and revealing information regarding your intellect, judgement, integrity and philosophy. Furthermore, in the interest of advancing your confirmation and in cooperating with the Senate, you will intuitively want to be as forthcoming as possible. Ultimately, the Senate has a right not to confirm anyone. Thus, even if the Executive has a legitimate right to withhold documents or deliberative materials, the Senate holds the final authority to refuse to confirm an appointee if the desired information is not produced. The confirmation process is not reviewable in any court.

On the other hand, the President is entitled to confidential advice from his top advisers. Your role as Counsellor to the President (particularly as a lawyer advising a client) has placed you in a position of the closest intimacy to the President as Head of State and Government. If he cannot rely on a confidential relationship with you, there is surely no one to whom he can turn to for confidential advice. If he

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*/ Senator Leahy has already indicated a desire to see internal White House deliberative memoranda regarding certain national security executive orders, NSDD 84 and other Administration policies.

forfeits the right to your confidentiality by appointing you to an important advice-and-consent position the consequences for the future are obvious: Presidents may be more reluctant to nominate their closest advisers to advice-and-consent positions, and future Presidents may be more restricted in their ability to obtain the best advisers because of fear by prospective appointees that their opportunity for other positions will be foreclosed by virtue of accepting an important White House position.

The Supreme Court uninimously held in the Nixon tapes case that there was a "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties, [and that] the importance of this confidentiality is too plain to require further discussion. 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 decision making process." United States v. Nixon, 418 U.S. 683, 705. While the Court in Nixon overrode the claim of presidential privilege asserted in that situation because of the paramount need for evidence in a criminal proceeding, and while the President's right to expect confidentiality from his advisers is not absolute, it is an important part of the President's authority in his area of responsibilities under the Constitution and should not lightly be set aside or waived.

On balance, we believe that you should not reveal the contents of oral or written communications between yourself and the President or between you and the President's other top level advisers in the decisionmaking process relative to the performance of the constitutional duties of the President. On the other hand, we do believe that you should be willing to discuss your current positions on issues and your views on positions of the Administration or other issues of public importance. Matters which are still in the pre-decision deliberative process within the Administration should be treated with sufficient discretion that you do not preclude or preempt the President's options on those matters.

The foregoing is by no means an ideal solution to this difficult problem and it unfortunately does not articulate clearly divided and easily distinguishable fields of black and white. However, within this general framework, you may find it a useful formulation to apply to specific situations. The following two paragraphs articulate this formulation in language you might consider using to explain your position to the Senate Judiciary Committee:

"As the Committee is fully aware, there is a longstanding, constitutionally rooted, tradition of comity between the Legislative, Executive and Judicial Branches of our Government. One of the basic tenents of this tradition is the great respect shown for confidential communications between the official representatives of each of the branches, whether they be Supreme Court Justices, Members of Congress, or the President and their rspective immediate advisers. These communications uniformly have been considered an inappropriate subject for examination or inquiry except in the most extraordinary circumstances. The Supreme Court has recognized the constitutional importance of protecting the confidentiality of these communications. The protection for the deliberative process involving the President and his immediate advisers is very similar to the protection which Members of Congress and the Judiciary expect and receive for their internal deliberations with their staffs. The Committee on the Judiciary of the United States Senate, which has rendered its advice on so many presidential appointees, has historically been respectful of the confidentiality of the deliberative process within the Executive Branch."

"I am, of course, pleased to discuss with you my current views on _____ as well as the position of the Administration on that subject. I am sure you will agree with me, however, that any conversations I may have had with the President and the President's other intimate advisers concerning _____ are neither vital to the confirmation process, nor appropriate to discuss publicly given the constitutional traditions of respect and comity between the Branches of our Government which we all wish to preserve."

We strongly urge that this approach be discussed with Chairman Thurmond and such other Members of the Committee and staff as may be appropriate in advance of the hearing to secure their advice regarding and support for this position.

We have conducted some historical research which is interesting but not decisive on the subject discussed in this memorandum. For what it is worth, it is contained in the attachments. For example, we have developed the attached list of former Attorneys General who were nominated for that position at a time when they were serving in another position, either diplomatic or non-diplomatic, in the Executive Branch. In the time available we have not been able to identify any former Attorney General who had come to that Office from a position in the White House.

We also looked into the confirmation hearings of Elliot Richardson and, because we were aware of the issues having arisen, John Shenefield and Justice Rehnquist. Attached are excepts from the Richardson, Shenefield and Rehnquist hearings. Although most of the Richardson confirmation hearing was directed to Watergate matters, the attached excepts from his hearing demonstrate that he was questioned quite directly about the propriety of a decision he had at that time recently made as a Defense Department official, a decision that did not seem to have any direct bearing on the duties he would undertake as Attorney General.

It is fair to say that the majority of the Shenefield confirmation hearing was devoted to an examination of his service as Assistant Attorney General in charge of the Antitrust Division. The excerpted hearings show that Senator Metzenbaum made a request for, inter alia, documents received by this Government from the Canadian government with respect to the potential for bringing a case which Shenefield ultimately decided not to bring. The printed hearing transcript reflects the turning over to the committee of those documents in truncated form. We are informed that Senator Metzenbaum put his foot down and threatened to block the nomination altogether unless he saw the full text of the relevant documents and that the full text was indeed turned over, or shown, to Senator Metzenbaum. Finally, another point of interest is that Mr. Shenefield was questioned directly about at least one meeting he had had at the White House (with the Counsel to the President) and he responded by revealing those oral communications as best he could recollect them. (pp. 81-82 of Hearings).

Justice Rehnquist was questioned about the legal advice he had given and other participation in the deliberative process. His responses are illuminating.

We urge that you skim through these testimony excerpts, if for no other reason than that it will give you a better feel for the process.

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Attachments

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