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Memorandum

ATTORNEY GENERAL/DEPUTY ATTORNEY GENERAL ACTION

Subject	Date
Executive Privilege - Reagan Memorandum	6 APR 1982

To
William French Smith
Attorney General

From
Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Action Required:

Final Action By:

Due Date: N/A

Attorney General [X]

Deputy Attorney General [ ]

Previous Background Provided:

Two memoranda for the Attorney General dated 9 October 1981 and conferences with the Attorney General.

Summary:

Attached is a draft of a memorandum for the President's signature on the subject of procedures governing responses to congressional demands for information and the invocation of executive privilege. This draft reflect suggestions and comments by the Attorney General, the Deputy Attorney General and members of their staffs.

Comments:

See memoranda of October 9, 1981 for reasons why such a presidential memorandum is recommended. Also attached is a brief summary of reasons favoring the execution and distribution of such a memorandum. The proposed draft, if approved by the Attorney General, will be submitted for discussion to the Counsel to the President prior to submission to the President.

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	DAG	AAG	OLC	OLP	OLA	PAO	LMD						
Date													

See Reverse For Instruction

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

6 APR 1982

MEMORANDUM TO THE ATTORNEY GENERAL

Re: Executive Privilege

I am proposing that President Reagan issue a Memorandum to the Heads of Executive Departments and Agencies setting forth his policies and procedures regarding the invocation of Executive Privilege. The existing policy/procedure memorandum was authored by President Nixon on March 24, 1969. It has provided the standard for Executive Branch responses to congressional requests for information since that time. While adequate in some respects, it should be replaced for the following reasons:

1. There have been a number of court decisions, including an important opinion from the Supreme Court, which have altered and refined the law in this area.

2. President Reagan should have his own statement of policy and procedure rather than relying on an antiquated position of a prior President.

3. Improvements in the coordination of responses to congressional demands for information is necessary on the one hand in order to avoid unnecessary provocation of Congress with inappropriate refusals to produce documents and, on the other, to reduce erosion of presidential prerogatives by repeated production of information which should properly be withheld.

4. The President has never provided any advice to heads of Executive departments and agencies on the subject of executive privilege. Even if the policies/procedures were not to be changed, some communication to them by the President is necessary to ensure that they will know what to do when faced with Congressional demands for information.

If you approve of its contents, I will discuss the proposed "Reagan Memorandum" with Counsel to the President. Changes may be necessary as a result of that consultation process. At the completion of that process you will be given another opportunity to review the final product and will be in a position to submit the proposed "Reagan Memorandum" directly to the President.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Office of the Attorney General
Washington, D. C. 20530

ATTORNEY GENERAL DECISION MEMORANDUM
REGARDING PRESIDENTIAL MEMORANDUM
ESTABLISHING PROCEDURE GOVERNING
RESPONSES TO CONGRESSIONAL REQUESTS
FOR INFORMATION

The attached draft memorandum for the President's signature establishing procedures for responses to Congressional requests for information is

APPROVED _____

DISAPPROVED _____

_____
William French Smith
Attorney General

April ____, 1982

MEMORANDUM FOR THE HEADS OF
EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: PROCEDURE GOVERNING RESPONSES TO
CONGRESSIONAL REQUESTS FOR INFORMATION

The policy of this Administration is to comply with Congressional requests for information to the fullest extent possible consistent with the constitutional and statutory responsibilities of the Executive Branch. While this Administration has an obligation like all of its predecessors to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances and only after a rigorous inquiry into the actual need for its exercise. Good faith negotiations by both Congress and the Executive have historically minimized the need for invoking executive privilege and this tradition of accommodation should continue as the primary means of resolving conflicts between the branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of military, diplomatic or national security secrets, deliberative communications which form a part of the decisionmaking process, or other information important to the discharge of the Executive's constitutional responsibilities. Legitimate and appropriate claims of privilege should not be thoughtlessly waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be employed whenever Congressional requests for information implicate concerns regarding the confidentiality of the information sought.

1. All requests for information from Congressional committees shall be complied with as promptly and as fully as possible unless it is determined that compliance therewith raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the material requested would significantly impair the conduct of foreign relations, the national security, the deliberative processes of the Executive Branch or the performance of the Executive's constitutional duties.

2. If the head of an executive department or agency (department) believes that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall consult promptly with department counsel.

3. If the department head, after consultation with counsel, determines that compliance with the request will raise a substantial question as to the need for invoking executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel and with the Counsel to the President.

4. Every effort shall be made to comply with the Congressional request and provide the information sought by the inquiring Congressional body in a manner consistent with the legitimate needs of the Executive Branch. The department head, the Attorney General and Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the information sought.

5. If the department head, the Attorney General or the White House Counsel, after the consultation process referred to above, believe that the circumstances justify the invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President who will advise the department head and the Attorney General of the President's decision.

6. In the event of a Presidential decision to invoke executive privilege, the department head shall advise the Congressional body that the claim of executive privilege is being made with the specific approval of the President.

7. Pending a final determination of the matter, the department head shall request the Congressional body to hold its demand for the information in abeyance until such determination can be made. Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request itself does not constitute a claim of privilege.