U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

December 21, 1989

MEMORANDUM FOR C. BOYDEN GRAY
Counsel to the President

Re: Congressional Access to Presidential Communications

This memorandum is in response to your request for this Office's opinion on whether the President is constitutionally empowered to decline to produce or disclose to Congress information, including his own communications, concerning sensitive national security matters. As discussed more fully below, we conclude that the President has the constitutional authority to assert an absolute executive privilege to protect information the production or disclosure of which he determines could adversely affect the Nation's security. In addition, we conclude that even if the President chooses not to assert an absolute privilege with respect to presidential communications concerning national security, these communications nonetheless would be protected, like all presidential communications, by a qualified privilege, which would permit the communications to be withheld absent an "essential" legislative need for them.

I.

The decision on how to respond to a congressional request for presidential communications or other information concerning sensitive national security matters should be based on consideration of both Congress' legislative interest in the subject matter of the information and the Executive's interest in keeping the information secret.

A. Congress' Legitimate Need for Information

The threshold question for the Executive when it receives such a request should be whether Congress has a legitimate legislative interest in the information it has requested. In assessing whether Congress has such an interest, it should be borne in mind that Congress has broad power under Article I to obtain information that it needs to perform its legislative

function.[1] Congress' constitutional authority to investigate and inform itself even of matters that may involve the Executive extends "over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate." Barenblatt v. United States, 360 U.S. 109, 111 (1959); see also Jurney v. MacCracken, 294 U.S. 125 (1935); McGrain v. Daugherty, 273 U.S. 135 (1927). The very principles that dictate that Congress have such expansive investigatory power, however, limit that power:

> Broad as it is, the power is not . . . without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.

Barenblatt, 360 U.S. at 111-12. If Congress does not have a legitimate legislative or other interest in the requested information, the Executive has no constitutional obligation to permit access to the information.

B. Executive Privilege

If there is a legitimate legislative purpose for a particular congressional request, the Executive must assess its interest in preserving the confidentiality of the requested information. If the President chooses not to disclose the information, and Congress issues a subpoena, the President must assert executive privilege if he wishes to withhold the information. Such a claim of executive privilege would be based on either the "state secrets" or "presidential communications" components of the privilege.

1. State Secrets Component of Executive Privilege

In the hierarchy of executive privilege claims, the protection of national security information is the strongest claim that can be asserted by the President. The President's authority to protect national security derives from his exclusive powers as Chief Executive and Commander in Chief and his constitutional power to conduct foreign affairs.

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[1] Congress may also request that the General Accounting Office (GAO) conduct investigations on its behalf. See 31 U.S.C. § 717(b). As an agent of Congress, however, see Bowsher v. Synar, 478 U.S. 714 (1986), GAO cannot exercise powers beyond those possessed by Congress.

There is no decided case on the constitutional authority of the President to assert an absolute privilege for state secrets against a coordinate branch of government. This is not surprising. The Executive and Congress have been properly solicitous of each other in resolving disputes over such fundamental questions of constitutional power without resort to the courts. This is especially true, as one would expect, in the context of disputes over national security information, where litigation itself could jeopardize the Nation's security. A number of cases, however, have discussed the privilege in some detail; the clear implications from these cases are that the privilege is absolute and that it may be asserted by the President against a coordinate branch of government. The Executive has long asserted the right to an absolute privilege. The Congress has long acquiesced in that assertion. And the powers and responsibilities conferred on the Executive by the Constitution necessitate that the President have such a privilege.

An absolute privilege not to disclose state secrets was first asserted by the President and addressed by the courts in United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). The contours of the privilege were further developed in Totten v. United States, 92 U.S. 105 (1875),[2] and United States v. Reynolds, 345 U.S. 1 (1953). In Reynolds, private plaintiffs sued the United States for the wrongful death of their husbands in the crash of a military aircraft on a secret mission. When plaintiffs requested the accident investigation report from the Air Force, the Secretary of the Air Force filed a formal claim of privilege objecting to production of the report on the ground that the aircraft was "engaged in a highly secret mission of the Air Force." 345 U.S. at 4. The Judge Advocate General of the Air Force also filed an affidavit with the court representing that the requested material could not be disclosed "without seriously hampering national security." Id. at 5. The district court ordered the Government to produce the documents for inspection by the court and, when it refused, the court took as

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[2] In Totten, plaintiff sought to collect on a secret contract with President Lincoln for an espionage mission during the Civil War. The contract itself was a state secret. The Supreme Court affirmed dismissal of the plaintiff's action to recover compensation under the contract on the ground that "[t]he secrecy which such contracts impose precludes any action for their enforcement." 92 U.S. at 107. The Court stated "as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." Id.

proven the facts alleged by plaintiff and ordered judgment against the Government. The Court of Appeals affirmed.

The Supreme Court reversed. In discussing the Secretary's assertion of privilege, the Court noted that the privilege was "well established" and "protects military and state secrets." Id. at 6-7. Although the Court observed that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," id. at 9, it emphasized that not even a court in camera should examine information withheld on state secrets grounds unless it is necessary to determine whether the privilege has been validly asserted. It stated that

> [when] 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 . . . [a] 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.

Id. at 10 (emphasis added). The Court concluded that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." Id. at 11 (citing Totten, 92 U.S. 105).

Reynolds thus recognizes in the context of a private citizen's demand for sensitive information that the Executive Branch may assert an absolute privilege for state secrets. See also Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984); Guong v. United States, 860 F.2d 1063, 1066 (Fed. Cir. 1988), cert. denied, 109 S. Ct. 1751 (1989). Indeed, the Court of Appeals for the District of Columbia Circuit has observed that Reynolds "establishe[d] that secrets of state -- matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation -- are absolutely privileged from disclosure in the courts." Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982) (footnote omitted)(emphasis added)(affirming application of privilege with respect to information sought by plaintiffs in claim against the CIA). In an opinion issued only months ago, the Court of Appeals reaffirmed that "[t]he [state secrets] privilege, it is clear, is absolute. 'No competing public or private interest can be advanced to compel disclosure.'" In re United States, 872 F.2d 472, 476 (D.C. Cir. 1989) (quoting Ellsberg v. Mitchell, 709 F.2d at 57), cert. dismissed, 58 U.S.L.W. 3336 (U.S. Nov. 13, 1989).

Although the claim of privilege at issue in Reynolds was based on an evidentiary rule rather than the Constitution, see 345 U.S. at 6-7, and though the adjudications to date have been of assertions of the state secrets privilege against private

parties,[3] it is clear after United States v. Nixon, 418 U.S. 683 (1974), and Department of the Navy v. Egan, 484 U.S. 518 (1988), (if it was not before) that the President's authority to protect state secrets is grounded in the Constitution, is absolute, and may be asserted against a coordinate branch of government.

The Supreme Court expressly recognized the constitutional underpinnings of the President's authority to protect national security information in Department of the Navy v. Egan:

> The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to . . . control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

484 U.S. at 527 (citations omitted).[4] In United States v. Nixon, the Court held that executive privilege itself is grounded in the Constitution: "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708 (footnote omitted); see also note 16 infra. And in its references to the absolute privilege for state secrets, the Court relied upon Reynolds, without even distinguishing between the evidentiary privilege asserted there and the constitutionally based claim of executive privilege asserted by President Nixon. See, e.g., id. at 710-11.

The Court also held in United States v. Nixon that executive privilege may be asserted against a coordinate branch of

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[3] The Court decided Reynolds on the narrow ground that the Government had asserted a valid privilege under Fed. R. Civ. P. 34, and therefore that the United States had been subjected to liability on grounds not authorized by the Tort Claims Act. Consequently, it did not address whether the Executive had the constitutional authority to refuse to produce the documents to the court for inspection.

[4] The courts of appeals, in reliance upon Egan, have uniformly acknowledged that the President's authority to protect national security information is constitutionally based. See, e.g., Hill v. Department of the Air Force, 844 F.2d 1407, 1410 (10th Cir.) ("The Executive Branch has constitutional responsibility to classify and control access to information bearing on national security.")(emphasis added), cert. denied, 109 S. Ct. 73 (1988).

government and implicitly reaffirmed that the privilege for state secrets is absolute. It held that the President had properly asserted against the court the more generalized privilege for presidential communications, see discussion infra at 12-14, although the privilege was overcome there by the grand jury's showing of need. It follows from the fact that the President may assert the more generalized privilege for presidential communications against a coordinate branch of government that he could assert against a coordinate branch the more specific and fundamental privilege for state secrets.

It seems evident from the reasoning in United States v. Nixon that the Court would also hold that the state secrets component of executive privilege is absolute. In defending his decision to withhold grand jury subpoenaed information, President Nixon asserted an absolute privilege, but based only on a "generalized interest in [the] confidentiality" of all presidential communications. Id. at 706, 707, 711, 712-713. The Court rejected the President's claim to an absolute executive privilege for all communications. In rejecting this claim, however, the Court repeatedly contrasted the generalized interest asserted by the President with an interest in protecting state secrets. Id. at 706, 707, 710-11, and 712 n.19. Through the frequency and manner in which the Court deliberately contrasted the President's generalized claim and the privilege for state secrets, the Court unmistakably implied (indeed, the opinion seems to assume) that the President does enjoy an absolute state secrets privilege.[5] For example, the Court explicitly noted that

> [President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. . . . We are not here concerned

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[5] In Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Court referred to the state secrets privilege as a "more particularized and less qualified privilege" than the generalized privilege for all presidential communications. Id. at 447 (emphasis added). The Court was saying there that the state secrets privilege is "less qualified" only in the sense that no balancing is required. As it noted, ". . . in the case of the general privilege of confidentiality of Presidential communications its importance must be balanced against the inroads of the privilege upon the effective functioning of the Judicial Branch." Id. (emphasis added). In contrast, where the state secrets privilege is asserted, a court's authority is limited to determining at most whether the assertedly privileged communications constitute national security information. See note 11 infra.

with . . . the President's interest in preserving state secrets.

Id. at 710, 712 n.19 (emphasis added). The Court also stated that "[a]bsent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide." Id. at 706 (emphasis added). And the Court explained that the "[generalized] need for confidentiality of high-level communications, without more, can[not] sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." Id. (emphasis added).[6] The inference to be drawn from these passages clearly is that a need to protect military and diplomatic secrets or sensitive national security information would support an absolute presidential privilege of immunity.[7]

We believe that United States v. Nixon supports the President's assertion of an absolute privilege for state secrets against Congress. If, on the reasoning discussed above, an absolute privilege for state secrets exists as against the Judiciary even when it is essential that a court have the information to decide a case, a fortiori it would exist as against Congress, even when there is a legitimate legislative interest in the information. That the President would have this absolute privilege to protect state secrets is unremarkable. Under the Constitution, the President is Chief Executive and Commander in Chief and, as such, he alone is ultimately responsible for national security. It is essential to the fulfillment of this paramount responsibility for the Nation's

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[6] See also id. at 706 (the privilege is not absolute when it "depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations")(emphasis added); id. at 713 (". . . when the ground for asserting privilege . . . is based only on the generalized interest in confidentiality . . . [t]he generalized assertion of privilege must yield to the demonstrated specific need for evidence in a pending criminal trial.")(emphasis added).

[7] See Executive Privilege -- Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 113 (1976) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel) (United States v. Nixon "suggest[s] strongly" that the state secrets privilege "could not even be defeated" by the "legitimate demands of another branch of the Government").

security that the President have the concomitant power to protect information the disclosure of which he believes could jeopardize that security.[8]

History is replete with examples of the Executive's refusal to produce information requested by Congress because of the prejudicial impact such disclosure could have on foreign relations or national security.[9] Largely on the basis of historical practice, then Assistant Attorney General William H. Rehnquist concluded that "the President has the power to withhold from the Senate information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."[10]

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[8] As Justice Stewart noted in his concurring opinion in New York Times Co. v. United States, 403 U.S. 713 (1971):

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. . . . In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.
>
> I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is clear to me that it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

Id. at 728-30 (footnote omitted).

[9] See Memorandum for William French Smith, Attorney General of the United States, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, 6 Op. O.L.C. 751 (1982) (compiling historical examples of cases in which the President withheld from Congress information the release of which he determined could jeopardize national security).

[10] Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: The President's Executive

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Significantly, Congress itself has recognized the prerogative of the President to withhold information from Congress on national security grounds. As early as the First

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Privilege to Withhold Foreign Policy and National Security Information 7 (Dec. 8, 1969). Consistent with United States v. Nixon, Reynolds, and Halkin, this Office advised the Counsel to the President only last year that

> [w]hile the Supreme Court has never explicitly so held, . . . we believe that th[e] high degree of judicial deference [accorded the President in matters involving state secrets] arguably amounts to an absolute privilege. To the extent that the privilege is viewed as absolute, no showing of need for the privileged material can overcome the privilege; in other words, there is no balancing of the competing needs of the judicial and executive branches.

Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution 12-14 (Oct. 17, 1988) (citing Department of the Navy v. Egan, 108 S. Ct. at 824; United States v. Nixon, 418 U.S. at 710-11; New York Times Co. v. United States, 403 U.S. at 727-30 (Stewart, J., concurring); United States v. Reynolds, 345 U.S. at 10-11). Accord Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 482 (1982).

The Department of Justice argued recently in the Supreme Court that such an absolute privilege exists. See Petition for Certiorari at 13, United States v. Albertson, No. 89-52 (U.S. July 5, 1989) ("When properly invoked in litigation, whether or not the government is a party, the [state secrets] privilege is absolute and bars disclosure of information within its scope, no matter how compelling the need for, or relevance of, the information to a proper resolution of the case."). The Department has also argued that "the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members." Department of Justice Brief for Appellees at 42, American Foreign Serv. Ass'n v. Garfinkel, 109 S. Ct. 1693 (1989).

Congress, Congress recognized the right of the President to protect state secrets. The House of Representatives was then investigating the failure of General St. Clair's military expedition against the Indians. In connection with the investigation, Congress requested from the Executive Branch all "persons, papers, and records" pertaining to the St. Clair campaign. 2 Annals of Cong. 493 (1792). Secretary of State Jefferson's notes reflect that President Washington thereafter convened the Cabinet because it was the first request to the President for state secrets, and "he wished that so far as it should become a precedent, it should be rightly conducted." 1 The Writings of Thomas Jefferson 303 (A. Lipscomb ed. 1903). The President and the Cabinet concluded that "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." Id. at 304.

The President ultimately decided to produce the requested documents. However, he directed Secretary Jefferson to negotiate an agreement with Congress that acknowledged the President's right to protect state secrets, the public disclosure of which he determined could adversely affect national security. Jefferson's efforts were successful, and on April 4, 1792, the House resolved

> that the President of the United States be requested to cause the proper officers 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.

3 Annals of Cong. 536 (1792) (emphasis added). Congressional recognition of this power in the President extends into the modern era. See, e.g., S. Rep. No. 1761, 86th Cong., 2d Sess. 22 (1960) (the Senate Committee on Foreign Relations, after failing to persuade President Kennedy to abandon his claim of executive privilege with respect to information relating to the U-2 incident in May, 1960, criticized the President for his refusal to make the information available but acknowledged his legal right to do so: "The committee recognizes that the administration has the legal right to refuse the information under the doctrine of executive privilege.").

Because there is no caselaw defining the precise scope of the state secrets component of the privilege when it is asserted against Congress, one can only be guided by the Supreme Court's reference in United States v. Nixon to the protection of "military, diplomatic, or sensitive national security secrets," 418 U.S. at 706, and the few other judicial discussions of the state secrets privilege, such as those in Reynolds, Totten, In re United States, and Halkin. It is clear, however, that the scope of the privilege is sweeping. See Ellsberg v. Mitchell, 709 F.2d

at 57. As the District of Columbia Circuit stated in In re United States:

> In assessing the privilege in these modern times, this court does not limit itself to a narrow conception of what constitutes a state secret. Going beyond the "military secrets" at stake in Reynolds, 345 U.S. at 11, this court has recognized that information protected under the state secrets doctrine includes "information that would result in impairment of the nation's defense capabilities, disclosure of intelligence gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."

872 F.2d at 476 (citations omitted). Moreover, the privilege extends to information in any form. See United States v. Nixon, 418 U.S. at 715 ("The need for confidentiality even as to idle conversations with associates in which casual references might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment.").

Based on the discussions in these cases, we conclude that essentially all communications of the President with his national security advisors on national security matters, and virtually all other information relating to national security, would fall within the state secrets component of executive privilege where the President determines that disclosure of the communications or information could jeopardize national security. Accordingly, we believe that the President, in his discretion, could decide that such information is absolutely protected by the state secrets component of executive privilege.[11]

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[11] It may well be that if the state secrets privilege were asserted in response to compulsory criminal process, a court would undertake at least to determine that the assertedly privileged communications constitute national security information. See United States v. Nixon, 418 U.S. at 703-05; United States v. Reynolds, 345 U.S. at 11. Such a determination may or may not require review of the actual communications. See United States v. Reynolds, 345 U.S. at 10. It almost certainly would never entail, however, a review of the President's judgment that disclosure of the information could harm the national security because it would be constitutionally impermissible for a court to substitute its judgment for that of the President on the threat posed by disclosure of the information.

In contrast, were Congress to challenge the President's assertion of the state secrets privilege, a court presumably

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2. Presidential Communications Component of Executive Privilege

Even if all presidential communications concerning national security were not invariably sensitive enough to warrant assertion of the state secrets privilege, the President's communications on such matters nevertheless would be protected by a qualified privilege because they are communications between the President and his advisors. Thus, although the state secrets component of executive privilege should where possible be the principal source of authority for withholding national security information, the presidential communications component of executive privilege would provide an alternative ground for denying access to the President's communications.[12]

It is well established that the President is constitutionally empowered to protect the confidentiality of his communications. Nixon v. Administrator of General Services, 433 U.S. at 446-55; United States v. Nixon, 418 U.S. at 708.[13] In

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[11](...continued)
would decline, on the basis of the "political question" doctrine, even to take cognizance of the case. See, e.g., Statement of Antonin Scalia, supra note 7, at 117 ("The question . . . whether or not the Legislative need for information outweighs the Executive need for confidentiality . . . is the very type of 'political question' from which, even under Baker v. Carr, 369 U.S. 186 (1962), the courts abstain;" there would be a "lack of judicially discoverable and manageable standards for assessing the relative importance of a Congressional need for information and an Executive requirement for secrecy" within the meaning of the political question doctrine).

[12] Of course, this privilege presumably would not apply to communications wholly unrelated to the "responsibilities" or "office" of the President of the United States. See Nixon v. Administrator of General Services, 433 U.S. at 449; United States v. Nixon, 418 U.S. at 711, 713, 715.

[13] The courts and the Congress enjoy the same constitutional assurance of confidentiality vis-a-vis requests from a coordinate branch of the Government. The Executive is no more entitled to the communications between a Supreme Court Justice and his law clerk, or a Senator and his legislative assistant, than are they entitled to the Executive's communications with his subordinates. See United States v. Nixon, 418 U.S. at 708 (the President's interest in the confidentiality of his conversations is analogous to the "confidentiality of judicial deliberations"); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 (continued...)

recognition of this power, the Supreme Court has held that communications among the President and his advisers are "presumptive[ly] privilege[d]." United States v. Nixon, 418 U.S. at 708. This privilege "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties" and "flow[s] from the nature of [the President's] enumerated powers." Id. at 705-06. It is justified in part by "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." Id. at 708. Only if the communications are "essential" to a coordinate branch's exercise of its constitutional responsibilities must they be disclosed. Id. at 713.[14]

Although the presidential communications privilege has been asserted most often to protect predecisional communications,[15] the privilege extends to all presidential communications. This

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[13](...continued)
F.2d 725, 729 (D.C. Cir. 1974) (the privilege between the President and his advisors is analogous "to that between a congressman and his aides under the Speech and Debate Clause; [and] to that among judges, and between judges and their law clerks")(quoting Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973)).

[14] Once again, because of the political question doctrine, the courts might well decline even to take jurisdiction of a dispute between the President and the Congress over presidential communications for which the President asserts the presidential communications privilege. See note 11 supra. It is not certain even that Congress would have standing to challenge such a claim. If a court were to reach the merits of a congressional challenge, it would likely be reluctant to reject the Executive's claim. As discussed infra at 16-18, it will likely be the exception when Congress could prove a demonstrable need for the communications. Moreover, a court likely would be influenced by the contrast between the inconsequential effect on candor that rare disclosures to the courts arguably have on presidential communications, see United States v. Nixon, 418 U.S. at 712, and the dramatic effect on presidential communications that honoring countless congressional requests for such communications would have.

[15] Courts and commentators often mistakenly equate the "deliberative process" privilege of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5), with executive privilege, which is constitutionally based. Even if Congress had attempted in FOIA to limit the reach of executive privilege (which there is no evidence it did), the attempt would have been futile. Congress of course cannot limit by statute a privilege conferred on the President by the Constitution.

conclusion is all but dictated by United States v. Nixon. In that case the President claimed that the Constitution provided "an absolute privilege of confidentiality for all Presidential communications." 418 U.S. at 703. The Court rejected the claim that the privilege was absolute. In so holding, however, it explicitly recognized that all presidential communications are presumptively privileged: The "singularly unique role under Art. II of a President's communications and activities . . . [and] the public interest [in] afford[ing] Presidential confidentiality the greatest protection," id. at 715, justify a "presumptive privilege" for presidential communications. Id. at 708, 713. The Court noted the "acknowledged need for confidentiality in the communications of [the President's] office," id. at 712-13, stating that its importance is "too plain to require further discussion." Id. at 705. The Court characterized the scope of the President's interest in the confidentiality of such communications as "broad," "weighty indeed, and entitled to great respect." Id. at 712-13. It specifically held that the privilege is constitutionally based even though it is not expressly provided for in the Constitution.[16]

In repeated references to the President's interest in and privilege to protect "presidential communications," see id. at 705, 706, 708, 711, 712-13, 715; "conversations," id. at 708, 715; and "correspondence," id. at 708, not once did the Court state or even suggest that only predecisional communications of

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[16] In responding to the Special Prosecutor's argument that there was no constitutional support for such a privilege, the Court stated:

> [T]he silence of the Constitution on this score is not dispositive. 'The rule of constitutional interpretation announced in McCulloch v. Maryland, 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it.'

Id. at 706-07 n.16 (quoting Marshall v. Gordon, 243 U.S. 521, 537 (1917)). See also id. at 711 ("Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.").

the President are entitled to protection.[17] Indeed, we can think

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[17] In reciting justifications for the privilege, the Court stated that

> [t]he expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Id. at 708 (emphasis added)(footnote omitted). See also id. at 705 ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor for appearances and for their own interests to the detriment of the decisionmaking process.")(footnote omitted). We are convinced that the Court did not intend by this passage to distinguish for constitutional purposes between predecisional and all other presidential communications.

First, the opinion repeatedly states that the privilege attaches to "presidential communications" and nowhere qualifies the term. Second, the passage quoted first above itself primarily analogizes the privilege to private citizen conversations, many of which are not in any sense predecisional; it is only after making this analogy that the Court "add[s] to th[e] values" of general privacy any reference to the need to preserve confidentiality of communications that precede a presidential decision. Third, it is reasonable to believe that the grand jury subpoena sought predecisional, decisional, and postdecisional communications, but the Court did not distinguish among these different categories of communications. Fourth, we can think of no principled reason, considering the constitutional basis for executive privilege, why the privilege should not extend to decisional and postdecisional communications. Fifth, defining whether a particular communication is predecisional, decisional or postdecisional is inherently arbitrary; almost any presidential communication -- even a directive -- could be said

(continued...)

of no principled reason to limit the privilege to predecisional communications. For example, the President's communications of his decision to conduct a secret intelligence mission or the President's communications with his National Security Advisor or the Joint Chiefs of Staff on the impact of a national security decision made the previous day are clearly as sensitive (if not more so) than the communications leading up to the decision. And the quality of the President's decisional and postdecisional communications would be affected as much as would be his predecisional communications by an expectation that they could be made public. Accordingly, we believe that the qualified or "presumptive" privilege for presidential communications recognized by the Court in United States v. Nixon extends to all presidential communications.[18]

Where the President asserts only the generalized privilege for protection of presidential communications, courts "must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege [on the coordinate branch's constitutional responsibilities]." Id. at 711-12. The President's generalized presumptive privilege for nonmilitary and nondiplomatic communications must yield where the communications are "essential" to discharge of a coordinate branch's constitutional responsibilities. Id. at 707. See also id. at 709, 713. As the Court observed in United States v. Nixon:

> Upon receiving a claim of privilege from the Chief Executive, it be[comes] the . . . duty of the District Court to treat the subpoenaed material as presumptively

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[17](...continued)
to be predecisional to the actual national security policy actions it directs.

[18] Presumably, it is not only communications to and from the President that enjoy a qualified privilege. In United States v. Nixon, only communications to and from the President were at issue; however, the Court specifically acknowledged the need for confidentiality among all high government officials and their assistants, whether or not the President is party to their conversations or communications. "[T]he valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties . . . is too plain to require further discussion." Id. at 705. Especially given the Court's holding that executive privilege "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties," id., one must assume that the privilege extends to the communications of other Executive Branch officials as well.

> privileged and to require the Special Prosecutor to demonstrate that the Presidential material was 'essential to the justice of the [pending criminal] case.'

Id. at 713 (quoting United States v. Burr, 25 F. Cas. at 192) (emphasis added). The Court held that it was "essential" for the court to have access to the communications at issue because "production of [this] evidence . . . is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access . . . a criminal prosecution may be totally frustrated." Id. at 713 (emphasis added). Thus, communications protected by the qualified privilege must be disclosed where the communications are "essential" to a coordinate branch's exercise of its constitutional responsibilities.

That Congress would have to demonstrate an "essential" need before obtaining the communications themselves is confirmed by Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). In that case, the court of appeals affirmed a decision of the district court dismissing a Senate committee's suit for enforcement of a subpoena duces tecum served on President Nixon for production of tape recordings. Because "Presidential conversations are presumptively privileged," id. at 730, the Court held that the Committee was entitled to access only if the "subpoenaed evidence [was] demonstrably critical to the responsible fulfillment of the Committee's functions." Id. at 731 (emphasis added). The Committee attempted to meet this requirement, arguing that the subpoenaed materials were "vitally and immediately needed" if the Committee was to fulfill its responsibilities and that access to information in forms other than requested was inadequate. Id. at 727. The court disagreed, contrasting Congress' need for particular documents with a court's need for documents in criminal cases:

> There is a clear difference between Congress' legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events. . . . In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. . . . [T]he grand jury need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable. We see

> no comparable need in the legislative process, at least not in the circumstances of this case.

Id. at 732 (emphasis added). In concluding, the Court reiterated that Congress did not have an "essential" need for the materials themselves, emphasizing that Congress had "point[ed] to no specific legislative decisions that [could] not responsibly be made without access to [the] materials." Id. at 733.

In the context of a congressional request for access to a presidential communication (national security related or not), we believe it would be rare when access to the communication itself would be "essential" to Congress' legitimate interests because Congress' need for the communication itself would seldom be "specific and central," id. at 713, to the legislative power in the same way such evidence is "fundamental," id. at 709, to the administration of criminal justice. Thus, in most cases, it is simply unlikely that the inability of Congress to obtain access to the communication itself would "gravely impair the basic function" of Congress in the way that the withholding of relevant evidence from a court would impair its basic function. Id. at 712. The Court suggested as much in United States v. Nixon by its seeming contrast of the "fundamental and comprehensive" need for relevant evidence in a criminal proceeding with "the need for relevant evidence in civil litigation" and "congressional demands for information." Id. at 712 n.19. Therefore, unlike in United States v. Nixon, where the communications themselves were essential for the court to determine whether particular officials were guilty of wrongdoing, in most cases involving congressional requests for presidential communications, the Executive Branch should be able to satisfy Congress' legitimate needs without actually providing access to the communications themselves -- for example, by providing briefings or written summaries of the communications. A failure by Congress to avail itself of such accommodations likely would substantially undermine Congress' chances of prevailing in the courts.[19]

In summary, on the authority of United States v. Nixon and Senate Select Committee, we believe that all presidential communications are presumptively privileged and that the Executive would be obliged to produce such communications to Congress only if the communications themselves were essential to

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[19] In United States v. Reynolds, for example, the Court stated that failure to take advantage of alternative means of acquiring the necessary information undermined any claim that access to the documents was essential. "By their failure to pursue [an available] alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity." 345 U.S. at 11.

fulfillment of the legislative or other functions constitutionally committed to Congress.

II.

Applying the principles discussed above, when the Executive receives a congressional request for national security information, there should first be an analysis of whether Congress has a legitimate legislative need for the information. If it does not, then the Executive Branch may decline to produce or disclose the information regardless of the strength of its interest in preserving confidentiality. Where Congress requests a presidential communication or other information concerning national security in which it has a legitimate legislative interest, a decision should be made whether the disclosure of the communication or information to Congress could adversely affect national security. If the President believes that disclosure could adversely affect national security, he is constitutionally empowered to assert an absolute executive privilege.

If it is determined that the President will not assert an absolute privilege, his communications are still presumptively privileged and need not be disclosed absent a showing by Congress of an essential need for them to fulfill its constitutional responsibilities. Access to the communications themselves cannot be required where the Executive Branch is able to provide by alternative means the information needed for Congress to fulfill its constitutional responsibilities. Where it is determined that disclosure to Congress would not adversely affect national security, nor impair the Executive Branch's interests in maintaining essential confidentiality, we believe the Executive Branch should continue its general policy and practice of attempting to meet Congress' legitimate interests in obtaining information.[20] As the District of Columbia Circuit explained:

> The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic

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[20] See Memorandum for the Heads of Executive Departments and Agencies, from President Ronald Reagan, Re: Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982).

> evaluation of the needs of the conflicting branches in the particular fact situation.
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> * * *
>
> [Because] it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

United States v. American Tel. & Tel. Co., 567 F.2d 121, 127, 130 (D.C. Cir. 1977) (footnotes omitted). A good faith effort to meet Congress' legitimate interests will minimize unnecessary and unwanted constitutional confrontations between the President and the Congress.

CONCLUSION

We conclude for the reasons set forth above that there is an absolute privilege for state secrets that would permit the President to decline to produce or disclose to Congress his communications with advisors, and any other information on sensitive national security matters, where he determines that such production or disclosure could adversely affect the Nation's security. Additionally, we conclude that, even if the President does not determine that disclosure of his communications on such matters could adversely affect the national security, his communications are subject to a qualified privilege as presidential communications, and thus would not have to be produced to Congress unless their production was essential to fulfillment of Congress' constitutional responsibilities.

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