

The CHAIRMAN. Mr. Bolton, would you explain the policy of the Justice Department on this matter? You have heard the conversation here. Give us the theater behind it.

**TESTIMONY OF JOHN R. BOLTON, ASSISTANT ATTORNEY GENERAL,  
OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE**

Mr. BOLTON. Yes, thank you, Mr. Chairman.

I might say, in response to a point that Senator Biden made, that after receipt of his letter dated, I believe, July 24, we did produce some documents that he had requested. Those documents contained, in every case, legal advice that had been transmitted outside the Office of Legal Counsel, in some cases, to other components of the Department of Justice, in some cases, to other Government agencies, as I recall.

Senator Hatch, however, has correctly stated that to our knowledge, there have never been provided to this committee internal deliberative documents from the Office of Legal Counsel or, I might add, by way of analogy, the Solicitor General's Office. And there are numerous precedents for that that we have followed.

Senator METZENBAUM. What about the *Brad Reynolds* case and the *Cooper* case?

The CHAIRMAN. What about these particular documents?

Mr. BOLTON. I do not know which ones you have in your hand, Mr. Chairman, but I believe one that was referred to was from the Office of Legal Counsel to Mr. McGrath, who at one point was with the Civil Division.

The CHAIRMAN. That is right; memorandum to Paul J. McGrath, Assistant Attorney General, Civil Division.

Mr. BOLTON. Yes, Mr. Chairman. That would be consistent with what I just said. It was a document transmitted from the Office of Legal Counsel to another component of the Department of Justice. We have produced that in response to Senator Biden's earlier request.

Could I say one other thing, please, Mr. Chairman? Senator Biden referred to a practice since 1977—I think it goes back before that—that some opinions of the Office of Legal Counsel are published. That is correct. In OLC's function as the President's lawyer's lawyer, there are occasions where such things are made public. The reason for that is so that the President's chief legal adviser, acting through his Assistant Attorney General, can advise other components of the executive branch and the public at large as to a particular position taken on a legal issue.

And I would submit, quite respectfully, that that is quite different from the internal deliberative documents that we are referring to here.

The CHAIRMAN. Senator Biden, do you want to ask a question?

Senator KENNEDY. May I—

Senator BIDEN. Go ahead.

Senator KENNEDY. Well, are you exerting executive privilege, then, on this request?

Mr. BOLTON. Senator Kennedy, I am not authorized at this point to assert executive privilege. We have received, first, a letter from Senator Biden on behalf of three Senators, as I recall.

Senator KENNEDY. That is correct.

Mr. BOLTON. We responded to that on Friday, July 25. Senator Thurmond transmitted another letter to me from Senator Biden that we responded to on July 30. In neither case did we assert executive privilege. In the July 30 letter, to show the length and consistency of the policy that we articulated in the letter, we attached a memorandum by former Assistant Attorney General for the Office of Legal Counsel, Antonin Scalia, dating back to the 1970's, which took basically the same position.

It is because of the highly sensitive nature of the internal OLC deliberations in their function of advice giving to the Attorney General—and as I say, the same argument can be made with respect to the Office of the Solicitor General—that we respectfully declined to produce those internal documents.

Senator KENNEDY. Well, with all respect, the President of the United States has issued a memorandum. You are an executive department, are you not?

Mr. BOLTON. The Department of Justice is an executive department, that is correct.

Senator KENNEDY. The memorandum has the subject procedures governing response. And you are familiar, I am sure, with that Executive order, and it indicates that there is only one justification for withholding information, and that is executive privilege, and it spells out the procedure by which that should be made.

Now we are asking you now, you are either going to follow, as I imagine, the President's order on this, or if you are not, I want to know why not.

Mr. BOLTON. Senator Kennedy, I think it has been the consistent position of administrations, whether Republican or Democrat, that documents have not been produced to Congress for reasons other than executive privilege where there are, within the opinion of the particular executive agency involved, sound reasons for not so doing.

I do not have a copy of the Executive order——

Senator KENNEDY. Well, you provide the precedents on that. You provide the precedents to this committee.

Senator HEFLIN. I think that is immaterial. I think it is immaterial. Here, you have a White House order, an Executive order by the President, Ronald Reagan, dated November 4, 1984; and the only exception—it states that in regard to congressional requests for information, the only exception to where it will be complied with promptly and fully is where the disclosure of the information requested might significantly impair the national security. Then it becomes a substantial question of executive privilege. It provides for the procedure to be followed relative to the matter, and it even calls for consultation with the Counsel for the President outside the Attorney General's office. Unless it is a matter of national security and is declared to be a substantial question of executive privilege, it appears to me that the action thus far, unless you can give me a good explanation, is in violation of the President's Executive order.

Mr. BOLTON. Senator, I feel quite comfortable in saying that we are not in violation of the President's Executive order. I would find it very difficult, obviously, if I were in that position.

I think in your reference to the Executive order, though, you—after referring to national security—you left out the other clauses that applied, and one of them in particular—I do not have the exact words in my mind—but one clause was documents that did deal with executive branch deliberations, quite apart from national security concerns.

Senator HEFLIN. Well, it may be. I just read this right now, but I do not see it right there. It may be.

Mr. BOLTON. Could I respectfully ask, Mr. Chairman, if I could make an inquiry of Senator Biden?

Senator BIDEN. Sure.

Mr. BOLTON. Excuse me, Senator. Did I understand you, or perhaps it was Senator Kennedy, to say that if an assertion of executive privilege were made with respect to these documents, that that would be the end of the matter?

Senator BIDEN. Well, yes. It would be the end of the matter in terms of whether or not we would then challenge the—I mean, it would be the end of this matter, whether you have a right to claim it under some nebulous thing that I do not understand in light of this document and the President's order.

As far as I am concerned, I think if the President is going to change the groundrules, then he can do that. I would have to get legal advice as to whether or not then there is a battle over what constitutes executive privilege, but you are clearly on stronger grounds. I mean, quite frankly, I think you all look foolish, unless I am missing something here, to make the case like you are making it when, in fact, the documents that you could let the staff look at are not going to make any difference anyway.

I mean, I do not know why we get in these fights here in this place. It is like a tempest in a teapot, a great, big fight. If it is so important, claim executive privilege, and then that is probably going to be the end of it; if it is not—

Senator METZENBAUM. I take issue—

Senator HATCH. Mr. Chairman, Mr. Chairman.

The CHAIRMAN. We are going to recess for lunch now, and we will continue—

Senator HATCH. Mr. Chairman, could I just make one comment.

Senator METZENBAUM. Well, Mr. Chairman, before you recess, I just want to say—

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. I just want to say that I do not believe that in this kind of matter that just claiming executive privilege when there is no reason for it makes any sense or is logical, and I think you were starting to go down the road of going back to the office and asking them to claim executive privilege.

I believe we have got a Chief Justice of the Supreme Court to confirm, or to deny him confirmation. He is willing to have the information made available. And for some reason that I am not clear about, the administration is now bucking against making the information available. Let us put the facts out, and whatever the facts are, they will speak for themselves. But do not now just take the

position, "Well, if you just say that asserting executive privilege will be adequate, then maybe we will go back and do that."

I think that that would demean the process, and I believe it would also reflect negatively on the whole confirmation proceeding.

Senator HATCH. Mr. Chairman.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. Just a minute. Senator Hatch.

Senator HATCH. Mr. Chairman, it is only fair to read some of the language that the Office of Legal Counsel wrote, to Senator Thurmond. It lays it out pretty carefully. It is astute and well-thought-out. Anybody who is fair can understand why you are taking this position. I do not care whether you assert executive privilege or not. Either way you should not give up these materials voluntarily.

Let me just read this:

As you are aware, the primary function of the Office of Legal Counsel is to provide legal advice to the President and to executive branch agencies often on difficult and controversial subjects:

The integrity of the advice given by the Office and the willingness of agencies to seek and follow that advice depend largely on OLC's, the Office of Legal Counsel's, ability to protect client confidences and to discuss fully all of the legal implications raised by issues referred to the Office.

The advice that OLC renders is almost always part of a larger decisionmaking process within the executive branch. For that reason the Office of Legal Counsel has consistently taken the position, in response to Freedom of Information Act and other requests—

This is well-known throughout the Government—

That it is not at liberty to disclose confidential memoranda, opinions, and other deliberative materials whose release would compromise the Office of Legal Counsel's continuing ability to provide objective legal advice to the executive branch.

Your letter makes other points, but that is all I care to read.

Let us be honest here. You have never given these materials to anybody before. We have a sitting Justice who has a tremendous record, the recommendation of every sitting Justice, and who has been on the court for 15 years. We have spent an awful lot of time during the last two days trying to dredge up any little item we can for 15 or 25 years before he came on the Bench.

It is easy for me to understand why any legal office would not want its internal memoranda given up. By doing so, you make it completely probable that future opinions are always going to be politically oriented, rather than candid advice to whomever has asked for that advice in particular, the President or any other agency, or any other person within the Department.

Your letter states it pretty well.

The only thing I can see here is an effort to dredge up anything they can on "fishing expeditions". This is not new around here. We all ought to call it like it is.

The CHAIRMAN. Mr. Bolton, if you want to make a statement, and then we are going to recess for lunch.

Mr. BOLTON. Thank you, Mr. Chairman.

I just wanted to clear up two points that Senator Metzenbaum made, and I regret that he is not here to hear them.

When I asked the question of Senator Biden, which he was kind enough to answer, I was simply trying to understand the point that he had made before.

Second, Justice Rehnquist's response to the question that was put to him, of course, has Justice Rehnquist in the analogy of lawyer and client, when he was the head of the Office of Legal Counsel. It is not the attorney's position to be able to waive the privilege; it is the client's. And, of course, in the case of his service as Assistant Attorney General for the Office of Legal Counsel, the U.S. Government was the client.

Senator BIDEN. The confusion here, though, if I may—the client is the President of the United States. The President of the United States has said, unless we misunderstand this document, that, in fact, all but for those areas where I claim executive privilege, should be made available.

So, on the face of it, it appears as though both the lawyer and the client are saying these documents should be released. That is what the confusion is.

And so what I say to you is I would just like an explanation over lunchtime; (a) I would like to renew the request; (b) I would like to ask you if, in fact, I misread the document—and I may have; maybe I have misread the Executive order, and (c) whether or not, regardless of what you conclude, you would at least make an index available of what we are talking about. That is all, I do not want to keep the committee—

The CHAIRMAN. I think all of them understand the question now. We are going to recess now, and we will continue after lunch, 2:15. We are in recess until 2:15.

[Whereupon, at 1:20 p.m., the committee recessed, to reconvene at 2:15 p.m. this same day.]

#### AFTERNOON SESSION

[Whereupon, at 2:23 p.m., the committee reconvened, Hon. Strom Thurmond presiding.]

The CHAIRMAN. The committee will come to order.

The matter that we were discussing before lunch has been referred to the Justice Department for consideration. In the meantime, we will go ahead with the hearing.

The distinguished Senator from Ohio is recognized.

Senator METZENBAUM. Mr. Justice, I indicated this morning that one of my major concerns has become the issue of your candor, your forthrightness, and I want to go back for a moment to one question about this entire memo in the Justice Jackson matter.

In the memo, just above your initials, you said, "I think Plessy against Ferguson was right and should be reaffirmed." That is very straight language.

Your fellow clerk at the time, Donald Cronson, said, "Unquestionably, in our luncheon meetings with the clerks, he"—meaning you—"did defend the view that Plessy was right."

So, we now have you saying that in a memo, and we have Don Cronson saying that that is the position you took. And you certainly had a right to take any position you wanted to take.

Then, that became an issue in 1971, and so you wrote a letter to Senator Eastland. And at that time you said: