U.S. Department of Justic
Office of Legal Counsel

Olson
Sudol
Files
Retrieval

Office of the
Assistant Attorney General

Washington, D.C. 20530

19 APR 1982

MEMORANDUM TO FRED FIELDING
COUNSEL TO THE PRESIDENT

Re: Executive Privilege

I am enclosing herewith a draft of a proposed "Reagan Memorandum" on the subject of Executive Privilege.

For a variety of reasons, I feel that it is appropriate and necessary for President Reagan to issue a memorandum on this subject to the heads of executive departments and agencies. The Attorney General agrees with me and has approved the attached draft of such a memorandum.

My reasons for suggesting such a "Reagan Memorandum" are set forth in my memorandum to the Attorney General of April 6, 1982 and my two memoranda of October 9, 1981. Copies are enclosed.

As you can see from the last paragraph of the April 6, 1982 memorandum, we would like to submit the proposed memorandum to the President with the Attorney General's recommendation that he sign and distribute it, but only after we have consulted with you and made any changes that result from that consultation process. It should probably be a joint submission and recommendation to the President.

For your convenience, I am sending an extra set of this memorandum and the enclosures to Dick Hauser.

After you have had a chance to look this over and when you have some time, I suggest that we get together to discuss the draft "Reagan Memorandum" and determine whether it is in a form which is suitable for submission to the President or how it might be improved.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: Richard A. Hauser
Deputy Counsel to the President

Memorandum

ATTORNEY GENERAL/DEPUTY ATTORNEY GENERAL ACTION

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL
APR 8 5 16 PM '82

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.

Concurrences:	DAG	AAG	OLC	OLP	OLA	PAO	JMD	ARMS				
Initials		N/A	N/A	N/A	N/A	N/A	N/A					
Date								9/7				

See Reverse For Instruction

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 12, 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.

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

Executive Privilege

9 OCT 1981

Attorney General

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

The following is a brief summary of the more detailed memorandum which I am supplying to you today regarding executive privilege in the context of congressional demands for information. 1/

1. The privilege, its origin, general principles, its scope and limits.

There is no reference in the Constitution to a privilege in the Executive Branch to withhold information from the courts, the public or the Legislative Branch. However, such a privilege has been recognized since the earliest days of the Republic (first by President Washington) as a necessary corollary of the executive function implicit in the Constitution.

Over the years, executive privilege was invoked in the areas of foreign affairs and military and domestic (investigations) secrets. In 1954, President Eisenhower asserted that it extended to deliberative communications within the Executive Branch.

The existence of the privilege and its constitutional derivation was recognized in 1974 by a unanimous Supreme Court in United States v. Nixon, 418 U.S. 683. While the court required the President to produce the Nixon tapes in response to the Watergate grand jury's subpoena, it also declared that "the protection of the confidentiality of Presidential communications has . . . constitutional underpinnings." The court noted as a partial basis for the privilege that the decisionmaking process would be detrimentally affected if the candor of communications were tempered because of the expectation of public disclosure.

1/ The standards for asserting executive privilege in court are somewhat different and are beyond the scope of this memorandum.

Congress has a similar implicit constitutional right to obtain information from the Executive Branch necessary to perform its legislative (including legitimate oversight) functions, also recognized by the Supreme Court. This includes the power to subpoena witnesses, including (with exceptions) officials of the Executive Branch, subject to claims of executive privilege, and provided the subpoena serves a valid legislative purpose.

Where the congressional demand for information is legitimate, but a valid claim of executive privilege exists, the courts have held that each Branch has a duty to accommodate the needs of the other and the courts will balance the interests and needs of each Branch if a judicial resolution of the dispute becomes necessary. A part of the duty to accommodate is the responsibility of each Branch to explain its position and needs to the other Branch.

Executive privilege problems typically arise after a demand by a congressional committee or subcommittee for information. If the committee or subcommittee is not satisfied with the response, a subpoena will be issued. If still not satisfied, the committee and then the full House or Senate will vote to hold the agency head in contempt. If it does so, the matter (a) may be referred to a United States Attorney who is obliged by statute to refer the matter to a grand jury, 2/ (b) may be taken to a court for a judicial order compelling compliance with the subpoena and contempt of court enforcement proceedings if the official refuses to comply with the court order or (c) may (theoretically) be referred to the Sergeant of Arms to arrest the Executive Branch official (who could test the legality of the arrest by petitioning for a writ of habeas corpus).

2. The Problems

The Executive Branch faces three primary problems in effectively dealing with congressional demands for information: (a) belligerence on the part of some members of Congress; (b) a lack of Executive Branch coordination; and (c) a lack of clear rules to guide decision.

Some members of Congress -- particularly the chairmen of certain committees and subcommittees -- apparently believe that Congress is entitled to any and all information from the Executive. Opponents of the Administration can use congressional investigations to embarrass it or interfere with its programs.

2/ It is unsettled whether the Attorney General could order that the United States Attorney not proceed with the matter.

Congressional supporters of the Administration, on the other hand, cannot be relied on to protect its interests, because the issue almost inevitably becomes transformed from a partisan contest into a struggle between the Legislative and Executive Branches.

The most serious problem is a lack of coordination in responding to congressional demands. Many agencies, unwilling to face the wrath of important Congressmen and Senators, tend to disclose whatever is requested of them, even if the materials are highly deliberative or sensitive. Such disclosure can be contrary to the agency's best interests; more importantly, it creates a factual precedent which damages the Executive Branch as a whole. Conversely, some agencies are so anxious to avoid disclosure to Congress that they adopt an unreasonable bargaining position that could unnecessarily provoke a damaging inter-Branch confrontation and a possible unfavorable judicial decision. These problems of overcompliance and undercompliance stem from the same root cause -- a lack of centralized coordination in dealing with congressional demands. A coordination mechanism does exist -- a presidential memorandum issued in 1969 (the "Nixon Memorandum") which codified procedures followed in the Executive Branch since the Kennedy Administration. This memorandum requires that agencies consult with the Justice Department and the White House Counsel's Office, and makes clear that a claim of executive privilege against Congress must be made by the President personally.

The Nixon Memorandum procedure has much to recommend it. Unfortunately, it has most often been honored in the breach in the present Administration. Agencies have consistently failed to consult the Justice Department until the last possible moment, when, in our opinion, serious tactical or legal mistakes had already been made. In one case, the Justice Department was not notified until the day before a member of the Cabinet was voted in contempt of Congress by a subcommittee for failure to comply with a subpoena it had issued over 6 weeks earlier.

A final problem is the lack of clear legal rules to guide decision. Because there are so few judicial decisions in this area, the "law" of executive privilege is in large measure defined by the factual "precedents" of how the Executive Branch has responded to congressional demands in the past. As a result, it is even more important to achieve government-wide coordination in order to draw a consistent and principled line.

3. Possible Approaches

The President might wish to adopt a "firmer" attitude towards executive privilege matters than that of previous Administrations. The basis for this attitude -- which could be expressed in a presidential memorandum -- could be that a

claim of executive privilege is a legitimate, constitutionally-based prerogative of the Executive Branch, for which there need be no further justification or excuse. A disadvantage of the "firm" approach is the political damage it could cause in Congress and in some segments of the public.

An alternative approach, which we recommend, is to reissue the Nixon Memorandum as the "Reagan Memorandum," with some modification and improvements, and perhaps some additional specification regarding documents considered to be covered by executive privilege. This would dramatically increase agency awareness of the executive privilege issue as a government-wide problem and would improve the coordination and handling of disputes by involving the Justice Department and the White House Counsel's Office at an early stage.

4. Recommendation.

Work towards reissuance of Nixon Memorandum as Reagan Memorandum, with possible improvements as noted.

Memorandum

Subject: Executive Privilege

Date:

To: The Attorney General

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

This memorandum sets forth a general discussion concerning the problems this Administration has faced and will face in the future in responding to congressional demands for information.

I. The Scope and Limits of Executive Privilege

A. Basic Principles

1. Executive Privilege.

The Constitution nowhere states that the President, or the Executive Branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the Legislative Branch. The existence of such a privilege, however, is best regarded as implicit in the views of the Framers, is a necessary corrollary of the executive function vested in the President by Article II of the Constitution, has been asserted by numerous Presidents from the earliest days of our Nation, and has been explicitly recognized by the Supreme Court of the United States.

That a privilege to withhold information was not explicitly included in the constitutional text is not surprising, given the Framers' belief that the holding of secrets was essential to, and implicit in, the executive function. In our view, the privilege to withhold information is implicit in the scheme of Article II and particularly in the provisions that "the executive Power shall be vested in a President of the United States of America," Art. II, § 1, cl. 1, and that the President shall "take Care that the Laws be faithfully executed," Art. II, § 3.

The first congressional request for information from the Executive occurred in 1792, when a committee of the House of Representatives requested certain papers from President Washington regarding the failure of a military expedition. Washington, apparently realizing the importance of the precedent, asserted that as President he retained the right to exercise discretion in transmitting executive documents to Congress. Although after reviewing the materials Washington found no reason to withhold disclosure, and produced the documents, he refused four years later to comply with a House Committee's request for copies of instructions and other documents employed in connection with the negotiation of a treaty with Great Britain.

The practice of refusing congressional demands for information, on the ground that the national interest would be harmed by the disclosure, was employed by many Presidents in the ensuing years. The privilege was most frequently asserted in the areas of foreign affairs and military and domestic secrets; it was also invoked in a variety of other contexts, including executive branch investigations. In 1954, President Eisenhower asserted that the privilege extended to deliberative communications within the Executive Branch. In a letter to the Secretary of Defense, he stated:

> Because it is essential to effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions . . . .

In only one case has a federal court squarely adjudicated the legitimacy of an assertion of executive privilege against a congressional demand for information. Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)(en banc), was a suit by a Senate committee for enforcement of a subpoena duces tecum, served on the President, demanding production of tape recordings of conversations between the President and his principal aides. A Senate resolution passed subsequent to the issuance of the subpoena stated that the committee, in subpoenaing and suing the President, was acting with a valid legislative purpose and was seeking information vital to the fulfillment of its legitimate legislative functions. Id. at 727. Nevertheless,

the court held that the presidential conversations were presumptively privileged, a presumption that could be overcome only by a strong showing of need to obtain the information. The court denied enforcement of the subpoena on the ground that the material demanded was not critical to the committee's performance of its legislative functions.

The Supreme Court first addressed whether there was a constitutional basis for executive privilege in the controversy over the Special Prosecutor's right of 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 this ruling, first, on the need for 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. In dictum, the Court hinted that the privilege was very broad in the areas in which it was traditionally asserted:

> [The President] does not place his claim of privilege on the ground that [the communications] are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities.

Id. at 709. Although United States v. Nixon involved an assertion of the privilege against judicial process, there is no reason to doubt that the privilege recognized by the Court applies in the context of congressional demands for information as well.

2. Congressional Investigatory Power

The foregoing discussion has noted the consistent and longstanding tradition in the Executive Branch -- now explicitly endorsed by the Supreme Court -- of maintaining the confidentiality of certain information, disclosure of which would impair the national interest. This is not to say that there are not legitimate interests in the Congress in obtaining information from the Executive Branch. To be sure, there is no express constitutional authority to obtain such information. But just as it is implicit in the structure of Article II that the President is authorized to maintain confidentiality of communications in the Executive Branch, so it is implicit in the structure of Article I that the Congress has the power and duty to obtain information relevant to its legislative tasks. If it were not able to obtain adequate information about the subject matter of proposed or existing laws, Congress would find it difficult or impossible to enact effective and needed legislation.

The Supreme Court recognized and endorsed a broad congressional investigative authority in McGrain v. Dougherty, 273 U.S. 135 (1927). The Court located the constitutional basis of this power in the authority to legislate granted by Article II, an authority which, the Court held, included authority to investigate in furtherance of that end. Moreover, the investigative authority necessarily presupposed some means of compelling the cooperation of contumacious witnesses:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it. Experience has taught that mere requests for information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

Id. at 175.

While the investigative power of Congress is thus very broad, it is not unlimited. Any congressional demand for information in the possession of the Executive Branch is subject to potential assertion of executive privilege. In addition, there must be a subject matter for the inquiry, the investigation must be authorized by Congress, there must be a valid legislative purpose, the witness must be accorded certain constitutional protections, and the information demanded must be pertinent to the inquiry.

3. Duty to Accommodate

In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each Branch to accommodate the legitimate needs of the other. This duty to accommodate, which is implicit in the leading case of United States v. Nixon, supra, was made explicit by the District of Columbia Circuit in a case involving a House subcommittee's request to a private party for information which the Executive Branch believed should not be disclosed. The court said:

> The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.
>
> . . .
>
> [I]t was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations. [Thus] the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977)(footnotes omitted). Accommodation is, therefore, not simply an exchange of concessions or a test of political strength. It is an obligation of each Branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other.

An important aspect of this duty of accommodation is the necessity that each Branch explain to the other why it believes its needs to be legitimate. Without such an explanation, it may be difficult or impossible to assess the needs of one Branch and weigh them against those of the other. At the same time,

requiring such an explanation imposes no great burden on either Branch. If either Branch has a reason for needing to obtain or withhold information, it should be able to express it.

The duty of Congress to explain its demands follows not only from the logic of accommodation between the two Branches, it is established in the case law as well. In United States v. Nixon, supra, the Supreme Court emphasized that the need for evidence was articulated and specific. Even more to the point is the decision of the District of Columbia Circuit in Senate Select Committee on Presidential Campaign Activities v. Nixon, supra. The court in that case stated that the sole question was "whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." Id. at 731. The court held that the Committee had not made a sufficient showing. It pointed out that the President had already released transcripts of the conversations of which the Committee was seeking recordings. The Committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events." Id. at 732. The court concluded:

> The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain.

Id. at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . . is too attentuated and too tangential to its functions" to override the President's constitutional privilege. Id.

We believe that this case establishes Congress's duty to articulate its need for particular materials -- to "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in" the privileged document it has requested. Moreover, this case suggests that Congress will seldom have any legitimate legislative interest in knowing the precise positions and statements of particular Executive Branch officials. When Congress demands such information, it must explain its need carefully and convincingly.

B. Procedural History of Executive Privilege Disputes

Executive privilege disputes with Congress typically commence with an informal oral or written request from a congressional committee or one of its members for information in the possession of the Executive Branch. Most such requests are honored promptly; in some cases, however, the Executive Branch official may decline to supply some or all of the requested information either because of the burden of compliance or because the information is of a sensitive nature. If the agency head determines that the congressional request raises a substantial question of executive privilege, the agency is required, under existing procedures, to consult with the Attorney General through the Office of Legal Counsel. The White House Counsel's Office is also frequently brought into the deliberations at an early stage because, again under existing procedures, any assertion of executive privilege against Congress must be made by the President personally.

The congressional committee may respond to the Executive Branch's submission either by accepting stated reasons for nondisclosure or by issuing a subpoena commanding the official to release the information. If a subpoena is issued, the Executive Branch official may comply with its terms in full, in part, or not at all. The Executive Branch agency and the committee staff will typically negotiate during this period to see if the dispute could be settled in a manner acceptable to both Branches of government.

If, however, the congressional committee remains unsatisfied with the Executive Branch's response, it may vote to hold the agency head in contempt of Congress. A contempt of Congress vote by a subcommittee must usually be referred to the full committee; the full committee's vote, in turn, must be ratified by the full Senate or House of Representatives. Contempt motions are privileged and receive quick floor action.

If a full House votes to hold an Executive official in contempt, it could attempt to impose sanctions by any one of three methods. First, the matter could be referred to a United States Attorney, who is required by statute to refer the matter to a grand jury. 2 U.S.C. § 194. Contempt of Congress is a misdemeanor under 2 U.S.C. § 192. 1/ Second,

---

1/ Although 2 U.S.C. § 194 states that it is the "duty" of the United States Attorney to bring a contempt citation before a grand jury, it may well be that the Attorney General would retain prosecutorial discretion, under principles of separation of powers, to order the United States Attorney not to refer the matter to a grand jury.

the House of Representatives could engage its own attorney, or the Senate could authorize the Senate Legal Counsel, to bring an action in court to obtain a judicial order requiring compliance with the subpoena and contempt of court enforcement orders if the court's order is defied. 2/ Finally, there is the theoretical possibility that the Sergeant at Arms could be dispatched to arrest the Executive Branch official and detain him in the Capitol guardroom. If this unlikely event did occur, the official would be able to test the legality of his detention through a habeas corpus petition, thereby placing in issue the legitimacy of his actions in refusing to disclose the subpoenaed information.

II. The Problems

Our ability to deal effectively with congressional demands for information in a way that best serves the interests of the Executive Branch and the government generally is undermined by an uncompromising and militant attitude on the part of some congressmen regarding what they believe to be their absolute right to obtain information; a failure by the Executive Branch effectively to coordinate its responses to congressional demands; and a lack of articulated and coherent principles to guide decisions in this area.

A. Congressional Oversight

It seems to be an article of faith among many congressmen -- Republicans as well as Democrats -- that congressional committees are entitled to any and all information from the Executive Branch. The underlying rationale is that Congress has the right and the responsibility to exercise "oversight" of the Executive Branch -- a responsibility that is separate and distinct from the power and duty of Congress to enact, amend, or repeal legislation. 3/ In one struggle earlier

---

2/ This procedure is untested except for one previous occasion during the Watergate dispute. The District Court initially dismissed the complaint for want of subject matter jurisdiction. This defect was promptly cured by special legislation granting the court jurisdiction in that instance. The court then took jurisdiction over the matter but denied enforcement of the subpoena on the ground that the subpoenaed material was not necessary to the legislative functions.

3/ This "oversight" theory manifests itself as well in the legislative veto battle, in which Congress sometimes seeks power to function as a supervisor and overseer of Executive Branch actions.

this year, for example, a congressional subcommittee appeared to rely solely on its oversight function as a justification for obtaining information, even in the face of repeated requests to the subcommittee for a legislative justification

Since this oversight theory serves the interests of the Legislative Branch vis-a-vis the Executive, it undoubtedly enjoys strong bipartisan support in Congress. Congressmen hostile to this Administration have and will predictably continue to seize upon this theory in an attempt to embarrass the Administration or interfere with its policies. This type of pressure will no doubt increase as we move to a congressional election year. We will see Administration supporters unavoidably drawn to the support of their colleagues as the issue becomes converted into a Legislative-Executive Branch struggle.

Past, pending, and anticipated future requests for information transmitted between Executive Departments and OMB pursuant to Executive Order 12291 (review of proposed and existing regulations) could also be the initial wedge of an attempt by certain members of Congress to insert themselves into the basic executive decision process regarding informal rulemaking. If the Executive Branch must comply with requests of this nature, it seems possible that the President's entire program for regulatory relief will be substantially undermined.

B. Failure to Coordinate Response

Like previous administrations, this Administration has not adopted or pursued a consistent and coordinated response to this congressional challenge. There are problems with overcompliance, undercompliance, and lack of consultation.

1. Overcompliance. Federal agencies receive congressional demands for information every day; in the vast majority of cases, the information is supplied. Sometimes, agencies turn over information which is damaging to the overall interests of the Executive Branch. Such compliance causes problems both in the particular case in which it occurs, and, more generally, for the government as a whole in future cases. Because executive privilege matters so rarely find their way into court, the "precedents" are almost always of a factual nature. In this area, the difficulty in resisting congressional demands for information increases almost geometrically if similar information has been produced in the past.

Despite this obvious problem, there are strong forces encouraging overcompliance. Many federal agencies are extremely unwilling to offend oversight committees, which have powerful weapons at their disposal to punish what they believe

to be intransigence. Even if such agences are aware that their actions may prejudice the government as a whole, they may have little incentive to protect this government-wide interest. Most agencies have neither the political clout nor the political, practical, and legal expertise effectively to resist congressional demands for information. Furthermore, there are incentives to submission, particularly the time, inconvenience and tension caused by resistance and the desire for an agency to end a dispute and get on to its regular business.

2. Undercompliance. Conversely, agencies sometimes tend to overestimate the importance to the government as a whole of noncompliance with a congressional demand. A given department, for example, may place a very high priority on a particular matter and the need for confidentiality and a desire to avoid congressional interference. This priority may not be shared in other Departments or the White House; indeed, it may run counter to the priorities of those who believe other concerns are paramount. When an agency strongly wishes to keep information from Congress, it may adopt a belligerent or unreasonable bargaining position. The result could be an inter-branch confrontation in which the facts favor the Legislative Branch. In such a confrontation, the Executive Branch may be faced with the choice between an embarrassing capitulation or a questionable lawsuit which might result in a broad ruling which would prejudice the government's more substantial interests.

3. Lack of Coordination. The problems of overcompliance and undercompliance can be traced, in part, to a lack of government-wide response in executive privilege matters. The Executive Branch as a whole has important interests which need to be protected when they are at stake. Some centralized decision mechanism is vital if agencies are to be prevented from turning over information they should withhold or withholding information they should disclose. Unfortunately, the existing mechanisms are not fully adequate and have not been employed properly in the instances which have occurred to date in this Administration.

The problem of overcompliance is, perhaps, an intractable one absent some very significant changes in current procedures. As far as we know, there is no mechanism in place that requires agencies to consult within the government before turning over information. The only current safeguard is an agency's self-interest in keeping matters private -- an interest which, as noted above, is commonly overridden by fear of Congress, lack of political muscle, or inexperience.

In contrast, there is a mechanism in place to handle problems of undercompliance. The Nixon Administration formalized a procedure (the Nixon Memorandum -- Attachment A)

which had been the practice in previous administrations and which all subsequent administrations have followed. Under the Nixon Memorandum, agency heads are required to consult with the Department of Justice if they believe that a congressional demand for information raises a substantial question of executive privilege. If the agency head and the Attorney General agree that executive privilege shall not be invoked, the information is released. If they agree that the privilege should be invoked, or if either believes the issue should be submitted to the President, the matter is transmitted to the White House Counsel for presidential decision. Only the President may approve a claim of executive privilege against a congressional demand for information. Pending resolution of this process, the agency head is to request that the committee keep its demand for information in abeyance.

The Nixon Memorandum has, unfortunately, been ignored or circumvented during the early months of this Administration. However, if followed, the procedure it outlines has much to recommend it. It brings the Attorney General, and eventually the White House, into the decisionmaking process. As a result, it is theoretically possible to achieve a degree of government-wide coordination. The involvement of the White House assures the agency head that his resistance to Congress will be backed by the power of the presidency. The involvement of the Department of Justice ensures the agency will have available a high degree of legal expertise. At the same time, the Attorney General and his subordinates have a government-wide perspective on the problem that should enable them to distinguish justifiable from excessive claims. An opinion of the Attorney General or the Office of Legal Counsel supporting a claim of executive privilege is a powerful political, legal and psychological support for the agency head wishing to resist disclosure. Finally, it is the Attorney General who will have to decide what to do about a contempt of Congress citation that is referred to the Justice Department for prosecution under 22 U.S.C. §§ 192 and 194. The Attorney General would be placed in a difficult, if not impossible, situation if an agency head were allowed to trigger an inter-branch confrontation without adequate fore-knowledge by the Attorney General, by resisting disclosure on grounds which the Attorney General determines, after the fact, to be legally unsupportable.

Despite these advantages, the Nixon Memorandum may have some theoretical flaws. For one thing, as noted above, it does not deal with the problem of overcompliance. Agency heads may freely divulge information without consulting the Attorney General or the White House Counsel. Secondly, while it is probably unavoidable, assertion of the privilege requires the personal involvement of the President. This procedure has the substantial advantage of encouraging accountability.

It does, however, make it difficult to assert the privilege. The President may not wish to take the political heat from Congress or the public that comes with asserting the privilege. Or, as a practical matter, a potential assertion of the privilege may simply not be important enough to justify intrusion on the President's limited time and energy.

These matters aside, the major problem with the Nixon Memorandum in the current Administration has been its nonobservance. There have been at least three occasions on which agencies have claimed or appear to have claimed executive privilege without your knowledge, the knowledge of this Office, and presumably without the President's knowledge. In these instances, even though the agency lawyers undoubtedly believed from the start that the congressional requests raised substantial claims of executive privilege, they did not consult the Attorney General as required by the Nixon Memorandum. In one instance, even when a subpoena was issued and not complied with, the Department of Justice was not consulted. In the latter instance, the Department was not even notified of the situation until the day before the congressional subcommittee voted to recommend that a member of the President's cabinet be held in contempt.

The Justice Department can assist in developing reasonable strategies for avoiding or minimizing the damage from breakdowns in negotiations. 4/ The President or the executive agency will ultimately have to turn to the Department of Justice for support regarding the legality of any refusal to respond to a subpoena. If that occurs after the fact, the Department of Justice is placed in a difficult situation, particularly if it is determined that resistance to the subpoena is not supportable. Even if the Department is not asked for advice on the subject, the Attorney General will have to take a position when and if the contempt is referred him for possible prosecution.

C. Lack of Clear Rules. Compounding these problems is the lack of clear rules to govern analysis of executive privilege matters. This Office is frequently faced with difficult and unresolved problems in this area. For example, it has never been decided whether the privilege attaches to communications which do not personally involve the President. This Office would probably take the position that the privilege extends to high-level intra-governmental communications (e.g., involving an Assistant Secretary) and to communications, at whatever level, which involve an issue for the President's personal decision. Intra-governmental communications at the staff level, or communications with persons outside the government, are more difficult.

4/ Indeed, this Office has historically played an important and constructive role in working out differences between congressional committees and the Executive Branch.

Moreover, even where the privilege applies, it can be successfully asserted only when the interests of the Executive Branch in keeping information private outweigh the interests of the Legislative Branch in obtaining disclosure. Such a balancing can be done only on an ad hoc, case-by-case basis.

The consequence of this uncertainty is that virtually any congressional demand for information raises a possible claim of executive privilege, but virtually no such demand clearly requires that the privilege be invoked. The best approach to executive privilege almost certainly lies somewhere between these extremes. But the lack of hard-and-fast rules makes it very difficult to draw a consistent and principled line.

III. Possible Approaches

There are a number of possible approaches to these problems; the following pages outline what seem to be the primary options: (A) a "firm" approach; (B) an effort to increase intra-governmental coordination; and (C) the current system.

A. "Firm" Approach

1. Rationale. The following might be stated as a rationale for a firm approach to executive privilege. Ever since the Watergate period, Congress has been able to place the Executive Branch on the defensive in executive privilege matters. No matter how burdensome the congressional request for information, no matter how lacking in legitimate legislative justification, the Congress has been able to make even the most reasonable Executive Branch resistance look suspect. An already cynical public is all too willilng to believe that anyone resisting disclosure has something embarrasing to hide. Through its control of the forum and its ability to draw maximum attention to the refusal to provide information and to cast it in the worst possible light in the media, Congress has effectively been able to set the parameters of debate in the executive privilege area.

Action to return the initiative to the Executive Branch, if effective, would be highly desirable. The Reagan Administration has nothing to apologize for when it legitimately resists congressional demands for information. The President was elected with a mandate for strong leadership -- leadership that could be undermined if the deliberative processes were routinely opened to public view by Congress. While Congress has a legitimate interest in obtaining information from the Executive Branch, the Executive Branch also has a legitimate interest in withholding certain information from Congress. The public should be made aware of this fact.

Recent congressional demands for information have demonstrated that a line must be drawn somewhere. The congressional oversight theory, as a logical matter, entails a right to examine into the most intimate decision processes of government without any legislative justification. Congress, in short, is asserting the power to participate with the President in executing the laws. Such a theory is contrary to the principle of separation of powers and must be vigorously resisted at the outset.

2. Possible Aspects of a "Firm" Approach

a. A "Reagan Memorandum". President Reagan might consider issuing instructions articulating his approach to executive privilege. There is some precedent for such an action. While the Nixon Memorandum was primarily procedural in nature, an earlier letter of President Eisenhower, issued in 1954, initiated the modern era of executive privilege law by formalizing for the first time the doctrine that the President could withhold sensitive intra-governmental communications even if they did not involve traditionally privileged matters such as foreign affairs, national security, or military information. Virtually, all modern executive privilege disputes -- including the seminal decisions in the Watergate era -- have involved this broad category of privileged information identified by President Eisenhower.

Possible alternative subjects for a Reagan Memorandum could include:

(i) A statement essentially adopting a policy of refusing to comply with congressional demands for information in cases where the Congress has failed to advance any legitimate and bona fide legislative need for the information.

(ii) A statement identifying particular areas or subject matters which the President views as presumptively privileged. For example, the President could state a general policy of refusing, unless a strong legislative need is shown, to turn over to Congress deliberative material generated pursuant to E.O. 12291, on the ground that disclosure of such material would fundamentally damage the President's program for regulatory relief by impairing the deliberative process.

(iii) A statement authorizing or instructing federal agencies to refuse disclosure of certain materials unless they first receive a written pledge from the committee that such materials will not be leaked or otherwise disclosed outside the committee. Such a written pledge would not guarantee that materials would remain private once sent to Congress. It would, however, place the burden on the committee for explaining how a leak occurred. A pattern of leaks would justify the Executive Branch in demanding further assurances -- for example, permitting inspection but not copying of sensitive documents.

b. Avoiding Overcompliance. Legislative affairs offices in the various agencies could be instructed to notify the White House and the Department of Justice of every congressional request for information received and to state what the agency's proposed response will be. If the White House approves the response or does nothing, the agency could go ahead with the disclosure. If the White House disapproves the response, a consultation process would begin in order to consider asserting executive privilege. This procedure could reduce the amount of overcompliance with congressional demands, and the unfavorable precedents which such overcompliance causes.

c. Litigation Strategy. The Department of Justice, after analyzing the legal issues, could commit itself to endorsing the legality of this approach in general and to defending the Administration's actions in particular cases if they are challenged in court.

3. Disadvantages of "Firm" Approach

The "firm" approach would probably be favored by some in the Administration. A bold move along these lines could dramatically reverse the current unfavorable dialogue with Congress. On the other hand there would be significant costs. Congressmen of both parties would be alienated. An inter-branch confrontation could result and could deflect attention from important economic and foreign policy issues. The approach would be condemned in the press and would be portrayed and perhaps perceived in some quarters as a return to the discredited Nixon policies. A court suit might eventuate which, if the facts were unfavorable, could generate an undesirable judicial precedent.

B. Greater Coordination

1. Rationale. Alternatively, the Administration could seek better means of coordinating its responses to congressional demands for information. It would be advisable to have the White House and the Justice Department involved at the early stages of this coordination process. Such coordination would help assure that executive privilege is asserted only in strong cases. It would aid the development of a somewhat more coherent and principled approach to the problem. It would also help guarantee that the requisite legal expertise and political force is brought to bear on the problem.

2. Possible Coordination Mechanisms

a. Reissue Nixon Memorandum as the Reagan Memorandum. The Nixon Memorandum is a fairly effective coordination mechanism, if its procedures are observed. However, it should be reissued to simply change the name, to emphasize that it does represent the policies of the Reagan Administration and

to remind people of its existence. Reissuance by President Reagan after consultation with interested departments and agencies would focus attention on and stimulate compliance with procedures currently required by the Memorandum. The process of consultation could also result in constructive changes within the overall framework of the Memorandum. However, broad consultation would undoubtedly result in considerable delay before a final position is developed.

b. Develop Informal Coordination Response Team. The White House Counsel's Office and the Department of Justice could designate a small number of supervising and staff attorneys to work together in any case where executive privilege is likely to be asserted against Congress. Representatives from the Congressional Liaison Office at the White House could also be included. This team could develop an expertise and an overall perspective on executive privilege matters that would aid efforts at coordination. It could stand ready to provide an agency with legal and political assistance and could conduct negotiations when an agency is unable to do so effectively itself.

Even if a team approach is ruled out, it might still be possible to achieve greater consultation and coordination between the Justice Department and the White House Counsel's Office on executive privilege matters through a process of informal consultation.

3. Disadvantages of Greater Coordination

There are few obvious disadvantages to greater coordination. Reissuing the Nixon Memorandum would require some effort and might result in undesirable changes in the procedure. Working more closely with the White House Counsel's Office might possibly prove cumbersome or awkward because of the different perspectives of the two offices, but this does not seem likely.

C. Do Nothing

The current system is functioning despite its defects. It may be that any attempt to develop a strong or more coordinated response would be futile. Retaining the current system avoids the downside risks of the other approaches, is the lowest visibility option, and would require the least expenditure of effort and political capital.

IV. Recommendation

Reissuance of Nixon Memorandum seems like the most desirable option, with some improvements, perhaps some additional specificity regarding documents considered to be covered by the executive privilege; but other alternatives, including the "firm" approach, should be discussed.