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1	MEMO	FROM J. MICHAEL SHEPHERD SUBJECT: SUBJECT FOI/PA REQUEST OF WILLIAM S. PALEY [PARTIAL]	1	9/18/1986	B6 B7(C)

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B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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THE WHITE HOUSE

WASHINGTON

September 30, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: J. MICHAEL SHEPHERD

SUBJECT: OLC Executive Privilege Materials

Barbara Percival, Senior Counsel in the Office of Legal Counsel, called me last week to inform us that, pursuant to our request, OLC had looked through its files and found no specific authority on the question of the participation of counsel in interviews conducted by Congressional investigators of White House staff. I told her that I was not working on that matter and suggested that she contact Chris Cox, as the question may arise in connection with the Deaver investigation.

As Barbara's attached letter indicates, Chris apparently is not working on this issue now. She therefore sent the attached materials to me for delivery to you. The documents are:

(1) Ted Olson's October 29, 1981 address to the Federal Legal Council on the role of OLC, with a good discussion, beginning on page 8, of procedures to be followed by an agency confronted by a Congressional request that may involve questions of Executive Privilege;

(2) a July 23, 1982 memorandum for former Associate Attorney General Rudolph Giuliani from Ted Olson, regarding a Congressional demand for the deposition of Fred Fielding, that reviews the history of Congressional requests for the testimony of White House officials and includes that a demand for testimony is even more intrusive and chilling in its effect on the deliberative process than a document request; and

(3) an OLC memorandum, with no addressee and a handwritten date of 1981 entitled "The Scope and Limits of Executive Privilege."

Attachments
cc: C. Christopher Cox

U.S. Department of Justice
Office of Legal Counsel

Washington, D.C 20530

September 26, 1986

J. Michael Shepherd
Associate Counsel to the President
The White House
Washington, D.C. 20500

Dear Mike:

I finally got in touch with Chris Cox today, but he told me he hasn't had anything to do (so far) with the proposed policy on having counsel present during congressional interviews. Since I am leaving momentarily for a two week vacation, could you do me a favor and give Peter these three memoranda? They are all quite general, and may not be of particular help, but should answer at least some questions. Of course, if he needs something more or different he should let us know.

I will be back in the office on October 14th, but Peter or whoever can contact Sam Alito (633-2051) before then if need be.

Thanks for your help. Sorry we didn't get a chance to chat this morning.

Sincerely,

Barbara

Barbara P. Percival
Senior Counsel
Office of Legal Counsel

Attachments

REMARKS OF THEODORE B. OLSON
to the
FEDERAL LEGAL COUNCIL

October 29, 1981

Ever since the Judiciary Act of 1789, the Attorney General has been charged with general responsibility for advising the President and the heads of Executive and military departments on legal matters. 1/ Under the current statutory formulation of this responsibility, the Attorney General "shall give his advice and opinion on questions of law when required by the President," and the head of an Executive department "may require the opinion of the Attorney General on questions of law arising in the administration of his department." As for the military departments, when a question of law arises which has not by statute been committed to another official, the Secretary of the department involved is required to send it to the Attorney General. The Attorney General's authority under these statutes has been further clarified by Executive Order No. 12146 so that agency heads who serve at the pleasure of the President are required to resolve interagency disputes by submitting them to the Attorney General. 2/

There are in addition a few specific statutory grants of opinion-rendering authority to the Attorney General, by which certain questions of law are required to be submitted

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1/ Act of September 24, 1789, 1 Stat. 92. See 28 U.S.C. §§511-13.

2/ Executive Order 12146 (July 18, 1979).

to him before an agency head may act. For example, under a statute dating from 1841 no public money may be expended for the purchase of land unless the Attorney General gives prior written approval of the sufficiency of the title. 3/

While the Attorney General has no specific statutory obligation to give legal opinions to the independent regulatory agencies, he is not prohibited from doing so. And, over the years, successive Attorneys General have construed their mandate and responsibility more or less expansively in this regard. In order to avoid wasted effort and to stay away from potential confrontations it has recently been the Department's position that a request for a legal opinion from an independent regulatory agency will generally be granted, but only on the condition that the requesting agency agree to consider it binding.

In recent years formal Attorney General opinions have been rendered infrequently -- only twenty or so have been issued during the past five years -- and the bulk of the Attorney General's advice-giving responsibilities has been discharged by the Office of Legal Counsel. OLC's authority to render legal opinions is derived from that of the Attorney General, who has delegated to OLC a variety of duties in

3/ See 40 U.S.C. §255. See also 15 U.S.C. § 1801 et seq. (Newspaper Presentation Act requires prior written consent of Attorney General for proposed joint operating arrangement).

connection with his opinion function. 4/ When rendered pursuant to this delegation, there is no difference in legal weight between an OLC opinion and an Attorney General opinion. Like an Attorney General opinion, an OLC opinion may properly be relied upon by Executive officers, and it is binding on such officers absent subsequent reversal by the Attorney General or the courts. 5/

From a practical point of view, the President and department heads seek legal advice from the Attorney General and OLC essentially for three reasons: first, because the opinions assist in directing executive action so as to avoid litigation; second, because they provide rules of operation which carry considerable weight with the courts should litigation nonetheless ensue; and third, because they can resolve disputes within

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4/ Under the authority of 28 U.S.C. §510, the Attorney General has assigned to OLC the responsibility to assist him in preparing the formal opinions of the Attorney General, rendering informal opinions and providing legal advice to the various agencies of government, and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet. 28 C.F.R. §0.25.

5/ See Smith v. Jackson, 246 U.S. 388, 390-91 (1918), aff'g 241 F.2d 747 (5th Cir. 1917) for the proposition that an officer of an Executive agency may and indeed in certain cases must rely on a ruling of the Attorney General on matters of law. See also Deener, The United States Attorneys General and International Law 104-05 (1957); Nealon, "The Opinion Function of the Attorney General," 25 N.Y.U.L. Rev. 825 (1950); Hart & Wechsler, The Federal Courts and the Federal System (2d ed.) at 70-74.

the Executive Branch with respect to legal issues. The fact that the Attorney General is also the government's chief law enforcement officer, and responsible for the conduct of litigation in the Executive branch, makes reliance on his prior view of the law particularly appropriate.

While Attorneys General have never claimed for their opinions the force of law, it has always been regarded as the proper practice within the Executive branch to follow their guidance. And Congress, while never directly legislating on this point, seems to assume that the opinions will be given practical effect. In our experience, agency heads do feel themselves bound by the Attorney General's opinion, and tend to follow it. This extends to the more common situation where the opinion is signed by the Assistant Attorney General in charge of the Office of Legal Counsel. In several cases, for example, an agency head has requested reconsideration of a formal OLC opinion in order to permit a course of action presumably otherwise precluded.

The kinds of questions which come to OLC from the agencies cover a wide range of issues that may arise under the statutes and the Constitution. Often the head of a department will wish to know what powers or duties flow from a statutory grant, or whether the absence of explicit authorization precludes his taking a contemplated action. While ordinarily an agency's own general counsel will be responsible for answering such questions in the first instance, it is often

important, where difficult and uncertain questions of law are involved, or controversial issues, to be able to rely upon the product of an independent and authoritative second source. Where questions of constitutional dimension appear to be involved, an agency general counsel will often consult with OLC in developing an agency position, then request more formal confirmation or correction before proceeding with its implementation. In the tradition established by the earliest Attorneys General, however, we have generally avoided passing on the constitutionality of acts of Congress even when requested to do so -- with the notable exception of cases where a conflict arises between prerogatives of the Executive and the Legislative branches. Furthermore, while there may be exceptions, the Attorney General generally avoids giving legal opinions on issues which are already before the courts for the obvious reason that the judiciary should and will resolve such questions. Finally, as noted above, in situations where two or more agencies are unable to resolve a legal dispute between them, including jurisdictional disputes, the President has directed that the dispute be submitted to the Attorney General and, through his delegation, to OLC.

Once a legal question is posed, we make every effort to research the matter thoroughly and develop, to the fullest extent possible, the clearest statement of what we believe the law provides and how the courts would resolve the matter. It is not our function to prepare an advocate's brief or simply to find support for what we or our clients might like the law to be. Needless to say, this

sometimes does little to enhance our popularity. Nevertheless, the Attorney General is interested in having us provide as objective a view as possible and we will continue to try to do so.

Where it is acting as legal adviser to the President, OLC often assists in the development of the Executive's overall approach toward a particular issue -- most commonly one with constitutional dimensions, particularly those involving separation of powers and Executive Branch prerogatives. The legislative veto is one recent example. Another is executive privilege -- about which I'd like to take the opportunity offered by this particular forum to say a few additional words.

But first, let me mention the opinions of the Comptroller General. I will defer to Mr. Van Cleve for a description of the situations in which it may be appropriate for an agency head or general counsel to solicit the views of the Comptroller

General rather than those of the Attorney General. Where the matter at issue is one of disbursement or the settlement of accounts, or involves the availability of funds, it may be one in which the opinion of the Comptroller General is the most appropriate response. However, I should acknowledge that in the sixty years since the Office of the Comptroller General was removed from the Treasury Department and made a part of the Legislative Branch, there have been instances in which the Attorney General and Comptroller General have found themselves at odds on which kinds of questions are appropriate for such disposition. There have been some noteworthy occasions on which considerable tension developed as to which of two conflicting legal opinions were binding upon the Executive Branch. It should come as no surprise that it has been the consistent position of the Attorney General that within the Executive branch the views of the Attorney General are dispositive. 6/ We feel that this position is constitutionally required. For if the Comptroller General's unique expertise warrants deference by Executive officers on some questions and in some situations, it would be inconsistent with our constitutional scheme of

6/ See e.g., 42 Op. A.G. 406, 415-16 (1969) (AG's conclusions about the Philadelphia Plan may be relied upon by Executive officers, notwithstanding contrary views expressed by Comptroller General); 37 Op. A.G. 562, 563 (1934) (AG's responsibility to decide meaning of term in Executive Order dealing with the adjustment of rates of compensation for certain government employees).

separation of powers to permit the Comptroller General, an officer of the Legislative branch, effectively to bind the Executive to his interpretation of the law.

Of course, we hope that no such conflict will develop in the Reagan Administration. We will make every effort to see that, wherever our responsibilities overlap, we work together to develop a mutually acceptable position.

I now want to discuss a problem which almost all of you have faced or will face in the coming months -- executive privilege. As you may know, the Administration has recently been deluged with a virtual flood of congressional demands for sensitive or deliberative information. Several of these demands, which initially take the form of letters to Cabinet Heads, have resulted in the issuance of subpoenas. On October 14, President Reagan asserted executive privilege for the first time by instructing Secretary Watt not to supply a congressional subcommittee with 31 documents which it had subpoenaed. This assertion of privilege was supported by a formal Attorney General's opinion to the President.

What should a general counsel do when informed that a congressional committee has requested information in the possession of the agency? First, it is important that you make sure that you are advised of each demand by a congressional committee for information from your agency. Your value in this process is necessarily proportional to the timeliness of notice to you that a demand has been received. The need to have agency lawyers following these situations from their inception

cannot be overemphasized. Second, you should make sure that the request is clearly articulated, preferably in writing, so that there will be a definite understanding of what precisely the committee wants and why it wants it. Next, you should immediately start analyzing the request and assembling the documents or, at the very least, determining what they are and where they can be located. You should then determine whether any of the materials requested contain diplomatic or military secrets or confidences, information obtained in confidential investigations, or (as is most likely to be the case) materials reflecting predecisional deliberative processes within the government, particularly the deliberations of cabinet or subcabinet officials.

If such materials are covered by the congressional request, you should be alerted that a possible question of privilege is involved. I would strongly urge you immediately to advise the head of your agency of the fact and to begin consulting with the Department of Justice, through the Office of Legal Counsel, and with the Office of the Counsel to the President. These two offices have expertise in the area of executive privilege and possess a government-wide perspective on the problem. Only by early involvement in these situations can our offices provide the advice and assistance which will be helpful to your agency. This is also the only way to insure that the Executive Branch will have a consistent and principled response to these demands. In addition, if the congressional demand encompasses materials in the possession of your agency which have been generated by other agencies,

or which reflect policy deliberations of interest to other agencies, it is important to consult with those agencies early in the process. The recent assertion of executive privilege involving the Interior Department, for example, was made only after extensive consultations with the Departments of State, Treasury, and Commerce as well as the United States Trade Representative.

At the same time, you should keep open your lines of communication with the congressional committee through your own legislative affairs offices. A high percentage of congressional requests are settled amicably; the government could not function any other way. If there is information which you feel should not be provided to the Committee, or if you feel the request is unreasonable or burdensome, you might let the committee know this. You might also ask them to explain their legislative need for the information in more detail if you suspect that their actual purpose is to interfere somehow with your agency's executive decision processes. It is almost always useful to create a written record of your dealings with the committee, and most particularly of any efforts you have made to accommodate the committee's need for information. It may be possible to satisfy the committee with something short of actually turning over the requested documents. For example, your agency might offer to brief the committee and its staff on the information they have requested. Alternatively, the documents might be provided to the committee members -- and possibly the committee staff -- on a "show only" basis, without copies

being made or notes taken. If classified material is involved, you should work through your security offices to ensure that the committee involved will provide adequate storage for the material and that the committee has staff cleared to handle such materials. Moreover, if classified or otherwise sensitive materials are released to a committee, it is important to obtain a commitment from the committee not to make the material public. We have found through recent experiences that it is extremely unwise to assume that the committee will treat the material with the same discretion as would agencies in the Executive Branch.

There is one thing, however, which you definitely should not do. Do not assert executive privilege. Under a procedure which has been in use since the Kennedy Administration, and which was memorialized by President Nixon in 1969, only the President himself can assert executive privilege against Congress. This procedure works as follows: First, the agency head consults with the Department of Justice and the White House Counsel; second, if after this consultation process any of the parties believes executive privilege should be asserted, the matter is presented to the President for his decision. This procedure was followed in the recent executive privilege dispute involving the Department of the Interior, the results of which you can see in the materials which I have distributed.

The purposes for this procedure should be obvious, but let me add a few words of explanation. During the Eisenhower Administration, cabinet and subcabinet officials frequently claimed privilege for deliberative documents requested by congressional committees. The result was needless tension with Congress, a tension which was aggravated by inconsistent standards employed by the different agencies. Vesting the sole authority to assert the privilege in the President -- after consultation among the agency head, the Attorney General, and the White House Counsel -- helped assure Congress that the privilege was being asserted on a principled, consistent basis and in the overall interest of the Executive Branch rather than as a parochial attempt by the affected agency to avoid embarrassment or public scrutiny. This centralization of authority also assured a consistency of approach in the Executive Branch -- a consistency that is important because, aside from a few scattered and inconclusive court cases, the "law" of executive privilege is almost entirely based on the factual "precedents" of what has happened in the past. To avoid creating factual precedents which weaken the President's authority, we must not overindulge the congressional committees when information is sought. However, to avoid tension with Congress and possibly strengthening the resolve of those who oppose the President in Congress, we must not be needlessly restrictive.

Finally, what are the legal standards governing executive privilege? They are indistinct and uncertain, for executive privilege is primarily a matter of political accommodation between the Legislative and Executive Branches. It is basically a question of balancing the interests of the Executive Branch in keeping information private against the interests of the Legislative Branch in obtaining disclosure. The courts have insisted that each Branch of Government has a constitutional duty to bargain in good faith and to make reasonable accommodations to the legitimate needs of the other Branch.

We may well decide in the coming months to reexamine the current procedures to see how they can be improved, and we would value your comments and suggestions. In the meantime, we stand ready to provide you with any assistance we can based on our experience and on our institutional role in these matters.

Congressional Demand for Deposition of Counsel to the President Fred F. Fielding.

July 23, 1982

Rudolph W. Giuliani
Associate Attorney General

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

A Congressional demand for testimony from a close adviser to the President directly implicates a basic concern underlying the Executive privilege, "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." United States v. Nixon, 418 U.S. 683, 705 (1974). There is no doubt that the Counsel to the President is an official included within the ambit of "high Government officials." See, e.g., Nixon v. Administrator of General Services, 443 U.S. 425, 446 n. 10 (1977) (discussing "legitimate governmental interests in the confidentiality of communications between high officials, e.g., those who advise the President") (emphasis supplied). Although Congress is authorized to inquire into any subject "on which legislation could be had," McGrain v. Daugherty, 273 U.S. 135, 177 (1927), "the occasions upon which Congress may demand information [from the Executive] are virtually unlimited." Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1426 (1974). The danger is great, therefore, that agreeing to this particular Congressional demand to depose one of the highest and most intimate of Presidential advisers will erode a central foundation of Executive privilege and severely chill internal deliberations among Executive Branch advisers in the future.

It is important at the outset to recognize three characteristics of the application of Executive privilege to a demand for oral testimony, as distinguished from a document request. First, application of Executive privilege in a document context is uniformly limited to those specific documents which would impair the privilege. Testimonial privileges, on the other hand, come in two varieties: those which exempt a witness absolutely from testifying, and those which provide only qualified protection. For example, a criminal defendant is absolutely immune from being sworn as a witness at his trial; clergy, attorneys, doctors, and spouses, on the other hand, have only qualified privileges to decline to answer specific questions. As discussed below, I believe the Counsel to the President possesses an absolute privilege not to testify with regard to any matters relating to his official duties as legal adviser to the President.

A second characteristic of the application of Executive privilege in a testimonial, as opposed to documentary, context is that "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 . . . ." 1/

Finally, a demand for testimony is inherently more intrusive and chilling in its effect on the deliberative process than is a document request. A witness before a Congressional committee may be asked -- under threat of contempt -- a wide range of unanticipated questions about highly sensitive deliberations and thought processes. He therefore may be unable to confine his remarks only to those which do not impair the deliberative process. A request for documents, however, permits the Executive Branch more carefully to consider which information may be divulged consistent with its independent, coordinate status in our structure of government.

The earliest, but inconclusive, precedent in this area arose during the trial of Aaron Burr for treason before Chief Justice John Marshall, sitting as a Circuit Judge. Marshall issued a subpoena for certain documents to President Jefferson. The President responded with a letter stating, in effect, that if the courts could 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 in our government. Although President

1/ Memorandum for Hon. John D. Ehrlichman from William H. Rehnquist (February 5, 1971) ("Rehnquist Memorandum").

Jefferson did not appear, Chief Justice Marshall continued to maintain his position that the President was subject to subpoena, but 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." 2/ Notwithstanding Marshall's position, it appears that from the time of Jefferson until 1974, when the Nixon tapes case was decided, every President (and Attorney General) took the position that the President was absolutely immune from subpoena.3/

Examples of the actual practice regarding White House staff testifying before Congress is somewhat inconsistent, as is the practice of Executive Branch compliance generally with Congressional demands for information. 4/ During Franklin D. Roosevelt's Administration, for example, Jonathan Daniels, Administrative Assistant to the President, refused to respond to a Senate subcommittee subpoena demanding his testimony on alleged attempts to compel the resignation of the Rural Electrification Administrator. Daniels justified his refusal to testify on the basis of his confidential relationship with the President. Following the subcommittee's unanimous recommendation that he be cited for contempt, Daniels wrote the Chairman that although he still believed that a Congressional committee could not require either the President or his Administrative Assistant to testify, the President felt that in this particular instance his testimony would not adversely affect the public interest. Daniels therefore agreed to answer the subcommittee's questions.

In the Truman Administration, John R. Steelman, Assistant to the President, returned a House subcommittee subpoena with a letter stating that "the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee." Another individual, however, Donald Dawson, Administrative Assistant to the President, was "reluctantly" permitted by President Truman to testify in order to clear his name of alleged wrongdoing before a Senate subcommittee investigating the Reconstruction Finance Corporation.

2/ 2 Roberson, Report of the Trials of Aaron Burr, 233, 236 (Statement at Burr's misdemeanor prosecution), quoted in Rehnquist Memorandum, supra, at 2.

3/ See Rehnquist Memorandum at 3.

4/ The following historical summary relies upon the Rehnquist Memorandum, supra, at 4-6.

During the Eisenhower Administration, Sherman Adams refused to testify before a Congressional committee on the basis of his confidential relationship with the President. Later during the same Administration, however, Adams volunteered to testify with respect to another matter.

Finally, during hearings on the nomination by President Johnson of Abe Fortas to be Chief Justice, the Senate Judiciary Committee requested W. DeVier Pierson, Associate Special Counsel to the President, to testify regarding the help which Fortas was alleged to have provided in drafting certain legislation while serving as Associate Justice. Pierson declined the invitation to testify, stating:

> As Associate Special Counsel to the President . . . , 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.5/

The opinions of this Office which I have found relevant to this question are unanimous in holding that individuals serving in a capacity such as Counsel to the President must be absolutely protected from coerced testimony before Congress. Assistant Attorney General Rehnquist, for example, has stated:

> The President and his immediate advisers -- that is, those who customarily meet with the President on a regular or frequent basis -- should be deemed absolutely immune from testimony or 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

5/ Rehnquist Memorandum at 6.

arrange a more convenient time, could impair that availability.6/

A similar position is found in a 1974 OLC background memorandum:

> [T]he following requests should be routinely declined and, if pressed, be met with assertions of Executive privilege: (1) requests for testimony by immediate Presidential staff concerning their official activities.7/

Finally, in 1977 Assistant Attorney General Harmon wrote:

> If no . . . compromise can be reached [with Congress], the decision whether Executive privilege will be asserted is largely dependent on the particular circumstances involved in the Congressional demand. This determination may depend on such varying factors as the nature and confidentiality and the information sought and the strength of the forces in Congress that are seeking the information. To the extent that any generalizations may be drawn, they are necessarily tentative and sketchy. It has been the position of the Executive branch that the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee. Lower-level White House officials have been deemed subject to a Congressional subpoena, but might refuse to testify with respect to any matter arising in the course of their official position of advising or formulating advice for the President. 8/

6/ Rehnquist Memorandum, supra, at 7. Rehnquist went on to note, however, that he did not believe this principle "can or ought to be extended to all 'members' of the White House Staff. . . ." Id. at 8.

7/ Memorandum (unsigned, undated; drafted for background in December, 1974).

8/ Memorandum to all Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice, from Acting Assistant Attorney General John M. Harmon at 5 (May 23, 1977)(emphasis supplied).

Office of the
Assistant Attorney General

Washington, D.C. 20530

1981

The Scope and Limits of Executive Privilege

A. Basic Principles

1. Executive Privilege.

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

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

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

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

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

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

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

The Supreme Court first addressed whether there was a constitutional basis for executive privilege in the controversy over the Special Prosecutor's right of access to the Nixon tapes. The Court's unanimous decision in United States v. Nixon, 418 U.S. 683 (1974), held that President Nixon could not invoke executive privilege to thwart the production of the tapes pursuant to the Watergate grand jury's subpoena. The opinion established, however, in the clearest terms, that the privilege is of constitutional stature. The Court rested this ruling, first, on the need for protection of communications between high government officials and those who assist and advise them:

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings. 418 U.S. at 705-6.

The Court also acknowledged that the privilege stemmed from the principle of separation of powers: "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708. In dictum, the Court hinted that the privilege was very broad in the areas in which it was traditionally asserted:

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

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

2. Congressional Investigatory Power

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

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

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

Id. at 175.

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

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

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

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

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

or withhold information, it should be able to express it.

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

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

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

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

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

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

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

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

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

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

September 18, 1986

MEMORANDUM FOR [redacted] b6 b7c

FROM: J. MICHAEL SHEPHERD JMS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Subject FOI/PA Request of William S. Paley:
FBI FOI/PA # 269,861

As requested by your memorandum of September 12, 1986, this office has reviewed the document you referred to us in connection with the Freedom of Information and Privacy Acts request of William S. Paley. We have no objection to the release of the document, with the deletions you have marked.

Thank you for bringing this matter to our attention. As you have requested, we are returning these materials to you.

Attachments

ID # 438628 CU

Fed. Pol

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

- ☐ O · OUTGOING
- ☐ H · INTERNAL
- ☐ I · INCOMING

Date Correspondence Received (YY/MM/DD) __ / __ / __

Name of Correspondent: Debbie Keaton

☐ **MI Mail Report** **User Codes:** (A) ____ (B) ____ (C) ____

Subject: Trust Request William S Paley

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
	ORIGINATOR	/ /			/ /
	Referral Note:				
22	R	86/04/15		S	86/04/30
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Department of Justice

Federal Bureau of Investigation 438628

Washington, D.C. 20535

SEP 12 1986

BY COURIER

To: The White House
1600 Pennsylvania Avenue, N.W.
Washington, D. C.
Attention: Peter J. Wallison
General Counsel

From: Chief
Freedom of Information/Privacy Acts (FOI/PA) Section
Federal Bureau of Investigation

Subject: FOI/PA REQUEST OF William S. Paley
FBI FOI/PA # 269,861 RE: same

In connection with review of FBI files responsive to the above request, the following was surfaced:

_____ unclassified document(s) which originated with your agency which is/are being referred to you for direct response to the requester. We will advise the requester that your agency will correspond directly concerning this matter, and request that you furnish us a copy of your letter to the requester reflecting final determination regarding the document(s). (See index A).

X 1 FBI document(s) containing information furnished by your agency. Please review your information (outlined in red) and return the document(s) to us, making any deletions you deem appropriate, and citing the exemption(s) claimed. (See index B).

_____ classified document(s) which originated with your agency which is/are being referred to you for direct response to the requester. We will advise the requester that your agency will correspond directly concerning this matter, and request that you furnish us a copy of your letter to the requester reflecting final determination regarding the document(s). Additionally, please advise us if the classification of the document(s) is changed so that we may amend our files. (See index C).

_____ classified FBI document(s) containing information furnished by your agency. Please review your information (outlined in red) and return the document(s) to us, making any deletions you deem appropriate, citing the exemption(s) claimed, and advising if the document(s) still warrant(s) classification. (See index D).

See Continuation Page for additional information.

X A copy of the requester s initial letter, and any other significant correspondence is enclosed for your convenience.

If you have any questions concerning this referral, please contact Debbie Beatty on 324- 5529. The FBI file number appearing on the lower right-hand corner of the enclosed document(s) as well as on the Index Listing (see reverse) should be utilized during any consultation with this Bureau concerning this referral.

Enclosure(s) (2): _____ classified material attached.

(Index Listing on Reverse)

FBI/DOJ

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

SEP 12 1985

BY COURIER

To: The White House
1600 Pennsylvania Avenue, N.W.
Washington, D. C.
Attention: Peter J. Wallison
General Counsel

From: Chief
Freedom of Information/Privacy Acts (FOI/PA) Section
Federal Bureau of Investigation

Subject: FOI/PA REQUEST OF William S. Paley
FBI FOI/PA # 269,361 RE: same

In connection with review of FBI files responsive to the above request, the following was surfaced:

_____ unclassified document(s) which originated with your agency which is/are being referred to you for direct response to the requester. We will advise the requester that your agency will correspond directly concerning this matter, and request that you furnish us a copy of your letter to the requester reflecting final determination regarding the document(s). (See index A).

x 1 FBI document(s) containing information furnished by your agency. Please review your information (outlined in red) and return the document(s) to us, making any deletions you deem appropriate, and citing the exemption(s) claimed. (See index B).

_____ classified document(s) which originated with your agency which is/are being referred to you for direct response to the requester. We will advise the requester that your agency will correspond directly concerning this matter, and request that you furnish us a copy of your letter to the requester reflecting final determination regarding the document(s). Additionally, please advise us if the classification of the document(s) is changed so that we may amend our files. (See index C).

_____ classified FBI document(s) containing information furnished by your agency. Please review your information (outlined in red) and return the document(s) to us, making any deletions you deem appropriate, citing the exemption(s) claimed, and advising if the document(s) still warrant(s) classification. (See index D).

See Continuation Page for additional information.

x A copy of the requester's initial letter, and any other significant correspondence is enclosed for your convenience.

If you have any questions concerning this referral, please contact Debbie Beatty on 324- 5529. The FBI file number appearing on the lower right-hand corner of the enclosed document(s) as well as on the Index Listing (see reverse) should be utilized during any consultation with this Bureau concerning this referral.

Enclosure(s) (2): _____ classified material attached.

(Index Listing on Reverse)

FBI/DOJ

April 4, 1986

The Honorable William H. Webster
Director
Federal Bureau of Investigation
Washington, D. C. 20505

Attention: FOI and Privacy Acts Branch

Dear Judge Webster:

This is a request under the Freedom of Information Act, 5 U.S.C. Section 552, and the Privacy Act, 5 U.S.C. Section 552a ("the Acts").

I wish to obtain a copy of all documents retrievable in a search for files listed under my name. Please also advise me if my name is contained in other "See References" files, so that I can decide whether to have any such files searched.

The following information about me may assist your search:

Full name:	William S. Paley
Current address:	51 West 52nd Street, New York, N.Y.
Date of birth:	September 28, 1901
Place of birth:	Chicago, Illinois
Social security number:	087-03-3119
Citizenship:	United States

I affirm that I am the person described by the information listed above.

If all or any part of my request is denied, please list the specific exemption or exemptions that are claimed to authorize nondisclosure of the requested material.

If you determine that some portions of the requested material are exempt from disclosure, I ask that, as the Acts provide, you release to me the remaining non-exempt portions. I reserve the right to appeal any decision to withhold information. If any information is withheld, I ask that you inform me of your current administrative procedures for appeal of the decision to withhold information.

I agree to pay reasonable copying fees for material disclosed to me under the Privacy Act, and reasonable fees as authorized by law for material disclosed to me solely under the Freedom of Information Act.

If you have any questions regarding this request, please contact John S. Minary, 51 West 52nd Street, New York, N.Y. 10019, telephone number (212) 765-3333, Financial Secretary to William S. Paley. You may also contact me directly at 51 West 52nd Street, New York, N.Y. 10019, telephone number (212) 975-3535.

As provided in the Freedom of Information Act, I look forward to receiving a reply within ten working days.

Thank you for your assistance.

Very truly yours,

William S. Paley

Sworn to before me this

4th day of April, 1986

Evelyn A. Correra
Notary Public

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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

Jan. 21, 1970

TO: [redacted] FBI 67C per FBI

FROM: Egil Krogh, Jr.

SUBJECT: FBI Investigations

Please do Name Checks on the following individuals who will be attending a White House function on January 29, 1970.

67C per FBI memo

[redacted]
President, CBS
51 West 52nd St.
New York, N.Y.

LAR memo

Mr. & Mrs. William S. Paley
Chmn. of Bd., CBS
51 West 52nd St.
New York, N.Y.

67C per telecon FBI INP

[redacted]
Pres., Breeze Corp.
700 Liberty Ave.
[redacted]

JAN 30 1970

62-5-35486

ENCLOSURE

September 16, 1986

MEMORANDUM FOR DONNA M. SIRKO
MANAGEMENT ANALYST
INFORMATION POLICY/SECURITY REVIEW

FROM: J. MICHAEL SHEPHERD /mcs
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Privacy Act Request Referral of Homer Perry Gainey

As requested by your recent memorandum, this office has reviewed the documents referred to you by the State Department in connection with the Privacy Act request of Homer Perry Gainey. We have no objection to the release of the documents.

Thank you for bringing this matter to our attention.

Attachments

F85-1290

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

August 21, 1986

MEMORANDUM FOR S. MICHAEL SHEPHERD
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: DONNA M. SIRKO

SUBJECT: Privacy Act Request Referral of
Homer Perry Gainey

Per our conversation of August 18, here again is the State Department document responsive to the Privacy Act request of Homer Perry Gainey, the subject of a now completed background security investigation.

Under the (k)(5) system of records, Richard Hauser, acting in an official capacity, is not considered a confidential source. The bracketed information could be denied as White House, not subject to the Privacy Act.

Mr. Garrett:

Mr. Kennedy [illegible]
return the at[illegible]
you.

sharon

DEPARTMENT OF STATE

Washington, D.C. 20520

March 11, 1982

MEMORANDUM

TO: M - Mr. Richard T. Kennedy

FROM: A/SY - Marvin L. Garrett, Jr. Acting

SUBJECT: GAINEY, Homer Perry
DPOB: 8/12/23; Bradford County, Florida

Richard Houser, Deputy Counsel to the President, The White House, Washington, D.C., after reviewing the Summary of Information of Mr. Gainey, expressed concern regarding two particular aspects of the inquiries:

A. In the court suit against Mr. Gainey and the Equitable Trust Company (ETC), the summary indicated amoung the judgments that $25,000 in punitive damages were to be awarded to Schneider, Bernet and Hickman (SBH). Mr. Houser noted that "punitive damages" implies impropriety and he requested additional inquiries to set forth the particulars.

B. Mr. Gainey indicated in his resume of having been honorably discharged from the Air Force. However, his military personnel file was reported as having been destroyed by fire. A source indicated Mr. Gainey confided of having been court-martialed from the Air Force. Mr. Houser requested a confrontation by SY with Mr. Gainey to resolve the issue.

An additional review of the records of the Bexar County Court, Texas, disclosed a civil suit was brought on 7/25/78 by SBH against ETC and Mr. Gainey, acting as an agent for ETC. The suit claimed that Mr. Gainey/ETC entered into an agreement to trade in coffee futures with SBH acting as the commodities broker. Mr. Gainey/ETC bought coffee futures on margin and when price conditions moved against Mr. Gainey/ETC, margin calls were made resulting in Mr. Gainey/ETC incurring a net loss of $71,829. Mr. Gainey/ETC refused to pay SBH for the loss. In connection with this suit, SBH brought a second suit against Mr. Gainey/ETC for alledged misrepresentation by Gainey/ETC with regard to: (1) Net worth and cash available to Mr. Gainey/ETC in order to enter the commodities market; (2) Mr. Gainey/ETC's desire to engage in trading and paying obligations incurred was not bona fide; and (3) Mr. Gainey/ETC agreed to pay all margin costs and maintenance requirements on 12/6/77, and had no bona fide intent to pay.

In this suit, the findings of the jury and final judgment of 6/15/81, were that Mr. Gainey/ETC, was guilty of knowing and intentional misrepresentations in all three of the above, and $25,000 in punitive and exemplary damages were awarded to SBH for the damage suffered by the misrepresentations. The case was appealed by Mr. Gainey/ETC on 9/8/81, and the appeal is still pending. A report with copies of pertinent documents is forthcoming to SY and a more detailed analysis will then be available.

The source furnishing the information cited in B above, is being reinterviewed, following which Mr. Gainey will be confronted concerning the military court-martial admission.

THE WHITE HOUSE

WASHINGTON

September 8, 1986

MEMORANDUM FOR JAY B. STEPHENS

FROM: J. MICHAEL SHEPHERD JMS

SUBJECT: Attached FOIA Request: Gregory L. Millspaugh

Gregory L. Millspaugh wrote the attached letter to the Executive Office of the President of August 20, 1986, requesting copies of documents relating to territory in the State of Nevada, under the Freedom of Information Act. Mr. Millspaugh also wrote the attached letter to the President dated August 15, 1986, suggesting a proposed regulation regarding the transfer of federal lands.

Attached for your review and signature are a letter to Mr. Millspaugh, declining to comply with his FOIA request and thanking him for his suggested proposal, and a memorandum to Ralph Tarr forwarding Mr. Millspaugh's letter to the Department of the Interior for appropriate action.

Attachments

JBS/JMS:jck
JBStephens
JMShepherd ✓
Chron.

THE WHITE HOUSE

WASHINGTON

September 8, 1986

MEMORANDUM FOR RALPH W. TARR
SOLICITOR
DEPARTMENT OF THE INTERIOR

FROM: JAY B. STEPHENS ORIGINAL SIGNED BY J.B.S.
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Attached Letter from Gregory L. Millspaugh: Proposed Regulation

Gregory L. Millspaugh of Las Vegas, Nevada wrote the attached letters to the President requesting information under the Freedom of Information Act and proposing a regulation regarding the transfer of federal lands. As our attached response to Mr. Millspaugh indicates, we have declined to comply with his FOIA request and are referring to you, for whatever action, if any, you deem appropriate, the letter proposing the new rule.

Thank you for your assistance in this matter.

Attachments

THE WHITE HOUSE

WASHINGTON

September 8, 1986

Dear Mr. Millspaugh:

Your letter of August 20, 1986, requesting copies of documents relating to territory in the State of Nevada, recently was referred to this office for response. The United States Supreme Court has held that, as an "entity whose sole function is to advise and assist the President," the White House Office is not an "agency" subject to the Freedom of Information Act. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980). Accordingly, we must respectfully decline to comply with your request. You may wish to make a similar request of an agency subject to the Act.

Thank you also for your letter of August 15, 1986, which included a proposed regulation. As you requested, we have referred that letter and its attachment to the Department of the Interior for its review and possible further referral to the other agencies you suggested.

Sincerely,

ORIGINAL SIGNED BY J.B.S.

Jay B. Stephens
Deputy Counsel to the President

Mr. Gregory Millspaugh
P.O. Box 11124
Las Vegas, NV 89111

25-R
G. Wallace

436925 CU

"FREEDOM OF INFORMATION ACT REQUEST"

Executive Office of the President
The White House
Attn.: Freedom of Information Desk
Washington, D.C.

Reply to: Gregory Millspaugh
P.O. Box 11124
Las Vegas NV 89111
(702) 451-4400

August 20, 1986

Dear Sir:

This is a request for Notification and Access under the Freedom of Information Act, 5 U.S.C. 552. This letter will evidence my firm promise to pay fees and costs for locating, duplicating and reviewing the documents and information requested below. This request pertains to the years Eighteen Hundred Sixty Four (1864) through Nineteen Hundred Eighty Six (1986), inclusive.

If some of my requests are exempt from release and disclosure, please send me those portions reasonably segregatable, and provide me with an indexing, itemization and detailed justification concerning information which you are not releasing.

Please provide copies of those documents in the custody of your office which relate to the determination that the region of territory commonly identified and treated as a portion of the State of Nevada which is located south of thirty-seven degrees north latitude was Constitutionally and lawfully joined as a portion of that state. Further provide me with copies of all legal opinions, whether originated from your office or otherwise, which hold, assert, entertain, claim, support, sanction, or otherwise endorse the position that said territory is now, or ever has been, lawfully made a portion of the State of Nevada.

Pursuant to 3 C.F.R., Section 101, I request that you waive all fees and costs for the locating, duplicating and reviewing of the cited documents, as the information contained therein will contribute to public debate on an important policy issue.

Dated August 20, 1986.

Sincerely,

Gregory Millspaugh

Gregory Millspaugh
P.O. Box 11124
Las Vegas, NV 89111

"FREEDOM OF INFORMATION ACT REQUEST"

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Wallison

The President
The White House
1600 Pennsylvania Avenue
Washington, D.C.

August 15, 1986

Dear Mr. President:

This letter is directed to you to raise the matter of an administrative petition to create a new rule, pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. 553(e). The language that your Executive Office is requested to adopt as a new rule is as follows:

LANGUAGE OF FEDERAL RULE TO RETAIN TERRITORIAL JURISDICTION UNTIL STATE TO WHICH TERRITORIAL LANDS HAVE BEEN TENDERED HAS FULFILLED CONSTITUTIONAL REQUIREMENTS OF BOTH THE FEDERAL AND APPROPRIATE STATE CONSTITUTIONS

"Whenever the Congress of the United States shall tender an offer of additional lands or population to be transferred from the jurisdiction of an existing Organized or Unorganized Territory; or, with the consent of the tendering State, from the jurisdiction of an existing State; to an existing State or a State in the transition of being admitted to the Union:

Unless the Congress of the United States by explicit provision of law compels otherwise, no such transfer of jurisdiction over lands or population shall be recognized at law by this office until there has been fulfilled each and every required condition precedent of the:

United States Constitution and federal statute making such tender; the State Constitution and statutes of the recipient State; the State Constitution and statutes of the tendering State, if any; the federal statute of such new State's admission, resolutions of territorial legislatures or territorial conventions, if any; and the legal boundaries of the tendered lands and the recipient State have been revised to effect the transfer."

END OF PROPOSED RULE

The justification for such a rule necessarily involves a review of the historical and legal circumstances by which this situation has occurred in fact. Please have your special counsel review the attached:

"Points and Authorities In Support Of An Administrative Rule-Making To Assign The Legal Jurisdiction Of Portions Of Organized Territories Previously Thought To Have Been Assimilated Into Existing States"

I request that your immediate attention be brought to this matter as the situation has Constitutional ramifications under the "Equal Footing Doctrine" pertaining to the admission of states into the union.

In addition, I request that your office brings this matter to the attention of the Secretary of the Interior, whose department is responsible for the administration of a territorial government for an unorganized territory; the Director of the Bureau of the Census, whose bureau is responsible for the compilation of population reports which are used in the apportionment of members of The House of Representatives; the Board of Governors of the postal service whose service agency is responsible for the proper identification of the names of post offices; and the Attorney General, whose department will be responsible for the litigation of this matter if the administrative approach fails to obtain solutions.

With the utmost respect,

Gregory L. Millspaugh

Gregory L. Millspaugh

P.O. Box 11124
Las Vegas, NV 89111
(702) 451-4400

Points and Authorities In Support Of An Administrative Rule To Assign The Legal Jurisdiction Of Portions Of Organized Territories Previously Thought To Have Been Assimilated Into Existing States

The State of Nevada has no jurisdiction over that Territory historically known to be a portion of Mohave County of the Organized Territory of Arizona, bounded on the North by 37 degrees North Latitude, on the South by the Colorado River, on the East by 37 degrees Longitude West of Washington, and on the West by the adjudicated boundary of the State of California.

The failure of the State of Nevada to ever properly fulfill the requirements imposed by the Congress of the United States to achieve annexation of the territory hereinabove described as a portion of the Territory of Arizona arise entirely from the willful acts of the Nevada State Legislature from the year 1867 to the present, and finds its genesis in the historical circumstances surrounding the admission of Nevada as a state.

In 1864, the State of Nevada was admitted to the union comprised of the lands exactly corresponding to the previous Territory of Nevada. It must be noted that the Territory of Nevada had previously been created out of the western (approximate) half of the Utah Territory. As of 1864, the southern boundary of the original Utah Territory, the Nevada Territory and the subsequent State of Nevada were all on the exact survey line of 37 degrees North Latitude. No portion of the Territory or State of Nevada had existed south of that survey line of 37 degrees North Latitude.

In anticipation of admission to the Union, the constitutional convention held in the Territory of Nevada defined the boundaries of the proposed state to be exact degrees of latitude on the north as well as the south, but provided for language which would allow for future adjustments along the eastern boundary shared with the surviving Territory of Utah, and the western boundary shared with the previously existing State of California.

Only after the first elections were held in the newly admitted State of Nevada, when members were sent to the United States Senate for the first time, was a statute proposed in Congress to amend the boundaries of the State of Nevada to include additional lands along the eastern boundary, removing those lands from the Territory of Utah.

As an afterthought, it was realized that the new southeastern corner of the State of Nevada would correspond to a point so close to the Grand Canyon that physical transportation from the capital of the Territory of Arizona, which was then located at Prescott, Arizona Territory, to the portion of Mohave County of Arizona Territory located between the Colorado River and the original southern boundary of Nevada at 37 degrees North Latitude would be extremely difficult, if not impossible.

Congress then tendered the offer of those lands to the State of Nevada in Section II of the United States Statutes At Large, Chapter LXXIII, 39th Congress, 1st. Session, Volume 14, page 43. The tender of the lands described in Section II of that Statute was not self-effecting, as was conclusively admitted upon the record of the Nevada State Legislature by the governor of the state at that time:

"... And in order to legally and fully extend the jurisdiction of the State over the ceded territory, I suggest the propriety of proposing and submitting to the people, for their ratification, an amendment to the Constitution conforming our southern boundary to the lines designated in the grant"

Remarks by Governor H. G. Blasdel before the third session of the Nevada State Legislature, Senate Journal and Appendix, Third Session, 1867.

At that time and thereafter, the amendment procedure of the Nevada State Constitution required that a Joint Resolution of both houses of the legislature be proposed and adopted by one session of the legislature, held by the Secretary of State of Nevada until the next biennial session, be passed by both houses again, and then be submitted as a ballot question to the electorate at the next succeeding general election for ratification.

Compellingly, the required Joint Resolution to amend the State Constitution was not even proposed, let alone adopted, during that session, much less two consecutive sessions.

During the following two years, the Territorial Legislature of the Territory of Arizona petitioned congress to draw attention to the defiance of the Nevada State Legislature, which had wilfully chosen not to amend its state constitution.

For numerous reasons involving the "Reconstruction Era", congress did not focus direct attention upon the State of Nevada.

For in excess of One Hundred Twelve years, the State of Nevada openly defied the intent of Congress, as a political issue, in which an individual citizen lacked standing to raise a judicial action to correct the matter.

In 1912, the State of Arizona was admitted to the Union. Congress, in the mistaken assumption that Nevada had properly annexed the portion north and west of the Colorado River fixed that river to be the boundary of the State of Arizona in its statute of admission. In error, the State of Arizona was silent to its outstanding claims to the portion tendered to, but not annexed by, the State of Nevada. By its silence and admission to the union with boundaries specifically mandated to be the Colorado River, the State of Arizona foreclosed all future claims to the tendered portions of the Territory.

Congress, still acting in the mistaken assumption that the other portion of the Arizona Territory had been annexed into Nevada, dissolved the territorial government of the Organized Territory of Arizona concurrently with the admission of the State of Arizona, thereby rendering the surviving portion of the Arizona Territory as an unorganized territory, with no territorial legislature to petition Congress.

In 1971, the legislature of Nevada acted to totally void its own composition, rendering itself permanently and irreversibly incapable of obtaining a state constitutionally mandated quorum for the conduct of any legislative business. This state of affairs continues to date. The process of rendering itself void was accomplished by apportioning a clear majority of

the seats in each house of the state legislature to persons who had not, did not and could not establish residence as actual residents of the state, to the standards required by the state constitution. Those persons were resident of the (tendered) territory of Arizona south of 37 degrees north latitude, which had never been annexed as a part of the state.

Only after the Nevada legislature had rendered itself and all of its subsequent purported legislation void was the issue of the legality of the State of Nevada's assertion of powers within the unannexed territory raised in a court of law.

In the case of The State of Nevada vs. Surinello, a public defender, as an officer of the court, attempted to raise the issue on appeal after his client had been silent on the question of jurisdiction during trial and conviction. The court relied upon the improper status of an officer of the court attempting to disqualify the court to rule the appeal "frivolous". A second case of The State of Nevada vs. Deutcher was then brought to the Ninth Circuit Court of Appeals with precisely the same deficiency of status of counsel to induce that court to apply the case law of Surinello to freeze any future litigant from entry into the courts.

Notably, both of those actions were in front of courts that had no jurisdiction to hear any issue arising from within the surviving remnant of the Territory of Arizona, as the jurisdiction of the Nevada courts extends only to the boundary described in its state constitution, and the jurisdiction of the Ninth Circuit is fixed by statute to include only those states named in that statute (28 U.S.C. 41), which statute does not include the Territory of Arizona. It is a fundamental axiom of law that jurisdiction cannot be given to a court by the consent of the litigants where that jurisdiction does not exist in law.

After the State of Nevada realized that it was soon to be open to attack on the issue of lack of jurisdiction over the Territory of Arizona, its legislature proposed an amendment to the state constitution that was void upon its face. The proposed amendment was void as the legislature did not have a state constitutional quorum present to conduct any business whatsoever, and was incapable of ever recreating a constitutional quorum in the future.

In order to maintain the facade of jurisdiction, the proposed amendment which was void as to both sessions of the state legislature in 1979 and 1981 was then presented to the public at large and a sham election was held in 1982 which included a clear majority of voters who were not actual residents of the state.

In 1981, the Congress of the United States created the situation which raised the issue of jurisdiction of the surviving remnant of the Territory of Arizona from a political issue not cognizable in the courts into a constitutional question involving the "Equal Footing Doctrine" regarding the political and legal equality of states' upon their admission into the Union.

The act which raised the status of the issue was the improper, unlawful and unconstitutional apportionment of a second seat in the House of Representatives to the State of Nevada, based upon the population resident in the Territory of Arizona being improperly attributed to the State of Nevada.

This situation came into fruition in 1982, upon the State of Nevada conducting that sham election involving persons not actually resident in the state, and in 1983 upon the United States House of Representatives seating a second member from Nevada, to which the state was not constitutionally entitled.

Since the issue became a constitutional question only in 1983, the doctrine of latches cannot be made to apply, the statute of limitations does not run out on the improper 1981 federal statute until 1987, and citizens now have standing to raise the question directly in the courts of proper jurisdiction.

It is imperative that federal agencies have a rule in place to provide proper administration of the Territory of Arizona while litigation regarding this issue is adjudicated.