Exhibit 43

FEB 5 1973

MEMORANDUM FOR THE HONORABLE JOHN D. EHRLICHMAN
Assistant to The President for Domestic Affairs

Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff".

This subject obviously raises the question of "Executive Privilege", since generally speaking the power of a congressional committee to investigate is an extremely broad one--as broad as the potential power of Congress to legislate. Barenblatt v. United States, 360 U.S. 109 (1959). And the power to investigate carries with it the power to compel the testimony of a witness:

> "We are of the opinion that the power of inquiry--with process to enforce it--is an essential and appropriate auxilliary to the legislative function." McGrain v. Daugherty, 273 U.S. 135.

Thus, if "White House staff" 1/ personnel are to be exempt from appearing or testifying before a congressional committee, it is because they have some special immunity or privilege not accorded others. It may be helpful to mention several closely related but not identical problems, any one of which could be the subject of a learned discourse which it would be neither possible nor profitable for you to read at length:

1/ The term "White House staff" is not used in any precise or technical sense. In view of the conclusions reached, no useful purpose would be served in attempting to fashion a definition of the term.

(a) Cabinet officers in the past have refused to accept subpoenas, but nonetheless have appeared and testified voluntarily on the subject matters specified in the subpoena; the technical question of the manner in which testimony may be compelled, if it is compellable at all, would, I think, be of relatively little concern unless one were defending a contempt prosecution. If a subpoena is insisted upon, and the committee has its back up, a subpoena will undoubtedly be sent, so that the presence or absence of a subpoena is not likely to be the critical element in a decision as to whether or not a presidential adviser should testify.

(b) Another slight variant of the problem is the subpoena requiring appearance at a place away from the Seat of Government. As you may recall, this question arose at the time of the trial of Aaron Burr for treason before John Marshall, sitting as a circuit judge in Richmond. Marshall issued a subpoena to Thomas Jefferson, who was then President, requiring Jefferson to produce certain documents; Jefferson responded with a letter saying in effect that if the courts were free to summon the President from place to place throughout the United States, he would be at their mercy in a manner incompatible with the coordinate status of the Executive Branch of the Government. That dispute between these two bitter enemies was not resolved--Jefferson did not in fact appear.

In the misdemeanor prosecution of Aaron Burr, Chief Justice Marshall, while adhering to his position that the President is subject to subpoena, conceded:

> "In no case of this kind would a court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and so obvious that all must acknowledge them." Robertson, Report of the Trials of Aaron Burr, Vol. 2, pp. 235, 236.

Everyone associated with the Executive Branch from then until now, so far as I know, has taken the position that the President himself is absolutely immune from subpoena by anyone, at the Seat of Government or away from it. 2/ This, of course, does not answer the question as to whether his immediate advisers are likewise exempt.

In 1806, a United States circuit court sitting in New York subpoenaed three Cabinet officers to appear and give testimony in a civil proceeding pending before that court. The three Cabinet officers declined to respond to the subpoena, advising the Court by letter that the press of their official duties prevented their absenting themselves from the Seat of Government, but offering to give testimony by deposition. United States v. Smith, 27 Fed. Cases 1194 (No. 16,342) (C.C.D. NY 1806). A similar ruling involving a Cabinet officer was made by Attorney General Moody in 1905. 25 Ops. A.G. 326.

Thus, the Marshall-Jefferson precedent involved two very strong arguments in favor of privilege which may not be present in other situations. First, the President himself was sought to be subpoenaed; second, he was sought to be subpoenaed to a place away from the Seat of Government. When a lesser official in the Executive Branch is sought to be subpoenaed at the Seat of Government, the Jefferson precedent, in my opinion, cannot be regarded as controlling.

(c) Another related question is the obligation of the Executive Branch to furnish documents in its custody to a congressional investigating committee. This, too, involves a question of Executive privilege, and George Washington asserted such a privilege with respect to documents concerning the ill-fated St. Clair Expedition during

2/ President Jackson repeatedly claimed immunity from the congressional subpoena power. Warren, Presidential Declarations of Independence, 10 Boston University Law Review 1, 8-12 (1930).

his Presidency, and it has been unvaryingly claimed by his successors. But the claim of privilege for documents is not necessarily co-extensive with the claim for personal immunity from subpoena which is the subject of this memorandum. A claim for documents in the custody of the Executive Branch necessarily involves Executive business, whereas it cannot always be said to a certainty in advance that a White House adviser will necessarily be interrogated on a matter pertaining to his official duties. There is here, I think, a certain analogy to judicial proceedings, which have always made a distinction between a claim of absolute immunity from even being sworn as a witness, and a right to claim privilege in answering certain questions in the course of one's testimony as a witness. The former type of privilege, so far as I know, extends only to a criminal defendant (and, under a recent ruling of the Court of Appeals for the Ninth Circuit, of course, to Earl Caldwell, a New York Times reporter); the second type of privilege is available to attorneys, doctors, those who claim that an answer may incriminate them, and the like. But all of this second class must at least be sworn as witnesses, and invoke privilege only with respect to particular questions or particular lines of testimony.

On the other hand, the furnishing of a document to a congressional committee involves little, if any, inconvenience to the Executive Branch or to the President and his advisers. The requirement of personal attendance of a witness at a hearing, on the other hand, does involve some degree of inconvenience, depending on the length of time the witness is expected to be present, the place the hearing is to be held, and the closeness of the relationship between the witness and the President. To this extent, then, the requirement of personal attendance by a witness is more burdensome to the Executive than is the requirement that a document be furnished.

The practice with respect to past White House staff members has been erratic, and the only examples I have been able to find are ones concerning intimate advisers

of the President--people in the position such as you occupy, as opposed to the positions occupied by those who report to you.

On two occasions during the Administration of President Truman, a subcommittee of the House Committee on Education and Labor issued subpoenas to John R. Steelman, who held the title "Assistant to the President". In both instances he returned the subpoena with a letter stating that "In each instance the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee."

In 1951, Donald Dawson, an Administrative Assistant to President Truman, was requested to testify before a Senate Subcommittee investigating the Reconstruction Finance Corporation, one aspect of which concerned Dawson's alleged wrongdoing. While President Truman felt that this request constituted a violation of the principle of the separation of powers, he nevertheless "reluctantly" permitted Mr. Dawson to testify in order to give him an opportunity to clear his name.

In 1944, Jonathan Daniels, an Administrative Assistant to President Roosevelt, refused to respond to a subpoena requiring him to testify with respect to his reported attempts to compel the resignation of the Rural Electrification Administrator. He grounded his refusal on the confidential nature of his relationship to the President. The subcommittee of the Senate Committee on Agriculture then unanimously recommended that he be cited for contempt. Thereupon Daniels wrote the Subcommittee Chairman that he still believed that a legislative committee could not require either the President or his Administrative Assistant to testify as to their conversations; that he had since conferred with the President; that the latter did not think in the particular matter his testimony would adversely affect the public interest, and that Daniels was therefore now willing to answer the subcommittee's questions.

Sherman Adams, during the Eisenhower Administration, declined to testify before a committee investigating the Dixon-Yates Power contract on the ground of his confidential relationship with the President, but at a later point in the Administration volunteered to testify with respect to his dealings with Bernard Goldfine.

During the hearings on the nomination of Abe Fortas to be Chief Justice of the United States, the Senate Judiciary Committee requested W. DeVier Pierson, Associate Special Counsel to the President, to appear and testify regarding the drafting of legislation authorizing Secret Service protection for Presidential candidates. It had been reported to the Committee that Justice Fortas had participated in the drafting of this legislation, at a time when he was sitting as Associate Justice of the Supreme Court. Pierson declined the invitation, writing Senator Eastland as follows:

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

These precedents are obviously quite inconclusive, particularly if one seeks to apply them to lower level White House staff members. In a strictly tactical sense, the Executive Branch has a headstart in any controversy with the Legislative Branch,

since the Legislative Branch wants something the Executive Branch has, and therefore the initiative lies with the former. All the Executive has to do is maintain the status quo, and he prevails. Congress, of course, has the authority to itself attach and detain a witness whom it regards as contumacious, and the threat to do this apparently prevailed in the Daniels incident.

But the question of legal remedies is not the only one involved, as you are well aware. When the President claims Executive privilege and refuses either to divulge a document or to permit a witness to testify, he immediately draws to himself some criticism for "withholding" relevant evidence from the Congress or from the public. While a soundly determined claim of Executive privilege is not only in the best interests of the Executive Branch as an institution but of the President himself, an inadequately justified claim of Executive privilege, hastily made at the behest of its beneficiary, may be an actual disservice to the President. 3/ The Jonathan Daniels episode seems to be such an example.

To the extent that any generalizations may be drawn from the foregoing, they are necessarily tentative and sketchy. I offer the following:

(1) The President and his immediate advisors--that is, those who customarily meet with the President on a regular or frequent basis--should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee. They are presumptively available to the President 24 hours a day, and the necessity of either accommodating a congressional committee or persuading a court to arrange a more convenient time, could impair that availability.

3/ During the Teapot Dome investigation President Coolidge considered Attorney General Daugherty's recommendation to invoke Executive privilege as to his activities in the Department of Justice so ill-advised that he asked for his resignation. 101 Cong. Rec. 11461.

(2) I do not think this principle can or ought to be extended to all "members" of the White House staff, whatever that group may include. Whether one wants to classify on the basis of what appropriation their salaries are paid out of, the building in which they work, or otherwise, lower level White House staff members ought to have some form of testimonial privilege with respect to congressional investigating committees. But I think it far more in accordance with related doctrines in the law to say that such a privilege is not one which enables them to wholly disregard a subpoena, or to entirely refuse to appear before a congressional committee; instead, it is a privilege to refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President.

As a practical matter, this distinction may not be of great importance because if the Committee specifies the subject of the testimony in its request, and the subject is one with respect to which privilege may be claimed, the request itself could be declined on that basis. But in terms of advancing a coherent set of defensible principles, I think the distinction is an important one. 4/

(3) With respect to Cabinet members, the role of the Legislative Branch is somewhat more substantial; all hold offices and administer departments which are created by Act of Congress. The Justice Department, for example, administers and enforces hundreds of statutes which are enacted by Congress. Whether or not the Attorney General himself may be compelled to appear as a witness before a congressional committee to testify as to the manner in which the Department performs these tasks, I think there is no question but that the Department is obligated to furnish some knowledgeable witness in response to a

4/ The President can, of course, waive the privilege and permit either class of advisers to testify. In view of this, the President should be advised of any instance in which a member of the White House staff is subpoenaed or requested to testify.

Congressional request for testimony on this subject. On the other hand, I think it equally clear that no Cabinet officer could be interrogated at all with respect to what took place at a Cabinet meeting, or as to any portion of conferences or meetings which were called for the purpose of advising or formulating advice for the President.

(4) It is vital that a recommendation that the President assert privilege be a considered one, because the consequences of initially asserting the claim and then receding from it in the face of public criticism are obviously more hurtful than an initial decision not to assert the claim.

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