

# **George W. Bush Presidential Library**

**Collection:** Counsel's Office, White House

**Series:** Kavanaugh, Brett – Subject Files

**Folder Title:** Executive Privilege Materials

# Withdrawn/Redacted Material

## The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Procedures...	3	11/04/1982	P5;
002	Memorandum	Congressional Requests... - From: Lloyd Cutler	2	09/28/1994	P5;
003	Memorandum	Cutler Memorandum on Executive Privilege - To: Walter Dellinger - From: Richard Shiffrin, et al.	3	10/17/1994	P5;
004	Memorandum	Follow-Up Guidance... - From: Abner Mikva	1	11/10/1994	P5;
005	Memorandum	Draft Memo on Executive Privilege - To: Jack Quinn, et al. - From: Walter Dellinger	3	04/18/1996	P5;
006	Draft	Congressional Requests... - From: Jack Quinn	2	05/06/1996	P5;
007	Fax Cover Sheet	[Fax Cover Sheet] - From: Paul Colborn	1	10/08/1997	P5;

**COLLECTION TITLE:**

Counsel's Office, White House

**SERIES:**

Kavanaugh, Brett - Subject Files

**FOLDER TITLE:**

Executive Privilege Materials

**FRC ID:**

9693

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- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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**Records Not Subject to FOIA**

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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DOCUMENT FORM NO.	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	Draft	Executive Privilege - From: Walter Dellinger, et al.	3	08/04/1994 P5;

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**ASSERTION OF EXECUTIVE PRIVILEGE FOR DOCUMENTS  
CONCERNING  
CONDUCT OF FOREIGN AFFAIRS WITH RESPECT TO HAITI**

*Executive privilege may properly be asserted with respect to certain documents subpoenaed by the Committee on International Relations of the House of Representatives that concern the Administration's conduct of foreign affairs with respect to Haiti.*

**September 20, 1996**

THE PRESIDENT  
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: You have requested my legal advice as to whether executive privilege may properly be asserted with respect to documents that are the subject of a subpoena issued to the Executive Secretary of the National Security Council ("NSC") by the Committee on International Relations of the House of Representatives. The documents concern the Administration's conduct of foreign affairs with respect to Haiti.

The Counsel to the President and the National Security Adviser recommend that you assert executive privilege with respect to all but four of the subpoenaed documents. Several of the documents record diplomatic meetings or other communications between the President, the Vice President, the National Security Adviser, or the Deputy National Security Adviser and the President or Prime Minister of Haiti. Other documents constitute confidential communications from NSC or State Department officials to the President or the Vice President. The remaining documents reflect and constitute the deliberations of the NSC and its staff in connection with their advice and assistance to the President regarding his policy and activities in Haiti. I understand that efforts have been made to accommodate the Committee's information needs with respect to these documents, but they have proven unavailing. The Counsel to the President and the National Security Adviser are appropriately concerned that the Committee's demand raises significant separation of powers concerns and that compliance with it would compromise your ability to conduct the foreign affairs of the United States, as well as the ability of the NSC to advise and assist you in discharging that constitutional responsibility.

The Office of Legal Counsel of the Department of Justice has reviewed the documents for which assertion of executive privilege has been recommended and is satisfied that they fall within the scope of executive privilege. I concur in that assessment. The Supreme Court has confirmed that the Constitution gives the President the authority to assert executive privilege to protect the confidentiality of diplomatic communications, Presidential communications, and White House deliberative communications. See generally United States v. Nixon, 418 U.S. 683, 705-13 (1974); Nixon v. Administrator of General Servs., 433 U.S. 425, 446-55 (1977). "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. at 708.

More specifically, the Supreme Court has acknowledged the settled application of executive privilege with respect to "diplomatic secrets," such as the diplomatic communications with the leaders of Haiti that are subject to the Committee's subpoena, stating that "[a]s to th[is] area[] of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Id.* at 710; see also *id.* at 706. "[I]t is

elementary that the successful conduct of international diplomacy . . . require[s] both confidentiality and secrecy. . . . [I]t is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the field[] of international relations . . . ." New York Times Co. v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring).

As Assistant Attorney General William H. Rehnquist concluded almost thirty years ago, "the President has the power to withhold from [Congress] information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest." 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 Privilege to Withhold Foreign Policy and National Security Information at 7 (Dec. 8, 1969). History is replete with examples of the Executive's refusal to produce to Congress diplomatic communications and related documents because of the prejudicial impact such disclosure could have on the President's ability to conduct foreign relations. See Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, 6 Op. O.L.C. 751 (1982) (compiling historical examples).

It is equally well established that executive privilege applies to confidential communications to and from the President or Vice President and to White House and NSC deliberative communications. The Supreme Court has recognized "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." United States v. Nixon, 418 U.S. at 708.

Under controlling case law, in order to justify a demand for material protected by executive privilege, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. See McGrain v. Daugherty, 273 U.S. 135, 160 (1927) (Congress has oversight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

"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 v. United States, 360 U.S. 109, 111-12 (1959). The Committee has sought to justify its demand based on its need for information on "Administration policy toward human rights abuses in Haiti" and "the Administration's knowledge of death squad activities in Haiti over the last two years." Letter for Jack Quinn, Counsel to the President, from Benjamin A. Gilman, Chairman, Committee on International Relations at 2 (Sept. 19, 1996). However, the conduct of foreign affairs is an exclusive prerogative of the executive branch. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (the President is "the sole organ of the federal government in the field of international relations"); Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (the President is "the Nation's organ for foreign affairs"); 5 Paul L. Ford, The Writings of Thomas Jefferson 161 (New York, The Knickerbocker Press 1895) ("[t]he transaction of business with foreign nations is executive altogether."). Thus, there is a substantial question of the executive branch's conduct of foreign affairs or its deliberations relating thereto.

Although the question of Congress's oversight authority in this context must be

viewed as unresolved as a matter of law, it is clear that congressional needs for information in this context will weigh substantially less in the constitutional balancing than a specific need in connection with the considerations of legislation. Based on the Office of Legal Counsel's review of the documents for which assertion of executive privilege has been requested, and conducting the balancing required by the case law, see Senate Select Committee, 498 F.2d at 729-30; United States v. Nixon, 418 U.S. at 706-07, I do not believe that access to these documents would be held by the courts to be "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee, 498 F.2d at 731.

In conclusion, it is my legal judgment that executive privilege may properly be asserted in response to the Committee's subpoena.

Sincerely,

JANET RENO  
Attorney General

## ASSERTION OF EXECUTIVE PRIVILEGE FOR MEMORANDUM TO THE PRESIDENT CONCERNING EFFORTS TO COMBAT DRUG TRAFFICKING

*Executive privilege may properly be asserted with respect to a memorandum to the President from the Director of the Federal Bureau of Investigation and the Administrator of the Drug Enforcement Administration containing confidential advice and recommendations regarding efforts to combat drug trafficking. The memorandum was subpoenaed by the Subcommittee on National Security, International Affairs and Criminal Justice of the Committee on Government Reform and Oversight of the House of Representatives.*

September 30, 1996

THE PRESIDENT  
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: You have requested my legal advice as to whether executive privilege may properly be asserted with respect to a document that was subpoenaed on September 27, 1996 by the Subcommittee on National Security, International Affairs and Criminal Justice of the Committee on Government Reform and Oversight of the House of Representatives.

The subpoenaed document is a memorandum to you from the Director of the Federal Bureau of Investigation ("FBI") and the Administrator of the Drug Enforcement Administration ("DEA"), containing confidential advice and recommendations regarding efforts to combat drug trafficking. The Subcommittee first requested this document on September 17, 1996. By letter dated September 27, 1996, the Deputy Counsel to the President informed the Subcommittee of the White House's concerns regarding the need to preserve the confidentiality of deliberative communications to the President and indicated that the Department of Justice is prepared to accommodate the Subcommittee's request by providing a briefing on the subject addressed by the memorandum.

The memorandum to you from the FBI Director and the DEA Administrator clearly falls within the scope of executive privilege. It is well established that executive privilege applies to confidential communications to the President. See generally *United States v. Nixon*, 418 U.S. 683, 705-13 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 446-55 (1977). The Supreme Court has recognized

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.

United States v. Nixon, 418 U.S. at 708.

Under controlling case law, in order to justify a demand for material protected by executive privilege, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). The only justification the Subcommittee has provided for access to this document is its oversight interest regarding counternarcotics policy. See Letter for the President, from William H. Zeff, Jr., Chairman, Subcommittee on National Security, International Affairs and Criminal Justice (Sept. 17, 1996). It is clear that such a generalized interest weighs substantially less in the

constitutional balancing than a specific need in connection with the consideration of legislation. See Letter for the President, from William French Smith, Attorney General, Re: Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 30 (1981) (“[T]he interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question.”). Accordingly, conducting the balancing required by the case law, see Senate Select Committee, 498 F.2d at 729-30; United States v. Nixon, 418 U.S. at 706-07, I do not believe that access to this Presidential communication would be held by the courts to be “demonstrably critical to the responsible fulfillment of the [Subcommittee's] functions.” Senate Select Committee, 498 F.2d at 731.

In conclusion, it is my legal judgment that executive privilege may properly be asserted in response to the Subcommittee's subpoena.

Sincerely,

JANET RENO  
Attorney General



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**FRC ID:**

9693

**OA Num.:**

2163

**NARA Num.:**

2074

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Office of Legal Counsel

Washington, D.C. 20530

DATE: 5-7-96

FACSIMILE TRANSMISSION SHEET

FROM: Paul Colborn

OFFICE PHONE: \_\_\_\_\_

TO: Steve Newirth

OFFICE PHONE: \_\_\_\_\_

NUMBER OF PAGES: 2 PLUS COVER SHEET

FAX NUMBER: 456-1647

REMARKS: *The draft is looking good. Here are our relatively minor changes.*

IF YOU HAVE ANY QUESTIONS REGARDING THIS FAX, PLEASE CONTACT KATHLEEN MURPHY OF KEVIN SMITH ON 514-2057

OFFICE OF LEGAL COUNSEL FAX NUMBER: (202) 514-0563  
FTS NUMBER: (202) 368-0563

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## The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	Congressional Requests... - From: Jack Quinn	2	05/06/1996	P5;

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**COLLECTION:**

Counsel's Office, White House

**SERIES:**

Kavanaugh, Brett - Subject Files

**FOLDER TITLE:**

Executive Privilege Materials

**FRC ID:**

9693

**OA Num.:**

2163

**NARA Num.:**

2074

**FOIA IDs and Segments:**

2018-0016-P

2017-0345-F

**RESTRICTION CODES****Presidential Records Act - [44 U.S.C. 2204(a)]**

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

**Deed of Gift Restrictions**

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Fax Cover Sheet	[Fax Cover Sheet] - From: Paul Colborn	1	10/08/1997	P5;

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	Executive Privilege - From: Walter Dellinger, et al.	3	08/04/1994	P5;

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