U.S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

OCT 30 1984

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

Re: Refusals by Executive Branch to Provide Documents from Open Criminal Investigative Files to Congress

As you know, this Office has previously prepared for the Attorney General two lengthy historical memoranda listing instances of Executive Branch invocations of executive privilege (dated December 14, 1982 and January 27, 1983). Upon your request, we have excerpted the portions of those two memoranda which discuss refusals to disclose material pertaining to open criminal investigations. We list below these precedents for your use in connection with the current dispute between the Department and Senator Grassley regarding documents contained in the files of the ongoing criminal investigation of the Electric Boat Division of General Dynamics.

The material contained in this memorandum demonstrates convincingly that throughout this nation's history, the Chief Executive and his subordinates have viewed the disclosure of open investigative files as detrimental to their constitutional duty to "take care that the laws be faithfully executed." Even Members of Congress have recognized at times the President's right or duty to preserve the confidentiality of materials essential to the faithful and responsible execution of the laws. On one occasion, six Members of the House stated the following position with regard to the Attorney General's refusal to disclose FBI investigative files regarding paroles of four federal prisoners:

> I think the Attorney General is entirely justified in his refusal to make the actual FBI reports available to the subcommittee. Investigative reports almost inevitably contain much confidential information relative to the identity of informants. They frequently contain material which must in the

> interest of a successful criminal prosecution be kept confidential until the very moment it is required at the trial. The effectiveness and efficiency of the FBI would be greatly impaired if its reports were to be made available to any congressional committee which asked for them. Nor do I believe that the consent of the Speaker or of the President of the Senate would obviate these difficulties. I may refer in this respect to the authoritative opinion of Attorney General Jackson . . . . [referring to the Opinion of Robert Jackson, 40 Op. Att'y Gen. 45 (1941)]

H.R. Rep. No. 1595, 80th Cong., 2d Sess. 11 (Minority Report) (1948).

The incidents described here include both formal, presidential invocations of executive privilege to protect sensitive information within the Executive Branch and efforts by executive officers to protect the integrity of their files by communicating their concerns to Congress before resorting to a formal, presidential assertion of privilege. The following enumeration is not intended, nor could it aspire, to be an exhaustive list of every refusal by an executive officer to disclose this type of sensitive material to Congress. It merely lists, in chronological order, historical examples of Executive Branch responses to congressional requests for information relating to an ongoing criminal investigation.

## 1. 1843

On January 31, 1843, President Tyler invoked executive privilege against a request by the House of Representatives to the Secretary of War to produce investigative reports submitted to the Secretary by Lieutenant Colonel Hitchcock concerning his investigations into frauds perpetrated against the Cherokee Indians. The Secretary of War consulted with the President and under the latter's direction informed the House that negotiations were then pending with the Indians for settlement of their claims, and that in the opinion of the President and the Department, publication of the report at that time would be inconsistent with the public interest. The Secretary of War further stated that the reports sought

by the House contained information which was obtained by Colonel Hitchcock through ex parte questioning of persons whose statements were not made under oath, and which implicated persons who had no opportunity to contradict the allegations or provide any explanation. The Secretary of War expressed the opinion that to publicize such statements at that time would be unjust to the persons mentioned, and would defeat the object of the inquiry. He also stated that the Department had not yet been given a sufficient opportunity to pursue the investigation, to call the affected parties for explanations, or to make any other determinations regarding the matter. The President stated:

> The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed,' necessarily confers an authority, commensurate with the obligation imposed to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective these inquiries must often be confidential. They may result in the collection of truth or falsehood, or they may be incomplete and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated . . . would deprive him at once of the means of performing one of the most salutary duties of his office . . . . To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive. 1/

In response to the House's claim that it had a right to demand from the Executive and heads of Departments any information in the possession of the Executive which pertained to subjects under the House's deliberations, President Tyler

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1/ 4 Richardson, Messages and Papers of the Presidents 222 (Gov't Printing Office ed.).

stated that the House could not exercise a right to call upon the Executive for information, even though it related to a subject of the deliberations of the House, if, by so doing, it would interfere with the discretion of the Executive. 2/

2. 1859

On January 11, 1859, President Buchanan responded to a request by the Senate for information relating to the landing of a slave ship on the coast of Georgia. The President transmitted a report from the Attorney General which stated that an offense had been committed and that measures were being taken to enforce the law. However, he concurred with the opinion of the Attorney General that "it would be incompatible with the public interest at this time to communicate the correspondence with the officers of the Government at Savannah or the instructions which they have received." 3/

3. 1861

On July 27, 1861, President Lincoln refused to provide to the House of Representatives documents revealing the grounds, reasons and evidence upon which Baltimore police commissioners were arrested at Fort McHenry for the reason that disclosure at that time would be incompatible with the public interest. 4/

4. 1862

On May 1, 1862, President Lincoln refused to comply with a request by the Senate for more particular information regarding the evidence leading to the arrest of Brigadier General Stone on the ground that the determination to arrest and imprison him was made upon the evidence and in the interest of public safety, and that disclosure of more particular information was incompatible with the public interest. 5/

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2/ Id. at 222-23.

3/ 5 Richardson, supra, at 534.

4/ 6 Richardson, supra, at 33.

5/ Id. at 74.

## 5. 1904

On April 27, 1904, Attorney General Knox sent a letter to the Speaker of the House declining to comply with a resolution of the House requesting him, "if not incompatible with the public interest," to inform the House whether any criminal prosecutions had been instituted against individuals involved in the Northern Securities antitrust case, "and to send to the House all papers and documents and other information bearing upon any prosecutions inaugurated or about to be inaugurated in that behalf." 6/ The Attorney General responded that no prosecutions had been initiated and that "further than this, I do not deem it compatible with the public interest to comply with the resolution." 7/

## 6. 1908

In response to a request to transmit, if not incompatible with the public interest, documents and information in the possession of the Department of Justice concerning the International Paper Company and other corporations engaged in the manufacture of woodpulp or print paper, Attorney General Bonaparte replied on April 13, 1908 that no evidence had been obtained sufficient to justify the institution of legal proceedings, either civil or criminal, against any alleged combination of woodpulp or print paper manufacturers but that a further investigation was in progress. He added that "[i]t would be inexpedient at the present stage of this investigation

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6/ 38 Cong. Rec. 5636 (1904). The phrase, "if not incompatible with the public interest" and other, similar phrases have often been embodied in congressional requests for information from the Executive. For a discussion of the origin and use of these congressional formulations, see generally Memorandum for the Attorney General re: History of Presidential Invocations of Executive Privilege Vis-a-Vis Congress, from Assistant Attorney General Olson, Dec. 14, 1982, at n. 15; 3 Hinds' Precedents, §§ 1856, 1896 (1907); Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1397 & n.55 (1974).

7/ H. Doc. No. 704, 58th Cong., 2d Sess. (1904). This refusal was cited by Attorney General Robert Jackson as historical precedent for his opinion at 40 Op. Att'y Gen. 45, 47 (1941), see infra at 8-9.

to disclose to the public specifically what steps have been taken, or what action is contemplated, by this Department with respect to matters mentioned in the said resolution." 8/

7. 1909

In response to a January 4, 1909 Senate resolution requesting Attorney General Bonaparte to inform it whether legal proceedings had been instituted against the United States Steel Corporation by reason of its absorption of the Tennessee Coal & Iron Company, and, further, to provide any Attorney General opinion written on the subject, President Roosevelt replied on January 6 that he, as the Chief Executive, was responsible for the matter, and that Attorney General Bonaparte had advised him that there were insufficent grounds for instituting legal action against U.S. Steel, and that he had instructed the Attorney General "not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction . . . because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his actions." 9/ Thereafter, the Senate Committee on the Judiciary subpoenaed the Commissioner of Corporations to produce all papers and documents in his possession regarding U.S. Steel. The Attorney General advised the Commissioner that the discretion to make the documents public was vested in the President, and that he should therefore call the request to the attention of the President, submit to him the relevant documents and obtain his instructions as to what part of the data, if any, was "suitable for publication by disclosure to the subcommittee of the Senate." 10/

8. 1912

On March 18, 1912, Attorney General Wickersham sent a letter to the Speaker of the House declining to comply with a

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8/ H. Doc. No. 860, 60th Cong., 1st Sess. 1 (1904); 42 Cong. Rec. 4512 (1908). See also 40 Op. Att'y Gen., supra, at 47.

9/ 43 Cong. Rec. 528 (1909).

10/ 27 Op. Att'y Gen. 150, 156 (1909).

House resolution directing the Attorney General to furnish to the House information concerning the Department of Justice's investigations of the Smelter Trust. 11/

On March 19, 1912, in response to a Senate resolution requesting the Attorney General to provide it with all correspondence, information and reports of the Bureau of Corporations relative to the "Harvester Trust," Attorney General Wickersham responded that he was directed by the President to say that it was "not compatible with the public interest" to provide the information at that time because the matters "pertain[ed] entirely to business which is now pending and uncompleted in this department." 12/

## 9. 1914

On August 28, 1914 Attorney General McReynolds sent a letter to the Secretary to the President stating that it would be incompatible with the public interest to send to the Senate, in response to its resolution, reports made to the Attorney General by his associates regarding violations of law by the Standard Oil Company. 13/

## 10. 1915

On February 23, 1915, Attorney General Gregory sent a letter to the President of the Senate declining to comply with a Senate resolution requesting him to report to the Senate his findings and conclusions of the investigations conducted by the Department of Justice "in the matter of illegal combinations in restraint of trade in the smelting industry, commonly called the Smelting Trust," on the ground that to do so would be incompatible with the public interest. 14/

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11/ See 40 Op. Att'y Gen., supra, at 47.

12/ S. Doc. No. 454, 62d Cong., 2d Sess. 1 (1912).

13/ See 40 Op. Att'y Gen., supra, at 47.

14/ See 52 Cong. Rec. 4089, 4908-09 (1915); see also 40 Op. Att'y Gen., supra, at 48.

## 11. 1941

In response to a request from the House Committee on Naval Affairs to furnish all FBI reports since June 1939, and all future reports, memoranda and correspondence of the FBI or the Department of Justice in connection with investigations arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which had naval contracts, Attorney General Robert Jackson declined, writing on April 30, 1941:

> 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. 15/

The Attorney General pointed to the following injurious results which would follow disclosure of the reports: (1) disclosure would seriously prejudice law enforcement; (2) disclosure at that particular time would have prejudiced the national defense; (3) disclosure would seriously prejudice the future usefulness of the Federal Bureau of Investigation, in that the "keeping of faith" with confidential informants was an indispensable condition of future efficiency; (4) disclosure might also result in the grossest kind of injustice to innocent individuals, because the reports included leads and suspicions, sometimes those of malicious or misinformed people, which had not been verified. In addition, he noted that the number of requests alone for FBI records by congressional committees would have made compliance impracticable, particularly since many of the requests were comprehensive in character.

The opinion of the Attorney General was in accord with the conclusions which had been reached by a long line of

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15/ 40 Op. Att'y Gen., supra, at 46.

predecessors, and with the position taken by Presidents since Washington's administration. He concluded by stating that the exercise of this discretion in the Executive Branch had been upheld and respected by the Judiciary. 16/

12. 1947

During the course of an investigation by a subcommittee of the House Committee on Expenditures in the Executive Departments into the operation of the United States Board of Parole in 1947-48, the subcommittee, on September 30, 1947, requested Director Hoover of the Federal Bureau of Investigation to have a representative of the FBI bring into a hearing the investigative files of four parolees alleged to be members of the "Capone Mob." Hoover replied that he was forwarding the request to Attorney General Clark to whom the subcommittee reiterated the request. Assistant Attorney General Ford replied on the Attorney General's behalf that the Department would contact the subcommittee after the completion of the FBI investigation. A further reply, by Acting Attorney General Perlman, dated October 15, stated:

> The substance of your letter is a request that the reports of investigating agencies of the executive departments be made available to your committee. Such reports have long been held to be of a confidential nature.
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> I feel certain that you can readily see the reasons why we cannot turn over to your committee [the] investigative reports or files you seek . . . . 17/

16/ Although this opinion arose in the context of a request for civil rather than criminal investigative files, we include it here because the reasons advanced by Attorney General Jackson apply with equal force to criminal investigative files.

17/ Hearings before the Subcommitee of the Committee on Expenditures in the Executive Departments, 80th Cong., 2d Sess. 595 (1948).

The subcommittee then sought to reassure the Department that it did not intend at that time to seek "any information as to the confidential sources from which the information was obtained," to which the Department replied that the investigation was not yet complete and referred to the previous letters, again refusing the files. However, the Department did offer summaries of reports and information contained in the file for the subcommittee's confidential use. 18/

13. 1952

On March 7, 1952, President Truman directed the heads of all departments and agencies to decline to comply with a congressional request for information concerning cases referred to the Department of Justice for either civil or criminal action, in which action was declined or not completed by the Department. In response to the request, President Truman wrote to the Chairman of a Special Subcommittee of the House Committee on the Judiciary:

> this request of yours is so broad and sweeping in scope that it would seriously interfere with the conduct of the Government's business if the departments and agencies should undertake to comply with it . . . . All this would be done, not for the purpose of investigating specific complaints, not for the purpose of evaluating credible evidence of wrongdoing, but on the basis of a dragnet approach to examining the administration of the laws.
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> I do not believe such a procedure to be compatible with those provisions of the Constitution which vest the executive power in the President and impose on him the duty to see that the laws are faithfully executed. 19/

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18/ Id. at 594-96. See also H.R. Rep. No. 2441, 80th Cong., 2d Sess. 7, 21-23 (1948).

19/ The Public Papers of the Presidents, Harry S. Truman, 1952-53, at 199.

On April 22, 1952, Acting Attorney General Perlman wrote the Chief Counsel of the House Subcommittee to Investigate the Department of Justice, in response to five letters sent by the subcommittee in April, 1952 for inspection of Department of Justice files, reiterating the agreement which he and the subcommittee had reached regarding the production of additional Department of Justice files in aid of the subcommittee's investigation. That agreement provided for the following:

1. Requests involving open cases, either civil or criminal, would not be honored; however, a written or oral status report on the cases would be furnished.

2. As to closed cases -- cases in which the Department had completed prosecution or consideration without suit -- the files would be made available.

3. As to all files made available, Mr. Perlman emphasized that the Department would "withhold from inspection all FBI reports and confidential information, reports of any other investigative agencies, and any other documents containing the names of informers or other data, the disclosure of which would be detrimental to the public interest."

4. Personnel files would never be disclosed, except in cases where Senate committees were considering nominations made by the President. 20/

14. 1969

During a House Committee investigation into the My Lai massacre, Congressman Rivers requested "all reports, affidavits, photographs and all other pertinent documents, and material which may have any probative value" concerning the Army's ongoing investigation into the incident. Thomas Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, gave the Department of Justice's approval of a proposed letter

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20/ Memorandum Reviewing Inquiries by the Legislative Branch During the Period 1948-1953, Concerning the Decisionmaking Process and Documents of the Executive Branch, 46-47 (unpublished, anonymous Department of Justice document).

to Congressman Rivers from Secretary of the Army Resor, which explained why this material could not be disclosed. Mr. Kauper stated as follows:

> Over a number of year, a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigational files. Most important, the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressure will influence the course of the investigation. The My Lai investigations clearly represent such a danger. 21/

15. 1972

On August 15, 1972 Senator Kennedy, Chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, requested from the Securities and Exchange Commission "documents, statements, and other materials" relating to the Commission's stock trading investigation of the International Telephone and Telegraph Corporation ("ITT"). On August 31, 1972 Chairman Casey of the Commission wrote Senator Kennedy as follows:

> The Commission has, as your letter points out, initiated and settled civil actions involving some of the transactions under investigation. However, the staff informs me that it is still investigating other collateral matters which might lead to appropriate proceedings.

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21/ Memorandum for Honorable Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 19, 1969), at 2.

> In such investigations the Commission has been likened to a grand jury and like a grand jury it is the Commission's policy to conduct its investigations on a confidential basis. Accordingly, in order to protect the contents of its investigatory files and the integrity of its investigative procedures, the Commission refrains from giving out material from its pending investigations. Pursuant to this established procedure, it is the Commission's decision to respectfully refuse your request. 22/

On September 21, 1972 Chairman Staggers of the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce made a similar request for Commission documents concerning its investigations of ITT. On September 26, 1972 Chairman Casey responded:

> It is the general policy of this Commission not to make public or deliver to any other party, materials, records and documents, during the course of this kind of an investigation and for a very good reason. Any investigation might lead to referral by the Commission of its investigative files to the Department of Justice with a recommendation for criminal prosecution. In such cases, the Commission has the same obligation as a grand jury to protect possible defendants from being unfairly injured by the possibility of a damaging but not fully substantiated charge. As you know, the Courts have strictly construed the right of a defendant to be free from pre-trial publicity. We do not want to take the chance that our release of any material obtained

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22/ Legislative Oversight of SEC: Inquiry into Withholding and Transfer of Agency Files Pertaining to ITT, Hearing Before the Senate Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. 29-30 (1972).

pursuant to our subpoena issued for the purpose of enforcing securities law would impair the rights of possible defendants or render ineffective any action taken to enforce the law. I am sure that you can understand our need to keep this file inviolate at this time. 23/

16. 1976

On January 31, 1976 Chairwoman Abzug of the Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations requested interview statements and investigative reports concerning domestic intelligence matters from the open files of the Federal Bureau of Investigation. On February 26, 1976 Deputy Attorney General Harold R. Tyler, Jr. wrote Chairwoman Abzug, explaining why these documents could not be disclosed to the Subcommittee:

> First, the Executive Branch must make a strong effort to protect innocent individuals. Disclosure of investigative files and reports, which often contain hearsay and inaccurate information, could do irreparable damage to the reputation of innocent individuals.
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> . . . .
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> Second, if the Department changes its policy and discloses investigative information, we could do serious damage to the Department's ability to prosecute prospective defendants and to the FBI's ability to detect and investigate violations of federal criminal laws.
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> Third, the detection, and investigation of violations of federal criminal laws and the prosecution of individuals alleged

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23/ Id. at 6.

to have committed such violations are Executive functions. The Attorney General, serving as the President's chief law enforcement officer, is under the same constitutional duty as the President to "take care [that] the laws be faithfully executed." U.S. Const. Art. II, § 3. That duty encompasses the responsibility to maintain the Separation of Powers so basic to our government.

The long history of Executive Branch treatment of its files pertaining to ongoing criminal investigations reveals a consistent practice of withholding such information from Congress until such time as the investigation is closed. The separation of powers ordained by our Constitution has been construed by executive officials throughout the history of the nation to require that written material generated in the course of an active criminal investigation must remain confidential.

Robert B. Shanks
Deputy Assistant Attorney General
Office of Legal Counsel

cc: D. Lowell Jensen
Associate Attorney General