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EXECUTIVE PRIVILEGE -- A BRIEF SURVEY

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A. Definition of the Term

Executive privilege. What is it? To be more precise, what is the executive privilege to withhold information? Broadly speaking, it is the power asserted by the President to be "inherent" in the executive to withhold information residing therein, from the public, from the legislature, or from the judiciary. Generally, the executive does not withhold information in this manner without also claiming that disclosure of the information would not be in the national or public interest. This report will focus on the use of executive privilege to withhold information from the legislative branch of the Government. As such, executive privilege runs directly counter to the power asserted by the Congress to make inquiry into the administration of the laws it makes and to be properly informed in order to fulfill its lawmaking function. Neither power is explicitly defined in the Constitution. They are, rather, powers inherent in the terms "legislative" and "executive," as understood by the drafters of the Constitution.

B. Power of the Congress to Make Inquiry — Origins

The words, "All legislative Powers," in Article 1, Section 1, of the Constitution imply powers of investigation; this is understood from the meaning of "legislature" at the time the Constitution was drawn up and signed. Parliamentary and colonial practice both affirmed the right of the legislature to make inquiries and investigations into the executive departments and to request from them such information as would facilitate the investigation.[1/] The First Congress laid the foundations for the acquisition of information in the Act of September 2, 1789 (1 Stat. 65-66 (1789), now 31 U.S.C. 1002 (Supp. V, 1965-1969)):

> The Secretary of the Treasury... shall make report and give information to either branch of the legislature in person or in writing, as may be required, respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office....[2/]

Attorney General Cushing in 1854 indicated that this "duty...is practically and by legal implication the same with the other secretaries, and with the Postmaster and the Attorney General."[3/]

The first Congressional investigation was initiated by action of the House of Representatives on March 27, 1792, when it set up a select committee "to inquire into the failure of the late expedition under General St. Clair"

1/ See The Constitution of the United States of America. Analysis and Interpretation. Annotations of Cases Decided by the Supreme Court...to June 22, 1964. Washington, U.S. Govt. Print. Off., 1964 (88th Congress, 1st session. Senate Document No. 39), page 105; Berger, Raoul. Executive Privilege v. Congressional Inquiry, pages 1056-1066.

2/ See also Berger, op. cit., page 1060.

3/ Ibid., page 1064.

and empowered it "to call for such persons, papers and records as may be necessary to assist in their inquiries."[1/] On April 4, 1792, the House resolved, "That the President...be requested...to lay before this House such papers of a public nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair."[2/]

The power of the Congress to investigate was reaffirmed by the Supreme Court in McGrain v. Daugherty (273 U.S. 135 (1927)) --

> We are of opinion that the power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history.... The Acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it 'more effectually' than before.
>
> * * * * *
>
> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information -- which not infrequently is true -- recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry -- with enforcing process -- was regarded and employed as a necessary and appropriate attribute of the power to legislate -- indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

1/ Taylor, Telford. Grand Inquest; the Story of Congressional Investigations, page 38.

2/ Younger, Irving. Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers, page 757.

> The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. 1 /

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1 / 273 U.S. 174, 175.

C. Executive Privilege -- Origins

Similarly, the concept of "executive Power" envisaged in Article 2, Section 1, clause 1, of the Constitution carried with it remnants of the doctrine of sovereign immunity which included the privilege of the executive to withhold information.[1/] Some authorities observe, however, that the Constitutional Convention did not intend for the executive to have such powers as were associated with the monarchical tradition of the time.[2/] This ambiguity in interpretation of the extent of "executive Power" is illustrated in Youngstown Sheet & Tube Co. v. Sawyer (343 U.S. 579 (1952)), the Steel Seizure Case, in which Mr. Chief Justice Vinson, in his dissenting opinion, characterized the executive as "an office of power and independence." He continued, "Of course, the Framers created no autocrat capable of arrogating any power unto himself at any time. But neither did they create an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake."[3/] Mr. Justice Jackson, in his concurring majority opinion in the same case, argued that the "executive Power" of Article 2 did not represent "a grant in bulk of all conceivable executive power," but simply "an allocation to the presidential office of the generic powers thereafter stated."[4/] In general, executive privilege to withhold information under specific circumstances has been recognized.[5/]

1/ See Schwartz, Bernard. Executive Privilege and Congressional Investigatory Power, pages 7-8.
2/ See Berger, op. cit., pages 1069-1076.
3/ 343 U.S. 682.
4/ 343 U.S. 641.
5/ See discussion of United States v. Reynolds, infra at pages 7-9, and of state secrets, infra at pages 39-40; also Berger, op. cit., pages 1067-1069.

Another ingredient in the argumentation supporting a need for and existence of executive privilege originates in the separation of powers doctrine which is embodied in the Constitutional structure of the Government of the United States. As separate entities each of the three branches -- the executive, the legislative, and the judiciary -- should, it is argued, be allowed to operate freely and without control or interference from the other two branches. Information originating within the executive branch, it is argued, is for the use of the executive branch, and it retains the right of decision on whether to release its information as well as to determine what information it will provide to the Congress.[1/] Needless to say, this comes face-to-face with the authority of the Congress to require information from the executive in its investigation of the administration by the executive of the laws made by the Congress.

1/ Schwartz, op. cit., pages 8-12; Younger, op. cit., pages 776-784.

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D. Role of the Judiciary

The basis of the confrontation between the executive and the legislature on the availability of information is the lack of limits on the powers which are inherent in the terms "executive" and "legislative" as used in the Constitution. It might appear logical that any jurisdictional dispute between these two co-equal branches of the Government would be adjudicated by the Supreme Court, as the highest level of the judiciary branch. There have, however, been no instances in which the Supreme Court has ruled specifically on the privilege of the executive branch to withhold information from the legislative branch.[1/]

There have been cases involving executive withholding of information from the judiciary. The opinion most pertinent to this survey is United States v. Reynolds, 345 U.S. 1 (1953). The following excerpts from Mr. Chief Justice Vinson's opinion add to the basic literature on the subject. Moreover, the Annotation at the end of the opinion, "Governmental privilege against disclosure of official information — federal cases" (97 L ed 735), outlines the major premises of the doctrine and updates the previous Annotation at 95 L ed 425.

> Judicial experience with the privilege which protects military and state secrets has been limited in this country. ...Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked.

1/ Berger, op. cit., page 1102, footnote 309.

There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination.

The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. ...A sound formula of compromise was developed. ...There are differences in phraseology, but in substance it is agreed that the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result.' Hoffman v. United States, 341 U.S. 479, 486, 487, 95 L ed 1118, 1123, 1125, 71 S Ct 814 (1951). If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure.

Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

* * * * *

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately

satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail. (Footnotes omitted.) 1 /

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1 / 345 U.S., 7-11.

E. Major Statements by the Executive on its Privilege

A consideration of the President's attitude towards availability of information to the Congress should be prefaced with a quote from Thomas Jefferson's notes on the Cabinet's conclusion in 1792 in response to the request of the House for papers relative to the St. Clair incident (see supra, at pages 2-3) --

> 1. that the house was an inquest, therefore might institute inquiries. 2. that they might call for papers generally. 3. that the Executive ought to communicate such papers as the public good would permit, & ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion. 4. that neither the commee nor House had a right to call on the head of a deptmt, who & whose papers were under the Presidt. alone, but that the commee, shd instruct their chairman to move the house to address the President....[1]

It should be pointed out that the President found no need to deny any materials to the Congress in this instance; in addition, Raoul Berger found no indication that these conclusions were transmitted to the Congress.[2]

1. Statements by the Attorney General of the United States

The most lengthy statements on behalf of the executive's right to withhold information have originated with the Attorney General of the United States. They provide a listing of occasions when the privilege was claimed as well as a discussion of the legal implications of the issue.

On April 30, 1941, Attorney General Robert H. Jackson stated the position of the Department of Justice to the Chairman of the House Committee

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1/ Berger, op. cit., page 1079.
2/ Ibid., page 1080.

on Naval Affairs who had requested copies of all FBI investigative reports since June 1939 and in the future relative to labor problems in "industrial establishments which have naval contracts." The letter states, "It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest." Mr. Jackson continues at a later point, "The information here involved was collected, and is chiefly valuable, for use by the executive branch of the Government in the execution of the laws. It can be of little, if any, value in connection with the framing of legislation or the performance of any other constitutional duty of the Congress."[1/]

The May 17, 1954, memorandum from Attorney General Herbert Brownell, Jr. to President Eisenhower, sets down the Administration's position at that time --

> For over 150 years -- almost from the time that the American form of government was created by the adoption of the Constitution -- our Presidents have established, by precedent, that they and members of their Cabinet and other heads of executive departments have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy. American history abounds in countless illustrations of the refusal, on occasion, by the President and heads of departments to furnish papers to Congress, or its committees, for reasons of public policy. The messages of our past Presidents reveal that almost every one of them found it necessary to inform Congress of his constitutional duty to execute the office of President, and, in furtherance of that duty, to withhold information and papers for the public good.[2/]

[1/] 40 Op. A.G. 45-51.
[2/] Letter and Memo of May 17, 1954, page 3910.

On June 18, 1956, Deputy Attorney General William P. Rogers transmitted to the House Government Information Subcommittee a study which the Department of Justice had made on the question, "Is a congressional committee entitled to demand and receive information and papers from the President and the heads of departments which they deem confidential, in the public interest?" While this study might not have the stature of an "opinion" of the attorney general, it provides materials in support of the executive's position with greater depth and comprehensiveness than the 1954 memo.

The first part of this study (pages 2894-2915) sketches the history of refusals and summarizes these in a chart which enumerates the refusals of seventeen Presidents. Part 2 examines court decisions on the provision of information and papers to the judiciary or to the Congress (pages 2915-2926). The cases cited relate specifically to executive withholding of information from the judiciary, but the opinions shed light on the principles surrounding the broad application of executive privilege.

In part 3 the Department of Justice examines the statutes which created the executive departments and concludes there is nothing in them requiring disclosure of information except at the discretion of the President and his agents, the heads of these departments (pages 2926-2933). Part 4 surveys the statutes surrounding the Congressional power of investigation — requiring testimony and the production of records -- and the departmental regulations relating to the keeping and use of records (pages 2933-2942). Its conclusion supports the executive's position

— "The statutes designed to compel witnesses to testify and to produce records before congressional committees affect only private individuals. They do not cover heads of departments or other Government officials."[1/]

Part 5 consists of three pages of conclusions which substantiate the privilege of the executive to withhold whatever information he deems necessary in the public interest (pages 2942-2945).

On March 6, 1958, Attorney General William P. Rogers presented a statement before the Senate Subcommittee on Constitutional Rights on "Inquiry by the Legislative Branch concerning the Decision Making Process and Documents of the Executive Branch." This statement narrates the development of the principles formulating the doctrine of executive privilege and, in particular, surveys the statements of the Presidents on this doctrine. Next follows a discussion of the separation of powers concept relative to executive privilege, in which section Mr. Rogers concludes, "that a constitutional privilege exists in the President and in those acting on his behalf and pursuant to his direction to withhold documents and information as against a congressional demand for production or testimony...." This conclusion, however, does not finish the problem.

> Is the Executive or the Congress to determine whether the privilege is appropriately asserted in a given case? There is no judicial precedent governing this question.

1/ U.S. Department of Justice. Is a Congressional Committee Entitled to Demand and Receive Information and Papers from the President and the Heads of Departments Which They Deem Confidential, in the Public Interest? page 2942.

As a practical matter only the President can make the determination as to disclosure. A House Judiciary Committee took this view in deciding who is the best judge in a close case, of the proprietary of divulging to any committee of the House 'state secrets.' It first noted that 'in contemplation of law, under our theory of government, all the records of the executive departments are under the control of the President of the United States.' Then it recognized what is so plainly implicit in the doctrine of separation of powers:

> The Executive is as independent of either House of Congress as either House of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

Finally, it came to the question as to whose decision must be accepted in this matter. Its Report stated:

> Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people.* * * [H.R. Rep. No. 141, 45th Cong., 3d Sess. 3-4 (1879)]1/

Lastly, there is the opinion of Attorney General Rogers on December 19, 1960, in response to a move by the Comptroller General to cut off funds to the Office of the Inspector General in the International Cooperation Administration pursuant to section 533A(d) of the Mutual Security Act of 1954, as amended. The background to this opinion will be covered in the next section. There are, however, portions of the opinion which are directly related to the doctrine of executive privilege --

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1/ Rogers, William P. Inquiry by the Legislative Branch concerning the Decision Making Process and Documents of the Executive Branch, page 693.

> In my opinion, Congress could not under the Constitution directly require the President to furnish information about a department or agency in the executive branch, if he determined that the disclosure of such information was imprudent or incompatible with the public interest; and it seems equally plain that Congress may not use its powers over appropriations to attain indirectly an object which it could not have accomplished directly.
>
> * * * * *
>
> Public policy...requires disclosure wherever possible. Nevertheless, under certain circumstances disclosure must be withheld in the public interest, and the principles expressed above may be summed up and applied as follows:
>
> First, it is the constitutional duty and right of the President and those officials acting pursuant to his instructions, to withhold information of the executive branch from Congress whenever the President determines that it is not in the public interest to disclose such information.
>
> Second, under the constitutional doctrine of separation of powers Congress may not directly encroach upon this authority confided to the President.
>
> Third, the Constitution does not permit any indirect encroachment by Congress upon this authority of the President through resort to conditions attached to appropriations such as are contended to be contained in section 533A(d) of the Act. (Footnote omitted.) 1 /

2. Statements by the President, Truman through Nixon

Presidential statements on the executive's right to withhold information from the Congress, while not plentiful, are obtainable and reveal a trend -- first toward expansion of the privilege, allowing subordinates to exercise it, and then toward more limited use of the privilege, by the President only. In 1945 in response to the congressional inquiry into the Pearl Harbor attack President Truman advised the Secretaries of State, War, Navy, the Attorney General, the Joint Chiefs of Staff, and the Directors of the Bureau of the Budget and the Office of

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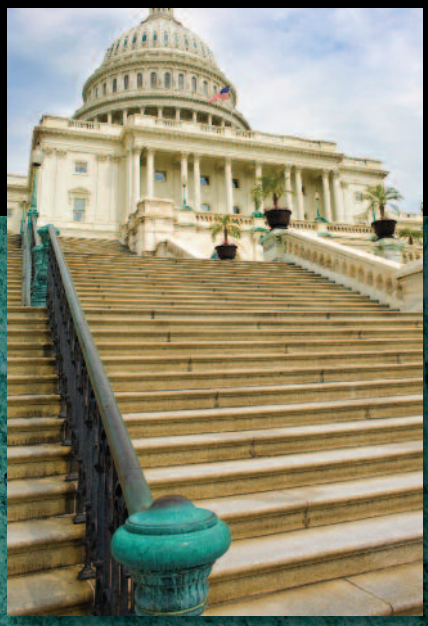
1 / Rogers, William P. Memorandum of December 9, 1960, pages 188; 192-193.

War Information to assist the committee in its investigation relative to documentation and testimony. His instructions did not, however, permit committee investigators to "search" executive files. Provision of materials "pertinent to the investigation" was left to the discretion of the executive.[1/]

The Brownell memo of 1954 was transmitted to the Secretary of Defense by President Eisenhower in a letter (May 17, 1954) which has been characterized as "stretch[ing] the claim of executive privilege to the breaking point."[2/] The letter is brief enough to be quoted almost in its entirety --

> ...It is essential to the successful working of our system that the persons entrusted with power in any 1 of the 3 great branches of Government shall not encroach upon the authority confided to the others. The ultimate responsibility for the conduct of the executive branch rests with the President.
>
> Within this constitutional framework each branch should cooperate fully with others for the common good. However, through our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation.
>
> Because it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.

1/ U.S. Department of Justice, op. cit., pages 2912-2913.
2/ Schwartz, op. cit., page 6.



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> I direct this action so as to maintain the proper separation of powers between the executive and legislative branches of the Government in accordance with my responsibilities and duties under the Constitution. This separation is vital to preclude the exercise of arbitrary power by any branch of the Government.[1/]

The views of President Kennedy crystallized with the passage of time. In a news conference on January 25, 1961, in response to a question on his views of executive privilege as related to the release of USIA public opinion polls, he indicated in general he "thought it would be well to release these polls" but,

> ....if other matters come up, we'll have to make a judgment whether it is an abuse or whether it is within the constitutional protections given to the Executive, and I would hope that we can within the limits of national security make available information to the press and to the people....[2/]

Later, in 1962 (February 8, 1962) in response to requests from the Senate Special Preparedness Investigating Subcommittee on Military Cold War Education, President Kennedy addressed the following instructions to Secretary of Defense Robert S. McNamara —

> ...[I]n accordance with the precedents on separation of powers established by my predecessors from the first to the last, I have concluded that it would be contrary to the public interest to make available any information which would enable the subcommittee to identify and hold accountable any individual with respect to any particular speech that he has reviewed. I, therefore, direct you and all personnel under the jurisdiction of your Department not to give any testimony or produce any documents which would disclose such information, and I am issuing parallel instructions to the Secretary of State.

1/ Letter and Memo of May 17, 1954, pages 3909-3910.
2/ Public Papers of the Presidents, John F. Kennedy, 1961, page 14.

> The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its own merits. But I do not intend to permit subordinate officials of our career services to bear the brunt of congressional inquiry into policies which are the responsibilities of their superiors.[1/]

A week later, on February 15, 1962, Congressman John E. Moss, Chairman of the House Subcommittee on Government Information, wrote the President requesting clarification of his position on executive privilege so as to avoid the bureaucratic restrictions on access to information which had developed pursuant to the Eisenhower letter of May 17, 1954. President Kennedy's response, on March 7, 1962, was as follows:

> As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval. Your own interest in assuring the widest public accessibility to governmental information is, of course, well known, and I can assure you this Administration will continue to cooperate with your subcommittee and the entire Congress in achieving this objective.[2/]

1/ U.S. Congress. Senate. Committee on Armed Services. Military Cold War Education and Speech Review Policies. Hearings before the Special Preparedness Subcommittee..., 87th Congress, 2d session. Part 2. February 1962. Washington, U.S. Govt. Print. Off., 1962. pages 508-509.

2/ Mollenhoff, Clark R. Washington Cover-Up. Garden City, New York, Doubleday and Company, 1962. page 239.

In response to a letter from Chairman Moss dated March 31, 1965, President Johnson, on April 2, 1965, stated the following --

> Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of 'executive privilege' will continue to be made only by the President.
>
> This administration has attempted to cooperate completely with the Congress in making available to it all information possible, and that will continue to be our policy.1/

A similar exchange occurred in 1969 between Chairman Moss and President Nixon. The following excerpts from the report of the activities of the House Committee on Government Operations for the 91st Congress are pertinent --

> In connection with its continuing study on the availability of executive branch information to the Congress, President Richard M. Nixon in a letter dated April 7, 1969, informed the subcommittee that any claim of Executive privilege as authority to withhold information from the Congress will not be asserted without Presidential approval in each instance.
>
> * * * * *
>
> In giving the policy continuity, President Nixon added another element by issuing a memorandum to the heads of executive departments and agencies which spells out specific procedural steps governing the invocation of Executive privilege, as follows:
>
> (1) If the head of an executive department or agency (hereafter referred to as 'department head') believes that compliance with a request for information from a congressional agency addressed to his department or agency raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.
>
> (2) If the department head and the Attorney General agree, in accordance with the policy set forth above, that Executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring congressional agency.
>
> (3) If the department head and the Attorney General agree that the circumstances justify the invocation of Executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

1/ Public Papers of the President, Lyndon B. Johnson, 1965, page 376.

(4) In the event of a Presidential decision to invoke Executive privilege, the department head should advise the congressional agency that the claim of Executive privilege is being made with the specific approval of the President.

(5) Pending a final determination of the matter, the department head should request the congressional agency to hold its demand for the information in abeyance until such determination can be made. Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request does not constitute a claim of privilege.1/

1/ U.S. Congress. House. Committee on Government Operations. Activities of the..., 91st Congress, 1st and 2d sessions, 1969-1970. December 1970. Washington, U.S. Govt. Print. Off., 1970. (91st Congress, 2d session. Committee Print) pages 101-102.

F. Major Statements and Acts by the Congress on Executive Privilege

1. Legislative Activity

Some authorities have argued that Congress has given the executive branch the right to withhold information, even from the Congress. They cite several acts of Congress, among them --

5 U.S.C. 22 (Rev. Stat. 161 (1875))

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Administrative Procedure Act, (60 Stat. 237 (1946), 5 U.S.C. 1001-1011 (1952))

> Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

18 U.S.C. 1905

> [A part of criminal law providing for the punishment of any] officer or employee of the United States or of any department or agency thereof, [who] publishes, divulges, dicloses [sic], or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties....1/

As regards the first act cited, 5 U.S.C. 22, known as the "housekeeping" statute, the Congress in 1958, as a result of investigations by the Hennings and Moss subcommittees (to be discussed below), added the following sentence -- "This section does not authorize withholding information from the public or limiting the availability of records to the public." The statement by Attorney General Rogers before the Senate

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1/ Schwartz, op. cit., pages 17-21.

Subcommittee on Constitutional Rights and in the report of the Committee on the Judiciary on this amendment point out the distinction between executive privilege and 5 U.S.C. 22 --

> [Rogers:] the executive privilege is not related to any statute; the executive privilege is an inherent part of our Government, based upon the separation of powers, and this has been recognized from the beginning of our Government.
>
> ...This [Rev. Stat. 161] is a bookkeeping statute, which says they [i.e., the heads of the several departments] keep the records, they hold them physically. It doesn't relate at all to executive privilege. [Footnote omitted]
>
> * * * * *
>
> The Senate Report stresses that the purpose of the bill is to prevent misuse of Rev. Stat. 161 but that it will not and is not intended to affect, what the Attorney General describes as an 'Executive privilege' to withhold information from the Congress and the public.
>
> To whatever extent such an 'Executive privilege' exists, it must be founded on the principle of separation of powers under the Constitution and, accordingly, will not be repealed, amended, or impaired by the proposed amendment to section 161. (S. Rept. No. 1621, 85th Cong., 2d sess., 1958, page 6).

1/, 2/

Section 3(c) of the Administrative Procedure Act, cited above, was amended in 1966 by PL 89-487 (80 Stat. 250, 5 U.S.C. 552). In Section 3 -- known as the Freedom of Information Act -- the pertinent subsection is --

> 4 (b). This section does not apply to matters that are
>
> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute;

1/ Kramer, Robert and Herman Marcuse. Executive Privilege -- a Study of the Period 1953-1960, pages 895-896.

2/ 5 U.S.C. 22 is now 5 U.S.C. 301 (1970) and reads as follows:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. (emphasis added). 5 U.S.C. 552 (4 (b)(c))

The third statute cited above relates to criminal punishment for the unauthorized disclosure of information.

An important Congressional response to the use of executive privilege can be found in the relevant portions of the Mutual Security Act and Mutual Security Appropriations Act, as amended in 1959 and 1960. Section 533A(d) of the Mutual Security Act of 1959 arranged for the expenses of the Office of the Inspector General and Comptroller, provided all documents, papers, etc., relating to the operation and activities of the Office would be furnished to the General Accounting Office and to any committee of the Congress requesting such information. Section 534 (b) imposed a similar duty on the International Cooperation Administration.1/

1/ Kramer and Marcuse, op. cit., page 854.

President Eisenhower's reaction to these amendments[1/] sparked revision of the Mutual Security and Related Agencies Appropriation Act, 1960, as follows:

> Section 111 (d). None of the funds herein appropriated shall be used to carry out any provision of chapter II, III, or IV of the Mutual Security Act of 1954, as amended, in any country, or with respect to any project or activity, after the expiration of the thirty-five day period which begins on the date the General Accounting Office or any committee of the Congress, or any duly authorized subcommittee thereof, charged with considering legislation or appropriations for, or expenditures of, the International Cooperation Administration, has delivered to the office of the Director of the International Cooperation Administration a written request that it be furnished any document, paper, communication, audit, review, finding, recommendation, report, or other material relating to the administration of such provision by the International Cooperation Administration in such country or with respect to such project or activity, unless and until there has been furnished to the General Accounting Office, or to such committee or subcommittee, as the case may be, (1) the document, paper, communication, audit, review, finding, recommendation, report, or other material so requested, or (2) a certification by the President that he has forbidden its being furnished pursuant to such request, and his reason for so doing.

In 1960 a similar proviso was added to the Mutual Security Act of 1960. Section 131 (a) was amended to require the President to provide whatever documents, etc., the GAO or committees of the Congress might request or to certify that he has forbidden the request and why. The House had originally passed a stronger proviso but the compromise worked out in House/Senate conference took into consideration--

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1/ Ibid., page 855. Eisenhower, upon signing the Mutual Security Act 1959: "I have signed this bill on the express premise that the... amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine." (Public Papers of the Presidents, Dwight D. Eisenhower, 1959, page 549).

> that the separation of powers under the Constitution makes it impossible for the Congress to infringe the prerogatives of the Executive by legislative action and that consequently this provision would serve to indicate the will of the Congress but that it could neither prescribe nor limit the constitutional powers of the Executive. (House Rept. No. 1593, 86th Cong., 2d sess., (1960) page 14) 1/

The Mutual Security and Related Agencies Appropriation Act, 1961, included the same proviso as the previous year, in Section 101 (d).2/

The President continued to refuse Congressional requests for documents of the International Cooperation Administration relative to its projects, certifying that for several reasons disclosure of the information was "contrary to the national interest." 3/ The Comptroller General of the United States, citing section 533A(d) of the Mutual Security Act of 1954, as amended, alerted the Secretary of State on November 17, 1960, that funds would be cut off from the Office of Inspector General unless the requested information was provided. On December 8, the Comptroller General ordered all funds cut off effective the next day. At the same time, the President's office asked the Attorney General to produce an opinion as to "whether, after the President forbids the furnishing of information...requested by a committee or subcommittee of Congress and issues a certificate reciting such action pursuant to section 101(d) of the Mutual Security and Related Agencies Appropriations Act, 1961 appropriations for the use of the Office of the Inspector General and

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1/ Kramer and Marcuse, op. cit., page 859.
2/ Ibid., pages 844-847 and 853-860 for full discussion. See also Rogers, William P. Memorandum of December 9, 1960, passim. Hereafter cited as Case Study.
3/ Case Study, page 160.

Comptroller must, nevertheless, be cut off by virtue of the operation of section 533A(d) of the Mutual Security Act of 1954, as amended."[1/] The Attorney General arrived at the conclusion "that the Comptroller General's view that the proviso of section 533A(d) has cut off funds under the circumstances disclosed here is an erroneous interpretation of the meaning of this statute. I further conclude," Attorney General Rogers continued, "that if this view of the Comptroller General as to the meaning of this statute is correct, the proviso is unconstitutional."[2/, 3/]

It is pertinent to note that the Foreign Assistance Act of 1971 -- Sections 624(d)(7) and 634(c) -- and the Foreign Assistance and Related Programs Appropriation Act, 1971 -- Section 502 -- contain provisions nearly identical to the original legislation discussed above. While advocates of Congressional access to information have interpreted this legislation as Congress' attempt to insure its access to information, executive privilege proponents have pointed to the need for Presidential certification as proof that Congress recognizes the existence of and need for executive privilege.[4/]

Another important statute requiring the executive to provide the Congress with information, upon request, is 5 U.S.C. 2954 (1970) --

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1/ Ibid., page 168.

2/ Ibid., page 193.

3/ Epilogue: Funds were not cut off; the President ordered the Secretaries of State and Treasury to ignore the Comptroller General's finding. Congressman Porter Hardy, whose Subcommittee on Foreign Operations had requested the documents, waited until after the change of Administrations and received the requested information from the State Department in March/April 1961, after the intercession of President Kennedy. (Case Study, op. cit., pages 157-159).

4/ See Kramer and Marcuse, op. cit., page 900.

> An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

This section was derived from an act adopted in 1928 to discontinue the large number of reports being transmitted to the Congress, yet enable the Congress to secure the information it had been receiving in these reports when necessary. Congressman Reuss recently used this statute in his attempt to obtain a copy of a report on the SST prepared in 1969 by a committee headed by Dr. Richard L. Garwin. John D. Ehrlichman, Assistant to the President for Domestic Affairs, informed Congressman Reuss that the "report constitutes an internal governmental memorandum of a confidential nature which cannot be released."[1/]

2. Congressional Committee Oversight

We have mentioned en passant the Moss and Hennings subcommittees. The Special Subcommittee on Government Information was created in June 1955 by Congressman William L. Dawson, chairman of the House Committee on Government Operations. He appointed as chairman of the subcommittee the member who suggested its creation — John E. Moss. During its existence, the Moss Subcommittee has functioned on a number of levels — in an investigative fashion, holding intensive hearings on how the statutes are being administered; in a legislative fashion, revising the laws, clarifying their meaning and intent; and, as a watchdog committee, vigilant to the problems of access to information. In 1963 the Subcommittee was merged with another to form the Subcommittee on Foreign Operations and Government

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1/ Congressional record, May 1, 1971: E6929 (daily edition)

The House of Representatives and Senate Explained

Congressional Procedure

A Practical Guide to the Legislative Process in the U.S. Congress

Richard A. Arenberg

Foreword by Alan S. Frumin

TheCapitol.Net

Information, chaired by Representative Moss. In 1962, 1965, and in 1969, Chairman Moss initiated and carried out a practice of securing from the President -- Kennedy, Johnson, and Nixon -- a statement of policy as regards his use of executive privilege (see supra, at pages 18-20).[1/] The latest report of the full Committee on its activities in the ninety-first Congress refers to the benefits of this practice -- "The Presidential commitment to continue the 'Executive privilege' policy, along with the implementing memorandum, will help safeguard and maintain a free flow of information to the Congress."[2/]

The Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, chaired by Senator Thomas C. Hennings, Jr., examined the subject of executive privilege during hearings in 1958 and 1959. It was Senator Hennings who combined forces with Congressman Moss to support enactment of the 1958 amendment clarifying the "housekeeping" statute. Together these two subcommittees have accumulated a wealth of literature, both from government sources and from private authorities, on the executive's privilege to withhold information and on the other methods which the executive uses to prevent the disclosure of information.

1/ Ladd, Bruce. Crisis in Credibility, pages 188-214.
2/ U.S. Congress. House. Committee on Government Operations. Activities ..., page 102.

G. Testimony by Members of the Executive Branch Before the Congress

1. General

The question of whether the Congress has the authority to compel requested executive department witnesses to give testimony before its committees is unclear. There are precedents on both sides of the issue. Section 192 in Title 2 of the United States Code provides for the punishment of "every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry...makes default, or, who, having appeared, refuses to answer any question pertinent to the question under inquiry...."(emphasis added)[1/] The law does not specify "private individual,"

1/ Texts from United States Code, Title 2 re Congressional Testimony:

§192. Refusal of witness to testify or produce papers.

Every person who having been summoned as witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

§193. Privilege of witnesses.

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

(continued on next page)

§194. Certification of failure to testify; grand jury action.

Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to bring the matter before the grand jury for its action.

or "person not a member of the government" but merely "person." Thus no statutory limit is placed on summoning members of the executive branch from the President down to the clerk-typist and file clerk.

At the same time the Executive has considered himself and his branch immune from the subpoenas of Congress. In 1955 a subcommittee of the Senate Committee on Post Office and Civil Service investigating the administration of the Federal Employees' Security Program was confronted with the problem of how to obtain the testimony and documents essential to the investigation. It became "standard policy" of the subcommittee to subpoena all the witnesses who were to appear before it. The statement of Secretary of the Army Brucker is typical of the replies to these subpoenas --

> I am willing to appear before the committee voluntarily at the committee's invitation at any time or times that may be mutually convenient, and to furnish the committee such information and produce for the committee's study such files, records, and papers as may be within my power to provide. However, as the head of a department in the executive branch of the Government, I am advised that I cannot be required to appear before a congressional committee under the compulsion of a subpena, and for that reason I am returning to you herewith the subpena that was served upon me on September 16.
>
> While I must respectfully decline to appear before the committee under compulsion of a subpena, I shall treat the committee's action as an invitation to appear and I shall assume that the committee desires me to be present voluntarily on September 27. Accordingly, unless I hear from you to the contrary, I will be there at that time. I wish to emphasize, however, that my decision to appear voluntarily on this occasion does not constitute a waiver of my legal position in regard to the subpena.[1/]

1/ Kramer and Marcuse, op. cit., page 862.

In many instances the documents requested by subpoena were not provided. In its report (Senate Report No. 2750, 84th Congress, 2d session (1956)), the Subcommittee recommended that "steps be taken by the several committees to provide a test in the courts to determine the respective powers of the Congress and the executive agencies," relative to this problem. According to Kramer and Marcuse, no contempt proceedings were instituted in connection with this investigation.[1/]

While there is disagreement on the authority of the Congress to subpoena the heads of executive departments to testify before committee proceedings, there is little doubt that, as creations of the Congress rather than the President's advisers, heads of executive departments do have an obligation to come before Congress to provide information on how their departments and the laws assigned to them are being administered.

2. The Special Problem Presented by Members of the President's White House Staff

A more sensitive situation surrounds the availability of members of the President's White House and Executive Office Staff to testify before the Congress. The prevailing policy has been that members of the President's Staff do not testify in formal sessions before Congressional committees.

1/ Ibid., pages 860-877.
For further reading, see Meader, George, Hon. Government Secrecy. Congressional Record v. 104, part 3, March 10, 1958: 3848-3854. Page 3849 contains examples of instances in which subpoenas were served on executive department heads; U.S. Congress. Senate Committee on the Judiciary. Congressional Power of Investigation. A Study Prepared at the Request of Senator William Langer, Chairman... by the Legislative Reference Service... Washington, U.S. Govt. Print. Off., 1954. (83rd Congress, 2d session. Senate. Document No. 99). See Chapter 7. Investigation of the Executive Branch, pages 20-27 ; United States Supreme Court. Annotation: Contempt of Congress or Congressional Committee. 97 L ed 782-821 (1952).

There are occasions when they might meet with individual or selected members of the Congress, but this is arranged in an ad hoc fashion and in an informal atmosphere.

In 1951, during the joint committee hearings on the MacArthur dismissal, General Omar Bradley, Chairman of the Joint Chiefs of Staff, was queried on the views and counsels to the President during a meeting on April 6, 1951. General Bradley responded that, "at that time I was in a position of a confidential adviser to the President. I do not feel at liberty to publicize what any of us said at that time." 1/ After some discussion Chairman Richard Russell indicated, "that any matter that transpired in the private conversation between the President and the Chief of Staff as to detail can be protected by the witness if he so desires...."2/ President Truman, in reply to a press conference question relative to General Bradley's position, observed, "The conversations with my advisers and my private staff before decisions are made is my business and mine alone."3/

During President Eisenhower's administration the question of whether Sherman Adams should testify in Congressional proceedings was handled differently in different situations. According to Mr. Adams, "McCarthy wanted to call me as a witness for questioning about the conversations at the January 21 meeting [at which Adams suggested that a chronology be

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1/ U.S. Congress. Senate. Committees on Armed Services and Foreign Relations. Military Situation in the Far East, Hearings..., 82nd Congress, 1st session, Part 2, May...1951. Washington, U.S. Govt. Print. Off., 1951. page 763. See pages 763-775 and 911-919 for discussion.

2/ Ibid., page 765.

3/ Public Papers of the Presidents, Harry S. Truman, 1951. page 290.

made of McCarthy's and Cohn's attempts to obtain preferential treatment for Schine]. He also wanted to see records of monitored telephone calls in the White House and in the Department of Defense. In no uncertain terms, Eisenhower told the Republican Congressional leaders in a meeting with them on May 17 [1954] that White House staff people, like me, were under no obligation to the legislative branch of the government and that he would permit no testimony before a Senate subcommittee concerning private meetings and telephones calls in which executive branch officials were involved."[1/] The same day President Eisenhower transmitted to Secretary of Defense Wilson his letter and memorandum instructing him not to transmit to the subcommittee such information which he deemed confidential (see supra, at pages 11, 16-17). On July 21, 1955, Sherman Adams was invited to testify before the Senate Subcommittee on Antitrust and Monopoly in its investigation of the Dixon-Yates power contract; he refused in this instance "because of my official and confidential relationship to the President."[2/] In 1958 during the hearings of a subcommittee of the House Committee on Interstate and Foreign Commerce into the Goldfine investigation, Mr. Adams voluntarily testified. This, however, did not relate to interaction between him and the President.[3/], [4/]

Adams, Sherman. Firsthand Report. New York, Harper and Brothers, 1961. pages 149-150.

2/ Kramer and Marcuse, op. cit., pages 701-702.

3/ Ibid., page 702, footnote #351.

4/ For brief background information on the McCarthy - Army Investigations, see Congress and the Nation, 1945-1964. Washington, Congressional Quarterly Service, 1965. See pages 1718-1727.

On the other hand, there have been complaints relative to the use of executive privilege to deny either the right to appear or the acquisition of information upon appearance.

According to Senator Hubert H. Humphrey, in an article on Government Organization for Arms Control, written in 1961 --

> The Disarmament Subcommittee of the Senate Committee on Foreign Relations has experienced the not uncommon difficulty of obtaining information from the Executive branch of the government. This difficulty is compounded under the status of Special Assistant in that he is able to plead executive privilege and thus deny to any committee of the Congress...information on any aspect of the problem which it is to his interest to deny. The Special Assistant to the President for Science and Technology and the Special Assistant to the President for Disarmament have used executive privilege to deny information to the Senate Disarmament Subcommittee, as well as to the public at large. 1/

Senator Humphrey was more explicit in a speech in February 1959 --

> ...Certain portions of testimony are deleted on the ground that the witness is a consultant to an advisory body to the President and, therefore, the information should not be given out. Not only is it contended that this is privileged information, but it is contended that since the testimony of the witness may conflict with the views of another executive agency, that this matter should be left to be ironed out within the executive branch of the Government.
>
> What this amounts to is that a regular executive department can air its views in public, even if these views conflict with public policy, but a consultant to a Presidential advisory body cannot make some of his views public, even if they agree with the policy. Now this is a strange situation.
>
> * * * * *
>
> Dr. Killian and his Science Advisory Committee is not the only group which has been sheltered from congressional and public inquiry. When Mr. Stassen was disarmament adviser to the President, all of work and studies conducted for him were classified under the label of executive privilege.

1/ Humphrey, Hubert H. Government Organization for Arms Control. In Brennan, Donald G., ed. Arms Control, Disarmament, and National Security. New York, George Braziller, 1961. page 395.

> When Clarence Randall was the President's adviser on foreign trade, he was prohibited from testifying before Congress because of his role as Presidential adviser.
>
> Nelson Rockefeller, when he was advising the President on matters of psychological warfare, could not tell the public what his views were and that they were not being accepted.
>
> William Foster an able and as conscientious a public servant as one can find, served as vice chairman of the famous Gaither report on our national defense. The Gaither report was completely classified, even from Members of Congress. Mr. Foster, it is reported, felt so strongly about his views that he wrote a book, but even this was labeled secret by the White House.[1/]

As relates to science policy, Harvey Brooks, in a chapter on The Scientific Adviser, in 1964, notes one partial solution --

> Under the Eisenhower administration, the Special Assistant often felt hampered by the rigidity of the practice of executive privilege, which is even more enforced when the Executive and Congress are controlled by different parties. There were times when the Special Assistant was unable to testify although it would have been to the interest of the government for him to do so. Reorganization Plan No. 2, which became effective in June, 1962, created the Office of Science and Technology and gave the Special Assistant two hats -- one as a confidential White House adviser and the other as statutory Director of the Office, subject to Senate confirmation. One of the purposes of providing such statutory underpinning to the science advisory role was to permit the Director to testify before Congress and thereby formally defend administration positions on new science legislation, on budgetary matters affecting basic science, and on the coordination of federal scientific programs. As a result of this reorganization, the area which we have called 'policy for science' can become the subject for congressional testimony, while the area which we have called 'science in policy' remained under executive privilege.[2/]

1/ Humphrey, Hubert H. The Need to Know; Address on February 13, 1959. In U.S. Congress. House. Committee on Government Operations. Availability of Information from Federal Departments and Agencies (Progress of Study, August 1958-July 1959). Twelfth Report....Washington, U.S. Govt. Print. Off., 1959. (86th Congress, 1st session. House Report No. 1137) pages 450-451.

2/ Brooks, Harvey. The Scientific Adviser. In Gilpin, Robert and Christopher Wright, eds., Scientists and National Policy-making. New York, Columbia University Press, 1964. page 91.

The problem of the unavailability to the Congress of the President's staff, especially his Assistant for National Security Affairs, has intensified in recent months. Members of the Congress and the public itself have become more keenly conscious of the importance of the decision making process in regard to foreign policy. The structure and personnel of the National Security Council and its Staff has expanded to the point where some observers fear that it is impinging on the operation and functions of the Department of State and its Secretary as adviser to the President on foreign policy matters. Most distressing, however, from the vantage point of Congress, is the fact that this vital influence in foreign policy making is not available to the Congress for querying in any formal way.[1/]

Senator J. William Fulbright, Chairman of the Committee on Foreign Relations, on March 5, 1971, introduced a bill which could be considered a first step in Congress' efforts to secure information from this source. The text of the bill follows --

S. 1125

To amend title 5, United States Code, with regard to the exercise of executive privilege.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 3 of title 5, United States Code, is amended by adding at the end thereof the following new section:

1/ See Marder, Murrey. Symington Hits Kissinger Role as the "Real" Secretary of State. Washington Post, March 3, 1971: 1, 10, for description of informal arrangements made with Senate Foreign Relations Committee.

"§306. Executive privilege

"(a) An employee of the executive branch summoned or requested to testify or produce documents before Congress, any joint committee of the Congress, any committee of either House of the Congress, or any subcommittee of any such committee, who intends to exercise executive privilege as to the whole or any portion of the matter about which he was summoned, requested to testify, or produce documents, shall not refuse to appear on the grounds that he intends to assert executive privilege.

(b) In no case shall an employee of the executive branch appearing before the Congress, any joint committee of the Congress, any committee of either House of the Congress, or any subcommittee of such committee in response to a summons or request, assert executive privilege unless the employee presents, at the time executive privilege is asserted in response to any testimony or document sought, a statement signed personally by the President requiring that the employee assert executive privilege as to the testimony or document sought."

(c) The analysis of such chapter is amended by adding at the end thereof the following new item:

"306. Executive privilege.".

H. Solutions to the Problem and General Remarks

1. General Attitude Toward "State Secrets"

The struggle between the legislative and executive branches over executive privilege and congressional investigation of the executive's administration of the law continues to be a source of controversy. Most authorities agree that the executive has some discretion to withold information on military and diplomatic matters, of a nature usually labeled "state secret" and that he can do so by claiming executive privilege.[1/] However, some of the founding fathers, among them Patrick Henry,

> recognized the need [only] for temporary withholding of such transaction as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the country. (emphasis added)[2/]

Another difficulty arises relative to the definition of the term, state secret. Rules 33 and 34 of the Rules of Evidence approved in 1953 by the National Conference of Commissioners on Uniform State Laws help slightly --

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1/ See Schwartz, op. cit., page 42; Kramer and Marcuse, op. cit., page 902; Hennings, Thomas C., Jr. The Executive Privilege and the People's Right to Know, pages 8-11.

2/ Berger, op. cit., page 1068; see Berger, pages 1067-1069.

> Rule 33: 'Secret of state' means information not open or theretofore officially disclosed to the public involving the public security or concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations. Rule 34: 'Official information' means information not open or theretofore officially disclosed to the public relating to internal affairs. . .of the United States acquired by a public official of . . .the United States in the course of his duty.[1]

2. Proposals

a. Schwartz - An Independent Judicial Tribunal

It seems to Bernard Schwartz, formerly chief counsel and staff director of the House subcommittee investigating the federal regulatory agencies,

> that the Reynolds case [United States v. Reynolds, see discussion supra, at pages 7-9] furnishes the proper rule for information involving 'state secrets,' not only when disclosure is sought in court, but also when disclosure is sought in the Congress. If a 'state secret' is actually involved, the Congress should not compel disclosure. . . .The congressional organ seeking disclosure should inquire to determine whether there is a reasonable basis for the executive claim and, if that basis is found to exist, more should not be demanded. What was said in the Reynolds case about the propriety of such inquiry should apply as well to cases where it is the Congress that seeks information.[2]

But does the Congress, as a directly interested party, have a right to make a decision in this matter? The answer to this objection

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1/ Schwartz, op. cit., page 41.
2/ Ibid., page 44.

> could be overcome if the power of inquiry were vested in an independent judicial tribunal. . . .The Congress could . . .establish by law an independent Government Information Commission. This tribunal could be composed of three members appointed during good behavior. Any case in which an executive officer refused to furnish requested information to the Congress would be referred to the Commission. It would determine, in camera if necessary, whether there is a 'reasonable ground' for holding that the information requested involves a 'state secret.' If it determines there is such ground, disclosure would not be allowed; otherwise disclosure would be compelled, under appropriate coercive powers vested in the Commission by law. Since both the executive and the Congress will, to some degree, be interested parties in the cases before the Commission, it is suggested that its members be appointed by a wholly impartial source, under an almost ignored provision of Article II(2) of the Constitution, i.e., that under which the Congress may by law vest the appointment of officers other than those expressly named 'in the Courts of Law.' Such appointments could be made by the Supreme Court or the Chief Justice thereof, a method which will ensure both the prestige and impartiality of the proposed commission.1/

b. Berger - Procedure Preliminary to Judicial Suit

Raoul Berger suggests the following in order "to stimulate study and design of a statutory procedure" --

> (1) If an executive officer declines to furnish information, the head of the agency, upon a written request by the congressional committee chairman, shall hold a closed hearing on the refusal, at which a representative of the committee shall be entitled to be heard; (2) If the head thereafter endorses his subordinate's refusal to produce, the request shall be put before the relevant legislative branch in order to obtain approval for the institution of a suit. Similarly, the institution of suit for declaratory judgment by an executive agency might be conditioned on prior approval by the President.2/

1/ Ibid., pages 44-45.
2/ Berger, op. cit., page 1335.

Pocket Constitution

The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII

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c. Dechert - Commission of Notables

Charles R. Dechert, in Availability of Information for Congressional Operations, observes --

> It might. . .be desirable to consider establishing an institutionalized and automatic procedure for linking denial of information to future appropriations. This would seem as a minimum to involve the following stages:
>
> (1) Report of denial, giving details as to the information requested and the agency and activity involved.
>
> (2) Confirmation of the legitimacy of the request in terms of congressional function, possibly by a Commission of Notables.
>
> The Commission might include nominees of the three branches, and independent members. This Commission would also verify the fact of refusal and the budget item(s) involved.
>
> (3) The Commission would authorize the congressional power of subpoena, and set a deadline for the submission of the information requested.
>
> (4) Failure to produce the information requested would result in an automatic notification to the agency concerned and to the Bureau of the Budget that the item(s) involved would not be authorized the following year, and that the agency would be wise to terminate that part of its activity within the current appropriation by June 30 of the on-going fiscal year.
>
> Such an institutional process within the Congress could be created by legislation or by concurrent resolution as a self-enforced internal congressional procedure. Some question might arise as to whether such self-enforced internal decisions could or should be subject to judicial review. The use of a commission mechanism, employing persons of national prestige and presumed objectivity, would create a dignified quasi-judicial character that would blunt accusations of congressional impropriety or irresponsibility in making demands upon the executive or employing the appropriation power as an instrument for

> enforcing its prerogatives. Moreover, the commission would certainly prove a focus of press attention, since conflict is at the heart of the news. Hence it could serve to direct public attention to congressional functions and prerogatives and their place in the American way of government.1/

d. Ladd - Use of Congressional Committee Apparatus

According to Bruce Ladd, in Crisis in Credibility, it is up to the Congress to restore the system of checks and balances intrinsic in the separation of powers structure of the Government. It should more effectively use its appropriation power to "force executive compliance" with its demands. Mr. Ladd continues,

> This power ought to be employed as often as is necessary to convince the executive that 'cooperation' is a two-way process.
>
> * * * * *
>
> One desirable change [in the committee organization of the Congress] would be to place the Committees on Government Operations of the House and Senate in the hands of the political party other than the party of which the President is a member. Under minority control, the major congressional investigating committees would be considerably more diligent in seeking facts from the executive branch. Another proposed change, put forward by three members of the Joint Committee on the Organization of Congress, is for the House and Senate each to establish a new Committee on Procedures and Policies to monitor executive activities, with the committee chairmen being from the minority party.2/

3. The Current Problem of Classification of Documents and its Relation to Executive Privilege

The claim of executive privilege in withholding information from the Congress is separate from the issue of classified documents. The classification system stems from the executive's practice of taking care of its records. Classification of a document does not necessarily mean it

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1/ Dechert, Charles R. Availability of Information for Congressional Operations, pages 202-203.

2/ Ladd, op. cit., pages 223-224.

will be withheld from the Congress, which has rules and regulations governing the safekeeping and examination of classified information. If a classified document is withheld, under the claim of executive privilege, the reason for its being withheld is not because it is classified, but because it is a "state secret " (see supra, at pages 39-40).

The claim of executive privilege, on the other hand, is based on the separation of powers; the President declares that it is not in the public interest to transmit certain requested information to the legislative branch. Or, the request might represent an encroachment on the prerogative of the executive to "execute the laws." The problem as we have seen arises when the President imposes his privilege over too much information, thus severely limiting the ability of the legislative branch to function properly.

4. Concluding Remarks

The argument---that because in the nearly 200-year history of our constitutional system no decisive action has been taken to eliminate the oftimes unequal struggle between the executive and the legislative in this area, thus that struggle must continue unchecked--might be considered out-of-date. The technological complexity of decision making in today's world may require that apparatus and procedures for a just settlement of of the tug-of-war on a case by case basis be formulated and put into operation. The suggestions above indicate that a thorough and up-to-date investigation and search for remedies may need to be initiated.

At the same time, much can be done now by the President and his "men" and by the Congress to improve the situation. The President can establish guidelines and procedures to insure that Congress in all instances receives the information it needs in order to function properly. Not many persons would question the failure of the executive to disclose information which genuinely needs to be "secret;" however, there are methods for the disclosure to the Congress of "secret" information when it is necessary for them to have it. At the same time Congress must make certain that the information it requests is genuinely necessary to its function. 1/ The various subjective evaluations which are inherent in the foregoing suggest third party arbitration as one solution.

There are other possible solutions and it is in the interest of effective representative democratic government that the Congress explore the ways by which it can obtain all the information it requires for fulfilling completely its Constitutional role.

1/ For more discussion, see Schwartz, op. cit., pages 45-50; Kramer and Marcuse, op. cit., pages 909-916; Bishop, Joseph W., Jr. The Executive's Right of Privacy: an Unresolved Constitutional Question, pages 488-491.

I. Appendix. Executive Privilege -- Examples of Claims Made in Response to Congressional Requests

1. List in Department of Justice Study (1956): 1796-1947

President	Date	Type of information refused
George Washington	1796	Instructions to United States Minister concerning Jay Treaty.
Thomas Jefferson	1807	Confidential information and letters relating to Burr's conspiracy.
James Monroe	1825	Documents relating to conduct of naval officers.
Andrew Jackson	1833	Copy of paper read by President to heads of departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
	1835	List of all appointments made without Senate's consent, since 1829, and those receiving salaries, without holding office.
John Tyler	1842	Names of Members of 26th and 27th Congresses who applied for office.
	1843	Report to War Department dealing with alleged frauds practiced on Indians, and Colonel Hitchcock's views of personal characters of Indian delegates.
James K. Polk	1846	Evidence of payments made through State Department, on President's certificates, by prior administration.
Millard Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer islands to United States.
James Buchanan	1860	Message of protest to House against resolution to investigate attempts by Executive to influence legislation.
Abraham Lincoln	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Ulysses S. Grant	1876	Information concerning executive acts performed away from Capitol.
Rutherford B. Hayes	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as collector of port of New York.
Grover Cleveland	1886	Documents relating to suspension and removal of Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute United States Steel Corp.
	1909	Documents of Bureau of Corporations, Department of Commerce.
Calvin Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.
Herbert Hoover	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigation made by Treasury Department.
Franklin D. Roosevelt	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of the Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Commisssion, and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy, refused to furnish documents, and permission for Army and naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.
President Truman	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee.
	1945	President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

SOURCE: U.S. Department of Justice. Is a congressional committee entitled to demand and receive information and papers from the President and the heads of departments which they deem confidential, in the public interest? Study transmitted by Deputy Attorney General William P. Rogers on June 18, 1956. In U.S. Congress. House. Committee on Government Operations. Availability of information from federal departments and agencies. Part 12 -- Panel discussion with government lawyers. Hearings before a subcommittee. . ., 84th Congress, 2d session. June 20 and 22, 1956. Washington, U.S. Govt. Print. Off., 1957. Page 2914.

2. List in Letter and Memo of May 17, 1954: 1948-1952

Date	Type of document refused
Mar. 4, 1948.....	FBI letter-report on Dr. Condon, Director of National Bureau of Standards, refused by Secretary of Commerce.
Mar. 15, 1948.....	President issued directive forbidding all executive departments and agencies to furnish information or reports concerning loyalty of their employees to any court or committee of Congress, unless President approves.
March 1948.....	Dr. John R. Steelman, Confidential Adviser to the President, refused to appear before Committee on Education and Labor of the House, following the service of two subpenas upon him. President directed him not to appear.
Aug. 5, 1948.....	Attorney General wrote Senator Ferguson, chairman of Senate Investigations Subcommittee, that he would not furnish letters, memoranda, and other notices which the Justice Department had furnished to other Government agencies concerning W. W. Remington.
Feb. 22, 1950.....	S. Res. 231 directing Senate subcommittee to procure State Department loyalty files was met with President Truman's refusal, following vigorous opposition of J. Edgar Hoover.
Mar. 27, 1950.....	Attorney General and Director of FBI appeared before Senate subcommittee. Mr. Hoover's historic statement of reasons for refusing to furnish raw files approved by Attorney General.
May 16, 1951.....	General Bradley refused to divulge conversations between President and his advisers to combined Senate Foreign Relations and Armed Services Committees.
Jan. 31, 1952.....	President Truman directed Secretary of State to refuse to Senate Internal Security Subcommittee the reports and views of Foreign Service officers.
Apr. 22, 1952.....	Acting Attorney General Perlman laid down procedure for complying with requests for inspection of Department of Justice files by Committee on Judiciary: Requests on open cases would not be honored. Status report will be furnished. As to closed cases, files would be made available. All FBI reports and confidential information would not be made available. As to personnel files, they are never disclosed.
Apr. 3, 1952.....	President Truman instructed Secretary of State to withhold from Senate Appropriations Subcommittee files on loyalty and security investigations of employees—policy to apply to all executive agencies. The names of individuals determined to be security risks would not be divulged. The voting record of members of an agency loyalty board would not be divulged.

SOURCE: Letter and memo of May 17, 1954. Letter from President Dwight D. Eisenhower to Secretary of Defense Charles Wilson enclosing Memorandum to the President from Attorney General Herbert Brownell on the availability of information to the Congress. In U.S. Congress. House. Committee on Government Operations. Availability of information from federal departments and agencies. Part 16 -- Department of Defense, seventh section (Air Force-GAO). Hearings before a subcommittee. . ., 85th Congress, 2nd session. November 12 and 13, 1958. Washington, U.S. Govt. Print. Off., 1958. Pages 3916.

3. List Extracted from House Report 2084 (86th Congress, 2d sess.): 1955-1960

TABLE OF FEDERAL INFORMATION CASES

Restriction	Source of complaint	Agency explanation of restriction	Authority claimed for restriction		Disposition		Documentation
			Statutory	Other	Action	Explanation	
Civil Service Commission: Denied information on investigation of rural mail carrier applicant.	Member of Congress.	Public interest requires restriction.		Executive privilege.	Restriction continued.		H. Rept. 1137, 86th Cong., 1st sess., p. 39.
Commerce Department (Business Advisory Council): Privileged status for Council which holds secret meetings.	Committee of Congress and press.	Public meetings restrain frank discussion.		Executive privilege.	Restriction continued.	Secretary unwilling to establish procedure for greater flow of information from advisory body.	H. Rept. 2678, 2d sess., p. 14, and H. Rept. 2947, 84th Cong., 2d sess., p. 39.
Defense Department: Computations used to arrive at the amount paid by the Pentagon newsstand concessionaire refused Member of Congress.	Member of Congress.	Improper to disclose private financial information obtained on confidential basis.		Executive privilege.	do.		See p. 221, this report.
Defense Department: Access to nonsecurity files of the Office of Security Review refused Congress.	Committee of Congress.	Access not consistent with proper preservation of the separation of powers among the 3 branches of government.		do.	do.		See p. 220, this report.
Defense Department: Access to press desk queries in Department of Defense newsroom refused Congress.	do.	Safeguard investigative reports and information received in confidence.		do.	do.		See p. 220, this report.
Defense Department: Senate Preparedness Investigating Subcommittee refused material derived from an Inspector General's report.	do.	Safeguard information in investigative reports.		do.	do.		See p. 218, this report.
Defense Department: Information concerning serviceman's discharge refused to Congress.	do.	Release only with serviceman's consent; information received in confidence.		do.	do.		See p. 218, this report.
Defense Department: Inspector General report of Okinawa employment conditions refused to Congress.	do.	Responsibility to safeguard investigative reports.		do.	do.		See p. 219, this report.
Defense Department: Various Inspector General reports and Auditor General reports denied House Appropriations Committee.	do.	Safeguard information in investigative reports.		do.	do.		See p. 218, this report.
Defense Department: Information pertaining to an officer's status refused to Congress.	do.	Advisory and preliminary in nature.		do.	do.		See p. 219, this report.
Defense Department: Investigation file on disloyalty and subversion charges at Signal Corps Intelligence Agency refused to Congress.	do.	Safeguard investigative reports.		do.	do.		See p. 218, this report.
Defense Department: Inspector General report on Irving Peress refused to Congress.	do.	Safeguard information on investigative techniques; protect confidential informants; withhold incomplete information and interdepartmental advisory matter.		do.	do.		See p. 218, this report.

Restriction	Source of complaint	Agency explanation of restriction	Authority claimed for restriction		Disposition		Documentation
			Statutory	Other	Action	Explanation	
Defense Department: Air Force Inspector General's reports and Auditor General's reports refused to Congress.	Committee of Congress.	Safeguard information in investigative reports.		Executive privilege.	Restriction continued.		See p. 218, this report.
Defense Department: Document described as "Research Material for Political Intelligence Problem" denied to Congress.	do	Safeguard intelligence material and techniques; protect confidential informants; preliminary, interdepartmental report.		do	do		See p. 218, this report.
Defense Department: Memorandum of Under Secretary of the Navy relating to discussion with Assistant Secretary of Defense refused to Congress.	do	Advisory in nature		do	do		See p. 218, this report.
Defense Department: Information relating to East-West trade controls including international list of controlled items refused to Congress (similar refusal by State and Commerce Departments and International Cooperation Administration).	do	Advisory in nature, involves other governments, highly sensitive intelligence information.		do	do		See p. 218, this report.
Defense Department: Recommendations of DOD Research and Development Policy Council on classification of technical information refused to Congress.	do	Interdepartmental documents of advisory and preliminary nature.		do	do		See p. 220, this report.
Defense Department: Inspector General report on "Management of the Ballistic Missile Program" refused to Congress and General Accounting Office.	do	Contains "opinions, conclusions, and recommendations."		do	do		H. Rept. 234, 86th Cong., 1st sess.
Defense Department: Review of Military Sea Transportation Service procurement and contracting activities refused to Congress and General Accounting Office.	do	do		do	do		H. Rept. 1224, 86th Cong. 1st sess.
Defense Department: Reviews of military construction program refused to Congress and General Accounting Office.	do	do		do	do		Subcommittee hearings, pt. 17, p. 3065, and p. 218, this report.
Defense Department: Review of Military Petroleum Supply Agency refused to Congress and General Accounting Office.	do	do		do	do		Subcommittee hearings, pt. 17, p. 3095, and p. 218, this report.
Defense Department: Review of Naval Supply Depot supply activities at Subic Bay, Philippine Islands, refused to Congress and General Accounting Office.	do	do		do	do		See p. 218, this report.
Defense Department: "Cordiner report" of Defense Advisory Committee on Professional and Technical Compensation made available to the public but refused to Congress.	Members of Congress.	If "Cordiner report" is opened up for discussion, both Congress and Department of Defense will be subjected to speculations and questions with respect to proposals which may never be recommended to or considered by Congress.		do	do		H. Rept. 1884, 85th Cong., 2d sess., p. 134.

Restriction	Source of complaint	Agency explanation of restriction	Authority claimed for restriction		Disposition		Documentation
			Statutory	Other	Action	Explanation	
Defense Department: Survey of use of Naval Gun Factory refused to Congress.	Member of Congress.	Official disagreement with recommendations in report would cause misunderstanding among employees.		Executive privilege.	Restriction continued.		H. Rept. 1137, 86th Cong., 1st sess., p. 218.
Defense Department: Study by U.S. European Command of allied forces objectives for military assistance program refused to Congress and General Accounting Office.	Committee of Congress.	Internal working papers.	do	do	do		See p. 189, this report.
Defense Department: Evaluation of Turkey military assistance program refused to Congress and General Accounting Office.	do	Internal working papers confidentially furnished by foreign government.	do	do	do		See p. 192, this report.
Defense Department: Evaluation of French military assistance program refused to Congress and General Accounting Office.	do	do	do	do	do		S. Doc. 108, 86th Cong., 2d sess., pp. 7-8.
Defense Department (Army): General Accounting Office request for records of Ordnance Tank-Automotive Command rejected.	do	do	do	do	do		S. Doc. 108, 86th Cong., 2d sess., pp. 2-4.
General Services Administration: Names of persons renting office space to Government in Philadelphia withheld from public.	Member of Congress.	Public interest not to disclose rental information because of landlord-client relationship.		Executive privilege.	Restriction removed.	List made available.	H. Rept. 2578, 85th Cong., 2d sess., p. 30.
Interior Department: "NOT FOR PUBLIC INSPECTION" stamp on document setting policy for classification of Alaska oil and gas lands.	Member of Congress.	Stamp used to assure proposed policy recommendations be withheld pending official approval.	5 U.S.C. 22	Executive privilege.	do	Department regulation issued prohibiting unauthorized use of restrictive classifications.	See p. 53, this report.
Interior Department: Legal evaluation of Death Valley National Monument land and water rights exchange proposal denied to Congress.	Committee of Congress.	Unevaluated analysis of possible position of United States in any litigation over Death Valley water rights.		Executive privilege.	do	Evaluation given to committee.	See p. 96, this report.
International Cooperation Administration: Evaluation reports on operation of foreign aid program in Laos, India, Taiwan, Pakistan, Guatemala, Vietnam, Bolivia, Brazil, etc., denied Congress and General Accounting Office.	do	Reports pertinent to effectiveness of foreign policy; contain confidential opinions and tentative recommendations.		Executive privilege.	Restriction continued.		H. Rept. 2578, 85th Cong., 2d sess., p. 191, and H. Rept. 1137, 86th Cong., 1st sess., p. 205.
National Aeronautics and Space Administration: Information about 2 development contracts withheld from the General Accounting Office.	Committee of Congress.	"Documents contain personal evaluations and recommendations."		Executive privilege.	Restriction continued.		S. Doc. 108, 86th Cong., 2d sess., pp. 12-13.
Operations Coordinating Board of the National Security Council: Defense Department information activities controlled by Operations Coordinating Board guidelines which are not available to Congress.	Committee of Congress.	Operations Coordinating Board guidelines are "advisory" only.		Executive privilege.	Restriction continued.		H. Rept. 1137, 86th Cong., 1st sess., p. 227.

SOURCE: Table of Federal Information Cases. In U.S. Congress. House Committee on Government Operations. Availability of Information from Federal Departments and Agencies (The First Five Years and Progress of Study, August 1959-July 1960). Twenty-fourth Report by the Committee. . . . Washington, U.S. Govt. Print. Off., 1960. (86th Congress, 2d session. House Report No. 2084). See pages 4-35 for tabular listing of restrictions of information to the public and to Congress between June 9, 1955 and June 1960.

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