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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 68, 92D CONGRESS)

WASHINGTON, D.C. 20510

### PRELIMINARY MEMORANDUM TO SELECT COMMITTEE

#### RE CONGRESSIONAL POWER TO SUBPOENA DOCUMENTS IN WHITE

#### HOUSE CUSTODY

President Nixon, in his letter of July 6, 1973 (attached) has refused to permit The Select Committee access to papers prepared or received by his personal staff, which papers he has termed "Presidential papers." Though he has declined to use the term, he is, in fact, asserting the doctrine of executive privilege as to all "the private papers of his office, prepared by his personal staff" in order, it is said, that his personal staff may "communicate among themselves in complete candor."<sup>1</sup>

There is substantial debate among legal scholars as to whether executive privilege has any legal existence. Professor Raoul Berger had contended quite forcefully that there is no such concept. See generally, Berger, Executive Privilege

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1. Perhaps because he has already waived executive privilege as to testimony of his staff, the President ostensibly bases his refusal to produce Presidential papers on the doctrine of separation of powers, but his arguments sound in executive privilege terms.

v. Congressional Inquiry, 12 U.C.L.A.L.Rev. 1044 (1965).<sup>1</sup>

Other authorities, however, contend that some sort of executive privilege should be recognized. See Kramer & Marcuse, Executive Privilege -- A Study of the Period 1953-1960, 29 Geo. Washington L. Rev. 623, 827 (1961). No federal court has ever been directly presented with the proposition of law advocated by Mr. Nixon,<sup>2</sup> and consequently there is no legal precedent in his favor. However, it is not necessary to settle the debate as to whether executive privilege actually exists for it appears that in no event would it be applicable in the instant case.

First, it is reasonable to conclude that the privilege has been waived: presidential aides and former aides have been allowed to testify in full regarding the Watergate affair without any assertion of the privilege; presidential documents in the possession of witnesses have been submitted

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1. See further, 93 Cong. Rec. 40-41 (1930) (Remarks of Senator, later Justice, Black); 3 Hinds' Precedents of the House of Representatives at 185, quoting House Report No. 271 (1844):

"Thus it appears that there exists no rule which would exclude any evidence from the House or a Committee of the House, which are as competent to guard the interests of the State, and have as high motives for doing so as the Executive can have."

2. It is worth noting, that a like issue has been decided by at least one state court. Opinion of the Justices, 328 Mass. 655, 660-61, 102 N.E. 2d 79, 85 (1951):

"The attempt of the Senate to secure such information as might be contained in the report was not an interference with the executive department of the government in violation of art. 30 of the Declaration of Rights, relating to separation of powers...

... It was a permissible exercise of an attribute pertaining to legislative power." (emphasis added.)

to the Select Committee without any claim to privilege. Mr. Nixon has "opened the door" to evidence and it is now difficult for him to argue that presidential documents regarding Water-<sup>1</sup>gate may be withheld.

In this regard, it is worth noting that the distinction between testimonial and documentary evidence which the letter of July 6, 1973, attempts to draw is unpersuasive. The letter (at p.2) contends that testimonial evidence "can, at least, be limited to matter within the scope of the investigation." (However, the President recognizes that the oral testimony will be, in fact, "unrestricted.") But the letter fails to recognize that documentary evidence can also be restricted. Any

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1. See Kramer & Marcuse, Executive Privilege--A Study of the Period 1953-1960, 29 Geo. Washington L. Rev. 827, 901 (1961), noting that at the time of the Army-McCarthy hearings it was felt that certain information would have been privileged "had not the Administration opened the door by volunteering information about it." The waiver principle is well-recognized in the law. See Tigar, Foreward: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1 (1970):

"Voluntary disclosure of any such fact (which may in any degree form a link in a chain of evidence against the witness) evinces, the argument runs, an intention not to rely upon the privilege, at least not in that forum, and not with respect to the entire subject matter to which the initial disclosure relates. The same general rule is followed with respect to all testimonial privileges, constitutionally-based or not, including the lawyer-client, clergy man-penitent, and doctor-patient privileges." Id. at 9-10 (citing Preliminary Draft of Proposed Rules of Evidence for the U.S. District Courts) (emphasis added).

Select Committee subpoena can be carefully drawn so that it is, in the letter's terms, "limited to matters within the scope of the investigation." If a particular document covers matters both within and outside of the investigation, the irrelevant parts can be excised. There is, in short, no reason to draw a distinction between documentary and testimonial evidence and waiver of rights as to the former<sup>1</sup> should also result in waiver as to the latter.

The second reason that executive privilege is inapplicable in the present circumstances is that the doctrine may not be used as a device to conceal information relating to the commission of a crime. Serious charges of criminal misconduct at the highest level of government have been made before the Select Committee. Certain files presently in the custody of the White House may support or rebut the charges. Such highly relevant information may not be shielded from the public on grounds of executive privilege.

President Nixon's prior statements on the privilege appear to support this conclusion. In his Guidelines of May 3, 1973, he defined Presidential papers as "all documents produced or received by the President or any member of the White House staff in connection with his official duties."

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1. Moreover, as noted, some Presidential documents regarding Watergate have been received without Presidential objection.

(emphasis added). But no document produced or received in furtherance of a crime may be justifiably considered one resulting from an exercise of an official duty. See also the Presidential Press Release of May 22, 1973, at 8:

"Executive Privilege will not be invoked as to any testimony concerning possible criminal conduct or discussion of possible criminal conduct in the matters presently under investigation, including the Watergate affair and the alleged cover-up."

The case law supports the use of a subpoena to the President to achieve relevant information regarding the commission of crimes. Chief Justice Marshall, in United States v. Burr, 25 Fed. Cas. at 187 (No. 14964) (C.C. Va. 1807), with respect to relevant evidentiary documents in the custody of the President, stated:

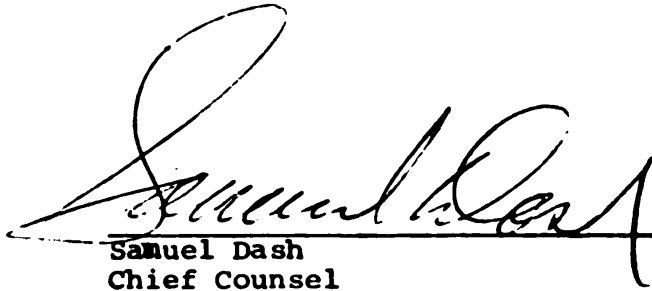
"That the President of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, in not controverted."

Though the Burr case is an old one, it is still good law as evidenced by the Supreme Court's favorable citation in Branzburg v. Hayes, 408 U.S. 665, 689 n. 26 (1972). The

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1. The "precedents" cited by Mr. Nixon are not sufficiently delineated to allow comment on each, but we know of no incident where a President, faced with compelling evidence that crimes have been committed, has invoked the privilege to withhold documents that might bear on these or other criminal violations. See generally Berqer, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A. L.Rev. 1044 (1965).

Court also quoted with approval Jeremy Bentham's observation,

"Were the Prince of Wales, The Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper or the barrow-woman were to think it proper to call upon them for their evidence, could they refuse it? No, most certainly." 408 U.S. at 689 n. 26.



Samuel Dash  
Chief Counsel



James Hamilton  
Assistant Chief Counsel



Ronald D. Rotunda  
Assistant Counsel

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