

AVAILABILITY OF INFORMATION TO CONGRESS

HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

H.R. 4938

TO AMEND THE FREEDOM OF INFORMATION ACT TO
REQUIRE THAT ALL INFORMATION BE MADE AVAILABLE
TO CONGRESS EXCEPT WHERE EXECUTIVE PRIVILEGE
IS INVOKED

H.R. 5983

TO AMEND THE FREEDOM OF INFORMATION ACT TO
REQUIRE THE DISCLOSURE OF INFORMATION, UPON
REQUEST, TO CONGRESS BY THE EXECUTIVE BRANCH
AND

H.R. 6438

TO AMEND THE FREEDOM OF INFORMATION ACT TO
REQUIRE THAT ALL INFORMATION BE MADE AVAILABLE
TO CONGRESS

APRIL 3, 4, AND 19, 1973

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AVAILABILITY OF INFORMATION TO CONGRESS

TUESDAY, APRIL 3, 1973

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Bill Alexander, John N. Erlenborn, Paul N. McCloskey, Jr., Gilbert Gude, Charles Thone, and Ralph S. Regula.

Also present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; Harold F. Whittington, professional staff member; L. James Kronfeld, counsel; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

This morning we begin the first day of hearings on H.R. 4938 and a later version of the measure—H.R. 6228—introduced by the ranking minority member of this subcommittee, Congressman Erlenborn, the gentleman from Illinois, and cosponsored by the ranking minority member of the full committee, Congressman Horton, the gentleman from New York, and by a number of other members—including some members of this subcommittee and the Government Operations Committee.

The bill provides that all information shall be made available to the Congress and the Comptroller General of the United States by executive agencies, except in cases where the President himself invokes the claim of executive privilege. Certain criteria are provided in the language of the bill to govern such a Presidential decision.

This subcommittee has for many years conducted extensive investigative hearings and studies of the claim of executive privilege as part of our oversight jurisdiction in the Government information field. In the last Congress we held hearings in June 1971 on U.S. Government information policies and practices involving the so-called Pentagon papers and in May 1972 we considered problems of Congress in obtaining information from the executive branch. We received testimony from a number of leading experts in the area of what is called executive privilege, including Prof. Raoul Berger of Harvard Law School, Prof. Joseph Bishop of Yale Law School, Prof. Norman Dorsen of

New York University Law School, former Chief Justice Arthur Goldberg, Mr. Benny L. Kass, former counsel of this subcommittee and a prominent Washington attorney, Prof. Philip Kurland, University of Chicago Law School, Mr. Clark Mollenhoff, former special counsel to President Nixon and now Washington Bureau Chief of the Des Moines Register, and then Assistant Attorney General William H. Rehnquist. A report of these hearings is being prepared by the subcommittee staff.

The hearings on the Erlenborn bill are prompted by recent developments that have focused immediate attention on the growing controversy between the executive and legislative branches over congressional access to information. This confrontation between the two branches has intensified because of Presidential impoundment of appropriated funds, Presidential denial of information to Congress through the claim of executive privilege, or by subordinate administration officials acting contrary to the Presidential guidelines issued on March 24, 1969.

Most recently, this controversy has involved the Presidential refusal to permit his counsel, Mr. John W. Dean III, to testify before the Senate Judiciary Committee on the Gray nomination and before this subcommittee in connection with these hearings on the Erlenborn bill. Moreover, the President's statement of March 12, 1973, attempts to expand the coverage of his claim of privilege to include former White House staff personnel as well as present members of his staff.

Members of our committee have staunchly defended the right of Congress to obtain all information from the executive branch—regardless of which political party has occupied the White House. Many of us differ, however, in the best approach to the problem of assuring maximum congressional access to information from the Executive. I personally feel that the claim of executive privilege has no legal or constitutional basis but merely exists as a practice because of the need for some degree of comity between the President and the Congress. For this reason, I am skeptical of providing any legal sanction to the practice as the Erlenborn bill would do.

However, I recognize the counter arguments by my distinguished colleagues who are seeking to establish workable legal ground rules to govern what appears to be a growing use of the alleged privilege by executive officials and by limiting such action only to the President himself.

As members of this committee know, since February 1962, the last three Presidents—Kennedy, Johnson, and Nixon—have agreed in writing through an exchange of letters with the distinguished former chairman of this subcommittee, Congressman John E. Moss, that the claim of executive privilege would only be exercised by them personally, would be used sparingly, and then only when certain guidelines were followed.

A special study of the claim of executive privilege conducted for this subcommittee by the Congressional Research Service of the Library of Congress since the 1962 agreement went into effect reveals that President Kennedy exercised this so-called privilege personally on only one occasion, but executive officials in the Kennedy administration refused information to Congress on three occasions. President

Johnson did not exercise it personally at all, but in two instances executive branch officials of his administration denied information to the Congress after he said that the claim of privilege would be used only as a Presidential power.

During the first 4 years of the present administration, the study shows, President Nixon has used this alleged power personally on four occasions, but executive branch officials of his administration have denied information to Congress in 15 other instances, contrary to his own guidelines. The study also traces the precedent for the claim of executive privilege to May 17, 1954, during the Army-McCarthy hearings. It disproves claims by several Presidents and Attorneys General that the claim of executive privilege is a "deep-rooted" constitutional doctrine that began during President Washington's administration.

These hearings mark the first effort of any House committee to deal with this controversial subject by legislation. In addition to Congressman Erlenborn's bill, we have also had referred to us another closely related measure—H.R. 5983, introduced by Representatives Reid and Moss.

I ask unanimous consent to include at this point in the hearing record the texts of both these bills, statements from Members, correspondence with the President involving our efforts to obtain testimony at these hearings from his counsel, Mr. John W. Dean III, correspondence with other executive departments and agencies regarding testimony on this legislation, the text of Congressional Research Service studies on executive privilege, and sundry articles on this issue.

I would like to state for the record that this subcommittee has received little cooperation from most of the executive branch witnesses invited to testify on this important legislation. Except for the Department of Justice, all have declined to testify despite vigorous efforts to obtain their cooperation. Secretary Weinberger of the Health, Education, and Welfare Department had pledged to the Senate prior to his confirmation that he would honor such requests from all congressional committees. Not only did he decline himself but refused to designate any other witness from his Department. Treasury Secretary Shultz, who, like Mr. Weinberger, also doubles as an Assistant to the President, likewise refused the subcommittee's invitation and refused to designate a Department witness. Mr. Ash, Director of the Office of Management and Budget, also refused to testify and refused to designate an OMB witness.

As an excuse, they say that the Justice Department is testifying for the administration and that they "do not believe they could add anything of a worthwhile nature" to the hearings. I submit that it is not for an executive agency to make any such judgment in advance. Obviously, it is up to the congressional committee to decide whether or not such testimony is "worthwhile" after it has been received.

It is extremely unfortunate that other departments invited here to testify on H.R. 4988 have taken this arrogant position. Since this is a legislative hearing, I feel that it would be inappropriate for us to consider subpoenas in this instance. However, I am serving notice in advance that I will not hesitate to recommend to our subcommittee that it seriously consider such a course of action in subsequent hearings this year if this same arrogant behavior by the executive branch

continues to occur. This subcommittee and every other subcommittee and committee of the Congress has every right to call witnesses from the executive branch on any and all matters within their legislative and investigative jurisdiction. The executive branch has the duty to respond in every instance by providing the best possible witness to set forth the views on the particular department or agency involved.

Our first witnesses this morning will be Members of Congress, beginning with our distinguished colleague on this subcommittee, Congressman Erlenborn. After Members conclude their testimony, we will hear from Mr. Paul Dembling, General Counsel of the General Accounting Office.

If there is no objection, I will include all bills as part of the record. Hearing none, so ordered.

[The bills, H.R. 4938, H.R. 5983, and H.R. 6438, follow:]

IN THE HOUSE OF REPRESENTATIVES**FEBRUARY 28, 1973**

Mr. ERLENBORN (for himself, Mr. HORTON, Mr. McCLOSKEY, Mr. THONE, Mr. REGULA, Mr. PRITCHARD, and Mr. HANRAHAN) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That section 552 of title 5 of the United States Code (the
- 4 Freedom of Information Act) is amended by adding at the
- 5 end thereof the following:
- 6 “(d) (1) Whenever either House of Congress, any com-
- 7 mittee thereof (to the extent of matter within its jurisdic-
- 8 tion), or the Comptroller General of the United States, re-
- 9 quests an agency to make available information within its
- 10 possession or under its control, the head of such agency shall

1 make the information available as soon as practicable but not
2 later than thirty days from the date of the request unless in
3 the interim a statement is submitted by the President or by
4 an agency head signed by the President invoking Executive
5 privilege as the basis upon which the information is being
6 refused.

7 “(2) Whenever either House of Congress or any com-
8 mittee thereof (to the extent of matter within its jurisdic-
9 tion) requests the presence of an officer or employee of an
10 agency for testimony regarding matters within the agency’s
11 possession or under its control, the officer or employee shall
12 appear and shall supply all information requested except that
13 such officer or employee may refuse to supply those items
14 of information specifically ordered withheld by the Presi-
15 dent in a signed statement in which Executive privilege is
16 invoked.

17 “(3) Executive privilege shall be invoked only by the
18 President and only in those instances in which the requested
19 information or testimony contains policy recommendations
20 made to the President or agency head and the President
21 determines that disclosure of such information will seriously
22 jeopardize the national interest and his ability or that of the
23 agency head to obtain forthright advice. To the extent possi-
24 ble, however, factual information underlying policy recom-
25 mendations shall be made available in response to a request.

1 “(4) ‘Agency’, as used in this subsection, means a de-
2 partment, agency, instrumentality, or other authority of the
3 Government of the United States (other than the Congress
4 or courts of the United States), including any establishment
5 within the Executive Office of the President.”

93D CONGRESS
1ST SESSION

H. R. 5983

IN THE HOUSE OF REPRESENTATIVES

MARCH 21, 1973

Mr. REID (for himself and Mr. Moss) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend the Freedom of Information Act to require the disclosure of information, upon request, to Congress by the executive branch.

1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*
2. That section 552 of title 5 of the United States Code (the
3. Freedom of Information Act) is amended by adding to the
4. 5 end thereof the following:
6. “(d) (1) Upon written request of either House of
7. Congress or any committee of Congress (hereinafter the ‘requesting body’) for information relating to programs or ac-
8. tivities administered or funded by an agency of the United
9. States, the head of such agency shall immediately make the
10. .I

1 requested information available to such requesting body and
2 its duly authorized staff.

3 “(2) Within thirty-five days of receiving from such
4 requesting body a written request for information; or within
5 such later time as the requesting body may specify, an
6 agency head shall, if so requested by the requesting body,
7 certify whether or not full and complete disclosure has been
8 made of the information requested insofar as that information
9 is known to his agency.

10 “(3) Notwithstanding any other provision of law, effec-
11 tive upon—

12 “(A) failure of an agency head to make a requested
13 certification as provided in paragraph (2) of this sub-
14 section;

15 “(B) receipt by the requesting body of certification
16 by an agency head that full and complete disclosure of
17 the information has not been made; or

18 “(C) formal determination by the Comptroller Gen-
19 eral of the United States that a certification of full and
20 complete disclosure by an agency head was false;

21 and upon resolution of the requesting body, no funds appro-
22 priated after the effective date of this subsection shall be
23 obligated or expended directly or indirectly by such agency
24 for the programs or activities in question (as defined by the
25 requesting body) until such time as, in accordance with the

1 provisions of paragraphs (1) and (2) of this subsection, full
2 and complete disclosure has been made to the requesting
3 body of all information specified in the request and known to
4 the agency. If and when directed by the requesting body,
5 the General Accounting Office shall take all steps available
6 to it under law, including, but not limited to, refusal to
7 countersign relevant warrants drawn upon the United States
8 Treasury, to effect the purposes of this paragraph. Any
9 officer or employee of the United States who willfully and
10 knowingly expends, or causes to be expended, funds in viola-
11 tion of the provisions of this subsection shall be deemed to
12 be in violation of the provisions of section 641, title 18,
13 United States Code, and shall, upon conviction, be subject to
14 the punishment specified therein.

15 “(4) (A) Notwithstanding the provisions of section 551
16 of this subchapter, as used in this subsection, ‘agency of the
17 United States’ means the President, and department, agency,
18 office (including any establishment within the Executive
19 Office of the President), officer, or other establishment in the
20 executive branch of the United States Government, and any
21 independent board, commission, corporation, or other instru-
22 mentality of the United States Government other than courts
23 of the United States.

24 “(B) Nothing in this subsection shall be construed to
25 require the President or other head of an agency of the United

1 States to make available to a requesting body the nature of
2 any advice, recommendation, or suggestion (as distinct from
3 any form of information included within or forming the basis
4 of such advice, recommendation, or suggestion) made to him
5 in connection with matters solely within the scope of his
6 official duties by a member of his staff or of an agency of
7 the United States, except to the extent that such information
8 may be required by some other provision of law to be made
9 available to Congress or made public: *Provided*, That in no
10 case shall information be refused to a requesting body under
11 authority of this subparagraph in the absence of a written
12 statement signed personally by the President describing the
13 justification for such refusal.

14 “(C) Nothing in this subsection is intended to recognize or sanction a doctrine of ‘executive privilege’.”

H. R. 6438

IN THE HOUSE OF REPRESENTATIVES

APRIL 2, 1973

Mr. FASCELL introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend the Freedom of Information Act to require that all information be made available to Congress.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That section 552 of title 5 of the United States Code (the
- 4 Freedom of Information Act) is amended by adding at the
- 5 end thereof the following:
- 6 “(d) (1) Whenever either House of Congress, any
- 7 committee thereof (to the extent of matter within its juris-
- 8 diction), or the Comptroller General of the United States,
- 9 requests an agency to make available information within its
- 10 possession or under its control, the head of such agency shall

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- 1 make the information available as soon as practicable but
- 2 not later than thirty days from the date of the request.

- 3 “(2) Whenever either House of Congress or any com-
- 4 mittee thereof (to the extent of matter within its jurisdic-
- 5 tion) requests the presence of an officer or employee of an
- 6 agency for testimony regarding matters within the agency's
- 7 possession or under its control, the officer or employee shall
- 8 appear and shall supply all information requested.

- 9 “(3) ‘agency’, as used in this subsection means a de-
- 10 partment, agency, instrumentality, or other authority of the
- 11 Government of the United States (other than the Congress
- 12 or courts of the United States); including any establishment
- 13 within the Executive Office of the President.”

Mr. MOORHEAD. The subcommittee is now privileged to hear from our colleague, Mr. Erlenborn, and later we will hear from Mr. Dembling, the General Counsel of the General Accounting Office.

First, Mr. Erlenborn.

**STATEMENT OF HON. JOHN N. ERLENBORN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF ILLINOIS**

Mr. ERLENBORN. Mr. Chairman, I welcome the hearings that begin today on executive privilege and especially on H.R. 4938 which I have introduced with 19 other Members.

As the subcommittee with primary legislative responsibilities for freedom of information, it is of paramount importance that we fully exercise our responsibility to see that the Congress be free and able to obtain all the information it needs to perform its duties capably and intelligently. The Constitution commands nothing less.

For almost two centuries, Congress and the Chief Executive have grappled with the issue of executive privilege without coming to grips with the problem. Since the executive branch is the primary generator of information, while Congress is primarily a seeker of information, this failure to close on the issue has worked principally as a detriment to the Congress.

There are those in Congress who do not recognize the existence of the privilege doctrine. While I can fully appreciate this sentiment and reasoning, I do not believe that such a position ultimately advances the cause of Congress. In plain truth, the failure to acknowledge the existence of executive privilege—and to impose reasonable limits—has had the effect of Congress' acquiescence in its existence and use. As a practical matter, the Chief Executive has been granted a free rein to exercise the privilege as he sees fit. Each President writes his own definition of executive privilege tailoring it to fit the circumstances of the moment.

And, of course, the circumstances change where the politics change.

The solution, I am convinced, is one that recognizes the general right and need of Congress to receive information and the President's right and need to receive in confidence advice from trusted advisers who will not be inhibited by the possibility that such advice will become a matter of public debate at some future date. That, briefly, is the solution proposed in the bill which we have introduced and which is before the subcommittee today.

H.R. 4938 would declare the policy that Congress shall have access to all information in the possession of the executive branch. The Executive must honor the request, whether it comes from Congress, from a committee acting within its authorized sphere, or from the Comptroller General. The request may be for information, for testimony of an officer or employee, or for the submission of written materials. H.R. 4938 would require compliance within 30 days.

The bill provides that the President may prevent the disclosure by invoking executive privilege; but he would be able to do so within the restrictions of the bill, namely:

When a policy recommendation has been made to the President or the head of one of the executive agencies; and

When the President certifies that disclosure of such advice would seriously jeopardize the national interest and the ability of the President or the agency head to get forthright advice in the future.

I would point out this is a requirement that both of these conditions exist concurrently. It is not an "either or" restriction. Both conditions, that the disclosure would seriously jeopardize the national interest and the ability of the agency head to get informed advice in the future, must be met.

The narrowness of this exception may be more fully appreciated when it is recognized that the privilege covers only communications to the President or to an agency head. Third party conversations would not be privileged, and the bill would in no way shield or stifle testimony of individuals such as Clark Mollenhoff in the current Civil Service Commission hearings involving A. Ernest Fitzgerald.

In addition, the proposed legislation requires that factual information associated with an exempted policy recommendation be made

available if requested by Congress. Moreover, the bill's mandate to supply information to the Congress applies to every person within the executive branch, including all those employed in the White House.

In this regard, I should make clear that our bill provides no opportunity for anyone to become ensnared in the issue of the coverage or lack of coverage of present or past employees—an issue that has recently surfaced in a statement on executive privilege issued by the President. H.R. 4938 authorizes a claim of privilege only in those instances where a policy recommendation is made to the President or current agency head by another individual, regardless of what the latter's position may be. Therefore, such an issue would never arise under our bill because the privilege under the legislation relates to a category of information and not to the person rendering it.

To those who believe that the definition of executive privilege contained in H.R. 4938 is too narrow, I wish to call attention to communications made to the Government Operations Committee by Presidents Kennedy, Johnson, and Nixon wherein they have all indicated their belief that the privilege should be narrowly construed and invoked only by the President. To illustrate, I quote from President Nixon's memorandum of March 24, 1969, to agency heads:

The policy of this administration is to comply to the fullest extent possible with congressional requests for information. While the executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons, executive privilege will not be used without specific Presidential approval.

More recently, this procedure was reaffirmed by John W. Dean III, counsel to the President, in a letter dated February 16, 1973, to you, Mr. Moorhead, as chairman of our subcommittee. Mr. Dean wrote, "Executive privilege will not be asserted in response to a congressional demand for information without specific Presidential approval."

These statements represent, in my opinion, a reasonable and workable guideline which Congress and the Chief Executive can live with and work compatibly within. Unfortunately, I believe the President's more recent statements on this issue exceed these limits and broaden the doctrine beyond the point that Congress can willingly go. It is essential, then, that we enact legislation along the lines we have proposed in order that effective and workable guidelines may be established.

I should point out, finally, that H.R. 4938 does not prescribe any set method for compelling the production of information from the executive branch. The reason for that is that a number of different methods of enforcement now exist and I do not believe we gain much by spelling them out in this legislation. I believe that the bill generally will be self-enforcing. That is, if it becomes law, I believe the President will faithfully abide by its conditions. If a genuine difference develops over its applicability in a particular case, I feel it should be resolved through court interpretation. If that judicial route proves unsatisfactory, Congress remains free to cut appropriations or to compel attendance through the subpoena process of the power to arrest.

I would like to believe, however, that these drastic remedies will not be necessary. I feel strongly that the chief cause of the growing controversy and contention between the two branches in this area rests

primarily upon the absence of any clear legislative expression which defines concisely the rights of Congress to receive information from the executive branch and the right of the President and agency heads to receive certain advice in confidence. Enactment of H.R. 4938 will go far, in my opinion, to resolve this controversy to the mutual satisfaction of both branches.

Mr. MOORHEAD. Thank you for an excellent statement. As you say, there are some of us who don't believe that the doctrine of "executive privilege" exists. We know that over the years, it has been a practice of Congress in the interests of compatibility between the two branches to permit a President to withhold certain information or witnesses from the Congress, but even if we could both agree on maybe that principle of compatibility, I think that it should be set out in the legislative language.

May I ask you one question? You used the words "to an agency head" and that would be communication by some subordinate to the top person in the department, and not to, say, an under secretary?

Mr. ERLENBORN. That is correct. This would be people who hold the position of Secretary, Cabinet member, chairman of a regulatory commission, and the one head of each department or agency. That is what it refers to.

Mr. MOORHEAD. Mr. McCloskey, do you have any questions of our distinguished witness?

Mr. McCLOSKEY. Yes, I do. I want to commend the gentleman on his excellent statement. I think it is as thorough and comprehensive a statement as I have seen, and the intent of the coverage of this bill is explicit.

I do have this question on the phrase "when the President determines disclosure of such information will seriously jeopardize the national interest," which appears at line 20 on page 2.

I can conceive of a great many areas of the national interest on which the President would not wish to disclose information, but I can think of only two serious ones: relating either to national security or foreign affairs in which the President would be justified in withholding the information from the Congress.

I think this is the difficulty some of our colleagues have on the whole question of executive privilege. We recognize the Congress should restrain itself in inquiring into matters that are properly handled only by the Commander in Chief, either in matters of combat or in foreign affairs, but are reluctant to concede any privilege relating to domestic affairs which are preferably within the realm of the Congress to enact laws.

Mr. ERLENBORN. If I could respond to that?

I think there is an answer—

Mr. McCLOSKEY. My question was whether or not the word security might be better than the national interest?

Mr. ERLENBORN. I don't believe so because I think your question is presupposing we are talking about the divulging of facts here or the President trying to keep facts from being divulged.

Remember that that is not the purpose of this bill, and it only relates to policy recommendations. The facts behind policy recommendations are not subject to being restrained or kept from Congress by virtue of the existence of executive privilege.

This bill would only protect, and the President could only invoke executive privilege to protect policy recommendations that were made to him or to an agency head.

Any facts relating to the matter under study by Congress would be available to us, but only the policy recommendations would be protected.

I think policy recommendations should go properly beyond questions of national security. The point here is not to confuse executive privilege with classification of information. I think the purpose of these two is altogether different.

Classification of information is for the purpose of keeping secret things that might endanger the United States. The executive privilege is exercised only to protect the right of the President or an agency head to get advice free from the constraints that would exist if that advice became a matter of controversy. That is why we are talking here about two different things when we talk about classification of information relative to national security and the invocation of executive privilege for advice, and they should not be confused.

Mr. McCLOSKEY. Let me cite a specific example, and one the committee had before it 2 years ago with the matter of the SST. I suppose the President might have urged that disclosure of the Garwin report to the Congress, which this committee requested and was refused, would have jeopardized the national interest because, in the President's judgment, the national interest required that we go ahead with the SST.

Now, how would the gentleman characterize the Garwin report, which contained policy recommendations to the President as I understand it, that the SST would have a dangerous impact on the environment or could have, and that it would not help with the balance of trade, and that it might not be a commercially marketable vehicle?

Those were all policy recommendations resting on facts that Dr. Garwin and his panel evolved. Would the President have been entitled to claim executive privilege by saying that disclosure of that advice to him would jeopardize the national interest?

Mr. ERLENBORN. I would say in that instance, if the report were one that was prepared to be a policy recommendation to an agency head or the President himself, he might try to invoke executive privilege.

I agree with you that each President is going to consider anything that goes against his policy recommendations, of course, as going against the national interest, because he is going to be recommending only the best for the country in his opinion. So this could arise. If there were really a question of fact, and I believe that was so in this case, I would say that the courts should decide as to whether the President had properly exercised the invocation of executive privilege as a matter of national interest, so the last word is not left to the President to invoke the privilege without review.

We could still test whether the conditions for the invocation of executive privilege did in fact exist. As counsel points out, the facts underlying the policy recommendations in that report would in any case be made available to Congress. Only the policy recommendations themselves would be subject to the invocation of executive privilege.

Mr. McCLOSKEY. I suppose that there is a third area in here and that is the professional opinion of Dr. Garwin and his associates. I wonder if we shouldn't provide in the bill for expression of scientific and technological opinion to be classified as fact rather than policy recommendations?

Mr. ERLENBORN. I myself would feel it would be more in the line of policy recommendations. I feel that when the President is seeking an opinion he is, in essence, seeking a policy recommendation.

I personally feel this ought to lie within the field of those things that would be protected. The fact ought to be made available to Congress, but just as we seek the opinions of those whose opinions we value, the President—or the agency head—ought also to have available to him the opinion of experts which he can seek in a manner that would not cause that opinion to become the subject of great controversy after the President had made his—or the agency head had made his—decision.

Obviously I think we should encourage the agency head or the President to get conflicting opinions and all of the possible input that is available before they make a determination and there will be conflicting opinions. Opening this whole area of controversy after a decision has been made doesn't work to the best interest of the President or the agency head. In my opinion that would inhibit their freedom to seek advice before making a final determination as to policy.

Mr. MOORHEAD. I have to run over to Banking and Currency. Would you take over?

Mr. McCLOSKEY. All right.

I probably exhausted my 5 minutes. Mr. Thone, do you have any questions of the witness?

Mr. THONE. I do not.

Mr. McCLOSKEY. Mr. Regula?

Mr. REGULA. No.

Mr. McCLOSKEY. Mr. Gude?

Mr. GUDE. No.

Mr. McCLOSKEY. I want to thank you for this testimony, and ask one other question on the history of the Freedom of Information Act and perhaps the broadening of executive privilege. In the original Freedom of Information Act the Congress very wisely provided for the privilege of withholding information about individuals, personnel files, and judicial proceedings.

In this bill I suppose we could write into the legislative history or perhaps in the bill itself that we are not anxious to penetrate pending judicial proceedings or personnel files about individuals. What is your thought on that?

Mr. ERLENBORN. Well, we have not, in this bill, gotten into the question of how we would handle, for instance, highly classified information or the question that you raise as to information of a sensitive nature that ought not be made public.

I think this is what you are suggesting. Obviously, Congress and the committees of Congress must exercise the proper restraint as to how we utilize whatever information we get.

I don't think that the classification of a document as top secret, for instance, should make that document unavailable to the Congress; but, when it is made available to us, we should honor that classification. We should not make the information readily available by print-

ing it in the public record of our hearings unless in the particular instance we find that that classification was improperly applied. Then, in my opinion, we would have the right to declassify it.

This whole question of what to do with the information is not a part of the bill. I don't think we have to spell out here the procedures that Congress must follow to keep confidential those things that ought to be confidential. It seems to me, this is outside the scope of the bill before us. Last, I would like to say I disagree with your characterizing this bill as broadening executive privilege. Executive privilege today exists number one, because you can't say it doesn't exist. It is being used today, so it does exist, whether we agree that it should or not.

Second, it is as broad as the President wants to make it, so we are not broadening executive privilege; we are limiting it.

Executive privilege today is whatever the President wants to make of it.

That I think is what we should stop. We should make executive privilege fit within guidelines that are clear and understood so that both the President and the Congress know what those guidelines are.

Mr. McCLOSKEY. I didn't mean to infer that I thought the bill was broadening it. I think the bill severely narrows executive privilege as it has been interpreted recently, although even this bill is not as narrow as the policy statements on executive privilege expressed by three Presidents in their letters to this subcommittee.

I share the gentleman's feeling completely.

Now, I welcome our distinguished minority member.

STATEMENT OF HON. FRANK HORTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HORTON. Mr. Chairman and distinguished members of this subcommittee, the fact that you are giving early attention to the critical issue of executive privilege is very gratifying to me and I appreciate this opportunity to discuss H.R. 4938 which I have sponsored with my colleague, Mr. Erlenborn.

Especially important to the working of a strong and healthy society is the availability of all essential information to those in government who directly represent the people. This is even more the case when a government is founded, as is our own, on the basis of separation of powers whereby the people's representatives must check and balance a strong, independent executive branch led by the President.

Congress, under the Constitution, is exclusively mandated to legislate for the national security, welfare, and economic needs of the people. It is given exclusive authority to "make all laws necessary and proper" to carry into execution all "powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." It cannot exercise this authority unless it is able to obtain all information which is necessary to discharge this constitutional obligation.

The sources of power are many, but clearly one of the most fundamental sources of power is knowledge obtained through the free flow of information. Today, and for some time, Congress has not had access to all the information it needs to discharge effectively its constitu-

tional responsibilities. Much of the fault for this condition lies with Congress itself, which has failed to enforce its rights, to streamline its organization, and to develop adequate information systems.

The information gap threatening the coequal status of Congress is not solely of its own making, however. Information essential for Congress' effective workings is sometimes denied, withheld or concealed from it by the executive branch. In some cases, information requested by Congress is withheld by the Executive on the basis that Congress does not have the right to receive it; that to provide it would in some way disadvantage the people and undermine the Republic. The fact that past Presidents have asserted executive privilege can in no way be interpreted as sanctioning the continuation of this practice with no examination or restriction by the Congress.

The fact that executive privilege is not claimed very often does not reduce the significant harm it can cause. Not only is the privilege generally exercised in cases of relatively important matters, but even limited use sets a tone within the executive branch which encourages officials and assistants to delay responses to congressional requests for information, to unduly narrow the scope of reply, to assume a non-committal character, or even to conceal data and sources.

The continuation of this practice in its present form must not be permitted. The problems of our world and the needs of our society are too broad and too pressing to permit this kind of impediment to the sound administration of government.

The time has come, therefore, to take action to correct this major barrier to informed and effective congressional action. It is with a desire to overcome this deficiency and to return Congress to a role equal to that of the executive branch that I have joined with Mr. Erlenborn and several of my colleagues in introducing H.R. 4938.

The proposed legislation provides that the executive branch shall supply within 30 days all information and testimony requested by Congress or any committee thereof—to the extent of matter within its jurisdiction—or the Comptroller General of the United States unless the President specifically claims executive privilege in a signed written statement. The President may only invoke executive privilege, however, in relation to policy recommendations made to him or to an agency head and only in those instances in which he determines that the disclosure of such information will seriously jeopardize his ability to obtain forthright advice in the area of national interest. Factual information underlying a policy recommendation must be made available and no officer or employee in the executive branch, including those employed in the White House, are exempted from coverage.

I recognize that there are those who refuse to recognize any legality or justification for a doctrine of executive privilege. Under our proposed bill, the doctrine is realistically cast as a statutory procedure, with built-in limits to guard against abuse of the privilege. The Congress, for its part, is being asked to concede that which already exists in practice, as well as in name—executive privilege. In turn, however, the Chief Executive is requested to agree to a significant narrowing of the use of the doctrine.

If our bill had been in effect over the past 10 years, there are several instances where executive privilege could not have been invoked because the material or information refused would have been outside the limitations prescribed in the bill. In my opinion, President Kennedy's refusal to allow Gen. Maxwell Taylor to testify on the Bay of Pigs crisis in 1963, President Johnson's refusal to supply the Command Control Study on the Tonkin Gulf incidents in 1968, and the refusal of the State Department last year to supply our own committee field submissions on the Cambodia aid program all would have been ineligible for executive privilege.

One could speculate as to the effect of this bill on current and highly publicized usage of the doctrine of privilege. I can only say that in an atmosphere where there is no statutory basis for or limitation of executive privilege, it is not only possible but likely that its use will be slowly stretched to include a broad category of information.

The sponsors of H.R. 4938 feel it is unwise to write into the law a specific enforcement measure to assure that the limits we propose are adhered to. I believe that once this bill is signed into law by the President, he and his successors will be bound to abide by its provisions in dealing with requests for information. The means which Congress may presently employ to force information from the executive branch will continue to be available—the power of Congress to cut off funds, to subpoena witnesses and have them cited for contempt, to arrest, to apply political pressure—especially by harnessing the force of political opinion—and to engage in behind-the-scene political negotiations and compromise with the President. There is no need to elaborate upon these options and, perhaps, inadvertently to narrow them by incorporating enforcement tools in the legislation.

Mr. Chairman, in conclusion, it is my hope that enactment of this legislation will constitute a healthy step forward in lessening the friction which exists between the two branches of Government today. Only through knowledge is a society free. H.R. 4938 represents, in my opinion, a workable means for providing an increased flow of information to the Congress—and thereby to the peoples' direct representatives. I am confident this subcommittee's deliberations will result in positive action.

Mr. MOORHEAD. I want to thank the distinguished gentleman very much for a very able exposition of the problem and of a proposed solution.

You state that you don't think we need it to have enforcement procedures. What do you think about spelling out court appellate procedures? We have this issue of whether the courts would look in camera at the documents to determine whether exemptions are presently improperly asserted, for example, whether or not the national interest would be seriously jeopardized if data were released.

There ought to be some review of that. Should we spell out a particular court review?

Mr. HORTON. As you know, in the freedom of information bill I introduced, of which I am the chief sponsor, along with you and Mr. Erlenborn, I do provide that procedure wherein the courts may look behind the various interpretations of the agencies of the Freedom of

Information Act, and decide independently what information may be withheld under the act. It was the *Mink* case in which the court refused to go behind the agency's determination or finding. That must not be allowed to stand.

I feel for the same reason there should be some technique in the area of executive privilege to provide means for the Congress to go behind a claim of secrecy. Here it is a little bit different because it is the President, and I think what we tried to do here is to spell out, without going into that type of procedure, a means whereby both the Congress and the Executive could exist under this problem of executive privilege. I believe it is preferable in the first instance to have Congress and the executive resolve their differences rather than leaving it up to the third branch, the judiciary, to determine this. But, if that should fail, resort to the courts would be a logical course to follow under the proposed legislation.

The other sponsors of the legislation might want to comment on that. My own view would be to leave it like it is in the bill. I think the chief sponsors of the bill in putting this bill together have been very careful in not providing greater specificity in the statute.

I don't think we ought to set up an elaborate system on this at least until we gain some experience on the workings of the proposed law. I feel the most important step is to give statutory authority to the subject matter without providing specific sanctions at this time.

Mr. MOORHEAD. Mr. Erlenborn?

Mr. ERLENBORN. I would comment first of all that, if you meant to suggest that we utilize the same sort of review board as we have set up in the other bill amending the Freedom of Information Act, it would be wholly improper, I think, to have some administrative agency or board review the action of the President. Obviously only the coequal branch of the Government, the judiciary, would have that right in my opinion.

I think we, without spelling it out, do have here an opportunity for judicial review if what the Congress or what the committee is asking for is not a policy recommendation. Let us say it is clearly a matter of fact and the President signs such a statement. I think we could go ahead and issue a subpoena for the information and seek its enforcement in the courts and thereby have a judicial interpretation of whether the President had properly invoked executive privilege. My reference is a clear-cut case where we aren't asking for policy information. Possibly the President wouldn't have the right to invoke executive privilege there and we could go to the court with our subpoena or whatever procedure we were utilizing to get the facts or the information.

So I think there is the possibility for judicial interpretation and enforcement even though we have not spelled it out specifically in this bill.

Mr. HORTON. I would like to say further that this is a suggestion, and I am sure the committee will work its will and I am sure the committee's composite thinking will come up with other suggestions or ideas with regard to how to handle this matter of executive privilege.

I do think, as the gentleman from Illinois and I both indicated, that we not build any elaborate procedures for checking the President in

this sort of thing. I think he clearly pointed out, as I stated in my statement, we can ultimately take it to the courts for interpretation. I think it is good to bring it out and discuss it, but I think we ought to leave it like it is.

Mr. MOORHEAD. Mr. Alexander?

Mr. ALEXANDER. No questions.

Mr. MOORHEAD. Mr. McCloskey?

Mr. McCLOSKEY. I have one question, Mr. Horton. We exempt only advice given to the President or to an agency head. In your opinion, would the Congress have the right to know what the President said to his chief advisers? In other words, should we exempt not only what is said to the President, but what is said by him to his chief advisers?

Mr. HORTON. I think that goes without saying. I don't think we can expect the President to come up here and testify as to what he said or what they said to him. I think that should be privileged.

Mr. ERLENBORN. We could not subpoena, say, Mr. Haldeman, to ask him to tell us what the President said to him, and I don't think we should be able to do so.

Mr. HORTON. I don't think Mr. Haldeman would testify to that no matter whether it is in writing or not. The statements that the President makes to staff or to Cabinet officials or to the one who is advising him, I think there should be no question but that they should be privileged information.

Mr. ERLENBORN. Would the gentleman yield?

Mr. McCLOSKEY. Yes.

Mr. ERLENBORN. I agree with Mr. Horton, and I think you raised a valid question here as to the way the bill is presently worded. We ought to give some thought to whether it is necessary and desirable to possibly amend the bill.

Certainly there should be a free flow two ways. We should protect communications from the President as well as from his advisers so that there is a free flow between them. That is the purpose, really, the main purpose of the bill.

Mr. McCLOSKEY. I make the point because I think we are dealing with a potentially explosive situation. If we draft a bill to exclude or to narrow this privilege, we also must consider the things that are beyond our power to demand or beyond our power to restrain.

Thank you.

Mr. MOORHEAD. Mr. Gude?

Mr. GUDE. Yes, Mr. Horton, the legislation as drafted goes only to the question of information. In part 3 it says that executive privilege shall be invoked only by the President and only in those instances in which the requested information or testimony contains policy recommendations made to the President, and so on.

Now, it doesn't speak to executive privilege extending to the President refusing to allow individuals to come, but only as to what information can be imparted.

In the President's statement on March 12, 1973, he explained his definition of executive privilege to mean "preclude the questioning of members of his staff past or present by Congress."

And he stated that "he did this following the well-established precedent" and that means "that a President could decline a request for a

formal appearance of a member or a former member of the President's personal staff before a committee of Congress."

Mr. HORTON. Excuse me. You are asking about individuals being required to be present?

Mr. GUDE. That is right.

Mr. HORTON. That subject is covered in subdivision 2 on page 2, starting on line 7 through 16.

You see, the subsection you were referring to, part 3, has to do with the type of information that the President can protect under executive privilege.

Subsection 2 reads "whenever either House of Congress or any committee thereof to the extent of," and so on, and then it says, "request a (present) officer or employee for testimony, the officer shall appear" and so on.

So that is covered there. There is no exemption from subpoena, if that is your point.

Mr. GUDE. That is my point.

In section 4 on page 3 defining agency, it states "including any establishment within the Executive Office of the President."

Mr. HORTON. Right. That is an attempt to cover them all.

Mr. GUDE. So in this legislation, no individual is exempt but only the information?

Mr. HORTON. Right.

Mr. GUDE. Thank you. And there is a limitation on the information too, and that is spelled out in part 3 where the information is limited?

Mr. HORTON. Yes, and also there is an "and" in there and that is a very important "and" on line 20, page 2, which states, "executive privilege shall be invoked by the President," and here is the important part, "and only those instances where the requested information contains policy information," and so on.

Now, if you said "or," you would have a different problem. It is a limited type of information that can be protected.

Mr. GUDE. I wanted to nail down the fact the legislation did not exempt individuals.

Mr. HORTON. Right. The gentleman from California asked Mr. Erlenborn about the question of whether this broadened executive privilege and I think it is a very important narrowing of executive privilege.

Mr. GUDE. Thank you.

Mr. ALEXANDER. Mr. Thone?

Mr. THONE. I have one question to either Mr. Horton or Mr. Erlenborn. What has the White House said about this bill, or has it invoked executive privilege?

Mr. HORTON. I haven't heard a word from them. I haven't discussed it with them. I didn't discuss it before and I didn't discuss it subsequent to introducing the bill. They haven't been in touch with me. I haven't been in touch with them.

Mr. THONE. I will yield to the gentleman from Illinois.

Mr. ERLENBORN. As the gentleman may be aware, Chairman Moorhead and I wrote a letter to the President asking that he have Mr. John Dean, his counsel, appear to testify as to the position of the President. We made it clear that we were not going to get into any other matters.

We wanted him to testify as to his position on how executive privilege should be defined, and controlled.

To my knowledge, we have not as of yet gotten an answer to that letter. I checked last night with the staff, and we have no answer as of yet.

Mr. THONE. That is all.

Mr. ALEXANDER. Mr. Regula?

Mr. REGULA. No questions.

Mr. ALEXANDER. Anyone have any questions? The staff?

Mr. CORNISH. I would like to direct this to the sponsors of the bill. On page 2, where it states "or any committee thereof," does that language mean to include subcommittees as well?

Mr. HORTON. Yes.

Mr. ERLENBORN. Without any question, the committee would include subcommittee. The subcommittee is acting for the committee under House rules.

Mr. McCLOSKEY. Mr. Chairman, I have a question that I might direct to our ranking minority member and Mr. Erlenborn.

There are two other areas that relate to this one. The first is title 5, section 2954, that has been on the books for several years, whereby seven members of the committee may request information. There is no limitation on what must be provided in response to a request made pursuant to that section, and at the same time, this committee, operating under that section, has been refused information over the last several years by several branches of the executive department.

The second related area is the Freedom of Information Act itself, which this legislation seeks to amend. At the same time, we have other amendments to the Freedom of Information Act.

Does the ranking member have any recommendations whether we should take up the repeal of section 2954, which the Executive has interpreted as a housekeeping statute rather than as a requirement that they furnish information?

Mr. HORTON. I don't have any recommendation or limitation on what the subcommittee takes up. I think you ought to take a look at the whole gamut. I put in bills on the Freedom of Information Act and executive privilege. I cosponsored the one with Mr. Erlenborn, and he cosponsored the other with me.

I think we are generally in accord. He is the ranking member of this subcommittee, and I am the ranking member of the full committee, and I think it is a matter that should be looked into. I hope it will.

Mr. ERLENBORN. I don't believe this bill infringes on the provision that the gentleman referred to where seven members may join together and request information. There it is not the committee or any subcommittee of the committee or the Congress acting in its official capacity.

The provision to which you refer is where seven individual members, not acting officially for the committee or for the Congress, make the request or demand it.

I think it is a different provision and it could coexist with this provision. There is nothing that conflicts between them.

Mr. ALEXANDER. Anyone else?

Well, thank you, Mr. Horton. We appreciate your contribution this morning.

Mr. HORTON. Thank you very much.

Mr. ALEXANDER. Mr. McCloskey, I believe you are the next witness?

Mr. McCLOSKEY. I would like to defer the statement until some of these questions are deferred that I brought up this morning. I am frankly puzzled about some of the amendments to this bill.

Mr. ALEXANDER. That may be rescheduled.

Mr. Regula?

Mr. REGULA. Yes, Mr. Chairman, I would like to make a brief statement.

STATEMENT OF HON. RALPH S. REGULA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. REGULA. As a freshman Member of Congress, I am graphically aware of the tremendous volume of legislation that is considered by both Houses. The number of ideas and policy alternatives suggested in the nearly 20,000 bills introduced each year is staggering. In the process of making the best possible policy choices, Congressmen thirst for any available factual information or knowledge on each bill. Given the tough decisions that Congress is called upon to make, it seems to me it is imperative that those decisions are made with a clear understanding of the facts.

The framers of our Constitution were wise men indeed. They carefully established a network of power that divided government into approximately equal separate parts. They jealously feared concentrating too much power into the hands of any one portion of the Government.

In today's highly technical, complex and diverse world, information is power. Within the Federal Government there are specialists dealing with almost every imaginable field of human interest. These men have or should have at their fingertips facts, learned opinions, and conceptual perspectives about their chosen fields. This information must be available to the policymakers of the Government to guarantee that the decisions they make are the best that can be achieved.

In short, while there is a separation of powers in our Government, there should be a partnership in the use of those powers to provide the best possible service to the American taxpayer. Too often the branches of our Government behave like adversaries, when, after all, we are all working for the same people. We have a responsibility to make the maximum use of each available tax dollar.

It kind of reminds me in this legislation we are referring to, of when I practiced law with the board of public affairs and the city council. They served some 1,500 people, and they each had their own trucks, and so on, and I thought we wouldn't find that down there, but it seems to me there is some element of the same thing.

It is ridiculous for the Congress to establish a separate bureaucracy to discover and provide facts and information available from within the executive branch. This duplication is a waste of the taxpayer's tax dollar.

I have joined Mr. Erlenborn and others in the sponsorship of H.R. 4938 in an attempt to insure that the information possessed or controlled by the executive branch, its agencies, departments, and bureaus, is available to the legislature.

We have defined and structured the use of executive privilege. Its use would be possible only when policy recommendations are involved and only when the disclosure of a given piece of information would jeopardize the Nation's security and hinder the President's ability to obtain forthright advice.

Today, we are proposing a partnership of information between the separate branches of this Government with the ultimate benefactor of this shared power being the American public.

This kind of common sense approach will, I believe, result in more open Government and a corresponding increase in public confidence in our political process.

Mr. ALEXANDER. Thank you, Mr. Regula. I appreciate very much your remarks. I agree that we should have a partnership and equal accessibility to information because we all represent and promote the same ideas and aspire to many of the same principles. I remember quite vividly last December when this subcommittee was in France trying to vigorously pursue the question of French debt to the United States. That debt has not yet been resolved. We were quite close to obtaining certain information which would help it become resolved. While I was serving as acting chairman, the subcommittee made a formal request for details of the negotiations between France, the French officials and the U.S. officials. We were denied access to that information. I might add that it was not sensitive information and certainly no national security questions were involved.

The members of the subcommittee all had top secret clearance, and we were dealing with a matter of debt rather than of strategy or acts of diplomacy, but we were denied that information.

And, as thousands of dollars of interest accrue on that debt, this information continues to be withheld. We need this information in order to pursue this matter. It seems to me if we had a closer sharing of that information, we could achieve better results for the people whom we have been elected to represent.

Mr. Erlenborn?

Mr. ERLENBORN. No questions.

Mr. ALEXANDER. Mr. McCloskey?

Mr. McCLOSKEY. No questions.

Mr. ALEXANDER. Mr. Cornish?

Mr. CORNISH. No questions.

Mr. ALEXANDER. Mr. Whittington?

Mr. WHITTINGTON. No questions.

Mr. ALEXANDER. Mr. Phillips?

Mr. PHILLIPS. No questions.

Mr. ALEXANDER. Well, thank you, Mr. Regula. It seems that you have traveled through a committee of adversity without any difficulty.

The next witness is Mr. Paul G. Dembling, General Counsel of the General Accounting Office.

**STATEMENT OF PAUL G. DEMBLING, GENERAL COUNSEL, U.S.
GENERAL ACCOUNTING OFFICE; ACCCOMPANIED BY JOHN MOORE,
ASSOCIATE GENERAL COUNSEL; AND HENRY W. RAY, ATTORNEY**

Mr. DEMBLING. We are pleased to appear before you to testify on H.R. 4938, a bill to require that information be made available to Congress except where executive privilege is invoked.

H.R. 4938 would add three substantive provisions to section 552 of title 5, United States Code (the Freedom of Information Act). First, it would require that any information within the possession or control of any agency be made available to either House or any cognizant committee of the Congress or to the Comptroller General, within 30 days of a request therefor unless the President submits or signs a statement invoking executive privilege as the basis upon which the information is being refused. Second, the bill would require all agency officers and employees to appear upon request before either House or any cognizant committee of the Congress, and to testify and to supply information regarding matters within the agency's possession or control, except that the officer or employee could refuse to supply items of information specifically ordered withheld by the President in a signed statement invoking executive privilege. Third, the bill would permit invocation of executive privilege only by the President, and only in instances in which the requested information or testimony contains policy recommendations made to the President or agency head and the President determines that disclosure of such information will seriously jeopardize the national interest and his ability or that of the agency head to obtain forthright advice.

It is further provided that factual information underlying policy recommendations shall be made available to the extent possible. Finally the term "agency" as employed in the bill is defined to mean "any department, agency, instrumentality, or other authority of the Government of the United States (other than the Congress or the courts), including any establishment within the Executive Office of the President."

Since H.R. 4938 relates, in part, to requests for information by the Comptroller General, we believe it might be useful to refer to the difficulties occasionally confronting the General Accounting Office in obtaining access to executive branch information.

One of the most important duties of the GAO is to make independent reviews of agency operations and programs and to report to the Congress on the manner in which Federal departments and agencies carry out their responsibilities. The Congress, in establishing GAO, recognized that the Office would need to have complete access to the records of the Federal agencies and provided that basic authority in section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 53, 54), as follows:

All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.

The more important factors underlying the law, intent of the Congress, and GAO's policy of insisting on generally unrestricted access to pertinent records of agencies and contractors in making GAO audits and reviews are:

1. An adequate, independent, and objective examination contemplates obtaining a comprehensive understanding of all important factors underlying the decisions and actions of the agency or contractor management relating to the subject of GAO examinations.

2. Enlightened management direction and execution of a program must necessarily consider the opinions, conclusions, and recommendations of persons directly engaged in programs that are an essential and integral part of operations. Similarly, knowledge of this type is just as important and essential to us in making an independent review and evaluation as it is to management in making basic decisions.

3. Agency internal audits and other evaluative studies are absolutely necessary. They are important tools by which management can keep informed of how large and complex activities are being carried out. Knowledge of the effectiveness with which corrective action where needed is taken is absolutely necessary to GAO in the performance of its responsibilities.

4. Availability of internal audit and other evaluative documents to GAO enables us to concentrate a greater part of our efforts in determining whether action has been promptly and properly taken by agency officials to correct identified weaknesses, and helps eliminate duplication and overlapping in audit effort.

We generally have had good cooperation in obtaining access to records of the executive departments. In the recent past, with only one exception, we have not had executive privilege used as a basis for refusing information to GAO. Over the years most of our problems have been with (a) the Federal Deposit Insurance Corporation, (b) the Department of State and the Department of Defense in those areas which involve our relations with foreign countries, and (c) certain activities of the Treasury Department. In addition to these which persist, we have recently had problems with the Emergency Loan Guarantee Board and the Corporation for Public Broadcasting.

I have detailed the major examples of our access to information problems in the appendix, attached to this statement, and respectfully request that it be inserted in the record.

Mr. MOORHEAD. Without objection, it will be made a part of the record.

[The document referred to follows:]

INTERNATIONAL ACTIVITIES

We have been experiencing increasing difficulties in obtaining access to information needed in our reviews and evaluations of programs involving our relations with foreign countries and U.S. participation in international lending institutions. The Departments of Defense, State, and Treasury have employed delaying tactics in preventing our access to necessary records. Information and records have been withheld on the basis that they were internal working documents or that they disclosed tentative planning data. The most serious interference has resulted from restraints placed upon agency officials which require them with more and more frequency to refer to higher authority for clearance before making records available to our staff.

On August 30, 1971, the President invoked executive privilege to withhold information which had been requested by the Senate Foreign Relations Commit-

tee relating to the military assistance program. The President determined that it would not be in the public interest to provide to the Congress the basic planning data on military assistance that was requested by the chairman of the Senate Foreign Relations Committee, and he directed the Secretary of State and the Secretary of Defense not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved executive branch positions.

Subsequent to this action we noted a general increase in the volume of documents that operating officials were referring to higher authority for approval for release to our auditors. This practice added to the delays in obtaining access to documents that had hampered our audit efforts in the past. Although absolute denial of access to a document is quite rare, our reviews have been hampered and delayed by the time-consuming processes employed by the various organizational elements within and between the executive agencies. These delays occur in screening records and in making decisions as to whether such records are releasable to GAO. It is not unusual for our staff people to request access to a document at an overseas location and to be required to wait several weeks while such documents are screened through channels from the overseas posts and through the hierarchy of the departments involved.

The increasing concern of the Comptroller General, especially with actions within the Department of Defense that were having the effect of denying GAO access to information and documents needed to carry out our responsibilities for review of international activities of the Department of Defense, in particular military assistance activities, prompted him to write to the Secretary of Defense on October 13, 1971. He cited examples of our access problems and pointed out specific DOD instructions and directives which, we believed, had created an atmosphere that was discouraging overseas agency officials from cooperating with GAO personnel. In reaching for a solution to this complex problem, the Comptroller General summarized his position to the Secretary of Defense as follows:

"I am most interested, as I am sure you are, in establishing a mutual accommodation within which we can carry out our respective responsibilities, with due regard to the sensitivities of the matters under review.

"I believe you can appreciate the depth of my concern at what appears to be an increasing effort within the Department of Defense to restrict the General Accounting Office's capability to carry out its responsibilities to the Congress in the field of international matters.

"To clear the air and set the stage for joint efforts to establish better working relationships I believe that a personal expression of your views communicated to your representatives in Washington and overseas would be extremely helpful. We would then be glad to work with the Assistant Secretary of Defense (Comptroller), or others that you designate, in the interest of accomplishing mutually acceptable working arrangements."

On January 27, 1972, the Secretary of Defense replied, stating:

"At the outset, let me assure you that neither the Assistant Secretary of Defense (ISA) nor myself condone any actions which could be interpreted as restricting your auditors from carrying out their responsibilities in the field of international matters or discouraging overseas officials from cooperating with your auditors in the performance of their statutory responsibilities."

He also indicated a need and intent to continue to screen the files of the Department before making them available for our review and stated:

"Papers in these files originate within as well as outside the Department, including the White House, and Department of State. I am sure that you appreciate that merely because such papers are in our files we cannot release them to GAO without the express approval of the originator. Fortunately, however, it is only on rare occasions that GAO auditors actually need access to such papers to complete their audits or reviews. The matter of access to such papers must, I believe, continue to be handled on a case-by-case basis. In the future, when the question of access to sensitive documents in the international affairs area arises, I have asked the Assistant Secretary of Defense (ISA), when he believes that access to a particular document should be denied, that he consult with the Assistant Secretary of Defense (Comptroller) and the General Counsel prior to refusing access."

The Secretary suggested that to clear the air and set the stage to establish better working relationships that DOD and GAO send representatives to some overseas locations with a view to creating an atmosphere of mutual cooperation and understanding.

Since the exchange of letters we have been meeting with Defense officials in an attempt to establish mutual working arrangements within which we can carry out our responsibilities. While we have vigorously pursued this matter with agency officials, we see no real breakthrough which will solve our problem. The most serious interference is in the restraints which have been placed upon agency officials overseas and which require them more and more to refer to Washington for clearance before making documents available to our staffs. Although these are not termed refusals, they come close because of the interminable delays that result from having to refer routine matters through channels to Washington.

On March 15, 1972, the President invoked executive privilege with respect to the foreign assistance program and international information activities. In a memorandum to the Secretary of State and the Director, U.S. Information Agency he directed these officials not to make available to the Congress any internal working documents which would disclose tentative planning data—such as is found in the country program memoranda and the country field submissions—and which are not approved positions.

Since then we have experienced some tightening up on our access to documents. For example, the Agency for International Development on March 23, 1972, instructed its operating personnel as follows:

"In order to carry out the President's directive, AID country field submissions should not be disclosed to representatives of the Congress or the General Accounting Office. Likewise, disclosure should not be made of any other document from an AID assistant administrator, AID office head or AID mission director to higher authority containing recommendations or planning data not approved by the executive branch concerning overall future budget levels for any fiscal year for any category of assistance (for example, development loans, technical assistance, supporting assistance, or Public Law 480) for any country.

"In lieu of the disclosure of such documents, the President has directed that Congress be provided with 'all information relating to the foreign assistance program and international information activities' not inconsistent with his directive. Ordinarily, the substantive factual information contained in these documents should be disclosed through means of oral briefings, testimony, special written presentations and such other methods of furnishing information as may be appropriate in the circumstance.

"The General Counsel should be advised of any congressional or GAO requests for any document described in (the first paragraph) above or for files or records containing such a document. The General Counsel should also be advised of requests for other documents which raise executive privilege questions, whether under the rationale of the President's March 15 directive or otherwise, and a decision should be obtained from the General Counsel concerning the availability of the document for disclosure before the document is disclosed."

On May 8, 1972, the Under Secretary of State issued a memorandum to all agency heads, assistant secretaries, and office heads on the subject of executive privilege. This memorandum cites the Presidential directive of March 15, 1972, and contains instructions similar to those put out by AID. However, it goes a bit further in broadening the field of applicability by stating:

"It will be noted that the President's directive is not strictly limited to country program memoranda and country field submissions, but applies also to other similar internal working documents in the foreign assistance and international information fields which would disclose tentative planning data and which are not approved positions. Undoubtedly, specific questions will arise in the future as to whether or not the President's directive applies to particular congressional requests for disclosure. Such questions should be resolved in consultation with the Office of the Legal Adviser."

There is evidence that the executive agencies may try to satisfy GAO's need for access to records by providing the required information by means other than direct access to the basic documents, especially in cases where such documents are considered to be internal working documents. This would not be acceptable unless we are able to satisfy ourselves that the data provided to us is an accurate presentation of the substantive information contained in the basic documents.

In summary, our access to the records and documents or other materials we need to carry out our responsibilities for reviewing programs relating to international activities has been increasingly difficult. It is a matter of degree, but it has seriously interfered with the performance of our responsibilities. The most serious interference is in the restraints which have been placed upon agency officials overseas and which require them more and more to refer to Washington for clearance before making documents available to our staff. Although these are not termed refusals, they come close because of the interminable delays that result from having to refer routine matters through channels to Washington.

In addition to the unnecessary cost and waste of time this involves, there is the increased risk of our making reports without being aware of significant information and the increased risk of our drawing conclusions based on only partial information.

We are seriously concerned with the increasing restrictions that have been imposed on overseas officials in particular, that take away a large measure of their discretion for dealing with GAO personnel, and we have conveyed this to the agencies.

INTERNATIONAL LENDING INSTITUTIONS

Beginning in the fall of 1970, we undertook to study U.S. participation in international lending institutions—the World Bank, International Development Association, Inter-American Development Bank, and Asian Development Bank. During our initial survey and in our later reviews relating to specific institutions, we encountered difficulties in obtaining information from the Treasury Department.

We experienced long delays in obtaining certain information. For example, access to monthly operations reports and to loan status reports for one of the institutions that we requested in December 1970 was not granted until August 1971 and then only after repeated requests.

We were refused access to several categories of documents by Treasury Department officials. These included the recorded minutes of the meetings of the institutions' board of directors, periodic progress reports on the status of projects being financed by the institutions, and a consultant's report on management practices of one of the institutions. Also, although Treasury officials advised us that they had refused access only to internal documents which they received in confidence from the institutions, we were refused access to certain documents which, as far as we could determine, were not documents furnished by the institutions but rather were documents prepared by U.S. officials for use by other U.S. officials.

We were not auditing the records of the Inter-American Development Bank as such but only those documents that had been provided by the Inter-American Development Bank to the Executive Director and were available for his use in the exercise of his management responsibilities. We believe that these records should have been available to us in our review which was on the U.S. system for appraising and evaluating Inter-American Development Bank projects and activities. Any report on this subject would necessarily be lacking to the extent to which information used by the United States in evaluating Bank projects was not made available to us during our examination. We see no valid basis for Treasury's refusal to provide access to the records we requested.

INTERNAL REVENUE SERVICE

GAO's review efforts at the Internal Revenue Service had been materially hampered, and in some cases terminated, because of the continued refusal by IRS to grant GAO access to records necessary to permit an effective review of IRS operations and activities.

Without access to necessary records, GAO cannot effectively evaluate the IRS administration of operations involving billions of dollars of annual gross revenue collections and millions of dollars in appropriated funds. Such an evaluation, we feel, would greatly assist the Congress in its review of IRS budget requests and in its appraisal of IRS operations and activities. Without such access, the management of this very important and very large agency will not be subject to any meaningful independent audit.

GAO has taken every opportunity to impress upon IRS officials that it is not interested in the identity of individual taxpayers and does not seek to super-

impose its judgment upon that of IRS in individual tax cases; rather, GAO is interested in examining into individual tax transactions only for the purpose of, and in the number necessary to serve as a reasonable basis for, evaluating the effectiveness, efficiency, and economy of selected IRS operations and activities. GAO has, in general, directed its efforts toward those areas where it believed that improvements in current operations would bring about better IRS administration of programs, activities, and resources.

It is the position of IRS that no matter involving the administration of the internal revenue laws can be officially before GAO and therefore we have no audit responsibility. The Commissioner of IRS, in a letter to the Comptroller General dated June 6, 1968, stated:

"* * * I must note that the (Chief Counsel, IRS) opinion holds that the Commissioner of Internal Revenue is barred by sections 6406 and 8022 of the Internal Revenue Code from allowing any of your representatives to review any documents that pertain to the administration of the Internal Revenue laws. Thus, Federal tax returns and related records can be made available to you only where the matter officially before GAO does not involve administration of those laws."

Under the provisions of 26 U.S.C. 6103, tax returns are open to inspection only on order of the President and under rules and regulations prescribed by the Secretary of the Treasury or his delegate and approved by the President. Regulations appearing in 26 CFR 301.6103(a)-100-107 grant several Government agencies specific right of access to certain tax returns. Our office is not included among those agencies. The regulation applicable to our office, 26 CFR 301.6103 (a)-1(b)(f), provides that the inspection of a return in connection with some matter officially before the head of an establishment of the Federal Government may be permitted at the discretion of the Secretary or Commissioner upon written application of the head of the establishment.

IRS has permitted Federal agencies, States, individuals, contractors, and others to have access to tax returns and records. GAO has been given access to individual tax returns only when the return is needed in connection with another matter in which GAO is involved or when we have made reviews at the request of the Joint Committee on Internal Revenue Taxation. Otherwise we have been denied records requested for reviews of IRS operations. The reviews of IRS conducted at the request of the Joint Committee have been made pursuant to an arrangement whereby GAO and the Joint Committee agreed on certain priority matters involving the administration of the internal revenue laws. Under this arrangement we, in effect, make reviews for the Joint Committee, and we have had the complete cooperation of the Service.

ECONOMIC STABILIZATION PROGRAM

Another access to records problem arose when GAO attempted, pursuant to a congressional request, to review the effectiveness of IRS activities in monitoring prices. IRS did not formally deny GAO the right to review records of the economic stabilization program. Rather, the General Counsel of the Treasury Department submitted a proposed "memorandum of understanding," which was to be signed by himself, the Comptroller General, and the Commissioner and Chief Counsel of IRS, as a condition precedent to permitting GAO to perform the review.

In our opinion, the memorandum of understanding would have negated GAO's independence and limited GAO's right to records to such an extent that any work undertaken would not have provided a basis to properly perform the audit. Accordingly, the General Counsel of the Treasury Department was advised that the memorandum of understanding was not acceptable to GAO. Subsequently, we advised the Treasury Department in January 1973 that, since phase 2 of the economic stabilization program was being phased out, there was no practical purpose in pursuing the matter.

FEDERAL DEPOSIT INSURANCE CORPORATION

The long and involved history of controversy between GAO and the Federal Deposit Insurance Corporation over GAO's right of access to certain of the Corporation's records appears in the published hearings of the House Committee on Banking and Currency of May 7, 1968. Those hearings resulted in the introduction of H.R. 16064, 90th Congress, a bill to amend the Federal Deposit Insurance Act with respect to the scope of audit of FDIC by GAO.

Essentially what is involved in this dispute is that although our office is required by section 17 of the Federal Deposit Insurance Act (12 U.S.C. 1827) to conduct annual audits of the Corporation, we have been unable to fully discharge our responsibilities because FDIC has not permitted us unrestricted access to examination reports, files and other records relative to the banks which it insures.

It is the position of the Corporation that our right of access to its records is limited to those administrative or housekeeping records pertaining to its financial transactions. It is GAO's position that, because the financial conditions of the Corporation is inseparably linked with the manner in which it supervised the banks which it insures, we cannot report to the Congress on the financial condition of the Corporation without evaluating the significance of its contingent insurance indemnity obligation for the banks.

At the time section 17 was being considered by the Congress, it developed that, although GAO and FDIC had agreed on the language included therein, divergent views were held by GAO and FDIC as to its meaning. Each made its position known to the House Committee on Banking and Currency, but the matter was not resolved. This difference of opinion still exists with both the Corporation and GAO feeling that the present law supports their respective positions. Repeated efforts to resolve the matter administratively have failed, and, for this reason, the Comptroller General in his testimony of March 6, 1968, before the House Banking and Currency Committee, recommended that the Federal Deposit Insurance Act be amended to specifically provide for an unrestricted access to the examination reports and related records pertaining to all insured banks.

EMERGENCY LOAN GUARANTEE BOARD

The Emergency Loan Guarantee Board, established by the Emergency Loan Guarantee Act (Public Law 92-70), through its Chairman—the Secretary of the Treasury—has taken the position that it was not the intent of the Congress in establishing the Board to grant GAO authority to review Board activities. The Board was established to make guarantees or to make commitments to guarantee lenders against loss of principal or interest on loans to major business enterprises whose failures would seriously and adversely affect the economy or employment of the Nation or a region thereof.

GAO believes that it has the responsibility and authority to review the Board's activities including decisions of the Board in approving, executing, and administering any loan guaranteed by the Board. The Board's position, as indicated, is that there is nothing in the Emergency Loan Guarantee Act or its legislative history which would provide for a GAO review of all Board activities and that the Congress might need to pass additional legislation to make it clear that GAO has this authority. The main thrust of the Board's position is that the congressional review of loan guarantee matters is carefully spelled out in the guarantee act; GAO is directed to audit the borrower and to report its findings to the Board and to the Congress; and the Board is directed to make a "full report" of its operations to the Congress. It is our position that, as an agency of Government, the Board is clearly subject to audit examination by GAO and that the records of the Board are required to be made available to GAO under its basic authorities. Those authorities are section 312 of the Budget and Accounting Act, 1921 (31 U.S.C. 53); section 206 of the Legislative Reorganization Act of 1946 (31 U.S.C. 60); subsections 117(a) and (b) of the Accounting and Auditing Act of 1950 (31 U.S.C. 67(a), (b)); and section 204 of the Legislative Reorganization Act of 1970 (84 Stat. 1140).

It is our view that under these basic authorities GAO has responsibility for auditing the activities of the Board and thus has attending right of access to such information and documents as the Board uses in reaching its decisions. Further, it is our view that neither the failure to spell out explicitly that GAO has such responsibility and right of access nor the fact that under Public Law 92-70 GAO was given explicit authority to audit the borrower diminishes in any way the basic audit authorities that we rely upon.

COUNTERVAILING DUTY STATUTE

In 1971, pursuant to a congressional request, GAO sought to review the Department of the Treasury's administration of section 303 of the Tariff Act of 1930

(19 U.S.C. 1303), which requires the Secretary of the Treasury to levy a countervailing duty on any dutiable product imported into the United States for which the producing nation has provided a production or export grant or bounty.

In January 1973, we decided that our efforts to obtain the necessary records to make the review were unsuccessful.

EXCHANGE STABILIZATION FUND

By Public Law 91-599, approved December 30, 1970, the Congress directed that the administrative expenses of the exchange stabilization fund, established by section 10 of the Gold Reserve Act of 1934, be audited by the General Accounting Office and provided certain access to records authority. The legislative history made it clear that the audit should start with fiscal year 1972, and the GAO started efforts to obtain access in the spring of 1972. After a long period of refusals and delays, the Treasury Department finally agreed in March 1973 to provide GAO access to all financial records and relevant supporting information on the administrative expenses of the exchange stabilization fund for 1972. The audit has been started.

CORPORATION FOR PUBLIC BROADCASTING

On November 7, 1967, the Congress approved the Public Broadcasting Act of 1967. A provision of that act provided for an audit of the Corporation by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States.

On several occasions during fiscal years 1972 and early 1973, we attempted to get access to certain information which we believed necessary to enable us to perform our audit of the Corporation. The Corporation officials advised us that they were not clear as to just what our audit authority was and requested that this be included in a letter to the then Acting President of the Corporation. On August 22, 1972, the Comptroller General advised the Acting President that the scope of our audit is as follows:

1. A review of the Corporation's financial transactions and conditions.
2. An identification of any activities identified in our review of financial transactions which, in our opinion, were taken without authority of law.
3. Examination of the books and records of recipients of the Corporation's grants for an identification of needed management improvements together with suggestions as to courses of action which, in our opinion, should be considered to correct management deficiencies or otherwise strengthen the management of the Corporation.

Discussion with Corporation officials subsequent to the August 22 letter has made it clear that any request for information of other than a financial nature would have to be decided on a case-by-case basis by Corporation officials. It is the Corporation's contention that GAO's access to records is restricted to strictly financial information. Such a situation has the effect of giving the Corporation the power to withhold information which might be needed in order to pursue areas where we believe management improvements are warranted. The language providing for our audit of the Corporation for Public Broadcasting is identical to our audit authority for various other programs. Such a narrow interpretation of that authority is totally unacceptable to us and is not supported by legislative history or our prior audit practices.

MR. DEMBLING. The position of GAO is that full access to records, information, and documents pertaining to the subject matter of an audit or review is necessary in order that GAO can fully carry out its duties and responsibilities. The intent of the various laws assigning authority and responsibility to the GAO is clear on this point. The right of generally unrestricted access to needed records is based not only on laws enacted by the Congress, but is inherent in the nature of the duties and responsibilities of the Comptroller General.

Our access to information difficulties arise in three general categories:

Refusal on the part of a department or agency to provide records and information which it does not consider appropriate for our review;

Refusal to afford any access with respect to certain areas of executive activity based upon a challenge of GAO's audit authority in such areas; and

Executive actions, such as screening files and other internal review procedures, which fall short of denials but can have a crippling effect upon audit and review activities.

It is this latter category in which we have had most of our difficulties.

There is another argument frequently made for denying us access to information; namely, that we are seeking access to records relating to matters for which an agency decision has not been made. The argument is then extended to encompass all information though decisions have already been reached.

I would like to take this opportunity to clarify this point. We do not expect to receive nor do we need to receive access to information relating to decisions yet to be made. We do not need such information prior to the decisionmaking to carry out our responsibilities. We do not desire to prejudge such information. Nor do we seek authority to obtain such information prior to the decisionmaking. We can fully appreciate the executive branch position of not releasing internal working papers involving tentative planning data until a decision has been reached. Our problems, however, involve the withholding of such information after a decision has been reached. If we are to make intelligent, effective and useful evaluations of management processes and program results, it is essential that we have access to the information available to and used by those involved in the decisionmaking process.

H.R. 4938 contains several features which could greatly ameliorate our access to records difficulties. Of great significance from our viewpoint is the requirement that requests for information be acted upon within 30 days. This essentially procedural device would go far in combating the long delays which now represent the greatest practical impediment to our audit and review activities.

Second, the bill would eliminate all grounds for denial of executive branch information except to the extent that the President personally invokes executive privilege as provided therein. As Mr. Erlenborn stated upon introducing H.R. 4938:

With this narrow exception, our proposal asserts the right of Congress, of any congressional committees—to the extent that the information deals with subjects within the committee's jurisdiction—and of the Comptroller General of the United States to all other information, classified or not (from Congressional Record, February 28, 1973, p. E1119.)

This would have the effect of precluding the practice we are often confronted with—which might be characterized as “agency” or “departmental privilege”—whereby various executive branch officials assert authority to determine whether particular records are appropriate for our review.

The broad language of the bill would also have the effect of precluding denials of information founded upon challenges to our basic

audit and review jurisdiction in particular program areas. While we believe that our jurisdiction is clear with respect to all program areas previously mentioned, certain executive accounts and activities are exempted by statute from audit, review or settlement by GAO. Two examples are certain expenses for the White House and the operations of the Central Intelligence Agency. We do not believe it is the intent of the bill to affect these exemptions. Accordingly, we suggest that proposed subsection (d) (1), at page 1, line 8 of the bill, be amended by inserting after "United States" and before the comma: "(to the extent of matter not specifically exempted from the jurisdiction of the Comptroller General or the General Accounting Office)." We believe that this clarification would ultimately strengthen the effect of subsection (d) (1).

From an operational viewpoint, we believe that H.R. 4938 could be of great assistance in efforts of GAO to secure information necessary to fully and effectively carry out its responsibilities as an arm of the Congress.

This concludes our prepared statement, Mr. Chairman.

I will try to answer any questions.

Mr. MOORHEAD. Thank you. Mr. Dembling, do you believe that with this legislation or any other legislation, GAO should be given subpoena powers?

Mr. DEMBLING. We have believed so for some time, yes.

Mr. MOORHEAD. In your opinion, would it be logical to include that provision of granting subpoena powers in this legislation?

Mr. DEMBLING. Yes, I think it would be most appropriate.

Mr. MOORHEAD. On page 4, you say that there was one instance where executive privilege was claimed.

Can you tell us the circumstances surrounding that one incident?

Mr. DEMBLING. Yes, sir. We had a request from the Congress to look into the accounting records for the Executive Office of the President for the period of fiscal year 1969 to the present time, and to examine manifest data concerning Presidential flights made during the month of September 1972. We requested that information from the White House and we received a letter from John W. Dean, counsel to the President, in which he stated that "accounting records for the Executive Office of the President for the period of fiscal year 1969 to the present are available for review by the General Accounting Office" and that the executive clerk has been instructed to make these records available at your convenience. However—and I am quoting from his letter—"with regard to your request to examine manifest data concerning the Presidential flights made during the month of September 1972, I must advise you that information of this nature has traditionally been considered personal to the President and thus not a proper subject of congressional inquiry. All political flights made during September were billed to the Committee to Re-elect the President, and that data will of course be reflected in the committee's financial reports."

That was the end of the quotation.

Mr. MOORHEAD. I see. In auditing the AID program, has GAO used country field submissions?

Mr. DEMBLING. I believe that that information has not been supplied to us, but I am not positive. I can supply that for the record if you wish.

Mr. MOORHEAD. You suggest on page 7 an amendment saying, "matters specifically exempted from the jurisdiction of the Comptroller General."

Mr. DEMBLING. Yes, sir.

Mr. MOORHEAD. Isn't it true that the Internal Revenue Service claims that they are specifically exempted, and you take the position that they are not?

Wouldn't we still face the problem that you have with the Internal Revenue Service if we put this language in?

Mr. DEMBLING. I was referring to specific exemptions by law, such as nonaccountable funds that are available to agency heads to use in their own discretion. I think that the bill spells out that all information would be available to the GAO. It would cover such items where we have been denied access by Internal Revenue.

I think it would help to strengthen our position even with that kind of problem.

Mr. MOORHEAD. You might want to think about reworking that language to be sure we can catch all of the ones that should be in the net.

Mr. Erlenborn?

Mr. ERLENBORN. Yes. Thank you, Mr. Chairman.

Mr. Dembling, let me thank you. It is always pleasant to start with an endorsement of a bill and I note you have endorsed it.

I also note the Comptroller General and the GAO are more in the position of an arm of the legislature rather than the executive branch, and, therefore, you don't have at the end of your statement the usual last paragraph that executive agencies have when they testify before this committee or submit a report. It would be nice if that were a part of your statement. Let me read that quote.

"The Office of Management and Budget has advised from the standpoint of the administration's program, there is no objection to the submission of this report to your committee."

I would have been very happy if we had that on the end of your report too, but unfortunately it isn't there. I guess we will have the Attorney General or one of his representatives testifying before this committee, and I suppose he will have that statement at the end of his report to us.

Let me ask, is the problem of screening files that you refer to on page 5 of your statement one that will be alleviated by the passage of this bill, or would you need some direct access provision to avoid that problem?

Mr. DEMBLING. The bill does not, of course, focus on that type of a problem. There is never a denial by the agency of any of the information. It is just a screening process or a review process through the various echelons of the hierarchy so that we are not denied the information directly, but it is a delaying tactic. It may be delayed so long that the audit is of no use.

Mr. ERLENBORN. Of course, here the 30-day limitation would prohibit that sort of delay?

Mr. DEMBLING. That is right.

Mr. ERLENBORN. So this would be helpful to some extent in screening?

Mr. DEMBLING. That is right.

Mr. ERLENBORN. A question has been raised by counsel, which I would like to ask you. What authority do you have to audit nonappropriated funds such as the post exchanges, the officers' clubs, and so forth?

Mr. DEMBLING. We do not have authority to audit nonappropriated fund activities because Federal appropriations are not involved in the operation.

Mr. ERLENBORN. Well, I wonder then, first of all, if we should consider extending your authority into that area, which I personally would think might be wise because of some of the scandals we have seen in the use of nonappropriated funds. Or, if we don't go that route, ought not that be included as an exception? That would not be in the language you have submitted to us, would it?

Mr. DEMBLING. No, it would not. We have been considering the proposal which has been suggested by many Members of the Congress that we do seek some legislation covering nonappropriated funding activities. We have considered drafting some type of language along that line—to give the Comptroller General authority over such activities.

[The suggested language follows:]

AUDIT OF NONAPPROPRIATED FUND ACTIVITIES BY GENERAL ACCOUNTING OFFICE

SEC. — (a) The operations of nonappropriated funds and related activities within the executive branch, the systems of accounting and internal controls and any internal or independent audits or reviews of such funds and activities shall be subject to review by the Comptroller General of the United States in accordance with such principles and procedures and under such rules and regulations as he may prescribe. The Comptroller General and his duly authorized representatives shall have access to such books, accounts, records, documents, reports, files, and other papers, things, or property relating to such funds and activities as are deemed necessary by the Comptroller General.

(b) To aid the Comptroller General in planning audits or reviews under subsection (a) of this section, each nonappropriated fund activity within the executive branch of the Government shall furnish to the Comptroller General at such times and in such form as he shall require an annual report of the operations of such activity, including an annual statement of financial operations, financial condition, and cash flow.

Mr. ERLENBORN. That is really a new subject that I hadn't thought of before, but at this point it appears to me that this might be a very fruitful area in which to expand the authority of the General Accounting Office. Many issues arise such as whether there is improper use of facilities, such as post exchanges, where materials are winding up in the hands of civilians who have acquired them through the post exchanges at much less cost than if they had gone into the general market.

Mr. DEMBLING. Yes, sir.

Mr. ERLENBORN. I think our committee has authority in this area and might turn their attention to that subject as well.

Thank you very much.

Mr. MOORHEAD. Mr. Alexander?

Mr. ALEXANDER. Thank you, Mr. Chairman.

Mr. Dembling, I appreciate the remarks you made, and I agree with Mr. Erlenborn that it is refreshing to a Member of Congress to find testimony from someone who has not gotten the approval of the Office of Management and Budget.

You mentioned a minute ago there were two areas where GAO had special difficulties in obtaining accounting activities. One is the Executive Office of the President, and one is the CIA. The CIA has traditionally been surrounded with a certain amount of mystique, as far as Congress at large is concerned. It is allegedly supervised by a secret board composed of certain members of certain committees of Congress. I don't wish to dwell on that particular area. But, I was interested when you referred to the letter from Mr. Dean, who has been in the news lately, concerning his refusal to provide information to the General Accounting Office about the personal travel of Mr. Nixon.

[For additional information regarding this incident, see appendix, p. 355.]

Mr. ALEXANDER. Are there other areas of the operation of the Executive Office of the President where you have encountered difficulties in obtaining information? For example, about the personal residences of the President? Have you examined government expenditures for providing facilities at the western White House or the southern White House and the other White Houses about the country?

Mr. DEMBLING. I don't believe we have looked into that matter, no, sir.

The only other item that I know that we were requested to check into by congressional request was the number of people that are detailed from various executive branch offices to the White House staff. We received a report from the White House on that matter.

Mr. ALEXANDER. Did the denial of Mr. Dean on the personal travel of the President go beyond the 707 fleet that is stationed at Andrews Air Force Base to the helicopter fleets?

Mr. DEMBLING. The request was directed primarily to the Andrews Air Force Military Airlift Command that operates the Presidential planes. The request was for the manifest of those planes or flights.

Mr. ALEXANDER. Did the request go beyond the 707 aircraft to the helicopters?

There have been certain reports recently about new helicopters for the White House and that is why I am asking you.

Mr. DEMBLING. I understand. I was going to refer to the language of the request. The letter from the Comptroller General said:

The records to be examined include passenger manifest and flight logs, which are on file at the Office of the Military Assistance to the President.

Prior to that it said:

The General Accounting Office has been requested by the Congress to examine records concerning flights made in September of 1972 by the President and his family, the Vice President, the White House staff, and Cabinet officers in aircraft assigned to the 89th Military Airlift Wing at Andrews Air Force Base, Maryland, and to the extent to which the U.S. Government has been reimbursed by the Committee to Reelect the President for these flights.

Then follows:

The records to be examined include passenger manifest and flight logs which are on file at the Office of Military Assistance to the President.

Mr. ALEXANDER. Mr. Dembling, would it be proper for you to reveal to me the person who made that request?

Mr. DEMBLING. I would be happy to supply it for the record, sir. [The information follows:]

The requests for the General Accounting Office to examine records concerning flights made in September of 1972 by the President and his family, the Vice President, the White House staff, and Cabinet officers were contained in letters from Senator Lawton Chiles and Senator William Proxmire dated August 31 and September 27, 1972, respectively.

Mr. ALEXANDER. Thank you very much.

One further question. You mentioned earlier that it would be helpful to the General Accounting Office if subpoena powers were made available to your institution. In what way do you envision that the power of subpoenas should operate? Who should have discretion and authority to order its issuance? To whom should the subpoenas be directed? Should they go beyond the agency heads to subheads, to the employees, to civil service rank, and so forth?

Mr. DEMBLING. We haven't given this too much thought. In the past we have sought subpoena powers for contractor records; this would enable us to obtain information from contractors that do business with the Government. We have not really focused on subpoena powers as it relates to Federal agencies and agency heads.

I responded to the chairman's question along the line that I think it would be helpful without spelling out exactly what procedures would be necessary.

Mr. ALEXANDER. Thank you, Mr. Chairman, and Mr. Dembling.

Mr. MOORHEAD. Mr. McCloskey?

Mr. MCCLOSKEY. Mr. Dembling, back in 1960, as I recall, the Comptroller General and the administration had some difficulty over a provision of the law that required a fund cutoff by the Comptroller General if the administration did not furnish certain information. Do you recall that example?

Mr. DEMBLING. I am aware of that situation; yes, sir.

Mr. MCCLOSKEY. I am wondering if inclusion of a fund cutoff in this bill would be appropriate, in your judgment, for an agency that declined to furnish information in compliance with this law; or, whether your experience with that law as it existed in 1960 would mitigate against that?

As I recall, the Comptroller General ruled that the funds would have to be cut off, and the Attorney General responded that such an action would be unconstitutional.

The matter was not resolved as I recall. It would seem to me that if we include such a provision in this legislation, we ought to try to resolve that kind of difficulty.

Would you respond?

Mr. DEMBLING. Yes, sir. The situation you are referring to involved military security program funds and there was a question of the availability of information at that time. You are correct, the Attorney General held that cutting off the funds would be unconstitutional and the President ordered the Treasury Department to continue the payment of funds.

A similar cutoff provision has been utilized most recently in the Appropriations Act for the foreign assistance and related programs

for fiscal year ending June 30, 1972. That provision essentially says that if information is not forthcoming after the expiration of a 35-day period, that funds should be cut off.

We have always been reluctant to recommend fund cutoff because of the problem of enforcing it. The problem of enforcing it against an entire agency—or against the bureau or office where the access problem exists has always bothered us.

We think there may be a confrontation and no resolution of the problem. We have thought of another approach to it and perhaps I might surface it. The idea is for the Comptroller General to institute a civil action in the district court. A special three-man court would be convened to expedite action and to resolve the problem.

Mr. McCLOSKEY. I take it that your past experience with this cutoff provision has been a difficulty of enforcement? You would not recommend a similar provision as part of this legislation as an enforcement tool; is that correct?

Mr. DEMBLING. That is correct, sir.

Mr. McCLOSKEY. Do you have draft legislation of this proposal? Have you carried it so far as to consider language that might effectuate this referral to the district court for expedited consideration?

Mr. DEMBLING. We are considering this at the present time. As I said, our thought has been generally to provide for a district court of three judges. Immediately upon filing a complaint, the matter would be referred to the chief judge of the appeals court, and he would convene the court and they would render a declaratory judgment.

Mr. McCLOSKEY. Mr. Dembling, on the matter of the example that you have specifically detailed at the conclusion of your statement, where the GAO has experienced difficulties with various agencies of the Government, I think it would be helpful to this committee if we had a specific statutory proposal that would resolve those questions in this legislation.

It seems to me, particularly with respect to the IRS, the Public Broadcasting System, and the Corporation for Public Broadcasting, that this legislation ought to clear up once and for all the total number of agencies that are exempted. Mr. Chairman, may we make this specific request to Mr. Dembling, at this time, to be furnished with suggested language that might resolve these difficulties discussed in his statement.

Mr. ALEXANDER. The committee would appreciate receiving any such recommendations based on the experiences of the General Accounting Office that may assist this committee in resolving the particular details that may result from problems of enforcement of this particular bill under consideration.

Mr. DEMBLING. Fine. We will try to supply something to the committee.

Mr. ALEXANDER. Thank you.

[The material referred to follows:]

ACCESS TO RECORDS BY THE GENERAL ACCOUNTING OFFICE

SEC. —. Section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 54), is amended to read as follows:

“Sec. 313. (a) Except where otherwise specifically provided by law including the authority contained in section 291 of the Revised Statutes (31 U.S.C. 107),

all departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, organization, transactions, operations, and activities of their respective offices as he may from time to time require of them; and the Comptroller General or any of his duly authorized representatives shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers or records of any such department or establishment.

"(b) (1) Each recipient of Federal assistance pursuant to grants, contracts, subgrants, subcontracts, loans or other arrangements, entered into other than by formal advertising, shall keep such records as the head of the department or establishment involved shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

"(2) The head of such department or establishment and the Comptroller General, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in paragraph (1) of this subsection, have access for the purpose of audit and examination to any books, documents, papers and records of such recipients which in the opinion of the head of the department or establishment or the Comptroller General may be related or pertinent to the grants, contracts, subgrants, subcontracts, loans or other arrangements referred to in paragraph (1) of this subsection."

SEC. —. (a) If any information, books, documents, papers or records requested by the Comptroller General from any department or establishment under section 313(a) of the Budget and Accounting Act, 1921, as amended, or any other authority, has not been made available to the General Accounting Office within a period of twenty calendar days after the request has been delivered to the office of the head of the department or establishment involved, the Comptroller General may institute a civil action in the United States District Court for the District of Columbia for declaratory relief in accordance with subsection (b) of this section. The Attorney General is authorized to represent the defendant official in such action. The Comptroller General shall be represented by attorneys employed in the General Accounting Office and by counsel whom he may employ without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapters III and IV of chapter 53 of such title relating to classification and General Schedule pay rates.

(b) Actions instituted pursuant to subsection (a) of this section shall be for the purpose of declaring the rights and other legal relations of the parties, in accordance with section 2201 of title 28, United States Code, concerning the Comptroller General's request for information, books, documents, papers, or records and no further relief shall be sought by the parties or provided by the court. Such actions shall be heard and determined by the district court of three judges. Immediately upon the filing of a complaint under subsection (a) of this section the matter shall be referred to the chief judge of the United States Court of Appeals for the District of Columbia Circuit, who shall designate three judges, at least one of whom shall be a circuit judge, to sit as members of the court to hear and determine the action. Actions under this subsection shall be governed by the rules or civil procedure to the extent consistent with the provisions of this section, and shall be expedited in every way.

(c) Any party may appeal directly to the United States Supreme Court from a declaratory judgment under subsection (b) of this section. Such appeal shall be taken within thirty days after entry of the judgment. The records shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(d) (1) Subject to paragraph (2) of this subsection, if after a declaratory judgment sustaining the Comptroller General's right to all or any information, books, documents, papers, or records requested becomes final such information is not made available to the General Accounting Office, no appropriation made available to the bureau, office or unit of the department or establishment which the Comptroller General identifies as being under review shall be available for obligation unless and until such information is made available to the General Accounting Office.

(2) Paragraph (1) of this subsection shall not become operative unless:

(A) the Comptroller General determines to invoke the provisions thereof and files with the Committees on Government Operations of the Senate and the House of Representatives notice of his determination, together with identification of the bureau, office or unit under review and the appropriations available thereto; and

(B) during thirty calendar days (excluding the days on which either House is not in session or adjournment of more than three days to a day certain or an adjournment of the Congress sine die) following the date on which the Comptroller General files such notice, neither House has passed a resolution stating in substance that it does not favor invocation of such provision.

(e) Where the conditions set forth hereinabove are satisfied paragraph (1) of subsection (d) shall become operative on the day following expiration of the thirty-day period specified in subsection (d) (2) (B).

Mr. McCLOSKEY. Thank you.

Mr. ALEXANDER. Mr. Gude?

Mr. GUDE. No questions.

Mr. ALEXANDER. Mr. Regula?

Mr. REGULA. Mr. Chairman, Mr. Dembling, two questions. Is the information that your office obtains open to all Members of Congress on a free basis or a complete basis?

Mr. DEMBLING. Yes, sir, our reports are available to all with one exception, and that is where a Member of Congress has asked us to investigate a matter, we will provide that to him. We are serving as an agent of his office at the time, and we will provide that information to him and wait for his release of that information to other Members of the Congress.

Mr. REGULA. Mr. Chairman, Mr. Dembling, do you respond freely to any request from any Members of Congress for any information made of your agency?

Mr. DEMBLING. Well, to the limit of our staff and our capabilities we do. If we have an overall review in being at the time, we try to have the Member recognize that we will be covering his particular interest in that overall review.

Mr. REGULA. Then, the other area I have, I gather from reading your testimony and the appendix, one of the tactics used against the agency is just delay. Do you feel that the 30-day provision is an important feature of the bill, and do you feel that 30 days is adequate time recognizing, for example, you are seeking information that might be overseas, if it were some type of agency with the Foreign Service?

Mr. DEMBLING. Yes, I think that that is a valid and reasonable time, and I think it would go far to help us. When we were reviewing the bill, we asked ourselves the same question; namely, is 30 days a reasonable period of time, or should it be less or should it be more?

You will note that foreign assistance program appropriation language is in terms of 35 days. We think the 30 days is a reasonable period of time.

Mr. REGULA. I have one other question, Mr. Chairman, and that would be is it possible in your judgment to do a more effective job of computerizing information so, for example, we could have the journal of this committee to give us instant access of statistical data?

Mr. DEMBLING. You are probably aware that GAO is working with the Joint Committee on Congressional Operations. GAO is acting as the agent of Congress, and working with the Office of Management and Budget and the Treasury Department in developing a standard-

ized fiscal and budgetary data system. This is required by title II of the Legislative Reorganization Act of 1970. We hope that that will be a viable method of keeping the Members of the Congress informed and supplying the type of information that they seek and need in order to legislate.

Mr. ALEXANDER. Mr. Phillips?

Mr. PHILLIPS. There is just one question, Mr. Chairman.

On the bottom of page 4 of your appendix, Mr. Dembling, you refer to the "March 15, 1972, action of the President in invoking executive privilege on foreign assistance documents." One of these two cases that occurred on that day involved this subcommittee and our request for the country field submissions for Cambodia.

On the next page you describe the AID operative personnel instructions to implement the President's directive. That was issued at the time he invoked executive privilege last March, and then you quote several paragraphs from those instructions.

I think the record should show, Mr. Chairman, an exchange of correspondence between the chairman of this subcommittee and Dr. John Hannah, Administrator of Agency for International Development, in the last several weeks. It began on March 6, 1973, with a letter from the chairman to Dr. Hannah requesting the country field submissions for the East Asia regional development program for fiscal 1973 in connection with an ongoing study by this subcommittee involving that program. On March 22, the chairman received a letter from Dr. Hannah denying the subcommittee access to this country field submission and applying it in a way that seemed to be an assertion of executive privilege on the part of Dr. Hannah, and not by the President himself, as is required by the President's directive of March 24, 1969.

Chairman Moorhead on March 28 responded to that letter by inviting Dr. Hannah to testify this week at these hearings, to explain any change in the executive privilege guidelines. Following a staff meeting yesterday with AID personnel, a letter was delivered this morning from Dr. Hannah in which he states that he had not meant to imply in his March 22 letter that he was invoking executive privilege and that the Presidential guidelines are still in effect. Thus this problem of access to this CFS will have to be resolved at another time.

But I would ask consent to insert at this point in the record this exchange of correspondence because it does relate to the subject matter before us.

Mr. ALEXANDER. Without objection, it may be admitted.

[The material follows:]

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., March 6, 1973.

Hon. JOHN A. HANNAH,
Administrator, Agency for International Development,
Washington, D.C.

DEAR DR. HANNAH: In previous years, as you may recall, our subcommittee requested and received copies of many of AID's country field submissions. You will also recall that when the subcommittee requested the Country Field Submission for Cambodia, President Nixon exercised what he considered as executive privilege and ordered the document withheld from the subcommittee on the basis that it contained proposals for future years' programs which were under consideration within the executive branch.

Subsequently, on May 31, 1972, the Assistant Secretary of State for Congressional Relations testified that "the President's invocation of executive privilege * * * did not constitute a blanket delegation of the authority to his subordinates to claim this privilege. Its exercise remains personal and, therefore, restricted to the most essential issues."

In connection with the subcommittee's continuing study of AID's East Asia regional program, I would like, at this time, to request a copy of the fiscal year 1973 "Country Field Submission" prepared by the Office of Regional Development in Bangkok. The country field submissions for fiscal years 1971 and 1972 contain nothing which I can see to be a "most essential issue." Further, I have delayed making this request until final congressional action on AID's fiscal year 1973 funding request to preclude the withholding of the document on the basis that it contains proposals for future years' programs which are under current consideration within the executive branch.

I would appreciate your prompt and favorable response to this request.

With kind regards,

Sincerely,

WILLIAM S. MOORHEAD,
Chairman

DEPARTMENT OF STATE,
AGENCY FOR INTERNATIONAL DEVELOPMENT,
Washington, D.C., March 22, 1973.

Hon. WILLIAM S. MOORHEAD,
*Chairman, Subcommittee on Foreign Operations and Government Information,
Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This responds to your letter of March 6, 1973, requesting a copy of the fiscal year 1973 "Country Field Submission" prepared by the Office of Regional Development in Bangkok.

As you know, the President, in a memorandum dated March 15, 1972, directed the Secretary of State not to make available to the Congress "Country Field Submissions" because they are basic planning documents which set forth intermediate staff level recommendations which are not approved executive branch decisions.

You refer in your letter to the President's directive but imply that you believe the document in question is no longer within the scope of the decision in that there is now an approved executive branch position with respect to the program to which the document refers.

We believe that such an interpretation overlooks the principal basis of the President's decision, "* * * that unless privacy of preliminary exchange of view between personnel of the executive branch can be maintained, the full frank and healthy expression of opinion which is essential for the successful administration of Government would be muted." "Country Field Submissions," at the time of their preparation, contain recommendations and opinions from officials in the field which are but one step in the decisionmaking process leading to an executive branch position. It is important that the candor and independence of judgment of the authors of CFS documents be insured because of the important role played by these internal documents in this decisionmaking process. The release of a "Country Field Submission" after the executive branch has arrived at an approved position would have the same undesirable impact upon the internal process as would the disclosure of the contents prior to a final executive branch decision. Full and frank expression of ideas would be discouraged in the same manner.

As you know, the President also directed that, in lieu of the country field submission document, Congress be provided with "all information relating to the foreign assistance program and international information activities" not inconsistent with his decision. Accordingly, we are prepared to furnish the subcommittee with the substantive information contained in the country field submission of the Office of Regional Development and to provide the subcommittee with all information relative thereto which is appropriate in light of the President's directive. According to your wishes, we will make such information available in either a detailed written presentation or in a full oral briefing.

Sincerely,

JOHN A. HANNAH,
Administrator.

MARCH 28, 1973.

Hon. JOHN A. HANNAH,
Administrator, Agency for International Development,
Washington, D.C.

DEAR DR. HANNAH: Your March 22d response to my letter of March 6, denying our request for a copy of the fiscal year 1973 country field submission prepared by the Office of Regional Development in Bangkok, raises serious questions which need to be answered.

As I explained in my letter, testimony before our subcommittee on May 31, 1972, by the Assistant Secretary of State for Congressional Relations made it clear that the President's March 15, 1972, memorandum regarding country field submissions and their availability to the Congress "did not constitute a blanket delegation of the authority to his subordinates to claim this privilege." Such interpretation was also given the subcommittee in testimony that same day by the Department's deputy legal adviser.

The subcommittee is holding hearings next week on the subject of "executive privilege" and desires to explore what appears to be a contradictory opinion to that of previous Department witnesses on this subject. We suggest either Wednesday, April 4, or Thursday, April 5, as optional dates. Since hearings will be in both the mornings and afternoons of those days, we will make our schedule flexible enough to accommodate you. If additional details on the desired scope of your testimony are required, please contact the subcommittee office: 225-3741.

In accord with the rules of the committee, it would be appreciated if 50 copies of your prepared statement are delivered to Mr. William G. Phillips, subcommittee staff director, room B-371B, Rayburn House Office Building, 24 hours in advance of your appearance.

We will look forward to hearing from you so that this most serious problem can be fully discussed and, hopefully, resolved in an expeditious manner.

With best regards.

Sincerely,

WILLIAM S. MOORHEAD,
Chairman.

DEPARTMENT OF STATE,
 AGENCY FOR INTERNATIONAL DEVELOPMENT,
Washington, D.C., April 3, 1973.

Hon. WILLIAM S. MOORHEAD,
Chairman, Subcommittee on Foreign Operations and Government Information,
Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This acknowledges receipt of your letter of March 28, 1973, and the invitation to attend hearings of the subcommittee on the subject of executive privilege.

I regret that my letter of March 22 with respect to the release of the country field submission for the Office of Regional Development in Bangkok may have led to a misunderstanding over AID's interpretation of the President's memorandum of March 15, 1972. I trust that a statement of AID's position on this subject will resolve the problems to which you refer to the satisfaction of all concerned.

The guiding policy of the administration on the subject of executive privilege was set forth in the President's memorandum of March 24, 1969, to heads of executive departments. In that directive, the President announced that the administration would invoke the authority to withhold information from the Congress "only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise." The authority was to be exercised only with "specific Presidential approval".

The President's invocation of executive privilege on March 15, 1972, has not been interpreted by AID as either a blanket exercise of the privilege or a delegation of the authority of the President to subordinates in the executive branch. Such would be contrary to the clear meaning of the March 24, 1969 directive. Instead, the memorandum indicates that requests for country field submissions and other comparable planning documents raise issues of particular importance which require careful review on a case-by-case basis. We have established a procedure to assure that such a review takes place.

Turning to my letter of March 22, it was not my intent in offering to the committee substantive factual information in lieu of the CFS document itself, to

deny the report requested by the invocation of executive privilege authority, which is reserved to the President alone. It was my hope that a full oral briefing or written presentation regarding the contents of the document would fulfill the requirements of the subcommittee. I have instructed my staff to work with yours to establish a mutually acceptable solution to the problem along these lines.

If I can be of further assistance please advise me. I regret that I shall be unable to accept your invitation to appear before the subcommittee on either April 4 or April 5 due to previous commitments.

Sincerely,

JOHN A. HANNAH,
Administrator.

**HOUSE FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,**
Washington, D.C., April 4, 1973.

Hon. JOHN A. HANNAH,
*Administrator, Agency for International Development,
Washington, D.C.*

DEAR DR. HANNAH: Your letter of April 3, 1973, advising that it was not your intent to deny the subcommittee a copy of the fiscal year 1973 country field submission for the East Asia regional program by the invocation of executive privilege, has been received. Also, your offer to provide the subcommittee substantive factual information in lieu of the document itself has been carefully considered. However, as previously noted by the subcommittee, it is essential that we have access to the document itself.

I had hoped that my letter of March 6, 1973, would have made it clear that the subcommittee has a current need for the document itself and that I did not believe—under any stretch of the imagination—the document could be refused under the so-called doctrine of “executive privilege.” Further, the Presidential memorandums which you mention as providing the guiding policy of the administration do not appear to provide a basis for withholding the document requested.

The President’s memorandum of March 24, 1969, as you acknowledge, stated that the administration would withhold information from the Congress “only in the most compelling circumstances.” Further, the President’s invocation of “executive privilege” of March 15, 1972, directs agencies “not to make available to the Congress any internal working documents concerning the foreign assistance program or international information activities, which would disclose tentative planning data, such as is found in the country program memoranda and the country field submissions, and which are not approved positions.”

I am convinced that the CFS requested does not fall within the foregoing guidelines. Further, your view that full and frank expression of ideas would be discouraged in the event that the country field submissions are released to the duly constituted committees of Congress seems equally without merit. The contents of the country field submissions are simply not that full of novel ideas. Furthermore, the identity of the originators of the materials contained in the country field submissions are not shown. In fact, the submissions are not actually printed until after complete review by both the mission involved and AID/Washington; thus, the published country field submissions actually represent the Agency’s views, rather than any identifiable individual or group of individuals.

Therefore, I must again request that a copy of the fiscal year 1973 country field submission for your East Asia regional program be provided to this subcommittee. You must realize that without free and unrestricted access to all personnel and records of AID, this subcommittee is seriously handicapped in carrying out its oversight responsibilities over the vast amounts of taxpayer’s moneys which are appropriated to and expended by the Agency for International Development.

I sincerely hope that you will see fit to provide the document requested to this subcommittee at an early date.

With kind regards.

Sincerely,

WILLIAM S. MOORHEAD,
Chairman.

Mr. ALEXANDER. Mr. Cornish.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. Dembling, I notice in your statement that you make a rather strong assertion that GAO is not interested nor does it desire to conduct preaudits. Is that correct?

Mr. DEMBLING. Yes, we do not seek to prejudge the decisions.

Mr. CORNISH. Of course, you are aware that the Agency for International Development on occasion does a preaudit. Do you happen to know if those preaudit reports are made available to you?

Mr. DEMBLING. I am not aware of that; no sir.

Mr. CORNISH. I wonder, Mr. Chairman, if that information could be submitted for the record because it is very important in that many times a preaudit can prevent a mistake from being made. Unfortunately, I think most audits are strictly after the fact when they could have been very valuable in helping decisionmakers actually make sounder decisions.

Mr. ALEXANDER. Mr. Dembling, do you have the information?

Mr. DEMBLING. I will check and see whether we obtained any preaudits from the AID organization.

Mr. ALEXANDER. And you are suggesting, Mr. Cornish, that if it is there, it should be made a part of the record?

Mr. DEMBLING. I will supply that answer for the record.

Mr. ALEXANDER. All right, so ordered.

Mr. CORNISH. What I am interested in is whether GAO has access to preaudit reports made by the Agency for International Development.

Mr. ALEXANDER. All right. Would you supply that for the record?

Mr. DEMBLING. Yes, sir.

[The material follows:]

The only preaudit reports of the Agency for International Development of which we are aware are those on preaward audits in the contract administration area. Those preaudit reports are included in the contract files and are available to the General Accounting Office.

Mr. CORNISH. My second question, Mr. Dembling, is simply this. I note in your statement that you quite properly point out the adverse effect of delays in receiving information when they are sifted through the bureaucratic process and a decision is made whether to give it to you or not.

Now, do you really believe that this particular legislation will solve that special problem or will it continue to exist even with the passage of this legislation?

Mr. DEMBLING. Well, I would hope that the 30-day provision would help speed up the information, but I am not sure whether it will cure it totally.

Mr. CORNISH. Wouldn't you be put in the position of virtually writing a formal letter for the basis of making a record in each instance where you desire information in order to qualify under the legislation?

Mr. DEMBLING. I suppose it would require that, yes, so that the time limit would start running.

All of the examples that we have listed in the appendix are those where the Comptroller General himself has made a request and where he has been refused. There are many refusals at lower levels in agencies throughout the Government, but as it goes through the various echelons, it is clarified and we do finally get access to the information that is required.

Mr. CORNISH. Now, don't you frequently run into situations where you ask for a particular file on a subject matter and are told that well, yes, you can have that information but first we must screen this file and make certain it doesn't contain items which you should not have in our view and doesn't this process take a long time?

Mr. DEMBLING. Yes, sir, it does. That is what I was referring to.

Mr. CORNISH. Yes, and doesn't it also adversely affect the timing of reports made to Congress on various programs so that in some cases the information is so outdated it is of little value?

Mr. DEMBLING. Yes, sir, I made mention of this earlier on where a program has lapsed so that there is nothing left to really bring to the Congress attention and I give one example of that in the appendix. That was a request by the Congress for us to do a review of how the IRS was monitoring price controls. There were delaying tactics by the Treasury Department so that finally when phase II ended and IRS was no longer monitoring the prices, there was no need to run a review.

Mr. ALEXANDER. Mr. McCloskey?

Mr. McCLOSKEY. Just one thing I would like to establish for the record, Mr. Dembling.

When the GAO performs its functions, you have access to all classified information such as "top secret," "secret," and "confidential"; do you not?

Mr. DEMBLING. Yes.

Mr. McCLOSKEY. In that review of classified information, do your employees undergo any national agency checks such as executive branch employees undergo before they obtain the top secret clearance?

Mr. DEMBLING. Yes, sir, we must undergo whatever agency checks that are required. Full field investigations are conducted for top secret clearance. If one has access to atomic energy information, he must undergo a Q clearance process, and so forth.

Mr. McCLOSKEY. To that extent, the access of your employees to information is subject to an executive checks and balance; are they not?

Mr. DEMBLING. Yes, sir, from that standpoint.

Mr. McCLOSKEY. Now do you see any practical difficulty in the classified information ascertained by your investigators being revealed to Congress and congressional personnel who are not so cleared for security purposes?

In other words, is there any procedure you follow?

Mr. DEMBLING. We maintain the classification of all information that is given to us throughout the review and audit. If such classified information is used in an audit report we then classify that portion of the audit report or the entire audit report as appropriate. We follow the executive branch classification on any of that information. When it is made available to the Congress, it still contains that classification on it.

Mr. McCLOSKEY. I see, so that as Mr. Regula inquired, if your information is freely available to the Congress, the Congress or individual Congressman is advised when he receives the information that it bears this classification?

Mr. DEMBLING. Yes, sir.

Mr. ALEXANDER. Mr. Gude?

Mr. GUDE. Mr. Dembling, in the legislation that we are considering it defines the information or testimony in which executive privilege can be invoked as being only that testimony or that information which contains policy recommendations made to the President or agency head. Then the President determines that disclosure of such information will seriously jeopardize the national interest and so on.

Congressman Reid has introduced a bill also pertaining to executive privilege and I think the principal distinction between his bill and the bill which we have been hearing on from Mr. Erlenborn says that the Executive will make available to the requesting body the nature of any advice, recommendation, or suggestion as distinct from any form of information included within or forming the base of such advice, recommendation, or suggestion.

In other words, it would seem to me in the Erlenborn bill that we have under consideration there is a linkage between factual information that is in the recommendation and the recommendation itself, whereas in Congressman Reid's bill it says that the information, that is encompassed within the recommendation, shall be available.

Do I make clear the distinction between what I think is really the heart of both bills?

Mr. DEMBLING. If I understand it correctly, your question is whether the provision in H.R. 4938 is a broader definition of the information that will be protected by executive privilege?

Mr. GUDE. Well, it seems to me that it is a broader area there and I would ask you if you agree?

Mr. DEMBLING. It appears to be from the way you have described Congressman Reid's bill. I haven't studied it but as you read it it appeared to be.

Mr. GUDE. I will read that section of his bill slowly then:

"Nothing in this subsection shall be construed to require the President or other head of any agency of the United States to make available to a requesting body the nature of any advice, recommendation, or suggestion—as distinct from any form of information included within or forming the basis of such advice, recommendation, or suggestion made to him in connection with matters fully within the scope of his official duties," and so on.

Now—Mr. Dembling, I think as we stated before, that Congressman Reid's bill is a tighter form of the information and that the bill before us today is a broader one, Mr. Dembling. It appears to be.

Thank you.

Mr. ALEXANDER. Mr. Cornish, do you have any further questions?

Mr. CORNISH. No, thank you.

Mr. ALEXANDER. Mr. Regula?

Mr. REGULA. Is all information in your agency, Mr. Dembling, available to the executive branch?

Mr. DEMBLING. I don't know what your question would pertain to. However, when we do an audit on an agency which will result in a report to the Congress, we send the draft to the agency for comments. Those comments are inserted in the report so that the Congress will have the benefit of the agency's viewpoint. So it is not a question of our having access to information which the agency does not.

Mr. REGULA. Thank you.

Mr. ALEXANDER. Mr. Copenhaver, any questions?

Well, thank you very much, Mr. Dembling. We appreciate your testimony. It has been helpful.

The subcommittee will meet in the same room tomorrow at 10 a.m. and hear the testimony of the Justice Department and of Mr. Clark Mollenhoff, Washington Bureau Chief of the Des Moines Register and former special counsel to Mr. Nixon. Mr. Mollenhoff is one of the Nation's leading experts on the subject of executive privilege and we look forward to hearing from him on this important legislative proposal that is before us today.

Mr. McCLOSKEY. Mr. Chairman, might we reiterate the request that has been previously made to Mr. Dean that he come and testify tomorrow? The only testimony we have received from the executive branch was that which was delivered by Deputy Attorney General Rehnquist over a year ago.

Mr. ALEXANDER. I thank the gentleman from California for making that suggestion. As acting chairman, I would reiterate our invitation to Mr. Dean, counsel to the President, to appear before this committee tomorrow. It would appear to me that based upon his most recent experiences, he is peculiarly qualified to testify on this subject that is before this subcommittee and we would appreciate any enlightenment which he might bring to us by way of a personal appearance.

The subcommittee stands adjourned.

[Whereupon at 11:55 a.m., the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, April 4, 1973.]

AVAILABILITY OF INFORMATION TO CONGRESS

WEDNESDAY, APRIL 4, 1973

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Bill Alexander, John N. Erlenborn, Paul N. McCloskey, Jr., Gilbert Gude, Charles Thone, and Ralph S. Regula.

Also present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; Harold F. Whittington, professional staff member; L. James Kronfeld, counsel; William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

This morning we continue our hearings on H.R. 4938 and companion legislation requiring that all information shall be made available to the Congress and the Comptroller General of the United States by executive agencies, except in cases where the President himself invokes the claim of executive privilege.

At the conclusion of yesterday's hearing, the question was raised by members of this subcommittee as to whether or not the President has responded to the letter sent to him by Mr. Erlenborn and myself requesting that his counsel, Mr. John W. Dean III, be permitted to testify on this legislation. The staff was instructed to contact the White House to see if a decision had been made by the President in this regard. A call was placed to Mr. Dean by the staff director after the conclusion of our hearing yesterday. He was unavailable but his assistant, Mr. Fred Fielding, informed the staff director that he understood a letter had been prepared for transmission to the subcommittee refusing our invitation. That letter has not yet arrived. When it does, it will be included in the hearing record.

As I explained yesterday in my opening statement, the subcommittee has received little cooperation from other executive branch witnesses invited to testify on H.R. 4938. The Secretary of the Treasury and the Secretary of Health, Education, and Welfare declined to appear or to designate a departmental spokesman, as did the Office of

Management and Budget. Each agency we contacted stated that the Department of Justice would present the views of the administration on this most important issue of congressional access to executive branch information. Each agency of the Federal Government said they could add nothing of value to the testimony to be given by the Department of Justice witness.

Testimony from the Department of Justice on the legislation before this subcommittee obviously will set forth the administration's position on this historic occasion. This is the first time that any committee of the House of Representatives has held hearings on a legislative solution to the problem of executive privilege.

And it is most proper, on this occasion, that the administration's position on the use of so-called executive privilege should be stated by a government representative who is a recognized professional in the area. The administration spokes-person, Mary C. Lawton, is the Deputy Assistant Attorney General in the Office of Legal Counsel. She is a career Government lawyer, serving for nearly 13 years in the Office of Legal Counsel which acts as the Justice Department's law office. And, of course, the Department of Justice acts as the law office for the entire administration.

Thus, there is placed on Ms. Lawton's shoulders an important—and heavy—burden today. Following her statement of the administration's position, and the questioning by subcommittee members, we will hear testimony from Mr. Clark Mollenhoff, formerly a special counsel to President Richard M. Nixon, now the Washington bureau chief of the Des Moines Register and an acknowledged expert on the problems of Government secrecy who first testified on this subject before the Congress at the first hearings of this subcommittee in November 1955.

Please come forward, Ms. Lawton.

Ms. Lawton, let me say, that I have read your statement, I hope you will not take my next remarks personally, because I realize this is the Department's policy and not yours, personally. Since this legislation was an attempt by Republican members of this subcommittee to reach some sort of a resolution of this problem—which has plagued the United States since the beginning of time probably—I had hoped that your testimony would be more constructive. If we are going to adopt this legislation, we, as legal experts, might suggest that it could be approached this way, or that way.

But instead you do not take a positive approach at all. Again, I am sure you were operating on instructions about the nature of your testimony and, while it is very ably written and cogently expressed, it is very much on the negative side. I hope when we get to the questioning period later, you will be thinking about how, if this committee, in its wisdom so decides—against the judgment of the Justice Department—that we should enact legislation in this field, you would help us to make it better legislation.

Now, that, I hope, is not an unfriendly introduction. Mr. Erlenborn, do you have anything to add?

Mr. ERLENBORN. No.

Mr. MOORHEAD. Would you now proceed, Ms. Lawton?

**STATEMENT OF MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY
GENERAL, OFFICE OF LEGAL COUNSEL; ACCOMPANIED BY
NATHAN SIEGEL**

Ms. LAWTON. Thank you. I know the statements reached the committee very late and there were only six Xeroxed copies because of a change of date. Would you prefer that I go through the entire statement or abbreviate it?

Mr. MOORHEAD. I believe the statement is so important and, because at this stage in the hearings, you are going to be the only administration witness, since HEW, Treasury, and OMB have deferred to Justice, I believe it would be wise if you would go through the entire statement.

Ms. LAWTON. As you wish.

First, may I introduce Mr. Nathan Siegel of our staff who has been with the Office of Legal Counsel a little longer than I have.

Mr. MOORHEAD. We welcome you both.

Ms. LAWTON. I am pleased to appear before the subcommittee as the Attorney General's representative to testify on H.R. 4938. The bill would amend the Freedom of Information Act to require that all information be made available to Congress by the executive branch, except where executive privilege is authorized to be invoked under the specific conditions set forth in the bill.

The bill would add a new subsection to 5 U.S.C. 552 consisting of three specific directives to the executive branch. The first would require an agency head, on request of the Congress or any of its committees or the Comptroller General, to make information available within 30 days unless the President invokes executive privilege as a basis for refusing the information. The second would require any officer or employee of an agency to appear on request before Congress and supply all information sought except to the extent that particular items of information are specifically ordered withheld by the President on a claim of executive privilege. The third attempts to restrict the instances in which executive privilege can be invoked to only those instances (1) where the requested information or testimony contains policy recommendations made to the President or agency head, and (2) where the President determines that disclosure of such information will seriously jeopardize the national interest and his ability or that of the agency to obtain forthright advice. "Agency" is defined for purposes of this subsection to include a department, agency, instrumentality, or other authority of the Government of the United States, including any establishment within the Executive Office of the President.

The Department of Justice opposes enactment of the bill because it trenches upon the constitutional right of the President to withhold certain information in the public interest and because it is likely to result in unnecessary burdens on officers and employees of the executive branch. In addition, it presents a number of technical problems.

I. THE CONSTITUTIONAL UNDERPINNINGS OF EXECUTIVE PRIVILEGE

The authority of the President to withhold certain information from the coordinate branches of the Federal Government stems from the separation of powers doctrine embedded in the first three articles of the Constitution and implicit throughout the document. While not expressed in a constitutional clause, executive privilege is necessarily implied from the powers vested in the President by article II. Cf. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936). This has been recognized since earliest times.

Throughout history, Presidents have offered various reasons for the exercise of the privilege to withhold information from the Congress or the courts. In 1798 George Washington, in refusing a request of the House to produce copies of instructions to his minister relating to treaty negotiations, explained :

The nature of foreign negotiations requires caution, and their success must often depend on secrecy ; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolite ; for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. (Richardson, *Messages and Papers of the Presidents*, vol. 1, pp. 194-95.)

Speaking of Washington's refusal to accede to the request in this instance, the Supreme Court has said that the wisdom of this action "was recognized by the House itself and has never since been doubted." *United States v. Curtiss-Wright Corp.* (299 U.S. 304, 320 (1936)).

Similarly, the sensitive nature of military secrets has been a basis for refusing information both to the courts, under the evidentiary State secrets doctrine (*United States v. Reynolds*, 345 U.S. 1 (1953)), and to the Congress under the doctrine of executive privilege. It is a basis the Congress itself has recognized :

[T]he administration has the legal right to refuse the information [concerning the U-2 incident] under the doctrine of executive privilege. (S. Rept. 1761, 86th Cong., 2d sess., p. 22.)

As H.R. 4938 recognizes, the need to receive candid advice from subordinates, free from second-guessing by others, has also prompted Presidents to claim executive privilege, as has the necessity of protecting raw investigative data, both to preserve the effectiveness of the investigatory process and to protect individuals (40 Op. A.G. 45).

While the bill under consideration recognizes the existence of the constitutional privilege, it does so in a manner which in our view unduly restricts the privilege. It would permit a claim of privilege only where the information pertains to policy recommendations the disclosure of which would seriously jeopardize the national interest and also jeopardize the ability of the President or an agency head to obtain forthright advice. These restrictions would exclude several areas concerning which privilege has traditionally been claimed and where Congress has acknowledged the propriety of the claim. For example, data on troop movements during time of war is a matter of fact, not a policy recommendation. It would not be subject to a claim of privilege under this bill. The substance of sensitive conversations between the President and a foreign head of state might not in any way affect his ability to obtain forthright advice, and yet it should not be

disclosed because of the adverse effect on foreign relations. Raw investigative files contain no "policy recommendations" yet disclosure may seriously injure innocent persons as well as jeopardize the Government's ability to obtain information in the future. Such a drastic and unprecedented attempt to circumscribe executive privilege clearly infringes on the ability of the executive branch to carry out the functions entrusted to it by the Constitution.

Moreover, the bill fails to recognize the principle that, as with other privileges, the claimant is the one who makes the ultimate determination to claim the privilege. In responding to the subpoena duces tecum approved by Chief Justice Marshall in the *Burr* case, Thomas Jefferson wrote:

Reserving the necessary right of the President of the United States to decide independently of all other authority, what papers coming to him as President the public interest permits to be communicated, and to who, I assure you of my readiness, under that restriction, voluntarily to furnish on all occasions whatever the purposes of justice may require. *United States v. Burr*, 25 Fed. Cas. (No. 14,693) 55, 65.

Similarly, a court in refusing to enjoin the Congress from retaining certain information, or making use of it, or disclosing it observed:

If a court could say to the Congress that it could use or could not use information in its possession, the independence of the legislature would be destroyed and the constitutional separation of the powers of Government invaded. Nothing is better settled than that each of the three great departments of Government shall be independent and not subject to be controlled directly or indirectly by either of the others. (*Hearst v. Black*, 87 F. 2d 68, 72 (D.C. App. 1936).)

The constitutional infirmity of this bill, as we view it, is the attempt by Congress to regulate when and how the Executive may exercise a privilege which the Constitution confers on him. This strikes at the very basis of the separation of powers—the independence of the three coordinate branches. A protective constitutional principle may perhaps in certain situations be expanded remedially by legislation, but it cannot be substantially contracted by legislation. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

II. POSSIBLE INTERFERENCE WITH EXECUTIVE OPERATIONS

Proposed section 552(d)(2) would require the presence of a Government officer or employee to testify whenever requested by Congress. He must appear personally and supply all information requested, except to the extent that items of information are specifically ordered withheld by the President. Presumably the officer or employee would be required to appear even if all of the information requested has been subjected to a claim of executive privilege. This presents several problems.

As defined in the bill, "agency" includes "any establishment within the Executive Office of the President." It is not clear whether "establishment" would include personal advisers such as Dr. Kissinger as well as the heads of statutorily established entities such as the Office of Management and Budget. If it is intended to apply to personal advisers it would, in effect, strike at the President himself. (Compare, *Gravel v. United States*, 408 U.S. 606 (1972).) Moreover, it could create the awkward situation of having a personal adviser serve as a messenger

who appears for the sole purpose of delivering the President's letter asserting that the entire inquiry as to the adviser is subject to executive privilege. Furthermore, it may interfere with the performance of important duties. Would Dr. Kissinger be required to cancel a projected trip to China, for example, merely to serve as letter carrier to a committee?

In 1971, the late Dean Acheson had occasion to testify on a similar provision contained in S. 1125 of the 92d Congress, which was not enacted. In his statement he expressed the fear that such a provision carries the possibility of infinite harassment and embarrassment to both the President and his subordinates and that the provision would be incompatible with public interest. Relying on his long memory of service as a public servant he observed :

With what relish one can imagine Senator Joseph McCarthy conducting these examinations without judge or defending counsel. Television would, of course, occupy half the hearing room; the press the other half. The employee's duties, relations with the President, with other employees in the White House, the State Department, and representatives of foreign governments, his qualifications for his duties, past experience, social life, and friends would all receive attention. He would be asked about matters he had worked on, although not the substance of them, aside from the one on which he was summoned, and long arguments would be provoked about whether the President's letter provided exemption from answering extraneous questions irrelevant to its principal subject.

As summons might follow summons as fast as committee clerks could get them out with the aid of the Congressional Directory and these witnesses followed one another with letters asserting privilege, what a picture could be created of a President in the center of a web of secret machination. What a picture presented to the world of government as bizarre, absurd, and divided by tragic vendettas as the King of Morocco's birthday party.

In short, what a hell of a way to run a railroad !

[Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st sess., on S. 1125, pp. 260-261.]

Mr. Acheson said, in response to questions by Professor Kurland, that the privilege should be claimed ultimately by the President and not by subordinate officers. But he thought the requirement that subordinate officers appear at every call was capable of abuse and undesirable for that reason :

But to pick out some poor unhappy little creature down in a department and say, come up here and tell me about this, in the first place, it isn't sporting, and in the second place, it isn't legal, and in the third place, it is bad politics. And it just isn't the way to do things. *Id.* at 267.

In this connection, it should be noted that the instant bill places no limits on the kinds of employees who may be called to testify. Career personnel without policymaking responsibilities would be as subject to call as agency heads appointed by the President with the advice and consent of the Senate. This is unfair to the subordinates, particularly where the inquiry concerns their advice and recommendations to their superiors. It could also prove unfair to the agency head, who would be required to appear in person at every turn regardless of interference with the performance of his regular duties, and who would be disabled by the bill from sending an expert substitute.

III. TECHNICAL PROBLEMS IN THE BILL

Aside from the constitutional and policy difficulties discussed above, there are a number of technical problems raised by H.R. 4938.

The present Freedom of Information Act, which this bill would amend, requires information to be made available to the public with certain exceptions. 5 U.S.C. 552(b). These exceptions, some of which appear to parallel the grounds for claiming executive privilege under proposed subsection (d) (3), do not constitute authority "to withhold information from Congress." 5 U.S.C. 552(c). The proposed subsection (d), however, purports to recognize executive authority to withhold information from Congress under certain circumstances. Its relationship to the remainder of the Freedom of Information Act is unclear.

The present sanction for failure to comply with the Freedom of Information Act is through suit in the Federal district courts. 5 U.S.C. 552(a) (3). This provision obviously was not written to permit suit by the Congress against the Executive, since the Freedom of Information Act was not intended to affect the providing of information to the Congress. If it is amended to do so, what effect does this have on the judicial review provision?

One of the criteria for claiming executive privilege in proposed subsection (d) (3) is a determination that the information would "jeopardize the national interest." The Freedom of Information Act permits information to be withheld from the public when required by Executive order "to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. 552(b) (1). The use of different terminology within the same statutory section suggests that different meanings are intended, but it is far from clear what difference is contemplated.

Finally, the proposed new subsection (d) would include its own definition of "agency" covering, apparently, every part of the "Government of the United States" except the Congress or the courts. This contrasts with the definition of "agency" applicable to the rest of the Freedom of Information Act and, indeed, to the rest of the Administrative Procedure Act, 5 U.S.C. 551(1). The creation of a special definition of agency raises a number of problems. Does the failure to except from the term "agency" the governments of the territories, the government of the District of Columbia, agencies composed of representatives of the parties to a dispute, courts martial, etc., indicate an intent to include them? [Compare 5 U.S.C. 551 (1)(C), (D), (E), (F).] Does the reference to "any establishment within the Executive Office of the President" include individual Presidential advisers as well as distinct units? Does it include cabinet or other committees chaired by the President personally? Does it include advisory bodies as well as "authorities" covered by the rest of the Freedom of Information Act? These questions involve not only problems of construction but also raise fundamental constitutional issues.

IV. SUMMARY

In summary, we oppose H.R. 4938 primarily because it represents an attempt by Congress to regulate an independent constitutional prerogative of the Executive. It would be analogous, hypothetically, to an attempt by the Executive through an Executive order grounded on national security interests, to limit the scope of the congressional privilege under the speech or debate clause. The separate and coequal status of the three branches, grounded in the

Constitution itself, cannot be altered by legislation. As Thomas Jefferson advised John Marshall, only the Executive himself can determine what papers received by him shall be provided to one of the other branches of government. The decision cannot be forced on him either by the courts or by the Congress.

Aside from the fundamental constitutional objection, the bill threatens both interference with executive officers in the performance of their duties and harassment not only of such officers but also of their subordinates. Moreover, in its present form it is sufficiently vague and ambiguous as to create endless controversy over its meaning. Accordingly, the Department of Justice opposes enactment of H.R. 4938.

Mr. MOORHEAD. Thank you very much.

On page 13, you summarize your opposition to the bill by saying that: "It represents an attempt by Congress to regulate independent and direct constitutional prerogatives of the Executive."

H.R. 4938, I would think, is along the lines you suggest. It is an attempt by the Congress and the Executive together—as I am sure it is going to require the President's signature, if it is going to become law—it's a joint effort to try to delineate the ground rules for future Presidents and future Congresses as to how far the Congress can go in seeking information, and how far the Executive can go in withholding information.

So, I would rather look at it as a joint attempt on a bipartisan basis by the executive and the legislative branches to do a better job of delineating this vague area where the Constitution doesn't spell it out.

And, even in areas where the Constitution is more precise, it often says, "as the Congress and the Executive by legislation shall determine." Here is a doctrine which is not spelled out in the Constitution. You can't find the words "executive privilege" if you start at the beginning and read it to the end through all of the amendments. So it seems to me purposely within the constitutional prerogatives of the legislative and executive branches to try to work out some ground rules.

There are some eminent experts on constitutional law who do take the very well-reasoned position—and have done so before this subcommittee—that there is no doctrine of executive privilege in the Constitution or any extensions thereof. What we have is a situation that over the years, the Congress—which has investigative powers that go back in tradition to the British Parliament—as a matter of restraint we have not exercised in the Congress those powers fully. This has become now hardened in the minds of some people as a constitutional principle called executive privilege, but we wonder whether such a doctrine really exists.

You cite as a precedent the case of a refusal by President Washington to turn over the Jay Treaty papers to the House of Representatives. Isn't it a fact that the papers were turned over to the United States Senate?

Ms. LAWTON. Yes, sir.

Mr. MOORHEAD. So that President Washington was merely saying that he shared with the Senate the treaty-making powers, but the House under the Constitution had no jurisdiction in this field. Isn't it also true

that in the *Burr* case, which you also cite, that the papers were turned over to the court for its inspection and decision as to which papers it needed and which it did not?

Ms. LAWTON. Yes, I believe the papers were, in fact, turned over for a decision to be made as to whether the full text or an excerpted text be made available and, as I recall the case, in the end the entire case was made available.

Mr. MOORHEAD. I wonder if the one statement on page 4 where you say, "while the bill under consideration recognizes the existence of the constitutional privilege," I mean, who recognizes the constitutional privilege? Mr. Erlenborn, in the bill you have introduced, do you recognize the constitutional privilege of executive privilege?

Mr. ERLENBORN. Mr. Chairman, I don't think anything in the bill refers to executive privilege in constitutional terms. This could be someone's interpretation, I suppose. I think executive privilege exists because it has been utilized by many Presidents and has been defined by each one according to the circumstances of the case, as he would like to define it at that time; but I do not believe anything in this bill refers to any constitutional executive privilege.

Mr. MOORHEAD. That was the way I read the bill.

What we have is a situation that, at least since 1954, four Presidents have asserted this doctrine and the Congress has not taken affirmative action to abate it, if it can be abated. Thus, recognizing what I call a de facto situation, the Erlenborn bill merely attempts to lay down legal ground rules for the President in exercising executive privilege. Mr. Erlenborn, does that pretty much state what it does?

Mr. ERLENBORN. Correct.

Mr. MOORHEAD. With that introduction, I yield to the author of the bill.

Mr. ERLENBORN. Thank you, Mr. Chairman.

Ms. Lawton, I think it is unfair of the administration to send an attractive lady to testify as the only administration witness. It puts us at a great disadvantage, but we are pleased to have your appearance here today.

I suppose your testimony is really summed up by the one sentence that I see on pages 13 and 14, "only the Executive, himself, can determine what papers received by him shall be provided to one of the other branches of government."

You are, on behalf of the administration, I believe, telling us that the Executive has a constitutional right to determine which papers from the executive branch should be made available to the Congress and the Congress has no constitutional right to obtain any information from the executive branch that it doesn't care to give us at the moment. Is that correct?

Ms. LAWTON. No.

Mr. ERLENBORN. Is that a correct interpretation?

Ms. LAWTON. No, the statement you refer to, Mr. Erlenborn, is of course, a reference back to Jefferson's own statements—

Mr. ERLENBORN. Yes.

Ms. LAWTON [continuing]. In saying that the President, himself, must make the decision in the public interest.

But I think that it has always been recognized, first, that Congress has the investigatory function and, second, that they are entitled to

information from the Executive and, to some extent, from the judicial branch, and, as well, from the public at large.

The point is, that there is recognized in the Constitution, that the President, as the Executive, has certain responsibilities that the other branches cannot interfere with. At the point where the request for information reaches that interference, then we think a constitutional privilege arises. Certainly not all information can be withheld from the Congress.

Mr. ERLENBORN. Then we start from the common base that the legislative branch does have some right to acquire information from the executive branch?

Ms. LAWTON. Certainly.

Mr. ERLENBORN. And you feel there is a point beyond which we cannot go? I have to join with the chairman in categorizing the statement that you delivered to us today as being rather negative.

If you start with the assumption that the legislative has some rights, that there are limits to that right, then I find it difficult to understand why the administration has not sent someone here with a statement saying, "here is the line that can be drawn." This would aid us in drafting legislation defining the rights of the Congress and the right of the Executive. It appears to me the statement you delivered is wholly negative, which suggests we don't even have the right to enact legislation in this area; is that a correct interpretation?

Ms. LAWTON. To a degree. The basic position that we are trying to express here is that the Congress cannot cut down the Executive's privilege to withhold information by legislation, where it is a constitutional right.

Mr. ERLENBORN. Let me interrupt at this point. It seems to me difficult for us to determine if we are cutting down on our rights, if they have not been clearly defined. Now, can you define where we would be interfering with the President's right? At what point, at what level, does the Congress no longer have the right to obtain information? If you can't define this, then how do we know if we are encroaching upon that level?

Ms. LAWTON. Well, as to this particular bill, I could point to instances where we think it does encroach. I believe you made a statement yesterday, Mr. Erlenborn, in talking about the history of this as to how it has been a matter of pull and tug between the Congress and the executive branch for approximately 200 years. And it has been worked out on a case-by-case basis, with one side giving at one time and one giving at the other.

Now, as I recall your answer to that it is, let's settle it once and for all by legislation. And our answer to that would be, this is the way it is and this is the way it must be. We cannot now, at this point, in this room, foresee where claims are going to be made.

When Washington consulted with his first Cabinet about making a claim, he couldn't foresee military assistance to foreign governments. He couldn't foresee atomic energy. He couldn't foresee telephone messages for that matter.

We can't either foresee for the future, just where all of the lines are going to be made. I think it has to be a case-by-case determination.

Mr. ERLENBORN. Don't you think that same difficulty in foreseeing future events faces the Congress every time it legislates?

Ms. LAWTON. Certainly.

Mr. ERLENBORN. Would you suggest, then, that we abandon the job of legislating because we don't have that kind of foresight?

Ms. LAWTON. No; not at all but in an area as touchy as the separation of powers, which is designed as a check and balance system, it is designed to produce accommodation, as I see it, through the natural friction of the three branches. And I don't think you can freeze that friction in any given point in time.

Oh, certainly, there are many areas where Congress must attempt to foresee the future and legislate, but, in this particular area, of the touchy and sometimes acrimonious relationship among the three branches, this is not the place for legislation, in our view.

Mr. ERLENBORN. Well, I don't mean this in any personal way, but it seems to me that the position of the administration at this point, in saying that this is a very touchy area and one that is difficult to define, so let's not define it, is wholly self-serving. It leaves the President—no matter who he might be of whichever party, at any given point in time—the sole arbitrator of the question of what privilege there is and how far it can be extended. This is, I think, a country that has a government of three coequal branches; I don't think either one should be the sole arbitrator of these questions.

I notice a few other things I would like to question in your statement. On page 5, you say:

The substance of sensitive conversations between the President and a foreign head of state, might not in any way affect his ability to obtain forthright advice, and yet it should not be disclosed because of the adverse effect on foreign relations.

In what way do you believe this bill would force the President to reveal to Congress conversations he has had with another head of state?

Ms. LAWTON. I understand, as I read the bill, that all information must be disclosed except when three cumulative conditions are present and one of those cumulative conditions is that "supplying the information would inhibit the ability to obtain forthright advice."

Mr. ERLENBORN. You anticipate then, or you read this bill as saying, that the Congress could summon the President himself to come here and reveal his conversations?

That certainly was not the intent of the drafter of the bill. If it would help in getting support from the administration for the enactment of this legislation, we might specifically exempt the President. I don't think we intended him to be subjected to the process anyhow.

You then say on page 5:

Moreover, the bill fails to recognize the principle that as with other privileges, the claimant is the one who makes the ultimate determination to claim the privilege.

I thought we did this by giving the President the authority to claim the privilege and only the President, because it is an executive privilege. We are not giving anyone else the right to claim the privilege. So, I don't understand your statement that the bill fails to recognize that the President has the right to determine when you claim the privilege. It merely states he is the only one who can.

Ms. LAWTON. I understand the bill states that. The bill says, however, he may claim it in this manner and only as to these things, regard-

less of his own judgment as to the public interest. That is what the statement referred to; admittedly it is not as clear as it should have been.

Mr. ERLENBORN. I see.

You make a statement—and I don't recall where it is—about Congress, for instance, having the ability to find out about troop movements.

Do you believe that it is improper for the Congress to be aware and able to get information concerning troop movements?

Ms. LAWTON. Not as a general rule, but I think there are and have traditionally been limited numbers of persons in the legislative branch, as well as the executive branch, that have been privy to that type of information.

Vast majorities of officers and employees of the executive branch do not get, nor is there any reason for them to have, such information and, I believe, that the practice has been—both from the limited experience of my own and from what my father has told me, who had 42 years also with the Government—that there are limited numbers of Members privy to this, but not in a public hearing. I mean, you do discuss troop movements, but not on the floor in an open session.

Mr. ERLENBORN. Well, I think that your comment here, together with some of the other comments about the bill, indicates that there is no faith in the Congress as an institution to emphasize good judgment and that, if we were given the authority to get classified information, we would blab it out on the floor of the House.

Now, I really think that is somewhat insulting to the Congress as an institution. I don't think that the executive branch ought to be able to deny Congress information merely by putting a classification on it, that it is top secret. If we were to have the same view of the executive branch, we would deny the executive branch the power of subpoena. Time after time in legislation we have given various departments and agencies in the executive branch the power of subpoena.

I could make the same sort of comments. How can the country exist if the Federal Trade Commission is going to be willy-nilly pulling people in to testify before it, because it has the power of subpoena?

If we viewed the executive branch as being that irresponsible, I think we should deny them the right to gain information through the use of subpoena. If the executive branch views Congress as that irresponsible, I suppose that might justify denying to the Congress the right to get information; but I think we have to have some mutual trust in each other as branches of the Government.

Do you really believe that if Congress has the right to get information relative to troop movement, we would disclose it publicly?

Ms. LAWTON. I think 99 percent of the Congress would not, but it has happened. It was 1941, where a Senator, now deceased, supplied information to the press about the landing of naval personnel in Iceland before it was even completed and it created severe problems.

There are people in the executive branch who do the same thing and we know that well—

Mr. ERLENBORN. I was just going to mention Daniel Elsberg.

Ms. LAWTON. But what you have, as I mentioned with respect to the executive branch, too, is the fact that it is a matter that some people know, does not mean that everybody in the executive branch is going

to be aware of it. There are certain things that a lot of people are aware of. But your risk of disclosure is diminished—and I think all of us know this and I am sure Congress has had the same experience—the fewer people who are privy to something and only on a need-to-know basis just to use the old phrase.

I might, as to your reference to subpoena, state that in almost all cases, where Congress has given the executive branch or regulatory agencies subpoena power, it has put a check on that. They have to go to court to enforce it. So there is another branch which comes into the situation to watch what we do. There is a lack of trust there—well, whether that is a lack of trust on the part of the Congress or whether it is just a system of checks—but there is a check there.

Mr. ERLENBORN. Let me state, as I am sure you are aware, this bill does not give any individual Congressman the right to gain information. It would confer upon the Congress itself acting in its official capacity, or a committee acting within its legislative jurisdiction, the right to get this information.

That being the case, do you still believe you can make a case for Congress acting irresponsibly with the exercise of this power?

Ms. LAWTON. I wasn't trying to suggest that the Congress acts irresponsibly. I was simply trying to point out that there are areas where we think legitimate claims of executive privilege can be made and have been made that are not covered or protected by this bill and I was trying to use these merely as examples. Obviously, Congress is furnished classified information. As I am informed, there were at least four to six Members of Congress who were fully aware of the Manhattan project back in 1941, and there were approximately four in the executive branch, not including the Vice President of the United States who were privy to it. But certainly Congress is entitled to the utmost secret information, where there is a relevancy, where the need is apparent.

Mr. ERLENBORN. You would then, I think, go on to say that the only one who can determine whether there is such a need or relevancy is the executive branch and not the legislative branch. Is that really the purport of your testimony here?

Ms. LAWTON. That the President has to be the one to determine where the public interest will be injured, yes.

Mr. ERLENBORN. On page 10 of your statement, you say: "It should be noted that the instant bill places no limits on the kinds of employees who may be called to testify. Career personnel without policymaking responsibility would be as subject to call as agency heads appointed by the President."

That is absolutely true, but that doesn't frighten me at all. It seems to me that career personnel ought to be subject to coming to Congress and furnishing us with information that we need in our legislative process.

Why do you feel there is something defective in the bill by allowing us to get information from career personnel?

Ms. LAWTON. I think it is not totally defective. I said it is capable of abuse and in many instances, I think it is unfair to call on a career person. As you well know, within Justice—to use the example of our office—when a new position is to be developed on some piece of legislation or some new executive statement whatever it happens to be,

there may be two or three staff members and perhaps one or two of the "policymakers" involved in this. There may be a pulling and tugging, and there may be totally diversified views expressed, and then in the end, the policymakers make the policies, and the staff doesn't really have any control over that. And they can disagree if they like, but to call them up and ask them to defend this position, I think is unfair.

Mr. ERLENBORN. Of course, I don't view the purpose of this bill as giving the Congress the right to review policy decisions. You know that every time a policy decision is made we bring all of the people here and have them rehash it. What I think we want to do is to be able to get the facts.

Would there be anything wrong in your opinion in career personnel or anyone else being called to testify, to bring forth facts, rather than reviewing policy decisions?

Ms. LAWTON. It doesn't have the same degree of harshness, I think, but I do have difficulty seeing why when three or four people are privy to the same set of information, you should pick on the most junior to come and testify. Granted, there may be times when the only person with the facts is somebody on the staff level, and certainly they have testified, as I understand it, with some degree of regularity.

Mr. ERLENBORN. Are you suggesting that the President should determine under the doctrine of executive privilege which person could come to testify when Congress desires information? That under the doctrine of executive privilege, he could say person "A" and person "B" could testify, but person "C" could not?

Ms. LAWTON. Not in the way you put it, Congressman, but I would think that there would be instances where the President would have a right to say this Cabinet officer has been called to testify 120 times this session, and I can't reach him on the telephone and you are interfering with my ability to work with him, won't you take a substitute out of that department?

Now, obviously, when it comes down to the details—the President did not make the decision, for instance, that I was going to appear today—to the best of my knowledge. I don't think that in all instances the President has a right to say no, you can't have this witness, you have to take that one, but I think there may be times when the President could properly say, "my job is to make sure that the laws are faithfully executed and I have these prime lieutenants to do it and you are consuming so much of their time that they cannot do their duties."

Mr. ERLENBORN. I think this interpretation of executive privilege that you have given us is probably an elegant testimony to the fact that we need legislation. It seems to me you are making the point that I have made, that, if we don't have ground rules for the exercise of this executive privilege, the President will make of it what he wants. That is exactly, I think, what you are telling us, in saying that the President, not out of the character of the information that the Congress is seeking, but merely because it would be interfering with him to have a particular person come up here, could exercise executive privilege to determine which person would be the witness.

In most cases, obviously, if the Cabinet officer said, "I am terribly busy, couldn't you take someone else," the Congress generally would say, "yes, certainly, we would be happy to accommodate you"; but to extend executive privilege as a doctrine to say that the President could decide certain individuals will not be available for testimony regardless of what the character of the testimony is, but just because the person is too busy, I think, is again eloquent testimony to the fact we do need legislation, legislative ground rules for executive privilege. I hope this committee will act.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Let me say this—and, again, this is no criticism of you, Ms. Lawton. You are just uttering the Justice Department's policy position, but I think it is similar to Louis the XIV, when you say only the Executive, himself, can decide this—well, that could be Louis XIV saying "L'Etat, c'est moi."

I thought that in this parliamentary fight, the Anglo-American position had been settled at the time when Chancellor Cook said to King James: . . . "Non sub homine. sed sub lege et deo." That is—"We thought we were a government of laws and not a government of an individual."

Well, anyway, this doctrine seems to me says we elect a dictator every 4 years and the only restraint on him is not the people's Representatives in Congress, or the laws in the United States, but the decision of the Executive himself.

That is extraordinary testimony.

Mr. Alexander?

Mr. ALEXANDER. Mr. Chairman, that is a tough act to follow.

Ms. Lawton, thank you very much for your testimony. Following the line of thought introduced by Mr. Erlenborn and referring to your testimony on page 5, I believe you said that data on troop movements, conversations between the President and foreign heads of state, and raw investigative files, might need to be withheld under claim of executive privilege.

Now, do you mean that as a general rule that such information should be withheld from congressional committees having appropriate legislative investigative and appropriation authority in these areas?

Ms. LAWTON. No, not at all. As far as I know, consistently since Washington's time, information in all of these areas has been provided, but it has also on occasions been withheld on an ad hoc basis—case-by-case determinations as to the nature of the particular material and the harm to the public interest that might occur.

Mr. ALEXANDER. Well, Patrick Gray, who is the nominee for Director of the Federal Bureau of Investigation, testified the other day before a Senate advisory committee concerning his nomination, that a White House aide, John Dean III, had lied to the FBI about his knowledge of the Watergate conspiracy, and that another White House aide had told agents that he had authorized payments to a political espionage fund for covert activities against Democrats.

In your judgment, should the doctrine of executive privilege be extended to cover testimony that is sought by a congressional committee investigating these charges?

Ms. LAWTON. I think that the doctrine applies generally to Presidential aides for the same reason that congressional aides are protected. It does not, however, as the Court said with respect to congressional aides, apply to a particular investigation of wrongdoing. This has been the traditional view of the doctrine of executive privilege.

Mr. ALEXANDER. You say it does not apply to a particular case of wrongdoing?

Ms. LAWTON. Yes, sir.

Mr. ALEXANDER. Let us assume that there is an investigation being conducted by a Senate select committee to investigate the Watergate conspiracy, and that it has been revealed that certain White House aides have information that would contribute to that investigation, which is dealing with a subject that some of us call wrongdoing; would you then conclude that the doctrine of executive privilege should not be applied to White House aides who had been summoned to testify before that committee?

Ms. LAWTON. No, Congressman, when I refer to the exclusion for inquiry into wrongdoing, what I meant was the specific inquiry into the conduct by the individual of his own office and not as to anyone's wrongdoing, but the conduct of the individual himself.

Well, the classic example, of course, there are two in fairly recent years: Donald Dawson, when he, himself, was accused appearing for himself, and Sherman Adams, when he, himself, was accused appearing for himself, in response to inquiry into their own conduct and not into the conduct of others.

Mr. ALEXANDER. Would your definition of wrongdoing extend to a criminal conspiracy?

Ms. LAWTON. Yes, certainly.

Mr. ALEXANDER. Then under your own definition, the doctrine of executive privilege would not apply to White House aides who could be a part of a criminal conspiracy?

Ms. LAWTON. I am not sure with what you mean by "could be." If you are talking about a request for a fishing expedition, I think there may well be legitimate grounds for claiming executive privilege.

Mr. ALEXANDER. What I mean by "could be" is determining whether or not certain allegations are true or false, and we cannot under our discretion, determine whether or not allegations are true or false, unless information, which is or could be secreted by the doctrine of executive privilege were made available.

Ms. LAWTON. Yes.

Mr. ALEXANDER. Then you are agreeing that under your definition, that the doctrine of executive privilege should not be applied to wrongdoing of White House aides who may be involved in a criminal conspiracy?

Ms. LAWTON. Well, are you asking me to endorse the "may be"?

Mr. ALEXANDER. I beg your pardon?

Ms. LAWTON. Are you asking me to endorse the "may be"?

Mr. ALEXANDER. I am asking you very politely if you would answer the question.

Ms. LAWTON. I think if there is a direct inquiry into wrongdoing by White House aides, there may well be no grounds to assert executive privilege. There may, however, be problems as to comparable judicial or simultaneous judicial inquiry.

Mr. ALEXANDER. I am not sure I understand your answer.

Ms. LAWTON. Well, I think it would be proper, for example, to say—for a White House aide who is specifically accused of criminal conduct to say, I do not want to testify before a congressional committee until I have appeared before a grand jury which has also summoned me.

Mr. ALEXANDER. Would not that be the personal right of that individual, rather than going to the doctrine of executive privilege?

Ms. LAWTON. Yes, I think so.

Mr. ALEXANDER. That would be a personal right, which is guaranteed to that individual under the fifth amendment, which does not go to the question of executive privilege.

Ms. LAWTON. It may not be a fifth amendment question, Congressman. It may be simply a question of the sequence in which it is proper out of respect to the judicial branch.

Mr. ALEXANDER. Let me ask you one final question. Should raw investigative information, or should information from raw investigative files, be made available to White House staff members, when they are not made available to Members of Congress having investigative authority in the area of the subject to which we refer?

Ms. LAWTON. I think that depends entirely on what the subject matter of the inquiry is. If the President is considering an appointee, he is going to review those files before he makes—or have staff review or both—before he makes a nomination. Subsequently, the files are turned over to the committee.

Mr. ALEXANDER. Well, would you say that rule should apply to a U.S. Senate committee considering the nomination of a person for confirmation?

Ms. LAWTON. It is my understanding that the files are made available under those circumstances.

Mr. ALEXANDER. Then you are saying that the files, information from raw investigative files of the FBI should be made available to Senate and House committees having jurisdiction over subjects which are legitimately within their jurisdiction?

Ms. LAWTON. Not that broadly, no. I am saying on nominations, yes, files are made available to the committee, as I understand, and in some other instances, files have been made available to committees. In others, executive privilege has been asserted when in balancing out the interests, the President determines the public interest and the interest of those individuals named is more important than the—

Mr. ALEXANDER. If the files would not be made available to the appropriate congressional committees, do you have a different standard for White House staff assistants?

Ms. LAWTON. I think the standard is always a balancing one in both instances. Files are not generally made available to White House staff assistants.

Mr. ALEXANDER. Referring to the Counsel for the President, John Dean. Are you saying there is a different standard applied or should there be a different standard applied to the Counsel for the President as compared to the committees in the Congress having jurisdiction over the subject?

Ms. LAWTON. I think there is the same standard, basically, that was applied. As I understand, he was commissioned to do himself

an investigation of whether or not there was involvement of White House staff in the Watergate affair. The judgment was presumably made that in order to carry out duties specifically assigned to him, he needed to see these documents.

Mr. ALEXANDER. Were you the one who made that judgment?

Ms. LAWTON. I have only the newspaper version. I assume from the papers that the President commissioned him to make that study.

Mr. ALEXANDER. Ms. Lawton, the Congress only had the newspaper version, too. Thank you very much.

Mr. McCloskey?

Mr. McCLOSKEY. Thank you, Mr. Chairman.

Ms. Lawton, in testifying before us today, does your statement represent your personal opinion as an attorney?

Ms. LAWTON. Yes, sir.

Mr. McCLOSKEY. In giving that opinion, you have indicated that it might be unfair to career employees to ask them to render their opinions to the Congress if, perhaps, their superior had a different opinion, is that correct?

Ms. LAWTON. Yes; I believe that was an example I used.

Mr. McCLOSKEY. If it were unfair to a career employee to ask him to give his opinion to the Congress when his policymaker had reached a different conclusion, would you not think it within the power of Congress to enact a law requiring that all opinions adverse or favorable be given to the Congress as part of its investigative power?

Ms. LAWTON. As a general rule, I think it would not be proper, no.

Mr. McCLOSKEY. You don't think it would be proper to ask for all information from the executive branch pro or con on a given policy decision?

Ms. LAWTON. Data information pro or con, perhaps, but when you get to who said what in a discussion over what our policy is going to be, I think, no. You have a unitary branch in the executive branch. You have a single head and I think it is unfair to inquire into who told him which views before he made his decision.

Mr. McCLOSKEY. Well, Ms. Lawton, let me go back to a precise example, 2 years ago when Congress was asked to fund the SST. We voted to appropriate \$290 billion for the SST, and during consideration of that vote we were inundated by the executive branch with tremendous force and persuasive arguments that the SST would not be adverse to the environment, and that we needed it for our balance of payments deficit, and that it would be a commercially marketable vehicle. This committee of Congress, at that time, asked the Executive for a copy of the Garwin report which had been prepared by the Garwin panel as advice to the President about the SST.

The Executive did not assert executive privilege, despite the Executive order that the President had signed or the letter that he had written to this committee, stating that only he would assert executive privilege. The best we could do was a letter from John Ehrlichman, stating that it would not be useful, in effect, to give this document; it was an internal document prepared to advise the President.

Congress voted several hundred million dollars for the SST over a period of 2 years. We couldn't get the Garwin report. Finally, we killed the SST and the circuit court of appeals ordered that that report be released to the public and to the Congress unless the Presi-

dent was willing to claim executive privilege. He did not and the report was released. The Congress learned for the first time that very competent scientists and engineering personnel had advised against the SST and stated opposite reasons and opposite opinions to those the executive branch urged upon the Congress. There was a case where we voted several hundred of millions of dollars in ignorance of the facts the Executive successfully withheld from Congress.

Do you think that it would be appropriate under those circumstances, for Congress to enact a law requiring that the Executive make favorable and adverse opinions available to the Congress, which, after all, is the sole body to appropriate money? Yes or no?

Ms. LAWTON. No.

Mr. McCLOSKEY. No? Can you say why?

Ms. LAWTON. Because I think that in the executive branch there is only one final decisionmaker who can decide what the executive position is going to be on any given thing.

And the bill here talks about the ability to obtain forthright advice. This is one of the exceptions that is made in the bill. I think if—

Mr. McCLOSKEY. May I interrupt?

You wouldn't change your forthright advice and interpretation of a law to conform to the opinion of your superior, would you?

Ms. LAWTON. I wouldn't to him, but if I thought I was going to be called up and questioned by the Congress every time, I might.

Mr. McCLOSKEY. In other words, you would change your opinion as to the law and a recommendation to the superior, if you thought the Congress might learn about it?

Ms. LAWTON. Opinion as to the law?

Mr. McCLOSKEY. Yes, ma'am.

Ms. LAWTON. No; if I am asked for a flat legal opinion, probably not.

Mr. McCLOSKEY. I understand Mr. Garwin's panel members were asked for their scientific, professional opinions. You are not suggesting they would change that opinion if they knew the Congress would learn about it, are you?

Ms. LAWTON. I rather doubt they would change it. I think they would couch it in more flexible terms.

Mr. McCLOSKEY. Ms. Lawton, with respect to your testimony, I am impressed that it is a very accurate statement and description of the past circumstances. However, when you move to the contention that the separation of powers would prevent Congress from enacting such a law on executive privilege, it seems to me you are on less firm ground in making a constitutional argument.

Let me cite you an example. The Constitution grants the President three powers: he has the power to act as commander in chief of the Armed Forces; he has the power to negotiate treaties; he has the power and responsibility to see that the laws are faithfully executed. If Congress should enact a law that would not interfere with his powers as commander in chief or his powers to negotiate treaties, how could that law be improper if it would require that he divulge all other facts to the Congress of the United States?

Ms. LAWTON. If a law could be devised that would be coextensive with the privilege in all circumstances under all fact situations, then perhaps there would be no difficulty, but I don't think it can be.

Mr. McCLOSKEY. Let's take an example.

Historically and constitutionally each branch of Government has prospered when it has exercised some restraint in its confrontation with the other branches. You would agree with that as a lawyer?

Ms. LAWTON. Certainly.

Mr. McCLOSKEY. It doesn't help relations between the branches if the President refuses to carry out an order of the Supreme Court or if the Supreme Court makes an order that it knows the President will not carry out, for example, *Marbury v. Madison*, or Chief Justice Taney's writ of habeas corpus during the Civil War.

Now, is it your legal opinion, Ms. Lawton, that the current occupant of the White House has exercised proper restraint of the constitutional power in his declaration that no White House employee will testify before the Congress under any circumstances? Is that proper executive restraint in your judgment?

Ms. LAWTON. I don't believe that is the statement that he made, Congressman.

Mr. McCLOSKEY. Let me ask you for your understanding of the statement he made. I understood he said, no White House assistant, past or present, would testify before the Congress.

Ms. LAWTON. Formally testify, yes. He did not say they would not come.

Mr. McCLOSKEY. In your judgment, constitutionally, and as a career employee of the Department of Justice, does that represent the proper restraint power of the executive branch?

Ms. LAWTON. I think it is a proper and traditional restraint.

Mr. McCLOSKEY. Traditional for the White House to say that no White House assistant will come to the Congress and testify?

Ms. LAWTON. Formally testify, yes; that has been a long tradition and one that finds its parallels in the other branches.

Mr. McCLOSKEY. This tradition does not have any constitutional basis under the powers to negotiate treaties, act as commander in chief, or execute the laws.

Ms. LAWTON. Yes; you speak of the Presidential powers. It starts out, as I recall, with "the Executive power," totally undefined, "Shall be vested in the President," and the legislative power and the judicial power vested by the comparable articles.

Implicit in that and in the separation of powers concept, which it expresses without using the phrase, I think the individuals, personnel close to him, are—well, the phrase I think the court uses in the *Gravel* case was "alter egos," and they are to be treated as one with the President. To call upon personal assistants to the President is to call upon the President, just as to call a legislative aide is to call the legislator.

Mr. McCLOSKEY. Let's go back to the three powers: the power to serve as commander in chief, the power to negotiate treaties, and the power to see that the laws are faithfully executed. Do you see a statute enacted by Congress that requires all White House aides to testify before the Congress on all subjects, other than when the President is acting as military commander in chief and in the negotiation of treaties, as unconstitutional?

Ms. LAWTON. I think such a statute calls the President and yet I do—

Mr. McCLOSKEY. Well, let me interrupt. Is there anything in our Constitution that would preclude the Congress from enacting a law which required the President to appear before the Congress and answer questions as the British Parliament requires its Prime Minister to appear, and answer questions candidly and truthfully?

Ms. LAWTON. Frankly, yes, I think so.

Mr. McCLOSKEY. Why?

Ms. LAWTON. Because I think this is the interference that Jefferson was referring to in the *Burr* case. The office, itself, cannot be questioned directly and challenged by the other branches in the form that you are referring to any more than I think a justice of the Supreme Court could be called down here and asked why did you vote this way on this case.

Now, this is not to say that the conduct cannot be inquired into—and it is certainly and constantly—or that the legislature has no recourse if it cannot get the information it wants. This is where the pull and tug of history has always worked itself out. There are powers in each of the branches and—

Mr. McCLOSKEY. This traditional conflict has been resolved in the past when there has been restraint from both branches in their dealings with one another. For this reason I think we go to the very heart of the matter when you support, sustain, and believe it is proper for the President to exercise executive privilege where he states that none of his aides, past or present, are going to come before the Congress and tell the Congress the truth. I suppose our disagreement stems from your belief and opinion that this is a proper exercise of executive privilege. I do state your opinion accurately; do I not?

Ms. LAWTON. That is right.

Mr. McCLOSKEY. You feel that the President is entitled constitutionally to withhold any of his aides from testifying before the Congress on any subject?

Ms. LAWTON. Aides in the personal sense, yes. There are people in the Executive Office who can be called in and are called to testify, but the personal aides, no.

Mr. McCLOSKEY. Well, when the Attorney General of the United States, your former employer, is alleged to have received funds and controlled the disbursement of those funds, do you think the President has the power to deny the Congress the full information from the Attorney General on the handling of those funds?

Ms. LAWTON. As I understand the statement—

Mr. McCLOSKEY. You understand my question, don't you?

Ms. LAWTON. I understand the question, yes.

Mr. McCLOSKEY. Do you think the President has the power to deny Congress the right to have the ex-Attorney General of the United States appear before it and testify as to the handling of funds?

Ms. LAWTON. Not if it deals with something unconnected with his advice and counseling to the President himself.

Mr. McCLOSKEY. Well, if the President is contending that none of his aides advised him on the Watergate, then how would he have the power to deny those aides coming before Congress to testify on this matter? Why would it have been the proper use of executive privilege, unless they gave the President some advice on the Watergate affair, under your definition?

Ms. LAWTON. Well, obviously, at least, I say "obviously," according to the papers, one did conduct an investigation specifically on—

Mr. McCLOSKEY. Wait just a minute. You have supported the President's invocation of executive privilege; that he can deny the right of Congress to require any of his employees to come before it to testify as to the truth. Now, are you qualifying your original statement, by saying that he can only assert that privilege if it involved their advice to the President?

Ms. LAWTON. No, I was referring at the point, you were making, I believe, Congressman, as to a former Cabinet officer—

Mr. McCLOSKEY. Correct.

Ms. LAWTON [continuing]. And what I was attempting to say was I believe that the President's statement that former, as well as present, White House personnel cannot be called to testify, applies only to testimony as to things occurring while they were in that relationship and not things that have occurred after it is terminated.

Mr. McCLOSKEY. Let us consider events during the relationship. The President contends that none of his aides told him him about the Watergate. I think that statement has been made by Mr. Ziegler on a number of occasions. How, then, is it proper to prevent his aides from coming before the Congress to testify about a matter on which they never advised the President about if the purpose of the privilege is to give the President this free and unhampered advice?

Ms. LAWTON. That is not the sole purpose. The purpose, I think, in this instance is to protect the relationship itself. Inquiry of these people, the personal aides and advisers to the President, while they are in that position and people formerly in that position as to things that occurred while they were in that position, amounts to an inquiry into the President himself and his conduct. They are simply extensions of him and he cannot be called to testify by a coordinate branch.

Mr. McCLOSKEY. Even though they might have been involved in the commission of a crime?

Ms. LAWTON. No. I made that exception earlier. I think if you were inquiring into their commission of a crime, specifically—

Mr. McCLOSKEY. They should come and testify?

Ms. LAWTON [continuing]. That the privilege does not apply.

Mr. McCLOSKEY. Is it your opinion John Dean should appear before the Congress to testify and executive privilege is improperly claimed with respect to Mr. Dean?

Ms. LAWTON. Mr. Dean is not under investigation for a crime that I know of.

Mr. McCLOSKEY. Well, isn't it a crime to lie to the Federal Bureau of Investigation?

Ms. LAWTON. Well, in the first place, the answer, I think, was that he "probably lied," that was Mr. Gray's answer, and, second—and I am just trying to run through this in my mind—depending, of course, whether it is under oath and various other things.

Mr. McCLOSKEY. Wait a minute. If Mr. Dean in any way interfered or delayed or obstructed a Federal investigation, he committed a crime, didn't he?

Ms. LAWTON. Obstruction, yes.

Mr. McCLOSKEY. If the Congress chooses to inquire into the obstruction of that crime, would executive privilege be properly claimed in your judgment?

Ms. LAWTON. In hypothetical terms, no.

Mr. McCLOSKEY. So, in hypothetical terms the constitutional definition of executive privilege that you have presented in your testimony today, should not properly be claimed for Mr. Dean? Is that correct?

Ms. LAWTON. If there were, and as far as I know, there is not now an inquiry into the commission of crimes by Mr. Dean.

Mr. McCLOSKEY. I think we are running out of time, Mr. Chairman, and I shall defer further questions. I would like to make the request that this witness be available after our ordinary interrogation of other witnesses.

Mr. ALEXANDER. Ms. Lawton, we would like to continue our inquiry of you after the other regularly scheduled witnesses, if that would fit into your calendar for the day?

I would like to ask one other question, if I may, just to pursue the line of thought that Mr. McCloskey developed.

When you said that no White House aide, no Cabinet members, nor the President, could be required by the Congress as a matter of right of the Congress appear, would it not be so that under impeachment proceedings that the Congress could interrogate not only Cabinet members that might be charged with the crime involving impeachment, but the President himself?

Ms. LAWTON. If I said—and I am not sure I did—that Cabinet officers can't be called, that is wrong. Anyway, Cabinet officers are repeatedly called. They have operational responsibilities. I did not mean to say that. As to the question on impeachment, certainly, yes. This is the constitutional forum of inquiry into the conduct of the President.

Mr. ALEXANDER. I merely would like to get that into the record.

At this point in the record, without objection, I would insert a complete statement by President Richard Nixon, which he delivered at his press conference on March 12, 1973, that covers the subject of our inquiry today, that statement may be admitted at this point in the record.

[The statement follows:]

THE WHITE HOUSE, *March 12, 1973.*

STATEMENT BY THE PRESIDENT

During my press conference of January 31, 1973, I stated that I would issue a statement outlining my views on executive privilege.

The doctrine of executive privilege is well established. It was first invoked by President Washington, and it has been recognized and utilized by our Presidents for almost 200 years since that time. The doctrine is rooted in the Constitution, which vests the executive power solely in the President, and it is designed to protect communications within the executive branch in a variety of circumstances in time of both war and peace. Without such protection, our military security, our relations with other countries, our law enforcement procedures and many other aspects of the national interest could be significantly damaged and the decisionmaking process of the executive branch could be impaired.

The general policy of this administration regarding the use of executive privilege during the next 4 years will be the same as the one we have followed during the past 4 years and which I outlined in my press conference: executive

privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest.

I first enunciated this policy in a memorandum of March 24, 1969, which I sent to Cabinet officers and heads of agencies. The memorandum read in part: "The policy of this administration is to comply to the fullest extent possible with congressional requests for information. While the executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons executive privilege will not be used without specific Presidential approval."

In recent weeks, questions have been raised about the availability of officials in the executive branch to present testimony before committees of the Congress. As my 1969 memorandum dealt primarily with guidelines for providing information to the Congress and did not focus specifically on appearances by officers of the executive branch and members of the President's personal staff, it would be useful to outline my policies concerning the latter question.

During the first 4 years of my Presidency, hundreds of administration officials spent thousands of hours freely testifying before committees of the Congress. Secretary of Defense Laird, for instance, made 86 separate appearances before congressional committees, engaging in over 327 hours of testimony. By contrast, there were only three occasions during the first term of my administration when executive privilege was invoked anywhere in the executive branch in response to a congressional request for information. These facts speak not of a closed administration but of one that is pledged to openness and is proud to stand on its record.

Requests for congressional appearances by members of the President's personal staff present a different situation and raise different considerations. Such requests have been relatively infrequent through the years, and in past administrations they have been routinely declined. I have followed that same tradition in my administration, and I intend to continue it during the remainder of my term.

Under the doctrine of separation of powers, the manner in which the President personally exercise his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.

This tradition rests on more than constitutional doctrine: It is also a practical necessity. To insure the effective discharge of the executive responsibility, a President must be able to place absolute confidence in the advice and assistance offered by the members of his staff. And in the performance of their duties for the President, those staff members must not be inhibited by the possibility that their advice and assistance will ever become a matter of public debate, either during their tenure in Government or at a later date. Otherwise, the candor with which advice is rendered and the quality of such assistance will inevitably be compromised and weakened. What is at stake, therefore, is not simply a question of confidentiality but the integrity of the decisionmaking process at the very highest levels of our Government.

The considerations I have just outlined have been and must be recognized in other fields, in and out of Government. A law clerk, for instance, is not subject to interrogation about the factors or discussions that preceded a decision of the judge.

For these reasons, just as I shall not invoke executive privilege lightly, I shall also look to the Congress to continue this proper tradition in asking for executive branch testimony only from the officers properly constituted to provide the information sought, and only when the eliciting of such testimony will serve a genuine legislative purpose.

As I stated in my press conference on January 31, the question of whether circumstances warrant the exercise of executive privilege should be determined on a case-by-case basis. In making such decisions, I shall rely on the following guidelines:

(1) In the case of a department or agency, every official shall comply with a reasonable request for an appearance before the Congress, provided that the performance of the duties of his office will not be seriously impaired thereby. If

the official believes that a congressional request for a particular document or for testimony on a particular point raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969. Thus, executive privilege will not be invoked until the compelling need for its exercise has been clearly demonstrated and the request has been approved first by the Attorney General and then by the President.

(2) A Cabinet officer or any other Government official who also holds a position as a member of the President's personal staff shall comply with any reasonable request to testify in his non-White House capacity, provided that the performance of his duties will not be seriously impaired thereby. If the official believes that the request raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969.

(3) A member or former member of the President's personal staff normally shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress. At the same time, it will continue to be my policy to provide all necessary and relevant information through informal contacts between my present staff and committees of the Congress in ways which preserve intact the constitutional separation of the branches.

Mr. ALEXANDER. Mr. Gude?

Mr. GUDE. Thank you, Mr. Chairman.

Ms. Lawton, on page 4 of your testimony, you state that the President has the right to claim executive privilege in order to protect investigatory data in order to preserve the effectiveness of the investigatory process.

It seems to indicate to me and imply that somehow the Executive alone has the sophistication and wisdom to analyze and interpret raw investigative data and then turn it over to the legislative body in a refined form. Yet, this investigative data is paid for with the taxpayers money, which has been appropriated through the legislative process. What is there about raw investigative data that would require that it shouldn't be available to the legislature?

Ms. LAWTON. Well, there are some instances, where it may indicate techniques and, say, the identity of undercover personnel, the blowing of cover of whom would create difficulties. It may be a matter of intimidating future witnesses who have given the information on the promise of confidentiality. And, if it is turned over to anyone outside of the department to which they gave the information, they may be reluctant in the future to testify. There are a number of reasons. It will vary, obviously, with the file itself. It will vary with the circumstances of the inquiry.

These are some of the examples that are laid out in that Attorney General opinion of matters in which the exposure of the files may create difficulties.

Mr. GUDE. In other words, the thrust of that is that only the Executive, in maintaining the security, can protect investigatory materials?

Ms. LAWTON. Not specifically, no.

As I mentioned earlier, the data is, in fact, turned over to the Congress in certain circumstances. It is all on an ad hoc basis. This is why it is difficult to generalize in any of these areas. There are times when it is appropriate and there are times when, in our view, it is not appropriate to turn over the raw data.

Mr. GUDE. Then your statement also says that the President has the right to claim executive privilege in order to protect the individuals. Protect the individuals from what?

Ms. LAWTON. From the raw data that is being exposed. There had been some discussion of this lately in the press. The problem of rumor, innuendo, false allegation, there are all sorts of stuff that go into raw files totally unevaluated and it can be very damaging to an individual if exposed and it can be utterly untrue.

Mr. GUDE. Well, if congressional investigations keep such material privy or secret, it would seem to me that, actually, you would give greater protection to an individual's reputation from the innuendos and the rumors surrounding him, by allowing him to come to testify before a committee of Congress rather than supposedly shielding him from making this information available to Congress.

Ms. LAWTON. Well, I think that would depend again on the fact of the particular case. There are times when, undoubtedly, this is true and, as I said, raw files have been made available and, generally speaking, are carefully safeguarded by the Congress as they are by the executive. In both cases, there have been difficulties on occasion.

Mr. GUDE. It would certainly seem to me in the present instance in the case of the Watergate problem that if executive privilege is being invoked in order to protect the individuals, it is serving to do exactly the opposite and it is spreading rumor and innuendo and giving to the public the impression that there is something that has been hidden.

Thank you, Mr. Chairman.

Mr. ALEXANDER. Mr. Thone?

Mr. THONE. No.

Mr. ALEXANDER. Mr. Regula?

Mr. REGULA. Yes, Mr. Chairman. Just a couple of questions.

Ms. Lawton, do you view the relationship of the Government to the people of the Nation as being one of agency-principal?

Ms. LAWTON. If I understand you correctly, well, at least with two of the branches—I am not sure about the judicial—whether you could call it an agency principal branch or not—

Mr. REGULA. You would say, then, as far as the Congress and the executive, that it is? That we are acting as agents on behalf of the people of the Nation; would that be a fair statement?

Ms. LAWTON. Yes, certainly.

Mr. REGULA. Would you agree that the public is entitled to a substantial amount of information as to what we are doing on their behalf?

Ms. LAWTON. Yes, certainly.

Mr. REGULA. Would it be possible to bring to this committee a definition of the areas that you think the principals should have access to, in terms of information and those areas in which they should not?

Ms. LAWTON. Well, generally, I think—and I believe coming from this committee, that has actually been done in the Freedom of Information Act. I assume that was the intent of the act, namely, to define what—

Mr. REGULA. If I may interrupt? I would be interested in what your definition, speaking on behalf of the Executive, would be as to what areas our principals should be aware of in terms of our actions and those you feel should be withheld from them.

Ms. LAWTON. Generally, although we have just come up with a recent problem, vis-a-vis the Congress, I think that the Freedom of Information Act does a good job of defining just that. There are

things that were not foreseen and they are coming now to haunt us but, basically, it does a good job.

Mr. REGULA. Mr. Chairman, our testimony this morning has pretty much gone along the lines of national security and the question of advice to the President. I would like to touch on something a little more mundane like just basic information.

I will ask you if you read the testimony from GAO yesterday that was given by Mr. Dembling?

Ms. LAWTON. Yes. Well, I didn't get all of the way through the appendix but I read the basic testimony.

Mr. REGULA. In this testimony, he sets out many examples of instances when GAO could not secure information either because of delaying tactics or simply because someone would not make it available and I am particularly interested in how you feel about some of the examples.

Let me take one such example as FDIC in which the report points out that there is a great reluctance on the part of FDIC to make available to GAO—and, in effect, to Congress and, in effect, the public—as to what the premium loss ratio would be or how the premiums on deposit insurance relate to losses.

Now, do you feel that is a proper withholding of information?

Ms. LAWTON. As I understand it from Mr. Dembling's description—and I am afraid I am very dense as far as the banking business is concerned—I don't see why the great delay or fight with GAO about it, is going on, but I don't really know. I don't particularly understand exactly what information is involved.

Mr. REGULA. Do you feel that we need any type of legislation to overcome the reluctance of agencies of Government to make available to the Congress and, in effect, to the public, things that do not go to the question of national security or perhaps just advice to the President in carrying out his duties as the Chief Executive?

Ms. LAWTON. I think to a degree, as I said, the committee has already done that with the Freedom of Information Act. I think that this is an area that defies—well, that when you get to the executive privilege area—that defies definition adequately precise for a statute.

This is, basically, our difficulty with it. I think, generally, one of our problems is, of course, for example, in this bill, any refusal must be made by the President personally.

When you come to Mr. Dembling's testimony, one of his problems, as I understand it, is it keeps going up the line to find the person who can make the decision on whether or not the information is going to be made available to GAO and that is part of the delay. And this is perhaps built into the system and I don't know any other way.

Mr. REGULA. Would you think there might be some inclination for a bureaucrat to use the shield of executive privilege to simply withhold information on the way in which he is conducting his responsibility to his principals, namely, the people of the Nation?

Ms. LAWTON. I wouldn't be surprised if it has been overclaimed on occasion.

Mr. REGULA. Mr. Chairman, I would appreciate from the witness a positive recommendation. As Mr. Erlenborn pointed out earlier, her statement is pretty much negative, in terms of the testimony and cer-

tainly I, as a member of the subcommittee, would welcome from Justice some positive ideas on how we might provide greater access to information such as that outlined in the appendix on the testimony from Mr. Dembling, this is one of the critical issues here—it is not very glamorous but to me it goes to the adequate function of Government on behalf of the people we represent.

Mr. MOORHEAD. Would the gentleman yield on that point?

Mr. REGULA. Yes.

Mr. MOORHEAD. Ms. Lawton, we have a private citizen here, as opposed to somebody like you and me who are working for the Government—Mr. Mollenhoff—who is a working journalist. We would like to get him on the stand before lunch. Could you come back this afternoon at 2 o'clock and maybe during that time you could be thinking further about my earlier remarks?

I believe some of the members and the staff have some further questions to ask you. So would 2 o'clock be all right?

Ms. LAWTON. I think it would be but—

Mr. MOORHEAD. We would appreciate it very much. We are imposing upon Mr. Mollenhoff, who is a private citizen, to ask you to come back but I think it is fairer to all concerned if you could come back.

Would 2 o'clock be all right to the members of the committee?

There seems to be general assent, so thank you very much.

Mr. Regula, if you want to add something—

Mr. REGULA. I have a problem getting back at 2 p.m. but I will reserve my time for 3 o'clock.

Mr. MOORHEAD. All right.

The subcommittee is very happy to welcome back one of the most articulate spokesman, not only before the congressional committees, but as a former member of the White House staff, Mr. Clark Mollenhoff, Washington bureau chief, Des Moines Register.

We are very privileged to have you here today. I know every member of this subcommittee looks forward to your testimony.

STATEMENT OF CLARK R. MOLLENHOFF, WASHINGTON BUREAU CHIEF, DES MOINES REGISTER

Mr. MOLLENHOFF. Delighted to be here, Mr. Chairman, and I guess in some ways Ms. Lawton made my case for me relative to the power grab that this amounts to. I have a prepared statement but I think the best way is to go right through it—it is relatively brief—and then open up for questioning.

I am not going to claim executive privilege. I have all of the files and memoranda of the *Fitzgerald* case here with me, which has already been made a part of the public record or most of it, in the Civil Service hearing. I think executive privilege would have been a disaster in that case because it would have stifled the whole brutality of the Air Force in that conspiracy. And having said that, I will proceed with the general philosophy as outlined in my statement.

There is no need for a long dissertation on the fallacies of the historic precedents that have been cited by this administration. The studious work of Raoul Berger in the UCLA Law Review in 1965, and his testimony before the Senate and House committees since then have

demolished the historic precedents. Representative John Moss, who chaired this committee for so many years, and Senator Sam Ervin are familiar with the flimsy basis for the claims of executive privilege. I can deal with those cases in response to your questions, but want to get right to the heart of the matter. Executive privilege is a poisonous doctrine, and would be evil even if a misguided Congress or court had given it some slight status at some point in our history.

Even if the present Congress was so shortsighted as to enact a law establishing President Nixon's illicit claims, I would be opposed to it from a commonsense standpoint because it would eventually destroy all of our freedom. I make these statements against a background of legal research and practical study of the problems of exposing and eradicating scandalous conditions in our Government. I have been in Washington 22 years. It is unfortunate that shortsighted editorial writers and superficial politically motivated legal scholars have occasionally given a degree of support to this so-called time honored doctrine and this phony well-established precedent of executive privilege.

Senator Ervin has properly referred to executive privilege claims as executive poppycock. Raoul Berger, following years of historic research, has declared executive privilege is a myth. I say it is a naked power grab under a cloak of constitutionality, thoroughly evil in its origins and destructive to any effort to make the executive branch accountable for the faithful execution of the laws passed by this Congress.

To start with, there can be no valid claim that there is any Federal law passed by Congress that even mentions executive privilege as a grounds for withholding anything from Congress or the General Accounting Office. I believe it would be a mistake to even mention it in a law and give credence to the fact that it might have some lawful claim.

Likewise, there can be no valid claim that there is any opinion of the Federal courts that mentions executive privilege as a grounds for withholding testimony or documents from the Congress or the General Accounting Office.

It is no more than the self-serving declarations and opinions of various recent Attorneys General of a vague claim that the U.S. Constitution and the separation of powers doctrine permit the President to arbitrarily refuse to cooperate with Congress with broad sweeping orders covering all personnel and virtually all documents in the executive branch.

In brief, it is the king's lawyer stating that it is his opinion that the king has total power, and that there is a divine authority behind this claim lodged in an all encompassing inherent power to run the Federal Government as he sees fit.

And my French is less fluent than yours, Mr. Chairman, but I would parrot your phrases if I could relative to the terminology of Louis the XIV.

To understand fully how absurd the executive privilege claims are it is only necessary to examine the total concept of what it is.

1. It is a claim that the President can arbitrarily withhold from Congress and the General Accounting Office the testimony of any present or former officials of the entire executive branch if he feels it is in the national interest. And there was nothing that Miss or Ms. Lawton

said here that could contradict that in any manner. In fact, she solidified it in a way that I have not seen it solidified. Basically, they come up here and are a little sneaky and sleazy. She was a little forthright in asserting the total privilege.

President Nixon has never even bothered to explain how the refusal to permit testimony by White House aides is in the national interest. I would be interested in some explanation of that and I would be interested in facing him at a press conference relative to that thing, too, because he has been avoiding me at the most recent press conferences in the most avid sort of way.

2. It is a claim that the President can arbitrarily withhold any document or other internal executive branch communications of advice from Congress and the GAO. We have been told from time to time that this covers all intraagency and interagency memoranda. There was a time when it was claimed it covered the independent regulatory agencies.

I am not sure they have abandoned that. I don't think there has been a scandal recently where they have to assert it.

William P. Rogers, now Secretary of State, as Deputy Attorney General, was the father of this evil doctrine to cover deceptive and devious behavior by Federal officeholders. It has seldom been used as anything but a blatant coverup for corruption and a wide range of mismanagement and political doubledealing. It is devoid of decency, because it creates the illusion that men can use the great power of the White House in secret and never be held accountable for their acts.

And that is why some of them are in the trouble they are in today. They believe there was executive privilege for everything. They believe they could run inside the White House gates and hide and tell no one and be unaccountable. And I tried to convince them otherwise during my brief period down there and it was futile.

It carries within it the seeds of totalitarianism and taken to its ultimate use by an evil-minded President would result in the downfall of democracy.

I can say nothing good for it. I guess I made that clear. From its birth in the March 17, 1954, letter by President Eisenhower, it has been a device for deception and a disservice to the Presidents who have from time to time bent to political expediency and used it to try to hide scandalous conditions as President Nixon is doing in the Watergate case. And following the Watergate, I can come to no other conclusion but he has to know at this stage that a *prima facie* or the outline of a *prima facie* case of conspiracy to cover this up has been made.

Its precedents are a long line of devious efforts, and fortunately unsuccessful efforts, to cover up the Dixon-Yates "conflicts of interest," the Sherman Adams-Goldfine scandal, foreign aid scandals, a wide range of military scandals, and corruptions and mismanagement in virtually every department of Government. The claim of executive privilege permitted our Presidents to pull down the secrecy curtain under the guise of a dome sacred constitutional doctrine.

When we declare that it cannot stand, we are now reminded that Dr. Henry A. Kissinger could not be expected to be testifying in public in the midst of sensitive negotiations to end the Vietnam war.

This is not the issue. Commonsense tells us that Dr. Kissinger should probably not be grilled by an antagonistic committee when he is carrying out touchy negotiations for the President. We need not go beyond commonsense and the ability of the President to articulate that commonsense to protect Dr. Kissinger. But, this does not mean that Dr. Kissinger should not be responsible at some later point for all of his actions and transactions in carrying out the Nation's negotiations. To argue otherwise would be to give Dr. Kissinger an unrestricted power to sow the seeds of our own destruction, and to forever refuse to say what he did, or why he did it.

Now, that concludes my statement.

If there is anything you want to know about the *Fitzgerald* case or any documents of it, I have them all here.

Mr. MOORHEAD. You have them here and you are not claiming executive privilege?

Mr. MOLLENHOFF. I am not claiming executive privilege. I think the *Fitzgerald* case dramatizes better than any other the great disservice, invoking executive privilege, would have in trying to get justice. Had I refused to go down there and claim executive privilege or permit the administration to impose an executive privilege upon me, which the Air Force was trying to do. There was a vast amount of evidence dealing with this conspiracy in the Air Force, such as the trooping around of two top Air Force officials to the White House distributing—what they must have known unless they were thoroughly negligent—was smear material about *Fitzgerald*. This was 3 or 4 months after their own investigative unit had said there was nothing to the conflicts of interest or the security charges that had been leveled against *Fitzgerald* by some people who are still anonymous. Had I claimed executive privilege it would have been a great injustice—

Mr. MOORHEAD. I am, as the gentleman knows, a member of the Joint Economic Committee and the Military Operations Subcommittee, so that I am somewhat familiar with the *Fitzgerald* case. I think you, Mr. Mollenhoff, have done a magnificent job in helping to protect the rights of this fine civil servant, whose only crime really was being honest and forthright before the Congress.

Mr. Mollenhoff, you studied some of the law review articles like Professor Berger's and so forth. Would you agree with me in all of the 400 volumes of Supreme Court decisions there is no instance where the Court directly ruled on the question of the ability of the Congress to get—or should I say there was an inability of the Congress to get information from the executive branch?

Mr. MOLLENHOFF. Never have they ruled otherwise, where the Congress was the proper authorized congressional committee operating within their jurisdiction.

Mr. MOORHEAD. Mr. Mollenhoff, at one time you were assistant to the President in the White House?

Mr. MOLLENHOFF. Yes, sir.

Mr. MOORHEAD. So, based on your experience, would you comment on the present situation where this subcommittee—on a bipartisan basis—in a letter signed by Mr. Erlenborn and me, invited John W. Dean III, to come before this committee, and we even specified that we

would not ask questions about the Watergate, that all we really wanted was his technical legal advice on "executive privilege" and also his practical experience in this area. Now, we haven't even gotten an official refusal yet—just over the telephone—but can you see any reason whatsoever in commonsense that would say that a man in the White House should not advise this committee on legislation pending before it?

Mr. MOLLENHOFF. I can give one very good practical reason. I have had discussions with John Dean on executive privilege and his knowledge in this area is about as broad and as valid as Ms. Mary Lawton's, I would think that it would not be wise for the President to send his Counsel up here and to be in that particularly embarrassing position.

Mr. MOORHEAD. Mr. Mollenhoff, we——

Mr. MOLLENHOFF. And I would like to add I wrote a book on this subject back in 1962 so this is a subject with which I am very familiar.

Mr. MOORHEAD. Lawyers have a saying that "hard cases make bad law" and I wonder if the situation of Mr. William P. Rogers' opinion arising out of the McCarthy situation in 1954 wasn't a case of hard cases making bad law?

Mr. MOLLENHOFF. It was a situation where there was a political embarrassment to the Eisenhower administration in admitting that they had been plotting the downfall of Joe McCarthy but what they wanted to do was to pull a sneak punch and then get by without anybody knowing and so they pulled the executive privilege.

The business of knocking off Joe McCarthy on grounds of irresponsibility was a valid one, but they should have had the courage to come out and do it openly. And that is the problem with this executive privilege. They run behind the White House gates or they can run behind essentially any of the executive branch doors and claim that there is an executive privilege if the President finds it is in the national interest and hide behind this.

Mr. MOORHEAD. The next point, Mr. Mollenhoff, on page 4 you talk about calling up Dr. Kissinger when he is in the middle of sensitive negotiations.

In previous administrations—and I hope in future ones—such negotiations might well be carried on by the Secretary of State and yet the Secretary of State has always been available to the congress. There is no claim that he is not available to congressional committees.

Mr. MOLLENHOFF. Well, the experience from the Pentagon papers, though, demonstrates that the Cabinet officers—and I don't know whether it would apply to Dr. Kissinger or not, because he has never testified—but the Cabinet officers were less than frank and there was a broad pattern of lies, outright lies, relative to the Vietnam war and that was before congressional committees. And, of course, the administration where those lies took place did not prosecute them for what was obviously perjury.

Mr. MOORHEAD. Yes, but there is no claim of an executive privilege to a lie. I mean, it is our job to ferret out the truth.

Mr. MOLLENHOFF. I might say that in many of these instances, the committees of Congress have not been diligent in following through and, while I am in the same position as the administration in opposing the legislation, it is, of course, for an entirely different reason, and

I appreciate your problem because I know that you are trying to come to grips with a very difficult thing of getting the Congress informed and to try to draw rules.

On one thing I would agree with Ms. Lawton. I don't think the Congress needs to draw rules and I don't think there should be any laws. I think that all this takes is a little guts and I think that Sam Ervin at the present time is displaying the ability to come to grips with the law. He is one of the few people up here who can get up and talk about the cases and slice—well, I shouldn't say that word—slice off of the administration, with citations of specific legal cases and in-depth knowledge of why Washington, for example, can't be used as a precedent because George Washington never held anything back from Congress. He held a few papers from the House which he had already delivered to the Senate.

And, the same thing is true with other examples over the years. The fact that Jackson was an arrogant so-and-so and was trying to hide some land scandals certainly should not be a precedent. And I would hope that the present situation relative to the Watergate would not be a good precedent.

Mr. MOORHEAD. I think the testimony—and this is now going to the practical necessity behind the claim for the President and for his aides, not having to testify—is that former Justice Goldberg told this subcommittee that in his capacity as Secretary of Labor and in his capacity as Ambassador to the United Nations, he had frequent occasions to have privileged conversations with the President of the United States and he had no difficulty in coming before congressional committees and explaining that which Congress needed to know and withholding that which he thought was a private communication with the President and that maybe the Congress didn't need to know about.

Mr. MOLLENHOFF. Mr. Moorhead, the case where I think the proper dividing line was drawn—and without any discussion of executive privilege or anything else, but just a matter of commonsense—was in the firing of MacArthur back in 1951. General Bradley, who was the closest adviser to the President as Chairman of the Joint Chiefs of Staff during that period of time—and, incidentally, he went before the Joint Committee, the Senate Foreign Relations Committee, and the Armed Services Committee, to explain what took place and he went before the committee to start with, which Henry Kissinger has not done—and he testified when he went there as to when he went to the White House to consult with the President, what was discussed, what the conclusions were at the end, and the only thing he did not go into were the exchanges as to what they should do about MacArthur and I am sure that Mr. Truman and General Bradley both used rather colorful language and I think it was quite proper—and the committee did, too—to avoid getting into repetition of that language, that was really all that was held back.

Mr. MOORHEAD. I would think that at the very least, every person other than the President, himself—and even the President if it were a case of impeachment—every person, no matter what his relationship, should be available to appear before a congressional committee. That is the minimum, although possibly there should be some limitations on questions to which he is subjected to.

Mr. Erlenborn?

Mr. ERLENBORN. Thank you, Mr. Chairman.

Thank you, Mr. Mollenhoff, for your testimony.

As you will recall, I called to ask if you would be willing to testify, and I am happy that you have testified even though you have testified against the bill I have introduced. I don't think we are really all that far apart, however, in our view of the situation.

Mr. MOLLENHOFF. I appreciate your problem and your sincere efforts to come to grips with this, but I just don't think anyone should even mention executive privilege in the law.

Mr. ERLENBORN. I can understand that.

Mr. MOLLENHOFF. I have seen what they have done to the Freedom of Information Act in some instances.

Mr. ERLENBORN. Right. And I think, in effect, however, what you have described as a commonsense application of restraint and what I have tried to define in section 3 of the bill are pretty close to each other. There are areas, obviously, where Congress should not interfere with ongoing negotiations, and so forth. What we have tried to say in this bill is, there is no area that is free from the inquiry of Congress except policy recommendations to the President or to an agency head when they would seriously jeopardize the national interest and interfere with the President's ability to get advice.

Mr. MOLLENHOFF. Is there some way you can do that without mentioning executive privilege because it has become such a sacred thing and it is such bunk?

Mr. ERLENBORN. Well, maybe we don't even have to use that term. If we let that term out would you agree with what we are trying to do?

Mr. MOLLENHOFF. I agree with what you are trying to do. I certainly do. I think that the Congress with all of its faults—and there are many scoundrels around Congress—but that the wisdom of Congress, liberals and conservatives combined, is the strength of our country and that no one of you has that eternal wisdom to do everything, but I have faith in the combined sum and total of wisdom and balance in Congress.

Mr. ERLENBORN. Well, so do I. I join with you in that.

Let me ask you something else. You mentioned the Freedom of Information Act and some of the things that have been done under that act. This committee, of course, is turning its attention to—and has done so already—to a review of this act's administration and what we might do to improve it. With all of its shortcomings and faults, don't you think the enactment of that law was good?

Mr. MOLLENHOFF. It was a good piece of legislation and there is nothing wrong with it that a closer oversight by Congress and a knowledgeable press wouldn't cure.

There are a few people in the press corps who understand it but not enough. It is, again, a matter of knowledge of the legislation's strength.

This would avoid the kind of situation that they have used it for; as in the case of the OEO and AID programs. I was trying to get some personnel information and all I wanted to do was to find out where someone was born—he was a Government employee—where he went to school, how old he was. I just couldn't find out because they used

the exception of personnel information to pull down the curtain and I had one hell of a time before I got them turned around on that. I got the information from another source fortunately, but I still went ahead and complained to them.

In that case the Civil Service Commission had given some kind of interpretation that permitted OEO and AID to do that and the Civil Service Commission would not come in and straighten the record out.

My experience with the Civil Service Commission is this: That it is one of the most ineffective arms of Government and that you would do well to abolish it. It is no protection for the civil servant. It is largely a device for putting down people like Fitzgerald.

Mr. ERLENBORN. Well, with that, let me just make one last observation. The Civil Service Commission may not be doing a very good job, but everything in the executive branch, with the exception of the President and the Vice President, is a creature of this Congress, and I think they have to be responsive and responsible to this Congress, and I think no doctrine of executive privilege can shield them from this Congress.

Mr. MOLLENHOFF. I agree with you completely and you made the law. The Congress made the laws. You set up every one of the executive departments so you have a right to accountability as to how the laws are being administered and enforced and you should insist upon it.

Mr. ERLENBORN. Thank you.

Mr. MOORHEAD. Members must now answer the quorum call; we could go over and come right back. Would that be all right with you, Mr. Mollenhoff? It would be better than recessing for lunch, wouldn't it? Which would you prefer?

Mr. MOLLENHOFF. Well, I have to get back to work—

Mr. MOORHEAD. I am sure other members are going to have some questions, too.

Mr. MOLLENHOFF. I have a busy day. I work as a reporter.

Mr. MOORHEAD. I, personally, am willing to sit right through.

Mr. MOLLENHOFF. I would be very happy to come back at some other stage or I could stay for another 10 or 15 minutes and that would be better than coming back at 2 o'clock. I would be very happy to come back at some subsequent stage for any number of things you may be interested in.

If any of you have special interests, just let me know and I will try to answer the questions.

Mr. MOORHEAD. You will stay for another 10 minutes?

Mr. MOLLENHOFF. Ten or fifteen minutes.

Mr. MOORHEAD. How would that strike you?

Mr. McCLOSKEY. That is beautiful. I might want to question since this is the time for building the record for the legislation. I think it would be helpful to have the full testimony on the *Fitzgerald* case, which is very important.

Mr. MOLLENHOFF. There is a record made of the Fitzgerald hearing, and Senator Proxmire is getting my testimony as well, so you could, by that device, incorporate it and then if there is any question you have about any aspect of it, I can make the memorandums available to you.

Mr. MOORHEAD. Congressman Alexander has one question.

Mr. ALEXANDER. Mr. Mollenhoff, time is of the essence and I thank you for your splendid testimony.

I will simply conclude by saying that obtaining information from an unwilling executive is a day-to-day problem not only for Members of Congress but for committees that attempt to function within specific areas of jurisdiction.

Now, if you do not support the present legislation which is before us now, and if you would assume that we will not only encounter with this administration but future administrations that the atmospheres which would be less than that of a free exchange of information and cooperation, I would like to ask of you at some future time, what remedies that you would ask the Congress to consider in order to provide a solution to this very tantalizing problem?

Mr. MOLLENHOFF. In the meantime, Mr. Congressman, before you get the legislation that you want, I would suggest that a more diligent followthrough should be used and this committee would be one of those that could be much more aggressive and I would suggest a larger staff. And I am not suggesting that because I like to see bureaucracies grow up here on the Hill, but simply a quick followthrough on problems with the agencies would be helpful and a realization by the agencies that there is a committee that will follow through quickly, and can get the staff work done on it so that they are sure you will follow up.

In conducting interviews, you have to be sure when you tackle the agencies, you will follow up.

Mr. ALEXANDER. Thank you, sir.

Mr. MOORHEAD. Bill, do you have any questions?

Mr. PHILLIPS. I will wait.

Mr. MOORHEAD. Do you have any questions, Mr. Copenhaver?

Mr. COPENHAVER. No.

Mr. MOORHEAD. Well, I think we might as well proceed.

Mr. Mollenhoff, Mr. McCloskey is coming back, and Mr. Alexander is not. I think on that basis, we could finish up within that time limit you have given.

Mr. MOLLENHOFF. OK, fine.

Mr. MOORHEAD. There are some other bills that it might be interesting to get your comments on. If you are not familiar with them now, perhaps later, but Senator Fulbright does have one that does use the evil words of "executive privilege."

Mr. MOLLENHOFF. I am familiar with that and I am opposed to that Fulbright approach and I understand Senator Fulbright's frustration, in getting anything out of that State Department. But, again, in that instance—and I hesitate to state his being fully aware of the frustration of the people who have been around here for a long period of time—but he has not been very diligent with his committee and I might say that the staff on that particular committee, far from following through as your staff does on things in a very diligent fashion, within the framework of their time, has too much of an alliance with some people down at the State Department and in a recent case here, that is, the case of Ambassador Macomber, he was charged with responsibility for perjury, or condonation, falsification of documents,

and he was charged with this by a responsible organization, and by responsible witnesses, and they didn't even call him in to question him about it.

I don't know how in the world they can expect to make any, anyway, in getting any honesty in the administration of the Department and I talked to Senator Fulbright on that and he said that no one on the committee is interested, and if one person on the committee would say that I should call in Macomber, I would do it. But he says, I get tired of being the only one against the administration. He said I get tired of being a one-man band.

And I can understand that attitude, but there are many members of that committee who want to give the impression that they are forceful figures for integrity in Government and, at the present time, they permit a man to be named ambassador, when there are those charges pending by responsible witnesses and they don't even go into them. I have some doubts about the strength of their integrity.

Mr. McCLOSKEY. There is a very interesting bill introduced by a member of the full committee, Congressman Fascell, on April 2, of this year, which doesn't mention executive privilege. It just says "all information and all witnesses shall be available to the Congress upon proper request by a committee having jurisdiction."

Mr. MOLLENHOFF. I think that is probably the approach I would go along with. I don't know what can be clearer than the Budgeting and Accounting Act of 1921, and still the GAO—and this is the part that has really become absurd—they are supposed to be on top of the accounting and the monitoring of these departments and yet when they run into situations like the Lockheed situation, which your committee has been going into, when a \$250 million loan guarantee goes to Lockheed and when they can't get an accounting of what the collateral is or what the arrangements are behind that collateral, it is a very sorry picture.

Secretary Connally, the Secretary of the Treasury, pulled down the curtain and he got by with it and I think raising a lot of hell on a lot of these subjects once in awhile would serve a very useful purpose, and it has to be done in clear and unequivocal language.

Mr. McCLOSKEY. We were discussing yesterday with Mr. Dembling, the General Counsel of GAO, whether or not the Congress should grant the General Accounting Office the right to subpoena. Mr. Dembling thought this would be a great help to them.

Mr. MOLLENHOFF. I think it would, too. I think they should have the right to subpoena and go right into the Federal courts. I would not suggest a direct subpoena power for the Comptroller General or any of his people, but that they would have the right to go directly into court when they run into a block and that would settle quickly what the situation is and it might be better, as Senator Ervin is suggesting, perhaps, he will send the Sergeant of Arms down to the White House to get some White House aide and this will settle the thing.

I think that is the only way you are going to force this issue and force it quickly; otherwise, the Attorney General will have time for foot-dragging, the same time for foot-dragging that he had in the *Fitzgerald* case.

In the summer of 1970, Proxmire raised questions about whether the laws about congressional witnesses telling the truth and not being intimidated had been violated in the actions they took against Fitzgerald.

He sent that down and this is a criminal charge and the *prima facie* case is there on the record. It is the only conclusion that you can come to. The Justice Department promised priority study of that. Justice still hasn't made a decision. That was back in 1970. They send it back to the Air Force. I am sure that the Air Force will not give this a very diligent study because the top people in the Air Force are involved in the conspiracy.

This is like John Dean sending the FBI employees to Segretti, to get a hold of this and somehow the people over at the committee to re-elect got a hold of it.

Mr. MOORHEAD. Well, I think you are right. This is what Professor Berger suggested in his testimony last year—that we pick the right person and subpoena him. We thought we had somebody last year that we could use this on, but I was a little concerned, really frankly, as a political reality, whether we might not be able to push it on through the House. I want to get one we can win on—at least win on up here.

Mr. MOLLENHOFF. I think that is important, but that is part of the problem that there are too few up here who will stand on principle. Most of them will cater to a political expediency at any stage and there will be a large number during that period.

And when the administration can use the money that it has to pressure and buy off Congressmen and Senators indirectly, there isn't much you can do about it and you have to be awfully careful. And that is an area where I am totally sympathetic with your position.

Mr. MOORHEAD. I am sorry they aren't here at this time but I might take this opportunity to say that the cosponsors of the Erlenborn bill are all members of the Republican Party and they know that the administration opposes even this bill—for a different reason than you oppose it, of course. I think the cosponsors of the bill are showing some real courage in standing up against their own administration.

Mr. MOLLENHOFF. I think that is right and you see my position on executive privilege extends way back to when I first became concerned about this in May of 1954, but there were very few people who were concerned at the earlier stages. There was a handful up here from this committee, like Senator Hennings in the Judiciary Committee and when Senator Kefauver had a subcommittee but it amazes me how few of the committee chairmen up here really understand fully the things that Senator Ervin understands so well and that you understand so well and that Congressman Moss understands so well. It has been laid out by Raoul Berger so clearly.

Mr. MOORHEAD. I think that because the sin of executive privilege—and you called it that—was committed relatively few times in either the Kennedy or in the Johnson administrations, according to the Library of Congress research paper, I think we thought maybe it was going away, but it is the excessive use by this administration that has brought it up again.

Mr. MOLLENHOFF. I think that it was unfortunate that it came in under Eisenhower because while it has the same seeds of totalitarian-

ism at that stage I am sure that Eisenhower did not view it that way nor could anyone view Eisenhower as trying to be a dictator.

Mr. MOORHEAD. I agree.

Mr. MOLLENHOFF. Kennedy was fully aware of the sensitivity of this problem and Bob Kennedy did not want to bend to it at all. He had done so under a couple of circumstances for political expediency. I disagreed with him on those but I could understand his viewpoint. Johnson had other ways of taking care of it.

Mr. MOORHEAD. Mr. McCloskey, Mr. Mollenhoff would have preferred to have left 5 or 10 minutes ago but he stayed with us.

Mr. McCLOSKEY. I want to thank Mr. Mollenhoff for his testimony. I think it helps occasionally to have a square statement of something we have grown gradually to accept without ever examining the basis behind it.

With respect to this legislation before us, if in view of what has happened since 1954, Congress now acquiesces in the course of the procedure outlined by the Justice Department, and passes no legislation on this subject, we might be acquiescing in the very thing you have interpreted. In light of the circumstances with the way that the administration has interpreted the Freedom of Information Act, the abuses that have been described by the General Counsel of the GAO yesterday, and the whole nature of the President's statement that only he will exert executive privilege and then everybody in his Cabinet and below him choosing to exercise it and thereby withhold information, I feel we have an obligation as the Congress of the United States to enact some legislation that will clarify the situation to which you refer in your testimony.

Mr. MOLLENHOFF. Just a moment ago the chairman raised this question relative to the Fascell bill which does not mention executive privilege but would just lay out again very firmly that the Congress shall be entitled to such and such. And I think that would be good to do that again although there are countless statutes on the books now that have that effect. And I mentioned that the General Accounting Office has the widest powers under the Budget and Accounting Act of 1921, and they should have access to everything without argument at the present time. But they don't have.

I think it would be a good idea to give them subpoena power, not to be exercised directly but through the courts and try that avenue for a brief period of time. That might solve the problem. If it were aggressively followed up from the Hill, that might solve it and I think that much of it can be solved by simply an aggressive followthrough from nonpartisan committees up here, as this one has done on this issue, and a kind of giving the administration a lashing—and that is any administration—every now and then. We have had some examples and my comments on this administration are not to be any more than a little more severe than on past administrations, because I don't really blame President Nixon for trying to get by with this alone.

If the Congress lets him get by with it, if it lets other administrations get by with it, that will be the Congress' fault.

There was a column by Alsop this morning which I thoroughly disagreed with, but he was making the point that other Presidents have done the same things that Mr. Nixon is doing so why should

everyone get all over his back? And there is some truth to that, but I think that rather than say that scandalous conditions probably existed under earlier administrations so you should abandon investigations of scandalous conditions now, I think that that is not a very logical conclusion and that rather than say that, we should correct the present.

Mr. McCLOSKEY. Well, Mr. Mollenhoff, you heard, as I did, with probably growing alarm, the sentence that the Justice Department made, stating that it is improper to ask a subordinate official for information and, in fact, it is even unfair of the Congress to ask for the truth from this subordinate official of the Government.

Mr. MOLLENHOFF. That is sometimes the only way you can get at the truth.

Mr. McCLOSKEY. It seems to me this concept of a bureaucracy and the concept of an administration that is loyal to the Commander in Chief alone, has become so pervasive throughout Government, that there is an obligation on our part to pass some kind of affirmative legislation.

What I wanted to ask you is, if we came out with this bill, would you have any objection to this bill containing a provision, for example, that made it a crime for a Government employee to lie or to deceive in response to an inquiry by the Congress? Do you have any objections to attaching criminal penalties for deceiving Congress?

Mr. MOLLENHOFF. Not at all. When they come before the committees, they have that obligation now. Some of the committees, I must say, do not put people under oath and that is unfortunate. I guess I wasn't under oath here today, either.

Well, I don't mind taking an oath and saying it was all true.

Mr. MOORHEAD. The custom of this subcommittee has been when we are having an investigative hearing, we swear the witnesses—

Mr. MOLLENHOFF. I understand there are some committees that rarely put anybody under oath, and I am thinking of the Agriculture Committee, which would be one of those. I talked to some people on the staff and a couple of members and, like something in the last 20 or 25 years, there hasn't been anybody under oath and they have been investigating things like the Russian wheat deal and all types of really devious situations, where there might be crime involved.

Mr. McCLOSKEY. There is a second area I wanted to ask you about. I wonder if perhaps the Congress might impose on the executive branch a test that we impose upon a lawyer in my State of California. When an attorney addresses the court, the decisionmaker on a matter of fact, and, there are four facts that justify a certain conclusion, if the lawyer has knowledge of a fifth fact which might materially affect the judge's decision, he is under an affirmative duty to tell that fifth fact.

On numerous occasions we have had witnesses that possess vast amounts of information and they will answer questions truthfully, but they will not volunteer information that would reflect the other vast information they are privy to and might affect the action of Congress.

Mr. MOLLENHOFF. Your point is valid and I think the case of the SST is one in point. If you have an investigation of some project related to that and some of the material is adverse to what the administration wants to do, it just usually tries to bury it and has all of the

witnesses come up and lie. Now, I think there should be a little more pursuit of perjury in some of these cases, too.

Mr. McCLOSKEY. That is the sole reason the previous witness said that it is unfair to call a subordinate employee. The subordinate employee, under the present frame of reference in Government, is very seriously endangered in his or her job future if he or she should give an opinion or fact which does not comply with the administration's.

Mr. MOLLENHOFF. The *Fitzgerald* case is a No. 1 example.

Mr. McCLOSKEY. Exactly, and I think that perhaps we ought to recognize this inherent conflict for someone testifying before the Congress who wants to please their superior on the one hand, and yet give truthful answers on the other. There is always going to be a conflict.

Mr. MOLLENHOFF. You have a law on the books right now that no person shall be intimidated or harassed because of giving truthful testimony before Congress. That is mostly ignored because the executive branch gets by with ignoring it and it is a matter of following through by the Congress and pushing on these things.

I have to follow through on these things as a newspaper reporter and it is difficult enough, but you have the power. You have subpoena power and you have the right to call witnesses up here, and if all of the committees were as diligent as this one is, you would have less of a problem all of the way around.

Mr. McCLOSKEY. Well, Mr. Mollenhoff, let me go back to one question finally which troubles me and I think you mentioned it in your statement.

You stated that commonsense should preclude the Congress from inquiring into ongoing diplomatic negotiations, I think you could probably extend that to ongoing intelligence-gathering operations. While I would agree with you that Washington's decision is certainly not a precedent to justify executive privilege, there was great deal of merit in his comments that delicate negotiations and future ability to conduct those negotiations would be prejudiced if a wide knowledge was available of their existence.

Now, I agree that technically, there is no reason why 535 Members of the House and Senate shouldn't be privileged to the identical information that Henry Kissinger has in his negotiations, but yet I think, as a practical matter, we shouldn't have that information on a day-to-day basis as the negotiations go forward and that we have to exercise restraint in this area.

Mr. MOLLENHOFF. The Senate and some House committees have worked out a solution to this in assigning two people, the ranking Republican and the chairman, to have access to even such things as raw FBI files, and then, also, the CIA. There is a small committee—and I think, again, it must be the chairman and someone else—who can go into the CIA and inquire beyond the general structure itself. I think that that should satisfy in cases where you have confidence in your colleagues and I think most of the time your colleagues come back and tell you, "Well, there isn't anything behind it, you can believe them." You can always choose which ones you can trust and which ones you can't.

Mr. McCLOSKEY. We then raise the question in our own procedures whether or not we are entitled to elevate one Member of Congress over the others under the constitutional requirements of the Congress.

Mr. MOLLENHOFF. Well, there must be a reasonableness on the part of the Congress in some circumstances. I don't think that every Member of the Congress and every Senator should have all information. I think that you should have most information, that is, probably 99 percent of the information but you get down to maybe that one-tenth of 1 percent where you just don't want to spread it around but you might want to check something, and you have to have someone that you have confidence in go in and check to see if the raw FBI files measure up to the conversations that you may have received about them, and that is the device through which it can be done.

Again, there is too little effort to do this in most cases.

Mr. McCLOSKEY. Thank you.

Mr. MOORHEAD. Mr. Regula?

Mr. REGULA. Mr. Chairman, Mr. Mollenhoff, just one question: Do you see any parallel between the doctrine of executive privilege and the shield law?

Mr. MOLLENHOFF. I am against the shield law and I am against executive privilege for the same reason.

Mr. REGULA. I gathered from your testimony that you were.

Mr. MOLLENHOFF. I don't think anyone in this country and this means Presidents or reporters, are entitled to any special privilege and, if I were for a shield law, I would be saying that reporters were entitled to something but I don't think the President or the White House gang is entitled to.

Mr. REGULA. Mr. Chairman, one further question.

In your experience as a reporter, Mr. Mollenhoff, have you had difficulty in getting what I call mundane information aside from these things that get headlines. I am talking now about day-to-day kind of material that might be important to the people.

Mr. MOLLENHOFF. No, I don't have any problems like that. They know that I know the law on this subject and I am not at all bashful in the way I put my position forward.

Mr. MOORHEAD. On that understatement of the year, the committee will stand in recess until 2 o'clock at which time Ms. Lawton will be back for additional questioning.

The subcommittee will stand adjourned.

[Whereupon, at 1:35 p.m., the subcommittee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

Ms. Lawton, would you reassume the witness stand?

Mr. McCloskey?

Mr. McCLOSKEY. I have a couple of more questions, Mr. Chairman.

Thank you for coming back, Ms. Lawton. Any difficulty you may have with this examination might be tempered by the recognition that the last representative of the Department of Justice who testified before us is now on the Supreme Court of the United States.

Ms. Lawton, the difficulty that I have with your testimony and that of Attorney General Rehnquist's before you, is that if we accept your

concept of executive privilege as a general point of view, there are really no limits on the executive privilege; it is something to be determined on a case-by-case basis by the Executive.

The testimony that we had yesterday by the General Counsel of the General Accounting Office is that the ordinary bureaucratic interpretation of this attitude that you express is to delay and in some cases seriously impede the free flow of information to the Congress.

We are faced with the practical problem that while the last three Presidents have all said executive privilege will be exercised only by him personally, we have found, in effect, the de facto exercise of the executive privilege by agencies such as the Federal Deposit Insurance Corporation, HEW, and by a number of individuals, who faced with the choice you mentioned of displeasing the superior and meeting a request of Congress, have chosen not to antagonize their superior.

We are faced with that as sort of a fact of life in Government if your view is sustained. Do you recognize any limitation on the privilege that you have described?

Ms. LAWTON. Well, I think as we mentioned before that, obviously, there are certain limits. Now, for example, in terms of disclosure to the public at large, the Freedom of Information Act imposes limits.

Mr. McCLOSKEY. The Freedom of Information Act specifically states nothing in that act shall prevent the free flow of information to the Congress.

Ms. LAWTON. Yes.

Mr. McCLOSKEY. In that *McGrain v. Daugherty*, it seems to be very clear that our power to ascertain facts is absolutely necessary to our legislative authority. And I have difficulty understanding how the exercise of the privileges you describe can be justified on the basis that interference with the executive's carrying out its functions justifies the denial of the Congress carrying out its functions.

Can you discuss why you feel interference with the executive branch is more important than interference with the legislative branch?

Ms. LAWTON. I didn't mean to imply that. I realize this produces a direct conflict in some instances. The executive has the information and Congress wants it and the executive says, "No; we won't provide it," and that is usually, as I am sure you are aware, the starting point and not the end point. The same thing happens with the courts.

The same thing happened in the FCC case where the court was asked to enjoin the Congress and the court said that, "No; we can't interfere with the Congress and this is beyond our powers." So, it does get worked out.

This is a gradual pull between and among the branches. What works it out is the fact that these are all basically in a political sphere. No President can get away with a total clamp of secrecy and no President ever has. There are always these pressures.

Mr. McCLOSKEY. Are you suggesting that a remedy on this recent pronouncement of the President would be a political remedy rather than a legislative remedy?

Ms. LAWTON. I think this has always been the answer. The political aspects and public opinion and so forth have been the answer in the conflicts, plus negotiations. Invariably, things have been worked out with the Congress whenever there is a conflict.

Mr. McCLOSKEY. I would say, Ms. Lawton, Mr. Dean has declined to appear before this committee and give his judgment on executive privilege. To our knowledge, you are the only executive branch authority that has thus far accepted the invitation of this committee to appear. In your judgment, is it proper judgment for the Secretary of the Treasury to decline to come and testify before this committee and discuss this subject?

Ms. LAWTON. That is executive privilege and I don't think he asserted it.

Mr. McCLOSKEY. What is it, Ms. Lawton, when a Cabinet officer declines either to appear in person or by his representative at the invitation of a committee of Congress?

Ms. LAWTON. It is just that it is a declination of an invitation on the grounds that, well, I am committed elsewhere, I will be out of town that day, I cannot add anything, which as I understand the chairman's statement is what the letter said, that we are not the lawyers for the executive branch on executive privilege—we meaning HEW or Treasury—and we can add nothing to what Justice has to say, so we would prefer to defer to Justice. And I understood that that is where it was left.

Mr. McCLOSKEY. I am not familiar with any other course of congressional requests or invitations to testify where executive branch agencies have declined to appear on the basis that they deferred to some other agency of Government. For example, most other administrations had each agency appear, state their opinions, views, and the facts that are appropriate; certainly in prior hearings by this subcommittee, we have had representatives from all of the executive branch agencies that were invited to come.

Now, suddenly, in the context of the present situation, we have a refusal to testify on the part of every executive branch agency except the Justice Department. Can you defend that?

Ms. LAWTON. I think that the position there is that whatever testimony would be made would be cumulative.

Mr. McCLOSKEY. As a lawyer, you know the courts have the right to subpoena a witness to give testimony.

Ms. LAWTON. In the courtroom.

Mr. McCLOSKEY. Wouldn't it be within the investigative power of Congress to do so? Isn't it a little arrogant for the executive branch to decide whose department will be giving testimony and whose department will not?

Ms. LAWTON. I wouldn't characterize it as arrogant. I assumed this was always the case. I know that primarily when invitations come to the Department of Justice—and I assume other departments do this—the invitation is normally addressed to the Attorney General and, if he sends someone else, I have never—well, on occasions I have heard complaints but normally not.

Mr. McCLOSKEY. Let me ask this question, Ms. Lawton. You are representing the Justice Department. Has an order gone out of any kind in the executive branch that no one is to testify but members of the Justice Department?

Ms. LAWTON. Not to my knowledge.

Mr. McCLOSKEY. Has the Justice Department consulted with any other executive branch agency with respect to the testimony of witnesses before this subcommittee?

Ms. LAWTON. On this bill, you mean?

Mr. McCLOSKEY. Yes.

Ms. LAWTON. Generally, I couldn't say but on this bill, no.

Mr. McCLOSKEY. With respect to this testimony?

Ms. LAWTON. Not to my knowledge, no.

Mr. McCLOSKEY. To your knowledge, it is just coincidence that you are the only representative of the executive branch of Government that has decided to come and testify before us?

Ms. LAWTON. Well, I suppose—and I don't know, we were not consulted on it—

Mr. McCLOSKEY. Just a minute. Who made the decision that you were to be the witness today?

Ms. LAWTON. The Office of Legislative Affairs of the Department of Justice.

Mr. McCLOSKEY. Who is the director of that office?

Ms. LAWTON. Mike McKevitt.

Mr. McCLOSKEY. Has Mr. McKevitt expressed any thoughts as to any other executive branch agencies appearing before us?

Ms. LAWTON. I have no idea.

Mr. McCLOSKEY. I wonder if you could inquire and give us the answer in writing whether or not the Justice Department has consulted with other agencies with respect to their declining to appear and testify?

Ms. LAWTON. Yes.

Mr. McCLOSKEY. Will you do that?

Ms. LAWTON. I can try.

[The following statement was subsequently submitted:]

DEPARTMENT OF JUSTICE,
Washington, D.C., April 18, 1973.

Hon. WILLIAM S. MOOREHEAD,

*Chairman, Subcommittee on Foreign Operations and Government Information,
Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: In response to Congressman McCloskey's inquiry concerning the decision of other agencies not to appear in response to the subcommittee's invitation, there was no joint decision that the Department of Justice would furnish the only witness. Upon receiving the invitation and determining the Justice Department witness, the Office of Legislative Affairs of this Department notified the Office of Management and Budget that the invitation had been received, and that Deputy Assistant Attorney General Lawton would be the Department's witness. This is, of course, the normal procedure within the executive branch. The Office of Management and Budget made its own decision that it would not send a separate witness, as did the Departments of the Treasury and Health, Education, and Welfare. Treasury did call the Office of Legislative Affairs to confirm that the Justice Department would be sending a witness and indicated its own intention to decline.

Mr. Dean's declination was not discussed with the Department. In summary, there was no meeting on the subject and no concerted decision, of which we are aware, that Justice would be the only Department or agency to accept the invitation.

Sincerely,

MIKE MCKEVITT,
Assistant Attorney General.

Mr. McCLOSKEY. In your testimony in direct examination, Ms. Lawton, you mentioned the fact that troop movements and diplomatic negotiations were within the realm of proper executive privilege. Would you say that the deliberations of the Department of Health, Education, and Welfare could ever properly be within executive privilege as you have defined it?

Ms. LAWTON. Yes, I would think so.

Mr. McCLOSKEY. On what basis?

Ms. LAWTON. The policy recommendations, the need to obtain forthright policy recommendations.

Mr. McCLOSKEY. With the exception for the need to obtain forthright policy recommendations, can you see any basis for the claim of executive privilege by HEW?

Ms. LAWTON. I don't think it would be phrased in executive privilege terms, but probably in statutory terms there are certain restrictions on disclosure of certain types of information outside the agency receiving it and I think HEW has some of this.

Mr. McCLOSKEY. You are familiar with title 5, section 2954?

Ms. LAWTON. The number doesn't ring a bell.

Mr. McCLOSKEY. It is the section that states upon written request of any seven members of the Government Operations Committee, the Government agencies will furnish any request for information to this committee. Are you familiar with that section?

Ms. LAWTON. No, I am not.

Mr. McCLOSKEY. Let me put a copy of it before you because it seems to us that the law is clear that the executive branch is required to respond to a request of Congress for information.

Now, on what basis other than policy formulations, do you state executive privilege would extend to information of the Health, Education, and Welfare Department?

Ms. LAWTON. I didn't say executive privilege. I said there may be statutory restrictions.

Mr. McCLOSKEY. Ms. Lawton, you are the attorney from the Justice Department testifying as an expert. Are you aware of any statutory restrictions that conflict with section 2954 of title V?

Ms. LAWTON. It would be a problem of statutory interpretation, I grant you, but you have restrictions.

Mr. McCLOSKEY. Do you understand my question?

Ms. LAWTON. I understand the question.

Mr. McCLOSKEY. Are you aware of any statutory provision that would justify the executive branch or HEW from withholding information from this committee?

Ms. LAWTON. There is the provision on trade secrets. It would depend on how you interpret that specific statute and read it against the more general statute. I believe there are restrictions on disclosure of social security information. How tight they are and how you would read them against the other statutes, I couldn't say. I would have to look at that. I think those two restrictions do relate to HEW as do others, particularly, in the food and drug area.

[Additional information subsequently submitted for the record follows:]

STATUTORY RESTRICTIONS ON RELEASE OF INFORMATION BY THE EXECUTIVE

Attached is a partial list of statutes which restrict the release of information by executive agencies, their employees, or officials. See Annex A. In general, these statutes fall into one of four general categories: (1) restrictions on the release of information necessary to protect the industrial property rights (trade secrets, patentable inventions) of the sources of information; (2) restrictions on the release of information in order to prevent its improper use by speculators; (3) restrictions intended to protect individuals from disclosure of personal information (e.g., 13 U.S.C. 9, restricting the release of information obtained by the Census Bureau); and (4) restrictions on release of information the secrecy of which is required for purposes of national defense.

None of the statutes listed in Annex A, by its own terms, prevents the release of information to Congress. Moreover, in a number of cases, statutory provisions specifically provide for the release of otherwise restricted information to the Congress (See the partial list of such statutes in Annex B). Where there is no specific provision for the release of the information to Congress, an executive agency may nonetheless have the discretion to release it. For example, 47 U.S.C. 220(f), while restricting the release of information obtained in an FCC investigation, permits its release when the Commission so directs.

Other provisions, such as that restricting release of census data (13 U.S.C. 9), do not appear to allow the agency discretion to release certain information to Congress. Certainly the logic of preventing dissemination of personal information, or information relating to trade secrets, would extend to release of information to Congress as well as to private individuals. And the fact that Congress has in some cases enacted special language to ensure the availability of information to Congress (see Annex B) may, in cases where no special provisions exist, indicate a legislative intent not to make the material available to Congress.

A brief comment on the meaning of 5 U.S.C. 2954 may be appropriate. This provision contains broad language with respect to requests by the House and Senate Committees on Government Operations for information from executive agencies:

"An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee."

Read literally, the provision purports to authorize the House and Senate Committees to obtain almost any document from the Executive. One obvious exception would be information protected by the executive privilege doctrine. In addition, however, relevant legislative history indicates that a narrow reading of the provision may be appropriate. The House and Senate reports on this statute (45 Stat. 996 (1928)) indicate that the provision was intended primarily to enable Congress to obtain information theretofore contained in reports from the Executive which were discontinued by an earlier section of the same statute. See S. Rept. 1320, 70th Cong., 1st Sess., p. 4; H. Rept. 1757, 70th Cong., 1st Sess., p. 6.

If the House or Senate Committees on Government Operations request information under 5 U.S.C. 2954 in a case where the release of such information appears to be barred by specific language in another statute, it would be a matter of statutory construction whether or not the information can be released. It is, of course, impossible to determine how such a conflict would be resolved without knowing the specific facts involved.

As a final point, it should be stressed that in any case where release of information to the Congress is prevented only by language contained in a statutory provision (and not by any legal or constitutional doctrine such as executive privilege), the Congress probably could obtain the document simply by repealing the language in question. As a policy matter, the Congress may well wish to weigh with some care the countervailing interests for and against release of the information before taking such action.

ANNEX A—PARTIAL LIST OF STATUTES LIMITING DISCLOSURE OF INFORMATION BY EXECUTIVE AGENCIES OR BY THEIR OFFICIALS OR EMPLOYEES

7 U.S.C. 135a(c)(4)—Disclosure of information regarding economic poisons obtained by the Administrator of EPA.

7 U.S.C. 472—Disclosure of cotton statistics in hands of Department of Agriculture.

- 7 U.S.C. 608d(2)—Disclosure of information from Commodity Benefits Investigation.
- 12 U.S.C. 1151j(c)—Disclosure of information imparted in confidence by Farm Credit Association.
- 13 U.S.C. 9—Disclosure of information obtained by the Bureau of the Census.
- 15 U.S.C. 78x(c)—Disclosure of information obtained by the SEC not available to the public.
- 15 U.S.C. 79v(c)—Disclosure of information on public utility holding companies obtained by SEC.
- 15 U.S.C. 80a-44(a)—Disclosure of information on investment companies obtained by SEC.
- *15 U.S.C. 80b-10(b)—Disclosure of information on investment advisors obtained by SEC.
- 15 U.S.C. 645(b)(4)—Disclosure of information regarding future action of Small Business Association.
- 15 U.S.C. 1263(h)—Disclosure of trade secret information obtained by HEW.
- 16 U.S.C. 825(b)—Disclosure of information obtained by FPC in examination.
- 18 U.S.C. 794, 798—Disclosure of national defense information.
- 18 U.S.C. 952—Disclosure of diplomatic codes.
- 18 U.S.C. 1902—Disclosure of crop information obtained by Government.
- 18 U.S.C. 1904—Disclosure of information affecting securities obtained by the Reconstruction Finance Corporation.
- 18 U.S.C. 1905—Disclosure of confidential information obtained by Government.
- *18 U.S.C. 1906—Disclosure of information obtained by federal bank examiners.
- *18 U.S.C. 1907—Disclosure of information obtained by farm credit examiners.
- *18 U.S.C. 1908—Disclosure of information obtained by National Agricultural Credit Corporation examiners.
- 21 U.S.C. 331j—Disclosure of information relating to trade secrets obtained by HEW.
- 21 U.S.C. 458h—Disclosure of information relating to trade secrets obtained through poultry inspection.
- 22 U.S.C. 286f(c)—Disclosure of information obtained by Government in compliance with IMF request.
- *26 U.S.C. 7213(a)(1)—Disclosure of information contained on income tax return.
- 26 U.S.C. 7213(b)—Disclosure of information on manufacturer operations obtained through visit by IRS personnel.
- 35 U.S.C. 181—Disclosure of invention where secrecy is necessary for national defense.
- 42 U.S.C. 1306(a)—Disclosure of tax information communicated by IRS to HEW or Department of Labor.
- 42 U.S.C. 2182(e)—Disclosure of atomic energy related inventions.
- *42 U.S.C. 2274, 2277—Disclosure of information classified as “restricted data” by AEC.
- 42 U.S.C. 3220(b)(4)—Disclosure of information regarding future action of Secretary of Commerce affecting value of securities.
- 47 U.S.C. 220(f)—Disclosure of information obtained through FCC investigation.
- 49 U.S.C. 20(7)(f)—Disclosure of information obtained in ICC examination or inspection.
- 49 U.S.C. 322(d)—Disclosure of information contained in reports to ICC.
- 49 U.S.C. 917(e)—Disclosure of information contained in reports to ICC on water carriers.
- 49 U.S.C. 1021(e)—Disclosure of information contained in reports to ICC on freight forwarders.
- *49 U.S.C. 1472(f)—Disclosure of information obtained by CAB in examination.
- 50 U.S.C. 643a—Disclosure of information obtained from war contractor records.
- 50 U.S.C. 1152(a)(4)—Disclosure of information deemed confidential under War and Defense Contract Act.
- 50 U.S.C. 2155(e)—Disclosure of confidential information obtained under Defense Production Act.

* The asterisk indicates existence of a possible statutory exception permitting release of otherwise restricted information to Congress. See statutes listed in Annex B.

50 U.S.C. 2160(f)—Disclosure of confidential information for speculating purposes.

§ 408, Public Law 92-255—Disclosure of patient records in connection with drug abuse treatment.

ANNEX B—PARTIAL LIST OF STATUTES PROVIDING FOR DISCLOSURE OF OTHERWISE RESTRICTED INFORMATION TO CONGRESS

15 U.S.C. 80b-10(b)(2)—Information obtained by SEC on investment advisors otherwise restricted to be released to Congress based on a resolution or request “from either House of Congress.”

18 U.S.C. 1906—Information obtained by federal bank examiners available “by direction of the Congress of the United States, or either House thereof, or any committee of Congress or either House duly authorized. . .”

18 U.S.C. 1907—Information obtained by farm credit examiners available to Congress under same terms stated in § 1906.

18 U.S.C. 1908—Information obtained by National Agricultural Credit Corporation examiners available to Congress under same terms stated in § 1906.

26 U.S.C. 6103(d)(1)(A)—Information from income tax returns available “upon request from the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a select committee of the Senate or House specifically authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution. . .”

42 U.S.C. 2252—AEC obliged to keep the Joint Committee on Atomic Energy “fully and currently informed with respect to all of the Commission’s activities.”

49 U.S.C. 1504—Information obtained by CAB cannot be withheld from the “duly authorized committees of the Congress.”

Mr. McCLOSKEY. Let’s go beyond those two limits to where it is executive privilege.

Is there any basis, outside of the statutes, for the exercise of executive privilege with respect to Health, Education, and Welfare?

Ms. LAWTON. Not that occurs to me offhand, but I don’t want to give you a categorical “no” on that.

Mr. McCLOSKEY. Is there any statutory basis for the withholding of information based on executive privilege?

Ms. LAWTON. As between the Executive and the Congress I know of no statutory basis.

Mr. McCLOSKEY. So, if the confidential advice to the President can be withheld it is a matter of executive privilege, and it rests solely on constitutional grounds?

Ms. LAWTON. Yes, to my knowledge.

Mr. McCLOSKEY. Now, if Congress could enact legislation that excluded the confidential advice from executive privilege, in your opinion, would that be constitutional?

Ms. LAWTON. Included only that? No, I think it would not.

Mr. McCLOSKEY. It would not be constitutional?

Ms. LAWTON. No, I think it would not if that is all.

Mr. McCLOSKEY. In other words, it is your testimony that any advice to the President of the United States or presumably to any of his employees is constitutionally protected under the doctrine of executive privilege?

Ms. LAWTON. Oh, I couldn’t say any advice, no, Congressman. I think that there are areas—it is very difficult for me to try to generalize this because it is not a subject that lends itself to generalization. There may be types of advice. The Advisory Committee Act, for example, requires certain things to be made public by advisory committees to the executive branch and I don’t think that presents a constitutional problem as a general rule.

Mr. McCLOSKEY. As a general rule, would Congress be free to say that any advice to the President should be disclosed to the Congress if we chose to seek disclosure?

Ms. LAWTON. No, I don't think so.

Mr. McCLOSKEY. All right. How would you distinguish between advice to the President that would fall within the realm of executive privilege and advice to the President that would not fall within the realm of executive privilege?

Ms. LAWTON. It is a public interest test that has to be decided on the facts in each case. I could not give you a generalization as to all advice flowing to the President in the course of any given year from all segments of the executive branch and from outsiders for that matter.

Mr. McCLOSKEY. You note this bill that you object to provides that any information which is confidential advice to the President and affects the national interest can be withheld on the basis of executive privilege. You have no objection to that language, do you?

Ms. LAWTON. I think it may not go far enough.

Mr. McCLOSKEY. Let me quote the language to you. The language states this:

"Executive Privilege shall be invoked only by the President" and you have no objection to that language, do you?

Ms. LAWTON. No.

Mr. McCLOSKEY. The President has agreed to that in his statement to the committee, hasn't he?

Ms. LAWTON. Yes. I think that has always been the President's opinion.

Mr. McCLOSKEY. "And only in those instances in which the requested information or testimony contains policy recommendations made to the President or Agency Head." Now, do you have any objection to that being contained within executive privilege?

Ms. LAWTON. I have no objection to it being contained within, but I think it is not an adequate description of the whole.

Mr. McCLOSKEY. All right. How much further would you go beyond policy recommendations made to the President as a subject of executive privilege?

Ms. LAWTON. The classic areas, as I mentioned before, are foreign relations matters, which may or may not involve policy recommendations as such, but may involve our relationships with foreign governments, may cause embarrassment or concern to them, information of a sensitive nature in the security—primarily, the military security—area, which is again one of the traditional, but not inclusive, realms of the Executive vis-a-vis the Congress, but an area in which executive privilege can be, and we think properly so, invoked, and the policy realms area mentioned here, such as investigative files and other matters dealing with confidentiality and personal privacy problems.

Those are the four traditional areas in which executive privilege has been invoked, I think.

Mr. McCLOSKEY. Now, none of those four areas would relate to Mr. Dean's statement to the Justice Department that Mr. Gray characterized as probably a lie, would it?

Ms. LAWTON. In the case of Mr. Dean, the privilege of policy recommendations, because of its inseparability between the personal Pres-

idential aides and the President is a very general privilege that applies to all relationships between them.

Mr. McCLOSKEY. Well, let's say that we leave out the conversations between Mr. Dean and the President. Are you suggesting that the conversations between Mr. Dean and Mr. Gray are subject to executive privilege?

Ms. LAWTON. Yes, because of Mr. Dean's position. In the case of personal aides of the President, or Congressmen, of judges, the privilege totally envelops personal aides because of their status as such.

Mr. McCLOSKEY. How far down as a personal aide would you go? Would you go to Mr. Segretti?

Ms. LAWTON. I don't think Mr. Segretti is a personal aide.

Mr. McCLOSKEY. Testimony has come out in the record that Mr. Segretti was paid by Mr. Kalmbach.

Ms. LAWTON. That is what I read.

Mr. McCLOSKEY. Mr. Kalmbach was the personal attorney for the President at the time, was he not?

Ms. LAWTON. But not an official personal White House aide.

Mr. McCLOSKEY. Well, how do we determine who is an official White House aide and who determines it? Is it the Justice Department or the Congress? Who should determine whether the executive privilege extends to Mr. Segretti or not? Should it be the President or the Congress or the Justice Department?

Ms. LAWTON. Well, as the bill indicates, the President determines executive privilege.

Mr. McCLOSKEY. Has the President determined, to your knowledge, that Mr. Segretti is a personal aide that shall not testify before Congress?

Ms. LAWTON. No.

Mr. McCLOSKEY. Does Mr. Kalmbach fall within that category of personal aide?

Ms. LAWTON. I would think he falls within an entirely different category. He is certainly not a government employee or officer. He is an attorney.

Mr. McCLOSKEY. So, you think executive privilege should not be claimed for Mr. Kalmbach?

Ms. LAWTON. I wouldn't say executive privilege in the sense we mean it, no.

Mr. McCLOSKEY. On the attorney-client privilege, could Congress by law require the disclosure of matters arising from the relationship by saying that all attorneys would have to testify if called by the Congress?

Ms. LAWTON. I am not sure. That particular privilege is granted primarily by statutory authority but it has fifth amendment overtones that I think might place limits on where the attorney-client privilege could be restricted.

I am by no means an expert on the law of evidence, but it seems to me that there may be problems there, particularly in the criminal sphere, of abrogating the attorney-client privilege altogether because of the fifth amendment and the sixth amendment rights to the assistance of counsel. It would be up to the courts to determine whether the assistance of counsel constitutionally requires a privilege in the attorney-client relationship.

Mr. McCLOSKEY. The Justice Department quite often grants immunity, in order to get around the fifth amendment, and this immunity from prosecution removes the fifth amendment protection, does it not?

Ms. LAWTON. I don't think it is often, but, yes, we have the authority to do that from the Congress.

Mr. McCLOSKEY. What?

Ms. LAWTON. We have the authority to do that from the Congress.

Mr. McCLOSKEY. You have the authority from the Congress. Could the Congress create the same authority with respect to the attorney-client privilege of the sixth amendment or the self-incrimination provision of the fifth amendment?

Ms. LAWTON. Provided it is coextensive, I would think so, although the courts would ultimately have to determine that.

Mr. McCLOSKEY. If the Congress were to grant immunity from prosecution, nothing in the Constitution prohibits the Congress from enacting a law abrogating the attorney-client privilege and, therefore, the attorney-client privilege could not be claimed as a basis for refusing to testify?

Ms. LAWTON. I think it is arguable, Congressman. I am not prepared to make a judgment on that.

Mr. McCLOSKEY. Our problem is that we are faced with a crisis of confidence. You and I both read the polls that say that public confidence in politicians is historically low and, in fact, they rate politicians less than secondhand car salesmen. Public confidence in the Justice Department and the White House is at the same low level.

Assuming all of us have an obligation to try to restore public faith in the judicial process, the prosecutorial process, and in the political process, would it not be correct to enact into law the requirement that those of us who hold public trust be prepared to make a full disclosure of all facts to the United States? And, if we could make a law that abrogates the fifth and sixth amendments by providing immunity from prosecution, can we not also enact a law that requires an attorney to testify and abrogate the attorney-client relationship?

Ms. LAWTON. First of all, immunity does not abrogate the amendment; it removes a need for using the amendment. The amendment stands and the Congress could not abrogate that amendment nor could the Congress abrogate the privilege grounded in the Constitution.

Mr. McCLOSKEY. I agree with that, but you have not given us any indication, other than in the four traditional areas of privacy, military security, foreign affairs, and active investigative files of a constitutional basis for executive privilege.

And yet you have claimed that executive privilege extends to anything to which the executive branch wants to extend it. I don't understand your constitutional basis for going on beyond those four classic areas and why you have said that the executive branch is entitled to withhold any matter upon its own determination.

Could you elaborate more on that?

Ms. LAWTON. Those are the four traditional areas, historically. What may develop as another appropriate area in the public interest in the future, I cannot predict. The test is, in effect, a public interest one. The public interest requires that this be withheld.

The problem is attempting to define how that applies to the facts. I think those are the traditional areas—well, I know they are—in which claims of executive privilege have been made and have been accepted as being valid public interest determinations.

Our problem is with attempting to look into statutory language specific enough to be meaningful with a problem as general, as complex, as executive privilege. I am not, by any means, asserting that executive privilege applies across-the-board to all information in the possession of the executive branch.

Mr. McCLOSKEY. Well, Ms. Lawton, the bill on which you are testifying states that: "Executive privilege shall be invoked only by the President and only in those instances in which the required information or testimony contains policy recommendations made to the President and the President determines the disclosure of such information will seriously jeopardize the national interest."

That is a rather broad grant to the President, is it not?

Ms. LAWTON. For the policy realm, yes, but that does not cover everything. Policy realm does not cover all of the four traditional areas that we were discussing; it is only one of them.

Mr. McCLOSKEY. Well, troop movements. I can't recall the Executive ever denying to the Congress and appropriate committees information on troop movements. You are not suggesting that the President has withheld from the Congress information on troop movements?

Ms. LAWTON. You mentioned appropriate committees. I think the Presidents have, in the past, made determinations of where it is appropriate to furnish to a committee and where it is not. Certainly there are items of military secrecy that have not been furnished to the Congress as a whole and to every Member thereof. There are matters that have been limited very narrowly.

Mr. McCLOSKEY. The bill states whenever either House of Congress or any committee thereof, to the extent that the matter is in its jurisdiction, requests information, it is limited to the committees of jurisdiction in the particular matters involved.

You don't have any objection that that goes beyond the past practices, do you?

Ms. LAWTON. I am not sure it doesn't go beyond. I believe there have been instances, as I said, the notable one that sticks in my mind is the Manhattan project where it was specific chairmen and not the whole membership of committees who were furnished the information.

Mr. McCLOSKEY. That might have been a situation in the past, but it is the present we are addressing here today.

The President doesn't have the power to give information to one Congressman and not to 50 Congressmen. He either deals with the Congress as a body under the Constitution or a committee of that Congress. You have no objection to that, I take it? You are not attempting to justify a position that the President should have the right to give information only to one Member of Congress, and not to a committee, are you?

Ms. LAWTON. I think there may be instances where that would be the case. I think they are rare, granted, and, hopefully, we will never see a Manhattan project again, but I think that would be justified there.

That was done there and I think was justified and the Congress acquiesced in this.

Mr. McCLOSKEY. Well, it is one thing to acquiesce and it is another thing to say the power exists to deny the information to Congress. This is what we are dealing with, whether or not, in your judgment, the Congress has power to compel information from the executive branch, so long as the executive branch contends it would be dangerous to the national interest to reveal that information.

The practice has been otherwise; the statements of the Presidents have been otherwise. You have proclaimed, Ms. Lawton, a far broader executive privilege than has ever been expressed as the position of the President before, with the exception of his recent statement that none of his aides, past or present, shall testify; have you not?

Ms. LAWTON. I don't think I am stating that.

I wouldn't phrase it the way you phrased it. What we are trying to say is, this is an executive privilege, it is granted in the Constitution, its limitations are unclear. Congress, however, cannot cut back a constitutional privilege. As we mentioned before, as to the fifth amendment, Congress can eliminate the need for the fifth amendment through immunity—there can be no self-incrimination if there can be no incrimination—but Congress could not, by statute, just wipe out the fifth amendment because it is a constitutional privilege.

What we are saying here is that Congress cannot restrict the President's privilege by cutting it back. Now, where its limits are, I admit are hazy, and this is one of the difficulties with legislation in this area.

Mr. McCLOSKEY. Thank you.

Mr. ALEXANDER. Ms. Lawton aren't you, in fact, saying it is the intent of the Constitution to permit the President at his discretion to limit the access of information to the Congress?

Ms. LAWTON. When it is a public interest determination he makes, yes.

Mr. ALEXANDER. And in his sole and exclusive judgment, based upon current times and information, he may restrict information to the U.S. Congress and to the public at large?

Ms. LAWTON. Yes, sir.

Mr. ALEXANDER. And you base your opinion upon language in the Constitution?

Ms. LAWTON. No. On a privilege necessarily implied from the separation of powers.

Mr. ALEXANDER. As I recall in your earlier testimony, you did not refer to any construction of the Supreme Court, did you?

Ms. LAWTON. We have references in the Court to executive privilege. They are incidental references. This issue, to my knowledge, has never been adjudicated, squarely, in the Supreme Court. The Court of Claims, yes, but not the Supreme Court.

Mr. ALEXANDER. Can you cite to me any primary authority from the Federal courts at large which would furnish a basis for your conclusion?

Ms. LAWTON. There is authority generally on separation of powers in the FCC case I cited earlier (*Hearst v. Black*) although that deals with the Congress and there is—

Mr. ALEXANDER. Excuse me. I am not referring to the separation of powers doctrine, I am talking about the doctrine of executive privilege.

Ms. LAWTON. Executive privilege as such?

Mr. ALEXANDER. Yes.

Ms. LAWTON. There is reference to it but, by no means, a definitive description in the *Gravel* case by analogy. I should have that case here.

There is a Court of Claims case of *Kaiser Aluminum Corp. v. the United States* (157 F. Supp. 939), where the specific claim was made dealing with a Government contract and where the court, in a rather lengthy opinion, did specifically refer to the constitutional grounds of executive privilege.

Mr. ALEXANDER. Ms. Lawton, you are not citing to the U.S. Congress authority from the Federal Communications Commission as authority for a constitutional opinion on executive privilege, are you?

Ms. LAWTON. No, sir, that was the wrong statement, the FCC statement, this is a Court of Claims case.

I was mentioning earlier an FCC case, meaning a case involving the FCC vis-a-vis a private party in which the U.S. Court of Appeals made a similar statement. But this was a Court of Claims case in *Kaiser Aluminum*.

Mr. ALEXANDER. In that case, was the Government of the United States a party?

Ms. LAWTON. Yes, well, the FCC case, yes.

Mr. ALEXANDER. Your Court of Claims reference?

Ms. LAWTON. Oh, the Court of Claims, yes. The *Kaiser Aluminum v. the United States*.

Mr. ALEXANDER. And that is the basis for authority for your opinion that there is constitutional basis for asserting that the President has executive privilege to deny the U.S. Congress information at his discretion?

Ms. LAWTON. No, it is a judicial recognition that such a privilege exists.

Mr. ALEXANDER. Do we refer to that as a dictum?

Ms. LAWTON. No, I don't think you can call it dictum in that case.

Mr. ALEXANDER. If it is not dictum or secondary authority, do you refer to it as primary authority?

Ms. LAWTON. No, because it did not deal with the Executive vis-a-vis the Congress.

Mr. ALEXANDER. Then it is neither primary nor secondary authority that furnishes the basis for your opinion?

Ms. LAWTON. It is an analogous authority and no more.

Mr. ALEXANDER. I see. Then it is what we would call subjective?

Ms. LAWTON. I don't understand your use of the term in that context.

Mr. ALEXANDER. Then it is your opinion that there is a constitutional basis for the President denying the Congress access to information, that is not based on the language of the Constitution, an opinion of the Supreme Court, or any of the Federal courts, is not that correct?

Ms. LAWTON. No. We originally derived our interpretation from statements that some of the framers, themselves, have made, like Jefferson, that it is the President's right to determine what public papers must be made available. Washington—

Mr. ALEXANDER. I am trying to find out if any court has ever relied upon this as justification for that conclusion?

Ms. LAWTON. In a square challenge between Congress and the Executive on executive privilege, no. In terms of discussing executive privi-

lege, yes. You can find it in *Curtiss-Wright* with a rather long discussion of the earlier precedents.

Mr. ALEXANDER. There is no statutory authority, I believe, for your conclusion, either; is that correct?

Ms. LAWTON. That is correct, there are no statutes on executive privilege that I know of.

Mr. ALEXANDER. Then based upon your testimony that you gave earlier this morning, I would conclude that your primary authority for the opinion that you have expressed on constitutional foundations for executive privilege are based upon the opinion that was rendered in 1954 by the present Secretary of State, Mr. Rogers, William Rogers, is that correct?

Ms. LAWTON. Oh, no, there is an earlier formal opinion of the Attorney General, which we have cited here in the testimony on one aspect of executive privilege.

Mr. ALEXANDER. Does it not squarely define the doctrine as does the Rogers opinion?

Ms. LAWTON. No, it does not. It does not attempt to.

Mr. ALEXANDER. One other point that I am not sure about that may need to be cleared up from this morning. Where there is a select committee of the Congress to investigate a criminal conspiracy that leads to officials of the executive branch, even to White House aides where it is believed that these aides participated in a conspiracy to violate the law or to become involved in a situation that has been adjudicated and found to be a violation of the law: Did you say that in your opinion that executive privilege should be applied to White House aides in that particular case?

Ms. LAWTON. I said that I think that the executive privilege does apply to White House aides in a general inquiry such as this. Now, the President has made clear that short of formal testimony before a full committee, public hearing, that White House aides could co-operate with that subcommittee or that select committee in attempting to clear this—

Mr. ALEXANDER. But in your opinion, as a spokesman for the Department of Justice you are telling this committee that executive privilege may be applied to White House aides who have been identified as, at least, participating in a conspiracy to violate the law?

Ms. LAWTON. That the President will have to determine whether it is appropriate, yes.

Mr. ALEXANDER. Let's go one step further.

If it is charged that White House aides did, in fact, violate the law and they are charged with a felonious act, would you, in that event, still conclude that the doctrine of executive privilege can be applied to cover up information?

Ms. LAWTON. If they are charged in the traditional judicial sense, no.

Mr. ALEXANDER. No, I am talking about the Congress.

Ms. LAWTON. Then I would have some question as to whether the Congress is empowered to try a felony.

Mr. ALEXANDER. I am not talking about trying a felony. I am talking about a charge of a felonious act of a White House aide made by a designated committee of the U.S. Congress, upon which the committee solicits information concerning a violation of the law.

Ms. LAWTON. I think in that instance, that we would have to have close determination—well, I have some question about that.

The word "officially" of course, refers to the grand jury, which has the charging function and there I think, obviously, if the grand jury is considering a charge there is no privilege.

Mr. ALEXANDER. You are not saying the Congress has no function to identify mismanagement, corruption, crime, or bad conduct in office, are you?

Ms. LAWTON. I am not saying it has no power. I think, as I recall the cases, there are some questions as to how far the power goes since *McGrain* indicates the investigatory power may look into charges of corruption in office but has cast that in terms of future legislative action to avoid this question.

Mr. ALEXANDER. Ms. Lawton, if I followed your reasoning to its ultimate conclusion, would I not then conclude that only the Department of Justice for which you are speaking today, can make a determination as to the right and wrong of charges that are made against individuals who serve within this Government?

Ms. LAWTON. I think, ultimately, only a jury or a judge, sitting without a jury, can make a determination whether there was criminal wrongdoing, yes.

Mr. ALEXANDER. Then I should conclude that in cases of executive privilege where charges of wrongdoing or charges of felonious acts may result from an investigation, that there are cases where the Congress should not proceed to inquire, to uncover, to ascertain information, and that only the U.S. courts through charges made of individuals, can pursue investigations in these areas?

Ms. LAWTON. No; I did not mean to imply that. Certainly Congress can, and always has.

The original Arthur Sinclair expedition was not criminal wrongdoing, but blundering which was the subject of congressional inquiry as I understand it, and the Congress has always inquired into ineffective or wrong performance of duties, malfeasance in office. I am saying, when it comes to an area where executive privilege applies, that there is going to be the conflict that the President has to determine his claim of executive privilege. Presidents have waived it in those circumstances.

Mr. ALEXANDER. Aren't you saying, in effect, that executive privilege can be used at the convenience of the Executive to cover up embarrassing situations which may lead to prosecution, to wrongdoing, to mismanagement and to corruption and scandal in Government?

Ms. LAWTON. I don't think it can properly be used that way, but I know this is again a question of interpretation.

Mr. ALEXANDER. You are saying it has never been used for that purpose, are you?

Ms. LAWTON. I wouldn't swear to that, no, sir.

Mr. ALEXANDER. Thank you very much.

Mr. Erlenborn?

Mr. ERLENBORN. Thank you. Let me just ask one or two additional questions.

You told us that there has been no clear-cut court determination of the existence or the boundaries of executive privilege. The President

recently suggested that maybe now is the time that this question be tried. As I recall, he has indicated that he would welcome it.

In your opinion, would this matter reach the courts? Would it be necessary for Congress to issue a subpoena to some person for whom executive privilege is claimed by the President and then charge him with contempt of Congress for failure to respond to a subpoena?

Ms. LAWTON. That I think would be certainly the most direct clash or conflict and it is one, I think, where courts could not decline to consider the issue because it would be a matter of a criminal charge against an individual and they would have to face it. There may well be other ways. They don't occur to me right offhand, but there may well be other ways that the courts could be drawn in although I suspect that the courts aren't going to be any happier to get into this issue than we are. But on a criminal case, I think the court would have to, yes.

Mr. ERLENBORN. We may be in the process of seeing the scenario that would lead to that case. Then, Ms. Lawton, who is the Attorney General going to represent?

Ms. LAWTON. Well, I wouldn't want to make a commitment on that one. I don't really know. This is awkward; it has happened before. The Solicitor General has been known to argue both sides of a case in the Supreme Court.

Mr. ERLENBORN. Is there any authority for the Congress to engage its own counsel and be represented by someone other than the Solicitor General or the Attorney General?

Ms. LAWTON. Congress has in the past, I know. They did that by passing a specific statute for that purpose. Whether that is actually necessary or not, I have no idea.

But it has been done, and certainly Congress has done it, not only on a direct confrontation basis, but also Congress quite frequently—well, not quite frequently but more often—has intervened in court cases or has appeared as amicus curiae in a case. It has been done and I suspect that this would have to be worked out.

Mr. ERLENBORN. Well, with Congress as a client in this case, it would seem to me that the traditional lawyer for the Congress having taken the position you represent here today, it might be wiser for us to look for outside counsel.

Ms. LAWTON. I think that is the reason it has been done before.

Mr. ERLENBORN. This could also be tested, I presume, by the passage of legislation such as is before us and then testing that in the courts under the proper circumstances?

Ms. LAWTON. It might be more difficult. Theoretically, yes, but it might be more difficult to get that into court because I think it would have to arise in the same way.

Mr. ERLENBORN. We would still have to have the same set of circumstances, where someone is refusing to appear and we would have to use the subpoena.

Ms. LAWTON. I could think of no way with the possible exception of declaratory judgment, and that would be a little difficult and the court would be less likely to take it, I think.

Mr. ERLENBORN. I suppose they could find that there was an existing dispute and so that part of the declaratory judgment procedure might be easy for them to determine.

Anyway, would there be any contention, do you believe, that the Supreme Court is not empowered to determine the extent of executive privilege because of the separation of powers?

You say the President is free from the Congress interfering with his executive privilege. Might that same claim be made under the division of powers?

Ms. LAWTON. Well, do you mean would the Department of Justice be likely to make that as an argument as a party to a dispute?

Mr. ERLENBORN. Yes, might that be one of the contentions put forth by the Department of Justice, that under the doctrine of separation of powers this cannot be determined by the courts?

Ms. LAWTON. Well, the Department has made the basic argument of a political, nonjudicial issue frequently.

In this particular hypothetical case that you state, I am not so sure of that in light of the President's statements, but theoretically, yes, the argument could be made.

Mr. ERLENBORN. If that were successfully made, I guess that does leave us without any possibility of a resolution, except maybe some political answer.

Ms. LAWTON. Well, as I said, that argument could be made depending on the context. If you were dealing with a specific criminal case, I am not sure it could. But it might be made, or it might be argued that the court should limit itself to this instance and not go beyond into the whole area. I think that would almost certainly be argued.

Mr. ERLENBORN. That would be known as judicial restraint; something that the court has not always been exercising in recent years. That is not a question, Ms. Lawton, that is a comment.

The doctrine of executive privilege we have seen recently as being extended to former White House aides and, in the case of Mr. Mollenhoff, before the Civil Service Commission.

In your opinion, can the President, by invocation of executive privilege, prohibit a former White House aide from testifying when he desires to testify?

Ms. LAWTON. In theory, yes. As a practical matter, no, because no sanction is available.

Mr. ERLENBORN. If he were presently employed, the sanction would be to fire him. If he is already off the payroll, there is no sanction?

Ms. LAWTON. That is right.

Mr. ERLENBORN. So someone like Mr. Mollenhoff, or any other former White House aide or Government official of any sort could freely testify before the Congress or before the courts without the President having any effective way of prohibiting him?

Ms. LAWTON. No effective way. He could only assert the privilege to the body before which the person was appearing and the decision would have to be theirs, as to whether they would recognize it, I suppose.

Mr. ERLENBORN. Well, I am not really intimately aware of the circumstances of the Fitzgerald hearing, but it has been stated that the representatives of the Air Force advanced executive privilege as an argument against the testimony of Mr. Mollenhoff being made available.

Is it proper for the representatives of the Air Force to make that claim? Should it not come from the President, himself?

Ms. LAWTON. As a claim, it should come from the President. As a "please delay taking this testimony until we can check it out," I think it is proper to come from the agency. Otherwise, the President would have no choice because the matter would be moot before it reached him.

So I think a delay claim that this matter may be privileged, "so please put the witness off until we can check," I think that is a proper claim, but at least since 1961, Presidents have made it quite clear that they think—and I think, constitutionally properly so—that the claims should be made by the President himself and not by agency heads.

Mr. EERENBORN. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you. Ms. Lawton, first let me commend you, as a fellow member of the legal profession. I think you have done an excellent job in presenting a very difficult case.

I presume that you have prepared for this presentation by reading all of the available material on this subject, like the Rogers memoranda, and so forth?

Ms. LAWTON. I did not review that memorandum, no. I have used more recent materials. I did not go back to that.

Mr. MOORHEAD. Did you use a legal memoranda or prepared brief by John W. Dean?

Ms. LAWTON. No, I haven't seen one. I did not know there was one.

Mr. MOORHEAD. You don't know that there was one?

Ms. LAWTON. Well, I am not sure. A legal memoranda? A long brief prepared by John Dean on executive privilege?

Mr. MOORHEAD. Yes.

Ms. LAWTON. No, I did not.

Mr. MOORHEAD. My reason for asking is a recent column by Evans and Novak entitled "Constitution Stretching to President Nixon's Aides." It reads in part:

Present Presidential aides as well as Nixon allies looking into the White House from the outside concentrate their anger against White House Counsel John W. Dean III whom they hold responsible for the spectacularly broad Nixon policy (on Executive Privilege) based on the separation of powers.

When the Executive privilege issue heated up during confirmation hearing of L. Patrick Gray, to be FBI Director, Dean did a study for the President. Dean consulted with the lawyers from New York and elsewhere, many of whom strongly urged a limited interpretation of executive privilege.

Nevertheless, the 34-year-old former Counsel for the House Judiciary Committee, wrote a legal brief ("competent but not outstanding") according to one Nixon aide, suggesting that the President had legal powers to claim that as much "Executive Privilege" as he wanted.

Now, Ms. Lawton, you were designated the chief administration spokes-person before this subcommittee—and, certainly, HEW, Treasury, and the Office of Management and Budget all acquiesced—they told us that you were to be, or at least the Justice Department was to be the spokesman for the administration. And you come before us, and you haven't even had the benefit of Mr. Dean's legal brief on the very subject on which you were directed to testify on behalf of the administration; is that correct?

Ms. LAWTON. I have not seen it, no, sir. To my knowledge, our office does not have a copy of it.

Mr. MOORHEAD. And yet, the author of this legal brief, which if he is any good as a lawyer ought to be of help to this committee, has

informally—and I won't say formally yet—but has informally declined to appear before this subcommittee to assist us in considering this legislation or to persuade us that we shouldn't act on this legislation.

This is despite the fact that in our letter to the President inviting Mr. Dean to testify, Mr. Erlenborn and I agreed we would not ask questions about the Watergate matter or other sensitive matters; we just wanted his legal assistance.

I think it is passing strange that the Dean memorandum was not made available to you. This criticism is not directed to you, Ms. Lawton, because if you didn't know of the existence of the memorandum, there is no way you could avail yourself of the legal positions contained therein.

Mr. Alexander, do you have any further questions?

Mr. ALEXANDER. No, sir.

Mr. MOORHEAD. Mr. Erlenborn?

Mr. ERLENBORN. No, sir.

Mr. MOORHEAD. Mr. McCloskey?

Mr. McCLOSKEY. No.

Mr. MOORHEAD. Mr. Phillips, would you like to ask a question?

Mr. PHILLIPS. Thank you, Mr. Chairman. I think for the record we should include, at this point, a legal memorandum on the two basic cases that are used in Ms. Lawton's statement as the basis for executive privilege. One is *United States v. Curtiss-Wright Corp.* and the other one is *United States v. Reynolds*.

Mr. MOORHEAD. Without objection, it will be made a part of the record.

[The information follows:]

MEMORANDUM BY LEGAL STAFF, HOUSE GOVERNMENT OPERATIONS COMMITTEE, ON THE STATEMENT OF WILLIAM H. REHNQUIST, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, TESTIFYING ON EXECUTIVE PRIVILEGE, JUNE 29, 1971

The statement declares: "The right of the Executive to withhold certain types of information from the other coordinate branches has been equally well recognized." It refers to two Supreme Court cases as buttressing that assertion. The first case involves the Government claim of privilege to resist judicial discovery in a tort claims action: *U.S. v. Reynolds* (345 U.S. 1 (1953)). The second involves a question of the constitutionality of a delegation by Congress of certain legislative power to the President: *U.S. v. Curtiss-Wright Export Corp.* (299 U.S. 304 (1936)).

Both cases should be examined closely, since they support Mr. Rehnquist's declaration above only in a highly qualified fashion (*Reynolds* case) or by remote inference derived from *orbiter dicta* (*Curtiss-Wright* case).

A. U.S. v. Reynolds

In this case, the widows of three civilian observers killed in a military plane crash sued to recover damages under the Federal Tort Claims Act. They requested production of an official report concerning the crash. The Secretary of the Air Force filed a claim of privilege against furnishing the report, asserting that the demanded material could not be supplied "without seriously hampering national security, flying safety, and the development of highly technical and secret military equipment."

The district court ordered the Government to produce the documents so that the court, alone in chambers, could determine if they contained privileged matter. The Government declined. As a result, the court entered judgment for the plaintiffs. The court of appeals affirmed.

The Supreme Court reversed and remanded the case to the district court. However, the Court expressly declined to pass on the broad constitutional proposition urged by the Government; namely, "that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest."

The Court, while conceding that a claim of privilege is one that the Government may properly raise where state secrets are concerned, explicitly limited the extent to which the courts would accept it. It pointed out that first a showing of necessity for the compulsion of documents must be made. It went on to say that in this case such necessity was greatly minimized by available alternative sources of evidence for the plaintiff "without forcing a showdown on the claim of privilege." It added that the respondents (plaintiffs) had made only a dubious showing of necessity to set against the Government's claim of privilege to protect military secrets. The Court noted: "There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident."

Even though the Court declined, as indicated above, to decide the issue on an absolute basis, it went a considerable distance toward that destination in its frequently quoted sentence: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."

Thus, the *Reynolds* case does not establish an unqualified executive privilege "against judicial subpoena," or an absolute "right" of the Executive to withhold certain types of information from the judicial branch.

B. U.S. v. Curtiss-Wright Export Corp.

In 1934, a joint resolution of Congress provided that if the President found that an embargo on the sale of arms and munitions in the United States to countries at war in the Chaco (Bolivia and Paraguay) "may contribute to the reestablishment of peace between those countries," he may, after consultation with other American republics, establish such an embargo by proclamation. Violations of such an embargo were made a crime.

President Franklin Roosevelt set up the embargo, and the defendant company was convicted of violating it by selling guns to Bolivia.

The defendant was indicted, but the trial court quashed the indictment on the ground that it was an invalid delegation to the President of legislative power. On appeal, the Supreme Court reversed and remanded the case to the court below for further proceedings.

In treating this appeal, the Court was basically concerned with a distinction between the permissible extent of delegation of legislative power in a matter related solely to internal affairs and the permissible extent of such a delegation which affects a situation "entirely external to the United States, and falling within the category of foreign affairs."

The issue framed by the court was "* * * assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory."

The Court upheld the constitutionality of this delegation of legislative power because it dealt with external affairs, which differ in nature and origin from those over domestic or internal affairs. It pointed out that in the international field, the sovereignty of the United States is complete; and that in international relations, the President is the sole organ of the Federal Government.

The Court's opinion emphasized that in legislation in the international field, the Congress must often grant the President a degree of discretion and freedom which would not be admissible were domestic affairs alone involved.

The opinion showed the origin of the distinction as the law of nations. It then offered the following paragraph by way of illustration:

"The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs the President is requested to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned."

The reference to certain congressional rules and precedents by the Court is clearly not a judicial affirmation of the right of the executive to withhold in-

formation from Congress. The existence of any such right, absolute or qualified, was not at issue in the case at all. In fact, such an issue has apparently never been decided by any court. The language represents merely *obiter dicta*. Even as *dicta*, the language is given only as a congressional recognition that in foreign affairs special circumstances apply.

MILES Q. ROMNEY,
Associate General Counsel.

Mr. PHILLIPS. Mr. Rehnquist testified before this subcommittee 2 years ago, when he was Assistant Attorney General, Office of Legal Counsel, on the same issue of executive privilege. He used both of these cases as justification for executive privilege.

Subsequently, a legal memorandum was prepared on these cases by Mr. Miles Q. Romney, associate general counsel of this committee, and was put into the record at pages 788 and 789 of part 3 of our hearings, dated June 29, 1971. It refutes the arguments Mr. Rehnquist made then, which you repeat today.

I am curious as to why you have used the same cases and the same arguments that have been refuted in great detail in our earlier hearings—both in this legal memorandum of the committee and also by a number of other witnesses who testified before this subcommittee who are legal experts on executive privilege. In preparation for your own testimony here today did you refer to these earlier hearings? Did you take into consideration these other legal arguments that were presented to this subcommittee—both in this legal memoranda and by other witnesses, prior to the time that you drafted your testimony?

Ms. LAWTON. I scanned hearings, both in this committee and in the Senate, but, frankly, there was not a lot of advance notice on this. I mean, time for me, and I am not referring to the committee's notice.

And I did not give a thorough going-over study of it. I read back through the laws, several materials and re-read the case, but—

Mr. PHILLIPS. We feel these legal arguments are quite persuasive on our side. I can't understand why you would be pleading what we feel is a weak case, relying so heavily on warmed-over arguments.

Second, Mr. Chairman, I think we should have for the hearing record another very important bit of information, mentioned on page 3 of Ms. Lawton's testimony where she said :

"Throughout history, Presidents have offered various reasons for the exercise of the privilege to withhold information from Congress or the courts." She then cites two or three specific examples which involve, I think, two Presidents.

I wonder if it would be an imposition on the witness if we have for the record a listing of these so-called Presidents "throughout history" whose actions are alleged to justify the use of executive privilege. Frankly, I and many other members of the staff have spent quite a long time researching the history of this so-called doctrine. The Library of Congress has done a definitive study in which they claim the exercise of executive privilege dates back not 200 years but only back to May 17, 1954. That study has been placed in the Congressional Record on March 28 and is a part of this hearing record. Every member of the subcommittee has a copy and has studied it.

We do not see anything in the history of the use of executive privilege that goes back prior to May 17, 1954. Since you state that "throughout history Presidents have used executive privilege to with-

hold information." we would like very much to have, for the record, that list of specific instances, by specific Presidents, with specific references and documentation for that statement.

We have been trying for 20 years to find such information. We don't think such a list exists. So if you can provide it for our hearing record, you will be doing a great service for legal scholars. You also will be refuting some of the Nation's most outstanding legal scholars who have spent their lives in researching and studying this so-called doctrine of executive privilege. Would that be possible? And if you can't find such a list, we would hope that you would so indicate.

Ms. LAWTON. If I could clarify this. In the first place, I did not say, and very deliberately did not say, throughout history Presidents have claimed executive privilege. What I said was that throughout history Presidents have offered various reasons for asserting a privilege to refuse information. They didn't use the term. The term is of recent origin.

Mr. PHILLIPS. We would like to have the reasons for asserting it. Why a specific President, in specific instances, asserted it and providing specific documentation in each instance.

Ms. LAWTON. Well, I will try to get it for you, but I hope you won't put a time limit on us. We are pretty harassed.

Mr. PHILLIPS. I don't think you can—

Ms. LAWTON. I think we can.

Mr. PHILLIPS. But if you can, you will be making a contribution to history.

Mr. Chairman, I have a series of questions that involve the Office of Legal Counsel in the implementation of the President's memorandum of March 24, 1969, as to how executive privilege can be invoked. I would like to read into the record from that memorandum.

It is directed to "the heads of executive departments and agencies establishing a procedure to govern compliance with congressional demands for information." And it is signed by President Richard Nixon and is dated March 24, 1969. Step 1 of those procedures—

Mr. MOORHEAD. I would suspect that the witness is familiar with the memorandum. Maybe we don't need to read the whole text into the record.

Mr. PHILLIPS. I would just read step 1 because that is the one that involves the Office of Legal Counsel:

If the head of an executive department or agency (hereafter referred to as department head) believes that compliance with the request for information from a congressional agency addressed to his department or agency raises a substantial question as to the need for invoking executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.

And then, of course, there are other procedural steps that go beyond that. I understand that in the Office of Legal Counsel, Mr. Herman Marcuse is responsible for the actual handling of these requests from executive departments; is that correct?

Ms. LAWTON. More frequently than not, but not exclusively. We have quite a few people familiar with the area.

Mr. PHILLIPS. Have you handled such a request yourself?

Ms. LAWTON. I have sat in. It is usually done by a conference. There are usually four or five people involved, yes.

Mr. PHILLIPS. This is an informal conference that involves staff attorneys of the Office of Legal Counsel and attorneys from the concerned department?

Ms. LAWTON. Well, attorneys or program administrators. It largely varies.

Mr. PHILLIPS. How many cases since March 24, 1969, have gone through the Office of Legal Counsel under step 1 of these procedures?

Ms. LAWTON. Three. Well, one of them was a double-barrel. It is listed in the legislative reference study as two items, but they were both discussed in a single meeting.

Mr. PHILLIPS. One involved this subcommittee on the Cambodia Country Field Submission; so there would be four in all?

Ms. LAWTON. Yes, we treated two of them together.

Mr. PHILLIPS. Those four occasions represent situations where the Office of Legal Counsel concurred in the opinion of the Department that there should be forwarded to Mr. John W. Dean III at the White House under step 2, a recommendation for the invocation of executive privilege?

Ms. LAWTON. I was not in on all of them and I would have to double-check that. I can't say that for certain. As you know, under the procedures, if the agency head and the Attorney General should disagree, you can still take it to the Counsel of the President.

Mr. PHILLIPS. You would have to go to Mr. Dean?

Ms. LAWTON. I would have to double-check in my office as to whether or not there was a disagreement on any of those.

Mr. PHILLIPS. We are trying to get some idea of the number of cases that are involved. We would like to know the total number of requests that were made to the Office of Legal Counsel for the step 1 procedure, and of that number, in how many cases the Office of Legal Counsel was able to persuade the concerned department that use of executive privilege was not warranted. And, number 2, on how many cases did the Office of Legal Counsel concur with the department that executive privilege was warranted. And finally how many cases involved the "bypass step," overruling or bypassing the Office of Legal Counsel and going directly to Mr. Dean for the specific request for the use of executive privilege?

We would like an answer in each of those three categories. This would give us a better picture of the dimension—just how many cases there actually have been. We have a listing of such cases we think is accurate, but we want to doublecheck our information against what you can provide us.

Ms. LAWTON. Well, I will try. I can't promise you, largely because any time we make a recommendation to the President through the Counsel, we are making a policy recommendation, as well as expressing a legal judgment because, of course, policy is involved here; not everything that could be withheld need be withheld, Counselor, and I can't promise you all of the details on it. I will try.

[The information follows:]

LIST OF INSTANCES IN WHICH PRESIDENTS HAVE INVOKED EXECUTIVE PRIVILEGE THROUGHOUT HISTORY

In response to your request during Hearings held on April 3, 1973 I regret that it is not physically possible to furnish you with a comprehensive list of

presidential refusals of information to the Congress. To give you all of the instances of such refusals since the beginning of the Republic would require an amount of historical research which the Office of Legal Counsel lacks the resources for handling. In addition, there is a categorization problem of distinguishing the relatively few instances of exercise of Executive Privilege *per se* from the many instances of agreed accommodation, for one reason or another, for nonappearance of witnesses, nondisclosure, or partial disclosure.

In these circumstances we believe that it is appropriate to refer you for the period up to 1956 to a study prepared by the American Law Division of the Library of Congress in 1955 and revised in May 1956, which has been reprinted in *Freedom of Information and Secrecy in Government*, Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on S. 921, 85th Cong., 2d Sess. pp. 428-446. We have not independently verified the information contained in that study. Also, it may well contain a concept of Executive Privilege, and a consequent categorization scheme, with which we would not agree. Nevertheless, we attach a copy of that study for your convenience.

We also note that a memorandum on the subject of refusals of information was prepared by the Library of Congress on March 27, 1973 under the guidance of your Subcommittee. That memorandum employs two categories of refusal: (1) ultimate invocations of Executive Privilege by the President or with his approval (four instances); (2) nonproduction of information by an agency without indicating the ultimate outcome (15 instances), although we know that in some instances the material was ultimately furnished or subsequently became the subject of a presidential claim of privilege.

We have prepared, and are attaching, a memorandum which seeks to cover, to the best of our ability, the invocations of Executive Privilege by or at the direction of the President during the last five years of the Eisenhower Administration, the Administrations of Presidents Kennedy and Johnson, and the first Administration of President Nixon.* This covers the period not covered in the Library of Congress study.

As you know, the documentation of invocation of Executive Privilege during the Eisenhower Administration is difficult, because his Memorandum of May 17, 1954 was interpreted as requiring every officer or employee of the Executive Branch to claim privilege on his own in any situation covered by that Memorandum. In these circumstances, you may want to supplement the coverage of the Eisenhower Administration in the Library of Congress study and our memorandum with a monograph of that era, such as Kramer and Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 Geo. Wash. L. Rev. 623, 827, which as you know was prepared by a former Assistant Attorney General and an attorney in the Department of Justice.

I hope this information is adequately responsive to your request.

MARY C. LAWTON,
Deputy Assistant Attorney General,
Office of Legal Counsel.

MEMORANDUM ON THE EXERCISE OF EXECUTIVE PRIVILEGE, 1956-72

I

ADMINISTRATION OF PRESIDENT EISENHOWER (1956-60)

1958

During the Hearings on East-West Trade (before the Senate Permanent Subcommittee on Investigations) the Secretaries of State, Defense, and Commerce and the Director of the International Cooperation Administration refused to furnish certain information to the Subcommittee on the ground that they constituted communications of an advisory nature within the Executive branch, or highly sensitive intelligence information, or information obtained from other governments on condition that it be kept secret. The officials also instructed the personnel of their respective agencies not to testify with respect to any matter

*It is, of course, impossible to list the situations where an agency requested for information pointed out that the information was of the nature usually covered by Executive Privilege and the Committee agreed and did not insist upon a referral of the matter to the President.

relating to East-West trade controls, any pertinent testimony was to be given by Governor Stassen. *East-West Trade*, Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 84th Cong., 2d Sess., pp. 161-162, 273, 282.

1956 and 1957

During the investigation of the Consent Decree Program of the Department of Justice by the Antitrust Subcommittee of the House Committee on the Judiciary, there were several instances in which the Department of Justice withheld information such as FBI reports and intradepartmental memoranda. Report on H.R. Res. 27 of the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess., pp. XI-XIII, 39-42. For details see Kramer & Marcuse, *supra*, at pp. 888-891.

1957-60

International Cooperation Administration repeatedly denied its evaluation reports on several countries to the Comptroller General and to Congressional Committees. H. Rept. No. 2578, 85th Cong., 2d Sess., p. 190; H. Rept. No. 1137, 86th Cong., 1st Sess., pp. 396-398; S. Doc. No. 108, 86th Cong., 2d Sess., pp. 11-12; H. Rept. No. 546, 86th Cong., 1st Sess., p. 4.

For further details on the ICA evaluation reports, see Kramer & Marcuse, *supra*, at pp. 847-853.

1958

On January 21, 1958, President Eisenhower denied a request of Senator Lyndon B. Johnson as Chairman of the Preparedness Investigating Subcommittee of the Senate Committee on Armed Services for copies of the reports of the Killian and Gaither Panels which had been set up to advise President Eisenhower on certain aspects of the national defense. The refusal was based in part on the consideration that the reports were National Security Council documents. *Public Papers of the Presidents: Dwight D. Eisenhower 1958*, pp. 117-118.

1958

Refusal of Department of Agriculture to advise the Chairman of the Subcommittee on Intergovernmental Relations of the House Committee on Government Operations on information relating to changes made in a pamphlet on Farm Population Estimates for 1957, an earlier version of which had been withdrawn and destroyed. The reason for the refusal was that the earlier uncirculated and unapproved version was in the nature of a working draft which did not have to be disclosed to Congress. The information was ultimately released. *Withholding of Information by Department of Agriculture*, Hearing before a Subcommittee of the House Committee on Government Operations, 85th Cong., 2d Sess.

1959

Certification by President Eisenhower denying disclosure of an Evaluation Report on Iran and Thailand. *Public Papers of the Presidents: Dwight D. Eisenhower 1959*, p. 777.

1959

Certification by President Eisenhower refusing disclosure of an ICA evaluation report on Vietnam. *Public Papers of the Presidents of the United States: Dwight D. Eisenhower 1959*, p. 777.

1960

Certification by President Eisenhower refusing disclosure of certain papers relating to U.S. aid program in seven South American countries. *Public Papers of the Presidents: Dwight D. Eisenhower 1960*, pp. 881-883; see also 41 Op. A.G. 507.

1960

During the hearings before the Senate Foreign Relations Committee relating to the U-2 Incident, the Secretary of State and the Director of the CIA invoked Executive privilege for reasons of security with respect to the nature of intelligence the U-2 flight was intended to obtain. S. Rept. No. 1761, 86th Cong., 2d Sess., p. 22.

II

ADMINISTRATION OF PRESIDENT KENNEDY

1962—(*Two matters*)

During the hearings before the Special Preparedness Subcommittee of the Senate Armed Services Committee on Military Cold War Education and Speech Review Policies, President Kennedy instructed the Secretaries of Defense and of State not to disclose the identity of any individual who had reviewed any particular speech. During the same investigation President Kennedy declined to release certain National Security Council papers to that Subcommittee. *Military Cold War Education and Speech Review Policies, Hearings before the Special Preparedness Subcommittee of the Senate Committee on Armed Services*, 87th Cong., 2d Sess., pp. 508, 725, 3160.

III

ADMINISTRATION OF PRESIDENT JOHNSON

1968—(*Two refusals*)

During the hearings before the Senate Judiciary Committee on the nomination of Abe Fortas and Homer Thornberry to be Chief Justice and Associate Justice, respectively, of the Supreme Court, W. DeVier Pierson, Associate Special Counsel to the President, declined to appear before the Committee to testify with respect to the performance of his duties on behalf of the President. On the same occasion Joseph W. Barr, Under Secretary of the Treasury, declined to appear before the Committee and to testify with respect to his meetings with representatives of the White House and his direct discussions with the President. It does not appear from the documents available to us whether these two refusals were authorized or directed by President Johnson. *Nominations of Abe Fortas and Homer Thornberry, Hearings before the Senate Judiciary Committee*, 90th Cong., 2d Sess., pp. 1347, 1348.

IV

ADMINISTRATION OF PRESIDENT NIXON (1969-72)

1970

The Attorney General with the specific approval of the President refused to consent to the release of certain investigative files of the FBI to Chairman Fountain of the Intergovernmental Relations Subcommittee of the House Committee on Government Operations.

1971

On August 30, 1971, President Nixon declined to make available to the Senate Foreign Relations Committee the Five-Year Plan for the Military Assistance Program. Hearings before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 92d Cong., 1st Sess. on S. 1125, at p. 46.

1972—(*Two matters*)

On March 15, 1972, President Nixon directed the Secretary of State and the Director, USIA, not to release to the Senate Foreign Relations Committee and to the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee all USIA Country Program Memoranda and the 1973 Country Field Submission for Cambodia.

APPENDIX EXHIBIT 17

SELECTED CASES IN WHICH INFORMATION HAS BEEN WITHHELD FROM CONGRESS
BY THE EXECUTIVE DEPARTMENT

By Mary Louise Ramsey, Michael Daniels, American Law Division, the Library of Congress, Legislative Reference Service, October 21, 1955—Revised May 1, 1956

TABLE OF CONTENTS

- I. Information concerning conduct of foreign affairs.
- II. Charges of misconduct and investigative reports.
- III. Confidential information pertaining to members, actions, or deliberations of the executive departments.

I. INFORMATION CONCERNING CONDUCT OF FOREIGN AFFAIRS

February 26, 1794: In submitting to the Senate correspondence between the United States Minister to France and the Republic of France, and between the Minister and the State Department, President Washington withheld "those particulars which, in my judgment, for public considerations, ought not to be communicated" (1 Richardson, *Messages and Papers of the Presidents* (1896) 152). The resolution requesting the information was unqualified (Senate Journal, 3d Cong., 1st sess., 26).

March 30, 1796: President Washington refused to furnish to the House of Representatives a copy of the instructions to the Minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and other documents relative to the treaty. By resolution the House had requested these papers, except such as any existing negotiations rendered improper to be disclosed. President Washington denied the right to demand and receive any of the papers, saying (1 Richardson, *op. cit.*, supra, 194) :

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent."

"It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment, which the resolution has not expressed. I repeat that I have no disposition to withhold any information which the duty of my station will permit or the public good shall require to be disclosed; and, in fact, all the papers affecting the negotiation with Great Britain were laid before the Senate when the treaty itself was communicated for their consideration and advice."

April 3, 1798: President John Adams transmitted to both Houses, in compliance with a request of the House of Representatives, certain instructions to and dispatches from the envoys extraordinary of the United States to the French Republic, but omitted "some names and a few expressions descriptive of the persons" (1 Richardson, *op. cit.*, supra, 265). The resolution requesting the information was unqualified (Senate Journal, 5th Cong., 2d sess., 249).

December 28, 1832: The House of Representatives had requested the President to communicate to it, so far as in the President's opinion was consistent with the public interest, correspondence between the United States and the Republic of Buenos Ayres and instructions given to the United States chargé d'affairs there. President Jackson replied that since negotiations with that country had only been suspended and not broken off, it would "not be consistent with the public interest to communicate the correspondence and instructions requested by the House so long as the negotiation shall be pending" (2 Richardson, *op. cit. supra*, 1172).

March 2, 1833: The Senate had requested the President to inform it, if not incompatible with the public interest, what negotiations had been carried on with Great Britain over the northeastern boundary, and what agreements had been made with the State of Maine with reference to such settlement. President Jackson informed the Senate that negotiations with Great Britain were in progress and that in the meantime it was not deemed compatible with the public interest to communicate the conditional arrangements made with the State of Maine (2 Richardson, *op. cit.*, supra, 1200).

January 6, 1835: The House of Representatives requested information concerning negotiations for the settlement of the northeastern boundary, if not incompatible with the public interest (House Journal, 23d Cong., 2d sess. 135). President Jackson advised the House that it would be incompatible with the public interest to communicate it (2 Richardson, *op. cit.*, supra, 1346). At the next session, he furnished this information to the Senate, declaring that "as the negotiation was undertaken under the special advice of the Senate, I deem it improper to withhold the information which that body has requested, submitting to

them to decide whether it will be expedient to publish the correspondence before the negotiation has been closed" (2 Richardson, op. cit., supra, 1449).

February 6, 1835: The House of Representatives had requested the President to communicate to it, if not incompatible with the public interest, certain correspondence with the Government of France, and dispatches from the United States Minister to Paris. President Jackson furnished extracts from certain dispatches, but "being of the opinion that the residue of the dispatches of that Minister cannot at the present be laid before the House consistently with the public interest" declined to transmit them (2 Richardson, op. cit., supra, 1348).

February 26, 1842: The House of Representatives had requested the President to communicate to it, if not incompatible with the public interest, the state of the negotiations with Great Britain in relation to the northeastern boundary and all correspondence on the subject not previously communicated. Tyler withheld the information, saying that "in my judgment no communication could be made by me at this time on the subject of its resolution without detriment or danger to the public interests" (3 Richardson, op. cit., supra, 1954).

June 20, 1842: The House of Representatives had requested the President to furnish "so far as may be compatible with the public interest" a copy of the quintuple treaty between the five powers of Europe for the suppression of the African slave trade and certain correspondence with respect to it. President Tyler replied that he had not received an authentic copy of the treaty and that "in regard to the other papers requested, although it is my hope and expectation that it will be proper and convenient at any early date to lay them before Congress, * * * yet in my opinion a communication of them to the House of Representatives at this time would not be compatible with the public interest" (3 Richardson, op. cit., supra, 2011).

August 23, 1842: The Senate had requested the President to communicate, so far as he might deem it compatible with the public interests, what measures, if any, had been taken to obtain recognition by the Mexican Government of certain claims of American citizens. President Tyler replied that "In the present state of the correspondence and of the relations between the two governments on these important subjects, it is not deemed consistent with the public interest to communicate the information requested. The business engages earnest attention and will be made the subject of a full communication to Congress at the earliest practicable period" (3 Richardson, op. cit., supra, 2032).

December 23, 1842: The Senate had requested information concerning negotiations with Great Britain for settlement of the Northwest boundary, if not inconsistent with the public interest (Senate Journal, 27th Cong., 3d sess. 44). President Tyler replied that measures had been taken to settle the dispute and that "under the circumstances I do not deem it consistent with the public interest to make any communication on the subject" (3 Richardson, op. cit., supra, 2063).

May 18, 1844: The House of Representatives had requested the President to cause to be communicated copies of instructions given to the commanding officers of the squadron stipulated by the treaty with Great Britain to be kept off the coast of Africa for the suppression of the slave trade, and also copies of the instructions given by the British Government to their squadron stipulated by the same treaty. President Tyler informed the House that "in my opinion it would be incompatible with the public interests to communicate to that body at this time copies of the instructions referred to" (3 Richardson, op. cit., supra, 2173).

June 1844: The Senate had requested the President to lay before it confidentially a copy of the instructions to the American Minister to England concerning title to and occupation of Oregon, and a copy of correspondence between this Government and that of Great Britain on the subject, if not incompatible with the public interest. President Tyler declared that "in the present state of the subject matter to which the resolution refers, it is deemed inexpedient to communicate the information requested by the Senate" (3 Richardson, op. cit., supra, 2180). The Senate renewed its request on December 11, 1844, but President Tyler again stated that "as the negotiation is still pending, the information sought for cannot be communicated without prejudice to the public service" (id. at 2214).

April 20, 1846: The House of Representatives had requested the President to cause to be furnished an account of all payments made on President's certificates from the fund appropriated by law for contingent expenses of foreign intercourse from March 4, 1841, until the retirement of Daniel Webster from the Department of State. The only qualification stated in the resolution was the proviso

that "no document or matter is requested to be furnished by the foregoing resolution which, in the opinion of the President, would improperly involve the citizen or subject of any foreign power" (House Journal, 29th Cong., 1st sess. 653). Polk declined to furnish the information. Citing the law which provided for private and confidential expenditures from such appropriation, he wrote (3 Richardson, op. cit. supra, 2281, 2282-2285):

* * * * * The President in office at the time of the expenditure is made by the law the sole judge whether it shall be public or private.

Under the direct authority of an existing law, he has exercised the power of placing these expenditures under the seal of confidence, and the whole matter was terminated before I came into office. An important question arises, whether a subsequent President, either voluntarily or at the request of one branch of Congress, can without a violation of the spirit of the law revise the acts of his predecessor and expose to the public view that which he had determined should not be 'made public.' If not a matter of strict duty, it would certainly be a safe general rule that this should not be done. Indeed, it may well happen, and probably would happen, that the President for the time being would not be in possession of the information upon which his predecessor acted, and could not, therefore, have the means of judging whether he had exercised his discretion wisely or not. The law requires no other voucher but the President's certificate, and there is nothing in its provisions which requires any 'entries, receipts, letters, vouchers, memorandums, or other evidence of such payments' to be preserved in the executive department. The President who makes the 'certificate' may, if he chooses, keep all the information and evidence upon which he acts in his own possession. If, for the information of his successors, he shall have the evidence on which he acts and the items of the expenditures which make up the sum for which he has given his 'certificate' on the confidential files of one of the executive departments, they do not in any proper sense become thereby public records. They are never seen or examined by the accounting officers of the Treasury when they settle an account of the 'President's certificate.' * * *

"It may be alleged that the power of impeachment belongs to the House of Representatives, and that, with a view to the exercise of this power, that House has the right to investigate the conduct of all public officers under the Government. This is cheerfully admitted. In such a case the safety of the Republic would be supreme law, and the power of the House in the pursuit of this object would penetrate into the most secret recesses of the executive departments, it could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial and to testify on oath to all facts within their knowledge. But even in a case of that kind they would adopt all wise precautions to prevent the exposure of all such matters the publication of which might injuriously affect the public interest, except so far as this might be necessary to accomplish the great ends of public justice. If the House of Representatives, at the grand inquest of the Nation, should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the executive departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation."

January 12, 1848: Without the usual qualification that information be furnished if compatible with the public interest, the House of Representatives had called upon the President to furnish the instructions and orders issued to Mr. Slidell prior to or subsequent to his departure for Mexico as Minister Plenipotentiary of the United States. President Polk refused to furnish the information saying (4 Richardson, op. cit. supra, 2415, 2417):

** * * The information called for respects negotiations which the United States offered to open with Mexico immediately preceding the commencement of the existing war. The instructions given to the Minister of the United States relate to the differences between the two countries out of which the war grew and

the terms of adjustment which we were prepared to offer to Mexico in our anxiety to prevent the war. These differences still remain unsettled, and to comply with the call of the House would be to make public through that channel, and to communicate to Mexico, now a public enemy engaged in war, information which could not fail to produce serious embarrassment in any future negotiation between the two countries.

"* * * I regard it to be my constitutional right and my solemn duty under the circumstances of this case to decline a compliance with the request of the House contained in their resolution."

July 29, 1848: To a request from the House of Representatives that he communicate, if not inconsistent with the public interest, copies of instructions to commissioners appointed to conduct negotiations for ratification of the treaty with Mexico, as amended by the Senate, President Polk replied that "in my opinion it would be inconsistent with the public interests' to give publicity to these instructions at the present time" (4 Richardson, op. cit., supra, 2452). At the next session the House again called for these documents and the President transmitted them on February 8, 1849 (Id. at 2529).

December 15, 1851: Upon receipt of a request from the Senate to furnish to the Senate, if not inconsistent with the public interest, information concerning the seizure of the American steamship *Prometheus* by a British vessel of war, and the measures taken to vindicate the honor of the country, the President transmitted extracts from a communication giving the facts of the case, but without the instructions given to the United States Minister in London. He declared that "Sufficient time has not elapsed for the return of any answer to this dispatch from him, and in my judgment it would at the present moment be inconsistent with the public interest to communicate these instructions. A communication, however, of all the correspondence will be made to the Senate at the earliest moment at which a proper regard to the public interest will permit" (4 Richardson, op. cit., supra, 2675).

May 29, 1852: The Senate had requested, without qualification, the papers and proofs on file in any of the executive departments touching a claim of Samuel A. Bilden & Co. against the Mexican Government (Senate Journal, 32d Cong., 1st sess., 395). The President forwarded all the files of the State Department with respect to this claim except those of a diplomatic character. As to the latter President Fillmore wrote that "As the claim referred to is a subject of negotiation with the Mexican Government, it is not deemed expedient at this juncture to make public the documents which have been reserved" (4 Richardson, op. cit., supra, 2687).

August 14, 1852: The Senate had requested the President to inform it, if not incompatible with the public interests, whether any propositions had been made by the King of the Sandwich Islands to transfer the sovereignty of those islands to the United States. President Fillmore replied that on June 12 last, he had received a similar resolution from the Senate adopted in executive session, to which he had returned an answer stating that in his opinion a communication of the information requested at that juncture would not comport with the public interest. "Nothing has since transpired," he wrote, "to change my views on that subject and I therefore feel constrained again to decline giving the information asked" (4 Richardson, op. cit., supra, 2695).

January 14, 1863: The House of Representatives had requested the Secretary of State to communicate to it, if not in his judgment incompatible with the public interest, information concerning our relations with New Granada, and what negotiations, if any, had been had with General Herran of the country. President Lincoln replied to the resolution giving a résumé of developments in New Granada. However, with respect to official communications with General Herran, he stated that "No definitive measure or proceedings has resulted from these communications, and a communication of them at present would not, in my judgment, be compatible with the public interest" (5 Richardson, op. cit., supra, 3350).

January 26, 1866: The Senate had requested the President to communicate, if in his opinion not inconsistent with the public interest, communications from certain military officers "in regard to the present condition of affairs on the southeastern frontier of the United States, and especially in regard to any violation of neutrality on the part of the army now occupying the right bank of the Rio Grande." President Johnson withheld the requested papers, on the ground that the publication of the correspondence at that time was not consistent with the public interest (5 Richardson, op. cit., supra, 3575).

February 26, 1887: The Senate had requested information relative to the seizure and sale of the American schooner *Rebecca*, at Tampico, and the resignation of the Minister of the United States to Mexico, if not incompatible with the public interest (Senate Journal, 49th Cong., 2d sess., 185). President Cleveland replied that "It is not thought compatible with the public interests to publish the correspondence in either case at the present time" (7 Richardson, op. cit., supra, 5123).

April 26, 1892: The Senate had requested the President, if not incompatible with the public interest, to inform it what steps had been taken toward securing an international conference on the use of silver. President Harrison declared that "in my opinion, it would not be compatible with the public interest to lay before the Senate at this time the information requested, but that at the earliest moment after definite information can properly be given all the facts and any correspondence that may take place will be submitted to Congress" (8 Richardson, op. cit., supra, 5674).

February 11, 1896: The House of Representatives had directed the Secretary of State to communicate to it, if not inconsistent with the public interests, copies of all correspondence relating to affairs in Cuba since February 1895. President Cleveland transmitted a communication from the Secretary of State and such portions of the correspondence requested as he deemed it not inconsistent with the public interest to communicate (8 Richardson, op. cit., supra, 6098).

May 23, 1896. The Senate had requested the copy of a protocol with Spain and copies of certain correspondence with that country, if not incompatible with the public service (Senate Journal 54th Cong., 1st sess., 314). President Cleveland furnished a copy of the protocol, but refrained from sending the correspondence, saying that it would be incompatible with the public service to do so (8 Richardson, op. cit., supra, 6101).

July 11, 1930. The Senate had requested the President, if not incompatible with the public interest, to submit all letters, cablegrams, minutes, memorandums, instructions, dispatches, and all records, files, and other information touching the negotiation of the London Naval Treaty. President Hoover refused to send these papers to the Senate, saying (73 Congressional Record 108) :

"This treaty, like all other international negotiations, has involved statements, reports, tentative and informal proposals as to subjects, persons, and governments given to me in confidence. The Executive, under the duty of guarding the interests of the United States, in the protection of future negotiations, and in maintaining relations of amity with other nations, must not allow himself to become guilty of a breach of trust by betrayal of these confidences. He must not affront representatives of other nations, and thus make future dealings with those nations more difficult and less frank. To make public in debate or in the press such confidences would violate the invariable practice of nations. It would close to the United States those avenues of information which are essential for future negotiations and amicable intercourse with the nations of the world. I am sure the Senate does not wish me to commit such a breach of trust.

"I have no desire to withhold from the Senate any information having even the remotest bearing upon the negotiation of the treaty. No Senator has been refused an opportunity to see the confidential material referred to, provided only he will agree to receive and hold the same in the confidence in which it has been received and held by the Executive. A number of Senators have availed themselves of this opportunity. I believe that no Senator can read these documents without agreeing with me that no other course than to insist upon the maintenance of such confidence is possible. And I take this opportunity to repeat with the utmost emphasis that in these negotiations there were no secret or concealed understandings, premises, or interpretations, nor any commitments whatever except as appear in the treaty itself and in the interpretive exchange of notes recently suggested by your Committee on Foreign Affairs, all of which are now in the hands of the Senate.

"In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest."

II. CHARGES OF MISCONDUCT AND INVESTIGATIVE REPORTS

January 22, 1807: The House of Representatives had requested the President to furnish information touching an illegal combination of private individuals against the peace and safety of the Union, except such as he deemed the public welfare to require not to be disclosed (House Journal, 9th Cong., 2d sess. 533).

President Jefferson, in reply, detailed the activities of Aaron Burr, but did not mention the names of other alleged participants. This omission he explained as follows (1 Richardson, op. cit., supra, 412) :

"* * * * The mass of what I have received in the course of these transactions is voluminous, but little has been given under the sanction of an oath so as to constitute formal and legal evidence. It is chiefly in the form of letters, often containing such a mixture or rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question."

January 10, 1825: The House of Representatives had requested the President to lay before Congress, so far as he deemed compatible with the public interest charges against certain naval officers (House Journal, 18th Cong., 2d sess. 102). President Monroe refused to submit the documents. He explained (2 Richardson, op. cit., supra, 847) :

"* * * * In consequence of several charges which have been alleged against Commodore Stewart, touching his conduct while commanding the squadron of the United States on that sea, it has been deemed proper to suspend him from duty and to subject him to trial on those charges. It appearing also that some of those charges have been communicated to the Department by Mr. Prevost, political agent at this time of the United States at Peru, and heretofore at Buenos Ayres and Chile, and apparently with his sanction, and that charges have likewise been made against him by citizens of the United States engaged in commerce in that quarter, it has been thought equally just and proper that he should attend here, as well to furnish the evidence in his possession applicable to the charges exhibited against Commodore Stewart as to answer such as have been exhibited against himself.

"In this stage the publication of those documents might tend to excite prejudices which might operate to the injury of both. It is important that the public servants in every station should perform their duty with fidelity, according to the injunction of the law and the orders of the Executive in fulfilment thereof. It is peculiarly so that this should be done by the commanders of our squadrons, especially on distant seas, and by political agents who represent the United States with foreign powers, for reasons that are obvious in both instances. It is due to their rights and to the character of the Government that they be not censured without just cause, which cannot be ascertained until, on a view of the charges, they are heard in their defense, and after a thorough and impartial investigation of their conduct. Under these circumstances it is thought that a communication at this time of those documents would not comport with the public interest nor with what is due to the parties concerned."

February 10, 1835: The Senate had requested the President to inform it of the charges, if any, made against the official conduct of Gideon Fitz, which caused his removal from office as surveyor general south of the State of Tennessee. President Jackson took the position that the Senate's call for information was unconstitutional and refused to furnish it. He wrote (2 Richardson, op. cit., supra, 1351) :

"This is another of those calls for information made upon me by the Senate which have, in my judgment, either related to the subjects exclusively belonging to the executive department or otherwise encroached on the constitutional powers of the Executive. Without conceding the right of the Senate to make either of these requests, I have yet, for the various reasons heretofore assigned in my several replies, deemed it expedient to comply with several of them. It is now, however, my solemn conviction that I ought no longer, from any motive nor in any degree, to yield to these unconstitutional demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive. This course is especially due to the present resolution. The President in cases of this nature possesses the exclusive power of removal from office, and, under the sanctions of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require. If, on the other hand, from corrupt motives he abuses this power, he is exposed to the same responsibilities. On no principle known to our institutions can he be required to account for the manner in which he discharges this

portion of his public duties, save only in the mode and under the forms prescribed by the Constitution. The suggestion that the charges, a copy of which is requested by the Senate "may contain information necessary to their action" on a nomination now before them cannot vary the principle. There is no necessary connection between the two subjects, and even if there were the Senate has no right to call for that portion of these matters which appertains to the separate and independent action of the Executive. The intimation that these charges may also be necessary "to the investigation now in progress respecting frauds in the sales of public lands" is still more insufficient to authorize the present call. Those investigations were instituted and have thus far been conducted by the Senate in their legislative capacity, and with the view, it is presumed, to some legislative action. If the President has in his possession any information on the subject of such frauds, it is his duty to communicate it to Congress, and it may undoubtedly be called for by either House sitting in its legislative capacity, though even from such a call all matters properly belonging to the exclusive duties of the President must of necessity be exempted."

January 31, 1843: The House of Representatives adopted a resolution that the Secretary of War be required to communicate to it reports made to the Department by Lieutenant Colonel Hitchcock relative to alleged frauds of Indian agents. The Secretary of War did not furnish these reports. He stated (Congressional Globe, 27th Cong., 2d sess. 579) :

"* * * The reports relating to the Cherokees contain information and suggestions in reference to the matters which it was supposed would become the subject of a negotiation between this Department and the delegates of the Cherokee Nation, who have been appointed to settle their claims, and all other matters of difference with the Government of the United States, and who have now arrived in this city. The nature and subject of the report, and the opinion of the President and of this department, render its publication, at this time, inconsistent with the public interest.

"The other report referred to in the resolution, relating to alleged frauds of Indian agents, contains such information as Lieutenant Colonel Hitchcock was enabled to obtain by ex parte inquiries of various persons, whose statements were necessarily without the sanction of an oath, and which the persons implicated have had no opportunity to contradict or explain. To promulgate these statements at this time, would be grossly unjust to these persons, and would be calculated to defeat, rather than promote, the objects of the inquiry. Sufficient opportunity has not been given to the Department to pursue the investigation, or to call upon the parties affected for explanations, or to determine on the measures proper to be adopted.

"It is hoped that these reasons will be satisfactory for not transmitting to the House at this time the reports referred to in its resolution."

Being dissatisfied with this reply the House adopted a further resolution insisting upon its right "to demand from the Executive or the heads of the departments such information as may be in his possession, relating to subjects of deliberations of the House and within the sphere of its legitimate powers." It requested, without qualification, that the President cause the information to be communicated to it (*id.* at 888). Tyler responded : "All the information communicated by Lieutenant Colonel Hitchcock respecting the Cherokees—their condition as a nation and their relations to other tribes—is herewith transmitted. But his suggestions and projects respecting the anticipated proportions of the delegates and his views of their personal characters cannot in any event aid the legislation of Congress, and in my opinion the promulgation of them would be unfair and unjust to him and inconsistent with the public interest and they are therefore not transmitted." He defended his right to withhold this information as follows (3 Richardson, op. cit., supra, 2075) :

"If by the assertion of this claim of right to call upon the Executive for all the information in its possession relating to any subject of the deliberation of the House, and within the sphere of its legitimate powers, it is intended to assert also that the Executive is bound to comply with such call without the authority to exercise any discretion on its part in reference to the nature of the information required or to the interests of the country or of individuals to be affected by such compliance, then do I feel bound, in the discharge of the high duty imposed upon me 'to preserve, protect, and defend the Constitution of the United States,' declares in the most respectful manner my entire dissent from such a proposition. The instrument from which the several departments of the Government derive

their authority makes each independent of the other in the discharge of their respective functions. The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed' necessarily confers an authority commensurate with the obligation imposed to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective these inquiries must often be confidential. They may result in the collection of truth or of falsehood, or they may be incomplete and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated or in respect to the character of the information obtained would deprive him at once of the means of performing one of the most salutary duties of his office. An inquiry might be arrested at its first stage and the officers whose conduct demanded investigation may be enabled to elude or defeat it. To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive.

"Nor can it be a sound position that all papers, documents, and information of every description which may happen by any means to come into the possession of the President or of the heads of Departments must necessarily be subject to the call of the House of Representatives *merely* because they relate to a subject of the deliberations of the House, although that subject may be within the sphere of its legitimate powers. It cannot be that the only test is whether the information relates to a legitimate subject of deliberation. The Executive Department and the citizens of this country have their rights and duties as well as the House of Representatives, and the maximum that the rights of one person or body are to be so exercised as not to impair those of others is applicable in its fullest extent to this question. Impertinence or malignity may seek to make the Executive Departments the means of incalculable and irremediable injury to innocent parties by throwing into them libels most foul atrocious. Shall there be no discretionary authority permitted to refuse to become the instruments of such malevolence?

"And although information comes through a proper channel to an executive officer it may often be of a character to forbid its being made public. The officer charged with a confidential inquiry, and who reports its result under the pledge of confidence which his appointment implies, ought not to be exposed individually to the resentment of those whose conduct may be impugned by the information he collects. The knowledge that such is to be the consequence will inevitably prevent the performance of duties of that character, and thus the Government will be derived of an important means of investigating the conduct of its agents."

January 11, 1859: The Senate had requested the President, if not incompatible with the public interest, to communicate information relating to the landing of the bark *Wandere* on the coast of Georgia with a cargo of slaves. Buchanan transmitted a report of the Attorney General which stated that the offense had been committed and that measures were being taken to enforce the law. However, he concurred with the opinion of the Attorney General that "it would be incompatible with the public interest at this time to communicate the correspondence with the officers of the Government at Savannah or the instructions which they have received" (4 Richardson, op. cit., supra, 3085).

July 27, 1861: The House of Representatives had requested the President to furnish, if in his judgment not incompatible with the public interest, the grounds, reasons, and evidence upon which the police commissioners of Baltimore were arrested and detained as prisoners at Fort McHenry (House Journal, 27th Cong., 1st sess., 138). President Lincoln replied that it was "judged to be incompatible with the public interest at this time to furnish the information called for by the resolution" (5 Richardson, op. cit., supra, 3234).

May 1, 1862: The Senate had requested any information not deemed incompatible with the public interest concerning the arrest of Brigadier General Stone (Senate Journal, 37th Cong., 2d sess., 413). President Lincoln informed the Senate that General Stone had been arrested and imprisoned "under my general authority and upon evidence which, whether he be guilty or innocent, required, as appears to one, such proceedings to be had against him for public safety." He added that "I deem it incompatible with the public interest, as also, perhaps, unjust to General Stone, to make a more particular statement of the evidence" (5 Richardson, op. cit., supra, 3275).

February 9, 1866: The House of Representatives had requested the President, if not incompatible with the public interest, to communicate any report of the

Judge Advocate General or any other officer of the Government concerning the grounds, facts, or accusation upon which Jefferson Davis and others were held in confinement. President Johnson replied that "the publication of the papers called for by the resolution is not at the present time compatible with the public interest" (5 Richardson, op. cit., supra, 3576).

May 2, 1866: The House of Representatives had without qualification requested a copy of the report made by General Smith and James T. Brady of investigations, at New Orleans (Congressional Globe, 38th Cong., 1st sess., 2130). Deeming it incompatible with the public interest, President Johnson did not furnish the report (5 Richardson, op. cit., supra, 3583).

January 3, 1901: The Senate had directed the Secretary of War to transmit the report of Abraham L. Laushe, giving in detail the result of his investigations, made under the direction of the War Department into the receipts and expenditures of Cuban funds. President McKinley informed the Senate that it was not deemed compatible with the public interest to transmit the report to the Senate at that time (9 Richardson, op. cit., supra, 6458).

April 27, 1904: The House of Representatives had requested the Attorney General, if not incompatible with the public interest, to inform the House whether any criminal prosecutions had been instituted against individuals involved in the Northern Securities case (an antitrust case), "and to send to the House all papers and documents and other information bearing upon any prosecutions inaugurated or about to be inaugurated in that behalf" (38 Congressional Record 5636). The Attorney General informed the House that no prosecutions had been initiated "and that further than this I do not deem it compatible with the public interest to comply with the resolution" (H. Doc. No. 704, 58th Cong., 2d sess., 1904).

April 13, 1908: The House of Representatives had requested the Attorney General to transmit, if not incompatible with the public service, documents and information in the possession of the Department of Justice concerning the International Paper Co. and other corporations engaged in the manufacture of wood-pulp or print paper (42 Congressional Record 4512). The Attorney General replied that no evidence had been obtained sufficient to justify the institution of legal proceedings, either civil or criminal against any alleged combination of woodpulp or print paper manufacturers but that a further investigation was in progress. He added that "It would be inexpedient at the present stage of the investigation to disclose to the public what steps have been taken, or what action is contemplated, by this Department with respect to matters mentioned in the said resolution" (H. Doc. No. 860, 60th Cong., 1st sess., 1).

January 6, 1909: The Senate had directed the Attorney General to inform it whether legal proceedings had been instituted against the United States Steel Corp. by reason of its absorption of the Tennessee Coal & Iron Co., and if not why not. President Theodore Roosevelt responded to the resolution by stating that he was responsible for the matter. He made a brief statement of the facts which led up to the absorption. He also stated that he had instructed the Attorney General not to respond to the call for a statement of his reasons for nonaction "because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action" (43 Congressional Record 840). Thereafter the Senate Judiciary Committee subpoenaed the Commissioner of Corporations to produce information which he had obtained pursuant to a statute which provided that "the information so obtained or as much thereof as the President may direct shall be made public" (82 Stat. 825, 828). The Attorney General advised the Commissioner to call the request to the attention of the President, submit to him the relevant documents and obtain his instructions as what part of the data, if any, was "suitable for publication by disclosure to the subcommittee of the Senate" (27 Op. Atty. Gen. 150, 156 (1909)). When the papers came into President Roosevelt's possession, he refused to turn them over to the committee (Letters of Archie Butt, Personal Guide to President Roosevelt, ed., Abbot, 305-306 (1925)).

March 19, 1912: The Senate had instructed the Attorney General to lay before it all correspondence, information, and reports of the Bureau of Corporations relative to the so-called Harvester Trust. The Attorney General answered that he was directed by the President to say that it was not compatible with the public interests to lay before the Senate the information demanded. "These are matters," he said, "pertaining entirely to business which is now pending and incomplete in this Department" (S. Doc. No. 454, 62d Cong., 2d sess., 1).

February 23, 1915: The Senate had directed the Attorney General to report to the Senate his findings and conclusions in the investigation conducted by the Department of Justice with respect to the Smelting Trust (52 Congressional Record 4089). The Attorney General expressed regret that he was compelled to reply that it would be incompatible with the public interest for him to comply with the request (*id.* at 4908).

May 6, 1932: The House of Representatives had requested all documents pertaining to an investigation by the Treasury Department of the importation of ammonium sulfate, if not incompatible with the public interest. The Secretary of the Treasury replied that (75 Congressional Record 11669) :

"In passing the Antidumping Act the Congress decided to provide that the initial decisions as to the existence of dumping should be made by the Secretary of the Treasury in accordance with administrative procedure. It has been the practice of the Department in acting under this statute to treat all information furnished by interested persons as confidential and not to disclose it unless such persons consent to the disclosure. This practice is complete information concerning manufacturers' and importers' business transactions which it would be practically impossible to obtain if those furnishing the information did not understand it would be treated as confidential and not divulged without their consent."

"As consent has not been given to the disclosure of the information contained in the record before the Treasury Department, I am of the opinion that it would be incompatible with the public interest to comply with the request contained in the resolution."

April 30, 1941: The chairman of the House Committee on Naval Affairs had requested the Attorney General to furnish all FBI reports since June 1939, and all future reports, memorandums, and correspondence of the FBI or the Department of Justice in connection with investigations arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which had naval contracts. The Attorney General declined (40 Op. Atty. Gen. 45). He wrote :

"It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest."

July 9, 1943: A Select Committee of the House of Representatives To Investigate the Federal Communications Commission subpoenaed the Director of the Bureau of the Budget to produce documents pertaining to the request of the War and Navy Departments to the President to sign an Executive order transferring the functions of the Radio Intelligence Division of the Federal Communications Commission to the Military Establishment. The Director of the Budget Bureau declined to furnish the information on the ground that "Proposals of this character relate directly to problems and activities of military concern which affect the national defense and conduct of the war, and the President has issued specific instructions that their contents should not be made public. The files of the Bureau relating thereto and its conclusions and recommendations thereon are considered to be confidential papers, and disclosure of them would not comport with the public interest" (House Select Committee To Investigate the Federal Communications Commission, 78th Cong. 1st sess. 37).

The committee also subpoenaed the Chairman of the Federal Communications Commission to produce documents relating to a complaint made to the Board of War Communications against Mr. Neville Miller. He replied that he did not have custody of the documents and that the Board had determined that the documents should be withheld because production of them would adversely affect the national security or injure the national prestige (*id.* at 46-51). The General Counsel of the Board, who had possession of the papers, also refused to produce them (*id.* at 54).

The committee had requested numerous documents from the War and Navy Departments concerning the foregoing and other matters. The heads of both departments replied that the President refused to allow the documents to be delivered to the committee as such delivery would be incompatible with the public interest (*id.* at 67-68).

October 15, 1947: A subcommittee of the House Committee on Expenditures in the Executive Departments investigated the operation of the United States

Board of Parole in 1947 and 1948, with particular emphasis on alleged irregularities in parolees given to four alleged members of the "Capone mob." The committee, on September 30, 1947, requested J. Edgar Hoover to send a representative of the FBI with investigative files on the four parolees. Hoover replied, on October 2, that he was forwarding the request to the Attorney General. A letter from the committee chairman to Tom C. Clark, Attorney General, dated October 7, 1947, reiterated the request for the files. On October 9, Peyton Ford, Assistant Attorney General stated that the Department would contact the committee after the completion of the FBI investigation. A further reply, by Acting Attorney General Phillip B. Perlman, dated October 15, contained the first direct refusal:

"The substance of your letter is a request that the reports of investigating agencies of the executive departments be made available to your committee. Such reports have long been held to be of a confidential nature.

* * * * *

"I feel certain that you can readily see the reasons why we cannot turn over to your committee the investigative reports or files you seek and also why we cannot advise the issuance of an Executive order to that end * * *"

Having been advised by the FBI that investigative reports had been sent to the Department of Justice, the committee requested, on November 17, "the information carried in these reports and in subsequent reports which may come to the FBI," and added "it is not the purpose at this time to ask any information as to the confidential sources from which the information was obtained."

Justice, replying to this request, stated that the investigation was not complete. The previous letters were referred to and departmental files again refused. However, it was stated that summaries would be made of reports and information contained in the file for the committee's "confidential information and use." The resulting memorandums did not satisfy the committee. Peyton Ford testified that the report was made "consistent with information which it was necessary to keep confidential because it was being presented to a grand jury." (All of the above information and quotations are from hearings before a subcommittee of the Committee on Expenditures in the Executive Departments, 80th Cong., 2d sess., 1948, pp. 594-596).

The majority report states that the reason given for the refusal was that "the information was confidential" and that it was "in compliance with an Executive order issued by President Truman" (H. Rept. No. 2441, 80th Cong., 2d sess. 1948, p. 7). The "additional views" submitted by Hon. Porter Hardy, Jr., stated that "The Executive order issued by the President did not relate specifically to the instant case" (id. 21). The full text of the October 17 letter was not printed (hearings, 595), and a letter of December 22 which apparently also gave reasons for the refusal was not printed (id. 21). Congressman Hardy also defended the adequacy of the "confidential" summary supplied by the FEI (referred to supra).

March 4, 1948: A report of the Subcommittee on National Security of the House Committee on Un-American Activities, made to the full committee on March 1, 1948, stated that Dr. Edward U. Condon, on the basis of evidence before the committee was "one of the weakest links in our atomic security." The report further stated: "So serious have Dr. Condon's associations been, that on May 15, 1947, J. Edgar Hoover, Director of the Federal Bureau of Investigation, sent a confidential letter to W. Averell Harriman, Secretary of Commerce." The report then quoted part of the letter, which set forth information in FBI files on Condon's associations. (The report is printed in H. Rept. 1753, 80th Cong., 2d sess., 1948, appendix A.)

An investigator of the subcommittee had apparently been allowed to see the letter and had copied portions of it before he was requested to stop (Report 1753, op. cit., supra, pp. 4-5).

After publication of the subcommittee report the Department of Commerce announced that Condon had been cleared by the Department Loyalty Board. The full committee, on March 3, 1948, subpoenaed the secretary of the Commerce Loyalty Board. The subpoena specifically ordered him to produce the Hoover-Harriman letter, along with files, documents, records, transcripts, and other papers involved in the loyalty board proceeding in Condon's case (id., 5).

In a letter of March 4, Secretary Harriman informed the committee chairman that he had instructed the secretary of the loyalty board to appear, but not to

produce the requested papers or to testify on the subject matter of the loyalty board hearings, Harriman stated:

"I am advised by the Attorney General that under traditional concepts of the separation of powers and responsibilities of the executive and legislative branches of our Government, the executive branch is not as a matter of law required to furnish information of this kind to a congressional committee, but on the contrary has the duty to exercise its own judgment in determining whether the furnishing of the information would be in the public interest.

"* * * I have after careful consideration reached the conclusion that the release of the documents and information called for in this case would in fact be prejudicial to the public interest" (*id.*, appendix B).

President Truman, on March 13 issued an Executive memorandum ordering all reports, records, and files relating to the loyalty program to be kept on a confidential basis and ordered officers and employees in the executive department to refuse to supply such material when requested, demanded, or subpoenaed by persons outside the executive branch. Such requests, demands, or subpoenas were to be referred to the President "for such response as the President may determine to be in the public interest in the particular case."

On April 22, 1948, the House passed House Resolution 522 (94 Congressional Record 4786) which "directed" the Secretary of Commerce "to transmit forthwith to the House of Representatives" the full text of the May 15 Hoover-Harriman letter (94 Congressional Record 4777). Replying to the resolution, by letter of April 24, the Commerce Department quoted the Presidential order of March 13, declined to furnish the letter and stated that the matter had been referred to the President (94 Congressional Record 4879). President Truman, in a press conference made remarks to the effect that the House resolution was of no effect and that he could not be forced thereby to produce the letter (*New York Times*, April 23, 1:1).

August 5, 1948: The Investigations Subcommittee, Committee on Expenditures in the Executive Departments, requested Attorney General Tom C. Clark, by letter of August 2, 1948, to furnish the committee with "any letter, memoranda, or other written notice which the Department of Justice may have furnished to any other departments, agencies, bureaus, or individuals in Government concerning William W. Remington after Miss Bentley spoke to the FBI in the fall of 1945." The letter stated that the reason the information was requested was to "determine what notice was given to the other executive branches of the Government concerning the possible espionage activities of Remington" so that the committee would then "be in a position to inquire as to who was responsible for allowing Remington to hold three important jobs of a highly confidential nature, at the same time you were conducting an investigation of him."

In his reply of August 5 the Attorney General refused to supply the material on the grounds that it fell within the President's directive of March 13 (see supra, discussion of Condon case), and stated that the request had been referred to the Office of the President. (The above letters are reprinted in *Hearings Before Investigations Subcommittee, Committee on Expenditures in the Executive Departments on Export Policy and Loyalty*, 80th Cong., 2d sess., 1948, pp. 383-384).

The committee report (S. Rept. No. 1775, 83d Cong., 2d sess.) submitted on September 4, 1948, does not indicate any action by the President. The report gives as a second basis for refusal "the protection of information relative to procedures employed by the Department of Justice in the handling of alleged espionage within the Government" (*id.* 20).

April 3, 1952: During hearings of the Senate Appropriations Committee on the Department of State appropriations for 1953 the Deputy Under Secretary had from time to time declined to furnish information requested by the committee concerning the status of loyalty-security cases, the names of persons who resigned or retired while under investigation, and specific information relating to them, information relating to the identity of State Department officers who sat as members of the Loyalty Security Board in particular cases, and how each member voted. Finally the Deputy Under Secretary requested the Secretary of State to obtain specific guidance from the President as to information to be furnished the committee. The President replied that:

"It would be a great mistake to release the names of State Department and other Federal personnel who have been subjected to loyalty investigations, and to divulge the specific steps and actions taken in the processing of individual loyalty-security cases. The FBI, which checks all Government employees, institutes full field investigations upon the basis of derogatory allegations, whether

or not true, and questionable affiliations or associations, however innocent in fact they may prove to be. In the overwhelming majority of loyalty cases, thorough FBI investigation and careful loyalty-board inquiry establishes the employee's loyalty. To divulge the names of these loyal employees, and the specific steps taken in adjudicating their cases, would serve no useful purpose. In the hands of unscrupulous persons, however, this information could be distorted and used to subject the employees and their families to untold embarrassment and distress. My apprehension in this regard is not based upon idle fancy, as you well know.

"Nor would the public interest be served by releasing the names of individuals determined to be security risks. Persons discharged as security risks are in a distinctly different category from persons discharged on loyalty grounds. They usually are employees who cannot be trusted with classified information because they have had questionable associates, talk too much, are careless, or may be unduly susceptible to outside influence. In enacting Public Law 733, 81st Congress, providing for suspension of employees in the interest of national security, the Congress clearly recognized that a security risk may be a useful and suitable employee in nonsensitive Government positions not involving access to classified information. Similarly, he may be an entirely loyal citizen who will render excellent service in private employment. The reputations of these persons should not be besmirched unnecessarily by making their names public.

"Many Federal employees leave the service while under routine investigation or prior to the completion of their loyalty-security processing. In the case of the State Department, I understand that such employees have left for a variety of reasons, such as military service, pregnancy, poor health, and the acceptance of employment in private business. In many instances, Government employees leave the service without being aware of the fact that they were under investigation. To protect the innocent from groundless accusations and unwarranted inferences, therefore, it is clear that these names should not be released in response to blanket request. All of the names, of course, are flagged for attention in case the individuals should seek to reenter Government service.

"There is no objection to making available the names of all members of an agency loyalty board, but it is entirely improper to divulge how individual board members voted in particular cases or to divulge the members who sat on particular cases. If this type of information were divulged freely, the danger of intimidation would be great, and the objectivity, fairness, and impartiality of board members would be seriously prejudiced.

"Hereafter, no information regarding individual loyalty or security cases shall be provided in response to inquiries from outside the executive branch unless such inquiries are made in writing. Where proper inquiries are made in writing, replies will be confined to two categories of information as follows: (1) If an employee has been separated on loyalty grounds, advice to that effect may be given in response to a specific request for information concerning the particular individual; and (2) if an employee has been separated as a security risk, replies to requests for information about that individual may state only that he was separated for reasons relating to suitability for employment in the particular agency. No information shall be supplied as to any specific intermediate steps, proceedings, transcripts of hearings, or actions taken in processing an individual under loyalty or security programs.

"No exceptions shall be made to the above stated policy unless the agency head determines that it would be clearly in the public interest to make specified information available, as in instances where the employee involved properly asks that such action be taken for his own protection. In all such cases, the requested information shall be released only after obtaining the approval of my office (Senate Appropriations Committee Hearings on State, Justice, Commerce, and Judiciary Appropriations, 1953, 721-725)."

III. CONFIDENTIAL INFORMATION PERTAINING TO MEMBERS, ACTIONS OR DELIBERATIONS OF THE EXECUTIVE DEPARTMENT

December 12, 1833: The Senate had, without qualifications, requested the President to communicate a copy of a paper read to the Cabinet relative to removal of deposits from the bank by the United States (Senate Journal, 23d Cong., 1st sess. 40). Jackson refused, saying (2 Richardson, op. cit., supra, 1255):

"The executive is a coordinate and independent branch of the Government equally with the Senate, and I have yet to learn under what constitutional

authority that branch of the legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of departments acting as a Cabinet council. As well might I be required to detail to the Senate the free and private conservations I have held with those officers on any subject relating to their duties and my own."

March 23, 1842: The House of Representatives had, without qualification, requested the President and heads of departments to furnish the names of members of the 26th and 27th Congresses who had been applicants for office. President Tyler declined to furnish the information. He took the position (3 Richardson, op. cit., supra, 1958) that:

"* * * applications for office, or letters respecting appointments, or conversations held with individuals on such subjects are not official proceedings, and cannot by any means be made to partake of the character of official proceedings unless after the nomination of such person so writing or conversing the President shall think proper to lay such correspondence or such conversations before the Senate. Applications for office are in their very nature confidential, and if the reasons assigned for such applications or the names of the applicants were communicated, not only would such implied confidence be wantonly violated, but, in addition, it is quite obvious that a mass of vague, incoherent, and personal matter would be made public at a vast consumption of time, money, and trouble without accomplishing or tending in any manner to accomplish, as it appears to me, any useful object connected with a sound and constitutional administration of the Government in any of its branches * * *. In my judgment a compliance with the resolution which has been transmitted to me would be a surrender of duties and powers which the Constitution has conferred exclusively on the Executive, and therefore such compliance cannot be made by me nor by the heads of departments by my direction. The appointing power, so far as it is bestowed on the President by the Constitution, is conferred without reserve or qualification. The reason for the appointment and the responsibility of the appointment rest with him alone. I cannot perceive anywhere in the Constitution of the United States any right conferred on the House of Representatives to hear the reasons which an applicant may urge for an appointment to office under the executive department, or any duty resting upon the House of Representatives by which it may become responsible for any such appointment."

May 4, 1876: The House of Representatives had requested the President, if in his opinion it was not incompatible with the public interest to inform it, whether since March 4, 1869, any executive acts had been performed at a distance from the seat of government established by law (4 Congressional Record 2158).

President Grant, in his reply of May 4, 1876 (6 Richardson, op. cit., supra, 4315), declined to supply the information on constitutional grounds and not that such disclosure would be incompatible with the public interest.

His first argument was based on the separation of powers doctrine. He failed to find the authority in the Constitution for the House to require of the Executive, "an independent branch of the Government * * * an account of his discharge of his appropriate and *purely* executive offices, acts and duties, either as to when, where, or how performed" (*ibid.*, 4316). [Emphasis added.] Although the argument was not made directly, there is a suggestion that the fact that the House is only one branch of Congress is significant. President Grant further stated that:

"What the House of Representatives may require as a right in its demand upon the Executive for information is limited to what is necessary for the proper discharge of its powers of legislation or of impeachment."

He found that the instant inquiry did not "necessarily belong to the province of legislation," and further that "it does not profess to be asked for that object."

If the request for information was "in view or in aid of the impeachment power of the House," it was Grant's position that the inquiry was in derogation of the constitutional guaranty which protects every citizen, including the President, from being made a witness against himself.

March 1, 1886: The Senate had directed the Attorney General to transmit to the Senate copies of all documents and papers filed in the Department of Justice in relation to the management and conduct of the office of district attorney of the United States of the southern district of Alabama. The Attorney General replied that the President had directed him to say that the only papers mentioned in the resolution in the custody of the Department were those relating

to the suspension by the President of George M. Duskin, late incumbent of the office in question and that "it is not considered that the public interest will be promoted by a compliance with said resolution * * *." Interpreting this letter as a claim "that the Attorney General of the United States is the servant of the President and is to give or withhold copies of documents in his office according to the will of the Executive, and not otherwise;" the Senate Judiciary Committee reported a resolution condemning the refusal of the Attorney General to transmit the papers. Thereupon Cleveland sent a special message to the Senate in which he disclaimed the assumption that the Attorney General was the servant of the Executive and that he should give or withhold papers at the will of the Executive. Instead, he declared that "Against the transmission of such papers and documents I have interposed by advice and direction * * * because I regard the papers and documents withheld and addressed to me as intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine. I consider them in no proper sense as upon the files of the Department, but as deposited there for my convenience, remaining still completely under my control. I suppose if I desired to take them into custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain." The Senate, however, adopted the resolution condemning the withholding of the papers (S. Misc. Doc. 68, 52d Cong., 2d sess. 233-270).

January 21, 1944: J. Edgar Hoover, Director of the FBI, testifying before the House Select Committee To Investigate the Federal Communications Commission (hearings before above committee, 78th Cong., 1st sess., pursuant to H. Res. 21 (1944), pt. 2, hereinafter cited as "hearings") refused to answer questions "concerning fingerprint records, and concerning certain matters relating to activities at Pearl Harbor, and concerning certain operations of the Bureau." He stated that "the President has directed I should not testify to any matter or to any correspondence relating to internal security, and the Attorney General has construed questions of this kind as falling within that category so I must decline to answer for that reason." The committee, informed that the President's directions were in writing, and that Hoover had a copy with him, asked him to produce them. On the advice of Hugh B. Cox, Assistant Solicitor General, who accompanied him, Hoover refused to produce the directions on the grounds that they were addressed to the Attorney General and could not be disclosed without his permission (hearings, 2304-2305).

The following day, January 22, 1944, Hoover refused to produce the directions, for reasons set forth in a letter from the Attorney General, Francis Biddle, to the chairman of the committee (hearings, 2337-2338). The letter (hearings, 2338-2339) reads in part:

"**MY DEAR MR. CHAIRMAN:** I have carefully considered the request of Mr. Garey, counsel for the committee, that I produce before your committee a copy of the document that I received from the President directing Mr. Hoover not to testify before your committee about certain transactions between this Department and the Federal Communications Commission.

"It is my view that as a matter of law and of long-established constitutional practice, communications between the President and the Attorney General are confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress. In this instance, it seems to me that the privilege should not be waived; to do so would be to establish an unfortunate precedent, inconsistent with the positions taken by my predecessors.

"It could, moreover, open the door to detailed inquiries into the confidential and privileged relationship that exists between the President and the Attorney General, heretofore generally recognized by the Congress. I must therefore respectfully decline to produce before your committee the President's communication. Without waiving in any way the privilege, however, I believe that I can inform the committee that the President's direction states that because the transactions relate to the internal security of the country, it would not be in the public interest, at the present time, for Mr. Hoover or any officer of the Department to testify about them or to disclose any correspondence concerning them.

"Furthermore, I should like to point out that a number of Mr. Garey's questions related to the methods and results of investigations carried on by the Federal Bureau of Investigation. The Department of Justice has consistently taken the position, long acquiesced in by the Congress, that it is not in the

public interest to have these matters publicly disclosed. Even in the absence of instructions from the President, therefore, I should have directed Mr. Hoover to refuse to answer these questions."

The subpoena issued to Mr. Hoover did not call for any documentary evidence (hearings, 2340).

Thereafter, Hoover refused to answer questions which in his and counsel's judgment were covered by the undisclosed Presidential directive.

March 9, 1948: A subcommittee of the House Committee on Education and Labor, inquiring into the administration of the Taft-Hartley Act, twice subpoenaed Presidential assistant, John R. Steelman to appear before the committee. Steelman replied by letter of March 9, 1948, as follows:

"I am returning to you herewith two subpoenas recently issued to me on behalf of your subcommittee. On Saturday, March 6, I received a subpoena which called for my attendance at a hearing to be held that afternoon. On Monday, March 8, I received another subpoena calling for my attendance at a hearing to be held the same day.

"As you know, my official duties are to advise and assist the President of the United States. After the receipt of each of these subpoenas, I promptly informed the President, and in each instance the President directed me, in view of my duties as his assistant, not to appear before your subcommittee." (Letter printed in appendix, H. Rept. No. 1595, 80th Cong., 2d sess., 1948.)

May 15, 16, 1951: In the course of the hearings on the dismissal of General MacArthur and the military situation in the Far East (hearings before the Committee on Armed Services and the Committee on Foreign Relations, Senate, 82d Cong., 1st sess., 1951), hereinafter cited as "hearings"), General Bradley, then Chairman of the Joint Chiefs of Staff, refused to testify as to certain conversations in the executive branch. He had testified that a meeting was held on April 6, 1951, attended by the President, Marshall, Acheson, Harriman, and himself, at which General MacArthur was discussed. He was asked, by a member of the committee, what was said at the meeting. General Bradley replied: "Senator, at that time I was in a position of a confidential adviser to the President. I do not feel at liberty to publicize what any of us said at that time" (hearings, 763). He added, "If I have to publicize my recommendations and my discussions * * * my value as an adviser is ruined" (id.).

The chairman (Senator Russell), ruled "that any matter that transpired in the private conversation between the President and the Chief of Staff as to detail can be protected by the witness if he so desires, and if General Bradley relies upon that relationship * * * I would rule that he be protected" (hearings, 765). This ruling was upheld by vote of the committee (hearings 872).

Further clarifying his refusal, the general stated that he would testify as to the conclusions reached at White House conferences, and the reasons given by the Joint Chiefs of Staff to General Marshall for thinking that General MacArthur should be relieved but not as to the conversations (hearings 810). He felt free to testify about reasons advanced because General Marshall had given his permission for such testimony (id.).

Although General Bradley first suggested that he talk to the President about the possibility of disclosure, he later took the position that he should not consult with the President and would refuse to testify on his own initiative (hearings 816).

May 17, 1954: John G. Adams, counselor to the Army, in his testimony before the committee investigating the Army-McCarthy controversy (hearings before the Special Subcommittee on Investigations of the Committee on Government Operations, Senate, 83d Cong., 2d sess., 1954), pursuant to S. Res. 189, herein-after referred to as "hearings") stated that on January 21, 1954, he had attended a meeting with Attorney General Brownell, Deputy Attorney General Rogers, Presidential Assistant Sherman Adams, White House Administrative Assistant Gerald Morgan and U.N. Ambassador Henry Cabot Lodge. Adams testified that he had outlined the Cohn-Schine situation to the meeting and Sherman Adams had suggested that a memorandum of all incidents in reference to Private Schine should be prepared. The meeting concluded that the Republican members of the Investigations Subcommittee should be briefed (hearings, 1059). When the committee attempted to question Adams as to what had happened at the meeting beyond what he had testified to, Mr. Welch, counsel for the Army, interrupted with the following statement: "This was a high-level discussion of the executive department, and this witness has been instructed not to testify as

to the interchange of views on people at that high level at that meeting" (hearings, 1169). Adams stated that the instruction had come to him orally, and that "the indications were that they were instructions from the Deputy Secretary of Defense," Robert B. Anderson, who was transmitting them from some other higher authority (hearings, 1170). It was argued that the witness had waived immunity by bringing up the subject of the meeting himself (hearings, 1171). Thereafter, Adams refused to answer several questions pertaining to the meeting (hearings, 1170 to 1173). Agreement was reached that the witness would bring to the committee written authorization for his position from the executive branch (hearings, 1197-1199).

On May 17 Adams submitted a letter of the same date from President Eisenhower to the Secretary of Defense (hearings, 1249) which reads in part:

"Because it is essential to efficient and 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. This principle must be maintained regardless of who would benefit by such disclosures.

"I direct this action so as to maintain the proper separation of powers between the executive and legislative branches of the Government in accordance with my responsibilities and duties under the Constitution. This separation is vital to preclude the exercise of arbitrary power by any branch of the Government.

"By this action I am not in any way restricting the testimony of such witnesses as to what occurred regarding any matters where the communication was directly between any of the principals in the controversy within the executive branch on the one hand and a member of the subcommittee or its staff on the other."

A memorandum from the Attorney General to the President accompanied the President's letter (hearings, 1269-1275). After reviewing historical examples the memorandum concluded:

"Thus, you can see that the Presidents of the United States have withheld information of executive departments or agencies whenever it was found that the information sought was confidential or that its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation. The courts, too, have held that the question whether the production of the papers was contrary to the public interest, was a matter for the Executive to determine.

"By keeping the lines which separate and divide the three great branches of our Government clearly defined, no one branch has been able to encroach upon the powers of the other."

The hearings recessed for a week to allow members of the committee to consider problems raised by the President's letter. The committee, on reconvening, announced that it did not want to burden the hearings with the difficulties involved in making a final determination of the problem at that time. It put no restrictions on questions which could be asked, but it was "up to each witness and his counsel to make the plea of the protections set up by the Executive order when it is considered essential to do so" (hearings, 1288).

July 1955: During the course of hearings before a subcommittee of the Subcommittee on Antitrust and Monopoly Legislation of the Committee on the Judiciary, there were the following instances of Executive refusal to supply information and documents and to disclose the content of executive conferences and conversations.

F. Sinclair Armstrong, Chairman of the SEC

The SEC, on June 13, had postponed hearings on Dixon-Yates, at which Adolph H. Wenzell and Duncan R. Linsey (both of whom had been or were connected with the First Boston Corp.) were to testify. On that date, the House of Representatives was approaching a vote on a bill involving Dixon-Yates. The allegation was made that the postponement of the hearing was intimately connected with the pending vote in the House.

July 12, 1955: Armstrong testified that on June 13 he had met with the Commissioners and ordered the postponement. However, he refused to testify as to whether the hearing had been postponed on White House orders or at the request

of someone close to the President. He also refused to answer the following questions: (1) Whether any Government officials had suggested the SEC postpone its hearings; (2) whether the "privilege" stand itself had been an inter-agency decision; (3) whether anyone from the SEC had initiated Dixon-Yates matters with the White House; (4) whether the White House had made any "representation" to the SEC during an earlier hearing on issuing Dixon-Yates stock; (5) question concerning minutes of the Commissioner's meeting on the day the hearings were postponed.

Armstrong claimed his privilege under authority of President Eisenhower's order of May 17, 1954, which was issued in connection with the Army-McCarthy hearings (discussed supra). He stated that the SEC had "administrative" and "judicial" functions and that "to the extent that the Chairman [of the SEC] may have conversations with the executive branch of the Government, those pertain to the 'administrative' branch of the agency." He added: "The Commission has complete administrative power * * * over when hearings should be terminated. That has nothing to do with the judicial matters." Armstrong was ordered to return the following day. (Above material from New York Times, July 13, 1955, p. 1; Washington Post and Times Herald, same date, p. 1).

July 13, 1955: The following day, on the basis of a written opinion by Herbert Brownell, Attorney General, Chairman Armstrong changed his position. Brownell's opinion stated, in part:

"Any communication within the SEC among Commissioners or the Commissioners and employees is privileged and need not be disclosed outside of the Agency. Likewise, any communication from others of the executive branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954 (forbidding access to confidential FBI files during the Army-McCarthy hearing).

"You inquired specifically whether when a proceeding is pending before the Commission a request to the Commission for an adjournment by someone in the executive branch outside the Commission is likewise covered. Because such a proceeding is quasi-judicial in nature, it is my opinion that such a request would not be covered by the President's letter * * *. Once the proceeding is no longer pending before the Commission such information should, upon request, be made available by the Commission to an appropriate congressional committee."

Armstrong testified that Sherman Adams, Presidential assistant, had telephoned on June 11 and had asked Armstrong to postpone the hearings and that on June 15, the day the House voted, he had called him again and had told him that Government attorneys had decided not to intervene. The possibility of such intervention was the reason Adams had given for his request for postponement according to Armstrong. However, Armstrong refused to testify as to whether the House vote had been discussed in these conversations, stating that such testimony went beyond the Brownell opinion. The committee ordered him to again consult with the Attorney General. (Above material from New York Times, July 14, 1955, p. 1).

July 20, 1955: Chairman Armstrong again retreated from a previous position. He testified that Sherman Adams had mentioned the pending House vote in his June 11, 1955, telephone conversation. Armstrong refused to testify as to whether he had collaborated with Sherman Adams with reference to testimony to be given before the investigating committee, stating "it has nothing to do with proceeding before the SEC" (New York Times, July 21, 1955, p. 1; Washington Post and Times Herald, same date, p. 1).

July 30, 1955: Armstrong again refused to testify as to what advice Adams had given him regarding testimony before the committee. Armstrong stated that this position was sustained by Herbert Brownell, Jr., and Gerald Morgan, special counsel to the President, on the grounds that it was privileged information (New York Times, July 30, p. 6).

Sherman Adams, Assistant to the President

July 21, 1955: Replying to a request by Senator Kefauver to testify before the committee, Mr. Adams stated in a letter to the committee: "Since every fact to which I might give testimony either has been or could be testified to fully by other responsible Government officials and because of my official and confidential relationship to the President, I respectfully decline the subcommittee's invitation" (New York Times, July 22, p. 1).

July 26, 1955: Replying to a letter from Senator Kefauver asking him to reconsider, Mr. Adams stated in a short letter that his position had not changed (New York Times, July 30, 1955, p. 6).

Kenneth E. Fields, General Manager, Atomic Energy Commission

July 21, 1955: Senator Kefauver, by letter of July 18, 1955 (reprinted, Daily Congressional Record, July 21, 1955, at p. 9576), requested Mr. Fields to deliver certain reports and memorandum. Fields stated in reply:

"The documents to which you refer constitute internal working papers within the Commission and reflect staff discussions prior to final action. They do not constitute official actions by a Government agency or a Government official. I hope you will appreciate, therefore, that they constitute privileged communications within the executive branch under the well-recognized doctrine of separation of powers, a principle which was recently reiterated by the President. Under the circumstances, therefore, the Commission has instructed me to advise you that we must respectfully decline to comply with your request."

Fields took the same position at the hearings that day (New York Times, July 22, 1955, p. 1).

Rowland Hughes, Director of the Bureau of the Budget

Hughes refused to make available to the committee a copy of a report prepared by Wenzell. Subsequently, Hughes released a copy of the report to Wenzell to use as he saw fit, and Wenzell turned it over to the committee. The committee, in its interim report states that the "refusal of the document to the committee directly still stands" (interim report to the Subcommittee on Antitrust and Monopoly Legislation of the Committee on the Judiciary (1955), p. 14). This refusal was made after checking with the President (*id.*). The report further states that Hughes refuses "on claim of Executive privilege, apparently still with the support of the President * * * other documents * * * including a memorandum prepared for his attention" and shown to a private party (*id.*, 15). The report does not give dates for these refusals.

Mr. PHILLIPS. Please try to the best of your ability.

You stated that the Office of Legal Counsel was involved in the decision to apply executive privilege to the request of this subcommittee for the Cambodian country field submission. Can you tell us the kind of criteria that were applied in that situation? And, specifically, along that line, we understand the argument that has been made by AID and by the White House is that planning data in the foreign aid field should be withheld while it is in the process of evaluation. Advice from an AID mission director in the field, that is, a mission director to the AID Washington Office or to the National Security Council, should be treated differently than some other types of information.

But in cases of fiscal 1973 country field submissions such as the Country Field Submission for the East Asia Regional Development Commission that we recently requested, they cannot be considered in the "planning data" category. Policies based on fiscal 1973 CFS have already been established. These memoranda have already been evaluated, revised, and have been provided to the Congress in program presentations, testimony, or other forms. Congress has acted on authorization bills and appropriations for such programs. They're no longer "planning documents," but we are still given to understand somehow "once a planning document, always a planning document," even if the point in time has long since passed where it has served in that function.

You had discussions about a request from AID for executive privilege on the subcommittee's request for the Cambodia country field submissions. A decision was reached to use executive privilege, in March of 1972. What kind of criteria, what kind of discussion took place? What consideration was given to this question of "planning data" that was no longer in the category for which it was originally intended? Was there any discussion along that line at all?

Ms. LAWTON. As I recall—and it is a very vague recollection—I was at the meeting. And this is our usual approach. We say to the agency,

let's see the document and so we take the document and we start going through it and we say, you tell us, what do you think are the reasons this should not be made available; what is there in this document that somehow there will be damage in one area or another if it is made available?

And my general recollection—and it is very vague at this moment in time—was that we had a couple of considerations there. One was the forthright policy advice, that type consideration, and granted it may already be implemented but, as I recall, there was language in there where, I adverted to it earlier in terms that an employee would not describe his views, if he knew it was going to be turned over to Congress.

Mr. PHILLIPS. That would imply that his name was somehow connected with it, wouldn't it? There are hundreds of people in AID missions overseas who have key roles in the AID programs.

Ms. LAWTON. Yes, but by area of responsibility, they can sometimes be identified with or without the name printed.

And the other reason, it seems to me, it had some foreign policy overtones in it. That was the other consideration we took into account. Beyond that, I couldn't give you details on it. It has been too long ago.

Mr. PHILLIPS. Up until a year ago, our subcommittee had received dozens of these country field submissions during the last three administrations. They were received by a routine phone call from my secretary to the Congressional Liaison Office. There was never any question raised and I can assure you, having read many, many of them, I have never seen the name of one individual ever mentioned. The version of the country field submission that is printed by AID after review, when it comes in from the field is edited extensively and references to individual mission personnel are eliminated from that document. There is absolutely nothing in such documents that I can see might infringe upon the free and frank flow of advice from one official at a lower echelon of Government to a higher level of Government.

This is why it is so difficult for us to understand why the President feels that this is such a "compelling case" to warrant the exercise of executive privilege. The President's guidelines state that executive privilege should only be invoked in the most compelling circumstances. I cannot for the life of me understand what is so sensitive about these country field submissions. Very few of them are even classified at all.

They are, of course, very important to the work of our subcommittee in its foreign operations oversight because they pull together in a very few pages a great deal of information. It might take us weeks of investigation to gather this information from other sources.

This is the reason why I am belaboring you, Ms. Lawton. It is not personal, I assure you, but we do feel that this administration policy of denial is inhibiting greatly our oversight function as a legitimate investigating committee in an area that is extremely important today and will be much more important tomorrow.

Now just a couple of other very brief questions.

When you make your decision as to whether or not executive privilege should be recommended, and you have consultation with the concerned department, do you consult on an informal basis with Mr. Dean

or Mr. Dean's office as to the feeling of the White House as to what advice should be forthcoming from this step 1 in the procedure?

Ms. LAWTON. In the instances I have been involved with this, no. We make up our own minds of what we think and then send it to Mr. Dean.

Mr. PHILLIPS. And the concerned department then has the option to bypass your recommendation and go directly to Mr. Dean?

Ms. LAWTON. Now, it will make a difference if they happen to go to Mr. Dean first and he comes to us. Then, the discretion might be otherwise. It will vary but that is my experience and that is limited.

Mr. PHILLIPS. Turning now to another area, a yes or no answer please. Did the Office of Legal Counsel participate in the drafting of the information disclosure provisions of the new administration bill to rewrite the Federal Criminal Code—H.R. 6046—which was introduced on March 22 by Congressman Hutchinson and others?

Ms. LAWTON. I can't give you a yes or no because of the peculiar nature of the arrangement. There was a group drafting the code, a part of the Criminal Division—and the Office of Legal Counsel was not involved in that. Then there was a subcommittee that sat in review of the various proposals as they came through the unit. I participated at that level on this subcommittee of the Law Enforcement Policy Committee and to that extent, the Office of Legal Counsel was involved.

Mr. PHILLIPS. Let me be more specific and maybe you could provide an answer for the record. I am specifically referring to the position of the draft bill which came to the Hill starting on page 81 and running through page 86.

Ms. LAWTON. Yes; I know the sections you mean. Yes, I sat in on meetings on two sections also.

Mr. PHILLIPS. Did you make recommendations as to language that should be in that draft?

Ms. LAWTON. Yes; I think I did. I have to remember. These were pretty free-flowing discussion-type meetings and there were no formal written recommendations from the Office of Legal Counsel.

Mr. PHILLIPS. This was give and take?

Ms. LAWTON. A give and take session, yes. I know I did. Yes.

Mr. PHILLIPS. Some of us up here consider this language to be an attempt to enact an American "Official Secrets Act," as I am sure you are quite aware.

Ms. LAWTON. I heard that.

Mr. PHILLIPS. As we read that language, it would make it a criminal offense—the disclosure of any type of information that would fall under the broad definition of "national defense information." In fact, some people think it would even subject a Member of Congress to criminal prosecution if he disclosed anything that came into his possession as part of his official duties and would subject him to the criminal sanction that is in the code.

Would you agree with that interpretation?

Ms. LAWTON. Well, you have a series of interpretations there. Generally, no, I would not. I think we have not, except in very limited instances gone beyond the existing law. In some areas we have cut back the existing law deliberately.

I think as to the liability of a Member of Congress, that would go to the Supreme Court and it would depend entirely on the circumstances.

Mr. PHILLIPS. Ms. Lawton, what about congressional staff personnel, would you feel that they could be prosecuted if they disclosed information that fell within this definition?

Ms. LAWTON. Again, because the staff is identified with the Congress, as a whole, that would depend on the circumstances under which they did that.

Mr. PHILLIPS. How about Mr. Lardner of the Washington Post who is sitting here at the press table? In other words, would we get an "Official Secrets Act" by this language or not?

Ms. LAWTON. I don't think we are at all. I just last night reread the British Official Secrets Act and we aren't anywhere close.

Mr. PHILLIPS. We keep that document under our pillows and we sometimes have nightmares about it.

Ms. LAWTON. Yes, agreed.

Mr. PHILLIPS. I expect the subcommittee will be looking further into this specific language, even though we do not have jurisdiction over the bill as a whole. We are very much concerned about some of the interpretations that may be involved in that language and perhaps we will have another chance to explore that further with you in the future.

Just one last question, Mr. Chairman. I now ask you a hypothetical question, Ms. Lawton, which I realize may invoke a hypothetical answer. Suppose Congress in its wisdom decides that in order to conduct a full and fair investigation of the Watergate incident, it was necessary to serve a subpoena and eventually issue a warrant and arrest a member of the President's staff, and to bring him before the committee to testify. Suppose he refused to testify and a contempt citation were voted because of that refusal. He would, subsequently, be imprisoned in the Capitol basement. From a legal standpoint, one of the ways this case could reach the courts would be that a petition for a writ of habeas corpus would then be filed, calling for the release of that individual and it would then be in the courts. My question to you is, in such an instance, involving a member of the President's staff, would the Department of Justice—the Solicitor General—be involved in the handling of the case for that individual? Would he be involved in the filing and handling of the writ of habeas corpus, arguing the case in the Federal courts or would that individual have to retain his own private counsel to represent him in that hypothetical case?

Ms. LAWTON. That would depend. I think the general rule is that the Department of Justice represents officers of the United States who are challenged for official action. Whether or not we would visualize this sort of situation, and it has never arisen to my knowledge—the imprisonment sort of thing that you mentioned, happened, but it was a private individual and not an officer of the United States or an employee of the United States—I cannot give you a flat answer. Our general guidelines—

Mr. PHILLIPS. What would be your best guess as to how that might be handled if it took place, say, the week after next?

Ms. LAWTON. Very carefully. I really can't say, I don't know. It would be a very awkward situation. It would be a very difficult situation as to whether this is an official challenge or not. If the claim of

executive privilege was made and the issue was being joined there, I suspect that the United States would enter as counsel for the individual or as an intervenor on behalf of the President, and I am not sure which.

Mr. PHILLIPS. Are you taking into consideration the decision of Judge Sirica in the instance where Mr. Colson of the President's White House staff was asked to appear before the grand jury in the Watergate case and requested counsel to represent him from the Justice Department? It was ruled that such counsel is not appropriate and he had to retain his own private counsel.

Ms. LAWTON. I am taking it into consideration. But if I may correct the record on that, it was Judge Richey in the civil case—

Mr. PHILLIPS. I am sorry, that is correct.

Ms. LAWTON. It was not in the criminal case, but it was in the civil case for deposition only.

Mr. PHILLIPS. Yes, it was the civil case.

Ms. LAWTON. And Judge Richey's decision in that case turned on the specific facts. He did not lay down a general rule. What he said was since simultaneous action was being carried out by the Justice Department, both criminally and civilly, it is inappropriate in this case.

Mr. PHILLIPS. Conflict of interest?

Ms. LAWTON. Of government counsel, yes.

Mr. PHILLIPS. But there was no claim of executive privilege in that situation?

Ms. LAWTON. Not to my recollection.

Mr. PHILLIPS. Not to the grand jury; in fact, the President has said that his aides would be permitted to testify before grand juries in criminal investigations.

Ms. LAWTON. Yes.

Mr. PHILLIPS. So all we have to do here on the Hill is to constitute ourselves as the "Subcommittee of Foreign Operations Grand Jury," and maybe we can get that kind of cooperation.

You agree this would make a fascinating law review article if such a case ever came to pass?

Ms. LAWTON. And a fascinating newspaper article, too.

Mr. PHILLIPS. Thank you, Mr. Chairman.

Thank you, Ms. Lawton. You have been very responsive and gracious.

Ms. LAWTON. Thank you.

Mr. ALEXANDER. Mr. Cornish?

Mr. CORNISH. Thank you, Mr. Chairman.

Ms. Lawton, as I understand your testimony, you are contending that the limits of executive privilege are really unclear but, nevertheless, the President has some inherent power to determine what they are on an ad hoc basis, is that correct?

Ms. LAWTON. I think that is a fair summary, yes.

Mr. CORNISH. Do you know of any information which the President is required to give to the Congress where he cannot exercise executive privilege?

Ms. LAWTON. I believe he is required, for example, to submit the budget and there are various submissions of that sort that are required by law, yes.

Mr. C_ORNISH. You would put budget information in that category, then?

Ms. L_AWTON. I believe that that is required by the Budget and Accounting Act, yes.

Mr. C_ORNISH. Now that is an interesting reply, because you say it is required by the Budget and Accounting Act?

Ms. L_AWTON. That is to the best of my recollection, sir, I did not research that.

Mr. C_ORNISH. Are you stating that anything required by the Budget and Accounting Act is not subject to executive privilege?

Ms. L_AWTON. No, I am not stating that. There are certain requirements that the President supply certain information to the Congress which have been spelled out in the statutes as to which, to my knowledge, no claim of executive privilege has ever been made and most of them are the types of things that it would be very difficult to make an executive privilege claim on. They just don't fit in that area.

Mr. C_ORNISH. I am sure you are familiar with article II of the U.S. Constitution, section 3, where it states that "the President shall from time to time give to the Congress information of the state of the Union."

Ms. L_AWTON. Yes.

Mr. C_ORNISH. What would be your interpretation of that constitutional provision as to the extent of that information? For example, if the President came in and said that the state of the Union is "peachy" would that suffice or would he have to go into further detail and give us the bad news as well as the good news?

Ms. L_AWTON. I think clearly the Constitution contemplates more than that. What it contemplated historically was a matter of some confusion, I think, as to whether it was periodic reports, whether it was an annual message. Just what it was has been interpreted differently from time to time, but clearly I think it is more than just a bald assertion. That would hardly be a fair reading of the state of the Union.

Mr. C_ORNISH. Do you think or does the Department think that this actually requires the President of the United States to communicate with the Congress of the United States?

Ms. L_AWTON. Yes.

Mr. C_ORNISH. And, of course, the meaning of the word "communicate" is to share information?

Ms. L_AWTON. Yes.

Mr. C_ORNISH. I notice in your testimony you have stated that the separate and coequal status of the three branches as grounded in the Constitution itself cannot be altered by legislation and I would assume that would also extend to any Presidential directive?

Ms. L_AWTON. Yes, the President cannot alter the Constitution.

Mr. C_ORNISH. I just wonder, as sort of a rhetorical question, how they can be coequal if one branch of the Government has all of the information and another branch of the Government has only part of the information?

Ms. L_AWTON. I think that does not alter the fact the branches are coequal.

Mr. PHILLIPS. Some may be more coequal than others.

Mr. CORNISH. I notice also you stated in your summary that the possibility of—speaking hypothetically and not directing an analogy here—of the use of an Executive order grounded on national security to limit the scope of congressional privilege; well, you are talking here about an Executive order.

Of course, an Executive order has no effect outside of the executive branch of the Government, does it? It has no legal effect outside of the executive branch of the Government?

Ms. LAWTON. Oh, yes. An Executive order, depending on the particular type, can affect private individuals. There are proclamations and orders issued in the tariff area, for example, pursuant to an act of Congress, which do have a legal effect, not only vis-a-vis our citizens but vis-a-vis foreign governments. It has an effect outside of the executive branch, depending on the type of order and the type of thing it is.

Mr. CORNISH. If someone violates an Executive order outside of the executive branch of Government, is there any legal action that can be taken against him?

Ms. LAWTON. The only legal action I know of, well, there may be instances where we could go and ask the court for an injunction, but the only other instances are where Congress has said what the sanctions will be by statute. Most Executive orders are pursuant to statutes enacted by Congress, and Congress has laid out what they will be and said, thus and thus will be the sanction.

For example, in the *Curtiss-Wright* case, the Congress in that case, involving an Executive order, said the President shall determine when shipments of arms shall be proscribed and Congress said what the sanctions shall be for violating that order.

Mr. CORNISH. I recall when the President issued his most recent order on security classification. He cited his powers as Commander in Chief and also he listed as a statutory authority, the Freedom of Information Act, which is very interesting. It popped up for the first time in this last Executive order on security classification.

Previously, he had just referred to inherent powers as Commander in Chief, as I recall.

Ms. LAWTON. Well, I don't recall the preamble to that order.

But it is true that—and the Freedom of Information Act is only one example—there are statutory recognitions of executive classifications of documents and I think the reason for citing the Freedom of Information Act is that it refers to information required by statute or Executive order to be kept secret and this is because it is in the national interest.

I think the reason for the President saying this in such an Executive order is to make clear that this is an order that the Freedom of Information Act refers to. I think that is the reason for the citation.

Mr. CORNISH. I don't want to dwell on it too much because you realize that it is permissive authority, not mandatory authority, that was granted to the executive branch in the Freedom of Information Act.

Ms. LAWTON. Oh, yes.

Mr. CORNISH. Would you agree with me that according to the Constitution, the Congress has the power to remove the President of the United States from office?

Ms. LAWTON. Under the impeachment clause, you mean?

Mr. CORNISH. Yes.

Ms. LAWTON. Yes.

Mr. CORNISH. Does the President have the power to remove any Member of Congress from office?

Ms. LAWTON. No.

Mr. CORNISH. Is a Presidential aide a civil officer of the U.S. Government?

Ms. LAWTON. In some contexts, yes, and in others, no. It is difficult to generalize on that.

Mr. CORNISH. Is it your legal opinion that the Congress could impeach a Presidential aide?

Ms. LAWTON. I have not considered it. I am unwilling to express an opinion right off the top of my head on an issue as complex as that.

Mr. CORNISH. Mr. Chairman, with the permission of this subcommittee, I think the response to that question should be inserted in the record if she wishes to research it.

Mr. ALEXANDER. Ms. Lawton, would you provide us an answer to that question in the next 2 weeks for the record?

Ms. LAWTON. I will try.

Mr. CORNISH. Thank you.

[The information noted above follows:]

In response to Mr. Cornish's inquiry as to whether the impeachment clause of the Constitution (art. II, sec. 4) applies to officers and employees of the executive branch who have not been appointed with the advice and consent of the Senate, we are unable to provide a definitive answer. There are no controlling legislative or judicial precedents and commentators appear to be split on the issue. As a matter of historical practice, of course, no such impeachment has taken place in our history, thus furnishing some historical support for the more narrow view of the clause.

Mr. CORNISH. There are some interesting references in regard to impeachment—and I wish I had them in hand—proceedings against the President, which we were looking at on a staff level the other day and the conclusion was from the precedents, that it wasn't necessary to institute impeachment proceedings against the President or any other civil officer before going ahead with an investigation; that is, an investigation could precede the initiation of any impeachment proceedings.

Would that be your understanding of the law, too?

Ms. LAWTON. Yes, as I understand it, the procedure is for a resolution to be passed in the House creating a committee or designating a committee, either way, to inquire whether there are grounds for impeachment.

Mr. CORNISH. So you don't disagree that it would be perfectly proper for the Congress to conduct an investigation that might lead to impeachment proceedings against a civil officer of the Government of the United States?

Ms. LAWTON. No, I understand that this is the method.

Mr. CORNISH. Yes.

I also notice in your statement that you cite a brief quotation from a report of the Senate Foreign Relations Committee referring to the U-2 incident and prior to that, you state that "it is a basis the Congress itself has recognized."

Now, I would respectfully submit to you that comment is nothing more than a recognition by the membership of the Senate of the Foreign Relations Committee at that time of this and does not represent a judgment of the Congress on this issue. Would you agree with that point of view?

Ms. LAWTON. I understand that that particular quote was, but there are others, cited in the *Curtiss-Wright* case, from 1812.

Mr. CORNISH. The only thing I was objecting to, Ms. Lawton, was the use of the language that went before the quotation that "it is a basis the Congress itself has recognized."

Ms. LAWTON. Oh, I see, the generalization.

Mr. CORNISH. I think it is too far reaching in that regard. Your statement also contained some fascinating quotations from the testimony of the late Secretary of State Dean Acheson, and I might state that I have a great regard for him. I had the great honor to serve under Secretary of State Acheson while an employee of the Department of State so what I am about to say is not at all critical of his memory. But I would really have to take issue with what he said there. Secretary Acheson painted quite a vivid picture when he said: "With what relish one can imagine Senator Joseph McCarthy conducting these examinations without a judge or defending counsel."

Now, maybe that could have happened at the time that it did—I am not sure that it even could have happened at that time, even though I do remember those events—but certainly no witness before a congressional committee today, especially in an investigative hearing would be denied the right of counsel to advise him as to his constitutional rights.

You certainly would agree with me on that.

Ms. LAWTON. Yes. As I understand the rules, that is provided.

Mr. CORNISH. And he goes on further to say that "television would, of course, occupy half the hearing room; the press, the other half."

Now, this is fascinating because under the House rules when there is testimony that may possibly defame the character of an individual, that testimony must be taken in executive session, so in that event, of course, the press would not be occupying one-half of the hearing room and television cameras the other. Would you not agree?

Ms. LAWTON. Yes, Certainly.

Mr. CORNISH. And then he goes on to state that all sorts of things would be inquired into such as his social life and I suppose what he has for breakfast and this sort of thing. And I can tell you that from my own personal experience as a former news correspondent covering investigative hearings on the Hill, for many, many years, possibly too many, as a matter of fact, and through my own service as a congressional staff investigator, that I have seen few, if any, committees of the Congress, where they are particularly interested in the social life of witnesses who appear before them. The reason I am bringing these points out here, Ms. Lawton, is that I think this is a very bad quotation to pull out and insert in your testimony, because it just doesn't, as you know, give the facts of the matter.

And although the good secretary raised all kinds of specters, in today's context they just really don't occur and I thought that I would just make some comment on it, because someone reading his testimony

in your statement might perhaps give more weight to Secretary Acheson's remarks than possibly they deserve in the context of what happens in the congressional investigative scene of today, and not in terms of what happened in McCarthy's day because I think it is a much different situation entirely.

Would you agree there has been quite a change over the years?

Ms. LAWTON. Oh, yes; I think in the whole of his testimony—of course, this is only a portion—as it was developed by questions, he made it clear that this was harking back to what had been and not what is. But he was also suggesting that it is what could happen again and this was the gist of the testimony; this was why he went through this. Well, I am guessing, of course, but this is the tenor of the whole testimony.

Mr. CORNISH. Well, the rules are different now.

Mr. PHILLIPS. Because of this kind of abuse, they have been changed. That took place 16 or 18 years ago.

Mr. CORNISH. And then the final comment from Secretary Acheson, which I think was stated really needlessly, said: "In the first place, it isn't sporting and in the second place, it isn't legal, and in the third place, it is bad politics. And it just isn't the way to do things."

He was talking about these little people in the Government departments that were hauled before congressional committees and beat over the head and so forth. And in my own experience here, I have seen an instance where this subcommittee was refused some years ago a file from the Development Loan Fund. There was much contention about it with the Secretary of State. He finally agreed to deliver that file intact to the committee. As a matter of fact, he sent it up here with a written certification that it was a complete file. And I can remember that Congressman Porter Hardy of Virginia was the chairman of this subcommittee at that time and he looked at the file and it became apparent that there were some things missing from it, so he summoned some of these little people, that you mentioned in your statement and which Secretary Acheson mentions, up from the Department of State or the Development Loan Fund and asked them whether they had anything to do with the removal of materials from this file. And they said, in so many words, "Oh yes, sir, we spent half the night going through this thing and cleaning it out and clearing it and taking out all of the things, which we were instructed to take out. So, sure there are papers missing from this file."

And I can remember Congressman Hardy at that time said: "Do you know what you have done?"—he was addressing this to the responsible officials who were appearing here—he said that "you have made a liar out of the Secretary of State."

Now, I say that to you because it is important sometimes to get the little people up here to get at the truth and I think that amply illustrates why we have to do it. It is unfortunate that high-ranking officials of our government—and I don't care what administration it is because it happens in all of them—do come up here and either lie or they don't tell you the whole truth and sometimes it is necessary to bring up the little people who do the so-called manual labor, or the paperwork on these things to really get the truth. I don't know whether you are aware of some of these instances or not but I think you should be.

Mr. ALEXANDER. The Chair wishes to thank the gentleman for sharing his experiences with us and the witness for the splendid effort that she has made here today.

I would propound one further question to you, after which, it will be necessary for us to adjourn, and this question I would like you to answer by way of a written communication to the committee within the next couple of weeks.

Assuming for the purpose of argument that the executive privilege does exist as a viable constitutional doctrine, would the witness, as a spokesman and representative for the Department of Justice, cite to the committee all authority in the knowledge of the Department of Justice for any agency's refusal of information to the Congress and Senate, with the claim of executive privilege?

And, in addition, the Chair would advise the witness that we may propound additional questions within the next several days to which we would like to have written answers within a reasonable time and with that the Chair would insert one editorial from an Arkansas newspaper in the record at this point which reflects on the doctrine of executive privilege as it relates to the experience of one Representative, Oren Harris, of Arkansas, who is now a Federal judge. His efforts as chairman of the Interstate and Foreign Commerce Committee some years ago, led to the acceptance of the resignation of one, Sherman Adams, during the Eisenhower administration.

It would appear from that experience that we could conclude that the scope of executive privilege is directly proportionate to the tolerance level of the American people.

[The editorial referred to above follows:]

[From the *Arkansas Democrat*, Little Rock, Ark., Apr. 2, 1973]

THE NATIVES ARE RESTLESS

There is nothing in the Constitution about executive privilege. There are no court decisions either and probably won't be, since the Supreme Court hesitates to interfere in disputes between the other two branches of government. Yet, every President, from George Washington to Richard Nixon, has used it to protect him from the Congress.

Everyone would agree that the executive branch has to be able to count on some privacy, especially in its conduct of foreign affairs. But as the Watergate incident continues to unfold, there is a growing impression that executive privilege is being used to hide impropriety.

On Friday, the White House made a small shift in its attitude, saying it would allow its aides to testify before grand juries. As far as going before a Senate committee was concerned, there was still doubt, although Mr. Nixon's press secretary said that the President wanted to "cooperate." Prior to this, Mr. Nixon had been firm—neither present nor past aides would testify anywhere. These developments undoubtedly prompted the change in attitude:

L. Patrick Gray, testifying before a Senate committee considering him for FBI director, said that one White House aide had lied to the FBI and that another one had told agents he had authorized payments to a Republican political espionage fund. James McCord, who was caught and convicted of burglarizing the Watergate office, has now decided that since he's going to jail, he's going to try to take a few others with him. He has said that perjury was committed during his trial and that higher-ups who are equally guilty have not even been identified, a suspicion U.S. Dist. Judge John Sirica has had from the start.

Several Republican senators have appealed directly to Mr. Nixon to allow his aides to appear before the committee. These are not opponents of his, or screaming liberals, either. They include Robert Packwood, James Buckley, Lowell P. Weicker, Jr., John Tower and Norris Cotton. Cotton summed it up for all of them when he said that it would be better for the President, better for the party and

better for the country if the aides went before the committee in public and told what they knew about the entire affair.

This is what the last Republican President decided to do in a somewhat similar case in 1958. A House committee (chaired, incidentally, by former Rep. Oren Harris of El Dorado, who is now a federal judge) turned up the fact that in return for favored treatment a Boston industrialist had paid hotel bills and presented some gifts to Sherman Adams, the White House aide whom President Eisenhower called "my right-hand man." Mr. Eisenhower sent Adams before the House committee, where he admitted he had been "imprudent"—an admission that led ultimately to his leaving the White House. This was a tough blow for Mr. Eisenhower, but he never blinked. One who didn't like it was Vice President Richard Nixon, who said, "The trouble with Republicans is that when they get in trouble they start acting like a bunch of cannibals."

That's true. The natives were restless then, and they are now. Mr. Eisenhower found it prudent to deliver Sherman Adams to them. Mr. Nixon would be wise to do the same.

Mr. ALEXANDER. The subcommittee stands adjourned subject to the call of the Chair.

Thank you very much.

[Whereupon, at 3:50 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

AVAILABILITY OF INFORMATION TO CONGRESS

THURSDAY, APRIL 19, 1973

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 11:20 a.m., in room 2203, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, John N. Erlenborn, Paul N. McCloskey, Jr., and Gilbert Gude.

Also present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; Harold F. Whittington, professional staff member; L. James Kronfeld, counsel; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

This morning we continue our hearings on legislation to deal with the thorny problem of executive privilege through amendments to the Freedom of Information Act.

These hearings are on the bills introduced by our ranking minority colleague on this subcommittee, Mr. Erlenborn, with cosponsors; by the former chairman of this subcommittee, Congressman Moss, and another of our former subcommittee colleagues, Congressman Reid, and by another former member of this subcommittee, a member of the full committee, Congressman Fascell, who is our first witness today.

When we began these hearings on April 3—a little more than 2 weeks ago—all of us had hoped that the President's counsel, Mr. John W. Dean III, would be permitted to testify on the substance of this legislation. Mr. Erlenborn and I had proposed specific ground rules for such testimony to limit questions only to the subject of executive privilege in general.

After the second day of hearings, a letter was received from the White House refusing our request. Meanwhile, the Justice Department sent a career lawyer, Ms. Mary Lawton, to represent the entire executive branch at these hearings.

Shortly thereafter, the Attorney General himself testified before the joint Senate hearings on executive privilege and repudiated certain testimony that Ms. Lawton gave here the previous week. In a blatant disregard for congressional rights of access to information, whether from documents or executive branch witnesses—Mr. Klein-

dienst arrogantly announced at the Senate hearings that the doctrine of "executive privilege" extended to all of the millions of Federal employees in connection with whether or not they would be permitted to testify before congressional committees. This was subsequently confirmed as Nixon administration policy the following day by Presidential Press Secretary Ron Ziegler.

Two days later, I testified before the same Senate panel headed by Senators Ervin, Muskie, and Kennedy, and denounced the new effort by the Attorney General to extend so-called "executive privilege" to all Federal employees.

I feel that my colleagues of both parties on this committee, and perhaps the overwhelming number of our colleagues in the House of Representatives, share my sense of outrage over this arrogant attempt to usurp congressional prerogatives. I will not repeat myself here, but ask that this portion of my testimony appear in the hearing record at the conclusion of these opening remarks.

Then, the day before yesterday, the President announced that the signals were again being reversed and he was going to "permit" two of his top White House aides—including the same elusive Mr. John Wesley Dean III—to testify before the Ervin committee that is investigating the Watergate bugging case. Had this decision been made several weeks earlier, perhaps we could have had the benefit of Mr. Dean's expert views on "executive privilege" at these hearings. As it is, we must continue to struggle along without the legal expertise that he might have provided.

Today, we have three distinguished Members of Congress and other expert witnesses. Before we proceed, however, I would like the record to show that yesterday Senator Ervin and Senator Baker announced the ground rules which I understand were agreed to by the White House for the appearance of Presidential aides before the Senate committee investigating the bugging of the Watergate.

The ground rules say, among other things, that the committee will not subpoena a White House aide to appear before it or its staff unless the aide fails to make timely response to an invitation to appear, recognizing the unquestioned, in my opinion, power of the Congress to subpoena anybody, including a White House aide. These ground rules say:

The testimony will be, of such White House aides will be governed by the ground rules set forth in item 6.

Which, among other things, says that if a witness claims a privilege, he is permitted to have his lawyers present his views on this and then, and I am quoting:

The committee shall thereupon rule on the validity of the claim or its application to the particular circumstances involved and require the witness to give testimony sought in the event its ruling on the claim is adverse to the witness.

In other words, what I have been saying, and I believe the gentleman from Florida (Mr. Fascell) has been saying, that it is up to the Congress to determine in a particular situation whether the claim of executive privilege is valid or not, whether as a matter of courtesy and comity between coordinate branches of Government we would permit the President to claim that a particular conversation should

not be made public before a congressional hearing; but the decision as to whether it should or should not rests with the Congress. Without objection, these ground rules will be made a part of the hearing record.

[The guidelines follow:]

On Monday, April 16, 1973, the Select Committee on Presidential Campaign Activities met and unanimously adopted guidelines regarding testimony and appearances of prospective witnesses before the Select Committee. The text follows.

GUIDELINES OF THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

In investigating the matters mentioned in S. Res. 60, the Senate Select Committee on Presidential Campaign Activities will observe its standing rules, its previously established procedures for staff interviews of prospective witnesses, and these guidelines:

(1) The Committee will receive oral and documentary evidence relevant to the matters S. Res. 60 authorizes it to investigate and matters bearing on the credibility of the witnesses who testify before it.

(2) All witnesses shall testify before the Committee on oath or affirmation in hearings which shall be open to the public and the news media. This guideline shall not abridge, however, the power of the Committee to take the testimony of a particular witness on oath or affirmation in an executive meeting if the Committee would otherwise be unable to ascertain whether the witness knows anything relevant to the matters the Committee is authorized to investigate.

(3) All still and motion picture photography will be completed before a witness actually testifies, and no such photography shall occur while the witness is testifying. Television coverage of a witness and his testimony shall be permitted, however, under the provisions of the Standing Rules of the Committee.

(4) In taking the testimony of a witness, the Committee will endeavor to do two things: First, to minimize inconvenience to the witness and disruption of his affairs; and, second, to afford the witness a fair opportunity to give his testimony without undue interruption. To achieve the first of these objectives, the Committee will honor the request of the witness to the extent feasible for advance notice of the time and place appointed for taking his testimony, complete the taking of his testimony with as much dispatch as circumstances permit, and release the witness from further attendance on the Committee as soon as circumstances allow, subject, however, to the power of the Committee to recall him for further testimony in the event the Committee deems such action advisable. To afford the witness a fair opportunity to present his testimony, the Committee will permit the witness to make an opening statement not exceeding 20 minutes, which shall not be interrupted by questioning, and a closing statement summarizing his testimony, not exceeding 5 minutes, which will not be interrupted by questioning: Provided, however, questions suggested by the closing statement may be propounded after such statement is made.

(5) The Committee respects and recognizes the right of a prospective witness who is interviewed by the staff of the Committee in advance of a public hearing as well as the right of a witness who appears before the Committee to be accompanied by a lawyer of his own choosing to advise him concerning his constitutional and legal rights as a witness.

(6) If the lawyer who accompanies a witness before the Committee advises the witness to claim a privilege against giving any testimony sought by the Committee, the Committee shall have the discretionary power to permit the lawyer to present his views on the matter for the information of the Committee, and the Committee shall thereupon rule on the validity of the claim or its application to the particular circumstances involved and requires the witness to give the testimony sought in the event its ruling on the claim is adverse to the witness. Neither the witness nor any other officer or person shall be permitted to claim a privilege against the witness testifying prior to the appearance of the witness before the Committee, and the Committee shall not rule in respect to the claim until the question by which the testimony is sought is put to the witness.

(7) The Committee believes that it may be necessary for it to obtain the testimony of some White House aides if the Committee is to be able to ascertain

the complete truth in respect to the matters it is authorized to investigate by S. Res. 60. To this end, the Committee will invite such White House aides as it has reason to believe have knowledge or information relevant to the matters it is authorized to investigate to appear before the Committee and give testimony on oath or affirmation in open hearings respecting such matters. In this connection, the Committee will extend to such aides the considerations set forth in detail in guideline No. 4 and the right to counsel set forth in detail in guidelines Nos. 5 and 6. In addition to these considerations and rights, the Committee will permit the White House to have its own counsel present when any White House aide appears before the Committee as a witness, and permit such counsel to invoke any claim that a privilege available to the President forbids a White House aide to give the testimony sought by the Committee, and the Committee shall thereupon rule on validity of such claim or its application to the particular testimony sought in the manner and with the effect set forth in guideline No. 6 in respect to a claim of privilege invoked by a witness or his counsel. The Committee will not subpoena a White House aide to appear before it or its staff unless such aide fails to make timely response to an invitation to appear.

(8) The Committee may require the Sergeant at Arms of the Senate, or any of his assistants or deputies, or any available law enforcement officer to eject from a meeting of the Committee any person who willfully disrupts the meeting or willfully impedes the Committee in the performance of its functions under S. Res. 60.

(9) Whenever the Committee takes testimony through the agency of less than the majority of the members of the Committee as authorized by its standing rules, the member or members of the Committee taking the testimony shall be vested with the powers set forth in these guidelines and shall be deemed to act as the Committee in exercising such powers.

Mr. MOORHEAD. Today we have three distinguished Members of Congress who have requested time to testify on this legislation, including the sponsor and cosponsor of pending bills.

Also, we will hear from Mr. David Cohen, vice president of Common Cause, and the newly appointed chairman of the Administrative Conference of the United States, Mr. Antonin Scalia. Mr. Scalia will present testimony which will be largely technical in nature and not on the constitutional or operational aspects of "executive privilege."

[Excerpts from Mr. Moorhead's statement before a Senate subcommittee follows:]

EXCERPTS FROM STATEMENT OF HON. WILLIAM S. MOORHEAD, CHAIRMAN, FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE OF THE HOUSE OF REPRESENTATIVES, APRIL 12, 1973

Mr. Chairman, I greatly appreciate the opportunity to testify at this joint meeting of these important subcommittees today on a subject which is central to the basic concept of democracy. At no time in recent years has the problem of government secrecy so pervaded our political process. The tug-and-pull between the Executive and Legislative branches which is built into our system serves a useful function if normal checks and balances are operational and unimpaired.

No matter what political party is in control, the free flow of information necessary in a democratic society is not an issue of political partisanship. Administrations have historically abused their power to control public and Congressional access to the facts of government. Administrations of both parties have claimed some form of an "executive privilege" to hide information. The conflict is not on partisan political grounds but on Constitutional grounds between the legislative and executive branches of government. An indication of this is the fact that eight Republican members of our committee have cosponsored legislation to limit or restrict the use of "executive privilege."

But this administration has reversed the trend away from the most blatant abuses of "executive privilege". This administration has turned our system of government backward, back down the path which leads to an all powerful political leader—call him president, dictator or king—who arrogates unto himself the right to know and against the elected representatives of the people whether in a Parliament or a Congress.

A recent Congressional Research Service study made for the House Foreign Operations and Government Information Subcommittee points out that the growth of the claim of "executive privilege" to hide the facts of government really began in 1954 during the Eisenhower Administration. I would like to submit a copy of this study for your record.

Congressman John E. Moss, the former chairman of my subcommittee, was responsible for convincing three presidents to limit the use of "executive privilege" to a personal claim of power, and the claim was used sparingly against the Congress by Presidents Kennedy and Johnson.

The CRS study reveals that President Nixon has, thus far, set an all-time record in utilizing the dubious doctrine of "executive privilege". It also shows that, despite his written assurance to our subcommittee in April, 1969 that he would adopt the same Kennedy-Johnson ground rules limiting its use, such rules have been violated by Administration subordinates at least 15 times.

I have always felt that, while the Executive has no inherent right to withhold anything from the Congress, a spirit of comity and recognition of the need for certain confidences and privacy between the branches has led the Congress to recognize privileged communications between the President and his closest advisors. This is the way it should be—but only if this spirit of cooperation is not abused by either branch.

Unfortunately, the present Administration has built a stone wall between itself and the Congress. This wall, much like the one in Berlin, has grown stone by stone until on March 12, 1973, Mr. Nixon capped it off with an amazing "blanket privilege" proclamation, extending to the entire Executive branch. As I understand the new theory, it applies to all past, present, and future White House aides who might be summoned to testify before Congressional committees. Thus, if a President wanted to keep secret the number of roses in the White House garden in the interests of national security, under the Nixon claim, he could invoke the privilege on behalf of his close "personal advisor", the White House gardener, and, according to a Justice Department witness before my subcommittee, this decision would not be subject to review by Congress or court. Such White House policies and claims are as ridiculous as their claims that "Executive privilege" is an historical doctrine that dates back 200 years.

Mr. Chairman, before turning to a discussion of freedom of information matters, I must comment on the amazingly arrogant performance by the Attorney General before this panel on Tuesday and on his exposition of the Administration's doctrine of the "divine right" of the Presidency. I submit that this is a doctrine of monarchial origin at best, or at worst, a totalitarian dogma espoused by "banana-Republic" dictatorships.

Our system of government places the ultimate power in the hands of the people. Congress is the people's representative in the exercise of that power for the public good. All of us have been elected by our constituencies and have taken an oath to carry out that solemn obligation. Unless they have changed the law school curriculum since my day, ours is still a government of laws, *not men*. I never thought the day would come when *any* Attorney General of the United States could have the audacity to proclaim that, in effect, Congress had *no* power to order *any* employee of the Executive branch to appear and testify before Congress if the President—in his almighty wisdom—barred such testimony.

Only *two persons*—the President and Vice President—of the millions who make up the vast bureaucracy of the Executive branch of our government are *elected* by the people of the United States. At that, they are elected *indirectly* through the Electoral College system and only once every four years. All other Executive branch officials are appointive—the result of Congressional action in the establishment and funding of Federal programs which they administer. This includes the countless number of faceless, politically-appointed bureaucrats as well as the faceless civil servants who exercise life-and-death power in administering Federal programs under authority delegated to the Executive by the Congress. *They have always been and must always be responsible to Congress* because they are the creatures of Congress—not the Executive. They are the *servants* of the people and the people's Representative—not *their masters*.

The Attorney General was the Administration spokesman chosen to assert the "divine right" of the Presidency. As we all recall, it was not too many months ago that many in this body raised serious questions during the hearings on his nomination concerning his qualifications for the office. It is ironic, in view of the sweeping claims he has enunciated here, that it was only after the President "permitted" his assistant, Mr. Peter Flanigan, to appear before the Judiciary

Committee to discuss the Administration's handling of the ITT anti-trust case that the log-jam was broken and the Attorney General's nomination was finally cleared for floor action. If the "divine right" doctrine had been in effect last year, it might be that someone else might be warming the seat of the Attorney General's chair today.

As the chairman of an investigating subcommittee of the House Government Operations Committee, I submit that it is absolutely essential for the Congress to have full access to all information and all Executive branch employees if we are to be able to perform our vital role as a "watch-dog" (with teeth) to make certain that the Representatives of the people are able to carry out our oversight duties as well as to perform our legislative functions required under the Constitution.

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Mr. MOORHEAD. The committee is now pleased to hear the testimony of the distinguished gentleman from Florida, Mr. Fascell, a member of the full Government Operations Committee, and the author of a bill on this very difficult subject.

STATEMENT OF HON. DANTE B. FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. FASCELL. Thank you, Mr. Chairman, and members of the committee.

Let me comment very quickly, Mr. Chairman, on my immediate reaction to the ground rules statement to which you referred.

I think it is great that in a particular instance an accommodation has been worked out which seems satisfactory for that particular problem.

We will not know whether that is going to be tested until a witness walks in with either verbal authority or authority in writing, however that may be expressed, that executive privilege has been claimed for that witness. That will be the real test. I hope it does not, and I hope this accommodation works out because I think what has been going on in the Watergate affair from the executive side is sheer stupidity and very, very unfair to the American people.

Mr. MOORHEAD. May I ask, do you not think that we should try to take this precedent, as you say—

Mr. FASCELL. And build on it.

Mr. MOORHEAD [continuing]. And build on it?

Mr. FASCELL. Oh, absolutely; I think we have to. The temporary arrangement is for this instance with that committee. Therefore, it becomes essential it seems to me to try to achieve something more universal and more permanent.

I am delighted to appear before this subcommittee which has jurisdiction on a subject matter that I spent so many years on with the gentleman from California, Mr. Moss. It seems to me it was some 8 years we worked together on freedom of information. The subcommittee has done an outstanding job with your followup on the Freedom of Information Act, its implementation and these hearings. Yours is a really commendable record.

I would hate to think of where we would be if we had not had the oversight of this subcommittee over all these years.

It is too fundamental to say that the Congress has to have the information from the Executive to operate but, nevertheless, we have had

this struggle now since the beginning of time, and it continues and I suppose it will continue forever.

I would hope, however, that we from time to time could make some reasonable improvement in the balancing of the Executive powers and the congressional powers so we can get our job done too. The power of the President is awesome; so are the number of people and the amount of money it commands. If there is any way to stack the cards—they ought to be stacked on the congressional side, on the legislative side, not on the executive side.

The claims have bounced back and forth with respect to the constitutional rights, be they implied or inherent. We are obviously not going to resolve that. So I am not going to get into the constitutional discussion. There is plenty of legal material on those issues.

Suffice it to say that the claims do arise out of the inherent or implied powers of the Constitution on both sides, and there we are in it and the conflict continues to rage.

It seems quite clear, however, as the chairman has pointed out and as everybody in the country knows today, that while executive privilege has been abused and misinterpreted since the beginning of time, that it has reached a new peak, if that is any kind of an accolade, but it has, under this administration. There is no question about the abuse that is going on, the misinterpretation, to say it politely, and the extension of executive privilege by the present administration.

In all of the years that I have been, well, the 18 years in the Congress now, my familiarity one way or another with this problem, I do not believe I have ever seen a more blatant grasp of, or the sheer exercise of Executive power at all ranges and levels of Government than has occurred in the last 5 years.

This question of obtaining information is where we really meet the problem more head-on than any other place.

The President's white paper is quite clear that he believes in the extension of the body of the President. I do not. I do not think we should. I will grant the President executive privilege for himself just to avoid revolution, and certainly the integrity of his body and position, but I do not believe it is reasonable to extend the body or the Office of the President to include all members of his staff, all members of Government, all people in Government, or out of Government. I mean it is just beyond any reason.

I suppose somebody could make a case, and probably has, that in the early days you had to have the private conversations between private secretaries and the President. And that, therefore, because of the practicality of the situation the President should deny Congress that information. I do not admit that this practice is right under the Constitution, or under the law, or that is the way it ought to operate. However, conditions of those early days certainly do not exist today.

All you have to do is to take a look at the people in the White House, the number of people, the number of people in the Executive Office Building, and the hundreds of others who advise the President. How can anyone reasonably say that privacy and confidentiality ought to exist between all these thousands of persons and the President, and thus deny Congress information in carrying out its responsibilities?

It just does not even make sense. I do not care if it is right in the Of-

fice of the President, the Congress authorizes the jobs; the Congress appropriates the money, the Congress has the responsibility to the American people for the very conduct of the President's office. I do not think it is a sufficient responsibility to say that the Chief Executive has the sole responsibility under the Constitution to run this office the way he wants to run it. I do not think that is a good answer.

We have a shared responsibility—the Congress and the President. Though there is a separation of powers, and I firmly believe in it, there is shared responsibility. Responsibility to share information so that the respective duties of the President and the Congress carried out by virtue of separate powers can be properly executed. We got the real test when the administration dropped the other shoe recently; the Attorney General said the President could direct anyone in Government not to appear before Congress or give Congress information. Kleindienst pointed out that Congress could impeach if it was unhappy. That is arrogant and impractical, unless you have a fraud in this day and time that can be proven and a justifiable criminal case would have to be made, in my judgment.

So the Attorney General, saying that impeachment is the first and last resort of the Congress when the President denies information and that if the Chief Justice presiding over the impeachment does not carry out the wishes of Congress, that Congress can get rid of him and evidence has no real value, not only begs the question but is idiotic. The entire inference is a callous and casual disregard of the whole principle of Government, the Constitution, ethics and principle.

Well, we certainly have had a fragile understanding, between the Congress and the President. Let's put it that way, to be gentlemanly about it. I hope that it has improved now with the ground rules, in that one case. If we can do better legislatively or otherwise, I think we should try to do that.

Now, I think the bill I have cosponsored goes in that direction. There is one theory of executive privilege, however, that I think we ought to talk about a little bit also. When is it executive privilege and when is it merely withholding information? The administration, for example, claims that it has used executive privilege in only three instances so far. But there were 15 times when the administration's officials, responding directly to the Congress, said, "No." The Library of Congress made up that compilation. In fact, when I made some remarks in the record on this subject the other day, I got into this semantics difficulty because Secretary Rogers, I said, used executive privilege in refusing to appear before the Foreign Relations Committee. I was immediately corrected by the Department to say he did not claim executive privilege, he just deferred the invitation.

Well, he just deferred the invitation again. The truth of the matter is that you could avoid the whole question of executive privilege simply by not claiming it at the Executive level. The President could state that he was not going to give Congress the information. Just a flat refusal without labeling by what authority he was so doing. Therefore, it seems to me we have to approach this issue not from the constitutional aspects of the executive privilege such as the implied right or the inherent right, but what we have to do is go at it legislatively in terms of the Freedom of Information Act. The gentleman from Illi-

nois does in his bill. I do in mine. We must say simply—the Congress is entitled to the information, and legislate the mandate.

We have the right to legislate it beyond any question, we have been doing it.

I think we have to start with some flat affirmatives. All the power rests in the people. The Constitution represents a specific grant of the power. All other power not specifically granted is retained by and remains in the people, and that means information. As the representatives of the people to carry out the congressional responsibility, I think we have to take the position that there is no just cause, no just cause for withholding any information from the Congress.

We have as much responsibility as the Executive in this job, and to say that we cannot have information to carry out the responsibility because it is sensitive or because it deals with national security or because it is confidential or because it deals with a private conversation between two persons in the executive or because it is a memorandum that has not yet finally become an order or any other excuse is, I think, meaningless.

If Congress unfairly or unwisely in some way in the eyes of the Chief Executive interferes with the conduct of his responsibilities as a Chief Executive, that confrontation will become a valid one soon enough. The people will make their decisions in the elections.

So I think that we have to lay out congressional requirement just as strongly as we can without exception. There is where we come to the major difference between the bill introduced by the distinguished gentleman from Illinois and me.

He sees it as a practical matter that we have to recognize that executive privilege exists as a fact and as a matter of law; and that certain reasonable, sensible exceptions ought to be made; and that we ought to try to resolve this issue. Therefore, he has introduced the legislation. I know he speaks for himself better than I do, but that is the way I read what he has done.

In my own legislation, Mr. Chairman, I made no exceptions. I have done it purposely because I feel that to permit any exception at all in terms of national security, or the national interest, or to lay out the claim in a statute that executive privilege really exists as a matter of law out of the flow of the Constitution, and, if not, is then written in the statute, in my judgment is not the route for us to go. I say that respectfully to my distinguished colleague there because I know he is very sincere on this issue.

But I would hope, Mr. Chairman, that we would not institutionalize the claim of executive privilege by writing it into statute. It does not exist now except by practice and allegation. I think we ought to go the other route in terms of expressing the congressional need and the congressional prerogative. Even if the exceptions were not built in, I think that would present a real problem for us, but to build in the exceptions as well is so broad that I am afraid that what we would wind up doing would be legitimatizing the claim and the broadened concept of the exercise of executive privilege.

I agree with the chairman that perhaps what we need to do is build on a concept laid down in the ground rules which have just been agreed to between the administration and the committee in the other body on this matter.

I have one other thought also, Mr. Chairman, and that is, the question of the Executive order, the manner by which executive privilege would be exercised.

Is a verbal direction sufficient? How far does the delegation go? Is a letter sufficient and, if so, what is a Presidential letter, a memorandum, an initialed memorandum? Or how about an Executive order? What is an Executive order? Does it have the force of law and, if so, can it supersede an act of Congress if you were to pass one?

There is no constitutional right to issue an Executive order. We have provided it by statute in certain specific cases. The last compilation that I can recall, and I happened to bring it here because it emanated out of the Government Operations Committee in 1957, on the whole question of Executive orders—the citations are either the Constitution, again under the implied authority or a specific statute of the Congress.

The point remains, Mr. Chairman, that if an Executive order is issued, for example, and one does not have to stretch his imagination too far to see how it would work, "I hereby direct that no one shall appear and no testimony or information shall be given to X committee unless under certain conditions"; or it could be a flat prohibition, and then published in the Federal Register under the precedents that we have and the custom that we have become accustomed to, it becomes law.

But do you not see the posture that the individual would be in if you passed a law with a penalty, with enforcement provisions, or just using the subpoena rights of the Congress, and you have an Executive order and a direction which has the force of law applied against the same individual, which law does he violate?

That is an unhappy position that individual is in.

Without the Executive order having the force of law, all the choice he has to make is to quit. If he does not want to violate the law of Congress, why he can just quit. It is an unhappy choice, but at least a little bit better than the other one. Either way, the other way he really gets stuck.

So what I am saying, Mr. Chairman, is that it seems to me that in trying to deal with this whole problem of the executive privilege that we really have to go back to the crux of Executive orders and, while we are at it, I just think it is fundamental, and try to deal with that problem.

The last time this committee did a study, as I say, was in 1957. I think if we could update that and relate it to the claim of executive privilege, while we are doing it we would clean up another one of these big loopholes that will exist in this issue. Maybe we ought to just eliminate Executive orders.

We ought to think very carefully while we are at it, Mr. Chairman, of the question of enforcement. We ought to have in legislation the institutionalization of the enforcement process and not leave it to happenstance. If we do not do anything more than simply reiterate the options which are available in terms of subpoena power or maybe we ought to have an opportunity for the Congress to act legally on an issue where there is a direct confrontation on the question of information by institutionalizing the legal process, either with its own

attorney, through the General Accounting Office, or whatever seems to be the best approach on that.

Finally, Mr. Chairman, since the President will probably veto the bill anyway, maybe we ought to think about a joint resolution if we can get that through. I do not think we are going to reach any agreement with this President or any other President on the kind of broad range information statute that we are talking about which, in effect, eliminates executive privilege without saying that that is what it does. But that is what my bill does.

It does concede, however, Mr. Chairman, in conclusion, that the body of the President is sacrosanct and so is the information within his brain.

Mr. MOORHEAD. Thank you very much, Mr. Fascell, for your——

Mr. FASCELL. By the way, Mr. Chairman, if there is no objection, I would like to have my statement put in the record. I think I got through it all, but I am not sure.

Mr. MOORHEAD. I was following it, I think you did, but I think to be absolutely sure, without objection, it will be made part of the record.

Mr. ERLENBORN. Reserving the right to object. [Laughter.] I want——

Mr. FASCELL. Which statement do you want me to take out, John?

Mr. ERLENBORN. The first one, the read one you put in.

No objection. [Laughter.]

[Mr. Fascell's prepared statement follows:]

**PREPARED STATEMENT OF HON. DANTE B. FASCELL, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF FLORIDA**

Mr. Chairman, thank you for this opportunity to appear before your Subcommittee this morning.

This committee more than any in the Congress is responsible for turning around the government's information policy. The Freedom of Information Act written by this Subcommittee reversed long-standing government information policies and customs from their previous presumption of secrecy to a presumption of openness and availability. Your follow-up of the administration of that Act, and the current deliberations on the so-called "executive privilege" add to the commendable record of your efforts to insure full access to all government information.

The basic necessity for access to information concerning the operation of our government is the issue before us today. For too long, information has been denied the Congress under the theory of "executive privilege." We can no longer allow the Executive Branch to judge what information is and what is not necessary for the Congress to carry out its responsibilities.

The theory of executive privilege denies Congress information which it ought to have. As such it should be struck down.

The controversy stems from alleged implied powers of the Constitution and various interpretations of those powers throughout our country's history. On one hand, the Executive Branch has asserted that its authority under Article II, Sec. 1 of the Constitution (The executive power shall be vested in a president of the United States of America) and the clear intention of framers of our Constitution to create three separate but equal branches of government, imply the right to pursue the execution of the laws without interference or intervention from either of the other branches of government. The extension of this theory has been the implied authority to withhold certain information of its choosing which relates to the internal operations of the Executive Branch, and which the Executive Branch has determined is not a matter for consideration by the Congress.

On the other hand, the Congress points to its authority under Article I, Sec. 1—"All legislative powers herein granted shall be vested in a Congress of the United States,"—and we assert that this responsibility carries with it the clear

necessity for and right to inquiry. Without complete knowledge and information on any matter within the purview of Congress we cannot expect the best judgment.

The conflict is obvious, and did not take long to develop. Our first President, George Washington, asserted the Executive's right to withhold information which it felt was not necessary for the Congress to know. I was glad to learn that at least in the beginning, Congress prevailed and the information requested regarding the defeat of General St. Clair was made available to the Congress.

Through the years, the conflict has been joined from Administration to Administration. In the absence of a clear decision on the issue, the theory of "executive privilege" evolved into the Doctrine of Executive Privilege. It remained one of those gray areas, where the intent of the Constitution was not clear, but where—with reasonableness and restraint on the part of the Executive—its use was limited.

As with all vague, "understood" concepts, however, abuse and excess strip all inclination to accommodate. The impoundment issue is another good example of the misuse of a power which has a questionable basis. So long as there was restraint on the part of the Executive to withhold funds in the interest of good management and administration the Congress was willing to enact programs with an element of discretionary authority. When that discretionary authority is abused, the Congress must assert its prerogatives and authority and eliminate discretionary authority which may have served a useful purpose.

The present Administration, in turn, has extended the concept of "executive privilege" further than ever in the history of our country. In his policy statement on March 12, President Nixon stated:

Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the President.

I will grant the President "executive privilege" for himself. But I do not believe it is reasonable to extend the "body" or office of the President to include all members of his staff.

The centralization of policy making authority in the White House and the Executive Office of the President to an unprecedented degree makes such an extension unthinkable. While there has in the past and of necessity been coordination of federal policies at the Cabinet level in the White House, the majority of policy determinations and program implementation decisions has resided in each Department. With these functions increasingly transferred to the White House, and the persons and information there denied to the Congress, we would have no access to vital material necessary for the oversight or implementation of federal programs. We cannot allow that situation to perpetuate.

In that March 12 statement the President extended the blanket of executive privilege to former White House staff members as well. As one former White House staff member has commented, we all know that former staff members respect privileged communications within the White House at least until their memoirs are printed.

Perhaps as a tensile strength test of the Congress, the Administration dropped what must be the last shoe last week. Attorney General Kleindienst testified before a joint Senate Judiciary and Government Operations Subcommittee hearing and asserted that all executive branch employees could be covered under the President's authority to invoke executive privilege.

To exacerbate the problem, the current emphasis on this executive-legislative conflict has developed out of the Senate's investigation of the Watergate incident—an incident involving criminal actions. The refusal of White House officials to testify in that investigation, and the tangentially related refusal of White House Counsel John Dean to testify in the Gray confirmation hearings on the unusual conduct surrounding the FBI's investigation of the Watergate incident, directly refute the President's assertion that "executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest."

Clearly, whatever fragile understanding which may have existed in the past and allowed Administrations to claim executive privilege in isolated instances—although not without opposition—has been so misinterpreted and abused as to demand affirmative action by the Congress.

That action must make clear, by statute, the right of Congress to any and all information on matters which legitimately fall within its jurisdiction—namely the operations of the federal government.

My bill would, I feel, accomplish this purpose. Before I discuss that proposal, however, I want to briefly look at one other aspect of the theory of "executive privilege" which has added to the complexity of this issue.

When is the withholding of information by the Executive Branch an exercise of "executive privilege" and when is it merely the withholding of information?

The Nixon Administration claims it has used "executive privilege" on only three instances prior to the refusal of White House Counsel John Dean to appear before the Senate Judiciary Committee. Yet the Library of Congress, in its study recently completed at the request of this Subcommittee, has found that in addition to the instances when the President personally claimed "executive privilege," information—documents or testimony—was denied to the Congress 15 times by administration officials directly responsible to the Congress. Under what authority is this refusal to comply with a Congressional request made?

I made the semantic mistake myself when I introduced my bill, H.R. 6438. In accompanying remarks in the Record, prepared with the assistance of the Library of Congress, I pointed to the use of Executive Privilege by Secretary of State William Rogers when he refused to testify before the Senate Foreign Relations Committee in January of this year on Vietnam War Policy. The Department called to my attention that the Secretary had not invoked "executive privilege" but had merely deferred the invitation to testify. I acknowledge the error on my part, but submit that the outcome is no different than had the Secretary claimed the privilege. He did not, after all, agree to testify when asked by a Committee of Congress with a legitimate inquiry. The Secretary did, however, agree to testify at a later date of his choosing.

If the delicate nature of the peace negotiations was such that public testimony would clearly have been detrimental, I am sure the Senate Committee would have consented to hear the Secretary in closed session. Although I am, as you all know, generally opposed to holding Congressional proceedings in closed session, I am willing to concede certain instances where the national security necessitates such actions.

But I am not willing to concede that there is any just cause for withholding information from the Congress.

The problem persists, however, of when "executive privilege" is "executive privilege."

The bill I have introduced, H.R. 6438, would in my judgment eliminate this semantic problem. In addition, it would settle, I believe, the question of the right of Congress to all information pertaining to matters which fall within its jurisdiction.

The proposal amends the Freedom of Information Act in an affirmative, straightforward manner stating: "Whenever either House of Congress, any committee thereof (to the extent of matter within its jurisdiction), or the Comptroller General of the United States, requests an agency to make available information within its possession or under its control, the head of such agency shall make the information available as soon as practicable but not later than thirty days from the date of the request."

For the purposes of this proposal, "agency" is defined as a department, agency, instrumentality, or other authority of the Government of the United States (other than the Congress or courts of the United States), including any establishment within the Executive Office of the President.

There is no presumption of any authority to withhold any information from the Congress.

To the contrary, my proposal would set, by the law, the right of the Congress to request and to receive any information we deem necessary.

The situation could still exist where the President ordered an executive branch employee not to provide information requested or not to testify. That employee would then be in the position of breaking the law or disobeying the command of his superior. Another option would be for the employee to resign, thereby eliminating the conflict. Granted this is not an attractive option.

The Congress clearly has the authority to make laws governing the actions of federal employees. And, as the late Mr. Justice Black pointed out in Senate debate in 1930, the files of government agencies, created by the Congress, "are kept under authority of law for the convenience of the Government and for the use of the representatives of the people in the performance of their duties."

Therefore, when these documents are placed on file in that office they are subject to the call of this Body."

The position taken by proponents of "executive privilege" that the separation of powers supports withholding of information is, in my judgment, simply incompatible with any understanding of the operations of the government.

The President stated this unique argument eloquently in his March 12 policy statement. He said :

"Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency."

This position assumes that after the Congress enacts laws and programs, it is dissolved of further responsibility or authority.

The Constitutional law in the issue has been adequately explored through the years, and I won't presume to review that. But I do think it is clear the business of government is a shared responsibility. The Chief Executive is mandated by the Constitution to "recommend to [Congress's] consideration such measures as he shall judge necessary and expedient."

At the same time, Congress is authorized by the Constitution "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department of officer thereof."

It is my strong belief that the Congress must act to dispel any question about its right to inquire and to be fully informed.

The theory of "executive privilege" denies to the Congress information which it should and indeed must have to carry out its responsibilities. We have the authority to enact legislation making it clear that all information shall be made available to the Legislative Branch. We must exercise that authority.

The bill introduced by our distinguished colleague, Congressman Erlenborn, serves I believe to exemplify the problems in discussing this issue as one of "executive privilege." I must admit, however, that it was his bill which I used to formulate my own, and which served to point out the need to take my approach—affirming the right of the Congress—rather than delimiting the scope of so-called "executive privilege."

H.R. 4938, the Erlenborn proposal, provides that all information requested by the Congress shall be made available "unless in the interim a statement is submitted by the President or by an agency head signed by the President invoking Executive privilege as the basis upon which the information is being refused." The bill further defines that "Executive privilege shall be invoked only by the President and only in those instances in which the requested information or testimony contains policy recommendations made to the President or agency head and the President determines that disclosure of such information will seriously jeopardize the national interest and his ability or that of the agency head to obtain forthright advice."

The dangerous phrase here is, obviously, what will "seriously jeopardize the national interest." Is it a security matter? If so, why would some security matters not jeopardize the national interest, and therefore be made available to the Congress as they are on a continuing basis, and not other security matters?

Even more significant is that the measure gives Congressional sanction to the claim of expanded executive privilege and institutionalizes the loopholes by which information can be withheld from the Congress.

If we allow any exemption or "out" the Congress will continue to be at the mercy of the President. We will continue to be spoon fed.

The Watergate case is a prime example. The President refused to allow White House officials to testify before Congress because he was convinced that there was no wrongdoing. Now he's not so sure—which says to me he has proof of involvement—and so he'll let us pursue the investigation. The Congress cannot depend on the beneficence of the Executive to determine what information will be made available. We cannot continue to know only what the Executive Branch says we "need" to know.

My bill addresses itself also to the appearances of Executive Branch officials before the Congress. It treats requests for the appearance of witnesses in the same manner as requests for information. If a request is made for an Executive Branch official to appear before the Congress, that official shall appear. There is no need for any exemptions.

I realize that my approach may appear unreasonably simplistic. I contend that it must be this way. Any efforts to define the existence of any "executive privilege" will inevitably lead to a situation which gives the President authority to withhold information.

One problem which immediately occurs to me is, what if the President issues an Executive Order that information will be provided to the Congress and employees will appear before the Congress unless he specifically prohibits such action? Or what if he issues an Executive Order (letter, memo, verbal direction) that certain information is to be specifically withheld or a particular individual is directed not to respond to Congressional requests?

Can an Executive Order supersede an act of Congress?

Under what authority does the President issue Executive Orders? Should that authority be reviewed or eliminated?

What about the enforcement of my proposal? Obviously the courts are available for our pursuit of a resolution to this issue, and I would hope that the issue does reach the Court at an early date.

The fact that no test case has yet been filed points to another omission. There should be some framework within the Congress for immediate consideration of any refusal by the Executive Branch to make available information or personnel for testimony and a determination of whether to pursue the matter in the courts. The indecisive approach which we have followed in the past only serves to strengthen the position of the Executive.

I commend the Subcommittee again for its efforts to insure the complete availability of information to the Congress. I urge serious consideration of my proposal, and as I said, stand ready to work with the Subcommittee in any way which might be helpful.

Thank you.

Mr. MOORHEAD. Do you want to make any comments before I ask questions? I would be happy to yield to you.

Mr. FASCELL. There are experts following me so I do not think I should have any questions.

Mr. ERLENBORN. I would like to question my colleague.

Mr. MOORHEAD. In the Freedom of Information Act, we set out certain exemptions and then said these exemptions shall not apply to Congress, but we did not say what the power of Congress to get information was. But clearly, I think, Congress has indicated that while the public has a right to know that under the Constitution, the Congress—to carry out its constitutional functions—has a need to know which is higher than the public's right to know. Would you not agree?

Mr. FASCELL. I think it is inherent in passing that statute, Mr. Chairman, that we took the position there was not any argument or any question about Congress needing the information. It never entered anybody's mind that the Congress would be denied information; certainly that is inherent in the statute.

Mr. MOORHEAD. It is only recently this has been questioned and, as I read your bill, it provides that these exemptions shall not apply to Congress, and states it affirmatively. Is that not correct?

Mr. FASCELL. I just followed the language, very fine language, of the gentleman from Illinois in his bill. My bill is just his bill really. I just took out all the loopholes. [Laughter.]

Mr. ERLENBORN. Now I will object. [Laughter.]

Mr. MOORHEAD. You did say this was not a partisan political issue.

Mr. FASCELL. The fight has been going on too long to be partisan about this; everybody is guilty, every President.

Mr. MOORHEAD. The other thing you said was, the power now is stacked in favor of the Executive just by the size and vast power of the executive branch.

Would you not agree that under the Constitution as originally written that the Founding Fathers, if they did any stacking, thought that the bulk of the power should rest in the Congress because they were still smarting under the abuses of power by King George of England?

Mr. FASCELL. I do not think there is any question about that. I have not done extensive reading on that subject, but what reading I have done would lead me to the conclusion that the Founding Fathers did everything they could to get away from the concept of the monarchy and the power, the sole absolute power of the monarch.

I do not think there is any question about that.

Mr. MOORHEAD. And all of the legislative powers were granted to the Congress—you have a quote at the top of page 2.

Mr. FASCELL. I think you have to go on the concept when we started out under this experiment of ours, we started out with the basic theory that all power resides in the people as against the monarch, a complete reversal of the process. Then we went from there to the constitutional process which is a limited grant of specific authority.

Mr. MOORHEAD. And the power of the President, other than being Commander in Chief, was to faithfully execute the laws passed by the Congress, is that not correct?

Mr. FASCELL. That is certainly my understanding and, of course, we are having a big debate on that still, but the answer to that is yes.

Mr. MOORHEAD. As you read your bill, with the possible exception of impeachment, it would not apply to the President and to the Vice President—who are Federal officers elected by the people through the electoral college—but it would apply to every other person or department or agency in the Federal branch which, after all, are created and funded by the Congress, and are not elected by the people. Is that interpretation correct?

Mr. FASCELL. That is absolutely correct, Mr. Chairman. And you know, if we need to spell it out, we ought to spell it out, but I do not think we need to.

Mr. MOORHEAD. I think it comes through clearly.

Mr. FASCELL. Yes.

Mr. MOORHEAD. I think there is a distinction between persons appointed by the President—and if they are to an important office they have to be affirmed by the Senate—and the President and Vice President, who are elected by the people, even though originally in the Constitution they were not elected directly by the people, but indirectly.

Mr. FASCELL. I think that is a useful distinction, Mr. Chairman. I think it is more important, however, to use the distinction that they are the focus of the Executive power; and in the separation of powers within the three coequal branches of Government, that the Executive power resides in the Office of the President.

Mr. MOORHEAD. I think it is very useful.

I do believe that there have been unfortunate changes taking place in the present administration's conduct of dealing with Congress. At one time foreign policy was thought to be handled in the State De-

partment and the Secretary of State was, so far as I know, always accessible to congressional committees.

Now it would appear that the basic foreign policy decisions are made by Dr. Kissinger, who is in the White House and who is, it is claimed, not available for examination by the Congress.

You even mention a recent case where the Secretary of State is beginning to be contaminated by this disease that is floating around Washington and decides that he is not available to the House Foreign Affairs Committee for testimony.

Mr. FASCELL. Mr. Chairman, if one were going to take the line of reasonableness, which the gentleman from Illinois takes, you run into the problem immediately which the chairman has pointed out. If you have the Cabinet system, even though they are appointed, theoretically they are performing ministerial functions, certainly within the oversight of the Congress. It would be pretty hard to stretch the case that those people for some reason, because they are in the executive branch, ought to be exempt from the overview of the Congress.

Mr. ERLENBORN. Would you yield at this point?

Mr. MOORHEAD. Yes; I yield completely.

Mr. ERLENBORN. I think you are maybe misreading what I have tried to say in the bill, or maybe it has not been stated clearly.

Mr. FASCELL. I apologize for that, John, because I do not want to put words in your mouth.

Mr. ERLENBORN. It would be good to get this cleared up.

I agree that all information in the executive branch should be made available to Congress. All factual information would be made available to the Congress without exception. No individual by virtue of his position would be immune from testifying.

As you have just suggested, whether a Cabinet level officer or otherwise, no individual is immune. The only information that could be protected by what we spell out statutorily here as executive privilege would be a communication between the President and his adviser or an agency head and his adviser relative to a policy recommendation. Any factual information supporting that would be made available to Congress.

The only exception is that limited communication between an adviser and the President or agency head about policy recommendations.

Now, the question I would ask you is, if we do not protect that, then would you believe that whenever the President had a meeting in his office with any of his advisers, we can immediately summon all of those advisers, whether he be the Attorney General or the Counsel to the President, or the national security adviser, and say, "What did you say, what did the President say?"

If you do not exempt that level of communication, how is the President or an agency head ever going to be able to get advice from his immediate advisers?

You see, that is the area that I am trying to protect. I think it is a practical, and a narrow, application of executive privilege.

Mr. FASCELL. Well, let me say to the gentleman, it sounds very reasonable to do that. Once you institutionalize it by statute, however, we will all be amazed at how broad that very narrow band suddenly becomes. That is the difficulty, and you do not have to, you know, stretch your logic too far on that to see how that would work.

Confidentiality of advice, internal advice, which has not resulted in a policy decision, we have faced that many times. For example, with the military, where you have dissenting views, and yet they are all working for the same command, and if they are going to testify individually they have the real responsibility there in terms of responding to the Congress where they have voluntarily appeared.

You know, you could have certainly an honest difference of views on that score.

It seems to me that, using that example, and it may not be totally relevant to the point you are making, but using that example where you have the dissenting opinion, I think the individual owes a responsibility to the Congress to say, "I dissented, and I dissented for these reasons, but I am carrying out the orders, a majority has won or the result is the other way and that is it. And I am perfectly satisfied to do it." If he wants to be extremely critical, it seems to me then he owes a responsibility to resign, and some have done that.

I see a reasonable way of working that problem out instead of institutionalizing the exception of the confidentiality of internal advice.

MR. ERLENBORN. I think maybe it would be helpful to relate this in a personal way. We all have our own personal staff, our legislative adviser, or administrative assistant, whatever they may be. Do you believe that it would be proper and helpful for you in the exercise of the powers of your office if there were a law on the books that would say that any committee of Congress could have your legislative assistant or administrative assistant appear before that body to testify as to communications between you and your immediate staff, or do you think that might in some way hamper you?

I see, in my own view of this, a complete isolation of the President if we were to make these policy communications subject to review by the Congress. I see the President not being able to get the kind of advice that we would hope that he would get. Often advice to him is conflicting, and he has to choose. I would hope he would always get conflicting advice, otherwise he would just have a bunch of yes men around him. Do you think there would be a danger that we might isolate the President from those conflicting views if we said that as soon as those meetings were held in the Oval office a committee of Congress could subpoena all of the participants down here and say, "What did the President say and what did you say?"

MR. FASCELL. Well, let me take those one at a time, and I do not want to defend either one of those concepts, you know.

What is the responsibility of the Congress? If the responsibility of the Congress is oversight of the operation of my office, then so far as I am personally concerned they can talk to anybody in my office and I would hope they would not have to subpoena them to do that.

There is considerable oversight, by the way, on our staffs, as you well know, and we have been very fortunate that we have not had the problem arise where certain committees of the Congress having the responsibility of staff have had to call the staff before them. That is very good. It means so far we seem to be doing fairly well on that score.

But that is administration, that is ministerial. It has nothing to do with the policy.

My own policy in my office is, I always tell my own staff never say anything inside the office that you do not want to see in the newspapers. Whom are we kidding?

The only one who does not know the results of a meeting in the office of the man in the White House is the man in the Moon. All are direct plants or leaks or just people speaking their piece, "An authoritative source out of the White House said today," quote, unquote.

We know there is dispute within the White House now on this whole issue. It has been raging for weeks. It has spilled over into the Congress.

So, John, I really, I am not that concerned about the fact that this would really hamper the President. It might be abused, that is entirely possible, and the Congress might have to be put in its place. You know it might become very political at some point but—

Mr. ERLENBORN. I think the real question is, is it necessary—

Mr. FASCELL. Sure it is.

Mr. ERLENBORN [continuing]. For us in the exercise of our legislative function—

Mr. FASCELL. Yes, I think it is extremely necessary.

Let me give you a "for instance."

Mr. ERLENBORN [continuing]. To know what these legislative recommendations are?

Mr. FASCELL. OK.

Mr. ERLENBORN. My apology to the reporter.

Mr. FASCELL. I will be careful about interrupting you. But a good example, as a member of the Foreign Affairs Committee, I would like to know whether right at this moment there is a National Security Council paper on a particular matter of foreign policy.

Mr. ERLENBORN. I think you could get that under this legislation.

Mr. FASCELL. The point is, I cannot get it now and I do not know that it exists.

Now I might, you know, with a little work and a few phone calls here and there might be able to eventually do it. The news guys work the same way going to his trusted sources, and eventually it comes out, and if there is no violation of the national security law in terms of producing the material, why, it's forgotten.

The President is also very much concerned about that document in this example. Eventually it makes the rounds of all needed persons, and a whole range of options are laid out one, two, three, four, five, three, whatever it is. Eventually—with recommendation from the, let's say National Security staff, Mr. Kissinger—it eventually makes its way to the President's desk. That is what he has to have to operate, and he says, "OK, option." He marks it and signs it and that goes into effect.

Say that I would like to know what option 2 and 3 were. I am not entitled to know that under your bill. Even under the practice now, I am not entitled to know that.

I could devise them myself. Congress could set up our own National Security Council and we prepare our own paper and formulate our own options. We can do that and sometimes we do. We get outside consultants.

I still ought to know and the Congress ought to know what were in the options and why did the President choose No. 1 instead of No. 3 or 2. I think it is vital.

Mr. ERLENBORN. Well, if I might respond to that, I think my proposal would in no way stop you from finding out from the responsible officials what options were available. I think that they could protect the document itself which was the policy recommendation to the President. But, without revealing the specifics in a document, you could have those same people before your committee—and I would limit access to only the official exercise of the authority of the Congress, not the individual curiosity of the Congress.

Mr. FASCELL. I believe under your bill you could not get anybody on the National Security Council before Congress.

Mr. ERLENBORN. Oh, yes, certainly you could for any factual information; factual information is not protected under this bill, only policy recommendations directly to the President or an agency. In fact, the bill specifically provides for disclosure of factual information, to the extent feasible.

Mr. FASCELL. That is all they could—

Mr. ERLENBORN. You could certainly invite them here to ask them what options were available, not necessarily what they recommended to the President. What options are available, and all of the facts behind the conclusions that they have reached as to available options.

Mr. FASCELL. This nameless group of experts and the Congress in the sensitive areas is not entitled to know what their recommendation is, is what you are saying.

Mr. ERLENBORN. I think this is true.

Mr. FASCELL. Nor should the Joint Chiefs of Staff, who recommend to the President directly any major military action.

Mr. ERLENBORN. Yes; I think that is true, and I feel that if we go into that area, we are in danger of having the whole legislative enactment held unconstitutional.

Mr. FASCELL. Well, I do not know that. I would as soon test that out, frankly.

What we are discussing here—and it is good this discussion has come up—is fundamental. It absolutely is fundamental to the consideration of this issue. We are struggling with this, for example, very thing in another committee now on the question of the war powers, how does this country go to war and what part will the Congress play in it?

Are we going to sit back forever and let the Chief Executive put us in the posture, in this technological day and age, with the Congress coming along after the fact, ratifying his acts only because we cannot get the information ahead of time upon which the President acts?

Now, I cannot conceive of any emergency that the Congress ought not to know about and participate in in those conditions. That is why I am very apprehensive, seriously, of writing in the statute this exception.

From a practical standpoint, it will probably take care of itself regardless of what we write, whether we write the broad language that is suggested in my bill or write the language that you suggested, but the difference is, I would hate to write it, I would hate to write that exception in the statute. I would rather let it take care of itself as it arises.

There is going to be a real confrontation of major substance. You know, we will hammer it out as we do everything else. It is an accom-

modation in the public eye, and maybe ultimately that is the best we can do. But at least it seems to me that we ought, if we are going to write the legislation, let's write it on the side of opening things up. That was the spirit of the Freedom of Information Act, that is the spirit of what we are trying to do here in both of these bills. I think we need to keep hammering in that direction because we in the Congress are at such a fantastic disadvantage that we must give ourselves every possible advantage in this accommodation that is going to have to go on constantly between the legislative branch and the executive.

We are—you know we are never going to hopefully set up a nice little blueprint here and it is going to work out. Neither are we going to impeach the President, neither is he going to fire the Congress. We will just have to keep working.

It is amazing the system does work, but it does and, the skeptics to the contrary notwithstanding, it has worked pretty well.

MR. ERLENBORN. One last question.

I presume because of your testimony here and the fact you have introduced the bill, you feel early legislative action in this area to open up the flow of information to the Congress is desirable?

MR. FASCELL. I certainly do and, you know, all of the factors that make for attention and interest and the possibility of action exist now. They might not exist next year, who knows, but right now we have a tremendous amount of public interest on this and tremendous interest in the Congress.

We have an obvious willingness on the part of the administration to reach some kind of accommodation, it might be possible to do that and we ought to try it.

MR. ERLENBORN. Thank you.

Thank you, Mr. Chairman.

MR. MOORHEAD. Mr. Gude?

MR. GUDE. Yes, I certainly want to commend our colleague from Florida on his introduction of this legislation and his testimony, and I think it has made a great contribution to our efforts to develop the very best legislation that we can offer to the floor of the House.

My feeling in regard to your testimony, and the dialog you have had with Congressman Erlenborn, is that I would fall somewhat in between as to the thrust of the final legislation we should enact, and I am going to introduce legislation today, having looked at the several proposals very carefully, to execute this. In citing an example, during the Roosevelt administration prior to the Second World War, there were times when it would seem to me it would have been very detrimental to have revealed to Congress not the facts regarding the situation abroad and in this country as far as the military and political situation was concerned, but the advice to and from the President as to what efforts the United States should make to aid the allied cause. If such considerations of assistance had been made known to Congress, it would have undermined the President's efforts to do what he was trying to accomplish as far as America's involvement and efforts to assist the free world in the struggle that finally ensued. That would be my concern with your legislation which basically prevents any private advice to the President from being held in confidence. The advice of his advisers, if they had been compelled to reveal it, would have been detrimental at that time.

Mr. FASCELL. Well—

Mr. GUDE. I am not talking about the factual material.

Mr. FASCELL. No, I understand.

One could make a case that way very easily. But on national security information, is it OK to make some available to the Congress, but some national security information is not? You see what we have if we adopt this posture? None of it should be made available if it is all national security. That's not reasonable, so it could be said that some sensitive national security should not be made available to Congress.

One could argue that only that national security information which the Executive decides should not be made available should be withheld, and we have come full circle.

I think we have dealt with this in the Congress satisfactorily. I think we have had more trouble in the executive branch than we have ever had at the congressional level with leaks of so-called sensitive national security information.

The Atomic Energy Committee, the CIA Oversight Committee, the Armed Services Committee, they are all privy to all kinds of sensitive, special or whatever label you want to put on, national security matters.

So, you know, why draw the line?

I am not saying we ought to know that we are going to war at 8 o'clock tomorrow morning, but I think before we go to war we ought to decide the facts upon which we are going to make that declaration and not wake up and read about it at 12 o'clock.

Mr. GUDE. But I feel in the very response you have made, you made the differentiation which I was trying to convey to you.

Mr. FASCELL. Right.

Mr. GUDE. You said national security information. I was speaking purely of advice, not information.

Mr. FASCELL. Well, advice is information though, see.

Mr. GUDE. No, I believe that the Congress could have before it all the facts just as the President does, but that could be a different thing from the Chief of Staff calling the President and saying, "Mr. President, I advise you that we should take such action tomorrow morning."

Now that would not be information. It would merely be "I advise you, Mr. President, that you should do thus and so," and that is not information. It is merely his counsel and advice based on what he knows and what the President knows, and the President makes his decision accordingly.

Mr. FASCELL. Well, you have a real difference of opinion there because I think that is vital and fundamental to the Congress.

Mr. GUDE. Well, anyway, I think the gentleman has made a real contribution.

Mr. FASCELL. And I thank you for your comment, but I really feel that that is absolutely vital for the Congress, in the area of jurisdiction of the committee having the responsibility. You can formalize the request, if you desire, by requiring a majority vote of the committee, with a written request to the President.

We have a whole method of inquiry in the Congress. As resolutions of inquiry. We can even formalize that more if we need to. I do not know that that is the best process. But I think we need to lay down the principle. Then the problems that you are talking about, that evolve

into those kinds of gray areas—the Executive will make the first decision anyway, it is going to be unilateral; and it will be a direct confrontation with the Congress if the Congress disagrees.

If the committee having the jurisdiction for some reason feels that it must or is entitled to have that under the law, I do not think the law will be used as an excuse; in other words, the Executive would never allow that.

Mr. MOORHEAD. So you come down, I think, ultimately as to who makes the decision as to whether information will be coming forth, Mr. Kleindienst would clearly say that the Executive unilaterally makes the decision.

Mr. FASCELL. He said that.

Mr. MOORHEAD. That is not subject to appeal?

Mr. FASCELL. Right.

Mr. MOORHEAD. I think Mr. Erlenborn's bill would provide that the judiciary would decide when we came to a confrontation. Would that be correct?

Mr. ERLENBORN. Yes; I would say in any event the dispute that could arise under the Fascell bill, the Erlenborn bill, and Moss bill—any of them—would have to be resolved ultimately in the courts.

Mr. MOORHEAD. Now, under the ground rules of the Ervin-Baker committee they would at least have the preliminary decision. Although the final decision would be up to the Senate, I think that 99-plus percent of the time they would make a wise decision. If a President said or his aide said, "Well, this is more in the nature of advice and really you should not come under this," I think the Congress would be reasonable and say, "No, we would not," but I think that whether you call it advice or facts, in a dispute over which it is, I think the preliminary decision should be by the Congress. If a witness still refused to answer, and we threw him in the jail in the basement of the Capitol, then he could bring a habeas corpus writ and the issue would ultimately be decided by the courts.

But I think that there should be respect for the good judgment and courtesy of the Congress in not asking what it should not ask.

Mr. ERLENBORN. Mr. Chairman, would you yield?

Mr. MOORHEAD. Yes.

Mr. ERLENBORN. It occurs to me that for over 200 years now the Congress has been stating pretty much the position you and Mr. Fascell are stating; that is, there is no executive privilege, and we ought to get everything. As a result, we have no ground rules for executive privilege.

I am reminded of the way certain monkeys are caught. Food is put in a jar with a very narrow opening. The monkey gets his hand in there and gets it so full of food he cannot get his hand out of the jar, you see.

Let's not grasp for too much here today. Let's try to get what we can without getting caught. [Laughter.]

Mr. FASCELL. That may be appropriate but I think this—that the mouth of the jar in this legislation is pretty broad; I do not think you could get anything caught anywhere because in the exception which the gentleman from Illinois writes into his bill, which is that information going to the Congress shall be limited to only that which is policy recommendation—I forget the exact language—all that says

in effect is that the information coming to the President is policy recommendation and therefore could be withheld.

Mr. ERLENBORN. Oh, no.

Mr. FASCELL. He is the chief ministerial officer. He makes a decision. As Mr. Truman used to say, "The buck stops here."

Mr. MOORHEAD. Mr. Fascell, you are familiar with the act of 1928 which says any seven members of the Government Operations Committee can request and obtain any information of the executive branch. That is now codified as title 5, section 2954.

Mr. FASCELL. Yes.

Mr. MOORHEAD. In effect, your bill takes that concept, the number of people, but says it applies to any committee of the Congress within its jurisdiction.

Mr. FASCELL. Absolutely; I am delighted, of course, that Senator Ervin rediscovered that old statute. The whole concept of the Government Operations Committee needing information is no different from that of the Congress. I think that is where we ought to come down; the exemptions will take care of themselves.

Mr. MOORHEAD. Thank you very much for your legislation and your—

Mr. FASCELL. The noise you heard was the other shoe. [Laughter.]

Mr. ERLENBORN. I recognized it. [Laughter.]

Mr. FASCELL. Thank you very much.

Mr. MOORHEAD. We will now hear from our colleague from Indiana, Mr. David W. Dennis.

Our colleague from Illinois, Mr. Anderson, was scheduled ahead of you but you have been waiting here.

Maybe the appropriate thing would be to have both of you come forward.

Mr. DENNIS. All right.

Mr. ANDERSON. I am pleased to defer to the gentleman from Indiana. I will wait my time.

Mr. MOORHEAD. Why do you not proceed, Mr. Dennis?

We are pleased and honored to have both of you with us, and I appreciate your efforts.

STATEMENT OF HON. DAVID W. DENNIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. DENNIS. Mr. Chairman and members of the committee, I consider it a privilege to appear before this distinguished committee to discuss with my colleagues the very interesting and highly important subject of executive privilege.

The recent and very welcome, and, as far as I am concerned, not unexpected action of the President in respect to the Watergate affair has no doubt served to remove some of the popular pressure and immediate interest in the subject, but it ought not to cause the Congress, or this committee, to diminish its interest or to slacken its effort in this field because the problem of course remains and will come to a head again, and it is, as you know, a problem of long standing which, I am persuaded, it would be desirable to resolve.

This controversy is an old one which has its roots in English history. English practice, however, seems to have been well settled in favor of Parliamentary power, at least since William Pitt, the elder, laid down his famous dictum in debate regarding the investigation of the conduct of affairs by Sir Robert Walpole, prior to his fall from power in 1742, that:

We are called the Grand Inquest of the Nation, and as such—

He was speaking of the Parliament, of course,

It is our duty to inquire into every step of public management either abroad or at home, in order to see that nothing has been done amiss.

This view was known to, and appears to have been followed by, American colonial assemblies.

The first instance which arose under the Constitution appears to have been when the House of Representatives in 1792 appointed a committee to inquire into the causes of the failure of General St. Clair's expedition against the Indians in the Ohio country, which committee was "to call for such persons, papers as may be necessary to assist their inquiries."

As is the case in a number of the individual instances in this field the result is, to a degree, ambiguous and the precedent has been cited both ways, because, while President Washington in fact delivered all of the papers requested, Thomas Jefferson, the Secretary of State, made private notes regarding the position taken in the Cabinet meeting in which he stated that the Cabinet was of one mind:

1. That the house was an inquest, therefore might institute inquiries. 2. That they might call for papers generally. 3. That the Executive ought to communicate such papers as the public good would permit, and ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion.

A little later, in 1796, President Washington did refuse to turn over to the House of Representatives correspondence, documents, and instructions dealing with the Jay Treaty with Great Britain. But again the precedent cuts both ways, because Washington based his refusal on the ground that the treaty-making power was vested exclusively in the President and the Senate and therefore "the inspection of the papers asked for can [not] be relative to any purpose under the cognizance of the House," and, as a matter of fact, he did turn the papers over to the Senate.

During the debate in the House, however, on this occasion, James Madison, who was then a Member, did say that:

He thought it clear that the House must have a right, in all cases, to ask for information which might assist their deliberations * * *. He was as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure at the time * * *.

If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a reasonable judge within his own department.

Since Madison is often called the father of the Constitution this has to be regarded, I think, as a rather weighty and early recognition of

the fact that there is some basis of claim for the existence of the doctrine of executive privilege, although it may be limited in scope. Nevertheless a motion offered by Madison broadly setting forth his view as just quoted was voted down by the House.

Thomas Jefferson, himself, as President, declined on one occasion, while furnishing other information, to give the House the names of other persons said to be implicated in Aaron Burr's alleged conspiracy. But again this precedent is not persuasive because the House resolution specifically excepted "such information as he [Jefferson] may deem the public welfare to require not to be disclosed."

Generally it seems that from those early times there was relatively little challenge by the Executive to the congressional right to inquire until the time of Andrew Jackson. Jackson, of course, was a very strong-minded President and he did, on some occasions, refuse congressional requests.

President Tyler refused to give the House reports relative to frauds on the Cherokee Indians, but as Prof. Raoul Berger points out in his article in 12 UCLA Law Review 1044—a most scholarly article to which I am very much indebted—President Tyler rather narrowly limited his position to those categories as to which a privilege for State secrets could be claimed in litigation involving private individuals, and even so the House committee took immediate issue with him, stating that such rules were applicable "only to the judicial, and not to parliamentary tribunals."

But, as Mr. Erlenborn has pointed out, although they took that position, I do not think they got the documents.

In earlier days Congress often qualified its requests by limiting them, in terms, to matters the revelation of which the President deemed consistent with the public interest. On the other hand, as time went on, Executive refusals seem to have become more sweeping—particularly under the Eisenhower administration—which was in part in response to the claims of Senator Joseph McCarthy; and, lately, we have witnessed the very sweeping claims of privilege apparently asserted the other day by Attorney General Kleindienst.

There has been relatively little judicial authority in this field, yet there are enough Court decisions to give us some light on the subject.

In the famous case of *Marbury v. Madison*, 1 Cranch (5 U.S.C.) 137 (1803), Chief Justice Marshall had some well-chosen words to say, in the course of his opinion, on the general subject of the separation of powers in which he pointed out that in certain capacities, at least heads of executive departments were merely acting for the President and had to be given the same treatment, the same privileges as the President might have, and he also allowed Mr. Lincoln, the Attorney General and former Secretary of State, some leeway regarding disclosure of his official actions in that capacity. But, on the other hand, in *United States v. Burr*, 25 Fed. Cas. 50 (1807) the Chief Justice, sitting as the trial judge on circuit, ruled that he could issue, on Burr's application, a subpoena duces tecum for the President of the United States, and he said that was the law and did it.

President Jefferson asserted his right to withhold the information, but, although he asserted that he, in fact, turned the letter that the Court wanted over to the U.S. district attorney and told him that he

would pretty well use his judgment about what part of it he would reveal, and the U.S. attorney offered to show the judge the letter and to let him decide pretty much what part of it should come into the court, so that the demands of the defendant were pretty well satisfied by what Jefferson actually did, although Jefferson claimed he didn't have to do it; and Justice Marshall asserted that he did have to do it—but they didn't have a showdown, of course.

There is a decision called *Kilbourn v. Thompson* which I have cited here which is frequently cited as a holding against the congressional power of inquiry, but in that case the Executive was not involved and the Court merely held that the House of Representatives could not lawfully commit a witness for contempt when it attempted to inquire into a matter which was pending in the bankruptcy courts and which, as the Court saw it, could only be determined there and was not subject to any legislation on the part of the Congress.

In any case, this decision has been criticized rather severely in several later decisions in the Supreme Court.

Probably the leading case, recognizing and upholding the congressional power of inquiry with respect to the executive departments, is the case of *McGrain v. Daugherty*, 273 U.S. 135. In this case the Senate was investigating the conduct of the Department of Justice by Attorney General Daugherty, President Harding's Attorney General. In upholding the Senate's right to subpoena the Attorney General's brother, Mal Daugherty, and interrogate him about a special bank account which the brother maintained in the bank he headed at Washington Courthouse in Ohio, the Court said that:

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.

And again:

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. Some means of compulsion are essential to obtain what is needed. The Constitutional provisions which commit the legislative function to the two Houses are intended to include this attribute to the end that the function may be effectively exercised.

It is true that the case involved Mal Daugherty, a private citizen; he was not a part of the executive branch, but I don't regard that as material because the investigation was directed against the conduct of the Attorney General's administration of the Department of Justice.

There is a later case which looks the other way to some extent, called *United States v. Reynolds*. In that case some people were killed while flying on an Air Force plane which had secret electronic equipment, some civilians were killed, and their widows brought an action against the United States and asked for the production of the Air Force's accident report. The Secretary of the Air Force had turned down the request on the ground that it was privileged because it contained secret information about the electronic equipment on the plane, and on the facts of the case, the Court upheld his assertion of privilege in that case. They were rather narrow facts and the Court did not recognize a wide sweeping and absolute privilege, but he did uphold the claim in that particular instance. This case, of course, does not involve a congressional inquiry.

I personally want to do, and intend, I may say, to do some additional research on this subject before I try my hand finally at drawing any legislation.

I have looked at the bills before the committee and I think I might support my friend, Mr. Erlenborn's bill perhaps, but I would suggest that to my mind its definition of the proper subject for the claim of executive privilege, which are limited to policy recommendations made to the President or agency head, may be a little bit narrow, as I read the law and the practicalities of the situation, because they might not necessarily cover, it seems to me, some military and diplomatic matters which, perhaps, in some circumstances ought to be covered, and, as the author admits, of course, the bill does not furnish any sanctions for its enforcement.

The bill offered by Mr. Reid and Mr. Moss has the sanction in there of cutting off funds if the request of the Congress is not complied with.

I cannot help but feel myself, and with all due respect, that that is a rather meat-ax approach which is not very practicable.

I cannot imagine that the Congress, for instance, will cut off the funds for the Department of State or the Department of Defense, or should do so, if we get into an argument about executive privilege. So I question how valid that particular sanction actually is in practice.

I have, gentlemen, in my thinking on this very important subject come to some conclusions which are still only tentative and subject to revision but which I would like to share with this committee and these are as follows:

1. Basically and historically the Congress has, and should have, a broad power to demand information from the executive branch.

Professor Berger's statement to the Senate committee the other day that all that is needed is to test the existing power by the use of a subpoena and, if necessary, by the power of contempt, is in my opinion probably correct.

2. I believe there is in law and there should be in practice a legitimate, although rather narrow, field for the doctrine of executive privilege. It probably includes advice given the Executive by his Cabinet and staff, their intrahouse communications among themselves in arriving at that advice, important military secrets, and important diplomatic and international negotiations which are in the negotiating stage. It certainly does not include wrongdoing or crime.

3. Probably, on balance, it would be desirable, I think, to clarify and define this field, and to set up some machinery for arriving at a decision in specific cases.

4. I believe that an act of Congress presents considerable difficulty because:

- (a) It would be difficult—although not necessarily impossible—to adequately provide in a statute for all the contingencies that might arise and second, as a practical matter any such act would probably be vetoed by any President in office and passage over such a veto would be at any time quite doubtful.

5. Consequently, a constitutional amendment may well be the best approach to this essentially constitutional problem.

I have not attempted to draft such an amendment but I think it should have certain points in it.

First, it ought to lay down the general principle of congressional right to make inquiry of the executive branch.

Second, it ought to provide a discretion to the Executive to refuse in writing, signed by the President, in certain categories, which I think would be rather broadly drawn and should be broadly drawn in a constitutional provision, and, third, it ought to provide for a prompt judicial decision in the case of a refusal. It seems to me, while there ought to be every effort to accommodate comity and reasonableness on both sides, when we finally come to an impasse where the legislative and Executive disagree neither one of them can make the final decision—the Congress will make the final decision as far as it is concerned—but the final decision will have to be made, it seems to me, if you get to that, by the judicial branch which normally makes such decisions.

So I would provide in such an amendment for a prompt judicial decision and probably, I think, by giving the Congress or either House the right, in the event of a refusal and a disagreement, to bring an original action against the Executive in the Supreme Court of the United States in order to obtain the information requested.

This constitutional provision would remove any possible question about standing to sue or any possible question of a political doctrine that the courts won't inquire into because we would say you are going to inquire into this, and we could confer that additional original jurisdiction on the court by a constitutional amendment, and I think, under that sort of a setup, that, by means of case-by-case decision, the Court, in due time, would build up a body of law which would, in the end, well and clearly define the appropriate limits of the doctrine of executive privilege; and I feel that would be a better way for us to get it rather than too narrowly and in too much detail in a statute.

I thank you.

I assume, Mr. Chairman, although I think that I covered all of this, that my statement might be included in the record.

Mr. MOORHEAD. Without objection, it will be put in there.

[Mr. Dennis' prepared statement follows:]

**PREPARED STATEMENT OF HON. DAVID W. DENNIS, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF INDIANA**

Mr. Chairman and members of the committee, I consider it a privilege to appear before this distinguished committee to discuss with you, my colleagues, the very interesting and highly important subject of executive privilege.

The recent, and very welcome, action of the President in respect to the "Watergate affair" has no doubt served to remove some of the popular pressure and immediate interest in the subject; but it ought not to cause the Congress, or this Committee, to diminish its interest or to slacken its efforts in this field, because the problem of course remains and will come to a head again, and it is, as you know, a problem of long standing which, I am persuaded, it would be desirable to resolve.

This controversy is an old one which has its roots in English history. English practice, however, seems to have been well settled in favor of Parliamentary power at least since William Pitt, the elder, laid down his famous dictum in debate regarding the investigation of the conduct of affairs by Sir Robert Walpole prior to his fall from power in 1742 that:

"We are called the Grand Inquest of the Nation, and as such it is our Duty to inquire into every Step of public Management, either Aboard or at Home, in order to see that nothing has been done amiss."

This view was known to, and appears to have been followed by American colonial assemblies.

The first instance which arose under the Constitution appears to have been when the House of Representatives in 1792 appointed a committee to inquire into the causes of the failure of General St. Clair's expedition against the Indians in the Ohio country, which Committee was "to call for such persons, papers as may be necessary to assist their inquiries".

As in a number of the individual instances in this field the result is to a degree ambiguous and the precedent has been cited both ways, because, while President Washington in fact delivered all of the papers requested, Thomas Jefferson, the Secretary of State, made private notes regarding the position taken in the Cabinet meeting in which he stated that the Cabinet was of one mind:

"1. that the house was an inquest, therefore might institute inquiries. 2. that they might call for papers generally. 3. that the Executive ought to communicate such papers as the public good would permit, & ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion."

A little later, in 1796, President Washington did refuse to turn over to the House of Representatives correspondence, documents, and instructions dealing with the Jay Treaty with Great Britain. But again the precedent cuts both ways, because Washington based his refusal on the ground that the treaty making power was vested exclusively in the President and the Senate and therefore "the inspection of the papers asked for can [not] be relative to any purpose under the cognizance of the House", and he in fact turned the documents in question over to the Senate.

During the debate in the House on this occasion, however, James Madison, who was then a member, did say that:

He thought it clear that the House must have a right, in all cases, to ask for information which might assist their deliberations. . . . He was as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure at the time. . . .

If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department.

Since Madison is often called the father of the Constitution this has to be regarded, I think, as a rather weighty and early recognition of the fact that there is some basis of claim for the existence of the doctrine of executive privilege, although it may be limited in scope. Nevertheless a motion offered by Madison broadly setting forth his view as just quoted was voted down by the House.

Thomas Jefferson himself, as President, declined on one occasion—while furnishing other information—to give the House the names of other persons said to be implicated in Aaron Burr's alleged conspiracy. But again this precedent is not persuasive because the House resolution specifically excepted "such information as he [Jefferson] may deem the public welfare to require not to be disclosed".

Generally it seems that from those early times there was relatively little challenge by the executive to the Congressional right to inquire until the time of Andrew Jackson, when Jackson—a strong-minded President—did, on some occasions, refuse Congressional requests.

President Tyler refused to give the House reports relative to frauds on the Cherokee Indians, but as Prof. Raoul Berger points out in his article in *12 UCLA Law Review* 1044—a most scholarly article to which I am very much indebted—President Tyler rather narrowly limited his position to those categories as to which a privilege for state secrets could be claimed in litigation involving private individuals, and even so the House Committee took immediate issue, stating that such rules were applicable "only to the Judicial, and not to parliamentary tribunals".

In earlier days Congress often qualified its requests by limiting them, in terms, to matters the revelation of which the President deemed consistent with the public interest. On the other hand, as time went on, executive refusals seem to have become more sweeping—particularly under the Eisenhower administration in response to Sen. Joseph McCarthy—and lately we have witnessed the very sweeping claims of privilege apparently asserted by Attorney General Kleindienst.

There has been relatively little judicial authority in this field, yet there are enough Court decisions to give us some light on the subject.

In the famous case of *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803) Chief Justice Marshall had some well chosen words to say, in the course of his opinion,

on the general subject of the separation of powers, and he also allowed Mr. Lincoln, the Attorney General and former Secretary of State, some leeway as regarding disclosure of his official actions in that capacity. But in *United States v. Burr*, 25 Fed. Cas. 50 (1807) the Chief Justice, sitting as trial Judge on Circuit, ruled that a *Subpoena duces tecum* might issue against the President of the United States on the application of the accused. President Jefferson asserted his right to withhold the information, but in fact delivered the letter which was requested to the United States Attorney and gave him discretion to withhold such parts as were not "directly material for the purposes of justice". The U.S. Attorney offered to show the letter to the Court, and Judge Marshall indicated that he would exercise his discretion as to what parts would be disclosed and as to inspection by the accused.

Kilbourn v. Thompson, 103 U.S. 176 at 193 (1880) is sometimes cited as a case holding against the Congressional power of inquiry, but here the executive was not involved and the Court merely held that the House of Representatives could not lawfully commit a witness for contempt when it attempted to inquire into a matter which was pending in the bankruptcy courts and could only be determined there, and as to which Congress could not legislate.

The case has been criticized in later decisions, such as *United States v. Rumley*, 345 U.S. 41 at 46 (1952) and *Hutchison v. United States*, 369 U.S. 599 at 614 (1961).

Probably the leading decision recognizing and upholding the Congressional power of inquiry with respect to the executive departments is *McGrain v. Daugherty*, 273 U.S. 185 at 174-175 (1927). In this case the Senate was investigating the conduct of the Department of Justice by Attorney Daugherty, President Harding's Attorney General. In upholding the Senate's right to subpoena the Attorney General's brother Mal Daugherty, and interrogate him about a special bank account in the bank he headed at Washington Court House, Ohio, the Court said:

"We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."

and again :

"A legislative body can not legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. Some means of compulsion are essential to obtain what is needed. The Constitutional provisions which commit the legislative function to the two Houses are intended to include this attribute to the end that the function may be effectively exercised."

It is true that it was Mal Daugherty, a private citizen, who was subpoenaed and not his brother the Attorney General; but since the investigation was directed at the Attorney General's conduct of that office this fact seems to me irrelevant and I think the case clearly recognizes the Congressional right to inquire into the operations of the executive branch—and particularly where alleged wrong-doing is involved.

A later case, which looks the other way but which does not hold that executive claims of privilege are necessarily conclusive, is *United States v. Reynolds* 345 US 1 (1952) in which, on the facts of that case, the Secretary of the Air Force was upheld in refusing to give the plaintiffs in a wrongful death action the Air Force accident report, on the ground that it might disclose information regarding secret electronic equipment aboard the plane, contrary to the national interest.

So far as I am concerned I want to do additional research on this highly difficult and important subject before trying my hand at drafting legislation.

I believe that I might support Mr. Erlenborn's bill H.R. 4938, but I would suggest that perhaps its definition of proper subjects for the claim of executive privilege—"policy recommendations made to the President or agency head" may be a bit narrow as not necessarily covering some military and diplomatic matters which perhaps should, in some circumstances, be included; and, admittedly, it furnishes no sanctions for its enforcement. H.R. 5983 by Mr. Reid and Mr. Moss supplies a sanction in the cut-off of funds, but I regard this as a blunt meat-ax approach which is scarcely practicable.

I have, in my thinking, come to some conclusions in this matter which are still only tentative, but which I would like to share with the Committee:

1. Basically and historically the Congress has—and should have—a broad power to demand information from the executive branch.

Professor Raoul Berger's statement to the Senate Committee the other day that all that is needed is to test the power by the use of the subpoena and, if necessary, by the use of the power of contempt, is probably correct.

2. There is in law and there should be in practice a legitimate, although rather narrow, field for the doctrine of executive privilege. It probably includes advice given the executive by his Cabinet and staff, their intra-house communications among themselves in arriving at that advice, important military secrets, and important diplomatic and international negotiations which are in the negotiating stage. It certainly does not include wrong doing or crime.

3. Probably, on balance, it would be desirable to clarify and define this field, and to set up some machinery for arriving at a decision in specific cases.

4. An Act of Congress presents considerable difficulty because:

(a) It would be difficult—although not necessarily impossible—to adequately provide for all contingencies, and

(b) As a practical matter any such act would probably be vetoed by any President in office and passage over such a veto would be at any time doubtful.

5. Consequently a Constitutional Amendment may well be the best approach to this essentially Constitutional problem.

6. Such an amendment—which I have not drafted as yet—should:

(a) Lay down the general principle of Congressional right,

(b) Provide a discretion to the executive to refuse in writing, signed by the President, in certain categories, and

(c) Provide for a prompt judicial decision in the case of such refusal—probably by giving the Congress (or either House thereof) the right, in the event of refusal, to bring an original action against the executive in the Supreme Court of the United States in order to obtain the information requested.

This would remove any question of standing to sue, or of the doctrine of political questions. By means of a Constitutional amendment this additional original jurisdiction could be conferred upon the Supreme Court. And, by case by case decision, the Court, in due time, would build up a body of law which would well and clearly define the appropriate limits of the doctrine of executive privilege.

Mr. MOORHEAD. Mr. Anderson, you made quite a splash before the Senate committee on your first appearance on this issue last week and we are looking forward eagerly to your testimony.

STATEMENT OF HON. JOHN B. ANDERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. ANDERSON. First of all, I was going to observe the fact that I appreciate it's getting on toward 12 o'clock and there may be some monkeys in the room who want to get their hand in the jar. [Laughter.] And, therefore, I am going to try to be brief and ask the unanimous consent of the committee that I have my full statement inserted in the record and then perhaps I can try to hit the high spots of that statement to conserve the time of the committee.

Mr. MOORHEAD. Without objection, it will be so ordered and I will state it will be my intention when finishing these witnesses to recess and give us an opportunity to get our hand in that jar.

[The statement follows:]

PREPARED STATEMENT OF HON. JOHN B. ANDERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman and members of the subcommittee, I greatly appreciate this opportunity to testify before you today on the subject of executive privilege. I guess I could be called a "Johnny-come-lately" to this issue since it was only a week ago yesterday that I made my first public pronouncement on executive

privilege in testimony before the other body. That appearance was prompted by the Attorney General's sweeping claims made the day previous on the scope of executive privilege. So I want to preface my statement today by saying that I neither possess nor profess great expertise on the subject of executive privilege, but rather appear before you today as a concerned and disturbed Member of Congress deeply interested in not only preserving the constitutional prerogatives of the legislative branch, but more importantly in protecting the people's right to know which is the keystone of our democratic system. And I firmly believe that both of these fundamental concepts are endangered so long as the Attorney General's claims are allowed to stand unchallenged and so long as the Congress does not act on corrective legislation to properly limit the scope of executive privilege.

Let me further preface my statement by saying that I am greatly encouraged and relieved by the President's announcement just two days ago that he now will permit his aides to testify under oath before the Senate committee investigating the Watergate affair. I think the President is to be commended on recognizing that the doctrine of executive privilege cannot and should not be invoked in matters involving wrongdoing. The President's pronouncement is exemplary of the type of cooperation which must exist between the executive and legislative branches if we are to maintain the delicate and precarious balance upon which our system of government hangs. For our system cannot long survive if it is constantly rocked by confrontation. While our Forefathers specifically provided for a healthy friction between three independent and coequal branches of government, they certainly did not intend for this to spark a ravaging conflagration of confrontation. Each branch must exercise a proper degree of self-restraint and responsibility in dampening such fires before they get out of hand.

You, in your executive privilege hearings, are probably as tired of hearing of the St. Clair incident under President Washington as we in our Rules Committee impoundment hearings are of hearing about gunboats under President Jefferson. And, as it turns out, both of these so-called precedents are on rather shaky grounds and that's probably because both Presidents involved are turning in their graves over the abuse and misuse of these incidents.

As one of the foremost experts on executive privilege, Professor Raoul Berger, has pointed out, the legislative power of inquiry into every aspect of executive conduct is firmly rooted in parliamentary history. In his extensive research, Professor Berger found no pre-Convention historical basis "for the claim that the power to withhold information from the legislature was an attribute of the Executive." In fact, he found numerous references in the debates surrounding the drafting of our Constitution to the legislative-inquiry attribute, and on the basis of all this he concludes that executive privilege is a "myth" with no "constitutional foundation," and thus rejects the argument advanced by the Administration that executive privilege is inherent in the separation of powers doctrine.

This legislative-inquiry attribute was strongly reaffirmed in the 1927 Supreme Court case of *McGrain v. Daugherty* (273 U.S. 135). The Court said, and I quote: "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . 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 itself possess the requisite information—recourse must be had to others who do possess it."

There can be no question that this recognized legislative power of inquiry would be seriously jeopardized if not permanently crippled if the Kleindienst doctrine were allowed to stand. You will recall that in response to a question last week, the Attorney General claimed that the Congress could not compel any of the 2.5 million executive branch employees to testify or produce documents if the President forbids it. This clearly flies in the face of early statements made by the Administration, including the President himself. Just two weeks ago, Assistant Attorney General Mary C. Lawton appeared before this subcommittee and conceded that executive privilege would not apply to White House aides in conjunction with congressional investigations into criminal activity.

On April 20, 1972, Presidential counsel John Dean wrote: "The precedents indicate that no recent President has ever claimed a 'blanket immunity' that would prevent his assistants from testifying before the Congress on any subject."

In his press conference of January 31 of this year, the President stated:

"The general attitude I have is to be as liberal as possible in terms of making people available to testify before Congress, and we are not going to use executive

privilege as a shield for conversations that might be just embarrassing to us, but that really don't deserve executive privilege."

In his memorandum to agency heads on March 24, 1969, the President laid down the following policy:

"The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive Branch has the responsibility of withholding certain information, the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval."

As I mentioned earlier in my statement, I am gratified by the President's announcement of two days ago that his aides would be permitted to testify before the Senate committee investigating Watergate. This would seem to indicate that the official position has returned to that enunciated in the statements I have just quoted and in rejection of the position taken by the Attorney General just last week. But this is certainly no reason for us to slacken in our pursuit of legislatively defining and limiting the use of executive privilege. If anything, the various interpretations given to the doctrine in just the last four years would indicate the compelling need for a legislative clarification and proscription of this authority.

In my testimony before the other body last week, I said, "Congress must immediately pass legislation strictly limiting executive privilege lest the delicate balance of shared power between the two branches be ruptured permanently." And I went on to suggest legislation which would:

(1) Strictly limit the right of executive privilege to direct, personal and confidential relationships between the President and his chief advisers on matters involving national security and other public policy decisions; and

(2) Require that executive privilege may be invoked only through written notice to the Congress by the Chief Executive.

I have subsequently joined in cosponsoring H.R. 4938 as introduced by Congressman Erlenborn, Congressman Horton and five other distinguished Republican members of this committee. I find that bill, which amends the Freedom of Information Act, does meet the criteria which I spelled out last week. That bill requires that agencies make information available to the Congress within 30 days of a request, and that agency officers or employees appear to testify before Congress in response to an invitation and supply all information requested. Information can only be withheld on a written statement from the President invoking executive privilege, and executive privilege can only be invoked if the President and agency head determine that disclosure of the information would seriously jeopardize the national interest and the ability of the President or agency head to obtain forthright advice. At the same time, the bill requires that, to the extent possible, factual information underlying policy recommendations shall be made available in response to a request.

Mr. Chairman, I think this bill incorporates a reasonable and responsible approach—one which is primarily based on a "gentlemen's agreement" between the President and Congress dating back to President Kennedy and subsequently reaffirmed by Presidents Johnson and Nixon. As such, it is designed to encourage cooperation rather than engender confrontation, and this should be our primary aim in resolving this controversy. In codifying this policy, we will be insuring that this very limited use of executive privilege is strictly adhered to and that it is not allowed to become an elastic umbrella which stretches with the political winds.

I appreciate the fact that there are some who, like Professor Berger, do not even recognize the existence of executive privilege, and are therefore reluctant to now give the term sanction in law. At the same time, I think most reasonable men do recognize the need for a certain amount of privileged communication between a President and his chief appointees if the policy-decision process is to function effectively. Perhaps the fears of those who oppose giving official sanction to the term "executive privilege" could be allayed by finding a more acceptable term.

I think this subcommittee might also consider an amendment to the Erlenborn-Horton bill requiring that each signed statement by the President invoking executive privilege shall include "his reasons for so doing."

The subcommittee may also wish to consider whether invoking executive privilege must meet the dual criteria that the information would jeopardize both the national interest and the ability of the President or agency head to obtain forthright advice, or whether it would simply have to meet one of these criteria. As the Erlenborn-Horton bill now reads, both criteria would have to be met.

Finally, I would like to address myself to the obvious question, "What can the Congress do if the President does not comply with the provisions of this bill or abuses or overuses the privilege with respect to information which is not intended to be covered by this bill?" I realize that some bills contain stiff penalties, provisions for fund cut offs, and other such enforcement procedures. I do not think it is wise to include in such a bill such obvious confrontation-triggers, even though they are only intended to guarantee compliance. As many have pointed out, Congress already has authority to refuse to appropriate funds for any agency of government; and Congress does have the power to issue subpoenas and contempt citations, though this has never been tested against an executive branch official in the courts.

I would suggest that if either House is not satisfied with the reason given by the President for invoking executive privilege, it could resort to the procedure in our rules known as the "resolution of inquiry." In the House, this is Rule XXII, clause 5, which simply states, "All resolutions of inquiry addressed to the heads of executive departments shall be reported to the House within one week after presentation." In reviewing Volume 3 of Hinds' Precedents of the House of Representatives, I discovered that these resolutions have been used quite successfully in obtaining information from various Presidents over the years. If, under legislation such as the Erlenborn-Horton bill, a committee does not obtain information it has requested from an agency head or if a President has signed a statement invoking executive privilege, the committee would review the reasons, and, if it determines they are not valid, could report out favorably a resolution of inquiry which would be privileged and be voted on by the entire House. It seems to me that the added weight of a House vote would give any President cause to reconsider his decision, and indeed, there are examples in the history of the House that it has had exactly that effect after a President's initial refusal to disclose requested information. While it is true that in recent years resolutions of inquiry brought by individual members have not been acted upon favorably in the House, this has been largely due to the fact that they have been reported unfavorably by committees. If, on the other hand, a committee should report favorably on such a resolution, I am confident that the House would respect the decision of the committee involved and that most of these would pass.

In conclusion, Mr. Chairman, I hope this subcommittee will take action now on legislation which will narrowly limit the use of executive privilege so that the Congress will have access to the necessary flow of information from the executive which is essential if we are to fulfill our deliberative, legislative and investigative responsibilities. And I would strongly urge that you give your special and serious attention and consideration to the Erlenborn-Horton bill of which I am proud to be a cosponsor.

Mr. ANDERSON. Mr. Chairman and members of the committee, I guess I can be called something of a Johnny-come-lately on this issue because it was just a week ago yesterday that I made my first public pronouncement on executive privilege in testimony before the other body, and I think everyone knows that that appearance on my part was prompted by the sweeping claims of the Attorney General made the day previous on the scope of executive privilege.

So I begin my statement by confessing quite freely that I neither possess nor profess great expertise on the subject.

Indeed, I have learned a great deal from listening to the two preceding witnesses and, particularly, the very interesting historical review of the doctrine given us by the gentleman from Indiana.

I have been encouraged and relieved by the President's announcement 2 days ago that he will now permit his aides to testify under oath before the Senate committee investigating the Watergate.

I think that that statement recognizes the fact that there simply has to be a degree of cooperation between the executive and legislative branches if we are to maintain the delicate and precarious balance upon which our whole system of Government hangs and that system, I fear, will not long survive if it is continually wracked by confrontation. Each branch must exercise a proper degree of self-restraint and responsibility in damping these fires of confrontation before they break out.

One of the foremost experts on executive privilege has already been quoted extensively in these hearings, Professor Raoul Berger, and I, too, am indebted to him for his article where he points out that the legislative power of inquiry into every aspect of executive conduct is firmly rooted in parliamentary history, and indeed that there is no preconvention historical basis for the claim that the power to withhold information from the legislature is an inherent attribute of the executive.

The case of *McGrain v. Daugherty* has already been cited by my colleague, Mr. Dennis, and therefore I will not repeat the quotation in my statement but, suffice it to say that that case, I think, does strongly reaffirm the whole legislative inquiry attribute that is essential to the work of the Congress, and there is not any question in my mind that the legislative power of inquiry would be not only jeopardized but permanently crippled if the Kleindienst doctrine were allowed to stand, and if Congress found itself in the position of inability to compel any 2½ million executive branch employees to testify or produce documents if the President forbids it.

I understand that it was 2 weeks ago that Deputy Assistant Attorney General Mary C. Lawton appeared before this subcommittee and conceded that executive privilege would not apply to White House aides in conjunction with congressional investigations into criminal activity. On the 20th of April last year, 1972, Presidential Counsel John Dean wrote:

The precedents indicate that no recent President has ever claimed a "blanket immunity" that would prevent his assistants from testifying before the Congress on any subject.

The President's press conference on January 31 of this year, indicated, or seemingly indicated, a very liberal attitude on his part with respect to the invocation of the doctrine. And in the memorandum that he addressed to agency heads on the 24th of March he laid down the policy of complying to the fullest extent with congressional requests for information. I said earlier in my statement that I was gratified by the President's announcement that his aides would be permitted to testify before the Senate committees investigating Watergate, and this would seem to indicate that the official position has returned to that enunciated in the statements I have just quoted, the memorandum of March 24, and some of the other matters of which I have just made mention.

And it seems also that this carries with it an implicit rejection of the position that was taken by the Attorney General just last week. But we cannot indeed be completely satisfied, particularly in view of the fact that on that very afternoon the Presidential press secretary, meeting before the television cameras announced that Mr. Kleindienst

was speaking for the White House. So I would suggest that there is no reason, therefore, for the committee, or us in the Congress, to slacken our pursuit of the goal of a legislative definition and limitation on the use of executive privilege. Indeed the various interpretations that have been given to that doctrine in just the last 4 years indicate, I think, a compelling need for a legislative clarification and proscription of this authority. In the testimony that I offered before the other body last week I said that Congress must immediately pass legislation strictly limiting executive privilege lest the delicate balance of shared power between two branches be ruptured permanently.

I went on to suggest that legislation ought to: First, strictly limit the right of executive privilege to direct personal and confidential relationships between the President and his chief advisers on matters involving national security and other public policy decisions; and second, that there be a requirement that the privilege be invoked only by written notice to the Congress from the Chief Executive.

It is for that reason that I have subsequently joined in cosponsoring H.R. 4938 as introduced by Congressman Erlenborn, Mr. Horton, and five other members of the committee.

I find that bill which amends the Freedom of Information Act does meet the criteria I spelled out last week. It does require that agencies make information available to Congress within 30 days of their request and that agency officers or employees appear to testify before Congress in response to an invitation and supply all information requested; and that information could only be withheld, on a written statement from the President himself and invoked only if the President and agency head determine that disclosure of the information requested would seriously jeopardize the national interests and the ability of the President or agency head to obtain forthright advice.

At the same time the bill requires that to the extent possible factual information underlying policy recommendations shall be made available in response to a request.

Mr. Chairman, I think the bill, therefore, incorporates a reasonable and a responsible approach and, as such, it is designed to encourage cooperation rather than engendering confrontation. And I would re-emphasize, I think this ought to be the primary purpose, a primary aim, in resolving this controversy. In codifying this policy we will be insuring that this very limited use of executive privilege is strictly adhered to and that it is not allowed to become an elastic umbrella which stretches with the political wind.

Now there are those, I appreciate, who like Professor Berger, do not even recognize the existence of executive privilege and, therefore, feel we would make a mistake to give it any sanction in law. At the same time, I think most reasonable men do recognize the need for a certain amount of privileged communication between a President and his chief appointees if the policy decision process is to function effectively.

I would suggest that the subcommittee might consider an amendment to the Erlenborn-Horton bill requiring that each signed statement by the President invoking executive privilege shall include his reasons for doing so.

The subcommittee may also wish to consider whether invoking executive privilege must meet the dual criteria that the information

would jeopardize both the national interest and the ability of the President or agency head to obtain forthright advice or whether it would simply have to meet one of these criteria.

As I understand it, the Erlenborn-Horton bill requires that both of those criteria would have to be met.

Finally, I would like to address myself, before closing, to the obvious question of what can the Congress do if the President does not comply with the provisions of the bill or abuses or overuses the privilege with respect to information not intended to be covered by the bill?

I have read the other bills that do contain stiff penalties and fund cutoffs and other enforcement procedures. It is my personal judgment that it would be unwise to include in such a bill such obvious confrontation triggers even though they are only intended to guarantee compliance.

As many have pointed out already, Congress has authority to refuse to appropriate funds for any agencies of Government and Congress now has the power to issue subpoenas and contempt citations although this law has never been tested against any executive branch official in the courts.

I would suggest if either House is not satisfied with the reason given by the President for invoking executive privilege it would resort to rule XXII, clause 5 of the Rules of the House, the resolution of inquiry, and in reviewing volume III of Hinds' "Precedents of the House of Representatives," I find these resolutions have been used quite successfully in obtaining information from various Presidents over the years.

If, under legislation like the Erlenborn-Horton bill, a committee does not obtain information requested or if the President has signed a statement invoking the privilege, then the committee would review the reasons and if it determines they are not valid could report out favorably a resolution of inquiry which would be privileged, of course, and could be voted on by the entire House.

It seems to me that the added weight of a House vote would give any President cause to reconsider his decision, and I believe there are some examples in history that this effect has been obtained.

It is true that in recent years resolutions of inquiry brought by individual Members have not had favorable action in the House but I believe that this is largely due to the fact that they were reported unfavorably by committees. If, on the other hand, a committee should report favorably on such a resolution, I am confident the House would, in most cases, respect the decision of the committee and pass the resolution.

In conclusion, Mr. Chairman, I hope this subcommittee will take action now on legislation which will narrowly limit the use of executive privilege so that the Congress will have access to the necessary flow of information from the Executive, which is essential if we are to fulfill our deliberative, legislative, and investigative responsibilities, and I would strongly urge that you give your special and serious attention and consideration to the Erlenborn-Horton bill of which I am proud to be a cosponsor.

Thank you, Mr. Chairman.

Mr. MOORHEAD. We thank both of you very much, and I will, in keeping with the spirit of trying to get to the cookie jar, try to be brief in the questioning.

Mr. DENNIS. I was intrigued by your thought of a constitutional amendment. You said that you doubted that we could get a bill through Congress, presumably because it would require two-thirds vote to override the veto.

Mr. DENNIS. I think there is a good chance for a veto.

Mr. MOORHEAD. But a constitutional amendment would also require a two-thirds vote of both Houses.

Mr. DENNIS. That, of course, is true but I think it would be easier to get it there than on a veto. That is just a personal opinion, but I believe it would be.

Mr. MOORHEAD. Are you familiar with the ground rules adopted by the Ervin-Baker committee in the Senate?

Mr. DENNIS. I am ashamed to say, Mr. Chairman, that I have actually not read them yet; I got the gist of them in your colloquy with Mr. Fascell.

Mr. MOORHEAD. By the way, Mr. Anderson, are you familiar with those ground rules?

Mr. ANDERSON. No, Mr. Chairman, I have not had an opportunity to read them as yet.

Mr. MOORHEAD. One of the important things, it appears to me, is that in the ground rules the witness shall not be permitted to claim a privilege before appearing before the committee. In other words, he must come forward and, it seems to me, if we draft legislation in this area, we should require that the witness requested must appear so that we can look him eyeball to eyeball. If he says, "I don't want to do that" he must first appear before the committee before he can assert that claim. That would be different from a document on which the President might claim executive privilege.

But if he just sits in the White House and says, "I am not going to appear before the committee," I think there is less pressure of public opinion placed on him. I wonder if you think we should put this type of provision into any legislation we might consider acting upon?

Mr. ANDERSON. Mr. Chairman, if I may, I think in my testimony I suggested that one amendment to the Erlenborn bill would be to perhaps require the President to assign specific reasons for his invocation of executive privilege. I am wondering if your question would go to that situation where the President, in writing, has invoked the privilege and given his reasons for invoking it, would it be your feeling, and I am throwing the question back to you in a sense but I want to be sure I understand it, would it be your feeling that even under those circumstances the witness should make what I guess would be clearly a pro forma appearance before the committee?

Mr. MOORHEAD. Yes. I think that under these ground rules he might be asked questions which would obviously not be prying into a confidential relationship with the President he should be able to answer those questions. Only when a committee might ask, "What, after that, what did you say to the President or what did he say to you," could such a claim be made.

Mr. ANDERSON. I would be inclined to agree with the chairman that the witness should appear and I think it would clothe the proceedings with some additional force and effect and dignity rather than simply dispatching a message that a witness is not going to even make an appearance. I think I would agree.

Mr. ERLENBORN. Would the gentleman yield?

First I would like to say I think there is a corollary here with the claim for protection against self-incrimination under the fifth amendment. That does not preclude appearing pursuant to a subpoena and responding before the proper body. The bill I introduced, which the gentleman from Illinois has cosponsored with me, does require the appearance of the witness and only excuses him from answering those questions which have the element of executive privilege involved, where the President has in writing claimed executive privilege. It does not excuse appearance of the witness under our bill.

Mr. MOORHEAD. I am glad to hear that because I think that is important.

The ultimate problem in a specific case is who makes the decision.

I think Mr. Kleindienst seems to indicate that the executive has absolutely unlimited right to make the decision.

Mr. ERLENBORN. I think, I would say if a dispute arose under the legislation we would take it to the courts and the courts would decide de novo. Under the Ervin-Baker ground rules the initial decision, although it is written :

The committee shall thereupon rule on the validity of the claim or its application to the particular circumstances involved and require the witness to give the testimony sought in the event its ruling on the claim is adverse to the witness.

In other words, as written the preliminary and final decision would be made by the committee.

I presume there would be a device to have that appealed to a court but I think the burden of proof would then be shifted to the witness. That is one theory which we might consider and then of course I think Mr. Anderson's theory would be that if the witness refused to answer and the committee decided he should then, and he still refused then it would go to a resolution of inquiry to the full House of Congress. Those are the possible decisions.

Mr. DENNIS. Mr. Chairman, if I may comment on that, it seems to me when you come down to an actual confrontation between two parties who are coequal and won't agree, that neither one of them, in the nature of things, can make the final decision. The court would have to do it, and I would suggest that if you follow the statutory route, and take Mr. Erlenborn's statute or something like it, one good idea would maybe be to think about providing a court procedure to test that case quickly and expeditiously.

If you look at Professor Berger's article he has a suggestion along those lines in there. He rather suggests you start out with this 5 United States Code statute that you mentioned a while ago or something like it, and then he has some suggestions in there about court proceedings. It seems to me that is one of the beauties, one of the things at least that I like about my proposal, is you get right into the Supreme Court and get a fast decision from the highest court in the land but you can take your statutory approach, I think, and write in something

which will more or less arrive at the same result and, it seems to me, that is a better type of implementation than a fund cutoff or something of that kind, and it might improve the bill. It is just a thought.

Mr. MOOREHEAD. I would agree with you that, under our system, where the two branches come into a conflict, there is a third one—the judicial branch—which is the arbitrator. That is ultimately where it has got to end up.

Mr. DENNIS. I would think so.

Mr. MOORHEAD. But I think it would be proper to draft the legislation so that you might say that when the Congress decides it is entitled to certain information it shall get it and then, of course, the President can refuse and then the case would go to court, but the burden would be on the executive branch to justify that refusal of the information.

I personally think at this moment in history that so much power has gone to the executive that we ought to take more drastic steps than the Erlenborn approach to right that balance.

Mr. Erlenborn?

Mr. ERLENBORN. Mr. Chairman, thank you.

I want to thank both of my colleagues. The statements each of you have made have given me some thoughts for ways in which we may very well improve the legislation now pending before us.

Mr. DENNIS. If I may add one thought, one of the advantages of a constitutional approach which, I realize, is not what this committee can consider exactly, is that we can give the Supreme Court, whatever merit there is in that, this kind of original jurisdiction by statute.

It takes an amendment to do that. It has to start with the lower courts with a statute.

Mr. ERLENBORN. I think your suggestion for having a quick resolution would be most helpful, as you just pointed out. A constitutional amendment, of course, would not come within the jurisdiction of this committee.

Congressman Anderson's suggestion to improve the legislation by requiring the President to state his reasons in writing I think is also helpful. I do not know why I didn't think of it myself.

I believe it would resolve some of the problems that Congressman Fascell pointed out. Some of the problems he foresaw, I think, are simply not in the bill. For instance, he said the President might by executive order blanketly say nobody would appear from the executive department. Obviously that would not be allowed under our bill. In view of the fact that the President's decision to invoke executive privilege may be subject to review in the courts, I think it would be well to make him spell out his reason beforehand so we would know before that review was sought on what basis he was going to justify his claim.

There is no enforcement spelled out in my bill, and Congressman Anderson has pointed out a good reason why we should not have any drastic enforcement provisions in any legislation of this sort. It is not our desire, nor do I think it would serve any purpose, to have this as an automatic confrontation bill, as Congressman Anderson has pointed out.

In comments I have made relative to this legislation, I have pointed out that we still have the power of subpena. We also have the power for resolution of inquiry. As a matter of fact, it might be much better

to have these several different avenues available to us, rather than having one procedure spelled out in the law. But, whichever one we would follow, it has a sort of safety factor built in by requiring the House or the Senate as a body, as a whole, to take action before the confrontation would take place.

Citing for contempt would require a resolution of the House or the Senate. Resolution of inquiry would require action by the body as a whole. This safeguard is extremely important in a matter such as this.

Again I want to thank both of my colleagues for very helpful testimony.

Mr. MOORHEAD. Mr. Gude?

Mr. GUDE. Thank you, Mr. Chairman. I, too, want to thank our colleagues. As mentioned earlier, I have been giving this legislation considerable thought, and the one change that I would like to recommend which will be in the bill I am going to introduce will be in subsection (3) and I would change that starting with line 17 so it would read: "Executive privilege shall be invoked only by the President and only in those instances in which the request is directed to policy recommendations or advice made to the President or agency head and the President determines that disclosure of such recommendations or advice will seriously jeopardize the national interest and his ability or that of the agency head to obtain forthright advice. Factual information underlying policy recommendations shall be made available in response to a request."

I shall introduce that and hope that that will be considered along with the other measures that have been made available to the committee. Again, thanks to our fine witnesses.

Mr. MOORHEAD. Are you going to introduce that bill today?

Mr. GUDE. Yes.

Mr. MOORHEAD. We have the other bills as part of the record.

Mr. GUDE. Could I have it made part of the record?

Mr. MOORHEAD. I think we should ask unanimous consent that the Gude bill be made a part of the record, when it is introduced.

[The bill follows:]

93rd CONGRESS
1st SESSION

H. R. 7221

IN THE HOUSE OF REPRESENTATIVES

APRIL 19, 1973

Mr. GODE introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked.

1 *Be it enacted by the Senate and House of Representa-*

2 *tives of the United States of America in Congress assembled,*

3 That section 552 of title 5 of the United States Code (the

4 Freedom of Information Act) is amended by adding at the

5 end thereof the following:

6 “(d) (1) Whenever either House of Congress, any com-

7 mittee thereof (to the extent of matter within its juris-

8 diction), or the Comptroller General of the United States, re-

9 quests an agency to make available information within its

10 possession or under its control, the head of such agency shall

1 make the information available as soon as practicable but not
2 later than thirty days from the date of the request unless in
3 the interim a statement is submitted by the President or by
4 an agency head signed by the President invoking Executive
5 privilege as the basis upon which the information is being
6 refused.

7 “(2) Whenever either House of Congress or any com-
8 mittee thereof (to the extent of matter within its jurisdi-
9 ction) requests the presence of an officer or employee of an
10 agency for testimony regarding matters within the agency’s
11 possession or under its control, the officer or employee shall
12 appear and shall supply all information requested except that
13 such officer or employee may refuse to supply those items
14 of information specifically ordered withheld by the Presi-
15 dent in a signed statement in which Executive privilege is
16 invoked.

17 “(3) Executive privilege shall be invoked only by the
18 President and only in those instances in which the request
19 is directed to policy recommendations or advice made to
20 the President or agency head and the President determines
21 that disclosure of such recommendations or advice will
22 seriously jeopardize the national interest and his ability or
23 that of the agency head to obtain forthright advice. Factual
24 information underlying policy recommendations shall be
25 made available in response to a request.

1 "(4) 'Agency', as used in this subsection, means a de-
2 partment, agency, instrumentality, or other authority of the
3 Government of the United States (other than the Congress
4 or courts of the United States), including any establishment
5 within the Executive Office of the President."

Mr. MOORHEAD. If there are no further questions—

Mr. DENNIS. If I can throw out one thought—I don't want to keep us here either—I think in our natural reaction to the situation and I think we all have more or less the same general point of view, we ought to be careful to try to do something reasonably practical. I go along with what Mr. Erlenborn suggested here a while ago that you just cannot really run anybody's business completely in a goldfish bowl and we should not go overboard in an impractical way that we cannot live with after we have done it.

We want something that is enforceable, and I have personally thought, I personally think, the privilege is a little broader than just advice, and I am not sure that some military matters, for instance—factual matters maybe should not be always put out in the open.

Mr. ERLENBORN. Might I interrupt you there? Others have raised this point. My feeling is we run a danger of confusing the necessity of protecting this information from public disclosure with protecting this information from ever being made available to Congress.

Certainly there is a good deal of information that we should protect against public disclosure that can come to the Congress and be properly protected here.

Mr. DENNIS. And you are correct in theory, but we have all got to show a good deal of restraint, because every day we see executive session stuff on the front page of the paper. You know that is one of the problems, actually.

Mr. MOORHEAD. On the other hand, I think the Congress has a pretty good record on national security matters.

Mr. DENNIS. Yes.

Mr. MOORHEAD. The Armed Services Committee and other committees—

Mr. ANDERSON. Mr. Chairman, if I may, I must speak out on that, that somehow I don't want to accord to the executive branch a higher degree of responsibility with respect to the release of classified information. After all, we have a very celebrated law suit going on right now that involves release of classified information by people who were in the executive branch, not in the Congress, so I don't know why we in the Congress should demean ourselves by entertaining the idea that we are less responsible than people in the executive branch in dealing with very sensitive material.

Mr. DENNIS. Except there are a lot more of us.

Mr. ANDERSON. 2½ million in the executive branch, and only 535 here.

Mr. DENNIS. Yes; but I do not figure that all these file clerks know the things we are talking about.

Mr. ERLENBORN. There are file clerks privy to information that we cannot have.

Mr. DENNIS. They shouldn't have it either.

Mr. MOORHEAD. I feel I should be entitled to every type of information that is necessary for me to legislate wisely. But, frankly I do not want to know, what I don't need to know that is secret and unnecessary for me to carry out my responsibilities under the Constitution.

Mr. DENNIS. It is a sound general principle.

Mr. MOORHEAD. But in recent years—and I say this in an absolutely bipartisan way—the policy of the executive branch has been to keep information away from the Congress that the Congress needed, rather than to give Congress what we really didn't need and have us leak it. We did not get the environmental report on the supersonic transport or the Amchitka nuclear test and that was, to me, clearly the kind of information that we needed to legislate sensibly and to decide whether we should appropriate the requested funds. We voted against the supersonic transport without knowing of the adverse environmental report. We voted for the nuclear test without getting the environmental report. I think in both cases we were flying blind and we should not have been in that situation. We were not exercising our constitutional duties properly because information was hidden from us by the executive branch.

We may have been coincidentally right in both cases, or coincidentally wrong in both cases, but we were flying blind.

The committee will recess shortly. I imagine we had better reconvene at 2:15 to give us adequate time for lunch. Is that all right?

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you both very much.

[Whereupon, at 12:55 p.m., the subcommittee recessed, to reconvene at 2:15 p.m., the same day.]

AFTERNOON SESSION

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

The subcommittee is pleased to welcome Mr. David Cohen, vice president and director of operations of Common Cause.

Mr. Cohen, would you introduce your associates to the subcommittee?

STATEMENT OF DAVID COHEN, VICE PRESIDENT AND DIRECTOR OF OPERATIONS, COMMON CAUSE; ACCCOMPANIED BY PATRICIA KEEFER, LEGISLATIVE REPRESENTATIVE; AND DAVID KENDALL, LEGAL STAFF

Mr. COHEN. I wanted to thank you, Mr. Chairman, and Congressman Erlenborn. I wanted to have you be able to meet, on my right Pat Keefer, who is legislative representative for Common Cause and who works in the whole area of antisecrecy for us, freedom of information, executive privilege, open meetings, that whole area.

Mr. MOORHEAD. We are especially pleased to welcome you, Miss Keefer.

Mr. COHEN. On my left is David Kendall, who is a member of our legal staff and is a former law clerk to Mr. Justice White.

Mr. Chairman and Congressman Erlenborn, I really appreciate the chance to come here and share some of our thoughts with you. Before I begin, I want to say I am very grateful to you, Congressman Erlenborn, because I think you had an awful lot to do with really making us aware of the hearings and thereby in turn letting us be aware of the value of testifying.

You know, Common Cause has had some rather exacting standards on the Congress and we think they are exactly on target. But if just a portion of the committees and subcommittees would follow the degree of oversight that this committee has followed and would follow the standards set by this subcommittee, I think the gap between the Congress and the executive branch would be a lot less distant. I think you really all ought to be very proud of the job that you have done over the years.

I especially hope, now at this point in time, that we will be able to see a whole spate of legislation coming forth from here on the subject of executive privilege and on the strengthening of freedom of information statute and related items.

If I can, Mr. Chairman, what I would like to do is make my statement part of the record and then just really deal with the highlights. I think you have been very patient in holding these hearings and I know there are other witnesses.

Mr. MOORHEAD. Without objection, it is so ordered. We will be delighted to have you proceed as you choose.

Mr. COHEN. First, I want to try to set a larger context for the subject of executive privilege. We are really talking here about shifting the burden of secrecy. Right now, we have a very passive anti-secrecy policy. What we need is an affirmative antisecrecy policy in which the Congress is able to get information from the executive branch, from officials of the executive branch, and is able in turn to perform its constitutional functions of legislation, investigation, and oversight. I think, without getting into great detailed arguments as to the public's right to know versus Congress' need to know, I think we can accept the fact that the public's right to know is inextricably intertwined with your ability as a Congress to get to know what you have to know. Unless you get to know what you need to know, the public's right to know is just shot down.

We are talking about more than just executive privilege. Congress has enacted a Freedom of Information statute and I think it has been dishonored too often. I think part of the problem is with the executive branch, but some of the problem is with the Congress itself, especially the House and Senate Appropriations Committees in that in this, if you can set the stage with executive privilege legislation, I think we will break the logjam in beginning to develop a very, very clear and affirmative antisecrecy policy, with the strengthened Freedom of Information Act, with a strengthened Lobby Control Act. Government is lobbied all the time, not only Congress but, far more important, the executive branch, and no one ever knows anything about it. So I think you have a great opportunity to break the logjam.

I do not think, and I would urge you that you not be bound by the psychology of the sustained veto. The President has made two major vetoes this year and they have both been sustained, but I think the issue we are talking about here is very, very radically different from water and sewer grants and vocational rehabilitation. We are not talking about old spending programs, we are not talking about important constituencies that are looking for the Federal dollar, whatever one thinks of the merits of the issue. We are really talking about something that is very, very institutional, that goes to the core of what the Congress is about. And unless the Congress has the will and the guts to take this kind of an issue on, the Congress is never going to be an equal branch. So, I really plead, because I think in this committee that the opportunities are there, to really set the stage for a determined Congress that will have the energy and the stamina to establish a coherent and enforceable, affirmative antisecrecy policy that will correct the present imbalance. If that happens, I think we will really have made some substantial progress.

Let me say at the outset that we believe that the enactment of a statute is necessary to define and protect the need for Congress to obtain adequate information while protecting confidential advice and governmental advice within the office of the President. It is true that that statement suggests a balancing and we support the concept of a balancing process, but I think, nevertheless, it is one that should be very narrowly drawn and one that should be very, very precise in how it works. I hope to discuss some of the details of that later.

I think one of the most important things is to get rid of the Kleindienst doctrine. I think the only way one can get rid of the Kleindienst doctrine is if Congress enacts some legislation. I think the most disturbing thing about what the Attorney General said was that I think he was really upsetting a very, very delicate system, which has been upset enough in the last few months, perhaps in the last few years, and perhaps even longer. But in upsetting that, he was going against the grain of our system, which is one of accommodation and cooperation. I think his statement was a destructive act. It was really laying down a gauntlet and polarizing—it was deliberate polarization and I think Congress has to correct that. It is not going to be corrected by the Attorney General, and I think as welcome as the President's statement is on the Watergate situation, it is a very limited statement, with limited application, and it goes in a situation in which there has been enormous publicity and I think we can all take judicial notice of the fact that there has been an awful lot of pressure on the President from within his own political party on this score.

Watergate does not solve the basic problem; it just deals with a very immediate kind of situation.

I think the issue here goes beyond the doctrine that the Attorney General stated, because he not only argued that he has the right, the President has the right to prohibit the 2.5 million Federal employees from testifying, he really said the election settled this whole question. What he was really saying is that what happens between November 7, 1972, and January 20, 1977, is irrelevant: there is no accountability in that period of time. Now, other Presidents have been elected by large majorities as well, and from time to time, they have had their troubles. Franklin Roosevelt was elected by even a greater majority than Presi-

dent Nixon was elected by and when he moved on the court packing he lost his support and the Congress showed that there is some accountability that goes in the Presidency between 1936 and 1940.

We are all familiar and sadly familiar with 1964, when the war situation and the failure to come clean with the Congress in the war situation by President Johnson, and the failure of the Congress to stand up, had its consequences not only in reduced congressional power, but also in eroding his enormous majority. So I think we need legislation and we need it badly.

I think we ought to get certain things out of the way on the question of whether the executive privilege is part of the Constitution. The evidence cuts strongly against it and whatever the situation is on that, there is nothing that justifies absolute and unchecked power on the part of the Chief Executive to withhold information from the Congress. I think the Congress not only has the right to deal with all legislative questions, the power of the Executive is limited to faithfully executing the laws and the courts, when given an opportunity, have as neutral bodies decided that the President has lacked inherent authority to engage in certain acts. We saw this when President Truman attempted to seize the steel mills 20-odd years ago; we see this most recently when a unanimous court rejected the Mitchell doctrine of inherent powers on wiretapping. So I think whenever the concept of inherent powers, which is what the argument for executive privilege is, is used, the courts have been pretty firm in opposition to its use.

I think, moreover, that we cannot ignore the *Gravel* case that was decided last year. Here the Supreme Court held that the explicit legislative privilege afforded Senators and Congressmen in the speech or debate clause of the Constitution does not protect them from grand jury questioning about illegal acts. The basis for this conclusion was that illegal acts are not essential to legislating, and thus do not fall within the rationale for the privilege.

Now, that line of reasoning seems mainly applicable to the claim of executive privilege to cover allegedly illegal transactions. If a privilege contained in the very language of the Constitution is not adequate to protect the Congressman from questioning when another branch of the Government, the judiciary, is fulfilling its proper role, investigating the commission of crimes, then it is as plain as my 10 fingers that the hazy controversial and implied doctrine of executive privilege must allow for exceptions when another branch, Congress, needs information to fulfill its constitutional duties of legislating.

I think that sets the stage for the fact that Congress can determine what it in its wisdom believes to be wise legislation in this area. There are no constitutional problems. Quite the reverse, I think you could almost say there is a constitutional mandate to do the job at this point.

Now, there has been a lot said about the history of executive privilege, and I do not want to repeat. We all seem to go to the same authority, because there appears to be only one authority at the time, that of Professor Berger. The concept first surfaced in the Truman and Eisenhower administrations. It surfaced for what others, including myself, felt was a worthy purpose, to protect Government officials from harassment by Senator Joseph McCarthy and others who followed those harassment tactics. Yet, in that time, the courts

were much less clear than they are now on the limits of Congress' power to investigate. By the late 1950's, the Supreme Court had held in a sufficient number of cases that the Congress does have constitutional limitations, other investigative powers.

Now, I think none of those limitations has to inhibit your desire or your need to get the kind of information you have to get from the executive branch. They really deal with rights that draw, that come, that flow out of the Bill of Rights, and the Court has settled this question. I think there are limits on congressional power to investigate. They do not go to the heart of what is involved in executive privilege. So I think knowing that, and knowing that the rationale that President Truman and President Eisenhower developed for executive privilege no longer applies, I think we can go ahead or you can go ahead with full confidence that the kind of legislation that you are considering in this subcommittee now is very much on target from a constitutional viewpoint and in no way goes beyond Congress' existing powers.

In fact, as I examined the bills, I thought it was quite clear that each of those issues, each of the bills before us, made very clear that you were seeking in executive privilege only what your authority was to legislate, seeking and modifying executive privilege for only those items that you had authority to deal with anyway. So I think this is right in keeping with the spirit of the decisions of the 1950's.

Let me turn to the bills before you. Rather than going through the bills in detail, I would like to say that I think they all move in the right direction and that what is striking to me, having sat through the hearing in the morning, is not so much the differences between the bills but your own spirit of accommodation, Mr. Erlenborn, and the fact that as I see it, I think we have a very, very fluid situation. I would hope that what we can do here is provide some strong and effective but workable legislation that really gets the kind of information that is necessary to get and that is enforceable at the same time.

If I may, Mr. Chairman, what I would like to do is just run through what we believe to be the nature, the appropriate nature of executive privilege legislation.

First, we think there is a very narrow area in which advice and recommendations made directly to the President concerning governmental policy should be insulated from compulsory disclosure. We think such a privilege is justified by the need of the Chief Executive for candid and reliable advice on controversial and difficult issues. Advisers are likely to be reticent and guarded if they know they will later have to defend their recommendations in the public arena. In each branch of Government, some confidentiality is necessary. This is true of the conversations between a judge and his law clerk and it is true sometimes of the discussions between an aide to a Senator or a Congressman. In fact, those discussions are protected by the speech or debate clause. And I think it can be argued that a similar privilege for Executive advisers exists under Federal common law, but I think it can be argued even stronger that a statute is desirable to define its contours and to provide courts with standards to determine when that privilege is properly claimed.

Now, in running through the standards, we think first that any statute should state categorically and in broad terms the general policy

of disclosure and state that the privilege afforded is narrowly construed. We think the privilege should be claimed only by the President and only if Congress believes that other department or agency heads also have the privilege. But the privilege should not flow automatically from the President to the department and agency heads. Congress has to decide that. In our judgment at this time, we see no reason why any department head or agency head should have the advantage of executive privilege immunity.

I think it is important that in the exercise of the privilege, clear and objective standards should be given in which the privilege is proper. Those are limited; they rely only to the faithful execution of the laws that the executive authority goes to in article 2.

Now, in the practical workings of any of this, there obviously has to be a certain amount of discretion left to the President and perhaps even to department heads. But I think the emphasis here ought to be on the clear and objective standards and not on the discretion. I think it is very important that the privilege can be claimed only for advice given directly to the President or the department head as opposed to political or personal acts.

I think that is terribly important and this is where we have had all this problem in recent days, in recent months, with the White House advisers. Anything that centered around the President's reelection campaign was clearly political and no one gets executive privilege, no one gets immunity for engaging in a political act. I think it is possible to define these. Congress has already done it; it has done it under the Federal Communications Act. You did it again when you adopted the franking legislation. It is possible to draw distinctions here. And those distinctions ought to be drawn in your statute.

Now, we share the view that was expressed earlier that any time the President avails himself of executive privilege, he ought to indicate it in writing and give the reasons why. And that is terribly critical.

Next, we think the privilege in no way goes to illegal or criminal acts and that ought to be clearly established.

I think actually, President Nixon, when he was a Congressman, had an eloquent statement on this and I think it is worth being governed by. He pointed out that if the Congress has no right to question the judgment of the President in making a decision involving the withholding of information, then Congressman Nixon said: "I say that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive order in the *Meyers* case"—which dealt with a Government scandal—"the *Teapot Dome* case or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question this decision."

Finally, I think it is important to put an enforcement mechanism in the bill. I think Congress should give up none of its existing powers. You should not give up the power of contempt citation; you should not give up the power of resolutions of inquiry. But I think you ought to have multiple options. I would like to discuss this with you.

The normal way for Congress to deal with a recalcitrant witness is to have the subcommittee or committee draft a contempt resolution

stating the facts and to have that resolution passed by the appropriate house, recommending prosecution by the Justice Department. An indictment is then obtained. The witness is prosecuted criminally and if convicted, a criminal contempt punishment of either fine or imprisonment is obtained. Congress has this as an inherent power. It has been little used, but it has the power to hold a recalcitrant witness for civil contempt until he talks.

Now, that is different from the criminal contempt, because as we all know, in civil contempt, the witness, the recalcitrant witness really holds the keys to the jail and he is released as soon as he starts talking. The criminal contempt citation does not result necessarily in the Congress obtaining any information. The person goes to jail for a set period of time, then he is free and that usually ends it.

Now, we have had a chance to examine rule 6 of Ervin's panel, of the Ervin panel guidelines for the conduct of the Watergate hearings. That rule provides that the select committee shall rule on a claim of executive privilege. If it rejects the claim, the witness will be required to give testimony. If the witness still refuses to talk, presumably, although we are not exactly clear on this, the normal criminal contempt route would be followed, with a special prosecutor appointed to try the case. I think the bills before you either lack an enforcement mechanism, or the Reid-Moss bill has such a severe one that I am not sure it will in fact be operable except as it may apply to some domestic situations. But I do not think we ought to make distinctions between domestic and foreign policy-related items here. Because the whole heart of the question is that as Congress, you have to pass on defense matters, you have to pass on moneys—it is a good bit of the budget. And I think as was said earlier today, it is clear that all information should be made available to the Congress.

Now, if the House, Senate, or a committee of either requests information that is not provided, the resolution of cutting off funds, we think, will not work effectively. Therefore, we think an additional enforcement mechanism, in addition to all the powers Congress presently has, is desirable.

One possible approach is that a bill governing executive privilege should provide that after the privilege is formally claimed by the President, the congressional body requesting information should be empowered to go directly to Federal district court to have the claim adjudicated. The bill should: (1) invest the District Court of the District of Columbia with jurisdiction to hear such a claim; (2) provide for an expedited hearing so that it can move through the appellate processes if necessary; and (3) I think it is clear that such legislation, if it uses that as one remedy, should authorize the committee counsel or anybody else appropriate, to prosecute the claim and appeal. So you have your own counsel and your own advocacy. You are not relying as Congress on the executive branch.

Now, we think there are several advantages to this mechanism. One, I think it is clearly speedier than the current criminal contempt route. Judicial review is triggered at the request of a subcommittee or at the request of a committee and no lengthy proceedings are necessary. But equally important, in addition to speed, we think this method helps result in the Congress actually receiving the information you want. That is what the real purpose here is. And while Congress does have

the theoretical civil contempt power that I spoke about earlier, it, too, is not practical in the sense of being speedy.

Finally, I think, in discussing the politics of the situation, I go back to the fact that our system is one of accommodation and cooperation and we want to avoid the drawing of lines in the dust. The battles between the President and the Congress are not "Gunfight at OK Corral." What we are here about is really trying to find ways of resolving it so that the fabric of the society remains whole after the controversy is resolved. That is the advantage of having a third party, the Judiciary branch, involved in it.

Now, in closing, let me just say that this whole issue is one of our major priorities. We think it is indispensable, Congress being an equal branch of Government. We are prepared to be helpful in any way we can. I think nothing I said here is frozen in Holy Writ. We are all trying to grope with this question. I think the fact that the subcommittee is willing to hold hearings on the three bills that are before it and the fact that there is such an open mind, I think, about how to resolve this issue is terribly encouraging for us. It is in that spirit that we are ready to participate and cooperate.

Thank you.

[Mr. Cohen's prepared statement follows:]

PREPARED STATEMENT OF DAVID COHEN, VICE PRESIDENT AND DIRECTOR OF OPERATIONS, COMMON CAUSE

Mr. Chairman and members of the committee, my name is David Cohen. I serve as Vice President and Director of Operations for Common Cause, a citizen's organization of more than 200,000 members throughout the 50 states. I thank the Committee for allowing Common Cause time to testify. Our organization was founded in September, 1970, and since that time we have been involved in a number of issues that open up the governmental and political system. The public's right to know is fundamental to all responsible and effective citizen participation in government affairs: namely, the necessity of having access to information about governmental decisions and activities.

James Madison was well aware of the significance of this issue when he wrote: "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."

These words have been quoted often in relation to freedom of information, and today they are more pertinent than ever. Information is power. Secrecy is used with increasing frequency as the means of keeping those in power isolated from the public. The public good depends on its ability to hold government officials accountable for what they do. Yet these officials cannot be held accountable if information about their activities is withheld from the public. Nor is the public inclined to probe when it is kept ignorant of important governmental matters. Secrecy undermines the public's ability to participate responsibly in the political process, thus threatening, as Madison warned, to make a mockery of popular government.

The secrecy issue today not only involves public access to information about government affairs, it also involves Congressional access to information held by the Executive branch. There are certain things the Congress has a "right to know" in order to carry out basic constitutional functions such as control over the Federal budget, evaluation of the nation's defense posture and military commitments, and the ability to check the exercise of excessive executive power. Yet our recent history shows that the Congress has experienced increased difficulty in getting from the executive the information it needs to perform these functions responsibly. Both executive privilege and the classification system have been used by the executive to conceal from Congress, and the general public, information which it does not want to disclose.

The problem of secrecy in government has become a national disgrace, all the more so because it is not recognized as such by those responsible for it. Many have come to accept it as a fact of American politics. Yet, as mentioned above, it has seriously weakened the power of the public to influence governmental decisions and the ability of Congress to function effectively. It has also eroded citizen confidence in governmental institutions and processes. The public is naturally suspicious of decisions made behind closed doors and the volumes of documents stamped with secrecy code words that are more fitting for a spy movie. In these ways secrecy in government distorts and undermines the political process. And over the last year the problem has emerged with new force, either in the form of old practices which have worsened or in the form of new assaults on the public's and Congress's right to know.

The categories of abuses are numerous: misuse of executive privilege; executive secrecy in budget formation accompanied by either withholding critical information or providing misleading information; the maintenance of secret committee mark-ups in most Senate committees and in the House Appropriations Committee, massive lobbying of the Executive branch, regulatory agencies, and Congress that remains hidden from the public view; a Supreme Court proposal to change the rules of evidence in a way that could further tighten the government's hold on certain information; an Executive branch passion to over-classify; and serious weaknesses in the Freedom of Information Act.

Each of our governmental institutions has contributed to this sorry state of affairs. The Executive Branch must assume major responsibility for this sorry condition, but the Congress and the Courts must accept their share of the responsibility. On all counts the public loses. Too often no information is forthcoming; other times the information is so incomplete that it obfuscates the real issues.

Only a determined Congress that has the energy and stamina to establish a coherent and enforceable affirmative anti-secrecy policy will correct the present imbalance. This will require major breakthroughs in legislation, it will equally require a willingness by Congressional committees to use the oversight function consistently. Oversight must apply regardless of who controls the Congress and who controls the Executive Branch.

I will now turn to the issue of Executive Privilege, the prime focus of the hearings today.

II—EXECUTIVE PRIVILEGE

The claim of an absolute "Executive privilege" by the President which justifies a refusal to disclose information to Congress and to allow Presidential aides to testify before Congressional committees is a very recent and very pernicious development. Exercise of such a privilege strikes at the heart of democratic self-government since it deprives Congress, and therefore the public, of information which is necessary both to legislate and to investigate whether past laws are being adequately implemented. Inquiry into illegal or improper conduct by government officials, who ostensibly hold their offices on a public trust basis, is effectively stymied. As recently articulated, this doctrine is not simply a new privilege: it is the new cover-up dressed up in false constitutional history and theory. It's a disservice to the country.

Common Cause believes that the enactment of a statute is necessary to define and protect the need for Congress to obtain adequate information while protecting confidential advice or governmental advice within the office of the President.

The novelty of this claim is revealed by a letter written by John W. Dean, III, Counsel to the President, a year ago to the Director of the Federation of American Scientists:

You have asked whether President Nixon or any former presidents have ever asserted a claim that presidential aides have blanket immunity from testifying before the Congress on any subject. I am not aware of any public statement by President Nixon or any past president to this effect.

"This administration adheres to the same doctrine of executive privilege which has been developed through precedent and tradition and followed by all recent administrations. The precedents indicate that no recent president has ever claimed a 'blanket immunity' that would prevent his assistants from testifying before the Congress on any subject. The fact that this administration has also not made such a broad assertion is clearly evidenced by the examples cited in your newsletter and the testimony of Mr. Flanigan before the Senate Judiciary Committee." (Letter dated April 20, 1972; reprinted in *Washington Post*, March 26, 1973.)

As recently as April 4, Deputy Assistant Attorney General Mary C. Lawton told the House Government Information Subcommittee that a presidential aide could not claim the privilege to shield himself from a Congressional investigation into wrongdoing on his part.

Recently, however, exactly such a claim of "blanket immunity" has been made, first by the President in his March 12, 1973, statement on Executive Privilege and then by Attorney General Kleindienst in his April 10 testimony before a joint session of three Senate subcommittees.

The President stated that agency officials and Cabinet officers would comply with all "reasonable requests" to testify before Congress in their "non-White House Capacity." However, the President retained the power to deny their testimony if he determined that it would be "incompatible with the public interest." He stated that Executive privilege would be claimed "only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise." In the case of members or former members of the President's personal staff, however, requests to appear before Congress would be "routinely denied." Attorney General Kleindienst, specifically disavowing Deputy Assistant Attorney General Lawton's testimony, further defined the scope of this alleged privilege by claiming that the President has the power to forbid any of the two and one-half million Executive branch employees from testifying before Congress about any matter, including wrongdoing or corruption, and may even forbid them from testifying at a Congressional impeachment proceeding.

Attorney General Kleindienst's April 10th statement on Executive Privilege is reckless and radical. The genius of our political system is one of accommodation and cooperation, not defiance and destruction. Yet the Administration's proposal of absolute immunity is really a determined effort to dismiss the Congress by preventing it from functioning each time it challenges Presidential policies or probes too deeply. The Administration policy is to stop Congress by not letting it question key witnesses in hearings. Permitting White House officials to testify on the Watergate does not satisfy the basic problem. That is a case with lots of publicity; most situations do not parallel that case.

The issue here reaches beyond the arrogance of the Nixon-Kleindienst doctrine. The Attorney General was serving as a political lawyer. The consequence of his testimony is to use the office of Attorney General in crass political terms. To argue that the issue of Executive Privilege was settled by the election and therefore the Executive Branch is not accountable between elections is a dangerous doctrine. This issue cannot be settled with temporary concessions from the White House. It requires Congress to enact workable and effective legislation promptly.

The test of whether Congress is an equal branch or not will not be settled by what vetoes are overridden on old spending programs. Will Congress enact legislation enabling it to perform its constitutional duties? This requires Congress to stop begging the Executive for witnesses and information and to start demanding. To legislate, Congress needs access to information and witnesses. It needs enforceable legislation to back up its demands.

III. EXECUTIVE PRIVILEGE—RECENT CLAIMS

It is important to note that the claimed Executive Privilege is not the same as the evidentiary privilege accorded to military and diplomatic secrets which are in the safekeeping of the Executive Branch. A privilege to protect these secrets was recognized as common law and is codified in several statutes. President Nixon asserted on March 12 that the Executive Privilege he outlined was necessary to safeguard "our military security, our relations with other countries, our law enforcement procedures, and many other aspects of the national interest", but protection for these secrets, even from Congress, already exists.

It is also significant that although the claim of Executive privilege is defended on the ground that it is necessary to enable the President to obtain confidential advice, many of the instances of the claim seem to be attempts to cover up inefficiency or mismanagement by the bureaucracy. In the past two years, for example, the privilege has been claimed in the following situations:

March 22, 1973: Air Force lawyers unsuccessfully attempt to claim the privilege and prevent former White House aide Clark Mollenhoff from testifying at the Civil Service Commission hearings on the firing of A. Ernest Fitzgerald. (*New York Times*, March 22, 1973.)

November 20, 1972: White House counsel John W. Dean, III blocks a GAO inspection into tax-paid flights by Administration officials during last fall's Presidential campaign. (*Washington Post*, April 4, 1973.)

April 27, 1972: Treasury Secretary John Connally refuses to testify before the Joint Economic Committee on the matter of the Emergency Loan Guarantee Board's refusal to supply requested records to the GAO concerning a government loan to Lockheed. (*Washington Evening Star*, April 27, 1972.)

June 9, 1971: The Defense Department refuses to release computerized surveillance records and refuses to agree to a Senate Constitutional Rights Subcommittee report on such records. (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive* at 398-399 (92nd Cong. 1st Sess. 1971).)

Exercise of the privilege in these situations is an arrogantly self-seeking attempt to prevent Congress from knowing the facts it must discover in order to govern effectively.

IV. EXECUTIVE PRIVILEGE—NOT PART OF THE CONSTITUTION

Neither the Constitution, history, nor political theory provides a justification for an absolute and unchecked power on the part of the Chief Executive to withhold information from Congress. It will be clear upon examination that the insubstantiality of this claim is matched only by its novelty: The Emperor's new clothes are cut in the latest mod fashion.

First of all, the Constitution contains nothing which authorizes the President to withhold information from Congress. Article I invests Congress with "all legislative powers" granted to the United States and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any officer. The President is admonished to "take care that the laws be faithfully executed" but beyond that, the Constitution delegates to the President only certain specific enumerated powers, none of which include the authority to withhold information from the Legislature. The absence of an explicit Executive privilege is rendered the more significant by the inclusion of a specific privilege for legislators, the "Speech or Debate" clause of Article I, Sec. 6, which provides that a legislator "shall not be questioned in any other place" for "any Speech or Debate in either House".

If anything, the words of the Constitution imply the *absence* of an Executive power to withhold information from Congress. The Constitution obliges the President "from time to time [to] give Congress information of the State of the Union . . ." Article II, Sec. 3, and the practice has developed of the Chief Executive giving an annual address. This obscure clause has never been construed by the Supreme Court, but at least one commentator, Justice Story, read this language as a clear requirement for the President "to lay before Congress all facts and information which may assist their deliberation . . ." (J. Story, *A Familiar Exposition of the Constitution of the United States*, 187, (1859)).

Finally, there is nothing in political theory to justify the claim of an unreviewable power to withhold information from Congress. Proponents assert that such a privilege is logically derived from the constitutional "Separation of Powers", but the threshold question is necessarily: what does the "Separation" separate? Congress has plenary legislative power, and the Executive has no theoretical right to interfere with the exercise of this power. In a case arising out of the Teapot Dome scandal, the Supreme Court upheld Congress' power to subpoena Executive branch officials, and the Court has repeatedly held that the power to secure needed information is a necessary attribute of the constitutional power to legislate:

"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—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so that some means of compulsion are essential to obtain what is needed." *McGrain v. Daugherty*, 273 U.S. 175 (1927).

President Nixon asserted in his March 12 statement that he would not use the privilege as "a shield to prevent embarrassing information from being made available" but would only invoke it in "those instances in which disclosure would harm the public interest". Thus, the President recognizes that there is absolutely no theoretical justification for use of the privilege to cover up inefficiency or wrong-doing by Administration officials. The problem, of course, is that the Chief Executive is arrogating to himself the right to make a determination about the "public interest". Ordinarily, the courts, as neutral bodies, decide Separation of Powers conflicts, as when the Supreme Court ruled that President Truman lacked any "inherent authority" to seize the steel mills in order to control production during the Korean War. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If "Executive privilege" is defined as the right of the President to withhold evidence, according to his unfettered discretion, from Congress or a court, then this issue has never been submitted to and interpreted by a court in this country. *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 945 N. 7 (Ct. Cl. 1958) (Reed J); Attorney General William Rogers, *The Power of the President to Withhold Information from Congress*, 62 (85 Cong. 2 Sess.) (1958), although the courts have recognized privileges to protect secret military and diplomatic information, the identity of secret informants, and the confidentiality of investigatory files, during judicial proceedings.

The Supreme Court has, however, held that the explicit legislative privilege afforded Senators and Congressmen in the Speech or Debate Clause of the Constitution, Article 1, Sec. 6, cl. 1 did not protect them from grand jury questioning about illegal acts. *Gravel v. United States*, 408 U.S. 606 (1972). The basis for this conclusion was that illegal acts are not "essential to legislating" and thus do not fall within the rationale for the privilege, a line of reasoning which is seemingly applicable to the claim of "Executive privilege" to cover allegedly illegal transactions. If a privilege contained in the very language of the Constitution is not adequate to protect a Congressman from questioning when another branch of the Government (the judiciary) is fulfilling its proper role (investigating the commission of crimes), then it's as plain as my ten fingers that the hazy, controversial, and implied doctrine of Executive privilege must allow for exceptions when another branch (Congress) needs information to fulfill its constitutional duties (legislating).

V. EXECUTIVE PRIVILEGE—HISTORY

Second, the history of the Executive privilege claim belies President Nixon's March 12 assertion that it has "been recognized and utilized" by American Presidents since the time of George Washington. A leading legal scholar, Professor Raoul Berger of the Harvard Law School, has conclusively demonstrated, however, that claims of Executive privilege date from the period of the McCarthy investigations of the early 1950's when Presidents Truman and Eisenhower sought to protect administration officials from testifying before Congress. In that period, the Court cases were less clear on the limits of the power of Congress to investigate. By the late 1950's the Supreme Court had held in a sufficient number of cases that Congress has constitutional limitations on its investigative powers.

The Supreme Court has held that a legislative committee cannot "expose for the sale of exposure," *Watkins v. United States*, 354 U.S. 178 (1957). The power to investigate, though broad, does not extend to an area in which the government is forbidden to legislate, *Quinn v. United States*, 349 U.S. 155, 161 (1955); a Congressional committee would presumably lack the power to subpoena churchmen during the course of an investigation which was intended to write a law to establish an official state religion. First Amendment associational rights must be protected during an investigation, *Watkins v. United States*, 354 U.S. 178 (1957), and a witness may refuse to answer committee questions by claiming the Fifth Amendment's guarantee against self-incrimination. *Quinn v. United States*, 349 U.S. 155 (1955). Also, determination of the guilt or innocence of a witness is not the proper business of a committee, and a hearing conducted as a trial has been held unconstitutional. *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956).

The rationale President Truman and President Eisenhower developed for Executive privilege no longer applies. Each branch of government is governed by the limits that the Constitution places on it. Professor Berger also indicates

that the first formal claim of an absolute unreviewable privilege to withhold from Congress whatever the President chooses dates from a 1958 memorandum to the President written by then Attorney General William Rogers. Berger, "Executive Privilege v. Congressional Inquiry", 12 U.C.L.A.L. Rev. 1044 (1965) Professor Berger's conclusions have never been refuted, and it is unnecessary to describe his historical survey in detail. A few examples, however, often cited by proponents of Executive privilege, should be examined briefly, since they are not really instances of a withholding of information by the President.

In 1791, Congress determined to investigate a disastrous expedition against the Indians led by General St. Clair and requested from President Washington all relevant documents. After a meeting with his Cabinet, Washington turned over all of the requested documents, noting that Congress was acting as an "inquest". Jefferson, then Secretary of State, took notes of the Cabinet meeting and indicated his belief that the President had a right to withhold information from Congress, but it is uncertain whether Jefferson ever publicly expressed this view to Washington, and it is perfectly clear that Washington never articulated it.

The second incident often cited as an example of the claim of Executive privilege is the refusal by Washington to turn over to the House documents having to do with the unpopular negotiations which led to the much-reviled Jay's Treaty of 1796. Washington did refuse to turn over the documents, but his reason was that the Constitution gave the House no power of advising and consenting to treaties. He turned over all of the relevant documents to the Senate instead. This is thus clearly not an instance of the claim of Executive privilege.

In 1807, while Jefferson was President, the House demanded information about the Burr conspiracy "*except* such as he [Jefferson] may deem the public welfare to require not be disclosed". Jefferson supplied most of the information about the conspiracy, yet he withheld the names of the conspirators implicated by rumor, explaining that "neither safety nor justice will permit the exposing of their names". Once again, this is not a claim of Executive privilege, since the House had not requested the information that Jefferson withheld.

It should be noted, also, that Chief Justice Marshall held, in the Aaron Burr case when he was sitting as a trial judge, that the President was subject to subpoena and could be required to turn over documents to a private litigant. *United States v. Burr*, 25 F. Cas. 30, 34 (Cir. Ct. D.Va. 1807) (No. 14,692d). President Jefferson was not subpoenaed, but he did turn over copies of his personal correspondence that Burr needed for his defense. As recently as 1972, the Supreme Court noted Chief Justice Marshall's statement with approval, *Branzburg v. Hayes*, 408 U.S. 665, 688-689 n. 26 (1972), although the Court has never been called upon to resolve the question of whether a President must answer an actual subpoena.

Although there is virtually no history of the claim of an absolute Executive privilege before the Truman and Eisenhower administrations, the history of statutes which require agency officials to provide information to Congress extends to the very beginning of the Republic. A 1789 law, drafted by Alexander Hamilton, enacted by the First Congress (which contained many of the framers of the Constitution), and signed by President Washington, required the Secretary of the Treasury to provide information to Congress concerning "all matters" pertaining to his office. This act was followed by many others, including laws which protect the "right" of civil service employees to testify before Congress and which make it a crime to threaten or otherwise intimidate any person, in or outside of government, called to testify before a Congressional committee. A law passed in 1928, now codified as 5 U.S.C. Sec. 2954, provides that "An executive agency, on request of the Committee on Government Operations of the House of Representatives or any seven members thereof or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee". (Emphasis added)

VI. THE NATURE OF EXECUTIVE PRIVILEGE LEGISLATION

There is a very narrow area in which advice and recommendations made directly to the President concerning governmental policies should be insulated from compulsory disclosure. Such a privilege is justified by the need of the Chief Executive for candid and reliable advice on controversial and difficult issues; advisers are likely to be reticent and guarded if they know they will later have

to defend their recommendations in the public arena. In each branch of the government, some confidentiality is necessary; the conversations of a judge and his law clerk have traditionally been privileged, and advice given by an aide to a Senator or Congressman is protected by the Speech or Debate Clause. A similar privilege for Presidential advisers therefore exists under federal common law, but a statute is desirable to define its contours and to provide courts with standards to determine when the privilege is properly claimed.

Three bills introduced in the House this session attempt to provide such a definition of the proper limits of Executive privilege. H.R. 4938, introduced by Congressman Erlenborn, and co-sponsored by Congressman Horton, Congressman McCloskey, Congressman Thone, Congressman Regula, Congressman Pritchard, and Congressman Hanrahan, would provide that when either House, one of its committees, or the Comptroller General requests information "to the extent of matter within its jurisdiction," the head of the agency (including any establishment within the Executive Office of the President) shall supply the information within 30 days unless the President submits a signed statement invoking Executive privilege as the basis upon which the information is being refused. Similarly, when an officer or employee of such an agency is requested to give testimony, he must appear and answer questions unless the President submits a signed statement empowering him to refuse to answer certain questions on the grounds of Executive privilege. The bill does not, however, contemplate a flat refusal to appear or a blanket refusal to testify. The very limited Executive privilege which the bill defines may be invoked only by the President and only in those instances "in which the requested information or testimony contains policy recommendations made to the President or [an] agency head and the President determines that disclosure of such information will seriously jeopardize the national interest and his ability or that of the agency head to obtain forthright advice."

H.R. 5983, introduced by Congressman Reid and Congressman Moss, would require any agency head or Presidential aide to "immediately" make available, upon written request, to either House of Congress or to a Congressional committee any desired "information relating to programs or activities administered or funded by an agency of the United States." If "full and complete disclosure" is not made, the House or committee is empowered to cut off all funds which are obligated or expended directly or indirectly by the agency for the programs or activities in question. The bill does contain an exception for advice given to the President (though this exemption is specifically not called an "executive privilege"):

"Nothing in this subsection shall be construed to require the President or other head of an agency of the United States to make available to a requesting body the nature of any advice, recommendation, or suggestion (as distinct from any form of information included within or forming the basis of such advice, recommendation, or suggestion) made to him in connection with matters solely within the scope of his official duties by a member of his staff or of an agency of the United States, except to the extent such information may be required by some other provision of law to be made available to Congress or made public: *Provided*. That in no case shall information be refused to a requesting body under authority of this subparagraph in the absence of a written statement signed personally by the President describing the justification for such refusal."

H.R. 6438, introduced by Congressman Fassell, would require that whenever the House, Senate, a Congressional Committee, or the Comptroller General requests information from an agency [including "any establishment within the Executive Office of the President"], the information shall be supplied within 30 days. Whenever either House or one of its committees requests the presence of an officer or employee of such an agency for testimony regarding matters within the agency's control, the officer or employee "shall appear and shall supply all information requested." A requesting body may obtain information "to the extent of matter within its jurisdiction."

All of these bills are serious and thoughtful approaches to confront the difficult problem of assuring Congress adequate information while protecting confidential relationships within the Office of the President. Common Cause believes that an Executive privilege statute should ideally contain at least the following provisions:

(1) The statute should state in broad terms a general policy of disclosure and provide that the privilege afforded is to be narrowly construed.

(2) The privilege should be claimable only by the President and by specified department or agency heads and should clothe their advisers with immunity only.

in regard to specific issues and questions; no adviser should have a blanket immunity from testifying.

(3) Clear and objective standards should be given for the situations in which exercise of the privilege is proper, although a certain amount of discretion must necessarily be left to the President, and to department heads.

(4) The privilege should be claimed only for advice given directly to the President or department head for governmental, as opposed to political or personal, acts. The distinction between "government" and "personal"/"political" acts is already made in statutes which regulate the use of the frank and in the Federal Communications Act's equal time provision.

(5) The President or department head should himself have to certify that the withholding of information is proper and give a statement of reasons for the withholding.

(6) Judicial review should be provided (with an expedited appeal) to resolve those cases where Congress challenges a claim of the privilege.

(7) The statute should clearly state that Executive privilege may not be claimed if illegal or criminal acts are the subject of Congressional questions. The rationale for Executive privilege simply does not cover advising a President to commit illegal acts. The necessity for empowering Congress to probe corruption in the Executive branch was aptly summarized by then-Congressman Nixon in 1948:

"The point has been made that the President of the United States has issued an order, that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.

"I say that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: that would mean that the President could have arbitrarily issued an Executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the Executive department and the Congress would have no right to question this decision." (*Congressional Record*, April 2, 1948.)

Mr. MOORHEAD. Well, Mr. Cohen, we certainly appreciate that comment and welcome the fact that Common Cause has made this a high priority item. I have not only great respect and friendship for you, but also for John Gardner, whom I like very much. I am glad to have him as an ally in our quest for answers to the problems that face us.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. MOORHEAD. I think I can assure you for every member of this subcommittee that our belief is that when you have three branches of government, as we do, there has to be accommodation and a recognition of courtesy between the branches. I think almost all of the executive branch recognizes it also, with the possible exception as expressed in the statement of the Attorney General before the Senate committee last week. So we are trying to work out something.

I think that your suggestions are excellent ones. There is one fundamental question that my good friend, Mr. Erlenborn, and I might have a slight disagreement on. You seem to be hedging up on his side of it.

Mr. COHEN. I think you had better probe a little.

Mr. MOORHEAD. This so-called doctrine of executive privilege does not exist as a legal doctrine, according to Harvard Professor Berger and other legal experts. But I would have to agree with Mr. Erlenborn that it does exist in a de facto situation. Do you think legislation should be drafted in a way that enshrines it in law, or should we not start more from the Fascell approach, which never mentions the term, as such, and just deals with making all information available to Congress by the Executive?

Mr. COHEN. Let me comment on that, because I found myself using words that I consciously avoided using when we wrote the testimony. That is, I think you will find nowhere in the testimony reference to executive privilege, at least in discussing the solutions that we want to deal with. I do not think you want to enshrine—I do not know what the answer to that is. I think what we are talking about, though, is being able to get information totally from every public official downtown, meaning everyone but the two elected officials, the President and the Vice President. I think we are clearly talking about that.

I think we are talking about one other thing. If you have an enforcement mechanism, you will have to be able to look behind the assertions. I think everyone agrees with that. But you have to be able to look behind the assertions. In other words, in Mr. Erlenborn's bill, there is reference to national security and I think we are all—whereas 10 years ago, one would accept the phrase "national security" without any question at all, I think all of us are familiar in the last 10 years that that phrase has been used to cover up things as well.

Mr. ERLENBORN. Could I interrupt for a moment, because we do not use national security. We say national interest.

Mr. COHEN. OK.

Mr. ERLENBORN. I think there is a valid distinction there.

Mr. COHEN. Right; although I think national interest could even be broader, is broader than national security.

Mr. ERLENBORN. OK.

Mr. COHEN. But as I understand the bill, I think there is no disagreement in any of these bills about the need to look behind that assertion. In other words, if the President says it and Congress disagrees, then you have to have some sort of an enforcement mechanism to make it, to see whether in fact the assertion is a valid one. And I think if those two points can be agreed upon, I think those are very, very fundamental points. Then I think whether you use the phrase or not becomes less important.

Mr. MOORHEAD. I am concerned that we might be giving up powers granted to the Congress as the "Grand Inquest of the Nation" by enshrining in law the term "executive privilege." That might mean to some to say: "You may be the Grand Inquest, but going only so far, not any further."

Mr. COHEN. Frankly, I would just as soon not use the words. But I think whether you use the words or not, you have to be able to have the capacity to look behind the assertion of whether it is executive privilege or whatever it is. I think that is critical.

In other words, we see the enforcement mechanism as one of the critical ingredients of this bill and because we are somewhat skeptical about the ability of the traditional enforcement mechanisms to work all by themselves, we would like to see this committee grope with another enforcement mechanism, the use of the courts and how you get that through the courts.

Mr. MOORHEAD. Because I mentioned Mr. Erlenborn and his bill, even though I have some more questions, I yield to him now.

Mr. ERLENBORN. Thank you very much.

It seems to me there is a basic question to be resolved. It is a difference of opinion that exists here in this committee and in the Congress

as to whether there is any limitation upon the right of Congress to get information from the executive branch. In a way, that skirts the issue. It is only a problem of semantics whether you call this executive privilege, limitation, or some other word or group of words, indicating that there is a limitation on the ability of the Congress to get information.

I would say the former chairman of this subcommittee, Mr. Moss, believes there is no limitation and should be no limitation, that there can be no area that would be sacred and inviolate from the Congress.

Mr. MOORHEAD. Except a self-imposed limitation.

Mr. ERLENBORN. Yes, except self-imposed. I think that is the first hurdle we have to get over in this legislative process whether we are going to say whatever Congress wants in the way of information, Congress is entitled to get without limitation, or whether we are going to draw very narrowly defined and narrowly construed limitations, an area where the President or an agency has to say, this is not within the ability of Congress. I think you have come down on the latter side, saying that there should be some very narrow area within which the Congress does not have the right to exercise its power.

Mr. COHEN. Except that I think I would respond by saying I would hope that would not be the first question that you deal with, because I think that—

Mr. ERLENBORN. Well, we are assuming that the first is agreed on, that all information should be made available to Congress. That is only the caveat. Whether there is an except in this area or no exception, that is really the thought. The first I think is assumed, everybody agrees free access to information should be within the power of the Congress.

Mr. COHEN. You are then talking about advice rather than information.

Mr. ERLENBORN. Yes.

Mr. COHEN. I think that is an important distinction and, yes, then we are coming down on the fact that there are some areas that relate to the President directly that could be excluded. But I think in the way this committee draws up the bill, we would hope that you would concentrate on the things that begin to unite you so that you go through that process, and then are dealing with the hard questions. They may be able to get resolved, because this is clearly the time to start working on this legislation. I mean, it is just one of those unusual opportunities for a whole variety of reasons.

Mr. ERLENBORN. My own feeling is the use of the term "executive privilege" in the law would be helpful to us in that there has been an area where information has not been made available to Congress based upon the claim of executive privilege. If we say there is such an area, and we define it, then a President could not define it because it would be statutorily defined. If we avoid the use of those words, I suppose the President will say: "Well, besides what is in the statute, there is also executive privilege."

In my opinion, there is a value to using those words and I know that some of my friends are getting a little bit hung up on that. When Clark Mollenhoff testified before the committee, I think he really agreed that there was some area of exception, but he did not want

to call it executive privilege because he hates the term. I do not think that is helpful to us, to get hung up on semantics.

I am very interested as a result of these hearings in the question of enforcement authority. None is in my bill and I thought the traditional enforcement authority was sufficient. I am beginning to change my mind on that. Let me ask you this:

Do you think that if we provide some judicial determination as to the claim of executive privilege, as to whether it falls properly within the law, should the safeguards around that access to the courts go through the whole House by resolution, or should we have access to the courts upon a resolution of, say, the full committee?

Mr. COHEN. We would be prepared to support the latter. In other words, you do not have to go through the whole House or the whole Senate. I think Congress works by committees and I think that would be sufficient.

Mr. ERLENBORN. Next, I think you have indicated that you think the committee should be able to have its own counsel to present its case in the courts.

Mr. COHEN. Yes, and that could be an employee of the House of Representatives and an employee of the Senate, or you could have arrangements as the House did in the *Powell* case of hiring outside counsel, as you do in the various cases involving Common Cause's lawsuits against the Clerk of the House on campaign spending. So clearly, I think whatever arrangements you make, you are entitled to have your own counsel and it ought to be effective counsel, so therefore, it ought to be employed by the House.

Mr. ERLENBORN. We do have precedent for the House as a whole employing counsel. I wonder if there is any precedent for a committee hiring counsel.

Mr. COHEN. I do not know if there is precedent for that, so I do not want to answer that question. So I think if this becomes statute and the point is that you build into it that the House can use counsel, it seems to me that the counsel the Government Operations Committee uses could be the same as the one that the Judiciary Committee uses. I do not think you necessarily have to have your own counsel.

Mr. ERLENBORN. I presume, however, that the law would have to authorize—

Mr. COHEN. Oh, yes.

Mr. ERLENBORN [continuing]. Authorize the committee to initiate suit, and second, authorize the counsel to act on behalf of that committee.

Mr. COHEN. Right.

Mr. ERLENBORN. Because I do not think there is a general provision—

Mr. COHEN. That is right.

Mr. ERLENBORN. Yes, and funds.

I do not know if you are able to answer this, maybe counsel for the committee can. Is the power of subpoena within the power of the committee or is it necessary for the committee to be authorized by the House to issue subpoenas?

Mr. COHEN. It is my understanding that the power of the subpoena is wholly within the power of the committee.

Mr. ERLENBORN. Then if there is a civil or criminal contempt procedure, it escalates and the power to enforce the subpoena lies only within the province of the House, not the committee individually.

Mr. COHEN. That is right.

Mr. ERLENBORN. Would giving the committee the power to initiate and conduct a lawsuit be somewhat unique in our history?

Mr. COHEN. It would.

Mr. ERLENBORN. You still think we should go that far?

Mr. COHEN. Yes. You see, I think what has happened, Congressman, is that you have an enormous tilting of the balance. Now, it did not just begin with President Nixon; it goes back a long way. It goes back 40 years. But this balance has tilted so much that in the effort of being accommodating in balancing things off, I think there is no reason that a committee which goes through the process of seeking information and is denied information cannot make the judgment to try to enforce that information, enforce that right by trying to get that information in a court hearing promptly.

One of the key things in this is that information that is not timely is not useful to your legislative function and I think, therefore, it does not bother me, this procedure, because it is not Congress that is sitting in judgment of its own assertion of a claim, it is a court that is sitting in judgment. I think that is a fair ground rule.

I would assume that you would not use this procedure all the time. There is a great advantage to having a lot of tools, because that helps keep the Executive on guard, and it provides an incentive to accommodate and, therefore, supply you with the information and the witness.

Mr. ERLENBORN. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Cohen, how is your time? Can we go over and vote and come back?

Mr. COHEN. I know you have to vote, so I am ready to stay here.

Mr. MOORHEAD. We have another witness following you, also.

The committee will stand in recess for a brief interval while we vote.

[A recess was taken.]

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

Mr. Cohen, are you familiar with the ground rules established by the Ervin committee in the Senate—the Ervin-Baker ground rules, I should call them? They are bipartisan.

Mr. COHEN. I have been reading them in the Times today.

Mr. MOORHEAD. Maybe you do not want to answer this right now, but I wonder if you would look them over and give us your opinion as to whether we ought to attempt to legislate those guidelines which appear to me to be excellent guidelines. They provide, among other things, that even if the President intends to assert executive privilege, let us say, with his personal aide if that aide is invited or subpoenaed to come before Congress, the aide must appear.

Mr. COHEN. I agree with that. That is very clear, that the personal, the eyeball-to-eyeball which you referred to earlier is healthy for our system. I think all this effort at some of the earlier negotiations of having the Watergate witnesses testify in closed session is a terrible mistake. Open hearing is what is needed. It is beneficial to the Congress and it is beneficial to the public.

And I want to go back to something that we just sort of mentioned earlier.

Mr. MOORHEAD. Could you pause just a minute, please?

[Discussion off the record.]

Mr. COHEN. We share that view. The more open this, the more open the discussion, the more that the public can watch and the press, the better. This goes back to the fact that the Congress in meeting its responsibilities and having its need to know fulfilled, that is really bound up with the public right to know. I think that is a very, very healthy step.

I do not know whether that is necessary to legislate or not. Let me throw out the possibility—well, in terms as it applies to the President, it is necessary to legislate. But some of the various ground rules it may be possible to engage in as rules of the House and the Senate. I do not know. Maybe we ought to take, reserve our opportunity to comment on that part more fully in the record.

Mr. MOORHEAD. We would welcome that.

Mr. COHEN. Right.

[Additional information subsequently submitted for the record follows:]

The question was also raised to whether it is desirable to define Executive privilege in a statute since this might legitimize as a right what has heretofore been an unrecognized and inchoate claim. In my testimony, I attempted to outline briefly the very sketchy historical support for the existence of such a privilege. However, since Article II, Section 1 of the Constitution requires the President to swear to "faithfully execute" the laws of the United States and since Congressional questioning of his immediate subordinate and Cabinet officers might obstruct the fulfillment of this duty, Common Cause believes that there is a very narrow area in which Executive privilege is properly asserted. Indeed, it seems to us that the Separation of Powers theory requires that the immediate subordinates of judges and legislators also be immune from interrogation about official advice concerning lawful acts by the Executive and by one another. If Congress defines by statute the narrow area in which the privilege is properly asserted and provides judicial review, the abuse of the privilege which has occurred in the recent past should be prevented. By providing justifiable standards, Congress will provide the courts with objective guidelines to determine the propriety of a claim of the privilege. Such standards will also enable the Executive branch to avoid hostile confrontations with Congress by defining in advance those circumstances in which Congress will accept the assertion of the privilege.

In my testimony, I outlined the circumstances in which Common Cause feels that a claim of Executive privilege should be recognized. It should be emphasized that most of the abuses of the privilege in recent years have not concerned the policy advice given by an immediate subordinate directly to the President concerning lawful activities. Instead, the privilege has been invoked to cover up facts which the Executive branch wished to conceal, such as secret agreements with Cambodia, the true cost of the TFX, and the extent of Army surveillance of civilian activities.

Neither H.R. 4938, H.R. 5983, nor H.R. 6438 contain any judicial mechanism to enforce compliance with the procedures in the bills, and it seems to us desirable that a bill governing Executive privilege contain a formal means of having a court resolve the conflicts that are bound to arise. Both H.R. 6438 and H.R. 4938 lack any specific enforcement mechanism, though the Erlenborn bill does require the President to file a formal claim of privilege. H.R. 5983 contains an extremely drastic sanction: if the House, Senate, or a committee of either requests information that is not provided, it may adopt a resolution which will prohibit any appropriated funds from being "obligated or expended directly or indirectly" by the agency "for the programs or activities in question."

The Senate Select Committee on Presidential Campaign Activities, established by S. Res. 60, to investigate the Watergate break-in and other matters, adopted on April 18 the following rule to govern Executive privilege claims:

"6. If the lawyer who accompanies a witness before the committee advises the witness to claim a privilege against giving any testimony sought by the committee, the committee shall have the discretionary power to permit the lawyer to present his views on the matter for the information of the committee, and the committee shall thereupon rule on the validity of the claim or its application to the particular circumstances involved and require the witness to give the testimony sought in the event its ruling on the claim is adverse to the witness.

"Neither the witness nor any other officer or person shall be permitted to claim a privilege against the witness testifying prior to the appearance of the witness before the committee, and the committee shall not rule in respect to the claim until the question by which the testimony is sought is put to the witness."

The rules adopted by the Senate Select Committee do not, however, explicitly provide a remedy for a case in which a witness refuses to answer a question after the Committee has ruled that the witness' claim of Executive privilege is inappropriate.

In the past, the normal way for a Congressional committee to deal with a witness who refused to answer a question has been to draft a contempt resolution which is passed by the appropriate House of Congress, recommending prosecution by the Justice Department. An indictment is then obtained, the witness is prosecuted, and, if convicted, a criminal contempt punishment (imprisonment) is imposed. Congress also has an ancient and well-established (though little used) power to punish directly for contempt. Last year, the Supreme Court declared in *Groppi v. Leslie*, 40 U.S.L.W. 4149, 4150 (1972) that "The past decisions of this Court expressly recognizing the power of the Houses of the Congress to punish contemptuous conduct leave little question that the Constitution imposes no general barriers to the legislative exercise of such power. E.g., *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)." As long as the requirements of due process are satisfied and the recalcitrant witness is afforded notice of the charges against him and an opportunity for a hearing at which he can state any defenses he may have, Congress may punish witnesses for contempt without going through the courts. Such punishment could presumably be either a fine or an imprisonment or the civil contempt sanction of incarcerating a witness until he answers responsively the questions put to him. Since a legislative trial is procedurally cumbersome, Congress has chosen to delegate its contempt powers to the federal courts in most cases, see 2 U.S.C. subsection 192-194, though the inherent power remains.

Common Cause believes that a bill governing Executive privilege should empower the Congressional body requesting information to go directly into federal district court to have the claim adjudicated in a civil suit after the statutory privilege is formally claimed by the President. The bill should: (1) invest the District Court of the District of Columbia with jurisdiction to hear such a claim; (2) provide for an expedited hearing and for expedited appeals to the District of Columbia Court of Appeals and to the Supreme Court; (3) authorize the committee or subcommittee counsel to prosecute the claim and appeal (and perhaps provide for the appointment of more lawyers, if necessary); and (4) explicitly state that this enforcement mechanism is only an alternative to the more traditional criminal contempt sanction, which is still available.

There are several advantages of using a civil suit to resolve controversies arising from a claim of Executive privilege.

1. It will be speedier than the current criminal contempt route—judicial review will be triggered at the request of a committee, and no lengthy proceedings (House or Senate resolution, referral to Department of Justice, grand jury indictment, criminal trial) are necessary.

2. Unlike the criminal contempt sanction, this method should result in Congress actually receiving information with the court's civil contempt power available, if necessary, to enforce the judicial decree.

3. The question of Executive privilege will be resolved by a neutral third branch of the government under standards set down by Congress, a resolution which should be more palatable to both Congress and the President than a unilateral decision by either of the involved branches.

4. A civil suit is a much less abrasive method of resolving a dispute between two branches of the government than a criminal contempt trial which might send a high Presidential adviser to jail on the resolution of Congress or a fund cutoff.

5. This mechanism bypasses the Department of Justice which is likely to be an interested party in such suits, supporting the witness it is supposed to prosecute.

I have appended to this letter a draft of a bill which we felt would adequately define and limit the scope of Executive privilege claims and would provide an effective civil suit enforcement mechanism. Please inform me if we can provide any further information or be of service to the Subcommittee in any other way.

I would appreciate your including the letter and bill as part of the hearing record. Thanks.

Sincerely,

DAVID COHEN,
Vice-President and Director of Operations.

Enclosure.

A BILL To amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 552 of Title 5 of the United States Code (the Freedom of Information Act) is amended by adding at the end thereof the following :

"(d) (1) 'Agency', as used in this subsection, means a department, agency, independent board, corporation, commission, instrumentality, or other authority of the Government of the United States (other than the Congress or courts of the United States), including any establishment within the Executive Office of the President.

"(2) Whenever either House of Congress, any committee or subcommittee thereof (to the extent of matter within its jurisdiction), or the Comptroller General of the United States, requests an agency to make available information within its possession or under its control, the head of such agency shall make the information available as soon as practicable but not later than thirty days from the date of the request unless in the interim a written statement is submitted by the President invoking Executive privilege as the basis upon which the information is being refused and describing the factual circumstances justifying the invocation of this claim.

"(3) Whenever either House of Congress or any committee or subcommittee thereof (to the extent of matter within its jurisdiction) requests the presence of an officer or employee of an agency for testimony regarding matters concerning the agency's actions, plans, or responsibilities, the officer or employee shall appear and shall supply all information requested, subject to the provisions of subsection (4).

"(4) Executive privilege shall be invoked only by the President in a signed written statement in which the factual circumstances justifying the invocation of the claim are described, and only in those instances in which (a) the requested testimony or documents contain policy recommendations concerning lawful acts within the jurisdiction of the agency made directly to the President or agency head, and (b) the President determines that disclosure of such information will seriously jeopardize the national security and his ability or that of the agency head to obtain forthright advice. Factual information underlying policy recommendations shall be made available in response to a request.

"(5) Whenever an agency or a witness pursuant to a request for information or testimony by either House of Congress or any committee or subcommittee thereof files a claim of Executive privilege pursuant to Section 4 of this title, and the requesting body determines that such claim is not authorized or justified, it may pass a resolution so stating and describing the reasons it believes the claim is not authorized or justified. Such a resolution may empower committee counsel, subcommittee counsel, or other designated counsel to file a civil suit in the District Court for the District of Columbia to compel the agency or witness to supply the requested information or testimony.

"(6) Whenever an agency or a witness pursuant to a request for information by the General Accounting Office files a claim of Executive privilege pursuant to Section 4 of this title, and the Comptroller General determines that such claim is not authorized or justified, he may formally request an appropriate oversight committee of either the Senate or the House of Representatives, in his discretion, to take appropriate action to secure the information requested. The committee shall consider and vote upon this formal request not later than thirty days after it is submitted by the Comptroller General.

"(7) The District Court for the District of Columbia shall have jurisdiction to entertain a suit brought by either a witness or agency claiming Executive privilege or by either House of Congress or a committee or subcommittee thereof

against which Executive privilege is asserted. The witness or agency asserting Executive privilege shall have the burden of proof of establishing by a preponderance of the evidence that the claim is justified and authorized by Section 4 of this title.

"(8) In an action brought pursuant to Section 7 of this title, it shall be the duty of the chief judge of the District of Columbia District Court (or in his absence, the acting chief judge) to designate a judge to hear and determine the case, and it shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause to be in every way expedited.

"(9) In an appeal from a judgment in an action brought pursuant to Section 7 of this title, the Court of Appeals of the District of Columbia shall set the case for hearing at the earliest practicable date and shall cause the case to be in every way expedited.

"(10) The Executive privilege provided by Section 4 of this title shall not be available to any person in any proceeding connected in any way with the impeachment or removal of the President, Vice President, or any civil officer of the United States.

"(11) Nothing in this title shall be construed to invalidate or limit any remedy or procedure whereby either House of Congress, or a committee or subcommittee thereof, heretofore had the power to compel the attendance and testimony of witnesses and the production of information or to punish contempts or noncompliance with subpoenas of witnesses or of information."

Mr. MOORHEAD. I know that former Justice Goldberg testified here in the last Congress that in his official capacity—whether he was Secretary of Labor or Ambassador to the U.N.—on numerous occasions, he gave very personal advice to a President of the United States, and that he never had any difficulty in appearing before the committees of the Congress. I think that, for example, Mr. Kissinger could come before congressional committees and there would be certain questions that he would clearly have no problem answering. There might be some questions that clearly, it would be most unwise, if we do have the power, to attempt to force him to answer. And then there might be some gray areas. But certainly, he should appear before congressional committees and not hide behind the White House form letter that we get so often, that states: "It is not the practice for assistants to the President to appear before congressional committees." It was not too important when such assistants had a very limited function, but now as their number and functions are expanded, I think it is important that they come before us.

Mr. COHEN. Let me just say I share that view completely and I really do not understand, I am really somewhat appalled at the mindlessness so often that is in the executive branch by officials not wanting to be able to discuss policy with legislators. I assume when you give the Kissinger example, we are really talking about policy questions, about what the rationale, the justification for the policy is. And by function, so many of these jobs are in fact not very much different from Cabinet-level and sub-Cabinet-level jobs, that such officials should be willing to discuss policy questions.

Mr. MOORHEAD. Not to impinge upon their motives, but I think they honestly think they can do a better job without us looking over their shoulder.

Mr. ERLENBORN. Would you yield?

Mr. MOORHEAD. Yes.

Mr. ERLENBORN. On that point, and that is why I asked the chairman to yield, I agree that anybody coming from the executive branch ought to be willing to justify their policy decision that they are carry-

ing out. But, when we talk about policy, you can imagine the scenario of having, say, it is Dr. Kissinger before a subcommittee and asking him what alternatives in the recognition of mainland China did you submit to the President? We know which one he finally chose, but what are the others that he rejected and why? Now that sort of inquiry I do not think is necessary in the legislative process, nor is it desirable.

Mr. COHEN. Well, I think alternatives are a terribly important point, especially when Congress has to make judgments as to—for example, take a bill that was before this committee that you had an active part in, the Consumer Protection Agency issue. Now, there very well may have been alternative suggestions on the administration's proposals in this area. It seems to me it is perfectly proper, and I would expect that the Congress has a right to ask of Mrs. Knauer or anybody else who appears before this committee what those were. I think it is possible to develop a kind of doctrine of common law as it applies to the national security field.

First of all, in the domestic field, I see no reason at all as to why we should not, why the Congress should not pursue the question of alternatives. I think there should be absolutely no limits at all.

In the foreign policy field, I think it is important for the Congress to be aggressive in this area, because too much too often has been done which, in the name of national interest or national security, is used to cover up matters which really do not adversely affect either the national interest or the national security. So I think the Congress ought to be aggressive in that area and I think by being aggressive, you will be able to delineate those matters which are properly Congress and those matters which may not be Congress.

I think Congress would be far better satisfied than to just allow the kind of situation in which in the name of national security or in the name of not wanting to discuss various policy alternatives, nothing gets discussed.

Mr. ERLENBORN. I must admit to some mixed emotions in this area. I have felt we were best served, for instance, by the policy of the administration not to tell the committees of Congress what the Secretary of HEW recommended to OMB as a funding level for a particular program, because thus, we were insulated from lobbying by the constituent agencies. So I do have some mixed emotions about this.

I like the policy of having the administration determine their priorities. We can change them and do our own job of investigating alternatives to the President's budget without going back and rehashing every decision made within the budgetary process.

Mr. COHEN. But you see, all I am suggesting is that the choice ought to be there for you to pursue.

Mr. ERLENBORN. I think we can always develop the information, you see. Again, I divorce policy recommendations from basic information.

Mr. COHEN. But I think Congress has to be aggressive in this whole area in order to begin to shift the information toward you. There is really a pretty gray line, often, between information and policy recommendations. We all know that.

Mr. ERLENBORN. Right.

Mr. COHEN. So my plea here is for Congress to be quite aggressive, because I think that is what is needed to begin to make the genuine information flow as a natural course.

Mr. ERLENBORN. I think our colleague has not had his chance yet.

Mr. MOORHEAD. Yes. Mr. Gude, if you do not mind, let me just ask this as a follow-on.

It seems to me as we start to draft this legislation, we should look closely at the Ervin-Baker ground rules. Executive privilege, if it exists, started with the Senator Joe McCarthy era, and as we know, hard cases make bad law.

Mr. COHEN. Right.

Mr. MOORHEAD. And this is bad law, if it exists at all. We have been successful in making our system of government work with divided power in legislative-executive relationships because the Congress has self-imposed some restraint. Often we have not pried too far or too deeply. What we would be doing in any legislation we might enact in this field would be to put that good, self-imposed restraint into legal language. The legal language of the Ervin-Baker ground rules is that when an executive witness comes up to the committee, he testifies on some questions, declines to on the others, asserting that he believes that if he went to the President, the President would assert executive privilege. The committee immediately withdraws to another room and votes on that assertion. If they vote that he should answer, then I think he ought to be under severe pressure to answer. But if he does not answer, if he refuses and if the claim is asserted that this is a confidential matter that Congress should not be going into, then and then only, would it go to court, with the burden of proof, by the vote of the committee, having been shifted to the witness. This is the way I am thinking at this particular moment. But as Mr. Erlenborn said, his opinions are in a state of flux, and so are mine.

Mr. Gude?

Mr. GUDE. Mr. Chairman, I wish to commend Dave Cohen, who always gives us good counsel up on the Hill here.

Mr. COHEN. Thank you.

Mr. GUDE. What sort of time frame should the Executive have in which to ascertain executive privilege?

Mr. COHEN. I do not know. It should not be limitless. I think it should probably be a range of time, but not more than, certainly, not more than 30 days, which I think has been suggested in your bill, Congressman Erlenborn.

I think there ought to be, somehow the norm ought to be developed for making the response quicker than that. Often, the information is there and there ought to be a premium placed on responsiveness by the executive branch. I think if the executive branch were more responsive to the Congress, I think there would be a byproduct of just some built-in respect and built-in confidence for Government as a whole. But certainly not more than 30 days.

Mr. GUDE. If we had a situation where a committee anticipated that the Executive was going to claim privilege, should we not possibly have a device in the legislation which would provide for the committee to submit the questions in advance to the Executive and then if the refusal came, the system could operate much more expeditiously? You would not have a 30-day delay there.

Mr. COHEN. Sure.

Mr. GUDE. This would be the spirit of what you are suggesting?

Mr. COHEN. Right. I think all of that would be—I think that is a very sound approach. Because I do not think the intent of Congress is to surprise witnesses, certainly, and you know when you have someone coming up who is a Peter Flanigan or a John Dean or something like that, that you are going to get into some gray areas at a minimum, so why not let him know in advance what some of your questions are?

Mr. GUDE. So that a written request could stand in lieu of confrontation here on the Hill.

Mr. COHEN. No, this is not to suggest that the witness does not show up. The witness shows up. I mean, he is sitting here as I am sitting here, but the witness has an advantage of knowing the kinds of questions that you are going to pursue with him.

Mr. GUDE. What I am saying is the witness has the advantage, but because of the prior knowledge, then the time in which the executive action would be taken would be short.

Mr. COHEN. Right. In fact, if the witness came and said, this question the President prohibits me from answering, the committee could meet and make its decision one way or another.

Mr. GUDE. Immediately go into action.

Thank you, Mr. Chairman.

Thank you, Mr. Cohen.

Mr. MOORHEAD. I will let Mr. McCloskey catch his breath a minute.

Mr. MCCLOSKEY. I do not think I have any questions, Mr. Chairman. Thank you.

Mr. MOORHEAD. I will ask a question and let you answer it for the record. Or maybe counsel can ask it for the record.

Would you review these bills to see if enactment would in any way inhibit the Congress from instituting an inquiry leading toward possible impeachment? We certainly do not want to give up our Constitutional rights, which I think even Attorney General Kleindienst agrees that we have.

Mr. COHEN. We will supply the answer to that; at least, our ideas as to what the answers are. But I want to say again that I do not think Congress should give up any power it currently has. We are really trying to figure out, I think, here how to orchestrate and begin to use some of the powers you do have.

For example, I would urge that somehow, you find a way of using that 1928 law. One of the reasons no one ever knew about it is that it has not been used. I am sure there are very legitimate reasons and ways of using the 1928 law.

[Additional information subsequently submitted for the record follows:]

It was a pleasure to testify before the Subcommittee on Foreign Operations and Government Information on April 19 concerning the Executive privilege legislation now pending, and I am happy to be able to supply you with the information which you requested during the hearing. As I indicated in my testimony, Common Cause believes that enactment of a statute which sharply limits the circumstances in which the privilege may be claimed is imperative. Although events of recent weeks have brought the controversy sharply into focus, the issue is a nonpartisan and long-standing one which concerns the ability of Congress to inform itself adequately so that it may legislate effectively.

A statute governing the claim of Executive privilege must not hamper the ability of Congress to obtain witnesses in any proceeding connected with the impeachment and trial of an Executive branch official. Article II, Section 4 of the Constitution provides that the President, Vice President, and "all civil officers of the United States" shall be removed from office after impeachment for, and conviction of, "Treason, Bribery, or other high Crimes and Misdemeanors." Article I, Section 2 provides that the House of Representatives shall have the sole power of impeachment, and Article I, Section 3 provides that the Senate shall have the sole power to try all impeachments, a two-thirds vote of the Senate being necessary to convict.

A recent House Judiciary Committee report describes the procedures normally followed in impeachment proceedings. *Legal Materials on Impeachment*, Special subcommittee on H. Res. 920 of the Committee on the Judiciary, 91st Cong., 2d Sess. (1970). An impeachment proceeding may be started by charges made on the floor of the House by a member, and it may also be initiated by a presidential message, a state legislature's resolution, a petition, or a memorial containing charges made under oath. Once charges are preferred, a standing or special committee of the House is designated to investigate and report. The official under investigation may be given an opportunity to appear at the committee hearings to testify, present evidence, and cross-examine witnesses. If the committee report prepared at the end of the investigation recommends impeachment, a proposed resolution is drawn up by the committee containing the articles (charges) of impeachment, and a majority vote of the House is then necessary to impeach. If impeachment is voted, several Representatives are designated as Managers to prosecute the case before the Senate. After the Senate has organized itself for trial and after each Senator has taken an oath, the impeached official is afforded an opportunity to appear, in person or by counsel, and answer the charges contained in the articles. After this pleading stage, the actual trial begins, at which witnesses are sworn and examined by the Managers. These witnesses may be cross-examined by the impeached official, and at the end of the Manager's case, the official may present his defense. Thereafter, a vote is taken on each article of impeachment.

In the 184-year history of the United States, there have been only 12 cases of impeachment at the federal level. Eleven of these resulted in Senate trials, but only four ultimately produced a conviction and removal. Among those impeached have been a President, a Senator, a Supreme Court Justice, a Cabinet member, a federal circuit court of appeals judge, and seven federal district court judges. There is no settled definition of what constitutes an impeachable offense, and controversy surrounds the question of whether the impeachment/removal power embraces acts of a nonindictable nature and whether it extends to non-official conduct. There have been few judicial decisions concerning the power of Congress to subpoena witnesses during these proceedings. In *Kilbourn v. Thompson*, 103 U.S. 168, 190, (1881), the Supreme Court held that the House of Representatives, when acting in impeachment proceedings, has the power to compel the attendance of witnesses, and there seems no reason to doubt that Congress has plenary authority to summon witnesses in a proceeding as important as an impeachment or removal action. In order to insure that Congress receives all relevant information in such proceedings, it would be desirable, we feel, for an Executive privilege law to provide explicitly that the statutory privilege therein defined is not available in federal impeachment/removal proceedings.

Mr. MOORHEAD. We invoked it, but we did not force it back in 1971 on our request for a set of the "Pentagon papers."

Mr. COHEN. Oh, well. I guess I should say invoke and enforce.

Mr. MOORHEAD. Thank you very much, Mr. Cohen, Ms. Keefer, Mr. Kendall.

Our next witness we would like to call to the stand will be Mr. Antonin Scalia, the Chairman of the Administrative Conference of the United States.

As I do so, Mr. Scalia, I want to apologize to you. You have been very patiently waiting here, but this is a day when we did not anticipate that the Congress would be called into session at 10 o'clock in the

morning or that we would have so much floor activity to concern ourselves with.

STATEMENT OF ANTONIN SCALIA, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. SCALIA. No problem at all, Mr. Chairman. We are all to a greater or lesser degree at the mercy of events. I must admit I was struck with a wry thought at your bemoaning your sometimes inability to get information from the executive branch while you had someone from the executive branch in the room dying to give you information. It was a feeling of wryness rather than any disturbance about it. I thoroughly understand.

Mr. MOORHEAD. I can assure you, sir, when the executive branch wants to give us information, they are always here. It is when they do not want to, that we have a little trouble.

You may proceed, Mr. Scalia.

Mr. SCALIA. Thank you. I will generally follow my written statement, but here and there, I may depart.

Mr. MOORHEAD. Without objection, we will see that your written statement is made part of the record in one way or the other.

Mr. SCALIA. Very good.

I appreciate the opportunity of appearing today to discuss certain aspects of the three pending House bills to amend the Freedom of Information Act by requiring provision of information to the Congress. The Administrative Conference has, as you know, a particular interest in any legislation amending the Administrative Procedure Act; and the freedom-of-information portion of the act has been one of our major areas of concern.

I want to make it clear that I am not here to speak to the broad issues of constitutional principle involved in this legislation. My agency has no particular expertise concerning those matters and I will express no opinion concerning them. I intend to discuss the various proposals not from the standpoint of what is constitutionally permissible, but from the standpoint of what is desirable for the administrative process as a whole. My purpose is to assist the committee in avoiding at least those difficulties that do not inhere in the object this legislation seeks to attain. I should also state at the outset, by way of disclaimer, that the Administrative Conference has, of course, taken no action as a body with respect to these legislative proposals; and I am speaking as Chairman of the Conference in pursuance of my statutory duties to provide information and advice to the Congress, but not on behalf of the entire Conference.

I think I can skip lightly over the portion of my statement that deals with a description of the proposed legislation. I think you are all well enough aware of the provisions of the three bills before you. I am happy to hear from Congressman Fascell's testimony this morning confirmation that his bill is verbatim the same as Congressman Erlenborn's, except for deletion of the exemptions. Congressman Reid's bill, H.R. 5983, is different from the other bills in that it provides an enforcement mechanism and specific sanctions for noncom-

pliance, and a procedure for ascertaining whether the information requested has indeed been provided.

I might point out one thing about that bill, however, that does not leap out at one quite as quickly. That is, that it applies, unlike the other two, to the very person of the President. There are two respects in which that bill is less sweeping than 4938 and 6438. The information under the Reid bill cannot be requested by the General Accounting Office; the request must come from Congress or a congressional committee. Another respect in which it is less sweeping is that it only requires the furnishing of information, whereas both the other two require not just the furnishing of information but actual testimony.

Both of the two bills that contain provision for exemption from the requirement to disclose, contain an exemption which is based on what might be called an executive-privilege-type rationale. There are various rationales that have been asserted in the past in connection with executive privilege—four principal ones. Three of them are not mentioned in any of the bills, although they have been mentioned in some of the testimony today. One is the claim of executive privilege by reason of the military function of the Executive; the second concerns foreign affairs; and the third the "investigatory" function. The fourth, executive-privilege-type exemption which has sometimes been claimed in the past is recognized in two of the three bills, and that is the exemption based upon the capacity of disclosure requirements to impair the operation of the executive branch by making it more difficult to obtain forthright advice and forthright recommendations from subordinates.

There is, however, another area in which there is certainly some question whether the Congress ought regularly to require disclosure from the executive branch. This area has nothing to do with what is generally referred to as executive privilege. It concerns the quasi-judicial area.

Some of the work of many agencies, as you know, is quasi-judicial rather than executive in character. It is likely that the doctrine of executive privilege has no application to the quasi-judicial activity of independent regulatory agencies, or even perhaps of executive departments. (This at least was the position of the Department of Justice under the Eisenhower administration.) Yet, if anything, it seems to me, there is greater justification for withholding information from Congress when that information pertains to specific adjudicatory proceedings before an agency than when it relates to an agency's executive or quasi-legislative activities. Fair and impartial performance of the adjudicative function is possible only in an atmosphere of independence from congressional as well as Presidential oversight. All three pending bills recognize the importance of judicial independence by specifically exempting the courts of the United States from their definition of "agency." In my view, it is equally important for Congress to respect the independence of administrative agencies when they are performing functions of an adjudicatory nature.

This view is not without precedent. In 1958, Attorney General Rogers, while expressing the opinion that executive privilege does not apply to quasi-judicial functions, went on to observe that "whenever an agency is exercising its judicial function by deciding an ad-

versary proceeding before it, it should be just as free from any demands from Congress or the executive branch as the court would be." Whether or not one would wish to go that far, it seems to me clear that agency adjudication should be accorded a special protection that is not only separate in its theoretical justification from the protections generally associated with executive privilege, but may also be more extensive in its concrete scope as well. For example, one might well consider it appropriate to exempt an administrative law judge from the obligation of appearing for testimony regarding a pending case even though one is unwilling to confer such immunity from appearance upon executive officers generally.

I am not suggesting, however, that this quasi-judicial privilege be written into the statute with great specificity; its exact scope would be extremely difficult to define. Whether it should apply only to formal proceedings conducted in accordance with sections 556 and 557 of the Administrative Procedure Act, or to some informal proceedings as well; to all formal agency proceedings or only to those that the APA would strictly classify as adjudication; to all formal agency adjudications or only those subject to the separation of functions requirement of section 554(d); to all cases, or only those cases still pending; to only information concerning substance or to procedural matters as well—frankly, all those are knotty questions better left to be decided as occasion arises. I think it would suffice to include within the present bills language to the effect that nothing in them is intended to sanction a request, or to require a disclosure, that would impair the integrity of any adjudicatory proceeding. Beyond that, I think the independence of the agency adjudicative process must depend for its protection upon the good sense and restraint of Congress and its committees rather than upon elaborate statutory safeguards.

I would next like to speak to the exemptions from disclosure that are contained within two of the three pending bills. I am frankly somewhat unclear as to how I should approach the topic, given the restriction which I sought to impose upon the scope of my testimony at the outset of my remarks; that is to say, if the exemption is intended to be merely an expression of what the drafters of the bills consider the constitutionally required exemption of executive privilege, if that is what it is intended to be, I have no comment.

I am not an authority on that subject. One of the two bills containing an exemption, however (H.R. 5983), specifically abjures recognition of any executive privilege; and it may be that the exemption contained in the other bill (H.R. 4938), is intended as an expression of what type of limitation is desirable rather than what type is constitutionally required. I would like to speak, therefore, to the effectiveness of these provisions in assuring the apparently desired goal of protecting the full and efficient provision of advice within administrative agencies.

First of all, let me discuss the limitation of these exemptions to agency heads. Full and forthright advice is needed at lower levels of the administrative agencies as well—where, indeed, the vast bulk of actual decisions, practically speaking, are made, and where also (among the career civil service), a chilling effect of requiring disclosure is much more likely to occur. What I mean by that is when

you are dealing at the higher levels, I do not think there is as much of a risk of intimidating advisers as there is when subpoenaing or requesting information on the advice given by lower level officials who happen to be career civil service people. I think frankly, the risk of intimidation there is much greater.

The existing provisions of the Freedom of Information Act recognize this fact by exempting from public disclosure "interagency or intra-agency memorandums or letters * * *" (5 U.S.C. sec. 551(a) (4)). This exemption has, I take it, the very same purpose of encouraging forthright advice as does the exemption now under discussion; and it applies not merely to memoranda addressed to agency heads but to all interagency and intra-agency memorandums. If the exemption in the present bills is intended to set forth the generally desirable limits of compulsory disclosure with due regard for the advice-giving function, I do not see why it does not extend as far down within the agencies as the existing Freedom of Information Act provisions.

The foregoing point is so obvious that I am sure the draftsmen of the bills have considered it and for some reason decided only to protect the highest level. I would like to call to your attention, however, an anomaly that may not be so apparent: The highest level advice, which is apparently what is sought to be protected—is identified in both bills by reference to the definition of agency. It is agency heads who are accorded the privilege. This is in fact an exceedingly crude mechanism for identifying what is high level advice, and it may not, it seems to me, succeed in achieving that purpose. I believe, for example, that under the language of these bills, the head of the water department of the District of Columbia may be accorded the privilege and the Deputy Attorney General of the United States will not be. For the purposes at hand—if your object is to insulate only high-level advice—I do not think reliance upon the concept of agency head is the appropriate way to go about it.

I would next like to speak to the dichotomy that these exemptions draw between recommendations and factual information. Again I am speaking on the assumption that these provisions are not seeking to set forth what the Constitution requires, but are seeking to set forth what is generally desirable. As an example of the type of high-level advice sought to be encouraged by these exemptions to the disclosure provisions, let us consider advice to the Secretary of the Interior concerning the need for increased offshore oil leasing. I presume that the rationale of the exception from disclosure is that if the blame for a mistake in that matter were to be laid on the shoulders of an adviser rather than of the ultimate decisionmaker—in this case the Secretary—advisers would be more timid and less likely to speak freely. But for that purpose, should it really make any difference whether the statement made to the Secretary by his adviser is "Mr. Secretary, do not open any more areas for leasing" or rather "Mr. Secretary, current domestic oil supplies are adequate." The former would clearly qualify as a recommendation and be exempt from disclosure under the two bills that contain provision for exemption; the latter would—unless the distinction between, advice, recommendation or suggestion, and, factual information, is interpreted in such a fashion as to be entirely meaningless—be categorized as mere information, not entitled to the privilege. Yet, would the chilling effect upon the provision of useful

assistance to the Secretary be any less in the latter case than in the former? I think not.

The fundamental problem with basing the exemption upon a distinction between advice, recommendation, or suggestion, on the one hand and, factual information on the other, is twofold. First, it is exceedingly difficult to distinguish between the two—and indeed, in many cases, the distinction may in many cases amount to little more than the form of words used. Second and more important, according different treatment to an adviser's advice, recommendation, or suggestion, and an adviser's reporting of factual information, is simply unreal for the purposes at hand. Both information and recommendations are needed by the decisionmaker; and both recommendations and information require the exercise of judgment on the part of the person who presents them—and that judgment in both cases may be subject to national criticism if it is compelled to be revealed to the Congress. The person who counsels the President or a high-level official is surely responsible not merely for the soundness of his recommendations, but also for the accuracy of the facts he presents, and for the selection of those particular facts over others which he might have presented instead. It seems to me, therefore, that an attempt to protect the advisory process by exempting only recommendations and not information is unsound on both conceptual and practical grounds.

Here, I agree with what is sought to be achieved, but I think that there is another way to do it, which way is contained within the present provisions of the Freedom of Information Act. The critical question is not whether the information sought is "recommendations" or "factual data." Rather, it is whether what is being inquired into is the character of information that the agency possesses which the Congress should have, or the nature of agency's decisionmaking process. The latter, namely, an inquiry into the nature of the decision-making processes, embraces not merely "what recommendations did X make to the Secretary?" but also "what facts in the agency's possession did X place before the Secretary?" A probing into the nature of the decisionmaking process occurs not merely when you ask the question, "What did you recommend?" but it also occurs when you ask the question, "What facts in the agency's possession did you place before the Secretary?" The existing provisions of the Freedom of Information Act apply this distinction by excluding interagency or intra-agency memoranda or letters from public disclosure. If the desired purpose of the present exemption is to protect the integrity of the administrative decisionmaking process, which is, I gather it is, it seems to me a similar exclusion of interagency and intra-agency communications would be appropriate. Bear in mind that this would not prevent a congressional committee from obtaining all data that an agency possesses, but only from requiring disclosure of who told what particular data to whom.

Mr. MOORHEAD. Let me see if I understand you correctly. You say, this is information given by Mr. Jones, and we just snip off the part that says "Mr. Jones," then the full memorandum of recommendations, advice, and everything, should be available?

Mr. SCALIA. Oh, sure.

Mr. MOORHEAD. Fine.

Mr. SCALIA. The question is not whether it is a factual matter, the critical question is whether you are seeking to obtain what somebody told somebody else. If that is what you are after, the custody provisions of the Freedom of Information Act would not allow it to be disclosed. If what you are after is simply what are the facts concerning this issue, that can be obtained without any problem.

Mr. MOORHEAD. I will let you proceed. I should not have interrupted you.

Mr. SCALIA. I will go into it further if any of you desire. Is there any other lack of clarity on that point? It may be conceptually confusing. Let me make it clear I am not saying there is any factual information you cannot get. What you cannot get is disclosure of who told what factual information to whom and it seems to me that is not ordinarily what you are after. You want to know the facts that the executive branch knows about a particular issue, not who told what facts to whom else.

Mr. GUDE. Suppose the particular person who is making the particular recommendation way down in the department was an expert in the particular field in the fact that he was not only conveying information but also the fact that, because of his expertise, his recommendation carried greater weight than if "Joe Smith" made the recommendation. In other words, a man has expertise, let us say, in the field of atomic energy. Then such an individual who made the recommendation in the department would make a difference, would it not?

Mr. SCALIA. I think the Congress, under the existing type of exemptions in the Freedom of Information Act, if you applied them to this new area, would be able to call this gentleman up and say: "What is your view of this, that, or the other thing?" The only thing it would not be able to ask him is what did you tell the Secretary about this, that, or the other thing—even though what he told the Secretary was not: "Mr. Secretary, I recommend that you do this," but rather "Mr. Secretary, we have enough oil," or some other factual matter. You would still be able to call him up and get his factual views. You just would not be able to get the manner in which or to whom he revealed those views within the agency. You would not be able to get into the nature of the agency decisionmaking process, which is what I take it the intention of this exemption is—to leave that in an area of privacy where it ought to be.

Mr. MOORHEAD. Just for the record, to be sure there is not any confusion, of course, the exemptions under the Freedom of Information Act do not now apply to Congress?

Mr. SCALIA. No, sir; I understand. I am just speaking to what results are if you take those exemptions and apply them to this new area. But it seems to me the purpose of those existing exemptions is exactly the same as the basic purpose that you are trying to get at—or these two bills are trying to get at—by making an exemption for recommendations I just think that is the wrong way to go at it for several reasons that I have indicated—one, that it is hard to tell a recommendation from a factual disclosure to begin with, and more important, that there is really no distinction between the two as far as the importance to the administrator of having forthright disclosure from his subordinates is concerned. He must have them speak freely about their esti-

mation of the facts, just as he must have them speak freely about their recommendations.

Now, the exemption provision contained in H.R. 4938 makes some attempt to protect information that is not recommendations—but only in the situation in which the requested information or testimony contains policy recommendations. As my preceding comments indicate, I do not think this narrow protection is enough; some information entirely unconnected with policy recommendations should be protected as well, if the object is to encourage the kind of advice-giving essential for efficient operation of administrative agencies.

I think the Congress should be able to get the information, but not to whom the information was conveyed by whom. Beyond that, there is a considerable practical problem which I might note in this provision of H.R. 4938. How is it to be determined whether "the requested information or testimony contains policy recommendations?" What is the relevant body of material that must be examined in order to find the presence of one policy recommendation that will exempt the entire body? If the Congress asks the Secretary of the Interior, for example, for all documents concerning the domestic supply of oil in the current year, surely at least one of that body of documents will contain a policy recommendation. Will this suffice to bring the entire body initially within the exemption? Can Congress avoid the problem by the simple device of requesting only "such documents pertaining to the domestic supply of oil in the current year as do not contain policy recommendations?" I frankly find the provision confusing, and I think the difficulty of implementing it is another practical reason for abandoning the attempted distinction between recommendations and information.

I would next like to address the application of these exemptions to independent regulatory agencies. The applicability of executive privilege, whether you believe in it or not, to independent regulatory agencies has been a subject much debated. Many students of the problem have taken the position that a constitutional doctrine resting upon the principle of separation of powers and upon respect for the prerogatives of the Presidency as a coordinate branch of Government, logically has no application to agencies that are not within the executive branch or subject in general to Presidential control—agencies, indeed, that are often conceived of as "arms of Congress." Others have argued that the executive privilege does apply to independent agencies, at least with respect to their executive and administrative functions. As I have repeatedly indicated, I hope not to enter this fray. Whether or not the privilege is available as a strict constitutional matter, however, it seems to me clear that the practical considerations justifying the exemption of certain information from compulsory disclosure to Congress apply with no less force to independent regulatory agencies than they do to executive branch agencies. The present bills are, therefore, on solid ground in extending to the independent agencies the privilege of nondisclosure they contain. There are, however, certain peculiar problems raised by the application to the independent regulatory agencies of the specific limitations upon the privilege and the prescribed procedures for invoking it.

Both H.R. 4938 and H.R. 5983 require that the privilege be invoked by the President himself rather than by the head of the agency to

whom the request for information is addressed. It is not immediately clear why the signature of the President should be necessary in order for the Chairman of the Federal Communications Commission to invoke a privilege not to disclose internal communications between him and his staff. The Presidential role is understandable if the privilege is intended to be no broader than what is thought required by the constitutional separation of powers. If, on the other hand, as I have assumed elsewhere in this testimony, the bills are intended to specify what is generally desirable rather than what is strictly required, it is both more seemly and more efficient to permit the agency heads of at least independent regulatory agencies to assert the privilege on their own behalf. Indeed, from the standpoint of pure desirability, some would question whether the President should be permitted, let alone required, to speak for the independent regulatory agency in the matter of the privilege. Where Congress has requested information relating to internal communications between the head of an independent agency and his staff, and where the agency head is prepared to comply with that request, believing that disclosure would not jeopardize the national interest or the agency's future ability to obtain forthright advice, the President's ability to prevent such disclosure surely lessens the "independence" of the agency—and casts doubt upon its sometimes alleged status as an "arm of the Congress." The situation is altogether different, of course, if the request is for information communicated to the independent agency or its staff by persons in the executive branch; then the President clearly should have the same power to invoke executive privilege he would have if the congressional request had been addressed instead to the executive branch agency which originated the communication.

I trust I have made myself clear on that distinction. Where what is sought is information or a communication that came to the independent regulatory agency from an executive branch agency—there, I think it is perfectly all right to apply the same mechanism for invoking privilege as one would apply to the executive branch agency from which the communication came. But when you are dealing solely with communications within an independent regulatory agency, I think you should consider, at least, whether you want to require the head of that agency to have the consent of the President for the exercise of the privilege.

One final point deserves to be made with respect to the application of the exemption to independent regulatory agencies: If it is decided to limit the scope of privilege to information provided to agency heads—a decision which, as I indicated before, I do not agree with—there should at least be some special provision for those collegial agencies in which, although the administrative management is conferred upon a chairman, the major policy decisions are made under the rule of one man, one vote. And I refer to all the independent regulatory agencies in that context. There is no reason why advice provided to a Commissioner of the FCC in assisting him to cast his one vote should be any less privileged than the advice given to the chairman in assisting him to cast his one vote.

Finally, I would like to discuss some technical aspects of the exemption provisions. H.R. 4938, after exempting factual information

or testimony which "contains policy recommendations" seeks to re-claim much of what has been exempted through the following language: "To the extent possible, however, factual information underlying policy recommendations shall be made available in response to a request." To begin with, it would seem that in order to achieve the desired purpose the phrase "factual information underlying policy recommendations" should read instead "factual information contained in the same information or testimony with policy recommendations," in order to track the earlier language. But more important than that, this exception to the exemption is exceedingly unclear in its application because of the introductory phrase "to the extent possible." Surely this does not refer to physical possibility. Does it mean "to the extent possible without seriously jeopardizing the national interest and the ability to obtain forthright advice"? Or does it mean "to the extent possible without disclosing the policy recommendations contained in the information or testimony"? The two meanings are quite different, and the difference is much more than theoretical. The President might well deem the disclosure of a particular piece of factual information to be seriously hazardous to the national interest even though it does not necessarily reveal the nature of a policy recommendation.

I am perplexed, as one of your earlier witnesses was, by the double finding that the President must make in order to invoke the exemption provision of H.R. 4938—to wit, that disclosure of such information will "seriously jeopardize national interest and his ability or that of the agency head to obtain forthright advice." If the word "and" means what it says, it is not enough that the President find that the disclosure of information would seriously jeopardize the national interest. Having made that finding—which I would have thought would be the supreme finding under any scheme—he must also find that disclosure would seriously jeopardize his ability or the ability of an agency head to obtain forthright advice. It is certainly a strange second step to have to take; rather like finding that something is impossible and that it is in addition too expensive. I have a few other technical points, gentlemen, but I think I will just leave that to my written testimony, because they begin to draw the wire rather fine.

I again express my appreciation for the opportunity to give you my views on this important legislation and will be pleased to answer any questions you may have.

[Mr. Scalia's prepared statement follows:]

PREPARED STATEMENT OF ANTONIN SCALIA, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I appreciate the opportunity of appearing before you today to discuss certain aspects of the three pending House bills to amend the Freedom of Information Act by requiring provision of information to the Congress. The Administrative Conference has, as you know, a particular interest in any legislation amending the Administrative Procedure Act; and the freedom-of-information portion of the Act has been one of our major areas of concern.

I want to make it clear that I am not here to speak to the broad issues of constitutional principle involved in this legislation. My agency has no particular expertise concerning those matters and I will express no opinion concerning them. I intend to discuss the various proposals not from the standpoint of what is constitutionally permissible, but from the standpoint of what is desirable for

the administrative process as a whole. My purpose is to assist the Committee in avoiding at least those difficulties that do not inhere in the object this legislation seeks to attain. The Administrative Conference has of course taken no action as a body with respect to these legislative proposals; the comments which follow are those of my Office, in pursuance of its responsibility to advise the Congress with respect to matters of administrative procedure.

I. DESCRIPTION OF PROPOSED LEGISLATION

It might be well at the outset to compare briefly the three bills you have before you. The simplest, and the one concerning which I will have the least to say, is H.R. 6438, which merely requires all agencies to make available information requested by either House of Congress, any Congressional committee or the Comptroller General, and requires all agency officers and employees to appear for testimony at the request of either House of Congress or any Congressional committee. "Agency" is defined to mean "a Department, agency, instrumentality, or other authority of the Government of the United States (other than the Congress or Courts of the United States), including any establishment within the Executive Office of the President."

The second bill, in ascending order of complexity, is H.R. 4938. This is verbatim the same as H.R. 6438, except that it contains a provision and a procedure for the withholding of certain information and testimony involving "policy recommendations" to the President and agency heads when executive privilege is invoked by the President.

H.R. 5983 differs from both the other bills in the obvious respect that it provides specific procedures for ascertaining compliance with the requirement of disclosure, and specific sanctions (the withholding of agency funds) for non-compliance.

It also differs from the other two in the less obvious respect that it applies the requirements of disclosure not merely to "agencies" as defined in the other bills but also to the President himself. Like H.R. 4938, H.R. 5983 contains a provision and procedure for exemption from disclosure of recommendations made to the President and to agency heads—though unlike that other bill it does not use the term "executive privilege" and indeed explicitly disavows any endorsement of that concept. There are two respects in which H.R. 5983 is less sweeping than the other two bills: First, the request for information must come from the Congress or a Congressional committee; a request from the General Accounting Office does not call its provisions into play. Secondly, the bill only requires the furnishing of information, and not the appearance of any person for testimony.

II. NECESSITY OF EXEMPTION FOR QUASI-JUDICIAL PROCEEDINGS

As the foregoing description indicates, none of the three bills contains an exemption for all of the areas in which "executive privilege" has in the past been asserted. These include not merely the area of information relating to the "advice-giving" function, but also information relating to the conduct of foreign affairs, military defense and investigative activities. I do not wish to speak to the absence of exemptions for those last three areas—they are all what might be called "substantive" areas of privilege, relating to particular fields of activity rather than the administrative process as a whole. The Departments of State, Defense, and Justice will presumably give you their expert views. The first of these areas—the exemption for the "advice-giving" function, which is contained in two of the bills—I will discuss later on. I now direct my comments to an area of exemption that has nothing to do with executive privilege, but that is nonetheless highly deserving of consideration in connection with this legislation.

Some of the work of many agencies is quasi-judicial rather than executive in character. It is likely that the doctrine of executive privilege has no application to the quasi-judicial activity of independent regulatory agencies, or even perhaps of executive departments. (This at least was the position of the Department of Justice under the Eisenhower Administration.) Yet, if anything, there would seem to be greater justification for withholding information from Congress when it pertains to specific adjudicatory proceedings before an agency than when it relates to an agency's executive or quasi-legislative activities. Fair and impartial performance of the adjudicative function is possible only in an atmos-

phere of independence from Congressional as well as Presidential oversight. All three bills recognize the importance of judicial independence by specifically exempting the courts of the United States from their definition of "agency." In my view, it is equally important for Congress to respect the independence of administrative agencies when performing functions of an adjudicatory nature.

This view is not without precedent. In 1958, Attorney General Rogers, while expressing the opinion that executive privilege does not apply to quasi-judicial functions, went on to observe that "whenever an agency is exercising its judicial function by deciding an adversary proceeding before it, it should be just as free from any demands from Congress or the executive branch as the court would be." (Hearing on S. 921 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, p. 23, 85th Cong., 2d Sess.) Whether or not one would wish to go that far, it seems to me clear that agency adjudication should be accorded a special protection that is not only separate in its theoretical justification from the protections generally associated with executive privilege, but may also be more extensive in its concrete scope as well. For example, one might well consider it appropriate to exempt an Administrative Law Judge from the obligation of appearing for testimony regarding a pending case even though being unwilling to confer such immunity from appearance upon executive officers generally.

I do not suggest, however, that this "quasi-judicial privilege" be written into the statute with great specificity; its exact scope would be extremely difficult to define. Whether it should apply only to formal proceedings conducted in accordance with §§ 556 and 557 of the Administrative Procedure Act or to some informal proceedings as well; to all formal agency proceedings or only to those that the APA would strictly classify as "adjudication"; to all formal agency adjudications or only those subject to the separation of functions requirement of § 554(d); to all cases, or only those still pending; to only information concerning substance or to procedural matters as well—all those are knotty questions better left to be decided as occasion arises. I think it would suffice to include within the present bills language to the effect that nothing in them is intended to sanction a request, or to require a disclosure, that would impair the integrity of any adjudicatory proceeding. Beyond that, I think the independence of the agency adjudicative process must depend for its protection upon the good-sense and restraint of Congress and its committees rather than upon elaborate statutory safeguards.

III. EXEMPTIONS FROM DISCLOSURE

The next important topic to which I would like to address myself is the scope of the exemption from the requirement to provide information in those two bills that contain such an exemption. I am frankly somewhat uncertain how to approach this topic; given the restriction which I sought to impose upon the scope of my testimony at the outset of my remarks. That is to say, if the exemption is intended to be merely an expression of what the drafters of the bills consider the constitutionally required exemption of executive privilege, I have no comment. I am not an authority on that subject. One of the two bills containing an exemption, however (H.R. 5983), specifically abjures recognition of any executive privilege; and it may be that the exemption contained in the other bill (H.R. 4938) is intended as an expression of what type of limitation is desirable rather than what type is constitutionally required. I would like to speak, therefore, to the effectiveness of these provisions in assuring the apparently desired goal of protecting the full and efficient provision of advice within administrative agencies.

A. Limitation to agency heads

I may note, to begin with, that the exception in both bills applies only to recommendations or advice given to the President himself or to any "agency head." But full and forthright advice is needed at lower levels of the administrative agencies as well—where, indeed, the vast bulk of actual decisions, practically speaking, are made, and where (among the career civil service) a "chilling effect" is much more likely to occur. The existing provisions of the Freedom of Information Act recognize this fact by exempting from public disclosure "inter-agency or intra-agency memorandums or letters. . ." (5 U.S.C. § 551(a)(4)). This exemption has, I take it, the very same purpose of encouraging forthright advice as does the exemption now under discussion; and it applies not merely to memoranda addressed to agency heads but to all inter- and intra-agency

communications. If the exemption in the present bills is intended to set forth the generally desirable limits of compulsory disclosure with due regard for the advice-giving function, I do not see why it does not extend as far down within the agencies as the existing Freedom of Information Act provisions.

The foregoing point is so obvious that I am sure the draftsmen of the bills have considered it and for some reason decided only to protect the highest level. I would like to call to your attention, however, an anomaly that may not be so apparent: The "highest level" advice is sought to be identified in both bills by reference to the definition of "agency." It is "agency heads" who are accorded the privilege. This is in fact an exceedingly crude mechanism for achieving the end desired, and may not, it seems to me, succeed in accurately identifying those officials whose sources of advice you would like to protect. I believe, for example, that under the language of these bills the head of the Water Department of the District of Columbia may be accorded the privilege and the Deputy Attorney General of the United States will not be. For the purposes at hand—if your object is to insulate only high-level advice—I do not think reliance upon the concept of agency is appropriate.

B. Dichotomy between recommendations and factual information

Another undesirable characteristic of the exceptions to disclosure (always assuming that they seek to set forth limitations reasonable to achieve full and forthright professional advice, rather than bare constitutional minimums) is the dichotomy that they seek to draw between "advice, recommendation, or suggestion" on the one hand and "factual information" on the other. As an example of the type of high-level advice sought to be encouraged by these exceptions, let us consider advice to the Secretary of the Interior concerning the need for increased offshore oil leasing. I presume that the rationale of the exception from disclosure is that if the blame for a mistake in that matter were to be laid on the shoulders of an adviser rather than of the ultimate decision maker (in this case the Secretary) advisers would be more timid and less likely to speak freely. But for that purpose, should it really make any difference whether the statement made to the Secretary by his adviser is "Mr. Secretary, do not open any more areas for leasing" or rather "Mr. Secretary, current domestic oil supplies are adequate"? The former would clearly qualify as a recommendation and be exempt from disclosure under the two bills that contain provision for exemption; the latter would (unless the distinction between "advice, recommendation or suggestion" and "factual information" is interpreted in such a fashion as to be entirely meaningless) be categorized as mere information, not entitled to the privilege. Yet would the "chilling effect" upon the provision of useful assistance to the Secretary be any less in the latter case than in the former?

The fundamental problem with basing the exemption upon a distinction between "advice, recommendation or suggestion" and "factual information" is two-fold. First, it is exceedingly difficult to distinguish between the two—and indeed the distinction may in many cases amount to little more than the form of words used. Secondly and more important, according different treatment to an adviser's "advice, recommendation or suggestion" and an adviser's reporting of "factual information" is simply unreal for the purposes at hand. Both information and recommendations are needed by the decision maker; and both recommendations and information require the exercise of judgment on the part of the person who presents them—which judgment may be subject to national criticism if it is compelled to be revealed to the Congress. The person who counsels the President or a high-level official is surely responsible not merely for the soundness of his recommendation, but also for the accuracy of the facts he presents, and for the selection of those particular facts over others which might have been presented. It seems to me, therefore, that an attempt to protect the advisory process by exempting only recommendations and not "information" is unsound on both conceptual and practical grounds.

Here, as in the area of the level of Government to which the privilege should extend, I think a more sound approach is contained in the present provisions of the Freedom of Information Act. The critical question is not whether the information sought is "recommendations" or "factual data." Rather, it is whether what is being inquired into is the character of information that the agency possesses or the nature of the agency's decision-making process. The latter will embrace not merely "what recommendations did X make to the Secretary?" but also "what facts in the agency's possession did X place before the Secre-

tary"? The existing provisions of the Freedom of Information Act apply this distinction by excluding "inter-agency or intra-agency memoranda or letters" from public disclosure. If the desired purpose of the present exemption is to protect the integrity of the administrative decision-making process, it seems to me a similar exclusion of inter-agency and intra-agency communications would be appropriate. This would not prevent a Congressional Committee from obtaining all data that an agency possesses, but only from requiring disclosure of who told it to whom.

The exemption provision contained in H.R. 4938 makes some attempt to protect information that is not "recommendations"—but only in the situation in which "the requested information or testimony contains policy recommendations." As my preceding comments indicate, I do not think this narrow protection is enough; some information entirely unconnected with "policy recommendations" should be protected as well, if the object is to encourage the kind of advice-giving essential for efficient operation of administrative agencies. But beyond that, there is a considerable practical problem in this provision of H.R. 4938. How is it to be determined whether "the requested information or testimony contains policy recommendations"? What is the relevant body of material that must be examined in order to find the presence of one policy recommendation that will exempt the entire body? If the Congress asks the Secretary of the Interior, for example, for all documents concerning the domestic supply of oil in the current year, surely at least one of that body of documents will contain a policy recommendation. Will this suffice to bring the entire body initially within the exemption? Can Congress avoid the problem by the simple device of requesting only "such documents pertaining to the domestic supply of oil in the current year as do not contain policy recommendations"? I frankly find the provision confusing, and I think the difficulty of implementing it is another practical reason for abandoning the attempted distinction between recommendations and information.

C. Application to independent regulatory agencies

The applicability of executive privilege to independent regulatory agencies has been a subject much debated. Many students of the problem have taken the position that a constitutional doctrine resting upon the principle of separation of powers, and upon respect for the prerogatives of the Presidency as a coordinate branch of Government, logically has no application to agencies that are not within the executive branch or subject in general to Presidential control—agencies, indeed, that are often conceived of as "arms of Congress." [See Staff Report Prepared for the Special Committee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess.] Others have argued that the executive privilege does apply to independent agencies, at least with respect to their executive and administrative functions. As I have repeatedly indicated, I hope not to enter this fray. Whether or not the privilege is available as a strict constitutional matter, however, it seems to me clear that the practical considerations justifying the exemption of certain information from compulsory disclosure to Congress apply with no less force to independent agencies than to executive branch agencies. The present bills are therefore on solid ground in extending to the independent agencies the privilege of nondisclosure they contain. There are, however, certain peculiar problems raised by the application to the independent regulatory agencies of the specific limitations upon the privilege and the prescribed procedures for invoking it.

Both H.R. 4938 and H.R. 5983 require that the privilege be invoked by the President himself rather than by the head of the agency to whom the request for information is addressed. It is not immediately clear why the signature of the President should be necessary in order for the Chairman of the Federal Communications Commission to invoke a privilege not to disclose internal communications between him and his staff. The Presidential role is understandable if the privilege is intended to be no broader than what is thought required by the constitutional separation of powers. If, on the other hand, as I have assumed elsewhere in this testimony, the bills are intended to specify what is generally desirable rather than what is strictly required, it would seem both more seemly and more efficient to permit the agency heads to assert the privilege on their own behalf. Indeed, from the standpoint of pure desirability, some would question whether the President should be permitted, let alone required, to speak for the independent regulatory agency in the matter of the privilege. Where Congress

has requested information relating to internal communications between the head of an independent agency and his staff, and the agency head is prepared to comply with that request, believing that disclosure would not jeopardize the national interest or the agency's future ability to obtain forthright advice, the President's ability to prevent such disclosure surely lessens the "independence" of the agency—and casts doubt upon its sometimes alleged status as an "arm of the Congress." The situation is altogether different if the request is for information communicated to the independent agency or its staff by persons in the executive branch; then the President clearly should have the same power to invoke executive privilege he would have if the Congressional request had been addressed instead to the executive branch agency which originated the communication.

One final point deserves to be made with respect to the application of the exemption to independent regulatory agencies. If it is decided to limit the scope of privilege to information provided to "agency heads" (a decision which, as I have indicated above, I consider unsound) there should at least be some special provision for those collegial agencies in which—although the administrative management is conferred upon a chairman—the major policy decisions are made under the rule of one man, one vote. There is no reason why advice provided to a Commissioner of the FCC in assisting him to cast his one vote should be any less privileged than the advice given to the Chairman in assisting him to cast his one vote.

D. Some technical aspects of the exemption provisions

If my preceding comments concerning the appropriate scope of the "advice-giving" exemption are rejected, there are some technical points I would like to make concerning the exemptions as now framed.

H.R. 4938, after exempting factual information or testimony which "contains policy recommendations" seeks to reclaim much of what has been exempted through the following language: "To the extent possible, however, factual information underlying policy recommendations shall be made available in response to a request." To begin with, it would seem that in order to achieve the desired purpose the phrase "factual information underlying policy recommendations" should read instead "factual information contained in the same information or testimony with policy recommendations." Only in this manner will the sentence cover the full range of exempted information described in the preceding sentence; factual information in a particular document or in a particular piece of testimony that contains policy recommendations may not necessarily be factual information which *underlies* those policy recommendations. More fundamentally, however, this exception to the exemption is exceedingly unclear in its application because of the introductory phrase "to the extent possible." Surely this does not refer to physical possibility. Does it mean "to the extent possible without seriously jeopardizing the national interest and the ability to obtain forthright advice"? Or does it mean "to the extent possible without disclosing the policy recommendations contained in the information or testimony"? The two meanings are quite different, and the difference is much more than theoretical. The President might well deem the disclosure of a particular piece of factual information to be seriously hazardous to the national interest even though it does not necessarily reveal the nature of a policy recommendation.

I am perplexed by the double finding that the President must make in order to invoke the exemption provision of H.R. 4938—to wit, that "disclosure of such information will seriously jeopardize the national interest *and* his ability or that of the agency head to obtain forthright advice." If the word "and" means what it says, it is not enough that the President find that the disclosure of information would seriously jeopardize the national interest. Having made that finding (which I would have thought would be the supreme finding under any scheme) he must also find that disclosure would seriously jeopardize his ability or the ability of an agency head to obtain forthright advice. It is certainly a strange second step to have to take—rather like finding that something is impossible and that it is in addition too expensive.

IV. OTHER TECHNICAL POINTS

I agree with the technical points raised in Part III of the statement of Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, in her testimony before you on April 4. I would add the following: H.R. 6438 and H.R. 4938 require disclosure of "information within [an agency's] possession or under its

control." In the section of these two bills dealing with requested testimony, however, the phrase "information within its possession or under its control" is changed to "testimony regarding *matters* within the agency's possession or under its control." There is some possibility of linguistic gamesmanship arising from this alteration in language: an agency may have within its control information that relates to a matter not within its control. It seems unlikely that any difference in meaning was intended and if that was the case it would be desirable for the provisions concerning testimony to track the provision concerning written information, so that it would read "testimony regarding information within the agency's possession or under its control."

May I again express my appreciation for the opportunity of giving you my views on this very important legislation. I will be pleased to answer any questions you may have.

Mr. MOORHEAD. Thank you very much, Mr. Scalia.

One point that you make that intrigues me is that if the Congress sought a memorandum which contained a mixture of facts and recommendations, you would say that as long as the agency was permitted to snip off the part that contains the recommender's name as author of the memo, that this should be freely forthcoming to a congressional committee?

Mr. SCALIA. I think in order to protect the internal processes of an agency, the advice-giving consultation function, it is not necessary to protect any factual information whatsoever. I think this is clear. But it is necessary to protect the knowledge of who told what factual information to whom else. And that is not done if you attempt to distinguish between the situations by distinguishing between recommendations and facts.

Mr. MOORHEAD. I think I could speak for all of my colleagues here that we are not trying to get the little guy who wrote the memo up to the Secretary. What we really want to see is what were the options presented to the Secretary by whatever source. We want to know, "all right, Mr. Secretary, you were told that you had option A, B, C, and D; why did you take B?" But if we do not have that memo, we may not know that there was an option A, B, C, and D. I do not care about the name of the guy who wrote the memo. But I do care that we can properly oversee the operation, in your example, of the Interior Department, that the options were to grant no more leases, a 100 more leases, a 1,000 more leases, and the reasons why you take No. 1, 2, or 3.

Do you see what I mean?

Mr. SCALIA. I think it is clear that you are seeking not to get into the agency decisionmaking process. Asking for an option is something I am not clear on—as to whether, under H.R. 4938, asking for an option would be considered asking for a recommendation if five options are set forth but only one is recommended. It is not clear to me whether H.R. 4938 would require the disclosure of all five options and only the retention by the agency of that information that pertains to which particular option was recommended.

Mr. MOORHEAD. Mr. Scalia, I think your suggestion does not fit under any of these bills. You are suggesting that if a right of executive privilege exists, it exists to protect the name of the individual who made the advice and recommendation. If we can eliminate the name, then there is no basis for executive privilege. I think this is a very good point, because 99 percent of the time, we do not care about

the individual who made the recommendation. We care about the man who made the decision based on the recommendation.

Mr. SCALIA. It is only protecting the name in order to protect the agency decisionmaking process. I am not sure that I mean just to exclude the name. I am not sure that I would want the Congress—or whether it would fit in with the scheme of what is desired—for the Congress to be able to come in and say, we want all recommendations that have been made within this agency concerning, let us say, the matter of Vietnam; the only thing we will let you delete is who made them to whom. I think that is getting too deeply into the administrative process as well. I think that the only touchstone that will enable you to avoid cutting deeply into it is the one now used by the Freedom of Information Act. And that is that you cannot require from the agency the internal memoranda, and correspondence or information pertaining to the internal memoranda.

Mr. MOORHEAD. I think there is a fundamental difference between the situation where the people have a right to know and where the Congress has a need to know to make a rational decision under the Constitution. So the FOI exemptions, as they clearly do spell out, do not apply to Congress.

Were you seeking recognition?

Mr. McCLOSKEY. Yes, on that very point, because I want to clarify something from the witness.

Everything you have said seems to be based upon the assumption that the Freedom of Information Act was intended to deny these things to Congress, that it is some sort of intrusion into the administrative process for Congress to have access to the intra-agency memos. Do you not intend to suggest that?

Mr. SCALIA. No, sir, I said that earlier. I am clear that it does not apply to Congress. There are many other exemptions within the Freedom of Information Act, too, which I would not think of applying to the Congress. My only point is that this particular exemption within the Freedom of Information Act for internal memoranda and correspondence was directed at the same problem that this proposed legislation tries to handle by making a distinction, what I consider an unreal distinction, between recommendations and information. I think that the method of handling that problem used in the earlier provisions of the Freedom of Information Act is a better way to handle the problem. I am not saying that it applies of its own force, but I am saying that what seems to me the exemption seeks to protect is the sanctity, if you will, or the privacy of the decisionmaking process.

Mr. MOORHEAD. That is just what we do not want to have applied to the Congress. We are charged with oversight over the executive branch and the independent regulatory agencies. How can we oversee the administration if you say such details are to be kept secret from Congress?

Mr. SCALIA. If that is the case, then I do not understand the purpose of the exemption for recommendations, either. I am only speaking on the assumption that you want to make that kind of an exemption and I do not purport to advise you as to how broad or how narrow you want to draw it. But it does seem to me that if what you desire to do is to protect the decisionmaking process—that is what I interpreted the purpose of this exemption to be—I do not think it is achieved by

drawing an unreal distinction between information and recommendations. I do think the way to achieve it is to preserve the—

Mr. MOORHEAD. A very good suggestion is to snip off the name of the author. That is good. I am happy with that.

Mr. SCALIA. But that may not be enough. As I say—

Mr. MOORHEAD. It may be too much if that particular author of the memo has been seen in questionable company, if he has been wined and dined by the oil companies, and his recommendation is for more leasing. We may have to get that man's name. But if you say that if we get rid of the name on the memo, everything is open, I say there may be situations where we have to get the name, where there are dubious connections—

Mr. SCALIA. I would say not just the name. I would say that you would also not be able to get the contents of the memoranda as such. Putting the question in that form, "let me see all of your internal memoranda, just erase the names," I think is not the same as merely asking what facts does the agency know about this or that? If the agency does not have them in the form in which it is willing to give them to you—in most cases it will—it will have to draw them up in some acceptable form. But the point is that I take the purpose of the exemption to be the privacy of the decisionmaking process. The only way I can think of to accomplish protection of that privacy is the way used in the other provisions of the Freedom of Information Act, and that is not to require disclosure of the process of agency decision-making—the contents of a particular memorandum or the name of a person who sent it to another person. You can get all the facts in it, but if the agency for some reason wants to protect the privacy of its decisionmaking process, it would under the existing Freedom of Information Act be able to. And if you want to achieve the same type of privacy, I think you should use the same type of distinction in these new provisions of the Freedom of Information Act.

Mr. ERLENBORN. Will the gentleman yield?

Mr. MOORHEAD. Yes.

Mr. ERLENBORN. I am sorry that I had to leave during part of your testimony and I have not heard some of the questions and your comments that led up to this point. But, as I understand it, you are suggesting that, if the purpose of the drafter of H.R. 4938 was to insulate policymaking so that advice could be made freely available, we should do it by exempting interagency memoranda. That addresses itself to the one part of the bill where factual information or documentary information is requested. Have you addressed yourself to a similar protection for the compelling of testimony from a witness?

Mr. SCALIA. I did not address myself to it specifically, but the intent of what I say would be that you would not be able to ask a witness who is before you, "What did you tell so-and-so?" I think you would be able to ask him what do you know about the situation in Vietnam, the level of oil needs in the United States this year, or anything else. It is only when you get into the area of what goes on within the agency in the decisionmaking process that you are treading upon ground which the existing Freedom of Information Act considers protected. If it is that same kind of protection you want to achieve, I think the only way to achieve it is in that fashion. It will not preclude any

factual information from the Congress, but it will preclude the internal agency process.

You were absent for that portion of my testimony that went to the distinction between fact and recommendation. I said that I think for present purposes it is an unreal distinction. It is just as important that a Secretary be able to get forthright advice from his subordinates concerning a fact as it is that he be able to get forthright advice concerning a recommendation.

Mr. ERLENBORN. It seems to me the distinction that you are suggesting here is maybe also a little unreal, as you suggest our distinction is unreal. If we ask a witness "What do you know about the Mid-east oil situation?" as you suggest, rather than "What conversations have you had regarding this?" he will tell us a number of facts. We will not be able to know whether he is basing those facts that he divulges on interagency memos, conversations with other people in the department—in other words, the very nature of his testimony may depend upon the validity of the underlying conversations and interagency memos that have given him the knowledge that he is divulging to the committee. Can we make that kind of a distinction, that he can verbally tell us his summation of all of this, but we cannot get behind his summation and his opinion to his source material?

Mr. SCALIA. Well, again, I think you are assuming that he is not willing. In most cases, when you ask that question, he is going to say, "We know this because, and we have field reports from here, there, and every other place." But in some instances, where an agency considers it important to protect the—

Mr. ERLENBORN. Now you have hit the nub. Who should make that decision as to whether it is important? You are suggesting that the agency, not the Congress, should decide whether it is important. We are suggesting that it ought to be the other way around. The agency should not be able to protect information because they think or the President thinks or the Secretary of Defense thinks it is important. The Congress should make that determination.

Mr. SCALIA. I am only speaking now to H.R. 4938 and that bill, it seems to me, does not say that. It does make a broad exemption for recommendations, categorically. That seems to me not to achieve what, if anything, is sought to be achieved. In my comments on 4938 I was only trying to analyze what it seemed to me the object was. The only object I can conceive of that is being sought is the same object that the existing provisions of the Freedom of Information Act seek to achieve.

In any case, I cannot see why a recommendation—or put it the other way around—I cannot see why factual advice should be any less privileged than a recommendation. Take the case I gave earlier when the Secretary of the Interior is told by his subordinate, we have plenty of oil for the current year; oil supplies are adequate. That is a fact, I take it.

Mr. GUDE. That is not a fact.

Mr. ERLENBORN. That is not a fact, that is an opinion.

Mr. GUDE. That is not a fact. That is an opinion.

Mr. ERLENBORN. Nor is it a policy recommendation.

Mr. SCALIA. Well, clearly, it is not a recommendation. The word "advice" is sometimes used in a factual sense, but read with the other

two words in this bill, I do not think it can be interpreted that way. You can say, "I advise you that it is now 3 o'clock" and you can call that "advice." But that is surely not the way the word in this legislation is intended.

If you want to get to something that is even more clearly factual, let us say he advises the Secretary. "There are now α million barrels of oil in the country." And assume that is grossly wrong.

Mr. ERLENBORN. Could I interrupt there? You are basing your testimony now on the word "advice," which we do not use in the bill. We say "policy recommendations."

Mr. SCALIA. One of the bills uses three words, sir. I was speaking to that exemption in both bills and I was taking the one that used the most language.

Mr. ERLENBORN. I see.

Mr. SCALIA. With respect to the single word "recommendations," I think my point is even clearer. I think it is very hard to say that when he tells the Secretary "we have enough oil for the present year," or "there is an adequate oil supply for the present year"—it is hard to say that that is a recommendation. I cannot conceive of calling that a recommendation.

Mr. ERLENBORN. I would interpret it the same way, and therefore, the exemption would not apply.

Mr. SCALIA. Would not apply. And I cannot see any reason why it is any less necessary, in order to preserve the confidential process between the Secretary and his subordinate, to apply it to that than it is to apply it to a recommendation. The man who said that and turns out to be wrong is surely going to be subject to just as much national public criticism as the man who said to the Secretary, "Mr. Secretary, you do not have to lease any more land for offshore oil drilling." It boils down to the same thing. I cannot see how the distinction between recommendation and fact protects what I suppose you are seeking to protect. And it seems to me that the way to that kind of protection is shown by the existing provisions—that what is sought to be protected is the internal decisionmaking process, but not the data that the agency has. The Congress ought to be able to get to that data.

I think that type of protection is achieved by the existing provisions of the Freedom of Information Act, although not as broadly. Mind you, under the provisions of the FOI Act, if the agency does not have the data in producible form—if it exists only mingled in an interagency memorandum—the agency does not have to go out in response to a public request and develop the data in a form that is not the kind of interagency memorandum that it is reluctant to reveal, whereas, in response to a congressional request under this bill, I presume the agency, if it only had the data in the form of interagency advice that it did not want to reveal, would be constrained to go out and develop it in some other fashion, to type up a new document or develop it in some other way.

Mr. ERLENBORN. I am troubled, as I think my colleague from California was, that you seem again to have suggested that the right or ability of Congress to get information might somehow be dependent upon the Freedom of Information Act. It was never so designed.

Mr. SCALIA. I am sorry if I have created that impression.

Mr. ERLENBORN. I thought you just said that, that we have the ability to get what we need through the Freedom of Information Act.

Mr. SCALIA. No, sir. I was saying that if you applied the same technique of segregating protected information to this new legislation as is applied to segregate protected information under the existing Freedom of Information Act, Congress would not be nearly as constricted as the public is under the existing Freedom of Information Act. For when the public asks for something that comes within the interagency memorandum exemption, the public cannot require the agency to go out and develop it in some other form—at least if it involves a whole lot of trouble—whereas the Congress can. That was my only point. I am clear that the existing act has nothing to do with the congressional power.

And I want to make it clear, too, that I am not purporting to advise you on how much power you want to exert over the agencies or over the administrative branch. I was speaking to this particular point, not to advise you that this is what you ought to do, but rather to say that if what you want to do is protect the confidential agency process, which I interpreted the purpose of the exemption to be, a more sensible way to do that is the way the existing Freedom of Information Act does that. I would not presume to give you advice on the battle between the two separate branches of power. I try to stay out of that.

Mr. ERLENBORN. I recognize that I have read hurriedly your testimony, and I think you have made some very helpful recommendations and brought up some points that I think we should consider in drafting this legislation. What you have done is to point up the great difficulty in trying to define that area of protection. Maybe this is why some of my colleagues have said that there should be no area that is protected—we ought to be able to subpoena the President himself in, or maybe just short of that, everybody but the President and the Vice President, and get all information. I personally think that there is an area that ought to be protected, and you have pointed up that it is extremely difficult to define that.

Your testimony has been quite helpful. I found your predecessor as Chairman of the Administrative Conference to be extremely helpful to this committee and your first appearance here before our committee leads me to believe that you are going to follow in that tradition.

Mr. SCALIA. I hope so, sir. I know Roger found the committee receptive to what assistance he sought to offer. I will be forthcoming, and I hope, the committee will be as receptive.

Mr. MOORHEAD. Mr. Gude?

Mr. GRUDE. Mr. McCloskey wants to ask a question.

Mr. MOORHEAD. Mr. McCloskey?

Mr. MCCLOSKEY. Mr. Scalia, we have assumed, all along, as my colleague from Illinois mentioned, that there was an area that we wanted to protect. The definition of this area which we have been accepting thus far is the area of not inhibiting candid and forthright and truthful advice to an agency head. I wonder if you would search your mind, and philosophy, and thinking right at the moment as head of the Administrative Conference, and tell me of an example that comes to your mind where candid, accurate advice to an agency head, either spoken or written, would be inhibited by the possibility that that information and that advice might later be made privately available to

Congress, or even to another agency. We have seen examples in the Pentagon papers, for example, where State Department employees gave advice to the head of the State Department which they did not want the Defense Department to learn about. And the Defense Department did not want State to learn about some of their internal recommendations that were made. I can conceive of examples with respect to personnel, where if you asked me about one of my colleagues, I would not give you a candid opinion of that colleague if I knew that it later would become public.

But outside of opinions of individuals and personnel matters, is there any right to withhold information on a proper administrative function or advice to an administrative head from other people in Government? Can you give me an example in your judgment, why advice to, say, the Secretary of Defense should not be made available to the Secretary of State?

Mr. SCALIA. Well, let me make clear before I try to fish up an example that I am, again, not urging that you should or should not make one particular kind of exemption. My comments again went to the fact that if you desire to make one, this is the intelligent way to do it.

Mr. McCLOSKEY. I appreciate that, but more than any other witness we have, you can tell us about how the administrative process might be inhibited by the knowledge that candid advice might later become public.

Mr. SCALIA. Well, to take a most prominent example, supposing the bill applies not to just agency heads but to the President. I suppose that some of the advisers from the last administration, in the time of the Vietnam war when it was not yet decided whether we should get in further or get out, or at what time we should get out—I think some of those advisers have probably felt they have been harmed by the disclosures of what their advice was in that particular case. I think some advice, especially in a politically heated situation, if it is known that it will become public, may be given to the agency head or to the President with an eye to: What will I look like before the public if I give this advice? I think it is very important that advice be given to the man on the basis of what that man needs to know rather than with a view towards the adviser's image in the newspaper or in the public eye—especially if the adviser has political ambitions later.

Mr. McCLOSKEY. Well, let us talk about that. We have a public now that is, I think, distrustful of politicians and distrustful of Government. Is it possible that we should not have any advice given in the course of governing the country that cannot later stand the light of day, either publicly, or at least to other agencies of Government? This is the question. This really troubles me, because we have assumed all along that the Government will run better somehow if people advise their colleagues in Government in a manner that they might not employ if it might be learned by the chairman of the Armed Services Committee. And I am wondering if perhaps we are not imposing a standard of performance that, in effect, suggests that advice might be given that is improper advice or criminal advice or less than ethical advice, which might not be given if it were made public.

Mr. SCALIA. Well, there is surely a trade-off there. There is no doubt that by considering this interest, you are to some extent not accord-ing as much weight to another interest as you might want to accord to it in full and free public disclosure. It is a trade-off between the two and I think you have to try to achieve some balance. I do think, however, that the former interest, the interest of the confidential relationship between the administrative officer and those who give him advice, is a real interest. Whether you choose to consider it impor-tant enough or not is another matter.

Mr. McCLOSKEY. Wait a minute. Is that an interest that you feel should be protected? You have earlier testified that you think it is a hollow distinction between an agency and an agency head, say, the head of—I think you used the District of Columbia Water Depart-ment as an example. We do not intend to make advice to an agency head so confidential that even Congress cannot learn it. But you are suggesting now that there is advice between the Secretary of State and the Under Secretary of State that should not be disclosed to the head of the Foreign Affairs Committee, for example, of the House?

Mr. SCALIA. I have not taken a position on the matter. I think that there are reasons why in some cases, it might be thought desirable not to ask for such information or for the Congress not to permit itself to ask for such information.

May I give you another example of how confidential advice may exist?

Mr. McCLOSKEY. Yes, give me an example of a piece of confidential advice from an adviser to his chief that in your opinion would not be given if it were going to be known by the congressional committee that had oversight over that governmental agency.

Mr. SCALIA. In a regulatory agency, for example, where some mem-bers of the Chairman's staff may have friends or contacts within what-ever private sector the agency has to deal with, I think it is exceed-ingly useful if those members know that they can give advice to the person to whom they are giving it without having to worry about what their image will be within that industry or within any other sector of the public. That adviser is the Chairman's man and his whole function is to give the Chairman the best advice he can. He should not have to worry about what somebody else is going to think about him for giving that advice. I think that is important and I think it is important to the Chairman to know that he has a man who is only worried about loyalty to him and giving him the best advice he can. I do not think it can be written off as negligible.

Mr. McCLOSKEY. Let us take an example. Are you saying, then, that the Chairman of the Environmental Protection Agency, the Director, hires a consultant, a man on leave from the Ford Motor Co., and asks for his candid advice as to whether or not a given series of emission controls are in the public interest and will work? Are you suggesting that that consultant who gives his candid opinion to the Director of the EPA should not have to face the possibility that Congress may learn of his advice and thereafter relav it back to the president of Ford, who might be outraged if that advice were adverse to Ford? Is that a fair statement of the kind of example you are thinking of?

Mr. SCALIA. No, that is probably a nastier one that could exist. But there are many more situations much more innocuous.

For instance, where an adviser's access to the industry—his relations with members of the industry that will enable him to get disclosure as to what the industry is doing—could be seriously jeopardized if he is known to have a hard line or a soft line on this or that. It is generally bad for any agency to have its personnel identified as to what position they take before that agency. It can seriously impair their effectiveness.

Mr. McCLOSKEY. This is the question, because I want to join in my colleague Mr. Erlenborn's statement of confidence in the Administrative Conference and yourself. But are you saying that in the administration of a Government agency, it is imperative for its personnel to be able to give candid advice to the head of the agency without having others know what they stand for? Is that your statement of what the Administrative Conference stands for?

Mr. SCALIA. I have said that there is a value—

Mr. McCLOSKEY. But is it right? There may be a value to the operation of that administrative agency, but is it a value to this Nation?

Mr. SCALIA. Well, I think that is a matter the Congress is going to have to decide. It has already decided it as far as the public is concerned, which is what your narrow question was. That was already decided within the Freedom of Information Act. So I am not the only one that thinks there may be a value there, anyway.

I would not purport to say how precisely that value is to be protected—I think it is a very difficult thing to decide. I would be, myself, hesitant to draw down general rules that go too far. I had assumed in my comments on this legislation that what the legislation is trying to set forth is the answer to the question, "What kind of information should the Congress generally ask for?" I would assume that whatever the legislation says, the Congress can always choose to go beyond that later in some particular instance, where it finds an exemption too narrow and it really wants to have something very badly. The Congress wrote the legislation; presumably, the Congress can change it. But I think what you have to decide is what, as a general rule, what kind of information as a general rule do we think it is more important for us to have than it is for the agency to retain in order to protect their internal processes? There are values on both sides and the difficulty is balancing the two.

Mr. McCLOSKEY. But my colleague has asked you that question, I think, specifically. The problem we have in this legislation is whether or not, and who should make the decision as to whether the Congress should properly ask for the information or the executive should properly withhold it. I assume if we have the power to make the law, we have the power to say that the Congress has the power to do this and should not do it in other words, that it be a congressional privilege not to extract specific information if we choose—

Mr. SCALIA. Yes, sir.

Mr. McCLOSKEY [continuing]. Rather than the executive's privilege not to release certain information if it chooses.

Mr. SCALIA. Yes, sir.

Mr. McCLOSKEY. And in this delicate area, where we have put into the proposed legislation the discretion to the President to decide if it will jeopardize the national interest, but also it must meet this second heading, the limited area of policy recommendations. Outside of policy

recommendations, the Congress would then have the privilege to ask for everything else. It would be a congressional privilege if we declined to go as far as we could if this law is enacted. Now, do you have any objection to Congress having that privilege rather than the administrative agency or the President?

Mr. SCALIA. Right now, without any legislation, I presume that there are theoretically no limitations upon what the Congress can ask for.

Mr. McCLOSKEY. For us there are.

Mr. SCALIA. Well, none by statute—no statutory limitations upon what a committee or the Congress itself can ask for. At some point you come up against, and we have not talked about this, but at some point, you come up against a Presidential assertion of constitutional power not to give any more information. I assume that is not the area you are talking about. You are talking about the area beyond any constitutional privilege, if any. If there is none at all, we are talking about the whole thing.

Mr. McCLOSKEY. Mr. Chairman, I think I am exceeding my time at this point and I want to thank the witness and say that I am troubled by this problem. All of us have assumed, up until now, that there is a value in an administrative agency operating with policy recommendations kept secret. I am beginning to wonder whether that is the case with respect to Government. Perhaps there ought to be a higher obligation in Government in comparison to the competitive free enterprise system that any advice that is given ought to be able to stand the test of our colleagues, at least, in Government, and if it cannot stand the observation of our colleagues in Government, then the advice should never have been given. Maybe we serve the cause of better government by saying that the policy recommendations that are made to the President by the Secretary of State himself at least ought to be also available to the chairman of the committees of congressional jurisdiction.

I am sorry to have taken so long, Mr. Chairman.

Mr. MOORHEAD. And the restraint should be, as I judge it, self-imposed by the Congress.

Mr. McCLOSKEY. Well, it goes back to the constitutional relationship that we make the laws, the President executes them. The only constitutional provision that exists is the one that Congress pointed out, that the President shall advise the Congress of the state of the Union. I think we are dealing with a far more important and delicate matter than maybe we have thus far perceived.

Mr. MOORHEAD. I think you are right.

Mr. Gude?

Mr. GUDE. No questions, Mr. Chairman.

Mr. MOORHEAD. I have just a few, Mr. Scalia, trying to get this in my understanding. You talk about quasi-judicial proceedings in your exemptions?

Mr. SCALIA. Yes, sir.

Mr. MOORHEAD. You make no provision that there is any constitutional or statutory exemption in law today for this?

Mr. SCALIA. I make no claim that there is, but I do not assert that there is not. There is in fact case law where an agency proceeding has been set aside because the agency heads, while the proceedings were

still pending, were interrogated by a Senate committee concerning the case. The decision that the agency later handed down was set aside by a court because the court felt that the senatorial inquiry had prejudiced the outcome of the case. Now, I am not sure whether that would be extended by any court to say that—

Mr. MOORHEAD. Has it been extended by any court to hold that the Senate cannot inquire? Or the House cannot inquire?

Mr. SCALIA. No; I suppose the way that would come up, Mr. Chairman, is that the party in that case, when the hearings were held, would have somehow sought to enjoin the proceedings and that has never occurred.

Mr. MOORHEAD. I have certainly never heard of any case like that.

Mr. SCALIA. No, sir.

Mr. MOORHEAD. I do not think the Senate should, but I think it should be a self-imposed self-discipline and there may be rights of the Nation under which the Congress is inquiring that are more important than the adjudication taking place in the agency. So if that case has to be thrown out, it must be thrown out.

Mr. SCALIA. I would hazard a guess that it is a constitutional question to this extent—

Mr. MOORHEAD. You cannot be serious?

Mr. SCALIA. Let me finish. To this extent: I think as a constitutional matter, any adjudication in which the Congress has chosen to inject itself to a certain degree, may as a matter of constitutional law have to be set aside by the courts because of failure of due process.

Mr. MOORHEAD. Oh, that is true.

Mr. SCALIA. So I think there is that element of constitutionality in it, but I find it hard to—

Mr. MOORHEAD. But that is entirely different from the power of the Congress, even unwisely asserted?

Mr. SCALIA. Yes, sir.

Mr. MOORHEAD. But on the opinion of Congress that the Nation's interests are more important than the fact that this decision in such a case might have to be set aside?

Mr. SCALIA. Yes, sir, I would find it hard to envision a situation in which that could arise or a court would even get involved at that stage.

Mr. MOORHEAD. Well, even to think about the possibility is, to me, astounding.

Similarly, the claim of exemptions of independent regulatory agencies—do you think that they have an independence from the Congress?

Mr. SCALIA. No, sir, the point of my remarks is just the opposite. I am questioning whether, assuming that for the case of executive branch agencies you want the privilege against disclosure to be exercised only by the President—I query whether you want that to be the situation with respect to independent regulatory agencies, which have been assumed to be closer to the legislative branch and in some cases have been called an arm of the Congress rather than of the President.

Mr. MOORHEAD. I would say that that would be the clearest case where there would be no privilege whatsoever, because the bodies were created to carry out the powers of the Congress under the Constitu-

tion. The power to regulate, to coin the money and regulate the value thereof was assigned to the Congress by the Constitution.

Mr. SCALIA. Yes, sir.

Mr. MOORHEAD. And the Congress created the Federal Reserve Board. We could terminate it at any time.

Mr. SCALIA. As a constitutional matter, I have no doubt that it is more difficult to assert a constitutional executive privilege for the independent regulatory agencies than it is for the rest of the executive branch. However, as a practical—

Mr. MOORHEAD. Would you not say it is a constitutional impossibility? Because you can read the Constitution. First, you will not find the term "executive privilege"; but, second, you will not find anything about regulatory commissions either. They are purely statutory creations, created to carry out in, almost every instance that I can think of, a function assigned by the Constitution to the Congress. Under the commerce clause, we created the Interstate Commerce Commission.

Mr. SCALIA. They are queer animals, Mr. Chairman, and have an amalgam of various functions—judicial, legislative, and executive—all built into them. I would not assert that there is a constitutional privilege, but I would not want to opine that there absolutely was not, either. I just do not know how the courts would come out on that. It is surely more difficult to find a constitutional privilege there than it is with respect to the executive branch.

Mr. MOORHEAD. I think you have outdone Mr. Kleindienst. I do not think even he claimed an executive privilege for the regulatory agencies created by the Congress.

Mr. SCALIA. I am not claiming that, either.

Mr. MOORHEAD. But he never even suggested that it might exist.

Mr. SCALIA. Oh, I think that likelihood has been asserted before.

Mr. MOORHEAD. I will let you submit for the record any time that any Justice Department official asserted a constitutional or other claim of "executive privilege" in support of the argument that a regulatory agency created by the Congress has this privilege.

Mr. SCALIA. I am innocent of that, too, Mr. Chairman. I am just unwilling to assert that there is not. I am certainly not asserting that there is, but I am not sure that there is not.

I think that I speak to the matter in my prepared testimony and do give some argument on it. In the hearings that I referred to on page 5 of my testimony, Attorney General Rogers spoke to this matter and took a view that is probably beyond what I have said. I think he would probably assert that there is some executive privilege in the independent regulatory agencies.

Mr. MOORHEAD. That was under their judicial proceeding?

Mr. SCALIA. No, sir, even with respect to the—never mind the quasi-judicial area, but even with respect to—

Mr. MOORHEAD. Well, the quote is with respect—"whenever an agency is exercising its judicial function." I do not agree with the Attorney General on that, or I do if he says it should be. I agree that it should be free, but I do not think there is any constitutional provision.

Mr. SCALIA. I am not sure that portion of his testimony is spelled out fully here, but what he said is this: He took a view of the matter

that did not break out according to executive department on the one hand and independent regulatory agencies on the other. Rather, he cut it another way. He said there are executive functions and judicial functions. And he said the quasi-judicial functions even of the executive branch, are not protected by executive privilege. However, the executive functions, even of the independent regulatory agencies, are protected by executive privilege, that is the position he took.

Mr. MOORHEAD. You did not quote that?

Mr. SCALIA. I do not believe that particular portion is quoted, but that is the position he took.

Mr. MOORHEAD. On page 15, you say that you think the laws should be changed so that the heads of independent regulatory agencies could assert the privilege in their own behalf.

Mr. SCALIA. No, sir, I am not speaking to the constitutional existence of a privilege at all. I am just saying that whether or not, strictly speaking, the independent regulatory agencies could assert such a privilege under the Constitution—whether or not they could—as a matter of desirable practice, I think Congress should be just as careful in dealing with their executive-type functions so as not to interfere with their administrative operations as it is with the executive branch. And if Congress chooses to hold back, as some of this legislation proposes, in making certain demands upon the executive branch, I think it is reasonable to hold back in similar fashion with respect to the independent regulatory agencies. That is all I have asserted.

Mr. MOORHEAD. I am coming down again, I think, to the question of the constitutional law because—when you suggest even in passing that it might exist—I cannot let the record stand there. The Congress is given by the Constitution the power to regulate the commerce between the States. The Congress decided instead of doing that to assign that function, delegate it, to the Interstate Commerce Commission and other regulatory bodies created by Congress. Now, I think that the Congress has the power—maybe it should not use it—but it has the power to call before the appropriate committees any official of its own creature and ask any question that needs to be asked. Now, maybe, as a matter of good policy, we should not always exercise this clear authority to the fullest extent.

I think that is where you and I are struggling on our point of agreement—whether this restraint that we have exercised in the past can be legislated so that we can protect future Congresses from bureaucratic excesses.

Mr. McCLOSKEY. I think so. Mr. Chairman, but I think the ultimate power of Government reposes in us and that our restraint is more to be trusted than any restraint the Executive might use which we legislated and gave him.

Mr. MOORHEAD. Because ultimately, the power is in the people and we in Congress more clearly, more closely represent the people than does somebody appointed by either the President or by an agency head.

Mr. McCLOSKEY. I think we have legislated—did we not in effect try to take the Post Office out of congressional influence? There are some other areas where—

Mr. MOORHEAD. Mr. Copenhaver makes the point that we did not create just the independent agencies, but all executive agencies.

MR. SCALIA. Yes, and it is precisely for that reason that the earlier point, Mr. Chairman, proves too much. The mere fact of congressional creation of the independent regulatory agencies does not necessarily mean that there could be no constitutional executive privilege there. I do not assert such a privilege, I do not even want to speak to such a privilege. But you pressed me to say that there is not such a privilege and that I just cannot do, because I have not really made up my mind on the subject. It is arguable and has been argued by some very intelligent people that there is such a privilege. I do not assert that it exists, but when you press me to say that it does not exist, I cannot say that, because I do not know it.

MR. McCLOSKEY. I have no further questions.

MR. MOORHEAD. Mr. Phillips?

MR. PHILLIPS. Mr. Scalia, if information that was in the possession of the Administrative Conference of the United States were requested by a congressional committee and for some reason—this is hypothetical—but for some reason, the President did not feel that information should be given to that congressional committee, do you feel the President could invoke executive privilege in such a situation over the Administration Conference?

MR. SCALIA. I do not know. That is a question that I raise but moot in my prepared statement—whether indeed the President ought to have even the power, much less be required, to exert executive privilege for an independent agency, which is what the Conference is, of course. I do not know the answer to that, but I will tell you I would have to look up the law and consider it deeply, before I could—

MR. PHILLIPS. It seems to focus on the bone of contention that we have been discussing here.

MR. MOORHEAD. Well, thank you very much, Mr. Scalia. We appreciate your testimony.

[The letter subsequently submitted for the record follows:]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
NEW EXECUTIVE OFFICE BUILDING,
Washington, D.C. May 4, 1973.

Hon. WILLIAM S. MOORHEAD,
Chairman, Subcommittee on Foreign Operations and Government Information,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In my testimony before your Subcommittee on April 19, you invited me to submit for the record any instance in which a Justice Department official has asserted that executive privilege may apply to functions of independent regulatory agencies. I would like to submit the 1958 testimony of Attorney General Rogers in the Hearings on S. 921 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., pages 21-24. I cited this testimony in my prepared statement, but without quoting the language specifically relevant to the question here at issue. The following excerpts are directly in point:

"To the extent that the [independent] agency exercises executive functions it would have the right and duty to furnish or withhold information from Congressional inquiry to the same extent as would other executive departments and officers of the Federal Government." [Page 22].

"The executive privilege applies to the executive functions of the independent agencies. . . ." [Page 24].

I may further note that Attorney General Rogers supported his position by reference to a 1955 opinion of Attorney General Brownell. [Page 22]. I reiterate that I do not maintain this position is necessarily correct. The only point I am at pains to make is that the administrative benefits of confidentiality are as valuable-

to the executive functions of independent regulatory agencies as to those of Executive Branch instrumentalities.

In my testimony, I took the position that any exception designed to preserve the confidentiality of the decision-making process should be modeled upon the similar exception contained in the Freedom of Information Act. That exception exempts inter-agency and intra-agency memorandums or letters not obtainable in private litigation. You will recall that we discussed whether the substance of this protection could not be provided by permitting deletion of only the names of the authors and recipients of such memorandums and letters. I concluded that it could not be, but on reading the transcript I am disappointed at the limited extent to which I clarified my reasons for that conclusion. Because the matter is of such importance, I would like to supplement my comments on the point—for the record, if that is still possible, but in any case informally. These additional observations also go to the colloquy that took place between Mr. McCloskey and me concerning the basic values served by confidentiality.

A policy of non-confidentiality may inhibit the frankness and forthrightness of the advisory process through its chilling effect both upon the giver of advice and upon the recipient. The former effect is the more obvious and also the more easily avoided. The valuable adviser is one who speaks not with an eye to his own advancement or safety, but solely to assist in reaching a wise decision. This attitude of selfless objectivity, rare enough in the best of circumstances, would be almost impossible to achieve if advisers knew that their views would be publicly attributed to them. At the highest levels of Government, advisers are often prominent men with political ambitions; at lower levels they are civil servants interested in career security and advancement. If their advice is to be uttered not merely to the decision-maker but to the Congress and, perhaps, the world at large, circumspection rather than candor will be the controlling virtue. The unconventional or unpopular opinion, the bold, venturesome proposal, the position not firmly held or fully worked out but nonetheless deemed worthy of discussion—all of these would be seriously inhibited by a policy of non-confidentiality. But the problem can be avoided, in theory at least, by simply withholding names.

In addition, however, the absence of confidentiality may damage the advisory process through its chilling effect upon the recipient of advice. The executive who knows that his decisions may later be impeached by the dissenting views of his subordinates has strong incentive to minimize such dissent and many means to do so. He may act, especially in controversial matters, without seeking advice at all; he may encourage a bland conformity; he may surround himself with "yes-men," compliant types who can be relied upon to tell their superior only what he wants to hear. (One wonders, for example, whether a wartime President would conceivably tolerate internal criticism of war policy—as President Johnson is said to have tolerated, even welcomed, the dissent of Mr. George Ball—if he knew that this criticism would be available to anti-war opponents in Congress or to the public.) Knowing moreover, that internal records and memoranda will be freely accessible to those who disagree with him, the cautious executive may insist that certain communications not be committed to writing, that minutes of meetings not be taken, that potentially embarrassing documents be discarded. Such a policy would be enormously detrimental not only to the efficient conduct of Government but, ultimately, to the cause of public accountability itself. These dangers, it should be stressed, cannot be avoided simply by preserving the anonymity of the advice-giver; they can be avoided only by preserving the confidentiality of the advice.

Apart from its effect upon the quality of the advice given and received, non-confidentiality may also have a subtly corrosive effect upon the decision-making institution as a whole. Knowledge, for example, that a decision of the Secretary of Defense was taken against the advice of the Chiefs of Staff may undermine its effectiveness. Exposure of internal dissent may also encourage attempts by outside interests to factionalize the agency decision-making apparatus. Finally, it is disruptive of sound lines of authority and destructive of harmonious working relationships for a subordinate's unaccepted advice to be in effect appealable to the Congress or to the public. These "institutional" costs of non-confidentiality are not entirely avoided simply by withholding the name of the adviser in question.

I conclude, therefore, that preserving the anonymity of the advice-giver while compelling full disclosure of the advice, will preserve some, but not all, of the

benefits of confidentiality. One further point emerges from the foregoing analysis: Only the last of the three distinct benefits can be preserved piecemeal, by choosing to honor confidentiality in a particular case though not respecting it generally. The first two—since they derive their effect from the *expectations* that they create within the adviser and the decision-maker—must either be preserved generally or else be entirely lost. It is not true, therefore, that it makes little difference what principles Congress chooses to enact in legislation on this subject, so long as each committee, on a case-by-case basis, takes due regard of existing sensitivities. With respect to what I might term the psychological benefits of confidentiality, it is the general principle rather than the particular application that achieves the desired effect. For this reason, it would be better to have occasional Congressional departures from a statutory principle that respects confidentiality, than rare Congressional application of a statutory principle that ignores it.

May I again express my appreciation for the opportunity of giving your Subcommittee my views on a matter that is of vital importance to all agencies of the Government.

Sincerely,

ANTONIN SCALIA.

Mr. MOORHEAD. The committee now stands in recess, subject to the call of the Chair.

[Whereupon, at 5:07 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL AND CORRESPONDENCE RELATIVE TO THE HEARINGS

STATEMENT OF REPRESENTATIVE MARVIN L. ESCH

Mr. Chairman, I appreciate the opportunity to present testimony on the question of Executive privilege and particularly on H.R. 6228 which I have co-sponsored with Congressman Erlenborn.

We have heard a great deal of testimony, presented both before this Subcommittee and last year before the Senate Subcommittee on Separation of Powers, much of it by formidable legal and constitutional scholars. A great deal of this testimony presents us with conflicting interpretations of historical precedents, with an eye toward justifying either the invocation or noninvocation of Executive privilege. While I will not presume to instruct this Subcommittee on the history of this question or offer a judgement on the validity of the many historical interpretations of "precedents", I would point out that all we have heard is illustrative of the basic ambiguity of the power of Executive privilege. We are not dealing with a subject where boundaries are precisely fixed, but with a broad area of government in which the Legislative and Executive Branches have claims which are both legitimate and often conflicting.

The doctrine of Executive privilege, as I understand it, defines the Constitutional authority of the President to withhold documents or information in his possession or in the possession of the Executive Branch from compulsory process of the Legislative or Judicial Branch of the government. The Constitution does not expressly confer upon the Executive any such privilege, any more than it expressly confers upon Congress the right to use compulsory process in the aid of its legislative function. Both the executive and congressional authority are implicit, rather than expressed, in the Constitution. James Madison spoke to the point in the Federalist No. 48:

"After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and more difficult task is to provide some practical security for each * * *."

Madison's statement strikes at the heart of what we are grappling with today. The bill I have introduced is an attempt to clarify this situation by defining more precisely the legal parameters of the use of Executive privilege.

I realize that there are those in Congress who do not recognize the existence of the privilege doctrine. Let me emphasize here that I share the current frustrations of Congress in our attempt to avail ourselves of needed information. With regard to the specific case of the Watergate investigation, I likewise agree with many of my colleagues that the present Administration has evoked the doctrine unwisely and unnecessarily in a situation where the American people have the right to know the facts of the matter. Having said this, however, I would suggest that we are incorrect in supposing that absolute discretion to demand information be substituted for unlimited power to withhold it. As Raoul Berger has pointed out in his article, "Executive Privilege Versus Congressional Inquiry":

"All 'unlimited power' is inherently dangerous. Already the Supreme Court has remarked that far reaching as is the Congressional power of inquiry, it does not embrace matters which are within the exclusive province of the Executive Branch. [Barenblatt vs. U.S. 360 U.S. 109, 111-12 (1959)]"

In a more practical sense, I do not believe that such a position ultimately advances the cause of Congress. Indeed, the failure to acknowledge the existence

of Executive privilege, and to impose reasonable limits, has had the effect of Congress' acquiescence in its existence and use. As a practical matter, the Chief Executive has been granted a free reign to exercise the privilege as he sees fit. As a result, each President writes his own definition of Executive privilege, tailoring it to fit the circumstances of the moment.

The solution, I am convinced, is one that recognizes the general right and need of Congress to receive information and the President's right and need to receive in confidence advice from trusted advisors who will not be inhibited by the possibility that such advice will become a matter of public debate at some point in the future. That, I believe, is the task which Madison spoke of in his Federalist No. 48 and is the solution posed in the bill which I have introduced and which is before the Subcommittee today.

H.R. 6228 would declare the policy that Congress shall have access to all information in the possession of the Executive Branch. The Executive must honor the request, whether it comes from Congress, from a committee acting within its authorized sphere, or from the Comptroller General. The request may be for information, for testimony of an officer or employee, or for the submission of written materials. H.R. 6228 would require compliance within thirty days.

The bill provides that the President may prevent the disclosure by invoking Executive privilege; but he would be able to do so only within the restrictions of the bill, namely:

When a policy recommendation has been made to the President or the head of one of the Executive agencies; and

When the President certifies that disclosure of such advice would seriously jeopardize the national interest and the ability of the President or the agency head to get forthright advice in the future.

The narrowness of this exception may be more fully appreciated when it is recognized that the privilege covers only communications to the President or to an agency head. Third party conversations would not be privileged, and the bill would in no way shield or stifle testimony of individuals such as Clark Mollenhoff in the current Civil Service Commission hearings involving A. Ernest Fitzgerald.

In addition, the proposed legislation requires that factual information associated with an exempted policy recommendation be made available if requested by Congress. Moreover, the bill's mandate to supply information to the Congress applies to every person within the Executive Branch, including all those employed in the White House.

In this regard, I should make clear that our bill provides no opportunity for anyone to become ensnared in the issue of the coverage or lack of coverage of present or past employees—an issue that has recently surfaced in a statement on Executive privilege issued by the President. H.R. 6228 authorizes a claim of privilege only in those instances where a policy recommendation is made to the President or current agency head by another individual, regardless of what the latter's position may be. Therefore, such an issue would never arise under our bill because privilege under the legislation relates to a category of information and not to the person rendering it.

I feel strongly that the chief cause of the growing controversy and contention between the two branches in this area rest primarily on the absence of any clear legislative expression which defines precisely the right of Congress to receive information from the Executive Branch and the right of the President and agency heads to receive certain advice in confidence. Enactment of H.R. 6228 will go far, in my opinion, to resolve this controversy to the mutual satisfaction of both branches.

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS.
Washington, D.C., March 23, 1973.

Hon. RICHARD M. NIXON,
President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: As you no doubt are aware, many Members of Congress of both political parties are concerned over your March 12 statement with respect

to Executive privilege and your subsequent refusal to permit testimony from White House staff personnel before Congressional Committees.

The Foreign Operations and Government Information Subcommittee has scheduled hearings on April 3, 4, and 5 on H.R. 4938 (copy enclosed), a bill to amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked by the President.

This subcommittee held extensive investigative hearings on this subject in the last Congress and its oversight activity involving claims of "Executive privilege" date back to the mid 1950's, spanning four administrations. Subcommittee Members have varying opinions over the extent to which "Executive privilege" actually exists from a legal standpoint and, if it does, what limitations can or should be placed upon it. Moreover, there is substantial concern about what role the courts should have in this question which involves delicate Executive-Legislative relationships and the Constitutional prerogatives of both branches.

In order for our subcommittee to obtain the depth of understanding of current Executive branch views on this subject, it would be extremely helpful to us to receive limited testimony from your Counsel, Mr. John W. Dean III. The following ground rules are suggested:

(1) Mr. Dean's testimony would be on the subject of "Executive privilege" and questions put to him would be limited to a discussion of this issue and matters related to his key role in the handling of requests for the invocation of the privilege claim under the guidelines of your March 24, 1969, Memorandum.

(2) No questions would be put to Mr. Dean that would in any way impinge on his confidential relationship with you, or any discussions, conversations, or memoranda on this subject that may have passed between you.

(3) No questions would be put to Mr. Dean that would relate to his role in the investigation of possible involvement of White House personnel in the Watergate incident.

We hope that you will agree that Mr. Dean's contribution to these hearings is of such a unique nature that you will permit him to testify under the ground rules described above.

With best regards,
Sincerely,

WILLIAM S. MOORHEAD,
Chairman.
JOHN N. ERLENBORN,
Ranking Minority Member.

THE WHITE HOUSE,
Washington, D.C., April 3, 1973.

Hon. WILLIAM S. MOORHEAD,
*Chairman, Subcommittee on Foreign Operations and Government Information,
Committee on Government Operations, House of Representatives, Washington,
D.C.*

DEAR MR. CHAIRMAN: I have been asked to respond to the letter of March 23, 1973, from you and Mr. Erlenborn to the President, inviting me to appear before your Subcommittee to present testimony on the subject of Executive privilege and my role in the handling of requests for invocation of that privilege.

As a member of the President's personal staff, consistent with his statement of March 12, 1973, I must respectfully decline your invitation.

We are confident that your Subcommittee will find the Department of Justice fully competent to present the Administration position regarding the exercise of Executive privilege as well as the historic background of the doctrine. While we are appreciative of the Subcommittee's proposals to limit the scope of my testimony, any information that I could provide beyond that supplied by the Department of Justice or the President's statements on the subject would necessarily relate directly to the performance of my official duties for the President.

With kind regards,
Sincerely,

JOHN W. DEAN III,
Counsel to the President.

**HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., March 19, 1973.**

Hon. Roy L. Ash,
Director, Office of Management and Budget, Executive Office Building, Washington, D.C.

DEAR MR. DIRECTOR: The Foreign Operations and Government Information Subcommittee has scheduled hearings on H.R. 4938, a bill to require that all information be made available to Congress, except where Executive privilege is invoked. A copy of the bill was directed to your agency by the full Committee on March 6, 1973. A duplicate is enclosed for your convenience.

You are requested to present testimony of the Office of Management and Budget on this important legislation at 10:00 a.m., Wednesday, April 4, in Room 2154, Rayburn House Office Building. If additional details on the scope of testimony are required, please contact the Subcommittee office: 225-3741.

In accord with the rules of the Committee, it would be appreciated if 50 copies of your agency's prepared statement are delivered to Mr. William G. Phillips, Subcommittee Staff Director, Room B-371B, Rayburn House Office Building, by 10:00 a.m., Tuesday, April 3, 1973.

We will look forward to a confirmation of your appearance as soon as is convenient.

With best regards,
Sincerely,

WILLIAM S. MOORHEAD, Chairman.

Enclosures.

**EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., March 27, 1973.**

Hon. WILLIAM S. MOORHEAD,
*Chairman, Foreign Operations and Government Information Subcommittee of
the Committee on Government Operations, Rayburn House Office Building,
Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request that I testify before your Subcommittee on H.R. 4938, a bill to require that all information be made available to Congress, except where Executive privilege is invoked.

We understand that at your request, the Department of Justice will present testimony during these hearings on the legal ramifications of the proposed legislation under consideration by your Subcommittee. It is most appropriate for that Department to present the views of the Administration, since the questions raised by the subjects of executive privilege and freedom of information are essentially legal in nature.

While I appreciate your affording me the opportunity to testify, I believe that there is nothing of real substance which I could add to the testimony you will receive from the Department of Justice. For this reason, I believe it would be more constructive for me to defer to that Department on this matter.

One comment, however, is appropriate. As you know, the President reaffirmed on March 12, 1973, his original statement of March 24, 1969, that "the policy of this Administration is to comply to the fullest extent possible with Congressional requests for information." The Office of Management and Budget will continue to be guided by this statement of policy in working with the Congress.

Sincerely,

Roy L. Ash, Director.

**FOREIGN OPERATIONS AND GOVERNMENT
INFORMATION SUBCOMMITTEE,
Washington, D.C. March 19, 1973.**

Hon. CASPAR W. WEINBERGER,
*Secretary of Health, Education, and Welfare, Department of Health, Education,
and Welfare, Washington, D.C.*

DEAR MR. SECRETARY: The Foreign Operations and Government Information Subcommittee has scheduled hearings on H.R. 4938, a bill to require that all in-

formation be made available to Congress, except where Executive privilege is invoked. A copy of the bill was directed to your department by the full Committee on March 6, 1973. A duplicate is enclosed for your convenience.

You are requested to present testimony of the Health, Education, and Welfare Department on this important legislation at 10:00 a.m., Wednesday, April 4, in Room 2154, Rayburn House Office Building. If additional details on the scope of testimony are required, please contact the Subcommittee office: 225-3741.

In accord with the rules of the Committee, it would be appreciated if 50 copies of your department's prepared statement are delivered to Mr. William G. Phillips, Subcommittee Staff Director, Room B-371B, Rayburn House Office Building, by 10:00 a.m., Tuesday, April 3, 1973.

We will look forward to a confirmation of your appearance as soon as is convenient.

With best regards,
Sincerely,

WILLIAM S. MOORHEAD, *Chairman.*

Enclosures.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C., April 2, 1973.

Hon. WILLIAM S. MOORHEAD,
*Chairman, Foreign Operations and Government Information Subcommittee,
Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. MOORHEAD: Thank you for your invitation of March 19 to me to testify on H.R. 4938 before your Subcommittee on April 4.

In view of the legal issues raised by this bill and the fact that they are matters of general applicability to all Federal agencies, we believe that the Department of Justice is the most appropriate Administration spokesman on these issues. Consequently, we will defer to the Justice Department to present testimony on H.R. 4938. I understand that a witness from that Department is scheduled to testify before your Subcommittee on April 5.

Sincerely,

CASPAR W. WEINBERGER,
Secretary.

HOUSE FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,
Washington, D.C., March 19, 1973.

Hon. GEORGE P. SHULTZ,
*Secretary of the Treasury,
Department of the Treasury, Washington, D.C.*

DEAR MR. SECRETARY: The Foreign Operations and Government Information Subcommittee has scheduled hearings on H.R. 4938, a bill to require that all information be made available to Congress, except where Executive privilege is invoked. A copy of the bill was directed to your department by the full Committee on March 6, 1973. A duplicate is enclosed for your convenience.

You are requested to present testimony of the Treasury Department on this important legislation at 10:00 a.m., Tuesday, April 3, in Room 2154, Rayburn House Office Building. If additional details on the scope of testimony are required, please contact the Subcommittee office: 225-3741.

In accord with the rules of the Committee, it would be appreciated if 50 copies of your department's prepared statement are delivered to Mr. William G. Phillips, Subcommittee Staff Director, Room B-371B, Rayburn House Office Building, by 10:00 a.m., Monday, April 2, 1973.

We will look forward to a confirmation of your appearance as soon as is convenient.

With best regards,
Sincerely,

WILLIAM S. MOORHEAD, *Chairman.*

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., March 29, 1973.

Hon. WILLIAM S. MOORHEAD,
Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your letter of March 19, 1973, addressed to the Secretary, inviting testimony of the Treasury Department at hearings before your Subcommittee on April 3, 1973 on H.R. 4938, "To amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked."

It is our understanding that you have also invited representatives of the Department of Justice to testify on the measure. Presumably the witness from that Department will present the views of the Administration on the proposed legislation and we do not believe that we could add anything of a worthwhile nature to that testimony.

Sincerely yours,

SAMUEL R. PIERCE, Jr.,
General Counsel.

HOUSE FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,
Washington, D.C., March 19, 1973.

Hon. RICHARD G. KLEINDIENST,

*Attorney General,
Department of Justice, Washington, D.C.*

DEAR MR. ATTORNEY GENERAL: The Foreign Operations and Government Information Subcommittee has scheduled hearings on H.R. 4938, a bill to require that all information be made available to Congress, except where Executive privilege is invoked. A copy of the bill was directed to your department by the full Committee on March 6, 1973. A duplicate is enclosed for your convenience.

You are requested to present testimony of the Justice Department on this important legislation at 10:00 a.m., Tuesday, April 3, in Room 2154, Rayburn House Office Building. If additional details on the scope of testimony are required, please contact the Subcommittee office: 225-3741.

In accord with the rules of the Committee, it would be appreciated if 50 copies of your department's prepared statement are delivered to Mr. William G. Phillips, Subcommittee Staff Director, Room B-371B, Rayburn House Office Building, by 10:00 a.m., Monday, April 2, 1973.

We will look forward to a confirmation of your appearance as soon as is convenient.

With best regards,
Sincerely,

WILLIAM S. MOORHEAD,
Chairman.

Enclosures.

DEPARTMENT OF JUSTICE,
Washington, D.C., March 28, 1973.

Hon. WILLIAM S. MOORHEAD,

Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter will confirm arrangements which have been made with your staff.

In response to your invitation, Deputy Assistant Attorney General Mary Lawton, Office of Legal Counsel, will testify for the Department concerning H.R. 4938, a bill to require that all information be made available to Congress, except where Executive privilege is involved. The Department is scheduled to present its testimony on April 5, 1973 at 10:00 a.m. in Room, 2154 Rayburn House Office Building.

If we may be of further assistance, please let me know.

Sincerely,

MIKE MCKEVITT,
Assistant Attorney General.

**FOREIGN OPERATIONS AND GOVERNMENT
INFORMATION SUBCOMMITTEE,
Washington, D.C., March 28, 1973.**

Hon. JOHN A. HANNAH,
*Administrator, Agency for International Development,
Washington, D.C.*

DEAR DR. HANNAH. Your March 22nd response to my letter of March 6, denying our request for a copy of the FY 1973 Country Field Submission prepared by the Office of Regional Development in Bangkok, raises serious questions which need to be answered.

As I explained in my letter, testimony before our subcommittee on May 31, 1972, by the Assistant Secretary of State for Congressional Relations made it clear that the President's March 15, 1972, memorandum regarding Country Field Submissions and their availability to the Congress "did not constitute a blanket delegation of the authority to his subordinates to claim this privilege." Such interpretation was also given the Subcommittee in testimony that same day by the Department's Deputy Legal Advisor.

The Subcommittee is holding hearings next week on the subject of "Executive privilege" and desires to explore what appears to be a contradictory opinion to that of previous Department witnesses on this subject. We suggest either Wednesday, April 4, or Thursday, April 5, as optional dates. Since hearings will be in both the mornings and afternoons of those days, we will make our schedule flexible enough to accommodate you. If additional details on the desired scope of your testimony are required, please contact the Subcommittee office: 225-3741.

In accord with the rules of the Committee, it would be appreciated if 50 copies of your prepared statement are delivered to Mr. William G. Phillips, Subcommittee Staff Director, Room B-371B, Rayburn House Office Building, 24 hours in advance of your appearance.

We will look forward to hearing from you so that this most serious problem can be fully discussed and, hopefully, resolved in an expeditious manner.

With best regards,
Sincerely,

**WILLIAM S. MOORHEAD,
Chairman.**

Enclosures.

**DEPARTMENT OF STATE,
AGENCY FOR INTERNATIONAL DEVELOPMENT,
Washington, D.C., April 3, 1973.**

Hon. WILLIAM S. MOORHEAD,
*Chairman, Subcommittee on Foreign Operations and Government Information,
Committee on Government Operations, House of Representatives, Washington,
D.C.*

DEAR MR. CHAIRMAN: This acknowledges receipt of your letter of March 28, 1973 and the invitation to attend hearings of the Subcommittee on the subject of Executive Privilege.

I regret that my letter of March 22 with respect to the release of the Country Field Submission for the Office of Regional Development in Bangkok may have led to a misunderstanding over A.I.D.'s interpretation of the President's memorandum of March 15, 1972. I trust that a statement of A.I.D.'s position on this subject will resolve the problems to which you refer to the satisfaction of all concerned.

The guiding policy of the Administration on the subject of Executive Privilege was set forth in the President's memorandum of March 24, 1969 to heads of Executive Departments. In that directive, the President announced that the Administration would invoke the authority to withhold information from the Congress "only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise". The authority was to be exercised only with "specific Presidential approval".

The President's invocation of Executive Privilege on March 15, 1972 has not been interpreted by A.I.D. as either a blanket exercise of the privilege or as a delegation of the authority of the President to subordinates in the Executive Branch. Such would be contrary to the clear meaning of the March 24, 1969 directive. Instead, the memorandum indicates that requests for Country Field Submissions and other comparable planning documents raise issues of particular

importance which require careful review on a case-by-case basis. We have established a procedure to assure that such a review takes place.

Turning to my letter of March 22, it was my intent in offering to the committee substantive factual information in lieu of the CFS document itself, to deny the report requested by the invocation of Executive Privilege authority, which is reserved to the President alone. It was my hope that a full oral briefing or written presentation regarding the contents of the document would fulfill the requirements of the Subcommittee. I have instructed my staff to work with yours to establish a mutually acceptable solution to the problem along these lines.

If I can be of further assistance please advise me. I regret that I shall be unable to accept your invitation to appear before the Subcommittee on April 4 or April 5 due to previous commitments.

Sincerely,

/s/ JOHN A. HANNAH,
Administrator.

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C., May 1, 1973.

Hon. CHET HOLIFIELD,
*Chairman, Committee on Government Operations, House of Representatives,
Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your letter of March 6, 1973, requesting a report and comments on H.R. 4938.

H.R. 4938 would amend the Freedom of Information Act to require that all information be made available, upon request, to either House of Congress, any committee thereof, or the Comptroller General of the United States, except where Executive Privilege is invoked.

On March 24, 1969, the President, in a Memorandum for the Heads of Executive Departments and Agencies, established a procedure to govern compliance with Congressional demands for information. This memorandum stated as follows:

"The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive Branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons, Executive privilege will not be used without specific Presidential approval."

The President's memorandum then set out the procedural steps governing the invoking of Executive privilege. The policy of this Department is in accordance with this directive of the President. A copy of the President's memorandum is enclosed.

H.R. 4938 sets out certain time limitations and other provisions which may conflict with procedures under the President's memorandum. However, this Department would defer to the Department of Justice on the particular merits of the bill.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

J. PHIL CAMPBELL,
Acting Secretary.

Enclosure.

U.S. ATOMIC ENERGY COMMISSION,
Washington, D.C., May 3, 1973.

Hon. CHET HOLIFIELD,
*Chairman, Committee on Government Operations,
House of Representatives.*

DEAR MR. HOLIFIELD: Thank you for the opportunity to comment on H.R. 4938, a bill "[t]o amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked,"

and H.R. 4960, a bill “[t]o amend section 552 of title 5 of the United States Code to limit exceptions to disclosure of information, to establish a Freedom of Information Commission, and to further amend the Freedom of Information Act.”

The Atomic Energy Commission considers enactment of H.R. 4938 unnecessary with respect to AEC activities, particularly in view of section 202 of the Atomic Energy Act of 1954, as amended, and subsection (c) of 5 U.S.C. 552, the Freedom of Information Act. We oppose enactment of H.R. 4960 as presently written.

H.R. 4938 would add to the Freedom of Information (FOI) Act a new subsection (d) which would place a time limit of 30 days on an agency's response to a request for information from a House or committee of Congress, or from the Comptroller General, unless Executive privilege were invoked over the President's signature.

An officer or employee of an agency would be required to appear in response to a request by a House or committee of Congress for his presence to present testimony. The agency representative would have to supply all information requested except those items specifically ordered withheld by the President in a signed statement invoking Executive privilege.

Finally, H.R. 4938 would limit the invocation of Executive privilege to those instances involving certain policy recommendations whose disclosure would jeopardize the national interest and the obtaining of forthright advice.

The AEC is required by section 202 of the Atomic Energy Act to keep the Joint Committee on Atomic Energy “fully and currently informed” regarding its activities. Beyond this statutory requirement, AEC has consistently been responsive to Congressional inquiries in general, both from individual members and from committees, and to inquiries from the Comptroller General. We thus see no need for this legislation as regards the AEC.

* * * * *

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

DIXY LEE RAY, Chairman.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., April 25, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN. Reference is made to your request for the views of the Department of Defense on H.R. 4938, 93rd Congress, a bill “To amend the Freedom of Information Act to require that all information be made available to Congress except where Executive Privilege is invoked,” and on H.R. 6438, a bill “To amend the Freedom of Information Act to require that all information be made available to Congress.”

The purpose of H.R. 4938 is to restrict Executive Branch agencies in their use of Executive Privilege as a basis for refusing information or testimony to Congress, any committee thereof, or the Comptroller General of the United States. This restriction would be effected by requiring that Executive Privilege be invoked only by the President and only to protect recommendations made to the President or an agency head when revelation of that information would seriously jeopardize the national interest and his ability, or that of an agency head, to obtain forthright advice. H.R. 6438 differs only in that even the President could not invoke Executive Privilege under the limited circumstances recognized in H.R. 4938.

The Department of Defense is opposed to these bills on the grounds that they are unnecessary and that they would be ineffective as means of limiting the constitutionally-established prerogatives of the President of the United States.

President Nixon's memorandum of March 24, 1969, for the Heads of Executive Departments and Agencies, and the Statement by the President dated March 12, 1973, clearly establish an Executive Branch policy in favor of very

restrictive use of Executive Privilege and only when specifically and personally approved by the President of the United States. In those rare instances in which Executive Privilege is proposed by an agency head as a basis for denying information to Congress, the procedures of those documents require that the proposal be submitted through the Department of Justice for thorough legal evaluation before it is considered by the President. As a result of these procedures, and President Nixon's well-understood reluctance to use Executive Privilege, there have been few instances in which the doctrine has been employed by the Department of Defense. Consequently, it is our view that the apparent intention of these bills has already been accomplished through the initiative of the President.

Although the Department of Defense defers to the Department of Justice on the constitutional issue raised by the subject bills, it seems apparent that legislation cannot limit the President in his exercise of a constitutional prerogative derived from his position as the nation's Chief Executive and as Commander-in-Chief of the Armed Forces.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

J. FRED BUZHARDT.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Washington, D.C., April 9, 1973.

Hon. CHET HOLIFIELD,
*Chairman, Committee on Government Operations, House of Representatives,
Washington, D.C.*

DEAR MR. CHAIRMAN: This replies further to your request for the comments of the National Aeronautics and Space Administration on the bill H.R. 4938, "To amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked."

H.R. 4938 would amend the Freedom of Information Act (5 USC 552) by adding a new subsection (d) which would provide:

(1) That information requested of an Executive Branch Agency by either House of Congress, or by the Comptroller General, would be required to be made available unless a statement signed by the President, invoking Executive privilege as the basis for withholding it, was submitted;

(2) That whenever either House of Congress, or any Committee thereof, requested testimony from an employee of an agency, the employee would be required to appear, and to supply all information requested unless Executive privilege was invoked against its disclosure in a statement signed by the President;

(3) That Executive privilege could be invoked only by the President, and only in those instances in which the requested information or testimony concerned policy recommendations made to the President or agency head, and as to which the President determined that its disclosure would seriously jeopardize the National interest and his ability or that of the agency head to obtain forthright advice. To the extent possible, however, factual information underlying such policy recommendations would be subject to disclosure upon request.

Since the subject matter of this proposed legislation appears to involve legal questions best addressed by the Department of Justice, the National Aeronautics and Space Administration would defer to the views of that Department on the provisions of H.R. 4938.

The Office of Management and Budget has advised that, from the standpoint of the President's program, there is no objection to the submission of this report to the Congress.

Sincerely,

H. DALE GRUBB.
Assistant Administrator for Legislative Affairs.

NATIONAL SCIENCE FOUNDATION,
 OFFICE OF THE DIRECTOR,
Washington, D.C., June 19, 1973.

Hon. CHET HOLIFIELD,
*Chairman, Committee on Government Operations,
 House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your letter of March 6, 1973 requesting the comments of the National Science Foundation on H.R. 4938, a bill "to amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked."

The Foundation believes that all possible information should be made available to the Congress to assist it in meeting its legislative and oversight responsibilities. The proposed legislation appears to be drawn for the purpose of limiting and defining the exercise of Executive privilege by the President in furnishing information requested by Congress. However, H.R. 4938 is drawn so broadly and so inclusively that the Foundation cannot support its enactment.

First, the proposed legislation makes no provision for protection of information which has legitimately been submitted in confidence to an agency. For example, research proposals submitted to the Foundation are not made available to members of the public without permission of the applicant since proposals often contain proprietary information and also in many cases premature disclosure could jeopardize the researcher's position of priority by alerting competitors to his advances and hopes before he is ready to publish. Also, under the Foundation's "peer review" system the comments of NSF outside reviewers of proposals are also treated as confidential to ensure complete openness and frankness. The proposed legislation makes no provision which would ensure that such documents are safeguarded from public disclosure. The only protection which could be afforded would require procurement of a statement invoking Executive privilege personally signed by the President. Needless to say, personal Presidential intervention not only would be extremely rare and difficult to obtain but it would not even be appropriate for the types of documents we are concerned with here.

Moreover, the bill does not appear to take into account and makes no safeguarding provision for information classified for national security purposes. While the Congress may have a right in many cases to receive such information, adequate provision should be made for protecting the security of such information and preventing its disclosure. Here again, the traditional doctrine of Executive privilege would not apply in a great percentage of cases, yet this is the only protection from disclosure given the information.

In sum, while the bill provides for access by the Congress to virtually all Executive Branch information, regardless of its security classification or the confidentiality in which the information was originally submitted, it provides no safeguards for protecting such information from public disclosure except a cumbersome assertion of Executive Privilege which I feel would be totally inadequate. For these reasons, the Foundation opposes enactment of H.R. 4938.

The Office of Management and Budget has advised us that there is no objection to the submission of this report from the viewpoint of the Administration's program.

Sincerely yours,

H. GUYFORD STEVER, Director.

—
 DEPARTMENT OF STATE,
Washington, D.C., April 23, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives.

DEAR MR. CHAIRMAN: The Secretary of State has asked that I reply to your letter of March 6, 1973, requesting a report on H.R. 4938, a bill "To amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked."

We are in accord with the general principles that information should be promptly furnished to Congress when requested, and individuals should appear and testify before Congress and its committees, except where the President invokes Executive privilege. Executive privilege, however, is a constitutional doctrine; it is not subject to expansion or contraction through legislation. In partic-

ular, paragraph (3) of the bill appears to us to raise substantial constitutional questions by attempting to fix in legislation a rather narrow definition of the types of material and testimony with respect to which Executive privilege may be invoked.

We also have doubts as to the constitutionality of the requirement in paragraph (2) of the bill that an officer or employee of an agency (including Presidential advisors) appear upon request before Congress or a congressional committee, even if he intends to invoke Executive privilege, on the basis of a statement signed by the President, in respect of all matters to be discussed. Presidential advisors and assistants stand in a special relationship to the President, and are in certain respects his alter egos. Since the President himself may not be compelled to testify before the Congress, it would also appear that his personal assistants and advisors may be privileged not to appear, if the President determines that their appearance would not be in the national interest.

For these reasons, the Department of State is opposed to the enactment of H.R. 4938.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely,

MARSHALL WRIGHT,
Assistant Secretary
for Congressional Relations.

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EXECUTIVE PRIVILEGE: A BRIEF OVERVIEW

The concept of executive privilege is currently one of varietal understanding. To some, it constitutes an attempt by the Chief Executive to thwart efforts by the other branches of our Federal Government to obtain information either of a documentary or testimonial nature. The legal community tends to regard the practice as a formal power of the President which is implied by the Constitution. For others, any Executive Branch refusal to supply requested information to Congress or the Judiciary constitutes an assertion of executive privilege. Any attempt at comprehending the significance of this doctrine and its exercise must focus upon both reason and practice.

Constitutional basis

There is no direct reference in the Constitution to executive privilege. As Sen. Sam Ervin (D.-N.C.) noted during hearings held during the 92nd Congress on the Practice:

Although the Constitution is silent with regard to the existence of executive privilege, its exercise is asserted to be an inherent power of the President. Its constitutional basis allegedly derives from the duty imposed upon the President under article II section 3 to see that the laws are faithfully executed. The President claims the power on the grounds that it is necessary in order to provide the executive branch with the autonomy needed to discharge its duties properly. Inasmuch as the "President alone and unaided could not execute the laws * * *" but requires "the assistance of subordinates" (*Myers v. U.S.* 272 U.S. 117 [1926]), the alleged authority to exercise executive privilege has thereby been extended in practice to the entire executive branch.¹

The first assertion of the doctrine of executive privilege was by President Washington in 1792 on the occasion of an investigation by the House of Representatives into an Indian massacre of a military expedition under the command of Gen. Arthur St. Clair. The investigation focused upon events of the previous year.

With a troop of approximately 1500 men, Gen. St. Clair had set out in September, 1791, to explore a region of northwestern Ohio and construct a ring of out-

¹ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *Executive Privilege: The Withholding of Information by the Executive*. Hearings, 92d Cong., 1st sess. Washington : U.S. Govt. Print. Off., 1971, p. 2.

posts in the area to provide protection to pioneer settlements against Indian attacks. The expeditionary force was composed of regulars, raw levies, and Kentucky militia. After weeks of cold and wet weather, a band of sixty of the levies declared, on the last day of October, that their term of enlistment had expired and they fled to the rear of the march. To protect his supply wagons and to instill discipline, Gen. St. Clair dispatched his best units to round up the deserters. With his forces thus depleted, he then pushed on into the headwaters region of the Wabash River.

On the evening of November 3, the party encamped on high ground near the eastern branch of the upper Wabash. Due to the lateness of the hour and the fatigue of his men, Gen. St. Clair did not prepare earthwork defenses that night but left their construction for the next morning. At daybreak the camp was attacked by a small but determined Indian band. Not only were they veteran warriors but according to one authority: "In discipline and leadership this group probably excelled any other the red men ever assembled."² Because Indian marks-men killed every artilleryman, the cannon had to be spiked. Major General Richard Butler, second-in-command, was mortally wounded. Raw recruits fled and most of the officers were killed. After three hours of fighting, half the troop had been lost and the order was given to retreat to Fort Jefferson some thirty miles south. Some 600 officers and soldiers were killed in the engagement, half as many were wounded, but fewer than seventy Indians were slain.³

In March of 1792 an effort was initiated in the House of Representatives to investigate the circumstances surrounding the St. Clair debacle. Subsequently a special committee of seven members under the chairmanship of Rep. Thomas Fitzsimons, a Federalist, was created. In establishing the panel it was authorized that "said committee be empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries."⁴

When Secretary of War Henry Knox received the committee's request for the original letters and instructions pertaining to the ill-fated expedition, he conferred with President Washington. This led to two discussions of the propriety of the Executive Branch providing information to Congress. On March 31, 1792, at a Cabinet meeting attended by Secretary of State Thomas Jefferson, Secretary of the Treasury Alexander Hamilton, Attorney General Edmund Randolph, and Knox, the President, according to notes kept by Jefferson:

"* * * had called us to consult, merely because it was the first example, and he wished that so far as it should become a precedent, it should be rightly conducted. He neither acknowledged nor denied, nor even doubted the propriety of what the House were doing, for he had not thought upon it, nor was acquainted with subjects of this kind: he could readily conceive there might be papers of so secret a nature, as that they ought not to be given-up. We were not prepared, and wished time to think and inquire."⁵

The Cabinet met again on April 2, with Jefferson noting:

"We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquires. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President... Note; Hamilton agreed with us in all these points, except as to the power of the House to call on Heads of Departments.

"He observed that as to his Department, the act constituting it had made it subject to Congress in some points, but he thought himself not so far subject, as to be obliged to produce all the papers they might call for. They might demand secrets of a very mischievous nature. (Here I thought he began to fear they would go on to examining how far their own members and other persons in the government had been dabbling in stocks, banks &c., and that he probably would choose in this case to deny their power; and, in short, he endeavored to place

² Telford Taylor, *Grand Inquest*. New York: Simon & Schuster, 1955, p. 18.

³ See, generally, *ibid.*, pp. 17-29.

⁴ Stephen Horn, *The Cabinet and Congress*. New York, Columbia University Press, 1960, pp. 22-25.

⁵ Andrew A. Lipscomb, ed. *The Writings of Thomas Jefferson* (vol. I). Washington: The Thomas Jefferson Memorial Association, 1903, p. 303.

himself subject to the House, when the Executive should propose what he did not like, and subject to the Executive, when the House should propose anything disagreeable.) I observed here a difference between the British Parliament and our Congress; that the former was a legislature, an inquest, and a council... for the King. The latter was, by the constitution, a legislature and an inquest, but not a council. Finally agreed, to speak separately to the members of the committee, and bring them by persuasion into the right channel. It was agreed in this case, that *there was not a paper which might not be properly produced*; that copies only should be sent, with an assurance, that if they should desire it, a clerk should attend with the originals to be verified by themselves." [emphasis added]⁶

Thus agreed, Secretary Knox transmitted the requested papers, but was not given an opportunity to testify before the special investigating committee.⁷ The theoretical basis for the doctrine of executive privilege, though expressed, had yet to be asserted in practice.

The occasion for implementing the theory arose in 1796 when the House again requested documents in the possession of the Executive. And, as in the instance of the St. Clair investigation, the matter prompting the demand was one of high emotion.

"So many controversies with England growing out of the Revolutionary War still remained unsettled that in 1794 President Washington sent Chief Justice Jay to London to negotiate a treaty. The anti-administration forces, bitterly disappointed at Washington's proclamation of neutrality instead of a declaration of war against England in order to aid France, wanted no such treaty. When, in due time, Jay returned with a treaty containing extraordinary benefits for Federalist interests and not one item favorable to anyone south of the Potomac, the rage against it was, as Washington said, 'like that against a mad dog.'"⁸

Obligated to appropriate funds in order that the requirements of the treaty might be carried out, the House sought the instructions to Jay for negotiating the agreement, together with the correspondence and documents relative to it as well. In refusing to transmit the requested papers, Washington first stated the constitutional nature of his action, saying:

I trust that no part of my conduct has ever indicated a disposition to withhold any information which the Constitution has enjoined upon the President as a duty to give, or which could be required of him by either House of Congress as a right; and with truth I affirm that it has been, as it will continue to be while I have the honor to preside in the Government, my constant endeavor to harmonize with the other branches thereof so far as the trust delegated to me by the people of the United States and my sense of the obligation it imposes to "preserve, protect, and defend the Constitution" will permit.⁹

At the close of his letter, the President, with regard to the role of the House, added a pragmatic reason for his refusal of their request and again stated the constitutional basis for his action.

As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light, and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.¹⁰

The information was thus denied and withheld.

It is impossible in our day to understand the heat generated by the prolonged controversy over Jay's treaty. The fate of the government seemed to be hanging in the balance. The Senate ceased its sittings. [Senator Rufus] King bluntly declared that unless the House appropriated the required funds the Senate would regard all legislation at an end and the union dissolved. Finally, the House, exercising the recognized constitutional freedom of judgment appropriated the needed funds and another constitutional crisis had passed.¹¹

⁶ *Ibid.*, pp. 303-305.

⁷ Horn, *op. cit.*, pp. 28-29.

⁸ Wilfred E. Binkley, *President and Congress*. New York: Alfred A. Knopf, 1947, pp. 42-43.

⁹ James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents 1789-1897* (vol. I). Washington: U.S. Govt. Print. Off., 1896, p. 194.

¹⁰ *Ibid.*, p. 196.

¹¹ Binkley, *op. cit.*, p. 44.

While this incident was the first instance of a document denial to Congress by the Executive, it was apparently not until 1877 that an Executive Branch witness refused to provide information by testimony before a congressional committee. Asked to provide details on the circumstances surrounding the removal of Chester A. Arthur as collector of port of New York and the appointment of Theodore Roosevelt to that position, Secretary of the Treasury John Sherman, in a letter to Chairman Roscoe Conkling (R-N.Y.) of the Senate Commerce Committee, argued:¹²

To answer in an official way the questions put to me would not only compel me to violate that trust and confidence reposed in me by the President, necessary for the transaction of the business of this Department, but to disclose papers of a confidential character filed in the Department and require me to enter into the discussion of questions totally immaterial to the nominations submitted to the Senate. I do not think it within the just limits of the intercourse of the Senate with executive officers to answer in writing, or even verbally, all the questions submitted by you, nor have I ever known such an instance.

The President has the power to nominate to the Senate a proper person for collector of the port of New York, whether that office be already vacant or not, and it is within the power of the Senate to either confirm or reject.

These are independent powers. No law requires the President to give the reasons for his nominations, and it does not appear that in this case the Senate even has directed this inquiry. The tenure-of-office act required of the President the reasons of a suspension made during the recess of the Senate, but this provision, after a very brief period, was repealed. To answer your questions would compel me to state to a committee of the Senate the reasons of an appointment by the President, to disclose confidential communications between the President and the Secretary, and to enter into an arrangement and accusation of the officers superseded. In the free exercise of independent powers it is the common practice, as we both know, for members of the Senate to have full conference with the heads of Executive Departments on all matters in which the concurrent action of the President and the Senate is required, and therefore it will give me pleasure to confer with the committee, or any member of it, on the subject of the fitness of the appointment of Mr. Roosevelt to the office of collector of the port of New York.¹³

Thus, while the President's reasons for selecting his nominee and communications between the Chief Executive and the Secretary of the Treasury on matters pertaining to the nominee were thought to be privileged, the Secretary was not unwilling to testify on the qualifications and suitability of the nominee. The events were such that Secretary Sherman had no opportunity to testify. Conkling kept Hayes' nominations for the New York Custom House confined to the Commerce Committee and they were unreported at the time when the special session expired. With the next regular session, fifteen of the New York delegation's seventeen Republican members of the House petitioned the President urging the retention of Chester A. Arthur, whom Roosevelt was supposed to replace, and Alonzo B. Cornell. Hayes subsequently returned his three nominations for the Custom House. The Commerce Committee reported favorably on one and unfavorably on the other two, Roosevelt being in the latter category. After a stormy Senate debate, the nominees receiving the adverse report were defeated. Arthur remained in his position but was cast out a year later when Hayes appointed new officials to the Custom House while the Senate was out of session. Roosevelt died shortly after his nomination was lost. His son, who was destined to later become President, became an ardent civil service reformer and attacked the spoils system which had cost his father his collector's position. In 1883 Chester Arthur would be the President signing and, the first chief executive to administer, the Pendleton Act which set the course for the institution of a competitive and nonpartisan civil service.¹⁴

Tradition basis

Another device for refusing information of one form or another to Congress is to assert that the information sought is within the province of the White House

¹² Conkling's letter of questions appears in the *Congressional Record*, XVII (Mar. 22, 1886), p. 2618; on the general circumstances prompting this inquiry see Binkley, *op. cit.*

¹³ *Congressional Record*, XVII (Mar. 12, 1886), p. 2332.

¹⁴ H. J. Eckenrode, *Rutherford B. Hayes: Statesman of Reunion*. New York: Dodd, Meade & Co., 1930, pp. 272-275.

Office, an allegedly exclusive presidential enclave. Created in 1939 by two reorganization plans, which Congress affirmed by not specifically rejecting on a vote, and organized under E.O. 8248, the White House Office is without statutory authority and those assistants and advisors located within it are viewed as being somewhat privileged in their roles of personal aides to the President. Appointed without congressional approval, the personnel of the White House Office were to confine themselves to that domain. The six Administrative Assistants to the President, which the Chief Executive is statutorily authorized to compensate (3 U.S.C. 105), were originally to "have no authority over anyone in any department or agency, including the Executive Office of the President, other than the personnel assigned to their immediate office."¹⁵ This situation has been breached in recent years where Assistants serve as the administrative officers of the presidential staff agencies. Currently, presidential assistant Dr. Henry Kissinger heads the National Security Council staff while Peter Flanigan heads the Council on International Economic Policy staff; the Director of the Office of Management and Budget, Roy Ash, also serves as an Assistant, as does Secretary of the Treasury George P. Shultz. The executive privilege problem occurs when these officials are called to testify before congressional committees to account for activities as officials of the presidential staff agencies and the basis for their refusal to appear is that they are members of the White House Office and, in the words of Counsel to the President John W. D Dean III who is currently justifying such refusals:

it has been a matter of long-established principle and precedent that members of the President's immediate staff do not appear before Congressional committees to testify in regard to the performance of their duties as members of the President's staff. This practice is, indeed, fundamental to the operation of our system of government.

Prior to the 1939 reorganization, the President had a very small staff located within the White House. From the presidency of George Washington, who personally compensated his nephew Lawrence Lewis to serve as his secretary, to that of Herbert Hoover, the President of the United States was statutorily permitted only one administrative aide. In 1929 Congress increased the Chief Executive's staff by providing for (45 Stat. 1230) the addition of two more secretaries and authority for an Administrative Assistant. In order to compensate his "Brains Trust," President Franklin D. Roosevelt had to obtain Rexford G. Tugwell an assistant secretaryship at the Agriculture Department and a similar position for Raymond Moley at the State Department.

Attempting to meet this problem of White House staffing, Roosevelt placed the matter before a President's Committee on Administrative Management, composed of some of the finest minds in matters of public administration at that time. In a report to the President and the Congress dated January 8, 1937, the Committee suggested that the President should be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government. These assistants, probably not exceeding six in number, would be in addition to his present secretaries, who deal with the public, with the Congress, and with the press and the radio. *These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the President and the heads of his departments. They would not be assistant presidents in any sense.* Their function would be, when any matter was presented to the President for action affecting any part of the administrative work of the Government, to assist him in obtaining quickly and without delay all pertinent information possessed by any of the executive departments so as to guide him in making his responsible decisions; and then when decisions have been made, to assist him in seeing to it that every administrative department and agency affected is promptly informed. Their effectiveness in assisting the President will, we think, be directly proportional to their ability to discharge their functions with restraint. They would remain in the background, issue no orders, make no decisions, emit no public statements. Men for these positions should be carefully chosen by the President from within and without the Government. They should be men in whom the President has personal confidence and whose character and attitude is such that *they would not attempt to exercise power on their own account.* They should be possessed of high competence, great physical vigor, and

¹⁵ E.O. 8248, Sept. 8, 1939.

a passion for anonymity. They should be installed in the White House itself, directly accessible to the President. [emphases added]¹⁶

As evidenced here, the Committee sought to provide the President with additional personal aides who would exercise no authority of their own and have no policy role. As official presidential intimates they would not be expected to divulge any details about those activities which might be their duty to perform. However, on various occasions, members of the White House Office have been given an opportunity to testify before congressional committees with regard to their personal activities but not their official duties. Among those officials who have so testified are:

Jonathan Daniels, Administrative Assistant to the President, who appeared before the Senate Agriculture and Forestry Committee on February 28, March 7, and March 8, 1944, to discuss his involvement in the personnel policy of the Rural Electrification Administration;¹⁷

Wallace H. Graham, Physician to the President, who appeared before the Senate Appropriations Committee on January 13, 1948 to discuss information to which he might have been privy with regard to the commodities market;¹⁸

Harry H. Vaughan, Military Aide to the President, appeared before the Senate Committee on Expenditures in Executive Departments on August 30 and 31, 1949 to discuss his personal involvement in certain government procurement contracts;¹⁹

Donald S. Dawson, Administrative Assistant to the President, appeared before the Senate Banking and Currency Committee on May 10 and 11, 1951 to discuss allegations he had attempted to "dominate" the Reconstruction Finance Corporation and influence appointments to that body;²⁰

Sherman Adams, Assistant to the President, appeared before the House Interstate and Foreign Commerce Committee on June 17, 1958 to discuss his involvement with certain lobbyists;²¹

Peter Flanigan, Assistant to the President, appeared before the Senate Judiciary Committee on April 20, 1972 during the course of hearings on the confirmation of Richard Kleindienst for Attorney General to discuss his involvement in apparent lobbying activities by the International Telephone and Telegraph Company;²²

There have been instances when individuals holding both a White House Office position and a leadership position in a presidential staff agency have come before congressional committees to discuss policy matters. The basis for their appearance and the refusal of others having such dual status has not been explained by the Executive. During the 92nd Congress the following examples occurred:

Edward E. David, Jr., Science Adviser to the President and Director, Office of Science and Technology, appeared before the Senate Interior and Insular Affairs Committee on June 15, 1971 to discuss the administration's position on matters of energy policy; he appeared before the House Science and Astronautics Committee on June 14, 1972 to discuss matters of scientific policy as they related to Soviet-American cooperative agreements;²³

Virginia H. Knauer, Special Assistant to the President for Consumer Affairs and Director, Office of Consumer Affairs, appeared before the House Select Com-

¹⁶ President's Committee on Administrative Management. *Report of the Committee*. Washington: U.S. Govt. Print. Off., 1937, p. 5.

¹⁷ U.S. Congress. Senate. Committee on Agriculture and Forestry. *Administration of the Rural Electrification Act*. Hearings, 78th Cong., 2d sess. Washington: U.S. Govt. Print. Off., 1944, pp. 61ff, 695ff, 721ff.

¹⁸ _____ Committee on Appropriations. *Speculation in Commodity Markets*. Hearings, 80th Cong., 2d sess. Washington: U.S. Govt. Print. Off., 1948, pp. 49ff.

¹⁹ _____ Committee on Expenditures in the Executive Departments. *Influence in Government Procurement*. Hearings, 81st Cong., 1st sess. Washington: U.S. Govt. Print. Off., 1949, pp. 495ff, 563ff.

²⁰ _____ Committee on Banking and Currency. *Study of Reconstruction Finance Corporation*. Hearings, 82d Cong., 1st sess. Washington: U.S. Govt. Print. Off., 1951, pp. 1709ff, 1735ff.

²¹ _____ House. Committee on Interstate and Foreign Commerce. *Investigation of Regulatory Commissions and Agencies*. Hearings, 85th Cong., 2d sess. Washington: U.S. Govt. Print. Off., 1958, pp. 3712ff.

²² _____ Senate. Committee on the Judiciary. *Nominations of Richard G. Kleindienst and Louis Patrick Gray III*. Hearings, 92d Cong., 2d sess. Washington: U.S. Govt. Print. Off., 1972, pp. 1585ff.

²³ _____ Committee on Interior and Insular Affairs. *The President's Energy Message*. Hearings, 92d Cong., 1st sess. Washington: U.S. Govt. Print. Off., 1971, p. 12ff;

_____ House. Committee on Science and Astronautics. *U.S.-U.S.S.R. Cooperative Agreements*. Hearings, 92d Cong., 2d sess. Washington: U.S. Govt. Print. Off., 1972, p. 60ff.

mittee on Small Business on June 25, 1971, to discuss consumer protection and advertising standards;²⁴

Jerome H. Jaffe, Special Consultant to the President and Director, Special Action Office for Drug Abuse Prevention, appeared before the House Interstate and Foreign Commerce Committee on June 28, August 2, October 27, and November 8, 1971 to discuss various aspects of his agency's operations.²⁵

When members of the White House staff are sought by congressional committees as witnesses, a contemporary explanation by these officials for refusing to so appear is one relying upon the tradition of White House Office personnel functioning as personal aides to the President and thereby being privy to the highest levels of policy and the private thoughts of the Chief Executive. Entwined as they are with the President, these aides argue that they are immune to congressional scrutiny as their official actions are protected by the separation of powers doctrine. In the event this argument is not accepted, the President might choose to shield his White House staff by invoking executive privilege on a formal basis. The difference between the two situations is significant, however, for it raises the question of who is the proper agent for involving executive privilege—the President alone or his subordinates as well—and how should the practice be exercised—by formal declaration, certification, or by casual communication which may go unnoticed or unreported in public records?

Contemporary Basis

At present there are four types of executive privilege being practiced. The first is a formal declaration of executive privilege by the President which relies upon implied constitutional authority for the Chief Executive to deny information to Congress which he deems should not be transmitted. The current operational basis for this exercise of authority was first expressed in a March 7, 1962 letter from President John F. Kennedy to Rep. John E. Moss, then chairman of the House Special Government Information Subcommittee, which said:

As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. *Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.* Your own interest in assuring the widest public accessibility to governmental information is, of course, well known, and I can assure you this Administration will continue to cooperate with your subcommittee and the entire Congress in achieving this objective. [Emphasis added.]²⁶

This gentlemen's agreement was continued by President Lyndon B. Johnson who, in a letter of April 2, 1965, to Chairman Moss, said:

Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of "executive privilege" will continue to be made only by the President.²⁷

And with the arrival of the next administration, President Richard M. Nixon also continued the policy, so stating in a letter of April 7, 1969 to Chairman Moss, which read in part:

✓ I believe, and I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval.²⁸

Thus, the basis for an invocation of executive privilege in response to a congressional request for information has been limited to a personal utilization of this authority by the President alone. However, this arrangement must be viewed as applying only to the congressional realm. Another type of formal executive privilege practice may be utilized with regard to information requests emanating from elsewhere within the Executive Branch or from the Judicial Branch.

Shortly after President Kennedy transmitted his letter on executive privilege to Chairman Moss, the Chief Executive was asked by the Attorney General if

²⁴ _____, House, Select Committee on Small Business, *Advertising and Small Business*. Hearings, 92d Cong., 1st sess. Washington : U.S. Govt. Print. Off., 1971, p. 567ff.

²⁵ _____, Committee on Interstate and Foreign Commerce, *Special Action Office for Drug Abuse Prevention*. Hearings, 92d Cong., 1st sess. Washington : U.S. Govt. Print. Off., 1971, pp. 171ff, 1037ff, 1443ff, 1578ff.

²⁶ _____, Senate, Committee on the Judiciary, Subcommittee on Separation of Powers, *Executive Privilege: The Withholding of Information by the Executive*. Hearings, 92d Cong., 1st sess. Washington : U.S. Govt. Print. Off., 1971, p. 34.

²⁷ *Ibid.*, p. 35.

²⁸ *Ibid.*, p. 36.

the expressed policy applied only to Congress. In a still unpublished letter of March 30, 1962, to the Attorney General, Theodore C. Sorenson, Special Counsel to the President, replied that the policy "relates solely to inquiries directed by the Congress or its committees to the Executive Branch" and does not have any application "to demands, made in the course of a judicial or other adjudicatory proceeding, for the production of papers or other information in the possession of the Government."²⁹

On January 30, 1973, Air Force Secretary Robert C. Seamans, Jr., invoked executive privilege in refusing to divulge the role of the White House in the dismissal of Ernest Fitzgerald, a high-level civilian cost-analyst in the office of the Secretary of the Air Force. The occasion was a Civil Service Commission hearing on Fitzgerald's dismissal. During a press conference the following day, President Nixon was asked if he had personally approved this utilization of executive privilege. He responded, saying: "In this case, as I understand it—and I did not approve this directly, but it was approved at my direction by those who have the responsibility within the White House—in this case it was a proper area in which the executive privilege should have been used."³⁰ Thus, this type of situation, where an Executive branch request for information is denied by a formal invocation of executive privilege at the direction of a presidential subordinate, constitutes a second type of contemporary invocation basis. And it may be presumed, relying upon the Sorenson letter, that Judicial Branch requests for information which are denied by a formal invocation of executive privilege would also be dealt with on this same basis.

A third way for refusing information to Congress relies not upon any formal invocation of executive privilege but rather a denial which argues that the information sought is within the realm of the White House Office which is alleged to be an exclusive preserve insulated against congressional scrutiny by the separation of powers doctrine.

The fourth manner for refusing information to Congress relies upon no doctrine, authority, or argument whatsoever. It is the case where an Executive Branch official flatly refuses to provide requested information and the denial is accepted by virtue of the matter not being pursued any further by the requestor.

With this understanding of the bases for Executive Branch refusal of information to Congress, the next consideration should be directed toward the instances since the occasion of President Kennedy's letter when such refusals have been made. The following compilation of refusal incidents concerns both documentary information and witness behavior. This is not a complete list of all such instances but, rather, as thorough a collection as public records will afford. Because some incidents might have been obscurely reported or not disclosed at all, this compilation is exemplary in nature.

On or about June 21, 1962 the Food and Drug Administration refused to provide the House Interstate and Foreign Commerce Committee with requested files on the drug MER-29;³¹

On or about June 27, 1962 the State Department refused to provide the Senate Foreign Relations Committee a copy of a working paper on the "mellowing" of the Soviet Union;³²

On or about February 7-8, 1963 General Maxwell D. Taylor, during testimony before the House Department of Defense Appropriations Subcommittee, refused to discuss the Bay of Pigs invasion as "it would result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned";³³

On April 4, 1968 the Department of Defense refused to provide the Senate Foreign Relations Committee a copy of the Command Control Study of the Gulf of Tonkin incident;³⁴

On or about September 18, 1968 Treasury Under Secretary Joseph W. Barr and presidential Associate Special Counsel W. DeVier Pierson refused to testify

²⁹ The existence of this letter was made known and is held by Samuel J. Archibald, Washington representative of the University of Missouri Freedom of Information Center.

³⁰ *Weekly Compilation of Presidential Documents*, IX (Feb. 5, 1973), p. 109.

³¹ *New York Times*, June 21, 1962.

³² *Ibid.*, June 27, 1962.

³³ *Congressional Record*, CIX (Apr. 4, 1963), p. 5817.

³⁴ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *Executive Privilege: The Withholding of Information by the Executive Branch*. Hearings, 92d Cong., 1st sess. Washington : U.S. Govt. Print. Off., 1971, p. 39.

before the Senate Judiciary Committee during hearings on the nomination of Associate Justice Abe Fortas to be Chief Justice;³⁵

On July 26, 1969 the Department of Defense refused to provide the five-year plan for military assistance programs to the Senate Foreign Relations Committee;³⁶

On or about August 9, 1969 the Department of Defense refused to provide the Senate Foreign Relations Committee a copy of a defense agreement between the United States and Thailand;³⁷

On December 20, 1969 the Department of Defense refused to supply the Senate Foreign Relations Committee the "Pentagon Papers";³⁸

On or about March 19, 1970 Secretary of Defense Melvin Laird declined an invitation to appear before the Senate Foreign Relations Committee's Disarmament Subcommittee;³⁹

On November 21, 1970 Attorney General John Mitchell refused to supply certain Federal Bureau of Investigation files to the House Intergovernmental Relations Subcommittee (*executive privilege formally invoked*);⁴⁰

On March 2, 1971 Department of Defense General Counsel J. Fred Buzhardt refused to release an Army investigation report on the 113th Intelligence Group to the Senate Constitutional Rights Subcommittee;⁴¹

On April 10, 1971 the Department of Defense refused to supply continuous monthly reports on military operations in Southeast Asia to the Senate Foreign Relations Committee;⁴²

On April 19, 1971 the Department of Defense refused to allow three generals to appear before the Senate Constitutional Rights Subcommittee;⁴³

On June 9, 1971 the Department of Defense refused to release computerized surveillance records to the Senate Constitutional Rights Subcommittee and refused to agree to a Subcommittee report on such records;⁴⁴

On August 31, 1971 the Department of Defense refused to supply certain foreign military assistance plans to the Senate Foreign Relations Committee (*executive privilege formally invoked*);⁴⁵

On September 21, 1971, White House Director of Communications Herbert G. Klein declined to appear before the Senate Constitutional Rights Subcommittee;⁴⁶

In December, 1971 White House Counsel John W. Dean III indicated neither Frederick Malek nor Charles Colsen, both of the White House, would appear before the Senate Constitutional Rights Subcommittee during hearings regarding an F.B.I. investigation of C.B.S. reporter Daniel Schorr;⁴⁷

On February 28, 1972 White House Counsel John W. Dean III indicated the unwillingness of presidential aide Henry Kissinger to appear before the Senate Foreign Relations Committee;⁴⁸

On March 15, 1972 the White House refused to allow the House Foreign Operations and Government Information Subcommittee to obtain country field submissions for Cambodian foreign assistance for the fiscal years 1972 and 1973 while simultaneously denying the Senate Foreign Relations Committee access to U.S.I.A. program planning papers (*executive privilege formally invoked*);⁴⁹

On March 20, 1972 Frank Shakespeare, Director of the United States Information Agency, refused during testimony before the Senate Foreign Relations Committee to provide copies of U.S.I.A. program planning papers withheld by a formal invocation of executive privilege on March 15;⁵⁰

³⁵ *Congressional Record*, CXIV (Sept. 18, 1968), p. 27518.

³⁶ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers, *op. cit.*, p. 40.

³⁷ *New York Times*, Aug. 13, 1969.

³⁸ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers, *op. cit.*, pp. 37-38.

³⁹ *New York Times*, Mar. 19, 1970.

⁴⁰ *Congressional Quarterly Weekly Report* XXXI (Feb. 10, 1973), p. 295.

⁴¹ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers, *op. cit.*, pp. 402-405.

⁴² *Ibid.*, p. 47.

⁴³ *Ibid.*, p. 402.

⁴⁴ *Ibid.*, pp. 393-399.

⁴⁵ *New York Times*, Sept. 1, 1971.

⁴⁶ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. *Freedom of the Press. Hearings*, 92d Cong., 1st and 2d sess. Washington: U.S. Govt. Print. Off., p. 1299.

⁴⁷ *Ibid.*, p. 425.

⁴⁸ *Congressional Record*, CXVIII (Mar. 28, 1972), p. S4906.

⁴⁹ *Ibid.*, CXVIII (Mar. 16, 1972), pp. H2148-H2149.

⁵⁰ *Washington Evening Star*, Mar. 21, 1972.

On or about March 20, 1972 the State Department refused to supply the Senate Foreign Relations Committee a copy of "Negotiations, 1964-1968: The Half-Hearted Search for Peace in Vietnam";⁵¹

On April 27, 1972 Treasury Secretary John Connally refused to testify before the Joint Economic Committee on the matter of the Emergency Loan Guarantee Board refusing to supply requested records on the Lockheed loan to the General Accounting Office;⁵²

On April 29, 1972 White House Counsel John W. Dean III indicated the unwillingness of David Young, Special Assistant to the National Security Council, to appear before the House Foreign Operations and Government Information Subcommittee;⁵³

On or about June 8, 1972 Henry Ramirez, Chairman of the Cabinet Committee on Opportunities for the Spanish Speaking, refused to testify before the House Judiciary Subcommittee on Civil Rights;⁵⁴

On July 26, 1972 Department of Defense Assistant General Counsel Benjamin Forman testified before the Senate Foreign Relations Committee before refusal to discuss weather modification activities in Southeast Asia;⁵⁵

On August 2, 1972, Henry Ramirez, Chairman of the Cabinet Committee on Opportunities for the Spanish Speaking again refused to testify before the House Judiciary Subcommittee on Civil Rights;⁵⁶

On October 6, 1972 Securities and Exchange Commission Chairman William J. Casey refused to turn over the Commission's investigative files on I.T.T. to the House Interstate and Foreign Commerce Committee and disclosed that the files were then in the possession of the Justice Department;⁵⁷

On October 12, 1972 presidential campaign manager Clark MacGregor, former Attorney General John Mitchell, White House Counsel John W. Dean III, and former Commerce Secretary Maurice Stans declined to appear before the House Banking and Currency Committee to discuss matters relating to the Watergate bugging case;⁵⁸

On or about November 29, 1972 White House Counsel John Wesley Dean III, presidential assistant John Ehrlichman, presidential special consultant Leonard Garment, and Bradley H. Patterson, Garment's assistant, refused to testify before the House Interior and Insular Affairs Committee during hearings on the take-over of the Bureau of Indian Affairs building in Washington;⁵⁹

On December 5, 1972 Housing and Urban Development Secretary George Romney declined to testify before the Joint Economic Committee on the matter of housing subsidies, saying his appearance was inappropriate in view of his announced resignation from office;⁶⁰

On or about December 19, 1972 the Department of Defense refused to provide the House Armed Services Committee with documents pertaining to unauthorized bombing raids of interest to the committee as part of their hearings on the firing of Gen. John D. Lavelle;⁶¹

On or about December 23, 1972 presidential assistant Peter Flanigan refused to appear before the House Conservation and Natural Resources Subcommittee to discuss an anti-pollution court case against Armco Steel Company;⁶²

On or about January 1, 1973 presidential assistant Henry Kissinger and Secretary of State William Rogers declined invitations to appear before both the House Foreign Affairs and Senate Foreign Relations Committees to discuss resumed Vietnam bombing and the Paris peace talks;⁶³

On January 9, 1973 Admiral Isaac Kidd declined to testify before the Joint Economic Committee regarding his role in action involving the demotion of

⁵¹ Washington Post, Mar. 20, 1972.

⁵² Washington Evening Star, Apr. 27, 1972.

⁵³ U.S. Congress. House Committee on Government Operations. Foreign Operations and Government Information Subcommittee. U.S. Government Information Policies and Practices—Security Classification Problems Involving Section (b)(1) of the Freedom of Information Act. Hearings. 92d Cong., 2d sess. Washington: U.S. Govt. Print. Off., 1972, p. 2453.

⁵⁴ Congressional Quarterly Weekly Report, XXX (Aug. 12, 1972), p. 2017.

⁵⁵ Washington Post, July 27, 1972.

⁵⁶ Congressional Quarterly Weekly Report, XXX (Aug. 12, 1972), p. 2017.

⁵⁷ Washington Evening Star/Daily News, Nov. 1, 1972.

⁵⁸ Washington Post, Oct. 12, 1972.

⁵⁹ Ibid., Nov. 29, 1972.

⁶⁰ Ibid., Dec. 6, 1972.

⁶¹ Ibid., Dec. 19, 1972.

⁶² Ibid., Dec. 16, 1972.

⁶³ Ibid., Jan. 1, 1973.

Gordon Rule, a Navy procurement official who testified earlier before the Committee on Litton Industries' contracts with the Defense Department and the suitability of Roy Ash, a former Litton official, as Director of the Office of Management and Budget;⁴

These records contain only three occasions when executive privilege was formally invoked against four instances when congressional committees were seeking information, all three being during the first Nixon Administration and each involving documentary material. No subpoena had been issued in any of these instances so no court action was initiated on these refusals. Indeed, in the history of executive privilege as a practice, no challenge to the Executive Branch has been made by Congress through judicial proceedings. There are not any statutes at present which directly regulate executive privilege practices.

The foregoing paragraphs raise certain points of consideration which are essential to any analysis of this subject. It is recognized that, in such a brief overview, some points could be analyzed from other perspectives and to a lengthier degree. There is no intention in bringing out these points to either advocate or oppose any aspect of the subject under discussion.

(Harold C. Relyea, Analyst, American National Government, Government and General Research Division, March 13, 1973, revised March 26, 1973)

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THE PRESENT LIMITS OF "EXECUTIVE PRIVILEGE"

A STUDY PREPARED UNDER THE GUIDANCE OF THE HOUSE FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE

(Samuel J. Archibald, Consultant, Government Information Policy, Government and General Research Division; Harold C. Relyea, Analyst, American National Government and Public Administration, Government and General Research Division, March 20, 1973)

May 17, 1954, was an important day on Capitol Hill. On that day, two separate political battles shifted emphasis, and the new emphasis of each controversy still is causing political problems.

In the Supreme Court Building Chief Justice Earl Warren issued the court's unanimous decision in *Brown v. Board of Education* holding that separate education is not equal education. In the Senate Office Building John Adams, the Army's general counsel, delivered a copy of a letter from President Dwight D. Eisenhower to Secretary of Defense Charles Wilson directing the Secretary to tell all his subordinates to testify about advisory communications during the hearings of a special subcommittee of the Senate Government Operations Committee.¹

Both important developments of May 17, 1954, had roots deep in the history of the United States. In the future both would effect the political development of the nation. The results of the Supreme Court's school desegregation decision are widely discussed in popular literature and scholarly studies and have become a part of current history. But there is comparatively little current knowledge about the developments that flowed from President Eisenhower's May 17, 1954, letter. Possibly, that letter and the political conflict of which it is part are more important to the study of the American form of democratic government with three branches than is the widely studied school desegregation issue.

President Eisenhower's May 17, 1954, letter brought a new dimension to the interactions between the Legislative and Executive Branches of the Federal government which are part of our separate-but-coordinate system. His letter, and its accompanying memorandum purporting to list historic examples of Presi-

⁴ *Ibid.*, Jan. 10, 1973.

¹ U.S. Congress. Senate. Committee on Government Operations. Special Subcommittee on Investigations. *Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr*. Hearings, 83d Cong., 2d sess. Washington, U.S. Govt. Print. Off., 1954, pp. 1169-1172.

dential assertion of the right of "executive privilege", became the basis for an extension of the claim of "executive privilege" far down the administrative line from the President.² Eight years later there was an attempt to bring "executive privilege" back into proper perspective, but the effort has not been a complete success even though it involved three Presidents.

There are many privileges exercised by the executive head of the United States Government, ranging from the free use of the mountain retreat at Camp David (or Shang-ri-la as Franklin D. Roosevelt christened it) to a funeral with full military honors. But the "executive privilege" has come to mean a claim of authority to control government information.³ This "executive privilege" to control the dissemination of information has been asserted against the public⁴ and against the courts,⁵ but the claim of an "executive privilege" which was the basis for the President's May 17, 1954, letter is the claim of authority to withhold information from the Legislative Branch of the Federal government. And the authority claimed in President Eisenhower's May 17, 1954, letter was extended throughout the Executive Branch to include agencies administered by persons appointed by the President with the advice and consent of the U.S. Senate. This claim of control over government information is in addition to the power exercised by Presidents to protect their immediate White House staff—their personal advisers, in effect, over whose appointment the Congress has no confirming power.

THE SEPARATION OF POWERS AND THE CONTROL OF INFORMATION

The conflict between the Legislative and Executive Branches of the Federal government over access to information begins with the first clause of the first section of the first article of the Constitution of the United States. Article I, Section I states that "all legislative Powers herein granted shall be vested in a Congress of the United States . . ." The power to legislate carries with it the power to investigate⁶ and the clash between the executive and the legislature over access to information almost always has occurred in connection with a Congressional investigation.

In fact, the earliest attempt by the Congress to investigate brought on a conflict over the authority of the executive to withhold information. The House of Representatives in 1792 appointed a committee to investigate General St. Clair's military disaster in the Northwest and empowered the committee to "call for such persons, papers, and records, as may be necessary to assist their inquiries."⁷ This demand for information by the first Congress and the reaction to it by the first President was brought up 162 years later in connection with President Eisenhower's letter of May 17, 1954. A memorandum from the Attorney General which accompanied the letter listed the call for information in the St. Clair affair as the first example of Presidential assertion of "executive privilege."⁸ The memorandum states that President Washington called a Cabinet meeting and the group decided that "neither the committee nor House had a right to call upon the head of a Department who and whose papers were under the President alone."⁹

Not only did this first Congressional investigation result in a confrontation over legislative access to Executive Branch information but it also provided a vehicle for the first major factual error in the memorandum accompanying the May 17, 1954, letter, discussing what has come to be called "executive privilege." Far from being an example of Presidential assertion of "executive privilege", the St. Clair

² H. Rept. 84-2947, p. 90.

³ H. Rept. 86-2084, p. 37.

⁴ *Ibid.*, p. 36.

⁵ *Marbury v. Madison* (1 Cranch 137) and the conspiracy trial of Aaron Burr are the classic historical cases. *Kilbourn v. Thompson* (103 U.S. 168), *McGrain v. Daugherty* (273 U.S. 135), *ex rel. Touhy v. Ragan* (340 U.S. 462) and *U.S. v. Reynolds* (345 U.S.) are modern cases which have considered court access to Executive Branch information. When President John F. Kennedy limited the use of "executive privilege" to the President alone (see below), he was asked by the Attorney General whether the limitation applied only to congressional requests for information. Theodore C. Sorenson, special counsel to the President, replied in a letter of March 30, 1962, to the Attorney General that the policy "relates solely to inquiries directed by the Congress or its committees to the Executive Branch" and does not have any application to "demands, made in the course of a judicial or other adjudicatory proceeding, for the production of papers or other information in the possession of the Government."

⁶ Library of Congress, Legislative Reference Service, *The Constitution of the United States—Analysis and Interpretation*. Washington : U.S. Govt. Print. Off., 1964, p. 105.

⁷ *Ibid.*

⁸ U.S. Congress, House, Committee on Government Operations, Special Subcommittee on Government Information, *Availability of Information From Federal Departments and Agencies*. Hearings, 85th Cong., 2d sess. Washington : U.S. Govt. Print. Off., 1958, p. 3911.

⁹ *Ibid.*

episode was an example of Congress effectively asserting its right of access to information. A Cabinet meeting was held and the question of Presidential power over records was discussed, as reported in the memorandum, but the full text of Thomas Jefferson's notes of that meeting shows that it was decided "there was not a paper which might not be properly produced."¹⁰ In fact, an historian-newsman who analyzed the precedents listed in the memorandum for withholding information from the Congress concluded that, in most of the examples, "the Congress prevailed, and got precisely what it sought to get."¹¹

The assertion of an "executive privilege" to withhold information from the legislature is rooted in the opening words of Article II of the Constitution: "The executive power shall be vested in a President of the United States of America" and in the last clause in Section 3 of Article II: "He shall take care that the laws be faithfully executed."¹²

This Constitutional grant of power is both vague and complicated, the language raising more questions of how the power shall be exercised than it answers.¹³ In the past 18 years, however, there have been some major changes in Congressional-Executive relationships which clarify the practice—if not the principle—of "executive privilege".

THE RECENT GROWTH OF "EXECUTIVE PRIVILEGE"

After May 17, 1954, the Executive Branch answer to nearly every question about the authority to withhold information from the Congress was "yes", they had the authority. And the authority most often cited was the May 17, 1954, letter from President Eisenhower to Secretary of Defense Wilson.¹⁴ Not only was the letter cited, but usually the claim of authority included the accompanying memorandum from Attorney General Herbert Brownell, supposedly prepared in the Department of Justice.

The letter and the memorandum were involved in a controversy between Senator Joseph McCarthy (R., Wis.) and the United States Army over the propriety of the Senator's pressure tactics as chairman of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. During two days of testimony at special hearings called to give McCarthy and the Army a forum for their fight, Army Counsel John Adams mentioned a meeting in the Attorney General's office attended by top White House staff members.¹⁵

When Subcommittee members tried to get more information from Adams about what went on at the high-level meeting, Joseph N. Welch of Boston, the Army's special counsel for the Army-McCarthy hearings, said Adams had been instructed not to testify any further about the meeting.¹⁶ That was on Friday, May 14, 1954. When Subcommittee members insisted that Adams testify, Welch asked for and was granted a recess until the following Monday.

On Monday, Adams gave the Subcommittee the letter of instructions from the President to the Secretary of Defense, accompanied by a memorandum supposedly prepared officially in the Department of Justice over the weekend. In fact, the memorandum consisted only of excerpts and paraphrases from a 1949 article printed in the *Federal Bar Journal* and written by Herman Wolkinson, a

¹⁰ J. Russell Wiggins, "Government Operations and the Public's Right to Know," *Federal Bar Journal*, XIX (January 1959), p. 76.

¹¹ *Ibid.*, p. 82.

¹² Senator Sam Ervin (D.—N.C.), the United States Senate's acknowledged constitutional expert, explains:

"Although the Constitution is silent with regard to the existence of executive privilege, its exercise is asserted to be an inherent power of the President. Its constitutional basis allegedly derives from the duty imposed upon the President under article II section 3 to see that the laws are faithfully executed. The President claims the power on the grounds that it is necessary in order to provide the executive branch with the autonomy needed to discharge its duties properly. Inasmuch as the 'President alone and unaided could not execute the laws * * *' but requires 'the assistance of subordinates' (*Myers v. U.S.*, 272 U.S. 117 (1926)), the alleged authority to exercise executive privilege has thereby been extended in practice to the entire executive branch."¹⁷

¹⁷ U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Separation of Powers, *Executive Privilege: The Withholding of Information by the Executive*, Hearings, 92d Cong., 1st sess. Washington: U.S. Govt. Print. Off., 1971, p. 2.

¹⁸ Edward S. Corwin, *The President: Office and Powers*. New York: New York University Press, 1968, pp. 4 and 5.

¹⁹ H. Rept. 86-2084, p. 177.

²⁰ U.S. Congress, Senate, Committee on Government Operations, Special Subcommittee on Investigations, *op. cit.*, p. 1059.

²¹ *Ibid.*, pp. 1169-1172.

Justice Department research lawyer.¹⁷ Two years later the Justice Department presented to another Congressional subcommittee what appeared to be an expanded memorandum supporting their position on "executive privilege",¹⁸ but it was merely the text of the Wolkinson article.¹⁹

There was a favorable public response to President Eisenhower's firm stand against disclosing conversations in his official family. Newspapers which were later to inveigh against the excesses of "executive privilege" praised the President's letter of May 17, 1954. The *New York Times*, for instance, editorialized against Senator McCarthy's use of legislative powers to encroach upon the Executive Branch "in complete disregard of the historic and Constitutional division of powers that is basic to the American system of Government."²⁰ And the *Washington Post* called the memorandum which was made public in connection with the President's letter "an extremely useful document," concluding that the President's authority under the Constitution to withhold information from Congress "is altogether beyond question."²¹

But the May 17, 1954, letter from the President, with its accompanying memorandum, soon became the major vehicle for spreading a claim of Presidential authority throughout the Executive Branch. The letter referred only to a specific series of conversations between Presidential appointees, restricting access to information about those conversations only to one specific Subcommittee of the Congress. Four months later, however, the May 17, 1954, letter was extended to cover more than the President's personal appointees and more than the specific Subcommittee's hearings.

In August, 1954, the U.S. Senate established a select committee to determine whether Senator McCarthy was guilty of conduct "unbecoming a member of the United States Senate" and asked two Army generals to testify about their conversations in connection with McCarthy's activities. Major General Kirke B. Lawton refused to testify on the advice of counsel that the May 17, 1954, "directive" applies to "this or any other" committee.²² Senator Arthur V. Watkins (R., Utah), the chairman of the select committee, asked Secretary of Defense Charles Wilson for clarification and received a letter stating:

As a matter of legal application, the Attorney General advises me that the principles of the Presidential order of May 17, 1954 are as completely applicable to any committee as they were to the Committee on Government Operations.²³

Telford Taylor, in his study of Congressional investigatory powers at the time of the Army-McCarthy controversy, commented:

If President Eisenhower's [May 17, 1954] directive were applied generally in line with its literal and sweeping language, congressional committees would frequently be shut off from access to documents to which they are clearly entitled. . . . It is unlikely, therefore, that this ruling will endure beyond the particular controversy that precipitated it.²⁴

He proved a poor prophet, in this case. President Eisenhower's May 17, 1954, letter became the major authority cited for the exercise of "executive privilege" to refuse information to the Congress for the next seven years of his administration²⁵ and it established a pattern which the three Presidents after Eisenhower have followed.

"EXECUTIVE PRIVILEGE" LIMITED

President John F. Kennedy bent, although he did not break, the pattern of "executive privilege" claims by officials far down the administrative line from the President. He had been in office for one year when a special Senate sub-

¹⁷ H. Rept. 86-234, p. 64, note 1.

¹⁸ U.S. Congress. House. Committee on Government Operations. Special Subcommittee on Government Information, *op. cit.*, p. 2894; another, modified version and the original also found in U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Constitutional Rights. *Freedom of Information and Secrecy in Government*. Hearings, 85th Cong., 2d sess. Washington: U.S. Govt. Print. Off., pp. 63-270.

¹⁹ Herman Wolkinson, "Demands of Congressional Committees for Executive Papers," *Federal Bar Journal*, X (April, July, October 1949), pp. 103-150, 223-259, 319-350.

²⁰ *New York Times*, May 18, 1954, p. 28.

²¹ *Washington Post*, May 18, 1954, p. 14.

²² U.S. Congress. Senate. Select Committee to Study Censure Charges Against Senator Joe McCarthy. *Hearings, Select Committee to Study Censure Charges Against Senator Joe McCarthy, August 31 through September 17, 1954*. 83d Cong., 2d sess. Washington: U.S. Govt. Print. Off., 1954, p. 167.

²³ *Ibid.*, p. 434.

²⁴ Telford Taylor, *Grand Inquest*. New York: Simon & Schuster, 1955, p. 133.

²⁵ H. Rept. 86-2084, p. 177.

committee held hearings on the Defense Department's system for editing speeches of military leaders. When the Subcommittee asked the identity of the military editors who had handled specific speeches, President Kennedy wrote a letter to Secretary of Defense Robert S. McNamara directing him and all personnel under his jurisdiction "not to give any testimony or produce any documents which would disclose such information."²⁹ The similarity of President Kennedy's letter of February 8, 1962, and President Eisenhower's letter of May 17, 1954, stopped there, for Kennedy added:

The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its own merits.³⁰

There was no legal memorandum attached to President Kennedy's letter, although one was available. A 169-page study of "executive privilege" cases through 1960 had been prepared by two lawyers in the Department of Justice and printed in two issues of the *George Washington Law Review*.³¹ The study, reminiscent of Herman Wolkinson's article in the *Federal Bar Journal* which was used as the back-up memorandum for President Eisenhower's May 17, 1954, letter, discussed executive responses to legislative inquiries from 1953 through 1960 and described some of the cases in which "executive privilege" was claimed. The new study called the exercise of "executive privilege" awkward and embarrassing—but not improper—and concluded:

This power, like most other Presidential powers, therefore, must be delegated to other officials. The question is how far down the administrative line can this delegation proceed.³²

President Kennedy's answer was: "it cannot." His position was clarified in an exchange of correspondence with Congressman John E. Moss (D. Calif.) who, as chairman of the Foreign Operations and Government Information Subcommittee and its predecessor special subcommittee, had been leading the fight against government secrecy for nearly six years. Moss wrote that President Kennedy's letter of February 8, 1962, "clearly stated that the principle involved could not be applied automatically to restrict information", but he urged clarification "to prevent the rash of restrictions on government information which followed the May 17, 1954, letter from President Eisenhower."³³ President Kennedy, whose staff had gone over a draft of the Moss letter before it was sent formally, replied on March 7, 1962:

Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.³⁴

Soon after Lyndon B. Johnson was elected President, Congressman Moss asked him to limit the use of "executive privilege" as had President Kennedy. In a letter of March 31, 1965, Moss discussed the spread of the use of "executive privilege" following President Eisenhower's letter and contended that, as a result of President Kennedy's limitation of the use of the authority, "there was no longer a rash of 'executive privilege' claims to withhold information from the Congress and the public." Moss expressed to President Johnson the hope that "you will reaffirm the principle that 'executive privilege' can be invoked by you alone and will not be used without your specific approval."³⁵ President Johnson, in a letter of April 2, 1965, to Congressman Moss, reaffirmed the principle, stating flatly that "the claim of 'executive privilege' will continue to be made only by the President."³⁶

Congressman Moss repeated the procedure soon after President Richard M. Nixon took office, asking him to "favorably consider a reaffirmation of the policy which provides, in essence, that the claim of 'executive privilege' will be invoked only by the President."³⁷ Two months after receiving the letter from Congress-

²⁹ U.S. Congress. Senate. Committee on Armed Services. Special Preparedness Subcommittee. *Military Cold War Education and Speech Review Policies*. Hearings, 87th Cong., 2d sess. Washington : U.S. Govt. Prnt. Off., 1962, pp. 508 and 509.

³⁰ *Ibid.*

³¹ Robert Kramer and Herman Marcuse, "Executive Privilege—A Study of the Period 1953-1960," *George Washington Law Review*, XXIX (April, June 1961), pp. 623-718, 827-916.

³² *Ibid.*, n. 911.

³³ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Separation of Powers. *op. cit.*, p. 34.

³⁴ *Ibid.*

³⁵ *Ibid.*, p. 35.

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 36.

man Moss, President Nixon issued a memorandum to the heads of all executive departments and agencies stating that "executive privilege will not be used without specific Presidential approval." He buttressed his memorandum with a letter to Congressman Moss stating:

I believe, as I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval.²⁸

President Nixon's memorandum of March 24, 1969, spelled out procedural steps to govern the invocation of "executive privilege". First, he stated, anyone who wanted to invoke "executive privilege" in answer to a request for information from a "Congressional agency" had to consult the Attorney General. If the Attorney General and the department head agreed that "executive privilege" should not be invoked, the information requested should be released to the Congress. If, however, either or both of them wanted the issue submitted to the President, "the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision." If the President decided to invoke "executive privilege", the memorandum concluded, "the department head should advise the Congressional agency that the claim of Executive privilege is being made with the specific approval of the President."²⁹

This was the first time that a step-by-step procedure was set up for invoking "executive privilege" against Congressional inquiries. It was not, of course, the first time that a President had promised to make the final decisions on the use of "executive privilege", but neither was President Kennedy's decision that only he should refuse information to the Congress a Presidential first. On April 14, 1909, President William H. Taft issued Executive Order 1062 stating:

In all cases where, by resolution of the Senate or House of Representatives, a head of a Department is called upon to furnish information, he is hereby directed to comply with such resolution, except when, in his judgment, it would be incompatible with the public interest, in which case he should refer the matter to the President for his direction.

No information is available on the results of President Taft's Executive Order 1062, but there is information from public sources on the results of the Kennedy-Johnson-Nixon limitation of the use of "executive privilege".

THE LIMITS OF LIMITATION

Has the Executive Branch claim of power to refuse information to Congress been severely limited since President Kennedy exercised "executive privilege" but said it would be used only by the President, judging each case on its merits? To answer the question, public sources were researched from 1962 through 1972 to determine the instances in which the Executive Branch refused documents or testimony to Congressional committees. The instances of invocation of "executive privilege" covered might or might not involve the issuance of a subpoena or a formal resolution requesting information. What has been focused upon is a publicly-recorded request for information by a Congressional committee and a publicly-reported refusal by an Executive Branch official to grant that request. That which was sought might be a document, a witness, or both. The refusal may or may not have been accompanied by a reason for the denial. The invocation of "executive privilege" has been interpreted for the purposes of this study to refer to a refusal of information to a Congressional committee or subcommittee by an Executive Branch agency or official. It does not include instances in which Presidential aides, serving in the White House Office, have refused to appear before Congressional committees.

Sources used in this study were the *New York Times*, the *Washington Post*, the *Washington Evening Star*, the *Congressional Record*, the *Congressional Quarterly* reports and almanacs, and printed hearings of Congressional committees. Following is the result:

KENNEDY ADMINISTRATION

Exercise of "executive privilege" by the President

1. State and Defense Department witnesses directed not to give testimony or produce documents at hearings of the Senate Special Preparedness Subcommittee

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 37.

on Military Cold War Education which would identify individuals who reviewed specific speeches. (Committee on Armed Services, United States Senate, *Military Cold War Education and Speech Review Policies*, 87th Congress, Second Session, pp. 338, 369-370, 508-509, 725, 730-731 and 826).

Refusals by executive departments and agencies to provide documents or testimony

1. The Food and Drug Administration refuses to comply with a request from the House Interstate and Foreign Commerce Committee for files on MER-29 drug (*New York Times*, 6/21/62).

2. The State Department refuses to provide a copy of a working paper on the "mellowing" of the Soviet Union to the Senate Foreign Relations Committee (*New York Times*, 6/27/62).

3. General Maxwell D. Taylor appears before the House Subcommittee on Defense Appropriations and refuses to discuss the Bay of Pigs invasion as "it would result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned." (*Congressional Record*, 4/4/68, p. 5817).

JOHNSON ADMINISTRATION

Refusals by executive departments and agencies to provide documents or testimony

1. The Department of Defense refuses (April 4, 1968) to supply a copy of the Command Control Study of the Gulf of Tonkin incident to the Senate Foreign Relations Committee (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, p. 39). This source hereafter cited as Senate Judiciary Committee hearings, *Executive Privilege*.

2. Treasury Under Secretary Joseph W. Barr refuses to testify before Senate Judiciary Committee on the nomination of Abe Fortas to be Chief Justice (*Congressional Record*, 9/18/68, p. 27518 and *Washington Post*, 9/17/68).

NIXON ADMINISTRATION

Exercise of "executive privilege" by the President

1. The Attorney General refuses (November 21, 1970) to give Congressman L. H. Fountain, chairman of the Intergovernmental Relations Subcommittee of the House Government Operations Committee, reports furnished by the Federal Bureau of Investigation to evaluate scientists nominated to serve on advisory boards of the Department of Health, Education, and Welfare (Committee on Government Operations, U.S. House of Representatives, *U.S. Government Information Policies and Practices—The Pentagon Papers*, Part 2, 92nd Congress, First Session, pp. 362-363).

2. The Department of Defense refuses (August 30, 1971) to supply foreign military assistance plans to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 45-46).

3. The State Department refuses (March 15, 1972) to give the House Foreign Operations and Government Information Subcommittee the Agency for International Development country field submissions for Cambodian foreign assistance for the fiscal year 1973 (*New York Times*, 3/17/72); *Congressional Record*, 3/16/72, pp. H2148-H2149).

4. The United States Information Agency refuses (March 15, 1972) to give the Senate Foreign Relations Committee all USIA Country Program Memoranda (*Congressional Record*, 3/16/72, pp. H2148-H2149).

Refusals by executive departments and agencies to provide documents or testimony

1. The Department of Defense refuses (June 26, 1969) to supply the five-year plan for military assistance programs to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 40).

2. The Defense Department refuses to provide a copy of "Commitment Plan 1964" between U.S. and Thailand to the Senate Foreign Relations Committee (*New York Times*, 8/9/69).

3.. The Department of Defense refuses (December 20, 1969) to supply the "Pentagon Papers" to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 37-38).

4. Secretary of Defense Melvin Laird declines invitation to appear before Senate (Foreign Relations) Disarmament Subcommittee (*New York Times*, 3/19/70).

5. Department of Defense General Counsel J. Fred Buzhardt refuses in hearings (March 2, 1971) to release an Army investigation report on the 113th Intelligence Group requested by Senate Constitutional Rights Subcommittee (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 402-405).

6. The Department of Defense refuses (April 10, 1971) to supply continuous monthly reports on military operations in Southeast Asia to the Senate Foreign Relations Committee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 47).

7. The Department of Defense refuses (April 19, 1971) to allow three designated generals to appear before the Senate Constitutional Rights Subcommittee (Senate Judiciary Committee hearings, *Executive Privilege*, p. 402).

8. The Department of Defense refuses (June 9, 1971) to release computerized surveillance records and refuses to agree to a Senate Constitutional Rights Subcommittee report on such records (Senate Judiciary Committee hearings, *Executive Privilege*, pp. 398-399).

9. The State Department refuses (March 20, 1972) to supply Senate Foreign Relations Committee with a copy of "Negotiations, 1964-1968: The Half-Hearted Search for Peace in Vietnam" (*Washington Post*, 3/20/72).

10. Treasury Secretary John Connally refuses to testify before Joint Economic Committee on matter of the Emergency Loan Guarantee Board refusing to supply requested records on the Lockheed loan to the Government Accounting Office (*Washington Evening Star*, 4/27/72).

11. Benjamin Forman, Department of Defense Assistant General Counsel, appears before the Senate Foreign Relations Committee but refuses to discuss weather modification efforts in Southeast Asia (*Washington Post*, 7/27/72).

12. Henry Ramirez, chairman of Cabinet Committee on Opportunities for the Spanish Speaking, refuses to testify before House Judiciary Subcommittee on Civil Rights (*Congressional Quarterly*, 8/12/72, p. 2017).

13. SEC Chairman William J. Casey refuses to turn over Commission investigative files on ITT to the House Interstate and Foreign Commerce investigative subcommittee (*Washington Evening Star/Daily News*, 11/1/72).

14. HUD Secretary George Romney declines invitation to appear before the Joint Economic Committee to testify on Federal housing subsidies (*Washington Post*, 12/6/72).

15. Department of Defense refuses to turn over documents requested by the House Armed Services Committee on unauthorized bombing raids of interest to the committee as part of hearings on the firing of Gen. John D. Lavelle (*Washington Post*, 12/19/72).

CONCLUSIONS

President Kennedy exercised the Presidential claim of "executive privilege" one time when he directed witnesses not to identify speech reviewers in testimony before the Senate subcommittee investigating military cold war education policies. Six separate refusals to provide information to the subcommittee were involved in the President's single action.

After the Kennedy directive, however, Executive Branch officials in his administration refused to provide information to Congressional committees three times, apparently without Presidential authority.

In the Johnson Administration "executive privilege" was not claimed by President Johnson, but there were two refusals by appointees in his administration to provide information to Congressional committees after President Johnson's letter of April 2, 1965, stating that "the claim of 'executive privilege' will continue to be made only by the President."

President Nixon personally and formally invoked the claim of "executive privilege" against Congressional committees four times after his memorandum of March 24, 1969, stating that "executive privilege" will not be used without specific Presidential approval. After the memorandum was issued there were, however, 15 other instances in the Nixon Administration in which documents or testimony were refused to Congressional committees without Presidential approval.

This public record of the controversies over Congressional access to Executive information after three Presidents limited the use of "executive privilege", raises a number of questions. Were the Executive Branch officials who apparently refused information to Congressional committees 20 times in violation of the orders of three Presidents, actually acting under orders? Is it possible that three Presidents ordered information withheld 20 times from Congressional committees and left no evidence of their orders?

Contrafriwise, is it possible that, in 20 instances, Executive Branch officials were ignoring the clear orders of three Presidents? Or possibly, is there some of both: Executive Branch officials refusing information to Congressional committees with the tacit understanding—at least by the White House staff if not the President, himself—of what was going on?

There are many other problems which can be raised in addition to those three alternatives, such as the question of what formal action the Congress or one of its constituent units must take to assert the Legislative Branch's right of access to information implied by the Constitution, and the question of whether the Legislative vs. Executive conflict over access to government information may be regarded as a partisan political fight having little to do with the evolution of a system of government based on three coordinate branches.

The fact that there is much more conflict over Congressional access to Executive Branch information when the two branches are controlled by different political parties gives substance to the view that "executive privilege" is a partisan problem. There were, for example, 19 cases of refusal of information to Congressional committees under the first four years of the Republican Nixon Administration working with a Democratic Congress, but there were only six refusals of information in seven years of the Kennedy and Johnson Administrations when both branches were controlled by the same political party. An additional indication of the partisan nature of the conflict is that there were some 34 instances of information refused in response to Congressional requests during the last five years of the Eisenhower Administration, after he issued his letter of May 17, 1954.²⁷ In that period, the Executive and Legislative Branches were under control of different political parties.

Partisan the problem is, but not purely partisan. It can come up when both branches are under control of the same political party—witness the six cases in the Kennedy and Johnson Administrations—and the partisan makeup of the two branches may merely sharpen the conflict and not make it less of a problem to be solved as the governmental system evolves.

President Nixon, in fact, did more to regularize the flow of information to Congress on controversial subjects than did his predecessors. He issued the first orders setting up a step-by-step procedure to be followed in his administration before "executive privilege" could be invoked. And his memorandum of March 24, 1969, moved toward an answer to the question of what type of formal action the Congress must take to demand information before "executive privilege" would be asserted.

His memorandum referred throughout to a "Congressional agency"²⁸ requesting Executive Branch information. By this language, apparently he was recognizing that a Congressional committee or subcommittee—or, possibly, the chairman of either—could make a formal request for information that might result in the claim of "executive privilege". He did not require a resolution of the House or Senate, as did President Taft, nor did he leave the problem completely in limbo, as did Presidents Kennedy and Johnson.

There is some additional information to indicate which of three alternatives—violation of a Presidential order, secret Presidential approval or both—explain the fact that the limitation on the use of "executive privilege" apparently has been ignored. It is possible that the five cases in the Kennedy and Johnson Administrations in which information was refused, apparently without Presidential approval, in fact had Presidential approval but this fact has been kept from public knowledge.

This is not the case in the Nixon Administration. President Nixon's memorandum requires a potential "executive privilege" case to go through the Office of

²⁷ H. Rep. 86-2084, pp. 5-35.

²⁸ U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Separation of Powers, *op. cit.*, p. 36.

Legal Counsel in the Department of Justice. The "executive privilege" expert in that office is Herman Marcuse, one of the authors of the *George Washington Law Review* study of "executive privilege" from 1953 to 1960 (see footnote 28). Marcuse has stated that only the cases of "executive privilege" listed above were handled in the office and approved by President Nixon since his memorandum.³⁹

There is a possibility that, in all three administrations, the cases of refusal of information to Congress, apparently in violation of Presidential orders, did not result from formal confrontations between the two branches of government. Assistant Attorney General William H. Rehnquist, who was in charge of the Office of Legal Counsel, testified after two years' experience under President Nixon's "executive privilege" memorandum that "agencies which seek to withhold information are complying with the procedures set forth in the memorandum."⁴⁰ By the time of his testimony, there already had been one formal Presidential use of the claim of "executive privilege" and eight other cases in which, public records show, testimony or documents had been refused to Congressional committees.

Rehnquist downgraded refusals of information to Congress which had not had the stamp of Presidential approval, arguing that no real confrontation over access to information occurs in many cases because they are mere discussions at the staff level between Executive agencies and Congressional committees. And in other cases, he testified, a witness would mention the possibility that a request for particular information might raise the spectre of "executive privilege." Rehnquist added:

But such a statement, of course, is by no means tantamount to the President's authorizing the claim of privilege. It is simply a statement by a department head or his representative that he is prepared to recommend a claim of privilege to the President should the demand for information not be settled in a mutually satisfactory manner to both the agency and the chairman of the committee or subcommittee involved.⁴¹

None of the 15 Nixon Administration cases of refusal of information to a Congressional committee without the formal Presidential citation of "executive privilege" seems to fit the Rehnquist criteria. While the committees or subcommittees involved may not have taken a formal vote to demand the testimony or documents in each case, the request for information did come up in hearings or as part of a formal request from the chairman.

If the 15 Nixon Administration cases involved formal, direct requests for information and if there are no secret Presidential orders directing the invocation of "executive privilege", it seems that Executive Branch officials violated the Presidential directive 15 times. When interpreting orders in government administration, however, one bureaucrat's violation may be another bureaucrat's compliance. Those who want to withhold information from the Congress will do everything possible to make it difficult for Congress to get what it needs. That is apparent from the 34 instances occurring in five years when the Executive Branch wrapped itself in President Eisenhower's letter of May 17, 1954, as a cloak of "executive privilege". That cloak no longer exists, but the bureaucracy that used it is little changed. And the top-level policy makers apparently are happy to use the bureaucracy's tactics of delay and obfuscation to prevent Congress from getting at information which might embarrass their agency or their administration.

While the Kennedy-Johnson-Nixon statements limiting the invocation of "executive privilege" may state clearly to Congressional readers that information will not be refused without specific Presidential approval, they may also state to Executive Branch readers that they should be careful when claiming "executive privilege" but they can use other techniques to block Congressional access to information.

Thus, the use of the claim of "executive privilege" has been severely limited but the limitation has not opened new file drawers to Congress. In fact, the Presidential statements have been limitations in name only.

³⁹ Telephone interview, Aug. 22, 1972.

⁴⁰ U.S. Congress. House. Committee on Government Operations. Foreign Operations and Government Information Subcommittee. *U.S. Government Information Policies and Practices—The Pentagon Papers*. Hearings, 92d Cong., 1st sess. Washington: U.S. Govt. Print. Off., 1971, p. 365.

⁴¹ *Ibid.*, p. 366.

EXECUTIVE PRIVILEGE, THE CONGRESS AND THE COURTS

(By Norman Dorsen¹ and John H. F. Shattuck²)

I. INTRODUCTION

The scene was the House of Representatives. The date April 22, 1948. The debate in progress concerned a report of the House Un-American Activities Committee, which had questioned the loyalty of a prominent government scientist. During the course of the debate, which centered on the refusal of President Truman to release the full text of an FBI letter concerning the accused scientist, one member of the Committee rose in the chamber and said:

"I am now going to address myself to a second issue which is very important. The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.

"I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.

"Any such order of the President can be questioned by the Congress as to whether or not that order is justified on the merits."

The speaker was Congressman Richard M. Nixon of California. . . .

It is clear, as this episode illustrates, that the Executive's claimed privilege to withhold information from Congress has more than one side and is often clouded by political controversy. Perhaps this is so because the issue has developed as a by-product of the often turbulent relationship between the two "political" branches of government, and so far has eluded resolution through the courts. In any event, its resolution appears to be more remote today than it was in 1792, when President Washington first raised the issue by urging a House Committee to withdraw its request to inspect executive documents about Major General St. Clair's military disaster in the Northwest. The first President turned the documents over only when the Committee declined to withdraw its request.

The doctrine of executive privilege has proliferated over the decades very much as executive power itself has grown. The origins of the doctrine were modest, asserted by early presidents rarely, in narrow circumstances and, as we shall see, often under a formulation which implied that the Executive could withhold information only with the consent of Congress.

Modern presidential government, on the other hand, is symbolized by the frequency with which information is withheld from Congress at the sole discretion of the Executive. The Library of Congress reported this year that executive privilege has been asserted 49 times since 1952—more than twice the number of all prior claims. The Nixon administration, while professing that it has done more than its predecessors to regularize the flow of information to Congress, has in fact broken all records for the frequency of its assertions of privilege by formally denying information or witnesses to Congress nineteen times in four years. On four such occasions the President himself claimed executive privilege, while cabinet members and agency heads have done so 15 times on his behalf.

A second indication that executive privilege is a vital pressure point in the struggle between Congress and the President is the frequency with which it is used to cut off congressional inquiry into the very issues over which Congress and the President are most sharply divided. By withholding crucial information or witnesses modern presidents have discovered that they can exercise an effective veto over attempts by Congress to act in certain areas, particularly foreign affairs. It should come as no surprise, therefore, that General Maxwell Taylor declined to appear before the House Subcommittee on Defense Appropriation in April 1963 to discuss the Bay of Pigs invasion; that Treasury Secretary Connally

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declined to testify before the Joint Economic Committee in April 1972 on the refusal of his subordinates to supply records to the General Accounting Office on the government's loan to the Lockheed Aircraft Corporation; or that the Department of Defense refused in December 1972 to supply documents requested by the House Armed Services Committee during its hearings on the firing of General John D. Lavelle, who reportedly conducted unauthorized raids over North Vietnam. The most recent example of an attempted veto of a line of legislative inquiry is President Nixon's refusal, until events required a reversal of position, to permit White House aides to testify before the Senate subcommittee investigating the Watergate matter.

Incidents like these have helped to create an impression that the Executive often balks at requests for information simply in order to prevent certain controversial subjects from being further explored by a hostile Congress. Indeed, General Taylor candidly admitted as much when he declined an invitation to testify about the Bay of Pigs invasion by stating that his appearance would "only result in another highly controversial, divisive public discussion among branches of our Government which would be damaging to all parties concerned." Nor is this assumption about controversy and divisiveness unfounded, since the modern doctrine of executive privilege is in many respects a product of the efforts of the Eisenhower Administration in 1954 to block investigation conducted by Senator Joseph McCarthy.

It will be recalled that the Senator, as part of his celebrated probe into the loyalty of Army personnel, sought details on individual cases, and in particular the appearance before his committee of Army loyalty board members who deliberated and voted on these cases. The Eisenhower Administration was understandably fearful that if loyalty "judges" were forced to account to Senator McCarthy it would have been impossible to assure fair and uncowed decision-making. The Administration therefore refused to provide the requested information and to allow the loyalty board members to testify. Later, during the Army-McCarthy hearings, President Eisenhower issued a statement, about which we will have more to say later, formally rejecting McCarthy's requests.

This was a wise and necessary decision. But the Justice Department memorandum that accompanied the President's statement was written in broad and unqualified terms, often embroidering history. It has spawned a conception of executive privilege that is indefensible in law and mischievous in practice, and indeed is at the root of our present constitutional crisis.

II. EXECUTIVE PRIVILEGE AND GOVERNMENT SECRECY

Secrecy in the government has assumed different forms from one administration to the next, but its central and consistent premise is an assumed right of the President acting in the public interest to withhold information which he has acquired in the course of executing the laws. This premise is most clearly reflected in formal claims of executive privilege, but it also may be found in a wide variety of other forms of secrecy behind which the Executive Branch attempts to conduct its operations without "interference" from the coordinate branches of government, or from the public.

The institutional patterns of executive secrecy are perhaps best established in matters of foreign affairs. Whenever the Departments of State or Defense are compelled before the judiciary to articulate why foreign affairs must not be impeded by openness, they resort to the florid language of the Supreme Court in *United States v. Curtiss-Wright Export Corporation*, language which is often cited today as the basis for executive secrecy in other areas well:

"In this vast external realm, with its important, complicated, delicate and manifold problems, the President has the power to speak or listen as the representative of the nation. . . . He has his agents in the form of diplomats, consular and other officials. Secrecy in respect of the information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. . . . The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all measures, demands or eventual concessions which may have been proposed or contemplated, would be extremely impolitic."

When the Executive acts in areas colorably touched by foreign affairs, it is protected by a variety of shields, some of which are sanctioned by Congress, some by the courts, and some by both. It need not, for example, engage in public

rule making, since the procedural requirements of the Administrative Procedure Act do not apply "to the extent that there is involved a military or foreign affairs function of the United States." This significant statutory exemption means that an agency is not required to give notice through the Federal Register or otherwise of rules or other decisions it is considering promulgating; nor to describe the proposed rule or decision and its underlying authority; nor to give interested persons an opportunity to participate through submission of written views; nor to render decisions supported by a record and stating the basis and purpose of the decision. Since these administrative formalities are dispensed with when the Executive acts in foreign affairs, secrecy in this area is not difficult to enforce. Moreover, it is sanctioned by Congress and therefore is not necessarily derived from any inherent executive power.

A second shield behind which the Executive can act in secret—even outside the area of foreign affairs—is ironically the Freedom of Information Act. While the purpose of the Act is to establish a general rule that government agencies should make information available to the public upon demand, the rule does not apply to nine enumerated categories of information, chief of which are foreign affairs, internal agency memoranda, investigative files compiled for law enforcement purposes, and information the disclosure of which would constitute an unwarranted invasion of personal privacy.

Since the hand of Congress is at work in the Information Act, one must conclude here as with the Administrative Procedure Act that Congress itself has recognized at least the occasional necessity of executive secrecy. While Congress may not have intended to concede that the exemptions from the Act justify the withholding of information from itself, the only instance in which members of Congress have sought to use the affirmative provisions of the Act to compel the production of documents from an executive agency resulted in a decision by the Supreme Court sustaining the agency's refusal to disclose, on the ground that the documents were covered by the foreign affairs exemption. In that case, *Environmental Protection Agency v. Mink*, however, the Congressmen were suing in their private capacities, and the power of Congress to override a mode of secrecy which it had itself created was not at issue, nor did the executive agency claim a privilege to override Congress.

A third form of executive secrecy, created not by Congress but by the executive bureaucracy itself, lies at the outskirts of the formal doctrine of executive privilege. Each of the last three presidents has made a formal commitment to Congress not to invoke executive privilege without specific presidential approval. Most observers agree, however, that this commitment has been reduced to a nullity by the simple bureaucratic expedient of evading requests for information without resorting to claims of executive privilege. So common are these tactics, Senator Fulbright recently pointed out, that "[a]s matters now stand, the commitment has been reduced to a meaningless technicality: only the President may invoke executive privilege but just about any of his subordinates may exercise it—they simply do not employ the forbidden words."

Information is withheld from Congress on at least three levels. At the highest level are the few instances in which the President himself personally directs a subordinate not to comply with a congressional request. More frequent are occasions when executive departments formally decline on their own initiative to cooperate with congressional inquiries, and the President does not direct them to do otherwise. In March 1970, for example, the Senate Constitutional Rights Subcommittee began a two year probe of the Army's surveillance of domestic politics. In the ensuing war of attrition which was waged by the Pentagon, three generals, the Secretary of the Army, its general counsel and several of their subordinates declined to testify or respond in writing to questions about the scope and basis of the Army's surveillance activities. At the same time they delayed for more than three months in complying with the request from the subcommittee for certain documents and computerized surveillance records compiled by the Army and disseminated widely to other agencies of government.

The Army's excuses for not complying with these requests were an awesome display of the arsenal of executive secrecy. Documents and witnesses were withheld for fear of prejudicing current departmental investigations into the very subject of the congressional probe. The generals were shielded at first because they were stationed overseas, and later because the Secretary of Defense determined they were not the proper persons to speak for the Department on the "broader issues" facing the subcommittee, notwithstanding their personal knowl-

edge and direction of the Army's surveillance operations. A further reason for not producing the generals was the Army's assertion that it is the policy of the executive branch not to present intelligence personnel before congressional subcommittees.

A copy of the computer printouts which formed the bulk of the surveillance product was withheld from the subcommittee long after the Army claimed that it had ordered the destruction of the printouts and discontinued collection of most of the information. Among the reasons given were that release of the documents would violate the privacy of the persons whose names appeared on them, although the subcommittee had guaranteed that names would be eliminated prior to publication. When part of the printout was finally released after eighteen months of tactical maneuvering by both sides, the Army classified it confidential, and at first applied the same classification to the subcommittee's report so that it was not published until more than two and one-half years after the investigation began.

The third and still more frequent way in which information is withheld are the countless struggles between congressional staffs and the lower levels of the federal bureaucracy over information to which no colorable claim of privilege could attach, but which is nevertheless withheld because of the general climate of secrecy and self-protection in which the Executive Branch operates in its relations with Congress.

A startling example of the obstacles encountered at this third level of informal "privilege" was the experience of a bipartisan group on 130 Congressmen in attempting between 1966 and 1968 to compile an exhaustive list of federal assistance programs. The resistance of the administering agencies was often bizarre: the telephone directory of the Office of Economic Opportunity was at first withheld because it was classified "confidential;" and current eligibility requirements for certain programs were withheld because, in the words of one particularly stubborn bureaucrat, "the programs and their personnel change so rapidly."

Executive secrecy has increasingly come to symbolize the troubled relations between Congress and the President, and to identify their points of sharpest conflict. Since executive privilege is at once the most refined form of government secrecy and the most direct Executive challenge to Congress, it is difficult to understand how one recent commentator on the subject could contend that executive privilege "is not one of the central issues of our time, but merely a moderately interesting question that has attained importance largely because of other issues of conflict between the executive and the legislature." On the other hand, this is generally the conclusion of the Executive branch itself—a conclusion undoubtedly colored by the fact that it is the congressional ox that is being gored. Perhaps a more dispassionate view of the subject is required to place it at its proper level of constitutional importance. In practical terms it is undeniable that executive privilege often interferes with the legislative work of Congress. As Senator Fulbright tersely pointed out after President Nixon had effectively vetoed further inquiry by the Senate Foreign Relations Committee into grants of foreign military aid by claiming executive privilege over certain Defense Department documents, the President's action "makes it most difficult to legislate in the area of foreign military assistance."

III. THE CLAIM OF A DISCRETIONARY EXECUTIVE PRIVILEGE TO WITHHOLD INFORMATION FROM CONGRESS

Attorney General Richard Kleindienst, speaking for the Nixon administration, recently asserted that the Congress had no power to order an employee of the executive branch to appear and testify before Congress if the President barred such testimony. It is important to distinguish the several strands in his testimony. First, its breadth. Mr. Kleindienst did not limit the application of the privilege to Mr. Nixon's personal advisors in the White House or to persons playing a policy making role in other parts of the executive branch. Nor did he limit in any other way the range of individuals who might claim the privilege; his assertion was that *all* employees of the federal government could be totally insulated from Congress at the order of the President.

Second, the Attorney General did not spell out in any detail the constitutional or other legal basis for this sweeping power. As we shall see, the legal questions are complex, and must be dealt with if a confident conclusion is to be reached regarding the nature and scope of any executive privilege.

Third and most important, the Attorney General claimed that the President's judgment on whether to produce documents or witnesses to the Congress was final; that the decision was his and his alone to make and neither the Congress nor the courts had the constitutional authority to interfere.

It was not always so. Even while the Executive branch during previous administrations was asserting a broad privilege, there were many attempts to define its contours and a hesitancy to proclaim an unreviewable presidential discretion.

The first major assertion of executive privilege during the modern presidential era came in 1941 when Attorney General Robert Jackson declined to comply with a request by the House Committee on Naval Affairs to inspect FBI reports on the strikes and labor disputes then plaguing defense industries and jeopardizing the war effort. The Attorney General's letter explaining his action covered a great deal of territory in a somewhat random fashion. It asserted on one level that the documents were "investigative reports" the disclosure of which "could not do otherwise than seriously prejudice law enforcement." On a second level the Attorney General claimed that release of the documents would also prejudice the national defense. Finally, a third justification was offered which purported to recognize (1) the difference between public disclosure and disclosure to a committee of Congress, and (2) the power of the Executive to withhold information even from Congress when "access . . . would not be in the public interest." Jackson's letter, while gratuitously observing that the documents in question "can be of little if any value in connection with the framing of legislation or the performance of any other constitutional duty of Congress," did not assert an unreviewable executive power to withhold information from Congress. That claim was reserved for a later day.

On May 17, 1954, President Eisenhower sent a letter to Defense Secretary Charles Wilson, with an accompanying memorandum from Attorney General Brownell, directing the Secretary to order his subordinates not to testify, on the ground of executive privilege, before Senator Joseph McCarthy's special subcommittee of the Senate Government Operations Committee. However laudable the purpose behind this blanket assertion of privilege, the Attorney General's claim at the time that "courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold [from Congress] information and papers in the public interest" was remarkably inexact. No authority was cited, nor was there any that could have been, since the courts had never considered the issue. Nevertheless, the Brownell memorandum became the basis for an unprecedented 34 claims of privilege during the remaining five years of the Eisenhower Administration. More important, as expanded and codified in 1957 by Attorney General William Rogers, the Brownell memorandum had a profound impact on the doctrinal development of executive privilege. As stated by Mr. Rogers, while heads of departments ". . . have frequently obeyed congressional demands . . . and have furnished papers and information to congressional committees, they have done so only in a spirit of comity and goodwill, and not because there has been an effective legal means to compel them to do so."

Perhaps because the presidency and the Congress were controlled by the same political party, the issue lay largely dormant during the Kennedy and Johnson administrations, although President Kennedy in his own name once exercised executive privilege, and executive departments and agencies did so three times during each of the Democratic administrations.

Even before Mr. Kleindienst threw down the gauntlet, there were signs that the present administration was escalating the warfare over the executive privilege. One may refer not only to the increasing number of occasions when the privilege was exercised, but also to the nature of the justifications. Dean Roger Cramton, former Assistant Attorney General for the Office of Legal Counsel, recently defined the privilege in terms reminiscent of the Brownell memorandum as "the constitutional authority of the President to withhold information from Congress" and he suggested that it would not be "wise to invite the judiciary to resolve for all time issues that are best left to the accommodations and realities of the political process." While Dean Cramton stopped short of asserting unreviewable executive discretion, and in any case was speaking unofficially, there was an implication—later to be confirmed by the Attorney General—of sweeping presidential authority.

It is important at this juncture to identify the subject matters that have been included in the executive privilege as it has been broadly asserted. Attorney

General Rogers identified at least five categories of executive information privileged from disclosure to Congress:

1. military and diplomatic secrets and foreign affairs;
2. information made confidential by statute;
3. investigations relating to pending litigation, and investigative files and reports;
4. information relating to internal government affairs privileged from disclosure in the public interest; and
5. records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates and informal working papers.

Former Assistant Attorney General Cramton recently consolidated these sweeping claims by asserting that executive privilege is most frequently and justifiably exercised in only three of these areas: (1) military and foreign affairs; (2) investigatory files of law enforcement agencies; and (3) testimony of presidential advisors. Mr. Cramton's one deviation from the formulation of Generals Rogers and Brownell is his limitation of the privilege to advisors *to the President* and not to all members of the executive branch. On the other hand, Mr. Kleindienst's recent claims exceed even those of the Eisenhower administration because the latter sought to insulate not all executive branch employees but only those who were engaged in the "making of policy."

In the remainder of this paper we shall express our reasons for concluding that the assertion of a discretionary privilege in whatever form by the President is without basis in historical or judicial precedent or in the constitutional doctrine of separation of powers. We shall also try to show that two of the three basic categories of privilege—national security and investigatory files—while raising issues about the propriety and scope of executive secrecy, can be explained and defined wholly apart from a constitutional privilege. The third category—internal advice within the executive branch—raises more difficult problems. While there may be a necessity for executive secrecy in this area, it is based on the same limited constitutional premise that justifies secrecy among members of Congress and judges as well as executive officials: each branch of government has an implied power to protect its legitimate decision-making processes from scrutiny by the other branches. As we shall see, however, this does not mean that any branch, including the Executive, can keep secret its decisions or the facts underlying them or shield wrongdoing by its officials or employees.

IV. THE UNTENABILITY OF A DISCRETIONARY EXECUTIVE PRIVILEGE

Attorney General Kleindienst's assertion of an unlimited executive privilege has been characterized by one lawyer for the Senate as a "blueprint for government by the President." As we have seen, however, Mr. Kleindienst is not the first Attorney General who has staked out such broad claims for the President. Indeed, his formulation is perhaps less dangerous than earlier ones because it is less defensible, coming as it does in circumstances where individual wrongdoing by presidential aides is directly at issue. This is the reason, presumably, that the President has decided to permit his subordinates to appear before Senator Ervin's committee (and respond to all questions).

Although the President has made it clear that his largesse is intended "for this trip only," in our view the boundless claim of a discretionary privilege is unwarranted in any circumstances. There is, very simply, no support for it in history, in judicial decisions, or in the constitutional principle of separation of powers.

It is vital at the outset to be clear about the precise question before us, which is not whether there are certain types of information that the Executive needs to keep secret in order to function properly. There well may be. Nor is the question whether the Congress generally requires access to information in the hands of the Executive in order to legislate properly. Of course it does. The issue is whether the President has the implied authority under the Constitution to withhold data from the Congress solely in his discretion, or whether his decision to do so is subject to constitutional limitation and judicial review.

A. The practice of early Presidents

It was not until 1835, during the presidency of Jackson—a full 46 years after the formation of the Republic and the enactment of the initial statute authorizing congressional inquiries into the workings of the Executive Branch—that

there was an unequivocal assertion of discretionary power to withhold information from the Congress. The earlier incidents of executive questioning of Congressional authority during Washington's administration were cases in which the executive eventually acceded to the requests of Congress and never confronted the legislature with a refusal to disclose.

The one denial of a request for information by President Washington—a request from the House of Representatives for all papers related to the negotiation of the Jay Treaty—was based on his belief that the House lacked the power under the Constitution to demand documents related to the treaty-making power. The President conceded that the Senate could receive the documents. Both Washington, and later Adams, freely communicated to the House all information on external relations, including instructions to envoys negotiating treaties when such information might be relevant to Congress' war-making powers.

Nor do the incidents involving President Jackson provide clearcut support for those seeking historical confirmation of Executive authority to withhold information. Jackson had conceded in 1834 that: "Cases may occur in the course of its legislative or executive proceedings in which it may be indispensable to the proper exercise of its powers that it [Congress] should inquire or decide upon the conduct of the President, or other public officers, and in every case its constitutional right to do so is cheerfully conceded."

Then, in 1835, Jackson rejected a request for information regarding "frauds in the sale of public lands" because he said (1) the information was to be used by Congress in secret session and thereby would deprive a citizen of the "basic right" of a public investigation, and (2) the inquiry was not "*indispensable* to the proper exercise of Congress' powers." The first ground, if valid, related not to presidential prerogatives but to the separate question of the rights of individuals, about which we shall speak below. The second, more amorphous, ground is inconsistent with Jackson's own comment, quoted above, relating to the plenary power of congressional investigation, and also with the numerous precedents established by Washington, Adams and Jefferson in encouraging investigations into the conduct of public officers.

A similar incident involving President Tyler about a decade later is also indecisive. In 1843 Tyler questioned the right of Congress to certain reports relating to alleged fraud on the Cherokee Indians, asserting in a memorandum to Congress that there was a narrow area of information, of the type private litigants could withhold, that the Executive was not compelled to disclose. He disavowed—albeit in ambiguous language—an absolute discretion in complying with congressional requests. In fact, Tyler eventually made available all investigative reports on the incidents except the purely advisory opinions of his investigator of the Cherokee delegates.

During this same period, a congressional practice developed of extending to the President a privilege or discretion to withhold certain investigative reports and state secrets from public disclosure. The technique was used infrequently, and in each instance, according to Raoul Berger, "it was well understood to be a congressional dispensation and not a constitutionally-based presidential right."

An early and typical example was a resolution introduced in the House in 1798 calling for President Adams to disclose reports from American envoys in Paris, "or such part thereof as considerations of public safety and interest, in his opinion, may permit." After debate the discretionary language was struck from the resolution, but the House agreed to receive the documents in executive session in order to comply with the President's request that they be held confidential, at least ". . . until the members of Congress are fully possessed of their contents, and shall have had an opportunity to deliberate on the consequences of their publication after which time I submit them to your wisdom." The House considered the reports in secret session and then decided to publish them. The result was the disclosure of the famous "X Y Z papers," which fanned popular hostility toward France and ultimately led to congressional authorization of the Naval War of 1798–1800.

In the instances where the offer extended by Congress was actually accepted by the President and documents were withheld, the congressional power to compel their release was explicitly recognized by both parties. When Jefferson declined, for example, to produce certain information on the Burr conspiracy in 1807, he was acting upon a House request that excepted "such [information] as he may deem the public welfare to require not to be disclosed."

A similar grant of discretion was made to President Monroe by the House in permitting him to withhold certain correspondence relating to alleged miscon-

duct of naval officers. Monroe carefully justified his decision not to disclose at that time in accordance with the terms of the House Resolution, and also left open the possibility that disclosure at a later date, after the trial of the officers was completed, would be appropriate.

Since Presidents Polk and Buchanan apparently recognized plenary power in Congress to investigate the Executive, the historical record until the Civil War does not permit an inference that the early Presidents or their subordinates possessed a discretionary power to withhold information from the Congress.

B. Judicial decisions

The judicial record is equally barren of authority sustaining the broad claims of the Executive. Although no Supreme Court case explicitly rejects such a privilege, there are no decisions in this country or in England that recognize it. The Queen's Bench in 1845, for example, established what is still the rule in England today: "the Commons are . . . the general inquisitors of the realm. . . . They may inquire into everything which it concerns the public weal for them to know." The Massachusetts Supreme Judicial Court, in 1951, rejected an executive attempt to withhold a report on the ground that it involved an internal communication within the executive branch.

The most comprehensive attempt to muster judicial authority on behalf of an executive privilege was made by Attorney General Robert Jackson in his 1941 letter referred to above, declining to make available to the House Committee on Naval Affairs certain investigative reports of the Department of Justice arising out of labor disturbances in industries with naval contracts. While some of the cases cited by Mr. Jackson support a limited power to withhold security data and confidential informers' communications from the courts, none lends credence to a discretionary privilege of the kind now being urged by the executive branch.

Marbury v. Madison, the first case cited, is clearly inapposite. In that historic decision Chief Justice Marshall expounded the judiciary's authority to review all executive acts not constitutionally committed to executive discretion *and to determine which issues are precluded from review*. It is true, as he said, that investigation of the Executive's acts is "peculiarly irksome, as well as delicate," but the courts possess the authority and indeed have the duty to undertake this investigation.

Perhaps we should stop here, in accordance with an observation made later by Mr. Justice Jackson, that when the first of a string of citations fail to support an asserted proposition of law the lawyer has "a blunderbuss mind" and could not be relied on.

But we shall persist, even though the other cited cases produce no additional support for the position of Attorney General Jackson. The second case, *Totten v. United States*, did not involve executive privilege at all, but rather a secret contract between President Lincoln and a spy. The court refused to permit a suit based on the contract because acknowledgement of the contract was in itself a breach of its terms.

In the Aaron Burr case, President Jefferson eventually *complied* with a subpoena to produce a letter sent to him and left it to the court to suppress those parts of the letter not material to Burr's defense. In his opinion in the Burr case Chief Justice Marshall recognized a limited state secrets privilege, but he emphasized that the court must be satisfied that the need for secrecy outweighs the accused's interest in having access to the document.

Of the remaining federal cases cited in the Jackson letter, all but one involved either the government's right to protect the identity of informers and their confidential communications, or the right of government employees to refuse to disclose information pursuant to a regulation specifically authorized by Congress.

Two of the three state cases cited in the Attorney General's letter refer to an executive discretion to appear or furnish papers to a court. But these same cases explicitly subject this discretion to judicial review and recognize the legislature's power to require executive disclosure. In the other state court decision the Executive had previously made the document available for inspection.

The judicial precedents therefore belie the claim of a discretionary executive privilege.

C. Separation of powers

The historical precedents and judicial decisions unavailing, we turn to even more fundamental sources of potential power, in particular, the constitutional doctrine of separation of powers. Contrary to the view of some recent Presidents and their legal advisors, our understanding of the scheme and meaning of the

Constitution suggests a strict limitation of the privilege. At the outset platitudeous generalities should be discounted. For example, former Attorney General Rogers has said in support of a discretionary privilege that "the separation of powers was . . . the very foundation of the Federal Government . . . and was regarded as the basic guarantee of the people against tyranny." But it is difficult to see why a refusal by the President to make information available to the Congress advances resistance to tyranny. There have been equally unavailing generalities uttered on behalf of the legislative branch. The essential task is to probe the meaning of separation of powers as it relates to the present problem. In our judgment, three distinct facets are involved, none of which supports executive discretion.

1. The first is the Article I power of the Congress to conduct investigations. Long before 1789 it was perceived that the English Parliament would be a mere appendage of ministerial government if it could not compel executive officers to explain their policies and reveal the facts on which those policies were based. Parliament did not merely seek explanations; it actively inquired, in the words of Pitt the elder, "into every step of public Management, either Abroad or at Home, in order to see that nothing has been done amiss." From the early seventeenth century this investigative power was very broad; in each instance of its use Parliament itself would determine the scope of its inquiry.

Perhaps the most dramatic example of an early parliamentary investigation was the inquiry into the administration of Robert Walpole during the two decades prior to his fall from power in 1742. The investigation was conducted in a climate of international and domestic crisis hardly conducive to parliamentary initiative. As Raoul Berger has noted in emphasizing the significance of this inquiry as a measure of Parliament's historic power to investigate:

"The times were stormy; England was at war with Spain; the opposition rattled the bones of disrupted continental alliances; they raised the dread spectre of civil war; and they played tattoo on the multitudinous dangers that would flow from a parliamentary inquiry. But to no avail. Member after member spoke for the right and the duty to inquire into the conduct of the administration and its ministers 'from the lowest to the highest.'"

Legislative practice in the American colonies followed the parliamentary model. Examples abound of investigations by colonial assemblies "into the conduct of the other departments of government." Typical was a resolution of the Pennsylvania Legislature in 1770 "order[ing] the assessors and collectors of Lancaster County to appear before the audit committee and to bring with them their books and records for the preceding ten years." Nor was this a haphazard colonial practice, abandoned during the Revolution. Most state Constitutions codified the legislative power to investigate in highly specific provisions like Article X of the Maryland Constitution of 1776, which gave the legislature authority to "call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of inquiries concerning affairs related to the public interest." So deeply rooted was this legislative right of access to executive documents that the Continental Congress refused to create a Secretary of Foreign Affairs until a resolution was adopted that "any member of Congress shall have access [to] all . . . papers of his office: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress."

While there is no express mention in the federal Constitution of a congressional power to investigate and gain access to the documents of executive departments, the practice was so well established by 1789 that such a power was assumed to be a fundamental attribute of Congress. In one of its first legislative acts, on September 2, 1789, Congress spelled out the reach of this implied power over the new Treasury Department by enacting a statute which remains on the books today:

"[It] shall be the duty of the Secretary of the Treasury . . . to make reports, and give information to either branch of the legislature in person or in writing (as may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office."

This statute was drafted by Treasury Secretary Alexander Hamilton, hardly an advocate of limited executive powers, and whether or not he anticipated that its "sweeping mandate . . . wholly without limitation [would] fasten onto ever conceivable activity of the Administration," he could not have been blind to the fact that the statute gave the Secretary no discretion to withhold information.

Moreover, it is reasonable to assume that Hamilton would never have imposed a duty on an executive department to report to Congress unless he felt such a duty was constitutionally compelled.

During the first half of the nineteenth century, Congress conducted continuous investigations into the expenditure of public funds in virtually every area of government activity. The authority underlying these investigations was derived both from the Appropriations clause in Article I of the Constitution and from Hamilton's Treasury Reporting Act of 1789.

The range and depth of inquiry during this early congressional period can be illustrated by some random examples of House investigations. During the early nineteenth century, the House conducted broad inquiries into the operations of the Treasury Department (1800 and 1824), the War Department (1809 and 1832), government employees generally (1818), the Post Office (1820 and 1822), the Bank of the United States (1832 and 1834), the New York Customs House (1839), the conduct of Captain J. D. Elliott commanding a naval squadron in the Mediterranean (1839), the Commissioner of Indian Affairs (1849), and the Secretary of the Interior (1850). Congressional inquiries into the Executive were in fact so common during this period that a nineteenth century observer commented wryly that "Committees instituted inquiries, ran the eye up and down accounts, pointed out little items, snuffed about dark corners, peeped under curtains and under beds, and exploited every cupboard of the Executive household." It is hardly surprising, therefore, that Attorney General Cushing in a memorandum opinion of 1854 advised the President and all executive departments that "Congress may at all times call on [the Departments] for information or explanation in matters of official duty...."

An instructive definition of the scope of the investigating power is to be found in *Watkins v. United States*, where Chief Justice Warren said in 1957:

"The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."

The Watkins case is especially suggestive because it is chiefly remembered, and rightly, as a decision *restricting* the power of Congress, and in particular the House Committee on Un-American Activities. It is perhaps ironic that the same libertarians who sought to confine the power of Congress during the hegemony of Joe McCarthy are now championing the legislative cause. Be that as it may, in *Watkins* Chief Justice Warren explicitly stated that "broad as is this power of [congressional] inquiry, it is not unlimited." He went on to say:

"There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."

This is the sum total of the limitations expressed by the Chief Justice, and it is plain that they do not support a discretionary privilege of the kind now being asserted by the executive. While there was a dissenting opinion in the Watkins case by Justice Clark, it took an even less restricted view of the investigative power of Congress. It is of course true that the decision dealt with the power of Congress to obtain information from a private individual, and it therefore would be disingenuous to suppose that the court was thinking of such recondite matters as executive privilege. But it also is plain that its latitudinarian appraisal of congressional power is consistent with history and with earlier judicial pronouncements.

2. The second aspect of separation of powers concerns the implications of the President's Article II power to "take care that the laws be faithfully executed." It is this general constitutional provision on which chief executives and their attorneys general have chiefly relied to buttress the claims of unlimited discretionary privilege to withhold executive documents and witnesses from the Congress.

Taken to its essentials it is a claim of inherent or implied power, because the general constitutional language surely does not authorize any such broad dis-

cretionary withholding. To the extent that the Executive branch has an implied power to maintain confidentiality, it is a power identical to that of judicial and legislative branches to protect their internal decisionmaking processes. As we shall see, no branch of government can perform its assigned constitutional function unless its employees are encouraged freely to voice their opinions without fear of external scrutiny. It does not follow, however, that the Executive power to maintain secrecy is inherently greater than that of the two other coordinate branches of government, nor that the Executive has an unreviewable direction to withhold information from Congress in order to frustrate the legislative power of investigation.

It would be tempting to dispose of the inherent power issue summarily in reliance on the Steel Seizure Case, where Justice Black, speaking for the Court, rejected in comprehensive terms the claim of an inherent presidential power to override the will of Congress. There President Truman was denied the authority to seize steel mills during the Korean War in order to maintain needed production. In concluding that "The Founders of this Nation entrusted the lawmaking power to the Congress *alone* in good and bad times," the Court accepted the conclusion of Justice Holmes, among others, that "The duty of the President to see that the laws be faithfully executed does not go beyond the laws...." Former President William Howard Taft put it this way:

"The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the federal constitution or in an Act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest...."

It is unnecessary to accept Justice Black's broad assertions about the lack of presidential power to reach his conclusion. In a more discriminating analysis in the same case, Justice Jackson distinguished three situations—those in which the President acts pursuant to an express or implied authorization of Congress, where his authority is at a maximum; those in which Congress is silent, where the President can rely only on his own powers and frequently the result is uncertain; and those in which the President takes measures "incompatible with the expressed or implied will" of Congress. In the latter situation, according to Justice Jackson, and at least two other Justices in the Steel case, the President's power "is at its lowest ebb."

The case of executive privilege is plainly of the third type. While Congress has not legislated explicitly on the privilege, it has expressed its intention unmistakably to obtain all necessary information from the executive branch in statutes going back to the Hamilton Treasury Reporting Act.

Another clear expression of congressional intent is found in Title 5 U.S.C., Section 2954, enacted in essentially its present form in 1928. This provision requires the executive to submit to the standing Committees on Government Operations of the House and Senate "any information requested . . . within the jurisdiction of the committee." The jurisdiction of these Committees extends to any malfeasance, incompetence, corrupt or unethical practice in the operations of a branch of the government and any improper expenditure of government funds. Nor was this statute novel. Even before this far reaching provision, Congress had enacted a series of laws requiring extensive disclosures by executive departments on the use of appropriated funds. The Budget and Accounting Act of 1921, for example, requires all executive departments to "furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require them." The Comptroller General is the administrative director of the General Accounting Office, an investigative arm of Congress.

Relevant also are the specific statutory provisions designed to prevent interference with the free flow of communications to Congress. As early as 1912, in the Lloyd-LaFollette Act, Congress prohibited any infringement of the right of government employees to furnish information to a member or committee of Congress. A subsequent statute, passed in 1948, imposed criminal penalties on anyone who influenced or threatened a witness in congressional proceedings.

The congressional will being clearly manifested in these and other laws, the formulation of Justice Jackson, which is more solicitous of executive powers than

Justice Black's opinion for the Court, would deny the President inherent and discretionary power of the sort now being claimed.

Two other considerations, one textual and one rooted in history, support this conclusion. Concerning text, the only reference to secrecy in the Constitution is the power given to *Congress* to keep and publish Journals, except "such parts as may in their judgment require secrecy," and the only reference in the text to making information available to another branch of government is the duty imposed on the *President* "from time to time to give to the *Congress* information of the State of the Union." How much can one read into these clauses? Probably nothing definitive, because their origins are shrouded and their purposes differ. But their presence in the Constitution cuts, as law teachers like to say, in the direction of legislative access to executive documents and away from executive discretionary authority.

Cutting in the same direction is the fact that the framers of the Constitution, fresh from bouts with English kings, were more concerned about the dangers of presidential than congressional domination. Some recent writers have pointed to isolated evidence of the Framers' fear of the "despotic tendencies of the legislature," and of "legislative tyranny." Nevertheless, the historical data, as shown by Professor Berger, reveals a consensus in the Constitutional Convention and in the early histories of state governments that "the executive magistracy" was the natural enemy, the legislative assembly the natural friend of liberty. . . ." As Justice Brandeis once said, the English and American people "must look to representative assemblies for protection of their liberties." The case against executive autonomy is thus advanced.

Other portions of the Constitution are of little help. Some informed observers have stressed the inherent weakness of the President. For example, Professor Bishop has minimized the danger to constitutional government by "an executive which has to go to Congress for every cent it spends, which has no power by itself to raise and maintain armed forces and which cannot jail its citizens except under a law passed by Congress and after proceedings presided over by an independent judiciary."

But Bishop wrote in 1957, during the incumbency of a passive President. In light of recent events, he might have stressed other constitutional powers which lead in a different direction—for example, the President's role as Commander-in-Chief and his *de facto* status as virtually sole representative of the United States in foreign affairs. Even more important perhaps than the powers explicitly found in the Constitution or those fairly implied are the numerous examples, apparently multiplying in recent years, of Executive action that seems to go beyond traditional bounds. For instance, Professor Kurland has recently prophesied, without enthusiasm, that "we will continue . . . to see the President wage war without Congressional declaration, to see executive orders substitute for legislation, to see secret executive agreements substitute for treaties, and to see Presidential decisions not to carry out Congressional programs under the label of 'impoundment of funds.'"

Other examples are available. The President has recently expanded the use of the Pocket Veto, has tightened White House budgetary controls over what used to be known as the "independent" regulatory agencies, and has twice devalued the dollar by executive action although a 1945 statute provides that only Congress can set the price of gold. Taken as a whole, these represent a significant change in the balance of power between the executive and legislative branches. An experienced foreign observer, Louis Heren, recently stated: ". . . the main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than diminution of his power. In comparative historical terms the United States has been moving steadily backward."

All this suggests that we should be slow indeed to permit the executive branch to accrete further power by uncontrolled discretion over the information it provides a coordinate branch. To acknowledge such power would increase the constitutional imbalance at a time when counter measures seem called for.

There are further aspects of the problem which underscore the danger of uncontrolled executive discretion: the vast expansion in the size and role of the White House staff, and the recent practice of assigning one person the dual role of cabinet officer and presidential advisor on the White House staff. The former problem is partly a matter of numbers. During 1971 Dr. Kissinger directed a National Security Council staff of more than 140, of whom 54 were substantive experts—a long way, indeed, from the small and rather clubby retinue of earlier

presidents. Dr. Kissinger as well as Messrs. Haldeman, Ehrlichman and other key figures on the burgeoning White House "staff" direct and participate in many governmental committees that cover the entire range of foreign and domestic security matters. Yet the Congress is denied the opportunity to question them, in a formal way, regarding their activities or knowledge or opinions. This situation is not, let us be clear, solely the result of action taken by the present administration: the growth of the White House has been steady since the Roosevelt years.

The second problem—multiple executive responsibilities—is even more serious. A cabinet member who is called to testify on the actions of his department may be asked questions which touch on his activities as advisor to the President. Former Assistant Attorney General Cramton has stated that while the first "is a proper inquiry, the latter is subject to a claim of executive privilege." He acknowledges, however, that "the matters shade into one another and the distinction is difficult to maintain, especially when a cabinet member is housed in the White House and has a separate role as Counselor to the President on specified matters."

These modern developments emphasize the intellectual difficulty of accepting the President as final arbiter of the issue. For it is the President who decides the size of the White House staff, the allocation of responsibilities between it and the cabinet departments, and whether or not to fuse in one individual both line and staff assignments that formerly were kept distinct. To permit the President also to determine, finally, when an individual may be immunized from legislative questions or a document sequestered is surely to defeat the goal of a balanced federal government.

3. Closely related to the President's power faithfully to execute the laws is the question, also an aspect of separation of powers, of the role of the courts in resolving the problem of executive privilege. In our judgment, if an issue concerning the privilege cannot be negotiated, it should be for the Supreme Court to decide. Neither the President nor the Congress should be the judge in its own cause. Accordingly, just as we deny the right of the President to determine the issue finally, we also reject the suggestion that a Senate committee should be "the final judge on whether a White House aide could refuse to answer any of the committee's questions."

There are technical questions to be faced here—the existence of a case or controversy, of proper standing, and of the possibility of a "political question" not meet for judicial determination. Analysis of these questions we postpone until a later portion of this paper. Here we merely refer to the general responsibility of the courts to decide cases that involve disputes over the allocations of power as between the political branches of the federal government.

While there have not been many such incidents, there have been some, and the net result points in the direction of judicial action, particularly since the scope of conflicting constitutionally implied power is at issue. The Supreme Court, for example, ruled on the power of the President as Commander-in-Chief to order a blockade in the early nineteenth century without Congress' approval. The Court also, as we have seen, determined the scope of presidential power, during the Korean War to seize private property without congressional authorization. The Court has declined, it is true, to rule on the legality of the Vietnam War in the face of persistent claims that only Congress had the power to send the nation into combat on a large scale. But this was a discretionary abdication by the Court, and a dubious one at that. Moreover, at least two courts of appeal have examined the merits and decided that Congress, through the appropriation of funds, had sufficiently authorized the war within the meaning of the Constitution.

Of course there will be difficulties concerning a judicial resolution of a claim of executive privilege, assuming a proper controversy reaches the courts. But these difficulties pale in comparison with the present position, in which two unacceptable solutions are possible. The President may continue to be the final arbiter, in flat conflict with elementary notions of justice as well as the precept embodied in the Federalist Papers that "Neither the executive nor the legislative can pretend to an exclusive or superior right of settling the boundaries between their respective powers."

Or executive privilege controversies will be settled *ad hoc*, by what has been called "the accommodations and realities of the political process." It is possible to sympathize with the desire of some to keep the issue in play, to leave options flexible and hard questions unresolved. Epitomizing this view was former Secretary of State Dean Acheson, who testified before the Senate that the "gulf"

between the executive and legislative branches cannot "be cured by law." Many differences and problems cannot be cured by law, but it is our thesis that this is not one of them. We are not dealing with a private difference of opinion, but of the constitutional powers of two branches of government. The opposite of law is lawlessness—the current state of affairs. Accordingly, we have no hesitation in recalling here the injunction of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is."

We are not unmindful that the process of political accommodation endorsed by Mr. Acheson, among others, permits judicious leaks of information from the Executive to the Congress that could not be provided on the record, as well as the familiar informal meetings between congressmen and presidential advisors at which, presumably, valuable data is provided—in short permits a flexibility in the deliverance of information that many will regard as satisfactory. We reject this modus operandi, however, and we are pleased that many congressional leaders likewise reject it. A surreptitious and informal means of communication demeans the Congress and indeed the entire governmental process. In addition, information acquired in this way is not on the record, and therefore is not usable in any stable way by other members of Congress or the public. We agree with Justice Brandeis that "sunlight is the best disinfectant;" we do not regard the "leak" or the "Old School Tie" as satisfactory substitutes for open testimony that the executive branch must be able to defend publicly.

V. THE PROPER SCOPE OF THE PRIVILEGE ASSERTABLE BY THE EXECUTIVE BRANCH

If our conclusion is correct that a discretionary executive privilege is untenable, this does not foreclose the question whether secrecy can properly be maintained by the President and his assistants in the three types of cases where a privilege has been asserted: foreign or military affairs, investigatory files and litigation materials, and advice within the executive branch. We shall now explore each of these areas of interest.

A. Foreign or Military Affairs

A degree of executive secrecy is probably necessary in foreign or military affairs, as the Supreme Court has asserted in the *Curtiss-Wright* case. But the Congress must have access to foreign and military information insofar as it is to exercise its express constitutional powers under Article I to advise the President in making treaties, to declare war, and to appropriate funds for raising and supporting armies.

Congress can, should and has delegated authority to the President to shield certain foreign and military activities from the public. It has authorized him to enforce administrative secrecy through the espionage laws and the classification system. Congress also can and should grant the President statutory authority to withhold certain information from Congress itself, the disclosure of which would cause immediate and irreparable injury to the nation. To conclude from this, however, that the President can, if he chooses, override Congressional requests for information relating to foreign and military affairs by asserting an unreviewable privilege is fallacious. Indeed, many federal court litigants in recent years challenging the legality of the undeclared war in Vietnam have documented a constitutional crisis brought on in part because of the repeated refusals by four presidents to disclose to Congress full data about the conduct of that war.

There are statutory sources for secrecy in foreign and military affairs which reflect the exercise of Congressional power. To give one illustration, the classification system administered by executive departments pursuant to Executive Order specifically derives its authority from provisions of the Espionage Act, the National Security Act of 1947, and the Atomic Energy Act of 1954. In the Freedom of Information Act, moreover, Congress has incorporated by reference the provisions of the classification Order in exempting from the mandate of the Act matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." This reference, however, does not mean that the constitutional authority to classify information rests solely with the President. The Supreme Court stated this term that the Executive Order on classification could not survive a Congressional challenge by way of new legislation, Justice White pointing out in the *Mink* case that "Congress could certainly have provided that the Executive Branch adopt new procedures [for classifying documents], or

it could have established its own procedures. . . ." To complete the circle, President Nixon, in March 1972, cited the exempting provision of the Freedom of Information Act as statutory authority for instituting reforms in the classification system through a new Executive Order.

Congress, therefore, is theoretically an active partner with the President not only in conducting foreign affairs, but in maintaining a system of confidentiality, balanced against the public's right to know what its government is doing in its name. It is because of this shared constitutional responsibility that a House sub-committee chaired by Congressman William Moorhead recently recommended the establishment of an independent Classification Review Commission to be composed of members appointed both by Congress and by the Executive. In the view of the committee chairman, the Commission "would have broad regulatory and quasi-adjudicatory authority over the . . . classification system. [It] would also have the responsibility of settling disputes between Congress and the Executive over access to both classified and unclassified types of information requested by Congress . . .".

Any argument that the Executive might make about possible breaches in security resulting from unimpeded Congressional access to classified information can readily be answered in both constitutional and practical terms. First, the argument rests on a premise rejected long ago by Chief Justice Marshall—that if a power derived from the Constitution might be abused, it should be denied. On a practical level any claim by the Executive that Congress cannot keep secrets has the sound of the pot calling the kettle black. The Executive's political use of classified information to gain the upper hand on Congress is too well documented to require elaboration here. Congressman Moorhead has summarized the practice well:

"On the one hand, the full power of the government's legal system is exercised against certain newspapers for publishing portions of the 'Pentagon Papers' and against someone like Daniel Ellsberg for his alleged role in their being made public. This is contrasted with other actions by top Executive officials who utilize the technique of 'instant declassification' of information they *want* leaked . . . Such Executive branch 'leaks' may be planted with friendly news columnists. Or, the President himself may exercise his prerogative as Commander-in-Chief to declassify certain information in an address to the Nation or in a message to Congress seeking additional funds for a weapons system."

The Pentagon Papers are a prime example of the kind of information improperly withheld from Congress under a spurious claim of executive privilege before they were released to the press by Daniel Ellsberg. On December 20, 1969 Defense Secretary Laird in a letter to Senate Foreign Relations Committee Chairman Fulbright explained that the documents could not be made available to the Senate because they contained "an accumulation of data of the most delicate sensitivity, including National Security Council papers and other presidential communications which have always been considered privileged." As Senator Fulbright pointed out in his response, this assertion of privilege went to the heart of the problem of Congress'waning foreign policy role:

"If the Senate is to carry out effectively its Constitutional responsibilities in the making of foreign policy, the Committee on Foreign Relations must be allowed greater access to background information which is available only within the Executive Branch than has been the case over the last few years."

To the extent that the Pentagon Papers contained purely advisory ocmunications, however, the President, as we shall explain more fully below, could properly have ordered that such advice be excised from documents released to the Congress.

In summary, there is probably a need for secrecy in foreign and military affairs. This means that information properly classified pursuant to statutory authority may be withheld in certain circumstances from the general public and provided to reliable persons within the executive branch on a need to know basis. But this conclusion provides no justification for denying Congress the foreign and military information it requires in order to fulfill its constitutional responsibilities. Accordingly, Congress has the power to compel production of such information by statute or Congressional resolution.

B. Investigatory files and litigation materials

The second major category of information frequently included under the umbrella of executive privilege is information which the government may have to produce in court—principally investigatory files and other litigation materials.

Roger Cramton recently described this as a "widely accepted legitimate area of executive privilege," agreeing with Attorney General Jackson that disclosure of investigatory files would prejudice law enforcement, impede the development of confidential sources, and result in injustice to innocent individuals.

It is unnecessary to dispute the validity of these conclusions to demonstrate that investigatory and litigation files need not be protected from unwarranted disclosure to Congress by anything so grand as an executive privilege. The government's law enforcement interest, as well as the privacy of individuals under investigation, are amply safeguarded by common law evidentiary privileges and by the statutory exemptions from the Freedom of Information Act. Unlike the blunderbuss of an unreviewable executive privilege, moreover, these other doctrines assimilate and attempt to balance competing interests in disclosure which are frequently advanced by private litigants, by Congress and by the public. Furthermore, it would be difficult to imagine a greater inconsistency in the law than that a private litigant could compel the disclosure of information from the Executive not accessible to Congress. But this is precisely the effect of extending executive privilege into the area of investigatory files and litigation materials.

The hallmark of the evidentiary privileges, which protect not only investigatory information but also "state secrets," is that the *judiciary* and not the executive determines when the circumstances are appropriate for a governmental claim of privilege. To invoke the court's power to review such a claim, a private litigant need only show, to the extent required by the Federal Rules of Civil and Criminal Procedure, that the information he is seeking to discover is "relevant" to his criminal defense or civil claim.

Once over this hurdle of relevancy, the litigant may seek to have the court apply the following general rules in considering the government's claim. First, the information at issue must be submitted to the court for an *in camera* inspection to determine whether it is properly covered by the privilege, and if so whether the government's interest in non-disclosure outweighs the private litigant's need for the information to prove his case. Where classified information is not involved, the courts generally reject government claims of a confidential privilege for any *factual* content in investigatory reports. Second, if the information is not privileged, or if the litigant's need for proof is greater than the government's interest in confidentiality, the government cannot be ordered to disclose the information upon pain of contempt, but it can be compelled to choose between losing its case or dropping its prosecution and producing relevant documents which it claims are privileged.

The Congress has demonstrated a sensitivity to the Executive's need for confidentiality in this area by enacting exemptions to the Freedom of Information Act which protect both "investigatory files compiled for law enforcement purposes," and "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." It is significant again that the application of these exemptions in cases where executive agencies have sought to invoke them has been made by *judicial* intermediaries. Moreover, the agencies have the burden of proving that they are entitled to exemption under the Act, again in contrast to an unreviewable claim of privilege by the Executive to withhold information which it determines to fall within its own definition of "investigatory files and litigation materials." The Executive, for example, often claims that investigatory files are permanently exempt from disclosure even if an investigation and prosecution have been completed—a claim which the courts have rejected with equal frequency.

Independent of these evidentiary privileges and exemptions from the Freedom of Information Act, there are a variety of important constitutional guidelines established by the Supreme Court for the conduct of legislative inquiries, aimed at preventing individual injustices of the sort that executive privilege is designed to combat, at least in the view of some of its advocates. These guidelines set forth limits to avenues of investigatory inquiry, consistent with the requirements of procedural due process and the privilege against self-incrimination. They also establish an absolute bar against inquiries into matters of belief protected by the First Amendment. As applied to the use of investigatory information in congressional hearings, these principles can be summarized as follows:

1. Before airing defamatory, adverse or prejudicial information, a Committee should screen such material in executive session to determine its reliability.
2. An individual whom information tends to prejudice should be properly noti-

fied and given an opportunity to appear before the Committee in executive session. He should be allowed to call supporting witnesses if he so requests, and to produce other evidence in order to rebut the prejudicial information. The same requirement of fair notice pertaining to witnesses at public hearings should apply, including a ban on disclosure of the names of witnesses in advance of their appearance.

3. No information discussed at an executive session should be disclosed prior to public session.

4. If adverse testimony is given in public session after the Committee has determined in executive session that it is vital to an investigation, any person about whom such testimony is offered should be afforded an opportunity to:

- (a) testify or offer sworn statements in his behalf;
- (b) subject a witness offering prejudicial testimony or documents to cross-examination; and
- (c) obtain the assistance of the Committee in compelling the attendance of witnesses and the production of documents reasonably necessary to rebut the charges against him.

These constitutional principles, together with the evidentiary and Information Act privileges, assure the protection of the investigatory process and the privacy of persons under investigation. There is no need or warrant to import an "executive privilege," whether or not discretionary, to achieve the same ends.

C. Advice within the executive branch

This brings us to the only aspect of the so-called executive privilege that deserves scrutiny as a possible constitutional privilege based on the separation of powers. That is, in the words of President Eisenhower, the power to withhold "conversations or communications, or any documents or reproductions" that relate to solely internal advice within the Executive Branch. The principal reason for asserting or recognizing such a "privilege" is the undoubted fact that persons will tend to be less candid in exchanging views and making recommendations if they know or fear that their ideas will be subject to later examination and possible public criticisms.

This "advice" privilege, as we think it should be called, has been the subject of unconscionably broad interpretation by the Executive. Whether there is or should be a privilege of this kind, and what its scope should be, are questions that not only have raised hackles over Watergate, but had a similar effect during many other celebrated conflicts between the branches of the government, including the Army-McCarthy imbroglio, the Teapot Dome Investigation, and the Aaron Burr treason case.

In our view the privilege is not one that is exclusively "executive." Many of the same considerations, about which we will have more to say later, would apply to attempts to extract data concerning the advice that judicial law clerks or legislative assistants render to their superiors. The principle involved is the necessity to protect the delicate internal decisionmaking process of each branch of government.

While it is true that there are reasons of institutional necessity which suggest that in certain limited circumstances the courts should countenance an advice privilege, we reject the idea that there is an "inherent power" in his office that gives the President an unreviewable discretion to withhold factual information from the Congress. In this connection, we take comfort from the Supreme Court's unwillingness in other contexts to accept a claim of inherent constitutional power. As we have seen, it rebutted such a claim in the Steel Seizure Case. Similarly, it rejected the Attorney General's argument that wire-tapping could take place without a warrant, denying that "domestic security surveillance may be conducted solely within the discretion of the executive branch;" and, in the case of Adam Clayton Powell, it declined to accept a claim by the Congress, based on similar premises, that would have remitted the seating of members of Congress to the discretion of the legislative branch.

But in our opinion there are reasons why, in closely limited circumstances, the President has an implied constitutional power, the exercise of which is fully reviewable by the courts, to withhold advice that has been given. The principal justification, as already suggested, is that the development of public policy will be harmed if individuals in government cannot rely on the confidentiality of their communicated opinions. Freewheeling debate among colleagues and the presentation of iconoclastic ideas are inhibited if the prospect looms of later cross-examination. A tragic example of such inhibition was the stagnation of Ameri-

can policy toward China in the wage of the censorious treatment of Old China Hands, such as John Paton Davies, who courageously anticipated American Far Eastern Policy twenty years too soon, and paid dearly for their prescience. To require all advice to be subject to often unfriendly scrutiny would surely dry up many sources of innovation and truth.

There is a second reason for protecting the "advice" that flows from one official to another. It is essentially a recognition of the realities of power and personal vulnerability. As stated by Professor Bishop, "It is one thing for a cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a higher vocal section of the public; it is quite another thing for a middle aged, middle-ranking civil servant, who needs his job, to do so."

In many cases, though not all, it will be sufficient if the middle-aged bureaucrat's superior appears and testifies as to government decisions actually made. The Congress will obtain what it seeks, but it will have to do without the pelt of a worker in the vineyard. Protecting the lower ranking individual is especially needed because members of Congress, in their desire to score a point for the folks back home, may run roughshod over the reputation and sensibilities, if not the legal rights, of an honest but uninspired bureaucrat. If this can be avoided, it should be. This is why we conclude that if an implied Constitutional privilege is admitted on practical grounds to allow executive officers to decline to testify, at the direction of the President, it should apply down the line to the lesser and weaker members of the bureaucracy.

The practical necessities of the case, however, may not be thought to justify a constitutional privilege, particularly since there is no express language in the Constitution to support one. In this view the courts would have a more limited, although still important reviewing role. An unsuccessful attempt by the Congress to obtain information from the Executive would not precipitate a constitutional question as to the scope of an "advice privilege," but it could lead to a lawsuit in which the critical question was whether the information sought was germane to a proper congressional inquiry. Courts might tend to shy from limiting Congress under such a vague standard. But because there would be situations in which the Congress reasonably need to know what action or decisions the Executive took, but not what advice it acted on, there would still be a live question for judicial determination.

Under either formulation, the issue would remain what sort of protection does the Executive require? Whom shall it cover, and what types of information? Who can invoke it, and by what procedures?

We shall now attempt, not without apprehension, to block out a workable and coherent set of principles answering these questions.

1. No witness summoned by a congressional committee may refuse to appear on the ground that he intends to invoke the "privilege" as to all or some of the questions that may be asked.

It has been suggested that certain officers in the executive branch—notably those who are White House aides to the President—may decline altogether to appear. This position has been taken recently not only by President Nixon but by a major congressional figure, Senate majority leader Mike Mansfield, who has stated: ". . . I believe any President is entitled to a few intimate advisors on the basis of absolute confidentiality who are not subject to Senate confirmation. The Senate, in my judgment, should respect that confidentiality at least while the advisors remain in the close counseling relationship with the President."

This is a plausible view, and is consistent with the conception, which no doubt is the reality, of an overworked Chief Executive turning to a trusted assistant for absolutely private advice at moments of tension. Such was the relationship, for example, between President Wilson and Colonel House, and FDR and Harry Hopkins. The difficulty is that we are no longer in an era when close personal advisors act purely in a counseling capacity. Fully apart from the individuals who occupy dual positions of cabinet members and advisors to the President, it is plain that the chief White House aides are action officers as well as advisors. This is certainly true about Messrs. Erlichman, Haldeman and Kissinger, and from what one reads in the press was also true about the Counsel to the President, Mr. Dean. It was undoubtedly also true about Messrs. Bundy, Califano, Moyers and Rostow under President Johnson, and about the principle aides to President Kennedy. There may be isolated exceptions, but because of the pattern in recent administrations, nobody should be exempt from appearing.

Accordingly, if an employee of the executive branch is directed by a superior not to testify, he should make himself available to explain the reasons for the refusal. Congress is entitled at least to this. Any other rule—and we fear that it is the rule by which we now live—opens the door wide to unjustified and even arbitrary assertions of privilege, and to the denial to the legislative branch of information it rightfully seeks in order to carry out its constitutional responsibilities.

2. a. A witness summoned by a congressional committee could claim advice privilege only when accompanied by, and at the direction of, the Attorney General, Deputy Attorney General or Counsel to the President, who would assert that they were acting at the direction of the President personally.

b. A witness may decline to answer questions about recommendations, advice and suggestions passed on to superiors or associates for consideration in the formulation of policy. (Nor may Congress question others, including the superiors or associates of an employee, about such advice.)

c. An individual summoned may not decline to answer questions about policy decisions that he personally made or personally implemented. Whatever the title of an individual, and whether or not he is called an "advisor," he should be accountable for actions that he took in the name of the government and decisions that he made leading to action on the parts of others.

d. An individual summoned may not decline to answer questions about facts that he acquired personally while acting in an official capacity.

The separation of "fact" from "advice," while sometimes difficult, is not impossible. Indeed, executive departments are often required by the courts to make this separation in order to comply with requests for documents under the Freedom of Information Act and other litigation. Without the separation an advice privilege invites abuse. As one witness pointed out in the 1971 Senate hearings on executive privilege, the protection of "advice" is potentially "a most mischievous privilege."

"Virtually every scrap written in the executive branch can, if desired, be labeled an internal working paper. Rarely are matters neatly labeled "facts," "opinions," or "advice." It can be used as readily to shield opinion corrupted by graft and disloyalty as to protect candor and honest judgment. And it can be used as a "back door" device for withholding state secrets and investigative reports from Congress."

e. This quotation also suggests why Congress may require answers to questions about actions or advice by executive officials which it has probable cause to believe constitute criminal wrongdoing or official misconduct, such as the anti-trust settlement with ITT, as well as the Watergate events. In such situations, of course, individuals summoned before Congress are entitled to exercise their constitutional rights, including, for example, the privilege against self-incrimination.

f. Past employees of the executive branch should also be able to exercise the privilege because the possibility that advice given in confidence might be revealed after an employee left the government could also have an inhibiting effect on free interchange. If called upon to review the exercise of a privilege over advice given by a former employee, a court in accommodating the respective interests of the legislative and executive branches might well conclude that the privilege is not permanent but expires after a given period of time—for example, a set number of years after a change in administrations, or the death of the former advisor. This would be consistent with the time limitation which the courts have placed on certain exemptions to the Freedom of Information Act.

3. a. *Documents* could be withheld from Congress or a committee of Congress only on the personal signature of the President.

b. The privilege should extend not to entire documents but only to those portions of documents that embody the criteria we have set out to justify an exercise of privilege. The Supreme Court recently declined to apply this discriminating rule with regard to an executive claim of secrecy because of national security considerations. But the case in which it did this is readily distinguishable since it involved an attempt to retrieve data under the Freedom of Information Act, which presents no constitutional claim. On the other hand, in the Pentagon Papers case, where a constitutional claim against prior restraints was presented, the Supreme Court held that the First Amendment interests at stake were of such paramount importance that it declined to excise any portions of the documents. As we have stated above, it would have been proper for the President to have ordered purely advisory communications among the Pentagon papers to be with-

held from Congress if he had complied, as he should have, with the Senate Foreign Relations Committee's earlier request for the documents in December 1969.

Executive privilege is inconsistent with constitutional principles underlying the investigative power of Congress and the judicial reviewing function of the Supreme Court. The executive branch is therefore on weak ground in asserting that an entire document may be withheld solely because a portion of a document contains "advice." Of course, if facts within the personal knowledge of a witness, or information relating to decisions that a witness personally made or implemented, are "inextricably intertwined with policy-making processes," secrecy should prevail. But if the separation can be made, Congress is entitled to the information not protected by executive privilege.

VI. JUSTICIABILITY AND ENFORCEMENT

No claim of executive privilege has ever been presented for judicial resolution, and Justice Stewart recently stated informally that he doubted it ever would be. The issue, however, is destined to reappear with increasing frequency, particularly when the executive and legislative branches are controlled by opposing political parties, and resolution through accommodation is least likely. Furthermore, compromise will never resolve the basic dispute. It is appropriate, therefore, to consider the context in which the issue of executive privilege might arise in the courts, the problems of jurisdiction and justiciability that it would encounter, and the ways in which a court might enforce a decision on the merits.

A threshold question is how Congress itself might make a determination to submit the dispute to the courts. Not all congressional demands for information are expressive of the will of Congress, many being pressed by individual members for private political reasons. To ensure that the contested information is sought pursuant to a formal legislative inquiry, therefore, it is suggested that a refusal by the Executive to comply with a request for information shall not be submitted for judicial review without the support of a majority of the members of the congressional committee from which the request came—a formula which could be embodied in a statute. Since a committee's request could be overruled by the full body, a more certain expression of congressional will would be a resolution by the relevant legislative branch to obtain the information sought through compulsory process or judicial review.

Once the congressional intent to submit a claim of executive privilege to the courts had been expressed, there are several ways in which a case might be precipitated. A clear case or controversy would be created by a decision of Congress to cite an executive officer for contempt for failing to comply with a subpoena served upon him pursuant to the statutory power of Congress to subpoena witnesses and documents. Theoretically, the only issues that would require resolution in such a proceeding would be whether the contested information was reasonably related to a proper legislative function, and, if so, whether the committee seeking the information had acted within its jurisdiction in issuing the subpoena. In practice, however, the dramatic potential of this method of resolving the question has never been realized: Congress has never expressed the will to punish executive officers who disregard its subpoenas, perhaps because it has never seemed likely that the appropriate United States Attorney, to whom Congress would have to certify the case, would present the contempt to a grand jury for prosecution.

An even more dramatic method of bringing the issue to a head would be for Congress to punish the contempt on its own initiative, as one commentator put, "by the simple and forthright process of causing the Sergeant at Arms to seize the offender and clap him into the common jail of the District of Columbia or the guardroom of the Capitol Police." The prisoner's ensuing petition for a writ of habeas corpus would then present an unavoidable occasion for the courts to decide whether the Executive had the authority to withhold the information which precipitated the dispute. If Congress were upheld the official would remain in custody until he testified or produced the document in question, or until the end of the session of Congress. This procedure assumes, of course, that Congress would adhere to the procedural requirements recently set forth by the Supreme Court in *Father Groppi's* case. Before imposing legislative punishment, Congress would have to give the official due process, which includes at a

minimum notice of the charge and an opportunity to appear and defend against it.

Less dramatic and more probable methods of triggering a judicial consideration of executive privilege—for example, in a civil action brought by Congress—are complicated by questions of the standing of Congress or one of its committees to invoke the judicial process in order to compel the production of witnesses or documents by the Executive, and justiciability of a dispute between the political branches of government.

The standing question is less difficult to resolve. While there is no statute conferring jurisdiction upon the federal courts to entertain suits by Congress to compel the production of executive information, Congress could confer upon persons, including itself, the requisite standing to invoke judicial aid in seeking such information. A statute giving Congress standing to secure judicial review of the withholding of information by the Executive would be analogous to the Freedom of Information Act, which gives such standing to “any person” whose request for information is denied.

Nor does Congress lack standing to sue a coordinate branch of the federal government, particularly where it seeks to protect one of its vital functions from impairment and therefore can demonstrate a clear stake in the outcome of the controversy. Unlike a private citizen challenging executive privilege, Congress suffers an injury in fact to an interest within the zone of interests protected by the Constitution each time it is denied information essential to its legislative function.

The political question is somewhat more difficult to resolve. As we have seen the doctrine of executive privilege is the product of repeated and often sharp clashes between the two political branches of government which have so far eluded resolution through the courts. For this reason some would say that the issue is incapable of judicial resolution. But a close examination of the principle that courts will not adjudicate conflicting power claims between the executive and legislative branches does not bear this out.

The political question doctrine as explained by the Supreme Court in its historic reapportionment decision requires that the federal courts refuse to entertain only those controversies (1) which the Constitution explicitly remits to another branch of government for resolution, (2) where no available standards for decisions are at hand, and (3) when fashioning an appropriate remedy is too difficult. The Constitution is devoid of language remitting the resolution of executive privilege claims to another branch of government. To be sure, the executive branch asserts an “unreviewable discretion” to withhold information from Congress, but as we have seen such an assertion is itself without any explicit or implied foundation in the Constitution. Nor is the power to decide whether Congress has an absolute right to demand information lodged in the legislative branch, even if the courts are confined to determining whether information sought by the legislature from the executive is “germane to a proper legislative inquiry,” the test that would be employed if the executive privilege is denied any constitutional stature whatsoever.

One branch, therefore, cannot finally determine the scope of its own power when to do so is to deny a power claimed by the other. Unless the two branches are to engage in a perpetual “trial of strength,” which the Supreme Court itself has decried, the power to decide must reside in the courts, which are intended in circumstances such as these, as Justice Holmes put it, to act “as umpire between Congress and the President.” If the courts have the power to decide, they do not lack available standards for review. In contrast to the admittedly difficult problem of working out standards for equal representation in the apportionment cases, the standards for deciding the scope of executive privilege can be based on distinctions no more difficult to make than those outlined above (Section V, *supra*), and no more difficult than those which courts are accustomed to make in resolving problems of evidentiary privilege.

Finally, the problem of enforcement, while complicated, cannot serve to bring the political question doctrine into operation when all other indices point toward a judicial resolution of the issue. Unfortunately, the courts could not employ in this context the convenient compromise they use in determining claims of privilege in an evidentiary context—ordering the government to drop its case if it persists in claiming a privilege held to be insufficient. Here the issue is squarely presented; either the Executive must disclose information to Congress or it

must not. The enforcement of a legislative contempt citation against an executive officer would not appear to present the courts with more than an ordinary contempt case, although admittedly in an unusual context. The real problem would lie in compelling the contested disclosure. Since a court would not find it difficult to frame the appropriate relief, speculation about the executive's willingness to comply with a judicial order should not enter into consideration of whether the order should issue in the first instance. As the Supreme Court said in the Adam Clayton Powell case, in which it ruled on what the Congress maintained was an "internal matter," "it is an inadmissible suggestion that action might be taken in disregard of a judicial determination."

Furthermore, judicial enforcement of an order resolving an executive privilege dispute would not create the dangers against which the Supreme Court fashioned the political question doctrine: it would not "risk embarrassment abroad or grave disturbance at home," nor would it embroil the courts in "overwhelming party or intraparty contests." For these reasons, we do not believe that the Executive would refuse to comply with a resolution of the issue by the judicial branch.

Nor do we mean to suggest that such a resolution would always be against the asserted interests of the Executive. We do not maintain that an absolute congressional power to compel information should be substituted for an absolute executive power to withhold it. All "unlimited power" is inherently dangerous, and it is the salutary function of the courts to circumscribe the boundaries of the executive and legislative powers so that neither branch is exalted at the expense of the other. The so-called executive privilege seems pre-eminently an issue to be resolved in this manner.

STATEMENT OF RAOUL BERGER, BEFORE THE SENATE SUBCOMMITTEES ON INTER-GOVERNMENTAL RELATIONS AND ON SEPARATION OF POWERS, APRIL 12, 1973

It is a privilege to respond to your invitation to speak to the issue of executive privilege. That issue does not constitute a mere jurisdictional squabble between Congress and the President; it goes to the very heart of our democratic system. As Justice Potter Stewart said about the withholding of agency and departmental reports respecting the contemplated underground atomic explosion in Alaska, "with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed." He who controls the flow of information controls our destinies; so much the mounting escalation in Vietnam alone should teach.

In the twenty-odd months that have elapsed since I testified on the subject before the Subcommittee on Separation of Powers, the atmosphere has changed very considerably. Mounting frustration has brought your leadership to realize that the steady drain on your energy and time caused by executive withholding of needed information must not be endlessly protracted. Some of you are prepared to resort to enforcement via a contempt proceeding. As you know the contempt power of Congress has been sustained in suits against private individuals, to mention only *McGrain v. Daugherty*. In June 1971, Assistant Attorney General William H. Rehnquist acknowledged that Congress can cite an officer of the government who refuses to appear or to supply information for contempt, and that an executive officer who has custody of desired documents must respond to a Congressional subpoena. 2 Moorhead 379,385.¹ Thus the contempt procedure has judicial sanction, and according to now Justice Rehnquist, it extends to recalcitrant officials.

The issuance of a citation for contempt need not be regarded as a punitive measure but rather as a means of opening the door to judicial review. Arrest of a recalcitrant by your Sergeant at Arms enables him to obtain a writ of *habeas corpus* whereby the constitutional issue may be judicially resolved. Happily President Nixon has stated that he would welcome submission of the issue to the courts, and a contempt citation offers a proven and direct route. To proceed in this manner obviates the "political question" issue. When a court is asked to free a man who contends that his detention is unconstitutional, it cannot very

¹ Hearings before a Subcommittee on Government Operations on the Pentagon Papers, pt. 2, pp. 379, 385 (June 1971) hereafter cited as Moorhead hearings.

well evade the issue and leave him to rot in jail. That course becomes even more dubious when both Congress and the President desire the Court to adjudicate the controversy. Indeed, Madison stated that neither branch can decide a boundary dispute between them. Professor Alexander Bickel expressed a similar view in his testimony during the Hearings on Executive Agreements before the Senate Committee on Foreign Relations, p. 31 (October 1971).

President Nixon's confidence that the Court will sustain his position needs to be measured against the historical facts. With George Ball, former Under Secretary of State, I consider that executive privilege is a "myth", without "constitutional foundation." We need to recur to the facts which riddle the myth because estimable members of your body as well as important molders of public opinion have been influenced by executive propaganda to believe that there is such a constitutional attribute as executive privilege, that Washington, for example, was the first to invoke the doctrine.

In 1965 I published an extensive critique of the view, expressed by then Deputy Attorney General William P. Rogers in a 1957 Memorandum submitted to the Senate, that the President had "uncontrolled discretion" to withhold information from Congress. So far as I can find, no member of the executive branch, past or present, or for that matter, no academician, has attacked my critique in a published writing. For the purpose of expanding my study into a book, I have engaged for the last 20 months in restudying and rethinking the problem, and in considerable additional research, particularly in the English sources and our own constitutional history. I found that Parliament enjoyed an untrammeled power of inquiry into executive conduct, that no Minister or subordinate interposed any objection to the right of Parliament to inquire, and substantial evidence that the Founders meant to adopt this power of the "Grand Inquest of the Nation," without the slightest indication that they intended in any way to cut it down. Against this history, the pseudo-precedents after 1787 carry an all but impossible burden. Permit me to spread some of this history before you.

I

McGrain v. Daugherty offers a good starting point. Decided in 1927, it declared that the investigatory power was "regarded as an *attribute* of the power to legislate in the British Parliament . . . before the American Revolution"; and that "the constitutional provisions which commit the legislative functions to the two houses are intended to include this attribute." To obtain light as to the *scope* of this attribute we may, therefore, turn to parliamentary history.

There I found that the power of inquiry had its inception as an *auxiliary to the power of impeachment*, on the sensible ground that one does not indict before inquiring whether there is cause. This fact is of immense importance because, as you recall, "The President, Vice President and all civil officers" are subject to impeachment, and it follows that they are all subject to preliminary inquiry. Of this, I shall have more to say later.

In performing this inquiry function, the House of Commons acted as the "Grand Inquest of the nation"; and we need to bear in mind, as Chief Justice Lord Denman stated in 1839, that:

"The Commons . . . are not invested with more of power and dignity by their legislative character than by that which they bear as grand inquest of the nation."

In a random sampling of parliamentary debates at different periods, stretching from 1621 to 1742, I found legislative oversight of administration across the board: inquiries to lay a foundation for legislation, into corruption, the conduct of war, execution of the laws, disbursement of appropriations, in short, into every aspect of executive conduct. Foreign affairs, about which American Presidents have drawn a curtain of secrecy, were not excepted. The great English historian, Henry Hallam, after advertiring to the investigations of 1691 and 1694, concluded, ". . . it is hardly worth while to enumerate later instances of exercising a right which had become indisputable, and, even before it rested on the basis of precedent, could not reasonably be denied to those, who might advise (*i.e.*, legislate), remonstrate and impeach."

The highest officers of the land responded to such inquiries without demur. No hint turned up in my search of the parliamentary records of a challenge by a Minister or subordinate to the right of Parliament to inquire or to the scope of inquiry into executive conduct. Speaking of inquiries instituted in 1689 with respect to miscarriages in the conduct of war in North Ireland, Hallam stated, "No courtier (*i.e.*, Minister) has ever since ventured to deny this general right

of inquiry." Colonial recognition of these facts is to be found in 1774 by James Wilson, with Madison the leading architect of the Constitution. The House of Commons, he wrote, "have checked the progress of arbitrary power, and have supported with honor to themselves, and with advantage to the nation, the character of the grand inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censure; and have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults."

From this, two complementary conclusions may be drawn: (1) Parliament enjoyed a plenary power of inquiry into executive conduct; and (2) no Minister or subordinate, no subject of inquiry was immune from investigation into any aspect of administration. It is a striking fact that neither the Eisenhower nor Nixon Administration, where "executive privilege" has been most extravagantly claimed, has advanced a single pre-1787 precedent for executive refusal to turn over information to the legislature. Thus, whereas Congressional inquiry, rested by the Supreme Court on the example of Parliament—which had plenary power, has a solid foundation, there is *no pre-Convention historical basis* for the claim that the power to withhold information from the legislature was an *attribute of the Executive*. All inferences are to the contrary. This, as I shall show, has important implication for the executive appeal to the separation of powers.

That the Founders were aware of this legislative-inquiry attribute is demonstrated by four or five references in the Convention and the several Ratifying Conventions to the function of the House as the "grand inquest of the nation." Wilson's 1774 publication, earlier quoted, exhibits a thorough appreciation of what that function embraced, above all that "the proudest Ministers . . . appeared." It calls for solid evidence that Wilson abandoned his admiration for this practice of the Commons, particularly since he viewed the executive power merely as a power to execute the laws. In fact, there is not the slightest intimation in the records of the several Conventions that the Founders intended to curb the functions of the Grand Inquest in any way.

The Executive branch builds its case on the separation of powers. But resort to the separation of powers assumes the answer; it assumes that the executive had a withholding power upon which legislative inquiry encroaches. John Adams spelled out in the 1780 Massachusetts Constitution that the separation of powers was designed to prevent one department from exercising the powers of another. Since *it was not an attribute of executive power* at the adoption of the Constitution to refuse information to the legislature. A Congressional requirement of information from the Executive does not encroach on powers confided to the President; it does not violate the separation of powers. This is confirmed by a statement of Montesquieu, who was repeatedly cited by the Founders as the oracle of the separation of power. The legislature, he said—exhibiting his familiarity with the English practice—should "have the means of examining in what manner its laws have been executed by the public officials." Given repeated recognition of the function of the House as Grand Inquest, something more than appeals to an abstract separation of powers is required to curtail the function. Unless evidence is inherently incredible, the courts hold, it is not to be defeated by speculation based on no evidence.

The fact that the separation of powers was not designed to reduce the "Grand Inquest" function is again confirmed by the Act of 1789, which made it "the duty of the Secretary of the Treasury . . . to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the Senate or the House of Representatives, or which shall appertain to his office."

The Act contains no provision for executive discretion to withhold information, and there is no reference whatsoever to such discretion in the legislative history of the Act. This provision was drafted by Alexander Hamilton who, as a member of the Convention and co-author of *The Federalist*, knew well enough whether a duty could be imposed on the Executive Branch to furnish information to Congress. Adopted by the First Congress, whose construction of the Constitution is given great weight, and signed by President Washington, who had been presiding officer of the Convention, this Act can hardly be deemed in violation of the separation of powers.

Were the issue in doubt, President Nixon has just supplied the clincher by his instruction to members of his staff to appear before the Grand Jury that is in-

vestigating the Watergate conspiracy. He is scarcely consistent: the separation of powers does not bar inquiry by the judiciary, one coordinate branch, while it does bar inquiry by another, the Congress. Yet it is the legislature, acting as the Grand Inquest, which is the highest grand jury in the land. And why does disclosure to the grand jury of confidential communications between members of the White House staff not "inhibit" the candor allegedly essential to performance of executive functions, whereas disclosure to Congress, according to President Nixon, would "weaken and compromise" the "candor with which such advice is rendered?"

Lest it be thought that the President's instruction to appear before the grand jury was a matter of grace, I submit that no man is immune from testifying before the grand jury as to the commission of a crime. If a member of the White House staff, for example, were the sole witness to a murder, he could scarcely refuse to testify on the ground of executive privilege. That the separation of powers interposes no obstacle to the judiciary is immediately apparent from two cases. In 1953, the Supreme Court held in *United States v. Reynolds* that the decision whether military secrets may be withheld from a party in litigation cannot be left to the caprice of an administrator but is for the determination of the courts. Much earlier Chief Justice Marshall held on the *Trial of Aaron Burr* that President Jefferson could be required to furnish to a defendant in a criminal trial a letter to Jefferson from General Wilkinson. Marshall, who had been a vigorous advocate of the Constitution in the Virginia Ratification Convention was hardly unaware that his ruling was not barred by the separation of powers; nor can it be presumed that in 1953 the Supreme Court was oblivious to that problem. If judicial insistence on executive disclosure does not offend against the separation of powers, Congress, too, is not barred.

Let us now return to inquiry as a prelude to impeachment, bearing in mind that the Constitution makes express provision for impeachment of "The President, Vice President and all civil officers." James Iredell, later a Justice of the Supreme Court, adverted in the North Carolina Convention to the maxim that the King can do no wrong, and exulted in the "happier" provision which made the President himself triable. The President, it should not be forgotten, was not looked at with awe but with apprehension. Of this power of impeachment, a Committee of the House, faithfully reflecting parliamentary history, stated in 1843 that, "The President himself, in the discharge of his most independent functions, is subject to the exercise of this power—a power which implies the right of inquiry on the part of the House to the fullest and most unlimited extent."

Since the Constitution expressly provides for impeachment of the President, since historically inquiry may precede impeachment, President Nixon errs in asserting that "the manner in which the President exercises his assigned executive powers is not subject to questioning by another branch of the Government." Even the headstrong Andrew Jackson acknowledged that "cases may occur in the course of (Congress') proceedings in which it may be indispensable to the proper exercise of its power that it should inquire or decide upon the conduct of the President or other public officers, and in every case its constitutional right to do so is cheerfully conceded."

Consequently, Mr. Nixon's argument that "If the President is not subject to such questioning, it is equally inappropriate that members of his staff not (sic.) be so questioned, for their roles are in effect an extension of the President" falls to the ground. Moreover, since "all civil officers" are impeachable by the terms of the Constitution, they are subject to inquiry without the leave of the President. Impeachment, said Elias Boudinot in the First Congress—that almost "adjourned session" of the Constitutional Convention, enables the House "to pull down an improper officer, although he should be supported by all the power of the Executive." The point was made again and again, among others, by Abraham Baldwin, a Framer. English history affords no instance where Parliament was required to seek leave of a Minister for the appearance of a subordinate; and the imposition of such a condition by the President has no historical warrant.

My search of the several Convention records, let me repeat, turned up not a shred of evidence that the President was empowered to withhold *any* information from the Congress. One constitutional provision, in fact, speaks against it. The Framers authorized secrecy in only one case, and then by Congress, not the President. Congress is required to keep and publish Journals except "such

part as may in their (each House's) judgment require secrecy." This provision encountered rough going, being harshly criticized by James Wilson, George Mason, Elbridge Gerry, Patrick Henry and also by Jefferson. To allay fears of this secrecy provision, proponents explained that it had very restricted scope. So, John Marshall stated in Virginia that the debates "on the propriety of declaring war" and the like, could not be conducted "in the open fields," and said, "In this plan, secrecy *is only to be used* when it would be fatal and pernicious to publish the schemes of government."

In light of the denial of limitless power to conceal to the "legislative authority"—which Madison said "necessarily predominates" in "republican government"—how can an intention be derived of an *implied* grant to the executive of power to keep anything and everything secret? Rather, as the Supreme Court held in analogous circumstances, the express authorization for limited discretionary secrecy by Congress and the omission to make similar provision for the President indicates an intention to withhold such authority from him. What might momentarily be concealed from the *public* by Congress had to be divulged by the President to Congress, if that senior partner in government was to participate in making the momentous decisions which alone were to be kept secret. Marshall's limitation of the express secrecy provision to "fatal and pernicious" publications renders laughable the wholesale executive claim to secrecy for communications between several million subordinates in the executive department.

II

Before I examine the pseudo—"precedents" on which administration spokesmen base their claim of executive privilege, it should be noted that there is a long line of Congressional precedents, solidly based on the investigatory power of Parliament and unequivocally asserted in plenary terms.

President Nixon tells us that executive privilege "was first invoked by Washington." Preliminarily, the first use of the phrase, so far as I could find, occurred in a private litigation in 1958. An independent search by Professor Arthur Schlesinger likewise turned up no use of the phrase prior to the Eisenhower Administration, scarcely testimony of a well-established doctrine. There were two incidents. First, there was the 1792 inquiry into the disastrous St. Clair expedition against the Indians; Washington turned over all the documents; "not even the ugliest line in the flight of the beaten troops was eliminated," states his biographer, Douglas Freeman.

Executive reliance on St. Clair is based, *not on refusal*, of the documents, but on Jefferson's notes of a Cabinet meeting at which it was agreed that the "house was a grand inquest, therefore might institute inquiries," but that the President had discretion to refuse papers "the disclosure of which would injure the public." These notes are not reconcilable with the 1789 Act which Washington had earlier signed, and which permitted unqualified inquiry. What little precedential value may attach to the notes vanishes when it is considered that only four years later Washington himself did not think to invoke the St. Clair "Precedent" in the Jay Treaty case upon which the Executive next relies, and instead stated his readiness to supply information to which ever House had a "right", such as the Senate had to treaty documents.

Jefferson's notes did not find their way into the government files; there is no evidence that the meditations of the Cabinet were ever disclosed to Congress. Indeed, it would have been most impolitic and unsettling to excite the House by a claim of discretion to withhold when all the required information was, in fact, turned over. The notes were found among Jefferson's papers after his death and published many years later, under his "Anas," what he described as "loose scraps" and "unofficial notes." There this "precedent" slumbered until it was exhumed by Mr. Rogers in 1957. Some precedent!

Time does not permit me to show that Jefferson, who unlike Rogers, turned to English precedents for the scope of the executive power, was mistaken in his reading of some remarks in the Walpole proceedings of 1742. It must suffice to say that William Pitt more accurately reflected the state of English law in those proceedings:

"We are called the Grand Inquest of the nation, and as such it is our duty to inquire into every step of public management, either abroad or at home, in order to see that nothing is done amiss." And so it remained, as Justice Coleridge stated in 1845: "That the Commons are, in the words of Lord Coke, the general inquisi-

tors of the realm, I fully admit . . . it would be difficult to define any limits by which the subject matter of their inquiry may be bounded . . . they may inquire into everything which concerns the public weal for them to know; and themselves, I think, are entrusted with the determination of what falls within that category."

The second Washington "precedent" is his refusal to turn over the Jay Treaty papers to the House. He had *delivered* them to the Senate but refused them to the House because, he said, the House had no part in treaty-making and hence no "right" to the papers. He emphasized, however, that he had no disposition to withhold "any information . . . which could be requested of him as a right," a repudiation of Jefferson's "discretion to withhold."

And as an example of a "right" to require documents (which explains his delivery to his partner in treaty-making, the Senate) he instanced impeachment; but stated that "It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives except that of impeachment; which the resolution has not expressed." This put the cart before the horse; it required the House to prejudge the case, to "purpose" impeachment before it inquired whether there was just cause. Then, too, the procedure required for impeachment was left to the House, for to it was given "the sole power of impeachment," so that Washington invaded the House's prerogative in suggesting a decision to impeach must precede inquiry. Nonetheless, here Washington recognized what parliamentary practice teaches, that inquiry was auxiliary to impeachment and could even reach an ambassador plenipotentiary, Chief Justice Jay.

A Washington precedent that sheds more light on President Nixon's invocation of executive privilege to shield his counsel, John Dean, from inquiry as to his knowledge of, or participation in the "Watergate" conspiracy, is the Hamilton incident. When Washington learned that an investigation into the conduct of his "intimate adviser," Alexander Hamilton, his Secretary of the Treasury, was rumored, Washington stated, "No one . . . wishes more devoutly than I do that (the allegations) may be probed to the bottom, be the result what it may." Washington would have welcomed, not thwarted, the interrogation of Mr. Dean.

Following Washington's example, President Polk stated in 1846, "If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe that there has been malversation in office . . . and should think proper to institute an inquiry into the matter, all the archives and papers of the Executive Department, public or private, would be subject to the inspection and control of a committee of their body, and every facility in the power of the Executive be afforded them to prosecute the investigation." This, it will be recalled, was also the view of President Jackson.

It would be stale and unprofitable to rehearse subsequent presidential assertions of a right to withhold information from Congress, for the last precedent stands no better than the first. Bare assertion, even if oft-repeated, can no more create power than the President can lift himself by his bootstraps. As the Supreme Court stated in the "*Steel Seizure Case*," "That an unconstitutional action has been taken before surely does not render the same action any less unconstitutional at a later date."

Let us rather focus on that branch of executive privilege which, according to President Nixon, was "designed to protect communications within the executive branch" and is allegedly "rooted in the Constitution." When Assistant Attorney General William H. Rehnquist appeared before Congress in 1971, the instances he cited for the refusal of the President's "intimate advisers to appear" went back no farther than the Truman Administration. These refusals, said he, were based on the principle that the advisers "ought not to be interrogated as to conversations . . . with the President." Be it assumed that communications between the President and members of his Cabinet enjoy constitutional shelter—by no means an incontrovertible assumption—and that still does not stretch to communications between several million subordinate employees.

What the President conceives to be "rooted in the Constitution" is in fact *first met in 1954*, when President Eisenhower sought to ward off Senator McCarthy's savage attacks on Army personnel by a directive that communications between employees of the Executive branch must be withheld from Congress so that they may "be completely candid in advising with each other." Overnight this "doctrine" was expanded to shelter mismanagement, conflicts of interest such as led the Supreme Court to set aside the Dixon-Yates contract, inexplicable selection of low bidders, etc., etc. A detailed account of the rank, jungle-like

growth of the "candid interchange" doctrine in the Eisenhower years is to be found in Clark Mollenhoff's *Washington Cover-Up*.

It is strange doctrine that the acknowledged power to probe "corruption, inefficiency and waste" does not extend to "candid communications" which are often at the core of such misconduct. Had that doctrine prevailed, many an investigation of corruption and maladministration, e.g., Teapot Dome, would have been stopped in its tracks. Congress, declared the Supreme Court in *McGrain v. Daugherty*, may investigate "the administration of the Department of Justice . . . and particularly the Attorney General and his assistants." To shield communications between suspected malefactors from such inquiry would go far to abort investigation.

As a Congressman in 1954, President Nixon protested against Truman's instruction to withhold an FBI letter, saying, "That would mean that the President could have arbitrarily issued an Executive order in the (Bennet) Myers case, the Teapot Dome case . . . denying the Congress . . . information it needed to conduct an investigation of the executive department."

Eisenhower's claim that "candid interchange" among subordinates is an indispensable condition of good government is an unproven assumption. It is disproved by the fact that his withholding on that ground of information respecting alleged maladministration of foreign aid in Peru was immediately countermanded by President Kennedy, with the salutary result that exposure led to correction, not to the toppling of administrative towers. Both the Kennedy and Johnson Administrations sharply whittled down claims of executive privilege with no noticeable ill effects on administration.

In England, "candid interchange" was laughed out of court by the House of Lords in *Conway v. Brimner* (1968). Against the debatable assumption that fear of disclosure may inhibit "candid interchange," there is the proven fact that such interchanges have time and again served as a vehicle of corruption and malversation, so that, to borrow from Lord Morris, "a greater measure of prejudice to the public interest would result from their non-production." Can the costs of suppressing the Pentagon Papers be weighed in the scales with preservation of confidences between subordinates? Disclosure to Congress and the people of reports about the untrustworthiness of and lack of internal support for a succession of Saigon satraps, of bleak intelligence estimates, of growing pessimism in the inner circle about the outcome of the Vietnam involvement, might have enabled Congress to weigh the mountainous costs against the increasingly doubtful benefits of the accelerating escalation.

The issue posed by President Nixon's claim for immunity for Messrs. Henry Kissinger, Peter Flanigan, and John Dean on the basis of mere membership in the White House staff calls for comment.

You will recall that Assistant Attorney General Rehnquist went no further than to say that the "intimate advisers" of the President "ought not to be interrogated as to conversations . . . with the President." On practical grounds, it may be desirable to shield such conversations from Congressional inquiry, and Congress itself generally has not insisted on their disclosure. But it does not follow that there is a constitutional basis for the withholding claim. Indeed, Mr. Dean himself wrote on April 20, 1972, that: "The precedents indicate that no recent President has ever claimed a 'blanket immunity' that would prevent his assistants from testifying before the Congress on any subject."

Such a claim would be without historical foundation.

"Pernicious advice" to the King by his Ministers was a repeated cause for impeachment; and Francis Corbin in the Virginia Convention, Henry Pendleton in the South Carolina Convention, and James Iredell in the North Carolina Convention, alluded to such "advice" as within the scope of impeachment. Given impeachable "advice", inquiry whether it was communicated cannot be barred on constitutional grounds, whatever may be the merits of the practical arguments for confidentiality. Practical desiderata cannot be converted into constitutional dogma.

In a dictum in *Marbury v. Madison*, Chief Justice Marshall stated that if anything was communicated to the Attorney General in confidence by the President, "he was not bound to disclose it." Sitting on the *Trial of Aaron Burr*, Marshall confined that dictum, as Deputy Attorney General Rogers stated, to non-disclosure of "communications from the President," and held that Burr was entitled to have a letter to President Jefferson from General James Wilkinson, obliquely confirming the right of inquiry into "advice".

It needs to be emphasized that the *Marbury* dictum is altogether irrelevant to *Congressional* inquiry. That was a suit by a private individual, and Marshall stated that the "province of the court . . . is not to inquire how the executive or executive officers perform their duties." Precisely that function, however, does lie within the province of the *legislature*, as parliamentary history makes clear, as Montesquieu and James Wilson perceived, and as the Supreme Court has repeatedly recognized. In sum, there is no historical warrant for the claim that confidential advice to the President is shielded from *Congressional* inquiry by the Constitution, though Congress may choose, as a matter of comity, not to probe into such advice.

Information is the blood stream of democracy; he who controls it controls our destinies, as the progressive escalation in Vietnam alone should teach. I cannot improve on President Nixon's 1972 statement: "When information which properly belongs to the people is systematically withheld by those in power (e.g., the facts behind the Vietnam escalation), the people soon become ignorant of their own affairs, distrustful of those who manage them and eventually incapable of determining their own destinies." The people, therefore, have an immediate stake in opening all channels of information to Congress, the great American forum of national debate.

III

THE PROPOSED BILLS

(1) S. 858

My prime difficulty with S. 858 is that expressed by Congressman John E. Moss about the predecessor bill: "we should not recognize executive privilege in any statute. I don't think there is any constitutional basis for executive privilege . . . By recognizing executive privilege here we are going to walk into a trap."

Hearings on executive privilege before the Subcommittee on Separation of Powers, Pp. 332-333 (1971). Similar views were expressed by Robert F. Keller, Deputy Comptroller General, and Professor Norman Dorsen, *id.*, at 304, 310, 364-365. The bill adds nothing to the existing sheaf of Congressional powers. If an official declines to testify, Congress may issue a subpoena; upon noncompliance with the subpoena a contempt citation can be used for enforcement.

The deference expressed in § 306(b) to a claim of privilege by the President means that in virtually every instance he will rubber-stamp his approval of withholding, as he did in 1971.

If there is a constitutional basis for executive privilege, § 306(c) invades a presidential prerogative by seeking to decide the scope of the privilege. That function would be for the courts. Again, the provision that the Committee "will determine whether the assertion of executive privilege is well taken" constitutes implicit recognition of a doctrine of indeterminate scope.

A fund-cut-off provision such as § 307(f) may well prove ineffectual. In 1960, the Porter Hardy House Committee sought information about rumored mal-administration of foreign aid in Peru, which proved true in the event. Congress enacted a cut-off after Presidential refusal to furnish information on ground of executive privilege. Thereupon, Attorney General Rogers rendered an opinion to Eisenhower that he could disregard such cut-offs on the ground that they imposed an unconstitutional condition on disbursement of an appropriation. Eisenhower then ordered the Secretary of the Treasury to disregard the cut-offs and to disburse the funds, any funds, to Foreign Aid. The incident is described with accompanying documents in Clark Mollenhoff's *Washington Cover-Up*. In a word, a cut-off may be defied, and this would require submission of the issue to the courts. The provision, therefore, defers an inescapable confrontation.

(2) Joint Res. 72

My difficulties with S. 858 are duplicated by J.R. 72. Line 2 of P. 2 also legitimates and provides for a claim of executive privilege by the President. On my view that executive privilege is a constitutional myth, the provision for a hearing on whether the President's claim is well-founded is gratuitous. If, on the other hand, it is indeed "rooted in the Constitution," it is for the courts, not the Congress, to determine its limits. And in any event, I suggest that a Committee would be well-advised to determine *before* the matter gets escalated whether it has a legitimate claim for information.

Existing law provides that a witness who declines to appear, be the cause what

it may, can be served with a subpoena; if the recalcitrant persists in his declination, the Committee may submit the case to the Senate, so that again, § 2 is superfluous.

c

(3) S. 1142

The amendments to the Freedom of Information Act are badly needed if only to overcome interminable bureaucratic stalling. Then, too, the decision in the Patsy Mink case made necessary express provision to empower the courts to have the last word as to whether the information sought to be withheld under the exemptions for matters of national defense or foreign policy and for intra- and inter-agency communications (§ 552(b)(1) and (5)) may be withheld. As you know, such is the bureaucratic addiction to secrecy that any permission to withhold becomes a blank check that is greatly overdrawn. In the parallel discovery practice of the courts, the courts are the final arbiter as to the right of the executive to withhold information from a litigant. I cannot believe that a judge is less to be trusted with a determination of what must be kept secret than a bureaucrat.

Let me also call your attention to the need to disavow an incautious statement contained in both the Senate and House reports on the FOIA. The Committees permitted the agencies to sell them a bill of goods and incorporated a statement that the disclosure of "candid interchanges" would inhibit free and frank discussion among officials of the Executive Branch. That statement has been seized upon by the courts, even in private litigation; and in due course it must paralyze efforts to obtain information. You know at first hand how crippling this "candid interchange" claim has been in the field of executive privilege. I would, therefore, urge that the Reports on the proposed amendment state that the prior "candid interchange" statements were made in deference to agency opinion, and that experience has demonstrated that they were mistaken and are now specifically repudiated. Let me emphasize, if disclosure to the public would inhibit "candid interchange" to the Executive Branch, by parity of reasoning, disclosure to Congress would have the same effect. You have furnished ammunition to the opposition.

Above all, matters of discovery in the courts, of FOIA, of executive privilege are interrelated and cannot be considered in isolation. The bureaucratic infatuation with secrecy pervades all three.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SPECIAL GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
February 15, 1962.

Hon. JOHN F. KENNEDY,
The President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: In your letter of February 8, 1962 to Secretary McNamara you directed him to refuse certain information to a Senate Subcommittee. The concluding paragraph of your letter stated:

"The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its merits."

A similar letter from President Eisenhower on May 17, 1954 also refused information to a Senate Subcommittee, setting forth the same arguments covered in your letter. President Eisenhower did not, however, state that future questions of availability of information to the Congress would have to be answered as they came up.

I know you are aware of the result of President Eisenhower's letter. Time after time Executive Branch employees far down the administrative line from the President fell back on his letter of May 17, 1954 as authority to withhold information from the Congress and the public.

Some of the cases are well known—the Dixon-Yates matter and the investigation of East-West trade controls, for instance—but many of the refusals based on President Eisenhower's letter of May 17, 1954 received no public notice. A report of the House Committee on Government Operations covering the five years from June, 1955 through June, 1960 lists 44 cases of Executive Branch officials refusing information on the basis of the principles set forth in the May 17, 1954 letter.

I am confident that you share my belief that your letter of February 8, 1962 to Secretary McNamara should not be seized upon by Executive Branch employees—many of them holding the same policy-making positions of responsibility they did under the Eisenhower Administration—as a new claim of authority to withhold information from the Congress and the public. A Subcommittee staff study indicates that during the year between the time you took office and February 8, 1962, the claim of an "executive privilege" to withhold government information was not used successfully once, compared to the dozens of times in previous years administrative employees held up "executive privilege" as a shield against public and Congressional access to information.

Although your letter of February 8, 1962 stated clearly that the principle involved could not be applied automatically to restrict information, this warning received little public notice. Clarification of this point would, I believe, serve to prevent the rash of restrictions on government information which followed the May 17, 1954 letter from President Eisenhower.

Sincerely,

/s/ JOHN E. MOSS,
Chairman.

THE WHITE HOUSE,
Washington, D.C., March 7, 1962.

Hon. JOHN E. MOSS,
*Chairman, Special Government Information Subcommittee of the Committee on
Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your letter of last month inquiring generally about the practice this Administration will follow in invoking the doctrine of executive privilege in withholding certain information from the Congress.

As your letter indicated, my letter of February 8 to Secretary McNamara made it perfectly clear that the directive to refuse to make certain specific information available to a special subcommittee of the Senate Armed Services Committee was limited to that specific request and that "each case must be judged on its merits."

As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval. Your own interest in assuring the widest public accessibility to governmental information is, of course, well known, and I can assure you this Administration will continue to cooperate with your subcommittee and the entire Congress in achieving this objective.

Sincerely,

/s/ JOHN F. KENNEDY.

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
March 31, 1965.

Hon. LYNDON B. JOHNSON,
*President of the United States,
The White House, Washington, D.C.*

DEAR MR. PRESIDENT: The use of the claim of "executive privilege" to withhold government information from the Congress and the public is an issue of importance to those who recognize the need for a fully informed electorate and for a Congress operating as a co-equal branch of the Federal Government.

In a letter dated May 17, 1954, President Eisenhower used the "executive privilege" claim to refuse certain information to a Senate Subcommittee. In a letter dated February 8, 1962, President Kennedy also refused information to a Senate Subcommittee. There the similarity ends, for the solutions of "executive privilege" problems varied greatly in the two Administrations.

Time after time during his Administration, the May 17, 1954 letter from President Eisenhower was used as a claim of authority to withhold information about government activities. Some of the cases during the Eisenhower Administration involved important matters of government but in the great majority of cases

Executive Branch employees far down the administrative line from the President claimed the May 17, 1954 letter as authority for withholding information about routine developments. A report by the House Committee on Government Operations lists 44 cases of Executive Branch officials refusing information on the basis of the principles set forth in President Eisenhower's letter.

President Kennedy carefully qualified use of the claim of "executive privilege". In a letter of February 8, 1962 refusing information to a Senate Subcommittee, he stated that the "principle which is at stake here cannot be automatically applied to every request for information." Later, President Kennedy clarified his position on the claim of "executive privilege", stating that—

"... this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. *Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.*"

As a result of President Kennedy's clear statement, there was no longer a rash of "executive privilege" claims to withhold information from the Congress and the public. I am confident you share my views on the importance to our form of government of a free flow of information, and I hope you will reaffirm the principle that "executive privilege" can be invoked by you alone and will not be used without your specific approval.

Sincerely,

JOHN E. MOSS,
Chairman.

THE WHITE HOUSE,
Washington, D.C., April 2, 1965.

Hon. JOHN E. MOSS, Chairman,
Foreign Operations and Government Information Subcommittee of the Committee on Government Operations, House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I have your recent letter discussing the use of the claim of "executive privilege" in connection with Congressional requests for documents and other information.

Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of "executive privilege" will continue to be made only by the President.

This administration has attempted to cooperate completely with the Congress in making available to it all information possible, and that will continue to be our policy.

I appreciate the time and energy that you and your Subcommittee have devoted to this subject and welcome the opportunity to state formally my policy on this important subject.

Sincerely,

LYNDON B. JOHNSON.

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., January 28, 1969.

Hon. RICHARD M. NIXON,
The President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: The claim of "executive privilege" as authority to withhold government information has long been of concern to those of us who support the principle that the survival of a representative government depends on an electorate and a Congress that are well informed.

As you know, some administrations in the past made it a practice to pass along to Executive branch subordinates a discretionary authority to claim "executive privilege" as a basis to refuse information to the Congress. The practice of delegating this grave Presidential responsibility was ended by President John F. Kennedy when he restored a policy similar to that which existed under previous strong administrations, including those of Presidents George Washington, Thomas Jefferson and Theodore Roosevelt. In a letter to the Foreign Operations

and Government Information Subcommittee, dated March 7, 1962, he enunciated the policy as follows:

"... this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. *Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.*"

President Lyndon B. Johnson informed the Subcommittee by letter, dated April 2, 1965, he would continue the policy enunciated by President Kennedy. He stated:

"Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of 'executive privilege' will continue to be made only by the President."

In view of the urgent need to safeguard and maintain a free flow of information to the Congress, I hope you will favorably consider a reaffirmation of the policy which provides, in essence, that the claim of "executive privilege" will be invoked only by the President.

Sincerely,

JOHN E. MOSS,
Chairman.

THE WHITE HOUSE,
Washington, April 7, 1969.

Hon. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Knowing of your interest, I am sending you a copy of a memorandum I have issued to the heads of executive departments and agencies spelling out the procedural steps to govern the invocation of "executive privilege" under this Administration.

As you well know, the claim of executive privilege has been the subject of much debate since George Washington first declared that a Chief Executive must "exercise a discretion."

I believe, and I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval.

I want to take this opportunity to assure you and your committee that this Administration is dedicated to insuring a free flow of information to the Congress and the news media—and, thus, to the citizens. You are, I am sure, familiar with the statement I made on this subject during the campaign. Now that I have the responsibility to implement this pledge, I wish to reaffirm my intent to do so, I want open government to be a reality in every way possible.

This Administration has already given a positive emphasis to freedom of information. I am committed to ensuring that both the letter and spirit of the Public Records Law will be implemented throughout the Executive Branch of the government.

With my best wishes,

Sincerely,

RICHARD NIXON.

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

[Establishing a Procedure to Govern Compliance with Congressional Demands for Information]

The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest. This Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval. The following procedural steps will govern the invocation of Executive privilege:

1. If the head of an Executive department or agency (hereafter referred to as "department head") believes that compliance with a request for information

from a Congressional agency addressed to his department or agency raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.

2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that Executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring Congressional agency.

3. If the department head and the Attorney General agree that the circumstances justify the invocation of Executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

4. In the event of a Presidential decision to invoke Executive privilege, the department head should advise the Congressional agency that the claim of Executive privilege is being made with the specific approval of the President.

5. Pending a final determination of the matter, the department head should request the Congressional agency 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 does not constitute a claim of privilege.

RICHARD NIXON.

March 24, 1969.

[From the Congressional Record, Feb. 5, 1973]

PRESIDENT NIXON'S ABUSE OF "EXECUTIVE PRIVILEGE"

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, the increasing preoccupation of the Nixon administration with secrecy in its activities, the penchant to hide its wide-ranging deals from the Congress and the American public, and its abuses of so-called executive privilege have put this administration fast on the road to becoming the most closed Government in our history.

The Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, which I Chair, has held extensive hearings and conducted numerous investigations over the years of the concept of "executive privilege" and its use in recent administrations—both Republican and Democratic. Excessive Government secrecy, violations of the first amendment rights and the undermining of the Freedom of Information Act (5 U.S.C. 552) were the subject of 41 days of hearings by our subcommittee in the last Congress. House Report 92-1419, titled "Administration of the Freedom of Information Act," was approved last September by the committee and pinpointed massive abuses of the intent of Congress in enacting this important law. It also made a number of administrative and legislative recommendations for strengthening the people's "right to know." I will soon reintroduce legislation to carry out these recommendations and welcome the support of all Members who share our concern over the trend toward the all-powerful Executive in our Nation.

Typical of the position being taken by the administration are the comments yesterday by President Nixon during his press conference. Responding to several questions by Reporter Clark Mollenhoff, an expert on "Executive Privilege," who has testified before our subcommittee on several occasions, the President gave a grossly distorted view of Executive prerogatives in the information field and even distorted his own public position on "Executive privilege" procedures. These procedures were spelled out 4 years ago in an exchange of letters with our distinguished colleague, the gentleman from California (Mr. Moss), then chairman of our subcommittee. President Nixon pledged in his April 7, 1969, letter to Chairman Moss that like his predecessors President Kennedy and President Johnson:

"Executive privilege will not be asserted without specific Presidential approval."

Both Presidents Kennedy and Johnson had given similar written assurances to our subcommittee.

Mr. Speaker, President Nixon's comments in response to Mr. Mollenhoff's questions yesterday indicate that either he is confused about what he has pledged or that a drastic change in policy has taken place. I have, therefore, written to the President to clarify this situation. So that all Members may know of the full background of this important question which dramatically affects the constitutional duties and responsibilities of the Congress in its dealings with the

executive branch. I will attach a copy of this letter, the text of the 1969 correspondence with Mr. Moss, and the portion of the transcript of the President's press conference yesterday in which this matter is discussed.

The material follows:

CONGRESS OF THE UNITED STATES,
Washington, D.C., February 1, 1973.

Hon. RICHARD M. NIXON,
President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: As Chairman of the House subcommittee with legislative and oversight jurisdiction over government information, I read with interest the text of your news conference remarks on the claim of "executive privilege". In this connection you stated that you would like to have "a precise statement prepared" rather than rely upon "an off-the-top of my head press conference statement."

As you may recall, you assured Congress through a letter to this subcommittee on April 7, 1969, that the claim of "executive privilege will not be asserted without specific Presidential approval." For your convenience a copy of the exchange of correspondence is enclosed herewith. [See pp. 315-317.]

One statement made in the press conference could be construed to be contrary to the precise statement made in your letter of April 7, 1969. I am referring specifically to that portion of the press conference where you made the following statement:

"On the other hand, I can assure you that all of these cases will be handled on a case-by-case basis and we are not going to be in a position where an individual, when he gets under heat from a congressional committee, can say, 'Look, I am going to assert executive privilege.'

"He will call down here, and Mr. Dean, the White House counsel, will then advise him as to whether or not we approve it."

On the surface this statement might be interpreted as an intention to delegate to Mr. Dean the authority to assert the claim of "executive privilege." This would be contrary to the "specific Presidential approval" referred to in the letter of April 7, 1969.

On the other hand, the statement could mean that Mr. Dean's only function is to communicate the specific Presidential decision which would be consistent with paragraph 3 of the memorandum accompanying the letter of April 7, 1969.

Because you mentioned in the news conference the interest of Senators Javits and Percy, I am sending them copies of this material for their information.

Sincerely,

WILLIAM S. MOORHEAD,
Chairman.

[From the Washington Post, Feb. 1, 1973]

EXTRACT OF PRESIDENT NIXON'S PRESS CONFERENCE, JANUARY 31, 1973

Q. Mr. President.
A. Mr. Mollenhoff.

EXECUTIVE PRIVILEGE

Q. Did you approve of the use of executive privilege by Air Force Secretary Seamaus in refusing to disclose the White House role in the firing of air cost analyst Fitzgerald?

It came up yesterday in the Civil Service hearings. He used executive privilege. You had stated earlier that you would approve all of these uses of executive privilege, as I understood it, and I wondered whether your view still prevails in this area or whether others are now entitled to use executive privilege on their own in this type of case?

A. Mr. Mollenhoff, your first assumption is correct. In my dealings with the Congress—I say mine, let me put it in a broader sense—in the dealings of the Executive with the Congress, I do not want to abuse the executive privilege proposition where the matter does not involve a direct conference with or discussion within the administration, particularly where the President is involved. And where it is an extraneous matter as far as the White House is concerned, as was the case when we waived executive privilege for Mr. Flanigan last year, as you will recall, we are not going to assert it.

In this case, as I understand it—and I did not approve this directly, but it was approved at my direction by those who have the responsibility in the White House—in this case it was a proper area in which the executive privilege should have been used.

On the other hand, I can assure you that all of these cases will be handled on a case-by-case basis and we are not going to be in a position where an individual when he gets under heat from a congressional committee, can say, "Look, I am going to assert executive privilege."

He will call down here, and Mr. Dean, the White House counsel, will then advise him as to whether or not we approve it.

Q. I want to follow one question on this.

A. Sure.

Q. This seems to be an expansion of what executive privilege was in the past and you were quite critical of executive privilege in 1948 when you were in the Congress—

A. I certainly was.

PRECISE STATEMENT

Q. You seem to have expanded it from conversation with the President himself to conversation with anyone in the Executive Branch of the government and I wonder, can you cite any law or decision of the courts that supports that view?

A. Well, Mr. Mollenhoff, I don't want to leave the impression I am expanding it beyond that. I perhaps have not been as precise as I should have been. And I think yours is a very legitimate question because you have been one who has not had a double standard on this. You have always felt that executive privilege, whether I was complaining about its use when I was an investigator, or whether I am now defending its use when others are doing the investigating—I understand that position.

Let me suggest that I would like to have a precise statement prepared which I will personally approve so that you will know exactly what it is. I discussed this with the leaders and we have talked, for example—the Republicans, like Senator Javits and Senator Percy, are very interested in it; not just the Democrats, and I understand that. But I would rather, at this point, not like to have just an off-the-top of my head press conference statement delineate what executive privilege will be.

I will simply say the general attitude I have is to be as liberal as possible in terms of making people available to testify before the Congress, and we are not going to use executive privilege as a shield for conversations that might be just embarrassing to us, but that really don't deserve executive privilege.

FITZGERALD FIRING

Q. The specific situation with regard to Fitzgerald, I would like to explore that. That dealt with a conversation Seamans had with someone in the White House relative to the firing of Fitzgerald and justification or explanations. I wonder if you feel that that is covered and did you have this explained to you in detail before you made this decision?

A. Let me explain. I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me.

No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.

[From the New York Times, Mar. 13, 1973]

NIXON SAYS AIDES WILL NOT TESTIFY BEFORE CONGRESS—POLICY STATEMENT INDICATES DEAN AND CHAPIN WILL BAR QUESTIONS ON WATERGATE

LONG PRECEDENT CITED—FORMER MEMBERS OF STAFF COVERED BY THE RULING—INFORMAL HELP VOWED

(By John Herbers)

WASHINGTON, March 12.—In a policy statement on the use of executive privilege, President Nixon said today that members and former members of his

personal staff would decline to make any formal appearances before Congressional committees.

The statement indicated that Mr. Nixon was ruling out an appearance before Congress of John W. Dean 3d, the President's counsel, and Dwight L. Chapin, a former White House aide, in the continuing inquiry into political sabotage during last year's Presidential race.

"A member or former member of the President's personal staff normally shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress," Mr. Nixon said.

"At the same time," he continued, "it will continue to be my policy to provide all necessary and relevant information through informal contacts between my present staff and committees of the Congress in ways which preserve intact the constitutional separation of the branches."

A CONTROVERSIAL PRACTICE

The use of executive privilege has become a heated issue recently, not only in regard to Congressional efforts to find out about possible White House involvement in last year's Watergate bugging and break-in case but also in the evolution of Presidential government—the drawing of more authority and decision-making away from the departments and into the White House, where the President can curtail the extent of Congressional and public access.

Mr. Nixon's 1,000-word statement on the issue, promised by the President in his Jan. 31 and March 3 news conferences, was designed to clarify the White House position.

Although he promised not to use the privilege "as a shield to prevent embarrassing information from being made available," the thrust of the statement was not likely to stop accusations that he has extended use of the privilege beyond that of any previous President, particularly in protecting Administrative officials well down the line of authority.

SENATORS WEIGH REQUEST

"The manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of government," Mr. Nixon said. "If the President is not subject to such questioning, it is equally inappropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency."

On the watergate case Mr. Nixon was asked March 3 if he would object to Mr. Dean's appearing before a Congressional committee.

"Of course," Mr. Nixon said. "It is executive privilege."

Mr. Dean was present when Federal Bureau of Investigation agents questioned White House staff members about alleged political espionage, and the Senate Judiciary Committee is expected to vote later this week to ask him to testify.

Mr. Nixon's position regarding his present counsel came as no surprise. But his statement today seemed to extend the use of the privilege by including former aides.

Mr. Chapin, who resigned earlier this year as a deputy special assistant to the President and returned to private life, may be asked to testify in the Watergate inquiry. There has been testimony before the Senate Judiciary Committee that Mr. Chapin made payments from Republican campaign funds to Donald H. Segretti, who was allegedly hired to conduct political sabotage against Democratic candidates.

Ronald L. Ziegler, the White House press secretary, questioned about the President's statement, said the use of executive privilege by former aides had been used in other administrations, but he was unable to provide specific precedents.

Mr. Nixon in his statement, and Mr. Ziegler in a press briefing contended that the Nixon White House was not extending the use of executive privilege in any way.

The issue was discussed at length last Thursday at a Congressional conference that brought two dozen historians, political scientists and other scholars to Washington to discuss the struggle.

Arthur Bestor, history professor at the University of Washington, said that executive privilege was not sanctioned by the Constitution nor provided for by parliamentary precedent.

Raoul Berger, the Charles Warren senior fellow at Harvard Law School, agreed that executive privilege was "a myth." He said that Congress should test it by calling the Secretary of State to Capitol Hill and demanding documents and, if they were not provided, citing him for contempt of Congress.

[From the New York Times, Mar. 13, 1973]

NIXON REMARKS ON EXECUTIVE PRIVILEGE

WASHINGTON, March 11.—Following are excerpts from a statement issued today by President Nixon on his use of executive privilege:

The doctrine of executive privilege is well established. It was first invoked by President Washington, and it has been recognized and utilized by our Presidents for almost 200 years since that time.

The doctrine is rooted in the Constitution which vests "the executive power" solely in the President, and it is designed to protect communications within the executive branch in a variety of circumstances in time of both war and peace.

Without such protection, our military security, our relations with other countries, our law enforcement procedures and many other aspects of the national interest could be significantly damaged and the decisionmaking process of the executive branch could be impaired.

The general policy of this Administration regarding the use of executive privilege during the next four years will be the same as the one we have followed during the past four years: Executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest.

PLEDGED TO OPENNESS

During the first four years of my Presidency, hundreds of Administration officials spent thousands of hours testifying before committees of the Congress. Secretary of Defense Laird, for instance, made 86 separate appearances before Congressional committees engaging in over 327 hours of testimony.

By contrast, there were only three occasions during the first term of my Administration when executive privilege was invoked anywhere in the executive branch in response to a Congressional request for information. These facts speak not of a closed Administration but of one that is pledged to openness and is proud to stand on its record.

Requests for Congressional appearances by members of the President's personal staff present a different situation and raise different considerations. Such requests have been relatively infrequent through the years, and in past Administrations they have been routinely declined.

I have followed that same tradition in my Administration, and I intend to continue it during the remainder of my term.

Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of government. If the President is not subject to such questioning, it is equally inappropriate that members of his staff not be so questioned for their roles are in effect an extension of the Presidency.

LOSS OF CANDOR FEARED

This tradition rests on more than constitutional doctrine: It is also a practical necessity. To insure the effective discharge of the executive responsibility, a President must be able to place absolute confidence in the advice and assistance offered by the members of his staff. And in the performance of their duties for the President, those staff members must not be inhibited by the possibility that their advice and assistance will ever become a matter of public debate, either during their tenure in government or at a later date. Otherwise, the candor with which advice is rendered and the quality of such assistance will inevitably be compromised and weakened.

What is at stake, therefore, is not simply a question of confidentiality but the integrity of the decisionmaking process at the very highest levels of our government.

As I stated in my press conference on January 31, the question of whether circumstances warrant the exercise of executive privilege should be determined on a case-by-case basis.

In making such decisions, I shall rely on the following guidelines:

1. In the case of a department or agency, every official provided that the performance before the Congress, provided that the performance of the duties of his office will not be seriously impaired thereby. If the official believes that a Congressional request for a particular document or for testimony on a particular point raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969. Thus, executive privilege will not be invoked until the compelling need for its exercise has been clearly demonstrated and the request has been approved first by the Attorney General and then by the President.

2. A Cabinet officer or any other governmental official who also holds a position as a member of the President's personal staff shall comply with any reasonable request to testify in his non-White House capacity, provided that, the performance of his duties will not be seriously impaired thereby. If the official believes that the request raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969.

3. A member or former member of the President's personal staff normally shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress. At the same time, it will continue to be my policy to provide all necessary and relevant information through informal contacts between my present staff and committees of the Congress in ways which preserve intact the constitutional separation of the branches.

[From the New York Times, Mar. 14, 1973]

EXECUTIVE COVER-UP

When President Nixon at a news conference on January 31 promised a precise statement concerning the use of executive privilege, he assured reporters: "The general attitude I have is to be as liberal as possible in terms of making people available to testify before Congress, and we are not going to use executive privilege as a shield for conversations that might be just embarrassing to us."

Now that the promised statement has been issued, it turns out to be vague rather than precise, restrictive rather than liberal in its effect, and designed to protect the President from grave political embarrassment rather than to assist him in the exercise of his proper official duties.

Executive privilege is comparable to the impoundment of funds. It is one of those Presidential powers which is implicit rather than spelled out in the Constitution. Its boundaries are inherently difficult to define. Presidents have traditionally used it sparingly, reserving it for a last line of defense when a Congressional committee has overreached itself. A decent respect for the comity that should prevail between equal branches of the Government has normally controlled its use.

Unfortunately, as in the impoundment controversy, President Nixon now seeks to exploit the necessary vagueness in this constitutional domain and to nail down as unchallengeable authority what is more wisely left flexible and loose.

Even worse, he is trying to extend the coverage of this doctrine in two significant ways. First, he would include not only members of the White House staff but also former members. No time limit is set on their alleged immunity from Congressional cross-examination. Secondly, he claims for Cabinet members who hold dual appointments as "Presidential counselors" the privilege of refusing to testify on that portion of their work which involves their White House duties.

These ambitious claims of a right to secrecy are novel and specious. Once individuals cease to be members of the White House staff, they cannot carry with them into private life the privilege of routinely "declining a request for a formal appearance before a committee of the Congress." Contrary to the President's statement, this is not a "well-established precedent." It is wholly unfounded.

Similarly, a Cabinet officer has always been regarded in normal constitutional practice as responsible not only for administering his own department but also for advising the President on broad issues of public policy. It is specious to assert that simply because the President has conferred on some of his Cabinet members the additional rank of "Presidential counselor" that he also confers on them some special added immunity. The duties of Cabinet members and Presidential counselors are so intertwined that any distinction in the degree of confidentiality and trust between the two positions can only be arbitrary and artificial.

The saddest aspect of this latest institutional wrangle between the President and the Congress is that Mr. Nixon is asserting such arrogant claims in so unworthy an affair. It is impossible to avoid the suspicion that the President is trying to cover up White House involvement in the ugly campaign of political sabotage and espionage which climaxed in the Watergate raid.

The assertion that executive privilege protects former Presidential aides, for example, looks very much like an effort to protect Dwight Chapin, the former Presidential appointment secretary, and perhaps former Attorney General John Mitchell and former Secretary of Commerce Maurice Stans from Congressional interrogation concerning their responsibility for the Watergate episode and related activities.

When President Washington first invoked the concept of executive privilege to protect the confidentiality of the diplomatic negotiations leading up to the Jay Treaty in 1796, a squalid political intrigue such as the Watergate affair was the furthest thing from his mind. When executive privilege is invoked in an apparent effort to cover up blatant political wrongdoing, the office of the Presidency is demeaned and this nation's constitutional practice is debased.

[From the New York Times, Mar. 14, 1973]

NIXON-CONGRESS BATTLE—PRESIDENT'S EXECUTIVE PRIVILEGE VIEW BRINGS ISSUE CLOSER TO THE CRISIS STAGE

(By James M. Naughton)

WASHINGTON, March 13—The President and Congress are headed once again for an impasse over executive privilege, the unwritten doctrine under which the executive branch has kept secrets from the legislative branch since 1796.

No Congress in all that time has had the nerve to go to court to test the President's asserted right to withhold some information from Congress. But the mood between the second Nixon Administration and the 93d Congress was acrimonious even before the President declared in a 1,000-word statement yesterday that it would be "inappropriate" for his aides, past or present, to be subject to Congressional questions.

As Mike Mansfield, the cautious Democratic leader, said today on the Senate floor, "the question of executive privilege may be approaching a crisis stage."

Legislation to set limits on use of executive privilege is pending in Congress. Two Senate subcommittees will begin joint hearings next Monday on Administrative policies on secrecy. And the Senate Judiciary Committee voted unanimously this afternoon to try to question John W. Dean 3d, Mr. Nixon's White House counsel, about the fitness of L. Patrick Gray 3d to become permanent director of the Federal Bureau of Investigation.

NIXON AND ERVIN VIEWS

"No President could ever agree to allow the counsel to the President to go down and testify before a committee," Mr. Nixon said at his news conference March 1. His policy statement on executive privilege yesterday merely codified that attitude.

But Senator Sam J. Ervin Jr., Democrat of North Carolina, countered that Mr. Nixon's policy on Mr. Dean's unavailability "represents the essence of the conflict." And Senator Mansfield said today that Mr. Nixon was seemingly trying to extend executive privilege to "cover too much territory."

George Washington refused in 1796 to tell Congress all about the Jay Treaty with Great Britain and virtually all of his successors have refused to give some

information to the Senate or the House of Representatives. Congress has often objected and has occasionally confronted the White House, but it has never resolved the issue.

The problem now, according to Senator Ervin and others, mostly Democrats, is that while previous Presidents have withheld information from Congress, Mr. Nixon is withholding witnesses.

According to Mr. Nixon's declaration yesterday, the President is not accountable for his use of his executive powers under the Constitution and it is therefore "equally inappropriate" to question his aides "for their roles are in effect an extension of the Presidency."

VIEW CALLED UNFOUNDED

Arthur Bestor, professor of history at the University of Washington, told a Congressional study conference last week that such an assertion of executive privilege was unfounded and that Congress would be well advised to disregard it. He theorized that Presidents had resorted to the custom of citing executive privilege as a response to the Congressional use of investigative power.

Similarly, Raoul Berger, the Charles Warren Senior Fellow of Harvard Law School, told the conference at the Capitol that Congress had been "too bashful about asking for what belongs to you" and that when an official refused to testify Congress should "stop being sissy about it—just clap him in jail."

No one in Congress has gone that far in opposing President Nixon's use of executive privilege. Senators Ervin and Mansfield concede that the President has a right to maintain confidentiality over his private discussions with intimate advisers. But they contend that the right does not extend to dealings between White House officials and third parties.

The Senate Judiciary Committee is asking to examine Mr. Dean not on his personal advice to the President but on his dealings with Mr. Gray during the bureau's investigation of the Watergate case last year.

TESTIMONY LAST YEAR

The situation appears to be comparable to one that involved Sherman Adams, President Eisenhower's closest aide, in 1958. Although General Eisenhower refused to allow the Senate to question Mr. Adams about his role in the Dixon-Yates power controversy of 1955, he permitted a House panel to interrogate Mr. Adams three years later about his relationship with Bernard Goldfine, the Boston industrialist. At the time, Mr. Nixon was Vice President.

There is an even more recent precedent for the interrogation of Mr. Dean. Last year, Mr. Nixon agreed to limited questioning of Peter M. Flanigan, a White House aide, in Senate confirmation hearings on the nomination of Richard C. Kleindienst to be Attorney General.

The Constitution does not specifically give Congress the power to demand information, nor does it give the President authority to deny information.

Senator Ervin's solution is to try to write rules for the use of executive privilege. His proposal would require an Administration official at least to show up, with a written excuse from the President, to claim the privilege when called before a Congressional committee. The committee would then judge the validity of the request. If it refused, it could insist on the information and, denied it anyway, could seek a citation for contempt of Congress.

President Nixon is certain to veto such a proposal if Congress sends it to him, and enactment of it over his veto would pose a constitutional issue for the courts to decide. No one on Capitol Hill appears to want matters to go that far.

Senator Robert C. Byrd, Democrat of West Virginia, noted today that Mr. Nixon intended to apply executive privilege even to former White House aides. He said that, with Congress and the President already arguing over war powers and spending authority, the White House attitude would "only heighten the pitch of the battle."

Senator Mansfield said he would prefer to "reach an accommodation" with the President over executive privilege. Senator Edmund S. Muskie, Democrat of Maine, said in a speech last night in Texas that "the best political medicine" to such constitutional disputes was "compromise."

JOINT STATEMENT BY REPRESENTATIVES WILLIAM S. MOORHEAD, D-PA., CHAIRMAN OF THE HOUSE FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE, AND JOHN E. MOSS, D-CALIF., AUTHOR OF THE FREEDOM OF INFORMATION ACT, MARCH 14, 1973

A few days ago, the President of the United States unilaterally assumed extraordinary powers well beyond those enumerated in the Constitution which he swore to "preserve, protect, and defend." He announced he would invoke the claim of executive privilege to prevent the officials of his administration from appearing before committees of the Congress of the United States in cases where he felt they should not testify.

The President by this action is not threatening to exercise the claim of executive privilege. In reality, he would be invoking some imagined form of immunity.

We call upon the President of this great nation to be a "strict constructionist" of the Constitution.

We demand, as two duly-elected representatives of the people, that he adhere to Article II, section 3 of the Constitution requiring him to communicate to Congress and faithfully execute the laws of the United States.

The President's March 12th statement on executive privilege is so far-reaching in its effect upon the traditional structure of the Government of the United States that it should have been submitted to the Congress in the form of a resolution to amend the Constitution.

The President obviously is operating under the illusion—which has become increasingly clear in recent months—that he has the *sole* power to govern this nation and that the Congress may intrude only to the extent that he is willing to tolerate and only so long as he regards its actions as wise.

In any case of disagreement, the President appears to assert a self-assumed privilege to make the final and binding determination. This must be rejected by the Congress and by the American people.

Executive privilege, a privilege analogous to the other claims made by chief executives of the United States over the many years of so-called inherent powers, has never been fully tested in the courts except to the extent of the test before the Supreme Court in the Youngstown Sheet and Tube case when the late President Truman seized the steel mills under a claim of inherent powers. The court in that case severely limited the President's inherent powers and struck down the seizure. What the court said of inherent powers is equally true of any claim of executive privilege.

President Kennedy on March 7, 1962, agreed to limit his claim of those powers by judging each case on its merits and permitting so-called executive privilege to be invoked only by the President. The late President Johnson, in a similar declaration on April 2, 1965, agreed to continue the same policy.

In a letter to the House Foreign Operations and Government Information Subcommittee on April 7, 1969, President Nixon appeared to concur. He used more language; he was not as precise as a few days ago; nevertheless, he did not then assert the kind of privilege broadening the claim of privilege which has occurred in his most recent statement.

If the Congress must join this issue with the President—then let this Congress enter upon that battle with a full understanding of both its powers to act and its responsibility to act to preserve our Constitutional form of government.

Through a lack of understanding and because of a Presidential arrogance which outpaces Congressional understanding, the Congress must not permit the creation of an executive larger than life. The Congress does not find itself at this moment powerless in challenging this unprecedented and most arrogant form of claim of executive privilege made by any Chief Executive in the history of this nation.

If witnesses decline to appear, then the body of Congress faced with this challenge to its powers should promptly cite that witness for contempt of Congress and should directly act to take him into custody if the person fails to comply with the Congressional demand for appearance and the giving of testimony. A writ of habeas corpus could then be sought, and the issue would be before the courts for the first time in American history.

Any President who bases privilege claims upon a continuing tradition demonstrates an amazing lack of knowledge with the detailed history of the confrontation between the Congress and the Executive.

President Nixon states that executive privilege was first invoked by President Washington. Presumably, he referred to a House investigation of the defeat of Gen. James St. Clair by the Indians. Every scrap of information on the whole disastrous affair was disclosed by President Washington to Congress. So there was no executive privilege in this case. The contention that there was is a myth.

In regard to witnesses, there is no trace of this privilege claim in American history until President Eisenhower's administration. So it is patently false that President Nixon's advance assertion of executive privilege in refusing to allow White House aides to testify before Congress is deep-rooted for "almost 200 years."

The President obviously wants to erect a barrier so that Congress cannot carry out its functions to legislate with the fullest understanding of details of conduct within the executive departments and agencies. But the Congress cannot determine whether there is fidelity to the mandates it has given the executive without compelling the appearance of executive department personnel and requiring them, if necessary, to testify under oath.

In doing so, the President picks a most inopportune moment; his motives must be brought sharply into focus in view of the revelations of his nominee for FBI Director before the Senate.

We charge that the President also has added another new element to the claim of executive privilege and that is the assertion that administration officials need not answer the call of Congressional committees if the performance of their duties would be "seriously impaired." This new alibi could be voiced by "every official." If this is allowed to stand, there will be no need for Congressional hearings because there will be no witnesses to inform the Congress and the American people what their government is doing and why.

The President is trying to recast us into a mold of government with a dominant executive, but Congress is dominant under our Constitution. Congress makes the laws and can impeach and question activities of the President and every other Federal official. God forbid that this ever change because then our Constitution will be nothing but a scrap of paper.

We invite—yea, urge—even demand if we must—that President Nixon re-examine his blanket claim of privilege in the light of the strict constructionist doctrine he believes the Justices of the Supreme Court should adhere to in their decisions.

We also remind him of his own words in the U.S. House of Representatives on April 22, 1948, when he, as a Member of Congress, was attacking the claim of executive privilege.

"... The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.

"I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision."

[From the Congressional Record, Mar. 15, 1973]

PRESIDENT NIXON'S ABUSE OF POWER

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, during the past few days we have witnessed an unprecedented arrogation of power by the President that threatens to provoke a direct constitutional confrontation with the Congress. I refer to President Nixon's statement of March 12 in which he attempts to give a blanket immunity to executive officials under the guise of clarifying the mystical doctrine of executive privilege.

Last month, in remarks in the *Record*—February 5, 1973, E645-647—I pointed out examples of the President's abuse of executive privilege and commented on the statements made by President Nixon at his January 31 press conference which seemed to modify his interpretation of the use of such dubious privilege as spelled out in his March 24, 1969, guideline memorandum. At the conclusion of

these remarks, I am inserting the letter I addressed to the President on February 1, 1973, asking for a clarification of his remarks and the text of a reply to my letter, dated February 16, 1973, and signed by Mr. John W. Dean III, counsel to the President.

Mr. Dean, the subject of current controversy over his role in the Watergate investigation, denied that there had been any extension of the executive privilege procedures previously outlined. Yet less than a month later, the March 12 clarification statement of the President—promised during the same January 31 press conference—seems to extend the alleged privilege to a point where he claims it applies to previous administration advisers as well as the current crop and also asserts that administration officials need not answer the call of congressional committees if their duties would thus be seriously impaired. This new alibi could be voiced by every official if they wished to avoid testifying on a controversial subject or to avoid an investigation of embarrassing scandal or bureaucratic blunder. Mr. Speaker, the full text of the March 12, 1973, statement of the President is also inserted at the conclusion of these remarks.

The President is obviously operating under an illusion—which has become increasingly clear in recent months—that he has the sole power to govern this Nation and that the Congress may intrude only to the extent that he is willing to tolerate and only so long as he regards its actions as wise. In any case of disagreement—and there are many—he appears to be boldly asserting a self-assumed privilege to make the final and binding determination. This concept of “divine right” was rejected by the American colonies almost 200 years ago and after the desperate struggle for independence, was replaced by the checks and balances of our Federal system of representative government by the Founding Fathers when they wrote our Constitution.

The President's assertion that executive privilege is a deep-rooted tradition for almost 200 years is patently false. Executive privilege was not invoked by President Washington, contrary to oft-repeated, historical distortions of the St. Clair incident and the Jay Treaty. At best, the dubious doctrine of executive privilege can only be traced to May, 1954—during President Eisenhower's first term. This is hardly a deep-rooted tradition.

Mr. Speaker, it is past time for Congress to stop paying attention to the devices of Presidents who seek to impose their will on the legislative branch of our Federal Government. If we do not act to protect our constitutional prerogatives and to recapture powers that have been delegated to grasping bureaucrats in the executive branch, we will have acquiesced in our own funeral. Let us hear less about respecting so-called executive privilege and begin now to assert fully our congressional privilege in behalf of the well-being of the American people.

The distinguished columnist James Reston put into proper perspective the relationship to the President's arrogant assertion of broad-gage executive privilege and the political embarrassment being caused by congressional probes into Watergate bugging case and the degree of involvement of top White House aides and officials of the Nixon campaign organization. He said:

“The President has gone way beyond the normal meaning of ‘executive privilege.’ He has applied a sound principle on security information to block the publication of ‘embarrassing information’ of a political nature, while promising to avoid doing precisely what he is doing.

“It is all very odd, and the oddest thing about it is that it is being done in the name of sound and noble principles, which are obviously being violated while they are being proclaimed.”

Mr. Speaker, I also include the full text of Mr. Reston's article with my remarks:

HOUSE OF REPRESENTATIVES,
Washington, D.C., February 1, 1973.

Hon. RICHARD M. NIXON,
President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: As Chairman of the House subcommittee with legislative and oversight jurisdiction over government information, I read with interest the text of your news conference remarks on the claim of “executive privilege”. In this connection you stated that you would like to have “a precise statement prepared” rather than rely upon “an off-the-top of my head press conference statement.”

As you may recall, you assured Congress through a letter to this subcommittee on April 7, 1969, that the claim of "executive privilege will not be asserted without specific Presidential approval." For your convenience a copy of the exchange of correspondence is enclosed herewith.

One statement made in the press conference could be construed to be contrary to the precise statement made in your letter of April 7, 1969. I am referring specifically to that portion of the press conference where you made the following statement:

"On the other hand, I can assure you that all of these cases will be handled on a case-by-case basis and we are not going to be in a position where an individual, when he gets under heat from a congressional committee, can say, 'Look, I am going to assert executive privilege.'

"He will call down here, and Mr. Dean, the White House counsel, will then advise him as to whether or not we approve it."

On the surface this statement might be interpreted as an intention to delegate to Mr. Dean the authority to assert the claim of "executive privilege". This would be contrary to the "specific Presidential approval" referred to in the letter of April 7, 1969.

On the other hand, the statement could mean that Mr. Dean's only function is to communicate the specific Presidential decision which would be consistent with paragraph 3 of the memorandum accompanying the letter of April 7, 1969.

Because you mentioned in the news conference the interest of Senators Javits and Percy, I am sending them copies of this material for their information.

Sincerely,

WILLIAM S. MOORHEAD,
Chairman.

THE WHITE HOUSE.
Washington, D.C., February 16, 1973.

Hon. WILLIAM S. MOORHEAD,
*Chairman, Foreign Operations and Government Information Subcommittee, House
of Representatives, Washington, D.C.*

DEAR CHAIRMAN MOORHEAD: This is to acknowledge receipt and thank you for your recent letter to the President concerning his remarks on Executive privilege at the press conference of January 31, 1973. Because my role in the procedure established for invoking the privilege is at question, the President has requested that I respond to your inquiry.

I wish to assure you that there has been no change in the procedure set forth in the President's memorandum of March 24, 1969 to the heads of Executive departments and agencies. Executive privilege will not be asserted in response to a Congressional demand for information without specific Presidential approval. The role of the Counsel to the President in the process is solely to serve as a channel to transmit to the President a request for the invocation of the privilege, and, in turn, to notify the requesting official of the President's determination. No authority has been delegated to me contrary to the provisions of the March 24, 1969 memorandum.

With best regards.

JOHN W. DEAN III,
Counsel to the President.

STATEMENT OF PRESIDENT NIXON

(March 12, 1973)

During my press conference of January 31, 1973, I stated that I would issue a statement outlining my views on executive privilege.

The doctrine of executive privilege is well established. It was first invoked by President Washington, and it has been recognized and utilized by our Presidents for almost 200 years since that time. The doctrine is rooted in the Constitution, which vests "the Executive Power" solely in the President, and it is designed to protect communications within the executive branch in a variety of circumstances in time of both war and peace. Without such protection, our military security, our relations with other countries, our law enforcement procedures and many other aspects of the national interest could be significantly damaged and the decisionmaking process of the executive branch could be impaired.

The general policy of this Administration regarding the use of executive privilege during the next four years will be the same as the one we have followed during the past four years and which I outlined in my press conference: executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest.

I first enunciated this policy in a memorandum of March 24, 1969, which I sent to Cabinet officers and heads of agencies. The memorandum read in part:

"The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval."

In recent weeks, questions have been raised about the availability of officials in the executive branch to present testimony before committees of the Congress. As my 1969 memorandum dealt primarily with guidelines for providing information to the Congress and did not focus specifically on appearances by officers of the executive branch and members of the President's personal staff, it would be useful to outline my policies concerning the latter question.

During the first four years of my Presidency, hundreds of Administration officials spent thousands of hours freely testifying before Committees of the Congress. Secretary of Defense Laird, for instance, made 86 separate appearances before Congressional committees, engaging in over 327 hours of testimony. By contrast, there were only three occasions during the first term of my Administration when executive privilege was invoked anywhere in the executive branch in response to a Congressional request for information. These facts speak not of a closed Administration but of one that is pledged to openness and is proud to stand on its record.

Requests for Congressional appearances by members of the President's personal staff present a different situation and raise different considerations. Such requests have been relatively infrequent through the years, and in past administrations they have been routinely declined. I have followed that same tradition, in my Administration, and I intend to continue it during the remainder of my term.

Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.

This tradition rests on more than Constitutional doctrine: it is also a practical necessity. To insure the effective discharge of the executive responsibility, a President must be able to place absolute confidence in the advice and assistance offered by the members of his staff. And in the performance of their duties for the President, those staff members must not be inhibited by the possibility that their advice and assistance will ever become a matter of public debate, either during their tenure in Government or at a later date. Otherwise, the candor with which advice is rendered and the quality of such assistance will inevitably be compromised and weakened. What is at stake, therefore, is not simply a question of confidentiality but the integrity of the decisionmaking process at the very highest levels of our Government.

The considerations I have just outlined have been and must be recognized in other fields, in and out of government. A law clerk, for instance, is not subject to interrogation about the factors or discussions that preceded a decision of the judge.

For these reasons, just as I shall not invoke executive privilege lightly, I shall also look to the Congress to continue this proper tradition in asking for executive branch testimony only from the officers properly constituted to provide the information sought, and only when the eliciting of such testimony will serve a genuine legislative purpose.

As I stated in my press conference on January 31, the question of whether circumstances warrant the exercise of executive privilege should be determined on a case-by-case basis. In making such decisions, I shall rely on the following guidelines:

(1). In the case of a department or agency, every official shall comply with a reasonable request for an appearance before the Congress, provided that the per-

formance of the duties of his office will not be seriously impaired thereby. If the official believes that a Congressional request for a particular document or for testimony on a particular point raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969. Thus, executive privilege will not be invoked until the compelling need for its exercise has been clearly demonstrated and the request has been approved first by the Attorney General and then by the President.

(2). A Cabinet officer or any other Government official who also holds a position as a member of the President's personal staff shall comply with any reasonable request to testify in his non-White House capacity, provided that the performance of his duties will not be seriously impaired thereby. If the official believes that the request raises a substantial question as to the need for invoking executive privilege, he shall comply with the procedures set forth in my memorandum of March 24, 1969.

(3). A member or former member of the President's personal staff normally shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress. At the same time, it will continue to be my policy to provide all necessary and relevant information through informal contacts between my present staff and committees of the Congress in ways which preserve intact the Constitutional separation of the branches.

[From the Washington Star-News, Mar. 14, 1973]

NIXON'S PRINCIPLES, PRACTICES

(By James Reston)

It is a common habit of most people to proclaim great principles when it suits their purposes, and evade or ignore them when it doesn't, and President Nixon's definition of the "privileges" of his office and his White House staff is only the latest illustration of the habit.

In his definition of "executive privilege," Nixon has insisted on the privacy and integrity of communications within the executive branch of the government. His personal aides must be free to advise him in private, without fear of being summoned by the Congress to testify on their advice, he says, and nobody would seriously question this principle.

He was even generous in modifying this right: "Executive privilege," he said, "will not be used as a shield to prevent embarrassing information from being made available, but will be used only in those particular instances in which disclosure would harm the public interest."

This raises some practical questions. The Watergate charges of bugging the Democratic headquarters in the presidential campaign have been confirmed by the courts, and the testimony of the FBI has involved not only members of the President's campaign committee but members of the President's own personal staff.

Would it harm "the public interest" to allow them to appear before the Congress and tell what they know about this case? If the President does not want to use his right of "executive privilege" to prevent "embarrassing information from being made available," why not let them be questioned by the Congress?

"Executive privilege," the President said in his official statement, "will not be invoked until the compelling need for its exercise has been clearly demonstrated, and the request has been approved first by the attorney general and then by the President."

This suggests that the burden of proof for keeping White House officials from testifying in the Watergate case rests personally on the President himself, but he has offered no proof why John Dean, the President's attorney, who sat in on all the testimony by members of the White House staff and others in the Watergate case should not be questioned. The President has merely said that Dean would not be allowed to do so, presumably because, in the President's personal judgment, it was not in "the public interest."

The more you try to reconcile the administration's principles and its actions, the more confused you get. The administration's "principle" is that the FBI should be independent, but the testimony of L. Patrick Gray 3d, the acting head of the FBI, is that he made political speeches for the President in the last

campaign, undertook to investigate the Watergate case but agreed to have the White House lawyer sit in on his investigations, responded to appeals for private talks with people involved in the Watergate, and then turned over their private testimony to the White House.

All this at least raises some interesting questions about what the President's private aides were doing, but the President refuses to allow them to talk, as if they were involved, not in charges of political espionage and sabotage, but in some fundamental questions of national military security.

Another conflict of principle and political practice: When Gray told the Congress that Herbert W. Kalmbach, the President's personal lawyer, had admitted that he paid Donald Segretti to engage in unusual political operations in the last presidential campaign, the White House complained that Gray was releasing "raw unevaluated material" out of the FBI files, thereby violating Kalmbach's "privacy." But the White House has said nothing about the men from the Committee to Re-elect the President, who were convicted of invading the privacy of the Democrats, bugging the Democratic headquarters, and then turning over their illegal transcripts of those telephone conversations to officials in the White House.

Finally, there is a paragraph in President Nixon's defense of "executive privilege" which goes beyond the normal rules of privacy, for it suggests that White House officials should not only be silent while they are in office but after they leave it.

"In the performance of their duties for the President," Nixon said, "those (White House) staff members must not be inhibited by the possibility that their advice and assistance will ever become a matter of public debate, either during their tenure in government or at a later date . . ."

If this is to be taken seriously, Henry Kissinger, for example, is not only forbidden to testify before the Congress now on his critical role in the Vietnam peace talks, but he should not "ever"—even after he leaves the White House—get involved in the "possibility" that his "advice and assistance will ever become a matter of public debate . . ."

This is obviously ridiculous. The President has gone way beyond the normal meaning of "executive privilege." He has applied a sound principle on security information to block the publication of "embarrassing information" of a political nature, while promising to avoid doing precisely what he is doing.

It is all very odd, and the oddest thing about it is that it is being done in the name of sound and noble principles, which are obviously being violated while they are being proclaimed.

[From the Washington Post, Mar. 28, 1973]

PROBERS URGE DEAN TESTIFY ON PRIVILEGE

(By George Lardner, Jr.)

President Nixon was urged yesterday to sanction testimony by White House counsel John W. Dean III on the controversial doctrine of "executive privilege."

The ranking members of the House Government Information Subcommittee, Chairman William S. Moorhead (D-Pa.) and Rep. John N. Erlenborn (R-Ill.), said they would steer clear of the Watergate case if the President would permit Dean to testify.

They made the request public in announcing the opening of hearings next week on the administration's policies in withholding information from Congress.

On the question of executive privilege, which Mr. Nixon has invoked in blocking Dean's testimony thus far, Moorhead charged that the President has "abused" the practice. He called it a legal fiction which Congress has tolerated largely as "a matter of courtesy between the two branches of government."

Erlenborn said he was prepared to concede the need for the administration's exercise of a "limited privilege," but he said he felt it was time for Congress to stop letting the President invoke it "as he sees fit."

At another congressional session on the issue yesterday, former Supreme Court Justice Arthur Goldberg said Mr. Nixon has clearly gone too far in claiming that the doctrine protects Dean from having to testify on the Watergate affair and the administration's subsequent investigations of it.

The President invoked the doctrine in a March 12 policy statement that would appear to prohibit Dean and other members of the White House staff, past and

present, from any "formal appearance before a committee of the Congress," no matter what its inquiries might be.

Maintaining that the doctrine of executive privilege is "rooted in the Constitution," Mr. Nixon said the manner in which he and his staff carried out their assigned executive duties were "not subject to questioning by another branch of government."

Goldberg, however, told the Joint Committee on Congressional Operations that Mr. Nixon had waived the privilege for his aides in the Watergate case by declaring that he had no knowledge of the political espionage attempt.

"There is no privilege for matters that go beyond the relationship between the President and his staff," Goldberg said.

Moorhead and Erlenborn said they have formally requested Dean's appearance at their upcoming hearings in a March 23 letter to Mr. Nixon. They said that Dean had a "key role" in the handling of claims of executive privilege under Mr. Nixon and they promised to limit their questioning to that issue. Deputy White House Press Secretary Gerald Warren said the request was being "studied carefully."

Releasing a special Library of Congress study on the issue, Moorhead said the doctrine of executive privilege really dates back only to 1954 when President Eisenhower invoked it over a hurried weekend to head off testimony demanded by the late Sen. Joseph McCarthy (R-Wis.).

Erlenborn has introduced a bill that would permit invocation of the privilege only after a presidential finding that disclosure would "seriously jeopardize the national interest" or the administration's ability "to obtain forthright advice." Moorhead said he feared this proposal would give the practice more legitimacy than it deserves.

[From the Detroit News, Mar. 28, 1973]

NIXON INVOKES "PRIVILEGE" MORE, REPORT SAYS

(By Beverly Craig)

WASHINGTON.—The Nixon administration, in declining to release information requested by Congress, has relied on "executive privilege" to a far greater extent than the Johnson or Kennedy administrations, according to a Library of Congress report.

The report was issued at a press conference yesterday in a new manifestation of the power struggle between the executive and legislative branches.

These developments occurred at the press conference:

The principal sponsor of legislation that would define and sharply limit the imposition of "executive privilege" said that Congress had been remiss in letting the White House use the device largely on its own terms, "to the detriment of Congress" and its quest for information.

The ranking members of a House subcommittee made public a letter asking President Nixon to permit his White House counsel, John Wesley Dean III, to testify on executive privilege in view of his "legal expertise" on the matter.

Mr. Nixon, citing executive privilege, has declined to permit Dean to testify before a Senate subcommittee investigating the Watergate bugging case.

Mr. Nixon was accused by the subcommittee chairman, a Democrat, of having abused "executive privilege" despite the President's pledge "that the scope of executive privilege must be very narrowly construed."

Put simply, executive privilege is the rationale by which presidents have withheld access to data generally on grounds that the data consisted of private conversations with presidential aides or that release of the information to Congress would be harmful to national security.

Rep. William Moorhead, D-Pa., chairman of the House Foreign Operations and Government Information subcommittee, has said that "the claim and belief that there is such a thing as executive privilege is simply a delusion dreamed up by Presidents and permitted by Congress."

He was joined at the press conference by Rep. John N. Erlenborn, of Illinois, the ranking Republican on the subcommittee. Erlenborn is the sponsor of an amendment to the Freedom of Information act that would require the President to issue a signed statement each time he invoked executive privilege.

In addition, executive privilege could be invoked only for policy recommendations whose disclosure would "jeopardize the national interest and the President's ability or that of the (government) agency head to obtain forthright advice."

Moorhead and Erlenborn differ on the issue. Moorhead has refused to co-sponsor Erlenborn's amendment, contending that "executive privilege" has no legal status.

Erlenborn, taking a more pragmatic view, argues that "it is time, after almost two centuries of dispute between the legislative and executive branches, for Congress to ascertain whether no such privilege exists, or to acknowledge that it does, and then define it and define the way in which it can be exercised."

The Library of Congress study, prepared for the subcommittee, was by Samuel J. Archibald, a consultant for the Library's government and general research division, and Harold C. Relyea, an analyst for the division.

Tracing the dispute back to the administration of George Washington, the analysts found that modern chief executives have severely limited the claim of executive privilege "but the limitation has not opened new file drawers to Congress."

The report covers only refusals of information and does not include instances in which presidential aides, serving in the White House, have refused to appear before congressional committees.

The study found that the Eisenhower administration was guilty of faulty history in having claimed in a 1954 letter that President Washington had declined to give documents to Congress for a 1792 investigation of a military debacle in the Northwest.

According to notes from a Cabinet meeting made by Thomas Jefferson, the administration not only agreed that Congress was entitled to the information but also smoothed the way for Congress to get all the documents it wanted.

After the 1954 Eisenhower letter, with a backup memo from his attorney general, Herbert Brownell, "the executive branch answer to nearly every question about the authority to withhold information from Congress was 'yes,' they had the authority," the Library of Congress report said.

Specifically, Eisenhower, using the memo, ordered Secretary of Defense Charles Wilson to tell all his subordinates not to testify about any advisory communications during the Army-McCarthy hearings.

Although the letter referred only to the Senate Investigation Subcommittee, the "executive privilege" argument later was extended to other congressional committees—and set a pattern for subsequent administrations.

President Kennedy, in ordering his defense secretary not to have subordinates divulge how they edited the speeches of U.S. military leaders, wrote:

"The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its own merits."

When Rep. John E. Moss, D-Calif., then chairman of the Foreign Operations and Government Information Subcommittee, sought to clarify Kennedy's position, Kennedy replied in 1962 that "executive privilege can be invoked only by the President and will not be used without specific presidential approval."

The Library of Congress researchers found that Kennedy formally exercised executive privilege only once—in the military speeches episode—and that subsequently the Food and Drug Administration, the State Department and Gen. Maxwell D. Taylor refused to provide documents or testimony in three instances, claiming executive privilege.

In the Lyndon Johnson administration, the analysts found that, in two cases, involving the Defense Department and a Treasury under secretary, executive privilege was invoked, but that Johnson himself never used it to withhold documents or testimony.

Johnson, in a letter to Rep. Moss, had reaffirmed the Kennedy policy.

After Mr. Nixon took office, Moss queried him and drew this response:

"I believe, as I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this administration, executive privilege will not be asserted without specific presidential approval."

Mr. Nixon, on March 24, 1969, further established procedural steps for claiming executive privilege—and became the first chief executive to do so.

He ordered that anyone wishing to claim executive privilege in response to a request for information from a "congressional agency" had to consult the attorney general.

If the attorney general felt the request for secrecy was valid, the matter next would be submitted "to the counsel to the President, who will advise the department head of the President's decision."

If the President decided to invoke executive privilege, the department head was to advise the congressional agency that the claim was being made with the specific approval of the President.

The study said that Mr. Nixon himself invoked the privilege four times in his first four years, and that executive departments or agencies—most frequently the Defense Department—had invoked it 15 times.

Other instances involved the State Department, former Housing and Urban Development Secretary George Romney, former Treasury Secretary John Connally and William J. Casey, former chairman of the Securities and Exchange Commission.

Herman Marcuse, the "clearing house" for such cases in the Justice Department's Office of Legal Counsel, has stated that only the four presidentially mandated cases of executive privilege were approved through his office, the procedure stipulated in Mr. Nixon's 1969 memo.

Thus, concluded the researchers, if there were no secret presidential order directing invocation of executive privilege in the other cases, "it seems that executive branch officials violated the presidential directive 15 times."

They continued:

"While the Kennedy-Johnson-Nixon statements limiting the invocation of 'executive privilege may state clearly to congressional readers that information will not be refused without specific presidential approval, they may also state to executive branch readers that they should be careful when claiming 'executive privilege,' but they can use other techniques to block congressional access to information.

"Thus, the use of the claim of 'executive privilege' has been severely limited, but the limitation has not opened new file drawers to Congress. In fact, the presidential statements have been limitations in name only."

At the press conference, Moorhead and Erlenborn stressed that Mr. Nixon's counsel, John W. Dean, III, would not be questioned on the Watergate case if he were permitted to appear.

A reporter asked Erlenborn what might happen if Dean claimed executive privilege in declining to discuss executive-privilege legislation.

"We might just pass the bill—and then make another attempt to get him to appear," replied Erlenborn.

[From the Congressional Record]

NIXON ADMINISTRATION'S BRAINWASHING ATTEMPT TO REWRITE HISTORY OF SO-CALLED EXECUTIVE PRIVILEGE

HON. WILLIAM S. MOORHEAD OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, March 29, 1973

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, in recent weeks we have seen a blatant attempt by the administration to brainwash the public in the issue of so-called executive privilege. A Presidential statement issued March 12 vainly tries to make the "privilege" some sort of constitutional doctrine by rewriting history to claim that it dates back to President Washington's administration. This is clearly demonstrated falsehood. It was totally disproven in testimony last year before the Foreign Operations and Government Information Subcommittee by Prof. Raoul Berger, the Charles Warren senior fellow at Harvard Law School, and the Nation's leading expert on the subject.

As shown in the recent study of "executive privilege," prepared for our subcommittee by the Congressional Research Service, Library of Congress, the claim of such dubious "privilege" dates back only to May 17, 1954—hardly any deep-rooted constitutional doctrine—Record, March 28, 1973, page H2242.

An excellent article by Mr. George Lardner, Jr., which discusses the historical fraud of so-called executive privilege, appeared in the Washington Post of March 25, 1973. I commend this thorough review of the history of this important subject to our colleagues and ask that the article be printed at this point in the Record:

[From the Washington Post, Mar. 25, 1973]

ONCE DOUBTFUL EXECUTIVE PRIVILEGE EXPANDED IN SCOPE

(By George Lardner, Jr.)

For decades now, U.S. Presidents and their Attorneys General have been sprinkling holy water of constitutional authority on the doctrine of "executive privilege."

President Nixon expanded on the tradition of high-level secrecy this month with a formal statement declaring, as have his predecessors, that it all began with George Washington.

According to the nation's leading legal scholar on the subject, however, "we've been brainwashed." And, says Raoul Berger, the Charles Warren senior fellow at Harvard Law School, "history is being manufactured under our noses."

Faced with growing congressional demands for the testimony of White House aides about the Watergate conspiracy and the investigations stemming from it, Mr. Nixon extended the cover of confidentiality March 12 to all members of his personal staff, both past and present.

"The doctrine of executive privilege," he said, "is well established. It was first invoked by President Washington and it has been recognized and utilized by our Presidents for almost 200 years since that time. The doctrine is rooted in the Constitution . . ."

The fact is that George Washington never "invoked" the privilege at all.

JEFFERSON'S NOTES

The controversy dates back to March of 1792 when the House of Representatives ordered what appears to be the first congressional investigation of conduct within the executive branch. Alarmed by the defeat of General Anthony St. Clair at the hands of some stubborn American Indians, the House assigned a select committee to look into the debacle and to "call for such persons, papers and records as may be necessary to assist their inquiries."

The committee, in turn, asked the Secretary of War for documents on the St. Clair expedition, a step that prompted Washington to call a meeting of his Cabinet, apparently to make sure that no untoward precedents were set.

The first session was inconclusive. Washington told his Cabinet he never "even doubted the propriety of what the House was doing," but, according to the informal notes of Secretary of State Thomas Jefferson, which surfaced years later, the President said he "could readily conceive there might be papers of so secret a nature that they ought not to be given up."

Coming back for a second meeting, Washington and his Cabinet then agreed that the "House was an inquest" and "might call for papers generally." They also felt, Jefferson recorded that "the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public. Consequently were (sic) to exercise a discretion." But finally, "it was agreed in this case that there was not a paper which might not properly be produced."

Congress, however, was evidently never notified of the mental reservations involved. Instead, Washington simply instructed the Secretary of War on April 4, 1792, to hand over to the House "such papers from your Department as are requested by the enclosed resolution." According to one of Washington's biographers, "not even the ugliest line on the flight of the beaten troops was eliminated."

JAY TREATY

Despite all that, in a lengthy 1957-1958 series of memos that has come to be the modern-day bible for advocates of executive privilege, then Deputy Attorney General William F. Rogers cited the St. Clair episode as the first example of "refusals by our Presidents, and their heads of departments, to furnish information and papers."

By that same bible, Washington is also supposed to have invoked executive privilege in 1796 when he refused a demand by the House for correspondence, documents and instructions sent to John Jay in connection with a controversial treaty with England. But in rejecting the House resolution, Washington held only that the papers were not pertinent "to any purpose under the cognizance of the House."

The first President indicated that the House, in his view, would have had a right to the papers if it had passed a resolution on "an impeachment," but it had not. Only the Senate, the first President said, shared in the treaty-making power set out in the Constitution. And the Senate, he observed, had already been sent "all the papers affecting the negotiations."

Out of such quicksand, Berger and other critics of executive privilege protest, has the practice of withholding information from Congress and the courts been enshrined.

At most, the University of Chicago's Alan C. Swan told a Senate subcommittee in 1971, the so-called precedents from the early days of American history reflect "ambiguous action accompanied by brave words in which Congress never acquiesced."

M'CARTHY ERA

But if Congress has never acquiesced, neither has it ever forced a showdown. From the first to the 93d, no Congress has ever resorted to the courts to challenge a President's asserted right to keep it in the dark, nor has any Congress clapped any White House aides in the Capitol guardroom to stand prosecution. As Sen. Sam J. Ervin Jr. (D-N.C.) observed in an interview last week, the steady buildup of presidential power has been made easy, partly out of congressional laziness, partly out of congressional default.

"As somebody said," Ervin declared of Congress's shrinking role, "It's not altogether homicide. Some of it's suicide."

The modern-day exaltation of executive privilege, by the same token, was largely a response to the rampant investigations during the 1950s of the late Sen. Joseph McCarthy (R-Wis.).

It was not until then, says Sen. Charles McC. Mathias (R-Md.) that executive privilege was raised to "the level of an absolute unqualified power" that could be exercised not only by the President himself, but by subordinate officials who then began applying it "to almost any kind of information."

By 1957, as a consequence, Deputy Attorney General Rogers, now Mr. Nixon's Secretary of State, was unabashedly claiming "an uncontrolled discretion" for both the President and executive department heads "to withhold information and papers" from Congress "in the public interest."

Berger blames the Rogers memo—much of which Berger says was lifted word for word from the 1949 writings of "a lowly subordinate" in the Justice Department—for much of the mischief. The document, he protests, is loaded with "the most amazing contradictions and inconsistencies."

AIDE TESTIFIED

Among them, Berger has pointed out, is a claim on one page that "the courts have uniformly upheld" the uncontrolled-discretion claim and an admission on another that "the legal problems which are involved were never presented to the courts."

At still another point, Rogers acknowledged the existence of a 1789 law making it the "duty" of the Secretary of the Treasury to "give information to either branch of the legislature . . . respecting all matters referred to him by the Senate or House. . . ." The law, however, was evidently overlooked on another page where, the memo asserted, "Congress cannot, under the Constitution, compel heads of departments to give up papers and information, regardless of the public interest involved."

Despite the demolition work Berger aimed at the memo in a detailed 1965 study for the UCLA Law Review, the Harvard scholar said Friday, "It's still the bible," even for many in Congress. "It's pathetic how little they know."

As far as the Nixon administration is concerned in the field of executive privilege, the President began his first term by assuring the House Government Information Subcommittee that the privilege would not be asserted "without specific presidential approval" and issuing instructions throughout the executive branch to that effect.

But as Ervin, among others, has protested, this failed to stop the Pentagon, for example, from summarily denying Congress information on grounds like these: "Inappropriate to authorize release of these documents" (former Secretary of Defense Melvin Laird), and, "No useful purpose would be served by a public report on these materials" (Defense Department general counsel J. Fred Buzhardt).

On a White House level, counsel to the President John W. Dean III in a letter assured the Federation of American Scientists last year, in response to an FAS newsletter on the issue, that "the precedents indicate that no recent President has ever claimed a "blanket immunity" that would prevent his assistants from testifying before the Congress on any subject."

NIXON DECLINES

The letter was dated April 20, 1972, two days after the White House agreed to let presidential aide Peter Flanigan testify on limited aspects of the ITT controversy then standing in the way of Richard Kleindienst's confirmation as Attorney General.

This month, however, in the wake of congressional pressures for Dean's own testimony on the Watergate investigations, Mr. Nixon declared: "A member or former member of the President's staff shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress."

The President said he would be willing to provide "all necessary and relevant information" in response to congressional inquiries but only through "informal contacts" that would give the White House the final say on what would be made available and what would be withheld.

"Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of government," Mr. Nixon asserted. "If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the presidency."

Court rulings on that score are not unanimous. In the famous case of *Marybury vs. Madison*, Chief Justice John Marshall recognized that certain Cabinet communications were privileged from any outside inquiry. He later said that "the principle decided (in that case) was communications from the President to the Secretary of State could not be extorted from him."

But Marshall, who presided at the treason trial of Aaron Burr, also saw fit, in 1807, to issue a subpoena duces tecum (to produce documents) to one Thomas Jefferson, then President of the United States. "If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the President," Marshall held, "that decision is unknown to this court."

PRODUCED LETTER

Jefferson claimed that state secrets might be involved in some of the papers sought, but he did not claim immunity from subpoena, even offering to submit to a deposition.

In any event, Berger states, "he fully complied with the subpoena," forwarding a copy of the letter Burr wanted to the government prosecutor in Richmond. The prosecutor excised certain portions, but offered the entire letter to Justice Marshall so that the court—not the executive branch—could decide what should be suppressed.

The Rogers memo on executive privilege tries to dismiss that case as an aberration. But John Henry Wigmore gave it a higher rating in his classic treatise on Evidence in Trials at Common Law, an authority often cited by the Supreme Court. Quoting Marshall's ruling in the Burr case at length, Wigmore concluded, "there is no reason at all" to exclude the chief executive of a state from producing testimony needed to see justice done.

Wigmore allowed that a chief executive could be excused from actual attendance at a trial because of "the priority of his official duties," but he added: "It is less certain that a privilege exists for subordinate executive officials."

From his pronouncements on the issue, President Nixon is hardly likely to accept such a notion in the face of congressional subpoenas, at least not without a court test which he has said he would "welcome." He has voiced no doubts that he would be upheld, a notion somewhat at variance with the views he expressed on the floor of the House 25 years ago as a freshman congressman from California.

The date was April 22, 1948; the occasion a drive by the House Un-American Activities Committee for a House resolution demanding an FBI report on Dr. Edward U. Condon. A government physicist who had been associated with the

development of the atomic bomb, Condon had been branded by a HUAC subcommittee as "one of the weakest links in our atomic security" despite his emphatic clearance by a loyalty review board.

President Truman responded on March 13 to the clamor for the document by issuing a directive forbidding compliance with any subpoenas or demands for FBI and other investigative reports on the loyalty of government employees.

During the next month's House debate on the Condon resolution, Mr. Nixon, a member of HUAC, took the floor with a tightly worded assault on the President's directive.

He argued that it was untenable "from a constitutional standpoint" and for a very simple reason. To let Mr. Truman maintain it against congressional investigations of alleged security risks, Rep. Nixon protested, would mean that the President could "arbitrarily" do the same thing in cases of corruption like "Teapot Dome."

Now, as President, Mr. Nixon has somewhat different recollections. Elaborating on his executive-privilege policy at a March 15 news conference, Mr. Nixon offered it as perfectly consistent with his views as a congressman back in the '40s.

Those were the days, he recalled, of congressional inquiries into espionage and Alger Hiss—cases. Mr. Nixon submitted, that should have had "complete cooperation" from the executive branch.

But the Watergate case, he said, was an entirely different matter. Congress, he maintained, "would have a far greater right and be on much stronger ground to ask the government to cooperate in a matter involving espionage against the government than in a matter like this, involving politics."

[From the Wall Street Journal, Mar. 30, 1973]

EXECUTIVE PRIVILEGE: A MURKY HISTORY

(By Arthur Schlesinger, Jr.)

"The doctrine of Executive privilege is well established," said President Nixon in his statement of March 12. "It was first invoked by President Washington, and it has been recognized and utilized by our Presidents for almost 200 years since that time." With that historical flourish the President issued still another challenge to the Legislative Branch of government, declaring that not only members but former members of the President's White House staff "shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress."

Board of Contributors

Most commentators, while noting that President Nixon was filing an unprecedentedly large claim for Executive privilege, appear to accept his idea that the doctrine has solid and unassailable historical basis. The impression is abroad that George Washington and all his successors, confronted by unacceptable congressional demands for information, simply cried "Executive privilege," and that settled the matter. Yet, when one looks into the problem, one encounters some curious facts. For example, the very term "Executive privilege" seems itself to be of fairly recent American usage. My research is far from exhaustive, but I cannot find that any President or Attorney General used it before the Eisenhower administration. You will look in vain for it as an entry in such standard reference works as the Smith-Zurcher "Dictionary of American Politics," or "The Oxford Companion to American History," or Scribner's "Concise Dictionary of American History." It is not even to be found, I was dismayed to discover, in "The New Language of Politics," compiled by William Safire of Mr. Nixon's very own White House staff.

Of course this may seem a semantic quibble, since the claim of the Executive to deny information to Congress is certainly not novel. Still, if the doctrine of "Executive privilege" were all this well-established and had the sanction, as Mr. Nixon assures us, of almost 200 years of American history, one would expect that the phrase would have been in common usage during the first 180 of these years.

President Nixon's historical recital undoubtedly derives from vagrant memories of Eisenhower days. In May 1954, in the midst of the Army-McCarthy hearings,

President Eisenhower instructed employees of the Department of Defense that, if asked by the McCarthy Committee about internal exchanges within the Department, they were "not to testify to *any* such conversations or communications or to produce *any* such documents or reproductions." This was an unprecedentedly sweeping denial to Congress. But it had a certain moral justification in the atrocious character of the McCarthy inquisition, and it was given legal color by an accompanying memorandum from Herbert Brownell, the Attorney General, assigning to the President "an uncontrolled discretion to withhold the information and papers in the public interest." Mr. Brownell then set forth a parade of supposed historical precedents, beginning with Washington. Neither the Eisenhower directive nor the Brownell memorandum, by the way, used the term Executive privilege.

The Brownell memorandum itself had a curious history. The "uncontrolled discretion" phrase—indeed the whole sentence from which it was taken, and a number of other sentences too—were lifted from a series of articles by a Department of Justice attorney named Herman Wolkinson published in the "Federal Bar Journal" in 1949. So too were the historical examples. In recent years the Wolkinson-Brownell version of history, later amplified by Attorney General (now Secretary of State) William P. Rogers in 1958, has received careful examination, most notably at the hands of J. Russell Wiggins, a newspaperman turned historian, and of the legal scholar Raoul Berger. Their research makes it clear that these examples do not prove what President Eisenhower and now President Nixon supposed they prove.

THE WASHINGTON PRECEDENT

Did George Washington, for example, ever invoke Executive privilege? In the first case of supposed presidential denial—a House inquiry into the St. Clair expedition in 1792—Washington actually gave the House all the papers it wanted and sent his Secretaries of War and the Treasury before the investigating committee. In the privacy of the Cabinet, the President and his colleagues agreed that, as Jefferson noted in his diary, "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently we're to exercise a discretion": but this notion was not transmitted to the Congress nor announced to the public. The second Washington example is equally irrelevant. When the House asked for papers relating to the Jay Treaty, the President declined to send them on the ground that the House had no constitutional role in the treaty-making process and that anyway the papers had already gone to the Senate. In neither case, in short, did Washington withhold from Congress the information it requested. In neither case did he invoke Executive privilege.

It would have been surprising had he done so. For the prevalent assumption, inherited from British parliamentary experience, was that Congress was among other things a "grand inquest" and thereby had a right to inform itself on public matters. The Constitution itself laid on the President the duty "from time to time [to] give to the Congress Information of the State of the Union," nor was this duty considered to be discharged by the annual presidential message. Though, as Washington's Cabinet thought, there might be occasions when disclosure as a practical matter could be against the public interest, the Executive presumption in the early republic was always that Congress should and would receive the information it sought. There was certainly no idea of an "uncontrolled" presidential discretion.

Our first Presidents were in consequence exceedingly chary about denial. Jefferson once withheld material he had received on the Burr conspiracy. He explained that it contained "a mixture of rumors, conjectures and suspicions," but in any case the congressional request had specifically exempted any thing the President "may deem the public welfare to require not to be disclosed." Monroe once withheld on the ground of potential damage to innocent persons; again Congress had asked for information only in "so far as he may deem compatible with the public interest." In both cases Presidents were exercising, not discretion they claimed for themselves, but discretion conferred on them by Congress. The first President to invoke privilege in anything like the contemporary sense was Jackson on two or three occasions; but his practice did not settle the constitutional issue.

Through most of American history the situation rocked along, with Presidents acceding to most congressional requests but sometimes reserving and very occasionally insisting on their right not to do so, and with Congress in such cases generally acquiescing for practical reasons in presidential denial but never ad-

mitting any principle of uncontrolled presidential discretion. Disagreements were always absorbed in the political process, and contention never led to a serious Executive-Legislative showdown.

MR. BROWNELL'S CLAIM

Mr. Brownell did make the curious claim in 1954 that the "courts have uniformly held" that the President had uncontrolled discretion. But the Attorney General did not cite a single case—for the entirely understandable reason that there were no cases to cite. There had never been up to 1954 a judicial decision dealing with the Executive denial of information to Congress. Nor has there been one to this day.

Thus up to twenty years ago, presidential withholding, not yet blessed with the impressive sobriquet of Executive privilege, was a practice to which Presidents very occasionally resorted in cases where they could expect support and understanding in Congress and in public opinion. Our system in its pragmatic beauty had declined to confront the theoretical question whether Congress had an absolute power to deny. On the whole, Executive privilege was not an urgent issue.

What precipitated the contemporary definition (as well as the designation) of Executive privilege was the system of internal security set up during and after World War II. Some members of Congress, not always the most admirable, liked to get into personal security files, and Presidents were reluctant to indulge them for the reasons advanced by Jefferson and Monroe—such files were too often a mixture of rumor, conjecture and suspicion calculated to do damage to innocent persons. So in 1941 Robert H. Jackson, then Attorney General, declined to give FBI reports to the House Naval Affairs Committee. His list of historical precedents undoubtedly supplied the basis for the Wolkinson articles.

The Wolkinson inquiry itself was undoubtedly stimulated by the determination of the Truman administration not to give security files to the House Un-American Activities Committee. This determination, by the way, was angrily protested by Congressman Richard M. Nixon of California, who said on April 22, 1948, that the Truman order "cannot stand from a constitutional standpoint." It would mean, young Mr. Nixon continued, "that the President could have arbitrarily issued an Executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the Executive department and the Congress would have no right to question his decision." Add the Watergate case to Mr. Nixon's list, and it would make a pretty good speech today for Senator Ervin or Congressman Moorhead.

It was similarly Joe McCarthy's inquiry into the loyalty of individuals that provoked the sweeping Eisenhower directive of 1954. But the language of the Eisenhower directive covered matters far beyond the original question of security files and ushered in the greatest orgy of Executive privilege in American history. From June 1955 to June 1960 there were at least 44 instances when officials in the Executive Branch refused information to Congress on the basis of the Eisenhower directive—more cases in these five years than in the first century of American history. Yet even President Eisenhower, not grasping the truth recently revealed to President Nixon about the immunity of White House staff members, permitted Sherman Adams to appear before a congressional committee in 1958.

PRESIDENT KENNEDY'S CONCERN

When President Kennedy came into office, he was considerably disturbed by the growing and manifest abuse of Executive privilege. He had served 14 years in Congress; his Attorney General had been counsel to congressional committees; and they took effective action to bring the matter back into its historical balance. Still, as Congressman Moss presciently said in 1963, "The powerful genie of Executive privilege momentarily is confined but can be uncorked by future Presidents."

President Nixon has uncorked it with a vengeance. The claim that not only present but past members of the White House staff are immune to congressional inquiry is wholly unprecedented. The President, it is true, says "Executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest." But it is hard to see how this principle would save John Dean or Dwight Chapin—as Mr. Nixon seems

determined to save them—from undergoing congressional interrogation about the Watergate affair. Here, if anywhere, the presidential concern can only be political embarrassment—unless, of course, our President has reached that point of self-delusion where he thinks anything that hurts his administration politically must by definition harm the public interest.

President Nixon, like President Eisenhower before him, makes a great deal of the separation of powers as a ground for Executive privilege. But the Constitution does not establish impassable barriers between the branches of government. Justice Jackson put it memorably: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

When congressional requests have been too outrageous, public opinion—indeed, responsible congressional opinion—has accepted presidential refusals. But a President has the correlative duty to fill all reasonable congressional requests for information. He has the responsibility to preserve the spirit of comity on which the separation of powers depends. He is not an absolute monarch, nor is his Executive privilege uncontrolled. President Nixon's extravagant claims find no support in historical precedent.

As Madison said in the 49th Federalist, none of the branches of government "can pretend to an exclusive or superior right of settling the boundaries between their respective powers." If President Nixon is determined to outdo all his predecessors and push his extraordinary claims to the point of irresolvable conflict with Congress, then the disagreement between two branches of government might well be passed on to the third. The Supreme Court has never had occasion to consider the issue of Executive privilege. Perhaps this is an idea whose time has come.

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[From the Congressional Record, Apr. 2, 1973]

EXECUTIVE PRIVILEGE—FOR THE CHIEF EXECUTIVE ONLY

(Mr. Fascell asked and was given permission to extend his remarks at this point in the Record and to include extraneous matter.)

MR. FASCELL. Mr. Speaker, I am today introducing legislation which would effectively limit the exercise of any so-called executive privilege to the Chief Executive only. The issue of executive privilege has been of great concern to many of us for a long time. We are all aware of the phenomenal growth of executive power at the expense of the legislative branch. We have all been witness, for example, to the use of executive agreements in place of treaties requiring Senate advice and consent. Such growth threatens the fiber of our government conceived as a system of checks and balances.

My statement today discusses two recent instances that the use of executive privilege hindered Congress in acquiring information for carrying out its duties. It lists in tabular form numerous other instances of the use of executive privilege. Second, it discusses the dubious historical foundation for the privilege.

This past January, Secretary of State William P. Rogers invoked executive privilege and refused to testify before the Senate Foreign Relations Committee on Vietnam War Policy. In the same month, prior to assuming their cabinet duties, Elliot L. Richardson and Claude S. Brinegar expressly declined to comment on the war at Senate confirmation hearings—*Congressional Quarterly Weekly Reports* for January 13, 1973, at pages 53, 60, and January 20, 1973, at page 67.

In April 1972, prior to confirmation of Richard Kleindienst as Attorney General, the Senate sought information of the dealings of the Justice Department with I.T. & T. Executive privilege was invoked to keep Peter Flanigan from testifying. As a confidential adviser to the President, he was allegedly entitled to claim executive privilege. Inconsistently, it was alleged both that Mr. Flanigan dealt solely with Robert McLaren and also that the President had no knowledge of the McLaren-Flanigan discussions. Eventually, a mutual arrangement was agreed

upon which limited the questions Members of Congress could ask Mr. Flanigan. Discussed in detail in an article by Arthur Selwyn Miller, "Executive Privilege: Its Dubious Constitutionality," appearing in the daily edition of the Congressional Record for October 2, 1972, at page S16, 461.

Other instances of claims of executive privilege too numerous to discuss are listed below:

CLAIMS OF EXECUTIVE PRIVILEGE

April 27, 1972: Treasury Secretary John Connally refuses to testify before Joint Economic Committee on matter of the Emergency Loan Guarantee Board refusing to supply requested records on the Lockheed loan to the Government Accounting Office. (*Washington Evening Star*, 4/27/72)

March 20, 1972: Frank Shakespeare, Director of the U.S. Information Agency, refuses to supply copies of USIA program planning papers for various countries—invokes executive privilege. (*Washington Evening Star*, 3/21/72)

March 20, 1972: State Department refuses to supply Senate Foreign Relations Committee with a copy of "Negotiations, 1964-1968: The Half-Hearted Search for Peace in Vietnam." (*Washington Post*, 3/20/72)

March 15, 1972: President Nixon invokes executive privilege in the request of the House Foreign Operations and Government Information Subcommittee for country field submissions for Cambodian foreign assistance for the fiscal years 1972 and 1973. (*New York Times*, 3/17/72; Congressional Record, 3/16/72, pp. H2148-H2149)

August 31, 1971: The Department of Defense refuses to supply foreign military assistance plans to the Senate Foreign Relations Committee. (*New York Times*, 9/1/71)

June 9, 1971: The Department of Defense refuses to release computerized surveillance records and refuses to agree to a Senate Constitutional Rights Subcommittee report on such records. (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, pp. 398-399)

April 19, 1971: The Department of Defense refuses to allow three designated generals to appear before the Senate Constitutional Rights Subcommittee. (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, p. 402)

April 10, 1971: The Department of Defense refuses to supply continuous monthly reports on military operations in Southeast Asia to the Senate Foreign Relations Committee. (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, p. 47)

March 2, 1971: Department of Defense General Counsel J. Fred Buzhardt refuses to release an Army investigation report on the 113th Intelligence Group requested by Senate Constitutional Rights Subcommittee. (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, pp. 402-405)

March 19, 1970: Secretary of Defense Melvin Laird declines invitation to appear before Senate (Foreign Relations) Disarmament Subcommittee. (*New York Times*, 3/19/70)

December 20, 1969: The Department of Defense refuses to supply the "Pentagon Papers" to the Senate Foreign Relations Committee. (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, pp. 37-38)

August 9, 1969: The State Department refuses to provide defense agreement between U.S. and Thailand to the Senate Foreign Relations Committee. (*New York Times*, 8/9/69)

June 26, 1969: The Department of Defense refuses to supply the five-year plan for military assistance programs to the Senate Foreign Relations Committee. (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, p. 40)

April 4, 1968: The Department of Defense refuses to supply a copy of the Command Control Study of the Gulf of Tonkin incident to the Senate Foreign Relations Committee. (Committee on the Judiciary, United States Senate, *Executive Privilege: The Withholding of Information by the Executive*, 92nd Congress, First Session, p. 39)

(Research by Harold C. Relyea, Congressional Research Service, excerpts appeared in daily edition of the *Congressional Record*, 6/20/72 at p. 5820).

Turning from the frequency of use of executive privilege to its validity as a doctrine, there is serious doubt that historical precedent justifies a claim of executive privilege. Prof. Raoul Berger, senior fellow in legal history at Harvard Law School, a member of the American Law Institute also serving as past chairman of its administrative law section, appeared before the House Subcommittee on Foreign Operations and Government Information and extensively documented the lack of historical foundation for executive privilege. Advocates of executive privilege claim that it is based on the doctrine of separation of powers. They reason that Congress encroached upon matters entrusted to the executive. Professor Berger discussed precolonial political thought and oft-cited examples of the use of executive privilege in Washington's administration. He concluded that neither supports the claim that the doctrine of executive privilege is founded on the separation of powers. Professor Berger also discussed the few cases which have considered the problem of executive privilege and concluded that none of them limited the power of Congress to inquire into executive conduct. He proposed these solutions:

- (1) a statute authorizing a suit on behalf of Congress against a member of the executive branch.
- (2) a permanent attorney who could screen congressional committee application for potential lawsuits.
- (3) resort to the Congressional contempt power.

Professor Berger concluded:

Until Congress faces up to the fact that the swelling tide of executive privilege claims can be stemmed only by decisive Congressional action, executive claims will continue to clog Congressional performance of vital functions." (Daily edition of *Congressional Record* 5/25/72 at p. E5796-8).

The recent pronouncement by President Nixon that "executive privilege" extends not only to current members of the White House staff but to former members as well should serve as an even greater impetus to the Congress to clarify and define what this privilege may be.

The "Nixon Doctrine of Executive Privilege" evolved out of the Senate Judiciary Committee's confirmation hearings on the nomination of L. Patrick Gray to be Director of the Federal Bureau of Investigation. Those hearings disclosed that information concerning the FBI's investigation of the Watergate incident was made available to the President's counsel, Mr. John Dean, in the White House. This unusual precedent appears to have put the chief law enforcement agency, the FBI, squarely in the political arena. Evidence further suggests that the FBI had knowledge of White House staff involvement in the Watergate case and turned that information over to Mr. Dean. At the same time, the White House steadfastly denied any involvement.

Now the President, in connection with the Gray hearings, has refused to allow Mr. Dean to appear before the Senate Judiciary Committee, claiming not only executive privilege but also the attorney-client privilege.

At question is the Congress ability to perform its constitutional duties. In this case, the Senate is charged with the responsibility of confirming Presidential nominations. If the Senate is to carry out that constitutional power and responsibility, clearly it must have the benefit of all available information. If such information includes the testimony of White House officials, then that testimony should be forthcoming.

I strongly support and defend the fundamental constitutional principle of the separation of powers. I question its application in the issue of executive privilege however, or even the existence of such a thing as executive privilege, except as it applies directly to the President himself.

The Congress should have access to all information on matters which fall within its jurisdiction. The executive branch has argued that complete access would hinder its discharge of its constitutional responsibilities. I find it difficult to follow this line of reasoning, and cannot understand what information would, if furnished to the Congress, hinder the Executive in this manner.

The bill I am introducing today is simple and straightforward. It amends the Freedom of Information Act and requires that administrative agencies and Executive Office staff members either furnish information or appear before congressional committees when requested by Congress on "matters within its [Congress] jurisdiction."

Tomorrow the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee begins hearings on the subject of so-called executive privilege, under the very able leadership of Con-

gressman Bill Moorhead. I commend Chairman Moorhead for scheduling those hearings and share his hope that a "rational and intelligent" solution can be found to the problem.

I submit to the House, that if there is to be "executive privilege" let it extend only to the Chief Executive.

Mr. Speaker, the text of my proposal follows:

H.R. 6438

A bill to amend the Freedom of Information Act to require that all information be made available to Congress

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 552 of title 5 of the United States Code (the Freedom of Information Act) is amended by adding at the end thereof the following:

"(d) (1) Whenever either House of Congress, any committee thereof (to the extent of matter within its jurisdiction), or the Comptroller General of the United States, requests an agency to make available information within its possession or under its control, the head of such agency shall make the information available as soon as practicable but not later than thirty days from the date of the request.

"(2) Whenever either House of Congress or any committee thereof (to the extent of matter within its jurisdiction) requests the presence of an officer or employee of an agency for testimony regarding matters within the agency's possession or under its control, the officer or employee shall appear and shall supply all information requested.

"(3) 'agency', as used in this subsection means a department, agency, instrumentality, or other authority of the Government of the United States (other than the Congress or Courts of the United States), including any establishment within the Executive Office of the President."

[From the Washington Post, Apr. 4, 1973]

DEAN CITES PRIVILEGE, BALKS HILL

(By George Lardner, Jr.)

The White House invoked executive privilege to block an inspection of tax-paid flights by administration officials during last fall's presidential campaign, a House subcommittee learned yesterday.

Counsel to the President John W. Dean III held last Nov. 20 that the passenger lists and flight logs in question were "personal to the President and thus not the proper subject of congressional inquiry."

Officials of the General Accounting Office, Congress's watchdog agency, said it was the first time that the privilege doctrine had been used, at least "in the recent past," to deny information to GAO investigators.

They cited the episode at the opening of hearings on executive privilege by the House Subcommittee on Government Information.

Urging legislation to limit the practice, GAO general counsel Paul G. Dembling said his agency had tried to review the flights made last September by aircraft assigned to the 89th Military Airlift Wing at Andrews Air Force Base, including the President's plane.

In a letter to President Nixon's chief of staff, H. R. Haldeman, last Oct. 31, Comptroller General Elmer B. Staats, the head of GAO, said his agency had been asked "by a member of the Congress" to review September trips by the President and his family, the Vice President, White House staff members and Cabinet members. Staats said the GAO also wanted to determine "the extent" to which the Government had been reimbursed for those flights by the Committee for the Re-Election of the President.

In that fashion, GAO officials said yesterday, they might have been able to determine what trips the White House deemed "political" and what flights it considered properly chargeable to the taxpayers.

According to Dembling, the Comptroller General's request for access to the passenger manifests and flight logs on file at the White House went unanswered until after Election Day.

Replying for Haldeman on Nov. 20, White House Counsel Dean wrote that "information of this nature has traditionally been considered personal to the President" and could not be reviewed.

"All political flights made during September," Dean added "were billed to the Committee to Re-Elect the President and that data will, of course, be reflected in the committee's financial reports."

In his policy statement on executive privilege last month, Mr. Nixon said he had no intention of using the doctrine "as a shield to prevent embarrassing information from being made available." But he said he could not permit any formal congressional appearances by either past or present members of his personal White House staff.

The Chairman of the House Government Information Subcommittee, William S. Moorhead (D-Pa.), and its ranking Republican, Rep. John N. Erlenborn (Ill.), had urged the President to permit Dean to testify at their hearings anyway, with the understanding that he would be asked no questions on the sensitive Watergate case.

Dean's office sent word to the subcommittee yesterday afternoon that he would not appear. The subcommittee which is focusing on an Erlenborn bill to limit the use of executive privilege, was also unsuccessful in its efforts to elicit testimony from the Office of Management and Budget, the Treasury Department, and the Department of Health, Education, and Welfare. All maintained that the Justice Department would be the "most appropriate administration spokesman" on the issue.

[From the Washington Post, Apr. 5, 1973]

DEAN HELD LIABLE TO HILL QUIZ

(By George Lardner, Jr.)

A Justice Department spokesman said yesterday that White House aides could not invoke executive privilege to steer clear of a direct congressional investigation of "wrong-doing" on their part.

Under steady questioning by a House subcommittee yesterday morning, Deputy Assistant Attorney General Mary C. Lawton said, for example, that the privilege would not cover counsel to the President John W. Dean III "if" he obstructed justice during the FBI's investigation of the Watergate scandal.

"Isn't it a crime to lie to the FBI?" Rep. Paul N. McCloskey, Jr. (R-Calif.) demanded. He recalled that Acting FBI Director L. Patrick Gray III told the Senate Judiciary Committee recently that Dean "probably" lied to the FBI last summer in professing not to know whether Watergate conspirator E. Howard Hunt had a White House office.

Miss Lawton, who testified as the administration's official spokesman on the controversial executive-privilege issue, said that Dean was "not under oath" during the conversation in question. She added that "Mr. Dean is not under investigation for a crime that I know of."

McCloskey then asked if it weren't a crime to obstruct, impede or interfere with an FBI investigation.

Miss Lawton said that it was, and added that "if there were an investigation and inquiry into crimes by Mr. Dean," Congress could properly demand his appearance.

"If you are inquiring into their commission of a crime specifically, then the privilege does not apply," she said of presidential aides.

But she told reporters later that the President alone has the prerogative of deciding whether there has been any wrongdoing and therefore of determining whether to invoke the privilege.

After Gray's affirmation last month that Dean "probably" lied to the FBI, the White House issued a statement assailing such talk and declaring that "Mr. Dean flatly denies that he ever misled or . . . lied to an agent of the FBI." The White House said the question asked of him was whether FBI agents could visit Hunt's office in the Executive Office Building and not whether Hunt ever had such an office.

Dean had already declined an invitation from the Senate Judiciary Committee to testify at the hearings on Gray's FBI nomination, citing President Nixon's March 12 policy statement that he could not permit a formal congressional appearance by any members of his personal staff, past or present.

The presidential counsel was subsequently invited to testify before the House subcommittee headed by Rep. William S. Moorhead (D-Pa.) under ground rules that would have confined the questioning to the doctrine of executive privilege and that would have made any questions about the Watergate case out of bounds.

Dean formally notified the subcommittee yesterday afternoon that he was not coming, invoking the privilege "as a member of the President's personal staff . . ." He said the Justice Department would prove "fully competent to present the administration position as well as the historic background of the doctrine."

As that spokesman, Miss Lawton voiced the administration's strong opposition [to] a bill sponsored by Rep. John N. Erlenborn (R-Ill.) and other House Republicans to limit the privilege to policy recommendations whose disclosure would "seriously jeopardize the national interest . . ."

She said the privilege was "grounded in the Constitution" and could not be limited in any way by congressional legislation.

[From the Evening Star and Daily News, Apr. 5, 1973]

U.S. OFFICIAL WAVERS ON DEAN QUIZ

A Justice Department official has said that White House counsel John W. Dean III could be forced to testify before a congressional committee if he obstructed the FBI's investigation of the Watergate affair. But she later backed-tracked from that position.

Mary C. Lawton, deputy assistant attorney general, told a House Government Operations subcommittee yesterday that President Nixon could not invoke executive privilege for Dean if a committee was looking "specifically into commission of a crime."

Reminded that FBI director-designate L. Patrick Gray testified before the Senate Judiciary Committee that Dean "probably" lied to FBI agents, Miss Lawton emphasized Dean is not charged with a crime, but agreed that if he obstructed the FBI inquiry, executive privilege could not be invoked.

But after a luncheon recess, Miss Lawton changed her testimony, saying the President could invoke executive privilege even if his legal counsel were charged with wrongdoing.

After the hearing ended, she told reporters that even though executive privilege does not extend to instances of wrongdoing, ultimately "it is the President who determines the propriety of an appearance."

Dean has cited executive privilege in refusing to testify at the Gray hearings.

[From the Los Angeles Times, Apr. 6, 1973]

WILL "EXECUTIVE PRIVILEGE" HAVE ITS DAY IN COURT?

NIXON, SENATE BATTLE MAY LEAD TO CONGRESS' ARREST OF JOHN DEAN

(By John H. Averill)

Washington.—President Nixon and the Senate are at such odds on the Watergate case that an officer of Congress may appear at the White House gate one day soon in an effort to arrest presidential counsel John W. Dean III.

Unlikely as the arrest may seem, legal scholars and strategists for both sides are searching the records to prepare for what would be the most extreme final act of the drama.

At the very last, either the President or Congress stands to lose power before the struggle is over. Rep. John E. Moss (D-Calif.) said:

"I would say that the one who yields now will give up power or at the very least a claim to power."

Moss, a leading authority in Congress on secrecy in government, was referring to Mr. Nixon's broadening of executive privilege.

COINED UNDER EISENHOWER

The term "executive privilege" was coined during the Eisenhower administration. But the principle has been invoked by presidents for years to justify withholding information from Congress.

Mr. Nixon extended the concept March 12 when he said he would invoke executive privilege to bar present and former members of the White House staff from testifying before congressional committees.

Mr. Nixon referred specifically to plans by the Senate's Select Committee on Presidential Campaign Activities to summon Dean and possibly other presidential aides for testimony on the Watergate case.

There have been reports that the White House is wavering on its stand.

Unless the President or the Senate committee does retreat, this scenario could unfold within the next few weeks:

Senate Sgt.-at-Arms William H. Wannall, or a deputy, will appear at the White House gate with a subpoena for Dean to testify before the select committee, headed by Sen. Sam J. Ervin, Jr. (D-N.C.).

MIGHT IGNORE SUBPOENA

Dean, assuming the President stands firm, will ignore the subpoena in compliance with Mr. Nixon's March 12 executive privilege statement.

The Senate, its select committee rebuffed, will adopt a resolution citing Dean for contempt of Congress, a crime punishable by up to a year in a "common jail" and a \$1,000 fine.

"I'd recommend to the Senate they send the sergeant-at-arms of the Senate to arrest a White House aide or any other witness who refuses to appear and let the Senate try him," Ervin has said.

Dean conducted a separate Watergate investigation for Mr. Nixon, and the President said late last summer that Dean's report absolved any "presently unemployed" members of the Administration involvement in the Watergate bugging. The report has not been made public.

Dean was asked to testify before the Senate Judiciary Committee, which is considering the nomination of L. Patrick Gray III to be permanent director of the FBI, but refused—offering instead to answer questions in writing.

Ervin, a member of the Judiciary Committee, said Dean's offer was unacceptable: "I want the man there in person, and I'd be satisfied with nothing less."

GIVEN FBI FILES

To conduct his Watergate investigation for President Nixon, Dean was given 82 FBI files. The Judiciary Committee wants to question Dean—as part of its study of the Gray nomination—concerning allegations that he might have misused the FBI files.

Under the law, the Justice Department is required to prosecute contempt of Congress citations. Should the department, in deference to the White House, drag its feet in responding, Congress can act on its own. If, in the words of Ervin, "it has the will."

According to constitutional authorities, there are two alternatives open to Congress should Dean and others defy such a contempt citation.

First, the Senate could arrest Dean and order his imprisonment. The power of Congress to punish for contempt has been upheld by the Supreme Court based on precedents established by the English Parliament in the centuries predating the U.S. Constitution.

COULD BE IMPEACHED

Second, should the White House police block Dean's arrest, he could be subject to impeachment proceedings under Article II, Section 4 of the Constitution, which provides the means for removing from office "the President, Vice President and all civil officers of the United States."

Impeachment must be initiated by the House of Representatives, but the Senate does the actual trying, with a two-thirds majority required for conviction. If convicted, a person is disqualified for life from holding a federal office.

Since impeachment is such an extreme step—there have been only 12 such proceedings in the nation's history—it is unlikely the White House would risk that possibility.

"If the President were to proceed like that he would be saying in effect that 'I am Caesar,'" said Prof. Raoul Berger, Charles Warren senior fellow at Harvard Law School and an authority on both executive privilege and impeachment.

"The President would be saying, 'Nobody can question me; I am above the law; I am the law! No man is above the law. So if the time comes, I wouldn't shrink from impeaching the President. If the time comes.'

If Dean were arrested and imprisoned, it could precipitate a test of executive privilege.

Dean's lawyers could ask the Supreme Court for a writ of habeas corpus. If the court freed him while adjudicating the issue, it would have to rule for the first time on executive privilege.

At a March 15 press conference, Mr. Nixon said it was perhaps time for a Supreme Court test of the doctrine. "If the Senate feels that they want a court test, we would welcome it," he said. He predicted that, if a test came, the court would uphold him rather than the Senate.

As have several of his predecessors, Mr. Nixon contends that Presidents have an inherent constitutional right to withhold certain information from Congress.

But until World War II, Presidents exercised that principle sparingly.

A 1954 Justice Department memorandum cited only 11 instances prior to 1941 where presidents had withheld information.

While the Constitution is silent on the question of executive privilege, legal scholars, as well as many members of Congress, are sharply divided on whether the doctrine is granted implicitly.

NARROW INTERPRETATION

Sen. Ervin is one who accepts the doctrine—but in narrow terms.

"Executive privilege," Ervin says, "is only intended to enable a President to keep secrets, confidential communications between him and his aides, or between his aides, which occur in the course of an effort to assist the President to execute in a lawful manner his constitutional or statutory duties. It covers no wrongdoing whatever."

Others, notably Rep. Moss and Prof. Berger, contend that executive privilege is a myth without any legal justification.

"We've been brainwashed by this term," Berger said in an interview. In search of precedents, Berger said he studied 150 years of debate in the English Parliament prior to 1787, when the U.S. Constitution was framed, and found none.

"There wasn't an example prior to 1787 where a minister of the government, let alone a subordinate, demurred to a parliamentary inquiry," Berger said. "I found a plenary power to investigate and I never found a single case where the highest minister demurred and said, 'You have no power to inquire,' or 'Your power to inquire is limited.'

"The importance of all this is that the Supreme Court has said that the power of Congress is rooted in the power of Parliament and has the same plenary powers. Where does the power of the President to withhold come from when no minister ever dared withhold from Parliament? Certainly there was no precedent before 1787 when the framers were sitting down to write the Constitution."

In support of his argument, Berger cited the 1927 Supreme Court decision in the case of *McGrain v. Daugherty*, which grew out of the famous Teapot Dome scandals.

In that case, which upheld the right of Congress to inquire, the court said:

"The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified."

'MEANS TO COMPULSION'

The court said further that where congressional requests for information were unavailing, "means to compulsion are essential to obtain what is needed."

In justification of executive privilege, the authority most frequently cited is a study submitted to Congress in 1958 by William P. Rogers, the present secretary of state, when he was attorney general in the Eisenhower administration.

President Nixon echoed the Rogers study in his March 12 statement on executive privilege.

"The doctrine of executive privilege is well established," Mr. Nixon said. "It was first invoked by President Washington and it has been recognized and utilized by our Presidents for almost 200 years since that time."

However, some historians insist that Washington, while he may have fathered many things, did not father executive privilege.

The Washington precedent cited by Rogers involved the mauling of some U.S. troops under Gen. James St. Clair by a band of Indians in 1792. There was an up-

roar in Congress and a House committee demanded documents that might shed light on the disaster.

According to private notes jotted down by Secretary of State Thomas Jefferson, Washington and his Cabinet concluded that "the executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public."

However, those views were not communicated to Congress, and Washington chose full disclosure. In the words of one of his biographers, "Not even the ugliest line on the flight of the beaten troops was eliminated."

"If the case is a precedent at all," Berger said, "it shows that President Washington refused to sweep under the rug an utterly discreditable business."

SECOND EXAMPLE

A second Washington example cited by the Rogers study related to a House demand in 1796 for papers relating to the controversial Jay Treaty. Washington refused to supply them on grounds the House had no constitutional role in the treaty-making process and that he had already supplied the documents to the Senate. Thus, again, Washington did not withhold requested information from Congress.

Between the days of Washington and the modern era there were occasional instances of Presidents withholding information from Congress. But the issue did not evolve into a major controversy until the Truman and Eisenhower administrations when the White House repeatedly denied personnel files and other papers demanded by congressional committees investigating communism and subversion.

Paradoxically, many of those now condemning President Nixon for his stand on executive privilege were among those most outspoken in praise of the withholding of information by Presidents Truman and Eisenhower.

Mr. Nixon also took a different view in 1948 when President Truman denied a document to the House Committee on Un-American Activities, of which Mr. Nixon was then a member.

Mr. Nixon attacked the Truman position as unconstitutional and said similar orders in the past could have blocked Congress from investigating the Teapot Dome and other scandals.

Thus far, Presidents have emerged as the clear winners in battles over executive privilege, chiefly because Congress has backed away from a test of strength.

However, the Watergate case could be different.

"This is the ideal issue for a confrontation," said Rep. Moss. "If it comes to a court test, the Senate will be picking the strongest ground for a confrontation and the President the weakest."

Asked if he felt a court test would be desirable, Moss said:

"I would welcome not having to go to court because I have always felt that one of the geniuses of our system has been the areas of gray lacking precise definitions.

"But when there is challenge, then I certainly would welcome the test since the problem is becoming increasingly aggravated."

[From the Washington Post, Apr. 11, 1973]

KLEINDIENST: NO LIMIT TO EXECUTIVE PRIVILEGE

(By George Lardner, Jr.)

Attorney General Richard G. Kleindienst, in a sweeping assertion of executive prerogatives, declared yesterday that the President has the power to forbid federal employees from testifying before Congress under any circumstances—including impeachment.

Testifying before an unusual joint session of three Senate subcommittees, Kleindienst maintained that the doctrine of executive privilege could properly be invoked even in the face of congressional investigations of alleged wrongdoing by White House aides.

"This is a power relegated to the President of the United States alone," Kleindienst said of executive privilege. Under it, he declared, the President "logically" has the authority to block congressional demands for any document within the executive branch as well as the testimony of any of its 2½ million federal employees.

Sen. Edmund S. Muskie (D-Maine), chairman of the Senate Subcommittee on Intergovernmental Relations, called the Attorney General's claims "frightening." "No administration in the history of this country has ever asserted the concept (of executive privilege) as you have today," Muskie told him.

Repeatedly Kleindienst suggested that the only real limits on the President's powers, in a confrontation with Congress, are those imposed by public opinion and the electorate. But he said Congress does have "a remedy" if it doesn't like the way those powers are being exercised.

"If it feels he is exercising power like a monarch," Kleindienst told the senators, "you could conduct an impeachment proceeding."

Sen. Sam Ervin (D-N.C.), chairman of the Subcommittee on the Separation of Powers, protested that even here, under Kleindienst's standards, impeachment of a President would be impossible "because he could forbid all of the witnesses from going to court."

"You put a nice question," Kleindienst agreed. But, he insisted, "You don't need facts to impeach a President . . . You don't need evidence to impeach a President . . . No sir, you don't."

Ervin pointed out that the Constitution makes the Chief Justice the presiding officer in any presidential impeachment trial to guarantee its fair conduct under the rules of evidence.

Kleindienst disagreed and said the Chief Justice could be impeached, too, if he got in the way. All Congress needs, the Attorney General insisted, is the votes.

"He seemed to be taunting us," Sen. J. William Fulbright (D-Ark.) told newsmen later.

Insisting that there were no limits on the privilege doctrine, short of a constitutional amendment, Kleindienst explicitly repudiated at one point the House testimony last week of Deputy Assistant Attorney General Mary C. Lawton.

Designated as the administration's official spokesman before the House Government Information Subcommittee, she took the stand that White House aides such as counsel to the President John W. Dean III could not use the privilege to steer clear of any direct congressional investigation of wrong doing on their part.

Kleindienst said he disagreed with Miss Lawton and pointed out, after a quick huddle with an aide, that she "modified her answer" before the same House subcommittee at an afternoon session.

"She'd gotten her marching orders?" Muskie said sarcastically, touching off a round of laughter in the hearing room.

Kleindienst waited until the laughter subsided and said in flat, deliberate tones: "Ha, Ha, Ha. . . . I'm sure you give your staff marching orders, too, Senator Muskie."

Acknowledging that the Watergate controversy has put a sharp edge on questions of comity between the executive and the legislative branches, the Attorney General assured the senators that "for crime, there can be no haven." But he maintained that the determination of alleged violations in the Watergate case was "uniquely the province of the judiciary." He reminded the subcommittee that the White House has said that even Mr. Nixon's close aides "will respond to grand jury inquiry."

"The Congress of the United States, in my opinion, was not set up or created to investigate or prosecute for crimes," Kleindienst said.

He stopped well short, however, of conceding that executive privilege can be overridden even by the courts.

"The question is academic," Kleindienst insisted. He said simply that "no President, in my opinion, is going to withhold his closest aides from criminal justice" and said he doubted that any President would ever try to do so.

[From the New York Times, Apr. 12, 1973]

NIXON'S POWER GRAB

(By Tom Wicker)

On the same day that President Nixon made the reasonable and necessary proposal that he be given executive power to raise or reduce tariffs, his Attorney General made the unreasonable and absurd claim that all 2.5-million Federal employees could be directed by the President not to testify before Congress. There could hardly be a better illustration of how the need for strong executive government, which no one can dispute, can be perverted into an open grab for imperial powers.

The low intellectual and constitutional level of Mr. Kleindienst's astonishing performance is not hard to demonstrate, as in the following examples:

As the Attorney General would have it, if a Federal employee—say a postmaster in Colorado—were summoned by a Congressional committee to tell it how (or if) the mails were going through in his part of the country, the postmaster could not do so if the President directed him not to.

It is probably true that in such a ridiculous instance no President would so order the postmaster. But that does not alter the case, because the President under the Kleindienst doctrine could order him not to testify. The plain meaning of that is that any President would have the right to determine what Congress could and could not hear from Federal employees. One can be absolutely certain, for example, that no Pentagon accountant, in that case, would ever tell a Congressional committee about a cost overrun on a new aircraft or submarine.

Again, suppose some Federal employee is ordered by the President not to testify before Congress, and refuses to do so with the impunity Mr. Kleindienst claims. Later, as frequently happens, the employee leaves the Federal service and writes a book about his experience. Does the Attorney General claim that he could stop the man from writing the book? Or that what he might put into a book, Congress had no right to hear?

Or what about instances in which a President would wish to appoint a Federal employee to a Federal position requiring confirmation by the Senate—as just recently happened in the case of L. Patrick Gray and several of the second-term Cabinet members? Does the Attorney General of the United States seriously claim that, if Mr. Nixon so ordered, these Federal employees could invoke executive privilege to avoid confirmation hearings, and damn the Constitution? That is implicit in his fatuous claim, and it does no good to argue that Congress certainly would refuse to confirm a nominee who was ordered to take such a stand; the question is the President's power to claim executive privilege, not the practical political consequence of his doing so.

That is true, too, of Mr. Kleindienst's arrogant prescription for Congress' "remedies" for what it might regard as too much executive privilege. These "remedies" were to cut off funds to the executive branch, to impeach the President, or to defeat him at the next election.

Suppose, for example, Mr. Nixon continues to refuse to let his counsel, John Dean, testify in the Watergate case. Congress decides to take action. According to Mr. Kleindienst, it could either impeach Mr. Nixon or cut off all funds to the executive branch; but for such a relatively limited offense, neither of these sweeping "remedies" makes sense or would ever be practical. They are more like going to war over the outcome of a soccer game, and to all intents and purposes are not remedies at all for the limited kind of offense likely to be an issue.

As for electing another President in protest against executive privilege. Congress and the nation would have to wait nearly four years in the present case, and even then there would be no punishment for Mr. Nixon, who cannot run again anyway—unless Mr. Kleindienst also has a doctrine for surmounting that constitutional problem.

The thought is chilling. For by now it is clear that these Nixon men are not merely trying to cover up whatever responsibility they may have for the Watergate affair. They are the same men who have gone to unprecedented lengths to seize the power of the purse from Congress, who are conducting unauthorized war in Cambodia in contradiction of the President's own pledges, who are trying

to make it a felony to disclose almost any foreign policy or national defense information and another felony to publish it.

Until thwarted in the Supreme Court, these same men claimed the unlimited right to wiretap and bug anyone they accused of domestic subversion, and imposed the first prior restraint on publication in American history. Is there any limit to the raw and unchecked power they seek?

[From the New York Times, Apr. 12, 1973]

A G.O.P. LEADER IN HOUSE URGES CONGRESS TO NULLIFY KLEINDIENST'S CLAIM OF WIDER EXECUTIVE SHIELD

(By Anthony Ripley)

WASHINGTON, April 11.—A leading Republican in the House of Representatives expressed "utter shock and dismay" today at Attorney General Richard G. Kleindienst's broad interpretation of executive privilege.

Representative John B. Anderson of Illinois, chairman of the House Republican Conference, told three Senate subcommittees meeting jointly to examine executive privilege and secrecy that Mr. Kleindienst's statements yesterday were "unnecessarily provocative and contemptuous of Congress."

"The Attorney General has thrown down the gauntlet," Mr. Anderson said. "If this Congress is to preserve even a semblance of integrity and independence, it must act immediately to nullify the sweeping claim of executive power asserted by the Attorney General."

The attack by a member of his own party on Mr. Kleindienst's position came as the White House was supporting the Attorney General. Ronald L. Ziegler, the Presidential press secretary, said at a news briefing at the White House that "the Attorney General was explaining the Administration's point of view."

SHIELD BROADENED

In testimony yesterday before the three subcommittees, Mr. Kleindienst said that if the President objected, none of the 2.5 million employees of the executive branch of the Government could testify before Congress. He repeatedly suggested that, if Congress wished to remedy the situation, it could cut off funds to the executive branch or impeach the President.

Mr. Anderson told the subcommittees today: "Until the present, I have not been inclined to take an overly restrictive view of executive privilege.

"It seemed to me quite reasonable to allow the President to enjoy confidential relations with his direct advisers regarding matters of national security.

"But I feel compelled to stress before the committee today in the strongest terms possible my utter shock and dismay at the testimony presented yesterday by Attorney General Kleindienst."

Mr. Anderson added that Mr. Kleindienst's statement "was not only unnecessarily provocative and contemptuous of Congress, but, more importantly, it contained such an alarming and dangerous expansion of the notion of executive privilege that I can see only one course of action: Congress must immediately pass legislation strictly limiting executive privilege lest the delicate balance of shared power between the two branches be ruptured permanently."

Asked as he left the hearing room if his statement reflected the position of House Republicans, Mr. Anderson replied: "I would hope so. I didn't come over here to be heroic."

The acting chairman of the subcommittees, Senator Edmund S. Muskie, Democrat of Maine, also expressed alarm about Mr. Kleindienst's testimony.

"EXECUTIVE WISHING"

"If his testimony does represent the considered policy of the Administration—and he seemed to be flying by the seat of his pants—then it seems to say to us that executive privilege is none of our business," Mr. Muskie said.

Senator Adlai E. Stevenson 3d, Democrat of Illinois, said executive privilege had no roots in the Constitution as the President contended, but was "a doctrine created not so much by legal or judicial deliberation as by executive wishing, conjurings and speechmaking."

Mr. Stevenson said Congress had broad powers in the matter and suggested that Congress or the courts set up a "special prosecutor" to handle the matter.

Controller General Elmer B. Staats told the subcommittees that his efforts to investigate actions by the executive branch on behalf of Congress were not frustrated directly by Presidential orders of executive privilege.

Instead, he said, agencies have become "super cautious" under the President's directives, resulting in "tremendous delays," records being "screened," and requests for information being referred "up the organizational hierarchy."

He added that "department or agency privilege" was often invoked.

Harding F. Bancroft, executive vice president of The New York Times, testified about the newspaper's difficulties in obtaining information under an Executive order the President issued last year in an effort to lift needless secrecy from Federal documents.

Mr. Bancroft said that 13 months of effort to declassify 51 documents had produced only five. He supported amendments to the Freedom of Information Act that would speed the declassification.

In a separate hearing before the Senate Foreign Relations Committee, Senator J. W. Fulbright, Democrat of Arkansas, discussed Mr. Kleindienst's testimony and asked Alexander M. Bickel, Yale University law professor, if there was any way to invoke censure short of impeachment.

Mr. Bickel noted that President Jackson was censured by resolution, but Congress recanted after Jackson became very angry.

Nicholas deB. Katzenbach, former Attorney General and one-time Under Secretary of State, commented that, before enacting such a censure resolution, "you might inquire where the nearest B-52's are."

[From the Washington Post, Apr. 13, 1973]

NADER ASKS FEDERAL SANCTIONS ON WITHHOLDING INFORMATION

(By George Lardner, Jr.)

Citing repeated frustrations and delays in implementing the Freedom of Information Act, Ralph Nader urged Congress yesterday to approve sanctions against federal bureaucrats who abuse the law.

He told a joint hearing of three Senate subcommittees that the "right to know" supposedly advanced by the 1966 law has been thwarted repeatedly by bureaucratic tactics ranging from costly search and copying fees to flat refusals to accept court rulings as precedents for making information public.

At the bottom of the problem, Nader said, is the fact that current laws make federal officials accountable, and sometimes criminally liable, only for releasing information. By contrast, he said, "the great failure of the Freedom of Information Act has been that it does not hold federal officials accountable for not disclosing information."

Cataloguing some of the abuses that have resulted, Nader singled out the Department of Agriculture which, he said, requested prepayment of \$85,000 in one instance and \$91,840 in another for access to documents. Turning to the Social Security Administration, he said its officials once denied a trade magazine editor nursing home reports "of an identical nature" to eight nursing home reports the same editor had already obtained as a result of court action. As a result, the editor had to go to court again.

The only lasting cure, Nader maintained, is to hold government officials individually responsible for illegal decisions against disclosure. He suggested sanctions such as mandatory suspension or termination of federal employment and, "in severe circumstances, where actual harm to health or safety has resulted," even criminal penalties.

Nader said, for example, that he felt criminal penalties would be appropriate if government officials could be shown to have deliberately withheld reports on "hazardous contamination of meat products" which reached the public and harmed consumers.

Yale University law professor Alexander M. Bickel, a consultant to the Senate Subcommittee on the Separation of Powers, voiced concern that Nader's proposals could lead to a climate of fear such as the late Sen. Joseph McCarthy (R-Wis.) once engendered. Nader disagreed and said that any sanctions should be accom-

panied by "due process safeguards." Citing McCarthy's penchant for making charges on the basis of secret documents and sources, Nader also maintained that "freedom of information would have exposed him" and even denied him his heyday.

Testifying on the doctrine of executive privilege at the same hearing, Raoul Berger, a leading legal scholar on the issue, called it "a myth" and said Congress would be wasting its time on restrictive legislation. He advised, instead, that Congress force a showdown in the courts by insisting on the testimony of White House aides—such as Counsel to the President John W. Dean III—in the Senate's Watergate investigation.

Dismissing Attorney General Richard G. Kleindienst's sweeping claims of executive privilege as dusty "executive boilerplate" that has already been refuted, Berger said he could forgive the Attorney General for resurrecting old arguments, but not for his "appalling statement" Tuesday that Congress needs no evidence—or witnesses—to impeach a President or any other official.

Rep. William S. Moorhead (D-Pa.), chairman of the House Government Information Subcommittee, told the Senators that he considered Kleindienst's claims "ironic" in light of the fact that his confirmation last year as Attorney General came only after Mr. Nixon "permitted" White House aide Peter Flanigan to appear before the Senate Judiciary Committee regarding a controversy that was holding up Kleindienst's nomination.

"If the 'divine right' doctrine had been in effect last year," Moorhead said, "it might be that someone else might be warming the seat of the Attorney General's chair today."

[From the New York Times, Apr. 13, 1978]

HISTORIAN TELLS SENATORS MEETING ON EXECUTIVE PRIVILEGE, 'YOU ARE THE SUPERIOR POWER'

(By Anthony Ripley)

Washington, April 12.—Senators examining President Nixon's use of executive privilege were told today that they needed no new laws and no further hearings, only the 'gumption' to assert their "superior power" under the Constitution.

Raoul Berger, a law historian and a senior fellow at the Harvard Law School, told a joint meeting of three subcommittees that the Administration had relied on "pseudo-precedents" and "boilerplate" law to back the "myth" of executive privilege.

"You are the superior power," he told three Democratic Senators at the hearing—Sam J. Ervin, Jr., of North Carolina, Edmund S. Muskie of Maine, and Edward M. Kennedy of Massachusetts.

Mr. Berger took the Senators through 12 pages of legal history that he had drawn up. They showed that there was no precedent under English parliamentary practice for the withholding of information from Congress and no precedent under the Constitution.

President Nixon has argued that privilege is "rooted in the Constitution" and based on the separation of governmental powers among the executive, legislative and judicial branches.

Mr. Berger said that such arguments were "speculation based on no evidence," and that the President has supplied "the clincher" by instructing his staff to appear before the grand jury investigating the Watergate affair.

"He is scarcely consistent," Mr. Berger said of the President.

"The separation of powers does not bar inquiry by the judiciary, one coordinate branch, while it does bar inquiry by another, the Congress."

He said that the legislative branch was set up as the "grand inquest" or the "highest grand jury in the land" with the power of impeachment and the power to call anyone before it. He asked:

"And why does disclosure to the grand jury of confidential communications between members of the White House staff not inhibit the candor allegedly essential to performance of executive functions, whereas disclosure to Congress, according to President Nixon, would 'weaken and compromise' the 'candor with which such advice is rendered'?"

He said that the contempt power of Congress had been clearly established.

"You don't need more hearings, you need gumption," he said.

He said that the Senators had been treated like "office boys" by some people in the Administration. "You'll be treated that way until you stand up on your hind legs and kick them in the slats," he said.

He suggested action on the Administration's efforts to keep John W. Dean 3d, the President's legal counsel, from appearing before Congress.

"If there was ever a case that will stink in the nostrils of the court, it is the attempt to shield Dean from Congressional inquiry," he said.

He said that Attorney General Richard G. Kleindienst, in explaining executive privilege to the subcommittees on Tuesday, relied on "executive boilerplate" rather than law.

Under old English parliamentary law, he said, anyone refusing a subpoena by the legislative bodies there would be thrown into the tower of London.

"Hear that, Senator Ervin?" Senator Muskie asked.

Senator Ervin has suggested using subpoena and arrest procedures to force the executive privilege matter into the courts.

Mr. Berger said, "If I had six Senator Ervins, old as I am, I'd storm the White House."

Ralph Nader, the consumer advocate, testified that he had had great difficulty in trying to dig documents out of the executive branch under the Freedom of Information Act.

THE WHITE HOUSE,
Washington, D.C., May 3, 1973.

The President desires that the invocation of Executive Privilege be held to a minimum. Specifically:

1. Past and present members of the President's staff questioned by the FBI, the Ervin Committee, or a Grand Jury should invoke the privilege only in connection with conversations with the President, conversations among themselves (involving communications with the President) and as to Presidential papers. Presidential papers are all documents produced or received by the President or any member of the White House staff in connection with his official duties.

2. Witnesses are restricted from testifying as to matters relating to national security not by executive privilege, but by laws prohibiting the disclosure of classified information (e.g., some of the incidents which gave rise to concern over leaks). The applicability of such laws should therefore be determined by each witness and his own counsel.

3. White House Counsel will not be present at FBI interviews or at the Grand Jury and, therefore, will not invoke the privilege in the first instance. (If a dispute as to privilege arises between a witness and the FBI or the Grand Jury, the matter may be referred to White House Counsel for a statement of the President's position.)

THE WHITE HOUSE,
Washington, D.C., May 4, 1973

The following is a supplement to the Memorandum of May 3, 1973, regarding the invocation of Executive Privilege:

White House Counsel will be present at informal interviews of White House personnel by Ervin Committee Staff, but only for the purpose of observing and taking notes. Privilege will be invoked by White House Counsel, if at all, only in connection with formal hearings before the Ervin Committee.

[From the Congressional Record, Apr. 3, 1973]

GAO REPORT ON FLIGHTS MADE BY THE PRESIDENT AND HIS CABINET DURING THE 1972 ELECTION CAMPAIGN

Mr. PROXMIRE. Mr. President, last September, I asked the General Accounting Office to determine the extent to which the Committee for the Reelection of the President was paying for the political trips of the President, the Vice President, the Cabinet, and other members of the administration.

I have now received a report from the Comptroller General giving much of that information.

According to his facts, the Committee to Reelect the President reimbursed the Government for 23 trips out of 103 trips made by the 89th Military Airlift Wing

on behalf of the White House and the Cabinet from September 1 through election day. Whether any of the remaining trips were political and should have been paid for is not determined by the GAO.

The White House refused to allow the GAO access to the flight logs of the Presidential crew. However, some 32 trips made by the Presidential crew have since been paid for by the Committee to Reelect the President.

May I also say that I am the Member of Congress referred to anonymously by the General Counsel of the GAO, Mr. Paul H. Dembling when he testified before the Subcommittee on Foreign Operations and Government Information of the House Government Operations Committee recently.

Until I have had an opportunity to carefully analyze the information presented to me by the Comptroller General I shall make no further comment about it. However, I think it should be made public and I ask unanimous consent that the letter from the Comptroller General and summary of the trips be printed at this point in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows :

COMPTROLLER GENERAL OF THE
UNITED STATES,
Washington, D.C., April 18, 1973.

Hon. WILLIAM PROXMIRE,
U.S. Senate.

DEAR SENATOR PROXMIRE: In accordance with your request of September 27, 1972, and subsequent discussions with your office, GAO has examined trips taken by the President and his family, the Vice President, White House Staff, and Cabinet officers. It was agreed that our examination would be limited to transportation provided by the 89th Military Airlift Wing, Andrews Air Force Base (AFB), Washington, D.C., during September, October, and the first week of November 1972. It was also agreed that the specific information we would furnish you would be a list of the trips made by those mentioned above with an indication as to which trips were paid for by the Finance Committee to Re-Elect the President and the amount the Committee reimbursed the Government.

From flight records of the 89th Military Airlift Wing, we identified 103 trips made by the White House and the Cabinet officers. We found that the Finance Committee to Re-Elect the President had reimbursed the Government for 23 of the trips. Our examination was restricted to trips made by other than the Presidential pilot and crew because the Presidential crew's flight records were not available to us.

However, information obtained by our Office of Federal Elections showed an additional 32 trips made by the Presidential crew and paid for by the Finance Committee to Re-Elect the President. We could not determine the total number of trips made by the crew during the period under examination.

SUMMARY OF TRIPS MADE BY OTHER THAN PRESIDENTIAL CREW

We identified from flight logs 103 trips made by the 89th Military Airlift Wing for the White House and for Cabinet officers between September 1 and November 7, 1972.

Twenty-six of the trips were made by Cabinet officers, and the costs were paid by the agency involved except in the case of the Secretary of Defense. Eight trips made by Secretary of Defense Laird were charged to the 89th Military Airlift Wing appropriation.

The remaining 77 trips were made for the White House. The flight logs for these trips showed only itinerary data and not the names of passengers. The Finance Committee to Re-Elect the President has reimbursed the Government \$50,355 for 23 of these trips.

Details of the 103 trips, including an indication as to whether costs were paid by the Finance Committee to Re-Elect the President, are included in enclosure I.

TRIPS MADE BY THE PRESIDENTIAL CREW

Our examination of payment documents at the Air Force Finance Office, Bolling AFB, Washington, D.C., and information available at our Office of Federal Elections showed that the Finance Committee to Re-Elect the President had paid \$98,936 for 32 additional White House trips made by the 89th Military Airlift Wing during the period we examined. These trips were not included in the 103 we identified through flight logs on file at Andrews AFB and manifests

at Headquarters, Military Airlift Command, Scott AFB, Illinois. We assume that they were made by the Presidential crew and that the pertinent logs and manifests were retained by the Military Assistant to the President. Details of these trips are included as enclosure II.

LIMITATIONS ON AVAILABLE FLIGHT DATA

The 89th Military Airlift Wing is responsible for fulfilling the air transportation requirements of the President and other key Government officials. Air Force officials informed us that the Military Assistant to the President maintains flight log information and manifests for trips made by the Presidential pilot and crew. Flight log information for all other trips flown by the 89th Military Airlift Wing are on file at Andrews AFB.

All flight manifests are maintained at Headquarters, Military Airlift Command, except those pertaining to White House flights. The Military Assistant to the President maintains the manifests for all White House flights, even those not flown by the Presidential crew.

In response to our request for the flight and manifest data, the Counsel to the President said that such records have been traditionally considered personal to the President and thus not subject to inquiry by the Congress.

We trust this information is satisfactory. We will be glad to discuss this matter in detail with your or members of your staff.

Sincerely, yours,

ELMER B. STAATS,
Comptroller General of the United States.

ENCLOSURE I

SUMMARY OF TRIPS BY OTHER THAN PRESIDENTIAL CREW FOR WHITE HOUSE AND CABINET OFFICERS BETWEEN SEPT. 1 AND NOV. 7, 1972

Date	Agency	Itinerary	Passenger	Cost paid by—
Cabinet (26 flights):				
Sept. 24	State	Andrews AFB to La Guardia International Airport, N.Y., and return.	Secretary of State.	Department of State.
Sept. 29	do	La Guardia International Airport, N.Y. to Andrews AFB	do	Do.
Oct. 2	do	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	Do.
Oct. 10	do	Andrews AFB to La Guardia International Airport, N.Y., and return.	do	Do.
Oct. 12	do	La Guardia International Airport, N.Y., to Andrews AFB	do	Do.
Sept. 21	Justice	Andrews AFB to Myrtle Beach AFB, S.C.	Attorney General	Department of Justice.
Sept. 23	do	Myrtle Beach AFB, S.C., to Andrews AFB	do	Do.
Sept. 6	Labor	Andrews AFB to Sullivan County International Airport, N.Y., and return	Secretary of Labor	Department of Labor.
Sept. 13	Agriculture	Andrews AFB to Des Moines and Burlington, Iowa, to Mankato, Minn., and return to Andrews AFB	Secretary of Agriculture	Department of Agriculture.
Oct. 30	do	Andrews AFB to Bloomington, Ill., to Amarillo, Tex., to Albuquerque and Kirkland, N.M.	do	Do.
Sept. 1	Treasury	Andrews AFB to Westover AFB, Mass.	Secretary of the Treasury	Department of the Treasury.
Sept. 4	do	Westover AFB, Mass., to Andrews AFB	do	Do.
Oct. 21	do	Andrews AFB to Ingalls Field, Va., and return	do	Do.
Oct. 25	do	Andrews AFB to Chicago, Ill.	do	Do.
Oct. 26	do	Chicago, Ill., to Andrews AFB	do	Do.
Nov. 2	Commerce	Andrews AFB to Logan International Airport, Mass., and return.	do	Do.
Oct. 19	do	Andrews AFB to Tinker AFB, Okla., to Los Angeles, Calif., and return to Andrews AFB	do	Department of Commerce.
Nov. 6 and 7	Defense	Andrews AFB to Chicago, Ill., and return.	do	Do.
Sept. 5 and 6	do	Andrews AFB to Alameda Naval Air Station, Calif., to Knoxville, Tenn., and return to Andrews AFB	do	Air Force appropriation for operating the 89th Military Airlift Wing.
Sept. 18 and 19	do	Andrews AFB to Mosinee, Madison, and Stevens Point, Wis., and return to Andrews AFB	do	Do.
Sept. 22	do	Andrews AFB to Hagerstown, Md., and return.	do	Do.
Sept. 26 and 28	do	Andrews AFB to Tinker AFB, Okla., to Sheppard AFB and Carswell AFB, Tex., to McConnell AFB, Kans., and return to Andrews AFB	do	Do.
Oct. 13 and 14	do	Andrews AFB to Pensacola, Fla., and return	do	Do.
Oct. 21 to 23	do	Andrews AFB to East Hartford, Conn., to Quonset Point, R.I., to East Hartford, Conn., and return to Andrews AFB	do	Do.
Oct. 25 to 31	do	Andrews AFB to London, England to Rota, Spain, to Norfolk, Va., and return to Andrews AFB	do	Do.
Nov. 2 and 3	White House (77 flights)	Andrews AFB to Oshkosh, Mosinee, and Madison, Wis., and return to Andrews AFB	do	Do.
Sept. 14	do	Andrews AFB to Birmingham, Ala., and return	Unknown	Do.
Sept. 19	do	Andrews AFB to Montgomery, Ala., and return	do	Do.
Sept. 19 to 21	do	Andrews AFB to Los Angeles and San Francisco, Calif., and return to Andrews AFB	do	Do.
Oct. 30 and 31	do	Andrews AFB to El Toro, Calif., and return	do	Do.
Nov. 3 to 7	do	Andrews AFB to El Toro and Ontario, Calif., and return to Andrews AFB	do	Do.
Sept. 12	do	Andrews AFB to Colorado Springs, Colo., and return	do	Do.
Sept. 22 and 23	do	Andrews AFB to Homestead AFB, Fla., to Ashland, Ky., and return to Andrews AFB	do	Do.
Oct. 27 and 28	do	Andrews AFB to Tristate Airport, W. Va., to Ashland, Ky., to Homestead AFB, Fla., and return to Andrews AFB	do	Do.

Nov. 7	Andrews AFB to Homestead AFB, Fla., and return.	do.
Sept. 3	Andrews AFB to Atlanta, Ga., and return.	do.
Oct. 4	do. Andrews AFB to Chicago, Ill., and return.	do.
Oct. 24	Andrews AFB to Ashland, Ky., and return.	do.
Oct. 19	Andrews AFB to Detroit, Mich., and return.	do.
Sept. 8	Andrews AFB to Fairbridge AFB, Mich., and return.	do.
Sept. 19	Andrews AFB to Minneapolis, Minn., and return.	do.
Sept. 10 and 11	Andrews AFB to Nellis AFB, Nev., and return.	do.
Sept. 18	Andrews AFB to Newark, N.J., and return.	do.
Nov. 6 and 7	Andrews AFB to Islip, N.Y., and return.	do.
Oct. 22 and 25	Andrews AFB to Albuquerque, N.Mex., and return to Andrews AFB.	do.
Sept. 6	Andrews AFB to JFK International Airport, N.Y., to Cleveland, Ohio, and return to Andrews AFB.	do.
Oct. 13 and 14	Andrews AFB to JFK International Airport and Westchester County Airport, N.Y., and return to Andrews AFB.	do.
Sept. 24	Andrews AFB to JFK International Airport, N.Y., and return to Andrews AFB to LaGuardia International Airport, N.Y., and return.	do.
Sept. 8	do. Andrews AFB to LaGuardia International Airport, N.Y., and return.	do.
Sept. 9	do.	do.
Sept. 13 and 14	do. Andrews AFB to Dulles International Airport, Va., to LaGuardia International Airport, Unknown.	Vice President.
Sept. 17	do. Andrews AFB to Laguardia International Airport, N.Y., and return to Andrews AFB.	do.
Sept. 19	do. Andrews AFB to LaGuardia International Airport, N.Y., and return to Andrews AFB.	do.
Sept. 20	do.	do.
Sept. 26	do.	do.
Sept. 28	do.	do.
Sept. 30	do.	do.
Do.	do.	do.
Oct. 3	do. Andrews AFB to LaGuardia International Airport, N.Y., to Johnson City, Tex., and return to Andrews AFB.	D. Henry Kissinger
Sept. 28 and 29	do. Andrews AFB to LaGuardia International Airport, N.Y., and return to Andrews AFB.	do.
Oct. 24 and 25	do. Andrews AFB to LaGuardia International Airport, N.Y., and return to Andrews AFB.	do.
Nov. 3 and 4	do. Andrews AFB to Cleveland, Ohio, and return to Andrews AFB.	do.
Oct. 13	do. Andrews AFB to Yonkers, Pa., and return to Andrews AFB.	do.
Oct. 27	do. Andrews AFB to Philadelphia, Pa., and return to Andrews AFB.	do.
Oct. 16	do. Andrews AFB to Wilkes-Barre, Pa., and return to Andrews AFB.	do.
Sept. 13	do. Andrews AFB to Beaufort, S.C., and return to Andrews AFB.	do.
Sept. 15	do. Andrews AFB to Ellsworth AFB, S.Dak., to Seattle, Wash., and return to Andrews AFB.	do.
Sept. 5 and 6	do. Andrews AFB to McGehee-Tyson Field, Tenn., and return to Andrews AFB.	do.
Oct. 6 and 7	do. Andrews AFB to Hartfield AFB and Randolph AFB, Tex., and return to Andrews AFB.	do.
Sept. 9 and 10	do. Andrews AFB to Charleston and Huntington, W.Va., and return to Andrews AFB.	do.
Sept. 14	do. Andrews AFB to Hot Springs, W.Va., and return to Andrews AFB.	do.
Sept. 22 and 23	do. Andrews AFB to Huntington, W.Va., and return to Andrews AFB.	do.
Oct. 19	do. Andrews AFB to TriState Airport, W.Va., and return to Andrews AFB.	do.
Oct. 21	do. Andrews AFB to Atlantic City, N.J., and return.	do.
Oct. 26	do. Andrews AFB to Atlantic City, N.J., and return.	do.
Oct. 27	do. Andrews AFB to Atlantic City, N.J., and return.	do.
Oct. 11	do. Andrews AFB to Atlantic City, N.J., and return.	do.

ENCLOSURE I
SUMMARY OF TRIPS BY OTHER THAN PRESIDENTIAL CREW FOR WHITE HOUSE AND CABINET OFFICERS BETWEEN SEPT. 1 AND NOV. 7, 1972—Continued

Date	Agency	Itinerary	Passenger	Cost paid by—
Sept. 13		Andrews AFB to Philadelphia and Pittsburgh, Pa., to Andrews AFB.	Mr. Robert Finch	\$1,124.51
Sept. 18 to 20		Andrews AFB to Billings and Yellowstone's, Mont., and Idaho Falls, Idaho, to Andrews AFB. Unknown	do	10,875.08
Sept. 18 to 21		do	do	do
Oct. 23		Andrews AFB to Lockbourne, Ohio, and return	President's family	1,025.68
Oct. 27		Andrews AFB to Shreveport, La., to Gulfport, Miss., to Keesler AFB, Miss., to Minneapolis, Minn., and return to Andrews AFB.	do	5,333.54
Oct. 28		Andrews AFB to Detroit, Mich., and return	do	1,179.53
Sept. 14		Andrews AFB to Trenton, N.J., and return	do	364.13
Sept. 5		Andrews AFB to Mayport Naval Air Station, Fla., and return	do	769.26
Sept. 8		Andrews AFB to Chicago, Ill., and return	do	72.00
Sept. 10		Andrews AFB to Cleveland, Ohio, and return	do	1,538.52
Sept. 11		Andrews AFB to LaGuardia International Airport, N.Y., and return	do	1,025.80
Sept. 12		Andrews AFB to Nashville, Tenn., and return	do	512.84
Sept. 28 to 29		Andrews AFB to Birmingham, Ala., to Craig AFB, Ala., to Little Rock, Ark., to Raleigh-Durham, N.C., and return to Andrews AFB	do	1,384.68
Oct. 1		Andrews AFB to Milwaukee, Wis., and return	do	2,923.18
Oct. 5		Andrews AFB to Indianapolis, Ind., and return	do	do
Oct. 6		Andrews AFB to Richards-Gebaur AFB, Mo.; to Los Angeles, El Toro, and Ontario, Calif.; to Cleveland, Ohio, and return to Andrews AFB	do	1,641.08
Oct. 18		Andrews AFB to Westchester County Airport, N.Y., to Montpelier, Vt., to Berlin, N.H., and return to Andrews AFB	do	1,435.95
Oct. 23		Andrews AFB to Columbia and Myrtle Beach, S.C., and return to Andrews AFB	do	6,154.08
Oct. 26		do	do	do
Nov. 6		do	do	1,791.68
Nov. 7		do	do	1,384.67
Nov. 4		do	do	6,820.77
		do	do	1,208.34
		do	do	666.69
		do	do	410.27
		do	do	512.84
				150,355.00

123 flights paid by Finance Committee to Re-Elect the President.

ENCLOSURE II

WHITE HOUSE TRIPS BY THE PRESIDENTIAL CREW BETWEEN SEPT. 1 AND NOV. 7, 1972, FOR WHICH THE COST WAS PAID BY THE FINANCE COMMITTEE TO REELECT THE PRESIDENT

Date	Itinerary	Passenger	Amount of reimbursement
Sept. 22 and 23	Andrews AFB to Laredo, Harlingen, and San Antonio, Tex., and return to Andrews AFB	President Nixon and staff	\$8,283.68
Sept. 18 to 20	Andrews AFB to Chicago, Ill., to Billings, Mont., to Idaho Falls, Idaho, to Moffett Field, Calif., to San Antonio, Tex., to Oklahoma City, Okla., and return to Andrews AFB.	President's family	16,794.00
Sept. 23	Andrews AFB to Chicago, Ill., and return	do	1,641.09
Sept. 26	Andrews AFB to Kansas City, Kans., to Stapleton and McCaren, Calif., to Phoenix, Ariz., to Santa Fe and Carlsbad, N. Mex., and return to Andrews AFB.	do	5,846.38
Oct. 24	Andrews AFB to Morgantown, W. Va., and return	do	669.69
Oct. 30	Andrews AFB to Syracuse and Buffalo, N.Y., and return to Andrews AFB	do	1,333.88
Do	Andrews AFB to Milwaukee, Wis., and return	do	1,948.79
Sept. 7	Andrews AFB to Laguardia International Airport, N.Y., and return	do	820.54
Sept. 9	Andrews AFB to Willow Grove, Pa., and return	do	512.84
Sept. 10	Andrews AFB to Laguardia International Airport, N.Y., and return	do	461.35
Sept. 12	Andrews AFB to St. Louis, Mo., to Cleveland and Port Columbus, Ohio, and return to Andrews AFB	do	2,410.34
Sept. 16	Andrews AFB to Port Columbus, Ohio and return	do	1,025.68
Sept. 18	Andrews AFB to Philadelphia, Pa., and return	do	615.39
Sept. 21 and 22	Andrews AFB to Bismarck and Fargo, N.D., to Sioux Falls, S. Dak., and return to Andrews AFB	do	588.88
Sept. 15	Andrews AFB to Morrisstown, Pa., and return	do	410.27
Sept. 16	Andrews AFB to Laguardia International Airport, N.Y., and return	do	338.99
Sept. 26 to 28	Andrews AFB to Newark, N.J., to Oakland and Los Angeles, Calif., and return to Andrews AFB	President Nixon President's family	11,574.45
Oct. 9	Andrews AFB to Laguardia International Airport, N.Y., and return	do	769.26
Oct. 13	Andrews AFB to Quincy, Ill., to Kansas City, Kans., to Wheeling, W. Va., to Hagerstown, Md., and return to Andrews AFB	do	2,668.76
Sept. 4 and 5	Andrews AFB to Harrisburg, Pa., to La Guardia International Airport, N.Y., and return to Andrews AFB	do	1,025.88
Oct. 15	Andrews AFB to Buffalo, N.Y., and return	do	1,025.88
Oct. 19	Andrews AFB to Detroit and Wayne, Mich., and return to Andrews AFB	do	1,179.53
Oct. 31 and Nov. 1	Andrews AFB to Lawrence G. Hanscom Field, Mass., and return	do	1,025.68
Oct. 10	Andrews AFB to JFK International Airport, N.Y., and return	do	326.00
Oct. 12	Andrews AFB to Atlanta, Ga., and return	do	2,723.40
Oct. 23	Andrews AFB to Washburn County and MacArthur Airports, N.Y., and return to Andrews AFB	do	1,929.08
Oct. 28	Andrews AFB to Cleveland, Ohio, to Saginaw, Mich., and return to Andrews AFB	do	3,971.63
Nov. 3	Andrews AFB to Chicago, Ill., to Tulsa, Okla., to Providence, R.I., and return to Andrews AFB	do	8,510.63
Nov. 2	Andrews AFB to Grand Rapids, Mich., to Chicago, Ill., and return to Andrews AFB	President's family	1,794.94
Nov. 4	Andrews AFB to Greensboro, N.C., to Albuquerque, N. Mex., to Ontario and El Toro, Calif., and return to Andrews AFB	President Nixon	11,687.83
Sept. 1	El Toro, Calif., to Seattle, Wash., and return	President's family	2,256.50
Oct. 21	JFK International Airport, N.Y., to Andrews AFB	do	36.00
Total			138,936.44

1 32 flights.

