DEPARTMENT OF STATE

Washington, D.C. 20520

17 JUL 1975

CONFIDENTIAL

MEMORANDUM

TO: T - Mr. Maw

FROM: L - Monroe Leigh

SUBJECT: Legal Protection of Sensitive Foreign Policy Materials

Attached is a memorandum of law prepared by my Special Assistant, Michael Sandler, relating to the protection of sensitive foreign policy materials contained in the Nixon tapes, monitored conversations of the Secretary, and memoranda from foreign governments. The principal conclusions are as follows:

1. Nixon Tapes. The Nixon tapes are currently the subject of some complex litigation and a congressional statute, the Presidential Recordings and Materials Preservation Act of 1974 (P.L. 93-526). Under the statute, all of the Nixon tapes would be transferred into the custody and control of the GSA Administrator. Under proposed procedures for processing the tapes, the GSA Administrator contemplates that special archivists would be designated to review the tapes. These archivists would be under instruction to select out any tapes which are not yet classified and which may have a national security impact, and to send such tapes to the NSC for possible classification. In addition, the proposed procedures would also give the GSA Administrator the exclusive authority over declassifying the tapes. We believe these procedures may not be adequate to prevent unwarranted disclosure, and should be revised. Prior presidential papers, as far as we know, did not include tapes of meetings between the President and

high foreign officials. From the standpoint of protecting the tapes, the optimal solution would be to have additional regulations issued which would retain in the Office of the President control over access to the more sensitive foreign policy tapes, even though physical custody may be with the GSA Administrator.

In the court litigation, former President Nixon is seeking to have the Presidential Recordings and Materials Act declared unconstitutional, but we believe the statute will be upheld. Nixon also seeks a declaration that he holds title to the tapes and papers. If, however, the statute is upheld, it by its very terms would vest title in the United States subject to rights of the former President to personal (as opposed to governmental) papers. Even if the statute's constitutionality is not upheld, a preliminary opinion in the litigation would indicate that the former President does not own tapes of conversations with foreign officials. Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975).

In companion litigation, Jack Anderson and others are seeking access to some of the Watergate tapes under the Freedom of Information Act. A court decision on these questions would undoubtedly have a bearing on attempts to obtain access to other tapes.

2. Monitored Conversations. In a letter of February 27, 1975 to the Secretary, Senator Weicker asks if the Secretary "taped and/or had your secretary make stenographic notes of both your incoming and outgoing telephone calls." Senator Weicker indicated that he had obtained such information in interviews with Charles Colson. Similar information has come out in depositions in the Halperin v. Kissinger wiretap case.

Assuming memoranda or notes are made of the Secretary's telephone conversations, there would seem to be two sets of legal concerns: (1) whether, in response to a formal congressional request, executive privilege could be asserted with respect to such notes and memoranda, and (2) whether requests under the Freedom of Information Act ("FOIA") could be restricted.

As discussed in Part IV of the attached memorandum, an assertion of executive privilege would be legally justified to the extent that the monitored conversations contained foreign policy or other national security materials. However, there may be political objections to this course. With respect to an FOIA request for notes of the monitored conversations, Part II of the attached memorandum points to a number of ticklish problems. To the extent that these notes have been generated or kept on the premises of the State Department, or to the extent that they have been used in connection with Department of State work, they would probably be deemed to be "agency records" subject to FOIA provisions--although an argument could be made that the notes, if intended and used only for personal purposes, should be deemed to be "personal" papers.

If the notes are "agency records," one could only protect the records under one of the specific exemptions of the FOIA--i.e., whether the notes have been properly classified, whether they are "intra-agency memoranda" which contain opinions used in the policy-making process, etc. For this reason, the notes should be reviewed and, if appropriate, classified.

3. Memoranda from Foreign Governments. We understand that the Government of Israel has given the Secretary certain memoranda. The legal protection of these memoranda pose the fewest problems of any of the materials discussed. These memoranda may already be deemed to be classified under Section 4(C) of E.O. 11652, which protects materials already "classified" by a foreign government. The safest course, however, would be to have the memoranda immediately reviewed for classification.

Attachment:

Memorandum of Law.

Drafted:L:MDSandler:kp
x22149:7/16/75

MEMORANDUM OF LAW

Legal Protection of Sensitive Foreign Policy Materials in the Custody of the President and Secretary

Summary

There are a number of sensitive foreign policy materials currently in the possession of the President or Secretary which may become the subject of court litigation and congressional attempts to obtain their disclosure. These materials include: (1) the Nixon tapes and papers which contain or refer to Presidential conversations with foreign heads of state and other foreign dignitaries; (2) notes and memoranda relating to the phone conversations which the Secretary allegedly had monitored, which involve foreign policy matters, and which are the subject of a letter from Senator Weicker; and (3) memoranda given in confidence to the Secretary by the Government of Israel and other foreign governments. There are a number of legal avenues available for preventing disclosure of such materials:

1. Control and Custody of the Nixon Tapes and Papers. A cross fire of litigation and congressional legislation casts some shadow over future control of sensitive foreign policy materials contained in the Nixon tapes and papers. At present most if not all of the sensitive foreign policy and national security records among the Nixon materials are in the custody of the Counsel to the President. A court order, still in effect, prevents all persons having custody of the Nixon materials from transferring, disposing or otherwise disclosing the contents of such materials. This court order is expected to be lifted later this year or early in 1976 when a U.S. district court determines the constitutionality of the Presidential Recordings and Materials Act of 1974.

That statute, if found to be constitutional would require all federal employees to transfer into the custody and control of the GSA Administrator all of the Nixon papers and sound recordings. The GSA Administrator has already proposed regulations and procedures for processing and restricting public access to these Nixon materials. Public access would be denied to materials presently having a national security classification. As for other sensitive materials, archivists appointed by the GSA Administrator would be instructed to have these forwarded to the NSC for determination as to whether they should be classified. Problems with this proposal are that the GSA and not the White House would appear to have control over access to and any future declassification of these materials; also, procedures for initial screening of the tapes by GSA archivists do not include a supervisory role for NSC or other White House personnel. The proposed GSA regulations, therefore, appear to be in need of revision. Sensitive foreign policy materials reputedly make up a minute portion of the approximately 42 million items of the Nixon tapes and papers.

2. Freedom of Information Act. It is almost certain that under the 1974 amendments to the FOIA requests from citizens for foreign policy records will be made. In fact, FOIA requests have already been made (by Jack Anderson and others) with respect to other portions of the Nixon tapes and papers. The primary statutory defense to such requests is that to the extent the foreign policy materials are deemed to be records of the President and of his immediate staff, they are not "agency records" within the meaning of the FOIA. This defense might also be available to materials held by Secretary Kissinger at his White House office and used exclusively in his advising of the President. This defense, however, may be lost with respect to the Nixon tapes and papers when transferred to the GSA, unless GSA custody is made subject to direct Presidential control of the foreign policy materials.

For materials which are "agency records" (as opposed to Presidential papers), the FOIA sets forth certain exemptions from disclosure. The exemption most directly related to foreign policy information is that for records which have been "properly" classified. The problem, however, is that many of the materials of concern here (notes on monitored conversations, foreign government memoranda) have not been formally classified and physically marked. We recommend that, where feasible, a review of the materials in question be undertaken to determine if they should now be classified. We are of the view the materials can be classified subsequent to their preparation, but this is a close question and is now being litigated. Also, any classification must be consistent with E.O. 11652 and the NSC directives and/or State Department regulations thereunder. As for memoranda given to the Secretary by a foreign government, it would be prudent to have these physically classified, even though a good argument can be made that memoranda submitted in confidence by foreign governments need not be specially classified to avoid FOIA disclosure. As for Nixon tapes and papers that may be transferred to the GSA, subsequent classification of those materials pursuant to GSA regulations would exempt those materials from FOIA disclosure, at least for the near future.

There is also a FOIA exemption for "privileged or confidential" information which, although primarily directed at information given the Government by businesses and individuals, might apply to memoranda supplied by a foreign state and perhaps also to some of the Secretary's personal records. The Secretary's personal records may also be covered by the FOIA exemption for intra-agency memoranda which reflect policy-making deliberations. Beyond the FOIA statutory defenses, the President would be reduced to asserting executive privilege against court orders for in camera review and for production of the materials under FOIA.

3. Privacy Act of 1974. We are of the view that the Privacy Act, which comes into effect on September 28, 1975, will not provide an effective vehicle under which foreign policy materials could be sought. The act applies only to files (a) which contain personal data and information and (b) which are readily retrievable because cross-indexed to an individual's name, social security number or similar identifying code. Although the Nixon papers and tapes may one day be cross-indexed by the GSA, they apparently would not constitute a "system of records" pertaining to individuals within the meaning of the act. The same, of course, would presumably be true of any notes on monitored conversations of the Secretary, as well as memoranda from foreign governments.

4. Executive Privilege. It is our view that all diplomatic communications which are sensitive because of their potential foreign policy impact could be ultimately be made the subject of a claim of executive privilege. Under the Supreme Court's standards in United States v. Nixon, when privilege is claimed with respect to an area in which the President has constitutional preeminence (as in the conduct of foreign relations), the claim of privilege should be recognized. It is our view that if executive privilege must be resorted to, it would be judicially recognized as an appropriate basis for denying requests for the release of foreign policy materials either to FOIA litigants or to Congress.

Discussion

I. OWNERSHIP OF THE TAPES

The most vexing of the legal questions relating to possible disclosure are those concerning who "owns" and controls the Nixon tapes. To the extent control over the tapes is placed outside the Office of the President, the practical and legal means for preventing unauthorized disclosures diminish. The tapes

ownership question is now the subject of some deliciously complex court litigation complicated by a congressional statute. The primary events in this litigation have been as follows:

1. On August 29, 1974, following a request by the Counsel to President Ford, Philip Buchen, Deputy Attorney General Laurence Silberman (now Ambassador to Yugoslavia) issued a preliminary opinion that Presidential materials and tape-recorded conversations were to be regarded as the property of former President Nixon, but that the Government had a right to use the materials for ongoing governmental purposes. This view was reaffirmed in a final opinion from Attorney General Saxbe on September 6, 1974.

2. Also on September 6, 1974, at about the time Attorney General Saxbe's opinion was released, Richard Nixon signed a letter to GSA Administrator Arthur Sampson offering to deposit "all of my Presidential historical materials" with the Administrator pursuant to the provisions of the Presidential Libraries Act of 1955. 44 U.S.C. §§ 2101, 2107 and 2108. This 1955 statute authorizes the GSA Administrator to "accept for deposit" historical materials of a former President "subject to restrictions agreeable to the Administrator as to their use." The term "historical materials" is defined as including "sound recordings" of a President or of a former President. As contemplated by the statute, the letter from Nixon to GSA Administrator Sampson stated numerous restrictions concerning the storage and use of these materials--e.g. that they were to be stored in California, that access to the depository required a key to be kept by Nixon. The Administrator accepted these restrictions in writing on September 7, 1974. In Nixon's view, this acceptance constituted an acknowledgement that all of the President materials were now personal materials belonging to Nixon. Indeed, the agreement states that all legal and equitable title and custody remained in Mr. Nixon.

3. On September 12, 1974, following adverse reaction from both the press and the Special Prosecutor's Office concerning the Nixon-Sampson agreement, Mr. Buchen agreed not to allow any of the Nixon presidential materials to be transferred from their then present location, pending discussions with lawyers representing Nixon and the Special Prosecutor. At that time, the materials happened to be at the White House, many in the Old Executive Office Building. During the next month, the materials were apparently segregated at the White House according to whether they contained national security, foreign policy or other sensitive information. Such materials (including all the tapes and documents relating to conversations with foreign heads of state and foreign dignitaries) were placed under the personal custody of Mr. Buchen in the Old Executive Office Building. Most of the remaining Nixon materials were placed under GSA Administrator Sampson's custody, but nevertheless stored in the Old EOB. The status and location of these materials remains essentially unchanged today.

4. Between October 17, 1974 and October 21, 1974, a spate of lawsuits was brought by Nixon, Jack Anderson, and two public interest groups against the GSA Administrator, Mr. Buchen and the Director of the Secret Service. The Nixon suit sought an injunction to compel compliance with the agreement contained in the Nixon-Sampson letter of September 6. Nixon also sought to enjoin defendants from permitting the Special Prosecutor and the FOIA defendants to have access to the materials, because such access would be in violation of Fourth Amendment rights and an executive privilege vesting in Nixon. Jack Anderson and the public interest claimants, of course, sought access to many of the Watergate-related materials under the Freedom of Information Act ("FOIA"). They also sought a declaration that the materials are property of the United States and "records" within the meaning of the FOIA. The Special Prosecutor intervened in these suits to establish a right of access to some of the materials.

5. On October 21, Judge Richey issued a temporary restraining order which prohibited the Nixon materials from being disposed of, physically transferred or disclosed. The effect of this order was to freeze custody of the more sensitive Nixon materials (including all tapes and foreign policy documents) in Mr. Buchen. That order is still in effect today.

6. On December 9, 1974 the Congress passed, and on December 19 President Ford signed into law, the Presidential Recordings and Materials Preservation Act. P.L. 93-526. That statute requires all federal employees to deliver original tape recordings and Presidential historical materials of the Nixon Administration to the GSA Administrator, who is required to receive and retain "complete possession and control" over them. The statute also provides that if the courts should subsequently hold that the statute deprived Nixon or any individual of private property without just compensation, just compensation should thereafter be paid to Nixon or other individual involved. If held to be constitutional, the statute would require the transfer of all of the Nixon tapes and papers to the GSA Administrator. As indicated under Point II of this memorandum, such a transfer might increase the risks of disclosure under the FOIA.

7. On December 20, 1975, former President Nixon brought a second suit, this one to enjoin enforcement of the Presidential Recordings and Materials Preservation Act of 1974 on grounds of unconstitutionality. Nixon then sought to have Judge Richey give priority to this new suit over all other litigation relating to the Nixon papers and tapes. Nixon also requested that a three-judge court be convened to consider the constitutionality of the statute. When these requests were denied, Nixon on January 28, 1975 petitioned the U.S. Court of Appeals for a writ of mandamus directing Judge Richey to give priority to the case challenging the statute and to convene a three-judge court.

8. On January 31, 1975, apparently at 2:00 in the morning, Judge Richey issued an opinion in the original litigation that had been filed in October 1974. Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975). Specifically, Judge Richey's opinion held:

(a) That materials "generated, created, produced, or kept by public officials in the administration and performance of the powers and duties of a public office belong to the Government and may not be considered the private property of the official." 389 F. Supp. at 107.

(b) That ownership of such materials by a former President would be inconsistent both with the constitutional theory of the Presidency (that the powers of the Presidency do not extend to any individual beyond his term of office) and with the emoluments clause (Art. II, Sec. I, Cl. 6) which limits the compensation of the President during his term of office. Id. at 136.

(c) That a former President's assertion of ownership to approximately 42 million items of material would impair the ability of his successor in office to carry out the constitutional obligations of the office of the Presidency, particularly where such materials "contain information vital to the ongoing affairs of the nation." Id. at 139.

(d) There is no legal precedent on point that would support a claim by a former President to the governmental papers and materials generated during his term of office.

(e) Apart from Presidents Kennedy and Johnson, most former Presidents have adhered to the view that governmental materials from their presidencies belong to the Government.

(f) The Presidential Libraries Act of 1955 (44 U.S.C. §§ 2101, 2107 and 2108) was designed to protect and preserve for historical study papers of former Presidents, particularly personal papers, and did not sanction or acknowledge personal ownership of governmental papers by a former President.

(g) That executive privilege can only be asserted by the present holder of the office of the Presidency, and not by a former President.

(h) That Jack Anderson and others would be entitled to access to those tapes and materials which constituted "agency records" under the FOIA; however, the term "agency records" included only materials of the Executive Office of the President as distinguished from materials of the President and his immediate staff; the private claimants were also entitled to a declaration as to which of the presidential materials are "agency records" within the meaning of the FOIA.

(i) That the former President is entitled to protection from disclosure of purely private materials in the tapes and documents and that when a dispute arises on whether a particular material is private, the court would conduct an in camera inspection to determine whether such materials are indeed private or otherwise invade the former President's personal privacy.

Judge Richey did not reach any decision concerning the constitutionality of the recent Presidential Recordings and Materials Preservation Act, which was being challenged in the other Nixon suit. He did, however, conclude that the Act abrogated the Nixon-Sampson letter agreement and all rights thereunder. 389 F. Supp. 124-25.

9. On January 31, 1974, on the same morning that Judge Richey issued his opinion, the U.S. Court of Appeals issued a brief order staying Judge Richey from issuing any order, mandate or declaration relating to the merits of the October litigation, on grounds that priority should have been given to Nixon's second suit challenging the constitutionality of the Presidential Materials Preservation Act. Subsequently, it was ordered that a three-judge court be impaneled to hear the constitutional issues in that case.

10. A three-judge court has been impaneled composed of U.S. District Judge Aubrey Robinson and U.S. Court of Appeals Judges McGowan and Tamm. Depositions and related discovery are taking place during the summer. It is contemplated that briefs will be filed in August and September. A hearing and oral argument is tentatively scheduled for September 22, which means that a decision will probably not come down before December at the earliest. The court may redecide all the points raised before Judge Richey, as well as the questions concerning the scope and constitutionality of the Presidential Recordings and Materials Preservation Act of 1974.

It is predicted, though not with certainty, that the court will reach and adopt most of the points in Judge Richey's opinion. As for the disposition of sensitive foreign policy materials among the Nixon tapes and papers, the most important of Judge Richey's conclusions was as follows:

> "To allow any [former] President to remove the documents, papers, tapes and other materials which contain information vital to the ongoing affairs of the nation would be totally disruptive to the office of the Presidency and would impair the ability of his successor in office to properly carry out the duties and powers of the office . . . ." [389 F. Supp. at 139].

This reasoning rests on constitutional considerations--that depriving the current President of these materials would infringe upon his exercise of constitutional powers and duties.

On the constitutionality of the 1974 Act, a number of outcomes are conceivable. If the three-judge court finds that the entire 1974 Act is unconstitutional* but that Nixon still does not own the tapes and materials, the materials would then remain at the disposition of President Ford.

A much more likely outcome is that the court will conclude that the 1974 Act is valid. When and if this occurs, Judge Richey's original restraining order would be lifted and under the Act Mr. Buchen would have to deliver all tapes and sensitive documents into the possession and custody of the GSA Administrator. As discussed in greater detail in Parts II(A) and (C) of this memorandum, a surrender of custody could have serious FOIA risks under proposed regulations issued by the GSA.

As a possible but not very politic alternative, President Ford could instruct Buchen not to deliver the more sensitive foreign policy and national security materials. If Congress or a private litigant then sought to compel such delivery, the President could assert executive privilege (see Part IV of this memorandum).

One further complicating factor: on June 11, 1975, Mr. Buchen, Assistant Attorney General Irwin Goldbloom and GSA Administrator Sampson apparently met to discuss the possibility of requesting a

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*In addition to claiming that the Act takes his property without just compensation, Nixon is also claiming that (a) the statute is either ex post facto or a bill of attainder, in violation of Art. I, Sec. 9, Cl. 3 of the Constitution, and that (b) the statute violates an executive privilege vesting in former Presidents.

modification of Judge Richey's restraining order so as to permit all of the tapes and materials to be transferred from the E.O.B. to a GSA administered facility. The materials are apparently taking up too much room in the E.O.B. To the extent Mr. Buchen surrendered direct control over the tapes, one would have to confront the Freedom of Information Act problems discussed below.

II. FREEDOM OF INFORMATION ACT DEFENSES

The Freedom of Information Act ("FOIA") presents the most serious of the risks of disclosure, not only as to the Nixon tapes, but also for the memoranda and records kept by the Secretary. These risks have been increased by the 1974 amendments to the FOIA, which strengthen the FOIA provisions on de novo judicial review of rejected FOIA requests, and limit the exemption available to classified materials.

A. What is an "Agency" Within the Meaning of FOIA

The Freedom of Information Act (5 U.S.C. § 552) applies only to agencies and agency records. Do records held by the President and by the Secretary constitute "agency records"?

The leading case on the question of what is an agency is Soucie v. David, 448 F. 2d 1067 (D.C. Cir 1971), which was decided before the 1974 amendments. That case involved a request for records held by the Office of Science and Technology, which was in the Executive Office of the President. The court held that for purposes of the Administrative Procedure Act (including FOIA), an agency is "any administrative unit with substantial independent authority in the exercise of specific functions", and concluded that the Office of Science and Technology was included within this definition. 448 F. 2d at 1073.

The court, however, was very careful to distinguish between administrative units which were simply part of the Executive Office of the President, and those that were part of the President's immediate staff. For example, the court noted that it "need not determine whether Congress intended the APA to apply to the President" (id., at 1073), and referred to a House Report concerning the Office of Science and Technology ("OST") which said that the Office was to "function as a distinct entity and not merely as part of the President's staff" (id., at 1074). The court then added:

> If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. [Id., at 1075].

In addition to advising the President, the OST had also been delegated by Congress the duty of gathering information on federal scientific programs available to the legislature.

Extending the rationale of Soucie v. David, it would appear that records controlled directly by the President himself or by his immediate staff would not constitute agency records. Moreover, to the extent that any records under the direct control of Secretary Kissinger were originated and are kept at the White House, and are used exclusively in advising the President (and not in the work of the NSC staff),* such records may fall within the presidential exemption implied in Soucie v. David.

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*Justice Department officials have expressed the view that the NSC is an "agency" for FOIA purposes.

In the 1974 amendments to FOIA, Congress added a new definition of the term "agency." That definition provides in pertinent part:

> "(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department . . . or other establishment in the Executive Branch of the government (including the Executive Office of the President), or any independent regulatory agency. [5 U.S.C. § 552(3)].

In the conference report to the 1974 amendments, the conferees stated specifically that this definition was intended to affirm the "result" reached in Soucie v. David, and then added the following significant sentence:

> The term ["agency"] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President. [Senate Report No. 93-1200, 93rd Cong. 2nd Sess., at 15 (1974) ("Conference Report")].

This language should seemingly be read in light of the opinion in Soucie v. David which indicated that two groups of presidential advisers were excluded from the term "agency": (a) members of the President's immediate staff, and (b) units in the Executive Office which simply advised and assisted the President and which did not perform other functions delegated by Congress.*

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*But cf. Judge Richey's statement in Nixon v. Sampson that records of the executive agencies and departments kept in the inner White House Office may not be immune from FOIA disclosure. 389 F. Supp. at 147.

This, of course, raises the question of how to characterize materials originated or kept in the office of the Secretary of State. Are such records necessarily the records of the Department of State? There is no judicial or legislative authority on this point. It would seem, however, that a characterization of such records would depend on the content and use of the records. To the extent that the materials contained foreign policy information or that persons other than the Secretary were permitted to read the records, or that the records were used so as to permit the Secretary or others to arrive at departmental policies or decisions, the records could well be viewed as those of an "agency." On the other hand, an argument could be made that if the Secretary intended to keep the records for his personal use, if he limited access to himself, and if he segregated them into files marked "personal," then the materials should perhaps be viewed as "personal" rather than "agency" records. In the absence of any precedent, such conclusions must be tentative.

With respect to the Nixon tapes and papers, a problem will arise when and if custody of the materials is transferred to the GSA Administrator, as is apparently desired by Philip Buchen or as contemplated by the Presidential Recordings and Materials Preservation Act of 1974 and the proposed GSA regulations thereunder. If direct custody and control is surrendered, it is likely that the tapes and materials will be deemed to be records of the GSA (and hence "agency records" under FOIA) rather than records of the President or his immediate staff.

It would, therefore, be desirable to retain the tapes and sensitive foreign policy documents at the White House, if the bulk of the 42 million items of material from the Nixon presidency is to be transferred. But if the tapes, etc. are to be moved also to a GSA facility, perhaps limiting access to or

control over them to the President's Counsel would preserve a claim that the tapes are still presidential in nature, and not GSA records.* To accomplish this, the proposed GSA regulations would have to be revised.

If deemed to be "agency records," the next step would be to determine whether the records in question are specifically exempted from disclosure by the FOIA.

B. Exemption for Records Properly Classified

Assuming records held by the President and by the Secretary are deemed to be records of an "agency," the FOIA is applicable to those records and one must turn as a first line of defense to the express exemptions set forth in paragraph (b) of the statute. The first of these exemptions are for records which are properly classified pursuant to Executive Order 11652--which is the executive order which sets forth the criteria and procedures for classifying records. The controlling statutory language--that a record be "in fact properly classified"--was added under the 1974 amendments. As discussed under point E below, the 1974 amendments also permit district courts to review records in camera to determine whether they have indeed been properly classified. In this part of the memorandum, our concern is what constitutes a "properly classified" record. This question can only be answered under the provisions of Executive Order 11652.

With respect to the substantive content of a record, Section 1 of Executive Order 11652 provides for the classification only of national security information--material whose unauthorized disclosure could reasonably be expected to cause exceptionally

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*Note that Judge Richey's stayed opinion in Nixon v. Sampson suggests that even if transferred the materials might remain "presidential." 389 F. Supp. at 146-47.

grave damage to the national security ("Top Secret"), serious damage to the national security ("Secret"), or damage to the national security ("Confidential"). Under Executive Order 11652, national security considerations are the only bases for the classification of a record. The potential for an adverse foreign policy impact arising from the disclosure of certain information is, however, a national security consideration within the meaning of E.O. 11652. See also, Uniform State/AID/USIA Security Regulations, §§ 911.1, 911.2 and 911.3.

Presumably any classification of the Nixon tapes or other records of concern here would meet these substantive standards, if a classification decision ever had to be defended.* The problem, however, is that the necessary steps to classify the tapes and records in question have apparently not been taken.

If the tapes and records were formally classified at the time they were prepared, there would be little procedural objection to the classification. But can the tapes and records be classified at a time substantially after their original preparation? Can they be classified after someone has requested their production under FOIA? And, if such ex post facto classifications are valid, can the tapes and records now be classified en masse or must be reviewed one by one?

(1) Classifying a Record After it Has Been Prepared

Section 4(A) of Executive Order 11652 provides that "each classified document shall show on its face its classification . . . whether it is subject

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*See, however, point F below, which discusses a new FOIA requirement that an agency must make available all "reasonably segregable" portions of a record from which exempt, e.g., classified matter, has been deleted.

to or exempt from the General Declassification Schedule," and also "the office or origin [and] the date of preparation and classification . . . ."*

The latter term concerning "the date of preparation and classification" suggests that the processes of preparation and classification are distinct and that each may be undertaken at a different time. If this is indeed the case, then there should be no objection if one were now to classify tapes and records held by the President and the Secretary.

On May 17, 1972, the National Security Council issued a directive (37 F.R. 10053) pursuant to Section 6 of E.O. 11652 (which authorizes the issuance by the NSC of binding directives relating, inter alia, to the "making" of classified material). Part IV of that directive provides:

> "At the time of origination, each document or other material containing classified information shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule."

This suggests that in order for a record to be properly classified, it must be classified at the time of its "origination." On the other hand, the directive then goes on to state:

> "The person who signs or finally approves a document or other material containing classified information shall be deemed to be the classifier."

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*Although Section 4(A) refers only to "documents," it might be argued that the term should be broadly construed as covering all classifiable materials.

The latter sentence seems to imply that a document has not been "classified" until and unless the appropriateness of classifying the document has been reviewed and the record has been "signed" or "approved." In other words, classification involves more than simply marking a document. Where documents are not marked at the time of their "origination," the directive states only that--

> "Should the classifier inadvertently fail to mark a document [using one of the formulae specified in the directive] the document shall be deemed to be subject to the General Declassification Schedule."

The directive does not say that failure to mark a record at the time of its origination ipso facto precludes a subsequent classification of the record.

In dealing with this complex problem of subsequent classification, one must also take into account the State Department's classification regulations which were promulgated pursuant to Section 7(B)(1) of E.O. 11652 and which may be applicable to the classification of records kept by Secretary Kissinger. Section 912.1 of the Uniform State/AID/USIA Security Regulations provides in pertinent part:

> "Any person who originates a classified document has the responsibility to assign the appropriate classification at the time the document is prepared. The final classification and declassification schedule, however, must be approved by an official with the appropriate level of classifying authority.

This language again suggests that the classification process is not complete until the appropriateness of a

classification has been reviewed and approved by an official having the requisite classifying authority.*

The reason for this circuitous discussion is that there is no court decision on the question of whether records can be classified long after their original preparation. Perhaps the entire problem can be avoided, at least as to memoranda from the Israeli and other foreign governments, by a broad reading of Section 4(C) of E.O. 11652--which seems to indicate that some materials received from foreign governments are inherently classified:

> "Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification is assured a degree of protection equivalent to that required by the [foreign] government or international organization which furnished the information or material." [Emphasis supplied.]

In other words, if the information or material is "classified by the foreign government, a new act of

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*Moreover, the requirement that a classification be assigned at the time a document is "prepared may suggest a distinction between the "origination" and "preparation of a document--particularly in the case of unwieldy materials such as a library of tapes or a file drawer of notes on conversations: until the raw tapes or notes are collated, indexed or otherwise organized, the tapes or notes might not be deemed to have been "prepared" for purposes of even assigning an initial classification.

As discussed under point C below, the proposed GSA processing procedures for the Nixon tapes and papers contemplate future NSC classification of sensitive materials not yet classified.

classification within the United States is not necessary. What does "classification" by a foreign government entail? It is probably safe to say as a general principle that all foreign states expect that conversations by their heads of state as well as memoranda they supply to our Secretary of State shall be guarded on a confidential basis. Perhaps this expectation in and of itself constitutes a "classification" by the foreign government. We certainly cannot expect a foreign government to adhere to our procedural formalities in classifying a record.*

The more certain approach would, of course, be to have the memoranda immediately reviewed and, where appropriate marked with a classification. A similar review should also be made of any notes on monitored conversations kept by the Secretary.**

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*Along these lines one could request the President to issue a new executive order which would amend Section 4(C) of E.O. 11652 to clarify that for purposes of Section 4(C), communications from foreign heads of state and information or material given in confidence by a foreign government shall be deemed to be classified unless the foreign government expresses a contrary intent. Cf. Wolfe v. Froehlke, 358 F. Supp. 1318 (D.D.C. 1973).

**As mentioned above, failure to classify a record at the time it was originated will subject the record to possible automatic declassification (in from six to ten years after the record was "originated") under the General Declassification Schedule. NSC Directive of May 17, 1972, Part IV(A), 37 F.R. 11053; E.O. 11652, Section 5(A). The Secretary, however, could specifically exempt "material furnished by foreign governments" and other sensitive foreign policy materials from this Schedule. E.O. 11652, Section 5(B)(1) and (3).

(2) Classifying After an FOIA Request is Presented

The legal arguments supporting subsequent classification of a tape or record suffer some attenuation when classification is attempted after an FOIA request has been made. Classification in these circumstances might give rise to a claim that the classification was made not in accordance with any ordinary review to determine the appropriateness of a classification, but simply to frustrate FOIA requirements. Such a shift in the equities in favor of the FOIA applicant might induce a court to conclude (a) that a reasonable opportunity to review the tape or record for purposes of assigning a classification has elapsed and that (b) the tape or record has, therefore, not been properly classified within the meaning of the FOIA. Again there is no authority on point. The problem will have to be met in any effort to classify Nixon tapes or materials for which FOIA requests are currently outstanding--such as by Jack Anderson (see Part I, above). As for records kept by the Secretary, the problem can be avoided by now undertaking a review of those records.

(3) Classifying Documents En Masse

If an immediate review of the tapes and records is to be undertaken, must someone engage in the painstaking work of reviewing the tapes and records one by one, or can certain categories of tapes and records be classified en masse without an item-by-item review?

A major obstacle to en masse classification is that such a wholesale approach may be inconsistent with some of the arguments discussed above--i.e., the argument that a government agency cannot waive its right to classify a record until an authorized official has had an opportunity to review the record to determine whether a classification is appropriate. By assigning a classification en masse, the "opportunity to review" argument may become fortuitous.

On the other hand, one might contend that since some of the materials are extremely unwieldy or bulky (e.g. the tapes and the Secretary's notes of conversations), and since some of these clearly contain national security information, it would be consistent with E.O. 11652 to make an interim classification of such materials pending a more detailed review. One might, for example, simply affix a classification marking to the front of each document and reel of tape that clearly contains some national security information;* such a classification would, of course, be a qualified one, applicable only to national security information contained in the tapes or records.

In sum, it would be desirable now to classify the foreign policy--national security materials contained in tapes, memoranda or other records in the custody of the President (or Mr. Buchen) or of the Secretary. Again "proper" classification of the tapes, etc. would exempt them from disclosure under the FOIA, even if the tapes and materials were held to be "agency records." 5 U.S.C. § 552(b)(1). To other possible FOIA exemptions we now turn.

C. Exemptions for Materials Covered by Other Statutes

Paragraph (b)(3) of the FOIA exempts "matters that are . . . specifically exempted from disclosure by [some other] statute." Ironically, one statute that may be pertinent here is the Presidential Recordings and Materials Preservation Act of 1974, relating to the tapes and other materials of the Nixon presidency.

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*See NSC directive of May 17, 1972, Part IV.B, which provides that the classification of a document shall be conspicuously marked or stamped at the top and bottom of the outside of the front cover (if any), on the title page (if any), on the first page, on the back page, and on the outside of the back cover (if any)."

Section 103 of the Act directs the GSA Administratior to issue regulations to prevent inter alia "access to [the] recordings and materials by unauthorized persons." Section 104 then directs the GSA Administrator to issue regulations governing "public access" to the tapes and materials; however, such regulations must take into account inter alia "the need to prevent general access . . . to information relating to the Nation's security." P.L. 93-526, § 104(a)(3). Thus, to the extent the GSA regulations will preclude access to foreign policy materials involving national security, disclosure under the Presidential Materials Act, and hence under the FOIA, would be prevented.

The GSA Administrator has issued proposed regulations relating to public access to the Nixon tapes and materials. The proposed regulations would restrict access to "national security classified information" which is defined to mean--

> ". . . any matter which is security classified under existing law, and has been or should be designated as such."

This definition assumes that materials may be classified even though the formalities of marking records as "classified" have not been complied with. The reason for this is that the GSA, in processing the Nixon tapes and papers, contemplates a procedure for "marking" materials that are not yet ostensibly classified:

> "To cite a specific area of restriction, any papers or White House tapes which contain national security information must be protected from disclosure in accordance with Executive Order 11652. During the review process, archivists will identify all materials bearing national security classification markings for segregation from other materials being prepared for public access. In addition, archivists

> will identify and lay aside any materials containing information which appears to be related to national security for later review by the National Security Council. If such materials are deemed to contain national security information, they will be marked appropriately and segregated. [GSA, Report to Congress on Title I, Presidential Recordings and Materials Preservation Act, at C-5 (March 1975)].

The success of this processing in protecting sensitive foreign policy materials will, therefore, depend on the awareness and competence of the "archivists" selected. Perhaps these archivists should be briefed in advance by NSC or State Department staff as to what types of materials to send to the NSC. In the alternative, an NSC or State representative could supervise the processing.

Returning to FOIA considerations, should a tape or document be set aside by an archivist and then formally "designated" as classified by the NSC, it would seem to be exempted from disclosure under the FOIA as protected under another statute.

D. Exemption for Privileged and Confidential Material

Section (b)(4) of the FOIA exempts materials that are--

> "trade secrets and commercial or financial information obtained from any person and privileged or confidential . . . ."

This exemption has generally been viewed as one designed to prevent information given to government agencies in confidence by individuals or companies. See Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F. 2d 578, D.C. Cir. (1970); Benson v. General Services Administration 289 F. Supp. 590 (W.D. Wash. 1968), affirmed 415 F. 2d 878 (9th Cir. 1969). It

has been said that the policy underlying this provision is to encourage individuals and businesses to continue giving confidential information to the Government, and that the provision must be read narrowly in accordance with this policy. Soucie v. David, supra.

The legislative history, however, suggests that the term "privileged or confidential" states a separate category of materials which is to be broadly construed. For example, the provision could be read as follows:

> "The provisions of this section shall not be applicable to matters that are . . . privileged or confidential . . . ."

On this point, the House report states:

> "It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges . . . . Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."

Arguably, if the Government has obligated itself in good faith to accept documents or communications in confidence from foreign governments or other non-U.S. sources, such a commitment might be exempted as privileged or confidential. Again, it must be kept in mind that the case law has thus far limited this exception to situations where commercial secrets or an individual's privacy are involved.*

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*One further point: the Secretary might be able to contend that his own notes and memoranda contain personal reflections about other persons. Portions of materials which contain such reflections may be protected under the "confidential and privileged" exemption. The remainder of the materials, however, would not be protected. See point E, below.

E. Exemption for Inter and Intra-Agency Policy Memoranda

Paragraph (b)(5) of the FOIA exempts matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." In discussing the scope and purpose of this provision, the House report states:

> "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contend, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fish bowl.'"

The courts, in applying this exemption, have formulated a test: opinions and advice expressed in a policy-making process by members of an agency staff are covered by the exemption, whereas purely factual materials are not. See Stern v. Richardson, 367 F. Supp. 1316, (D.D.C. 1973); Stokes v. Brennan, 476 F. 2d 699 (5th Cir. 1973). To put it another way, it is a process of deliberation or of policy making which is protected under this exemption, and not mere factual data. Soucie v. David, supra.

No court has had occasion to extend this exemption to records other than staff reports, memoranda, etc. But at least some of the tapes and materials in the custody of the President or Secretary presumably reflect processes of deliberation and of foreign policy making. This should be true of any written notes of monitored telephone converations between the Secretary and other persons at policy-making levels.

F. In Camera Inspections and Disclosure of Segregable Matter

Assuming that a tape or document is deemed to be an "agency record," and assuming also that the tape or document qualifies for protection under one of the exemptions discussed above, there are still two more hurdles to cross--one procedural (in camera inspections) and the other substantive (the segregable matter requirement).

In Camera Inspections. At the time the FOIA was first enacted in 1967, there was considerable uncertainty as to how far a court could go in reviewing an agency's claim that certain material was exempted from disclosure. The act stated simply that the courts shall determine the matter de novo and the burden is on the agency to sustain its action. As for materials exempted because classified, the Supreme Court held that U.S. district courts could not make in camera inspections of classified documents for purposes of separating out any "non-secret" components. Mink v. Environmental Protection Agency, 410 U.S. 73 (1973).

The 1974 amendments to the FOIA eliminated much of this uncertainty by increasing judicial authority to conduct in camera inspections. The act now provides:

> "[T]he court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in Subsection (b) of this section, and the burden is on the agency to sustain its action. [5 U.S.C. § 552(a)(4)(B)]."

The conference report, however, states that "in camera examination need not be automatic" and that before a court orders in camera inspection, "the Government should be given the opportunity to establish by means

of testimony or detailed affidavits that the documents are clearly exempt from disclosure." Senate Report No. 93-1200, at 9. The conference report then goes on to state:

> "[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that federal courts, in making de novo determinations in Section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. [Id., at 12].

This would appear to indicate that [if an FOIA request were made for the tapes or records held by the President or Secretary, and if a refusal to disclose such tapes or records were made by the executive branch, an in camera judicial inspection might be resisted by presenting affidavits attesting (1) that the [records and tapes] contain national security and foreign policy matters, and (2) that the [tapes or records] have been properly classified or that they fall under some other FOIA exemption. [If the affidavits were to be rejected by a court, and if appeals were to no avail, executive privilege would be the last line of defense (see Part IV below).]

Segregable Matter. Although information in a document may qualify for one of the FOIA exemptions, it does not necessarily mean that the entire document will be protected from disclosure. [Paragraph (b) provides:]

> "Any reasonably segregable portion of a record shall be provided to any person requesting such

record after deletion of the portions which are exempt under this subsection."

The courts are empowered to make determinations not only with respect to an entire record, but also as to "any part thereof." 5 U.S.C. § 552(a)(4)(B). To resist partial disclosures under this segregable matter rule, the executive branch would have to follow the course outlined above--i.e., submitting sworn affidavits to the court and/or asserting executive privilege.

III. PRIVACY ACT DEFENSES

The Privacy Act of 1974 will come into effect on September 28, 1975. Conceivably, someone might file a request under the act seeking access to information relating to him and contained in tapes or records in the custody of the President or Secretary.

In our view, the Privacy Act would be of no avail to persons seeking disclosure of foreign policy materials contained in tape recordings, memoranda or other records. The primary purpose of the Privacy Act is to "permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated" by an agency. P.L. 93-579, § 2(b). As this statement of congressional purpose indicates, the act applies only to records about the "individual" making a request.*

Significantly, not all information about an individual is obtainable under the act. The act permits access only to information which is contained

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*The term "individual" is defined to mean "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2). Justice has tentatively taken the position that the term "individual" would not include corporations.

in a "system of records," which in turn is defined to mean a group of records retrievable "by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 442a(a)(5). In other words, the information must be in a file or other collection which is cross-indexed to the individual's identity so that it may be readily "retrieved" by officials seeking information on the individual. In addition, such a file must contain personal data or information about the individual. 5 U.S.C. § 552a(d)(1).

Presumably, neither the tapes nor the other materials in the custody of the President or Secretary is cross-indexed--and hence retrievable--according to an individual's identity;* nor are they a "system of records" pertaining to information about individuals. In our view, the fact that the President or Secretary discusses a particular individual in a policy-making context would not convert a recording or memorandum of the conversation into a record of personal information about the individual.**

IV. EXECUTIVE PRIVILEGE

As a last line of defense in protecting sensitive foreign policy or national security information, the

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*Such a cross-index, however, may come into existence when and if the Nixon papers and tapes are processed by the GSA under the Presidential Recordings and Materials Preservation Act of 1974.

**In addition, if the tapes and other records were properly classified and hence exempted under paragraph (b)(1) of the FOIA, they would also be exempted from disclosure under the Privacy Act. 5 U.S.C. § 552a(k)(1). However, not all FOIA exemptions are carried over into the Privacy Act. For example, the Privacy Act does not specifically exempt materials protected under other statutes--such as the Nixon papers would be through GSA processing under the Presidential Materials Preservation Act of 1974 (see Part II-C of this memorandum).

President, for himself or for the Secretary, could assert executive privilege. The privilege is generally considered to be available only against another branch of the Government, i.e. Congress or the judiciary, and not against private individuals. However, once a private individual resorts to litigation to obtain access to information or records, the privilege may be asserted against the process of a court (e.g., a subpoena).

The availability of the privilege to protect diplomatic and foreign policy information was recognized in the most recent and authoritative decision on executive privilege, United States v. Nixon, 418 U.S. 683 (1974).* Four times during the course of its opinion in the Nixon case, the court emphasized that the case before it did not involve a subpoena seeking the production of diplomatic or military information. As the court noted, Nixon had raised "no more than a generalized claim of public interest and confidentiality of non-military and non-diplomatic discussions." 418 U.S. at 707.

In dictum, the court indicated that an assertion of executive privilege to protect diplomatic secrets involved an exercise of the President's Article II duties under the Constitution:

> "He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Article II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. [418 U.S. at 710].

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*The court also observed, "The need for confidentiality even as to idle conversations . . . in which reference might be made concerning . . . foreign statesmen is too obvious to call for further treatment." 418 U.S. at 715.

With respect to the protection of diplomatic information, the court cited C & S Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948), where it was said that the courts should not "review and perhaps nullify actions of the executive taken on information" that the President had obtained "as the nation's organ for foreign affairs."* Then the court indicated that a claim of executive privilege which relates to the exercise of a President's powers to conduct foreign affairs had constitutional underpinnings:

> "Nowhere in the Constitution, as we have noted earlier, 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. [418 U.S. at 711].**

In light of the foregoing, an assertion of executive privilege against either congressional or judicial action relating to most of the materials of concern here would, in our view, be judicially recognized. Presidential conversations with foreign heads of state, the Secretary's conversations which lead to foreign policy decisions, the acceptance of

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*With respect to the protection of military information from court review, see United States v. Reynolds, 345 U.S. 1, 10 (1953), which is also discussed in United States v. Nixon.

**The court also stated:

> "Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." 418 U.S. at 705.

memoranda from foreign governments--each involve an exercise of the President's foreign relations powers under Article II; thus a claim of privilege with respect to these materials would be consistent with the constitutional theory outlined in United States v. Nixon.

A claim of executive privilege with respect to freedom of information act requests, as discussed in Part II-F of this memorandum, raises an additional problem. If the President or Secretary declined to make certain records available under one of the exemptions stated in the statute, a court would have the authority to make an in camera inspection of the records in order to determine de novo whether such records should have been made available. If the court declined to rely on affidavits and representations concerning the records and insisted instead on an in camera inspection, the President could attempt to prevent such an inspection by asserting executive privilege.

Ironically, however, the Supreme Court in the United States v. Nixon provided for in camera inspection of records for which a privilege had been claimed (418 U.S. at 714-16) and provided that the district court could segregate privileged from non-privileged material (418 U.S. at 715 n. 21). This suggests that the courts are the final arbiters of the scope and extent of executive privilege; however, the United States v. Nixon decision was specifically limited to the facts of that case. Therefore, it is not clear where courts can generally conduct in camera inspections to determine whether a claim of privilege is proper. On the other hand, if an in camera inspection were conducted, a court would presumably conclude that the claim of privilege was appropriate with respect to sensitive foreign policy materials and therefore find it unnecessary to determine whether the records in question qualified under one of the FOIA exemptions.

A third situation in which executive privilege could come into play is where Congress itself sought access to some of the foreign policy materials discussed in this memorandum. In fact, Senator Weicker has written to the Secretary about the alleged monitoring of the Secretary's telephone conversations; and there have been congressional requests for copies of the Nixon-Thieu letters. Although there has been no court decision on point recognizing a claim of executive privilege against a congressional request, the availability of such a claim is widely recognized and was obliquely acknowledged in United States v. Nixon (418 U.S. at 705-06).

In sum, to the extent that executive privilege is claimed to protect sensitive communications in the area of foreign relations--an area in which the President's constitutional preeminence has been recognized by the Supreme Court--the claim of privilege will undoubtedly be legally recognized. There may, however, be practical reasons for not asserting the privilege.

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