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MEMORANDUM March 14, 1975

Question has been raised as to the legal consequences which would follow if a government official should request his secretary to monitor all his telephone calls and thereafter to prepare from stenographic notes written transcripts of all or significant portions of such telephone calls. For purposes of this memorandum it is assumed, unless otherwise indicated, that such monitoring and transcribing is carried out without the specific consent of the other party to telephone calls. It is further assumed that the transcripts are given at least limited circulation to other members of the government official's office for their information and that a file of such transcripts is kept by the official's secretary for future reference.

1. The first question presented is whether the practice of monitoring and transcribing telephone calls is illegal.

In an opinion dated September 25, 1974 this office expressed the view that the practice of monitoring and transcribing telephone calls is not illegal.

2. The second question is whether the transcripts of such monitored telephone calls could be regarded as the personal property of the official who arranged for the monitoring and transcription.

One can conceive of circumstances in which such a claim might be sustainable, but the facts of the hypothetical case assumed at the outset would not sustain that claim. Here the transcript is given at least limited circulation, is used to inform other members of the staff of official actions to be taken, and in effect becomes a document used in the execution of government business. When these facts are put together with the fact that the calls themselves involve government business, that the stenographer is employed by the government and that the transcripts are made on government time, the result is that a claim that the transcripts are personal property becomes clearly untenable. Only if the transcripts were made and used exclusively by the government official himself would there be any chance of claiming that they are personal property and even then success is uncertain. It will be recalled that Secretary of State Byrnes was a former shorthand reporter and used that skill to record his diplomatic negotiations. His notes I believe would have been considered personal property.

3. The third question is whether the official who has kept files of transcripts of monitored telephone calls is free to destroy the transcripts.

If the transcripts were purely for his personal use, then presumably he would be free to destroy them. This would be all the more true if any such file was intended to be used as a temporary file, in which case the file would be considered a "working file" and could be destroyed. If, however, as we have heretofore assumed, the transcripts were concerned with official business, were circulated within the office for information of other officials in order to apprise them of actions to be taken by them, then clearly such documents are official records and may not be destroyed.

4. The fourth question is whether the transcripts of monitored telephone conversations are subject to production upon request by an ordinary citizen, newspaperman, or lawyer under the Freedom of Information Act.

We believe that the transcripts may properly be denied under Exception 5, 5 U.S.C.A. §552(b)(5) of the Freedom of Information Act on the ground that they are internal agency records, to the extent that they

reveal the internal deliberative process leading to decision making within the Executive Branch. However, denial would not prevent the transcripts from being reviewed in camera by a court if the requesting individual elects to appeal the administrative denial to the courts. The statute provides that after in camera inspection, the judge is authorized to make his own determination as to whether the transcripts fall within Exception 5. Any official who has preserved the transcripts would be obliged to supply them to the court for inspection in camera unless a constitutional objection based on executive privilege is sustained. However, the official could not invoke executive privilege without specific Presidential approval.

If the transcript involved information properly classified under Executive Order 11652, it could also properly be denied under Exception 1 of the Freedom of Information Act which provides for withholding information required to be kept secret for national defense or foreign policy reasons. Again, however, the denial would be subject to court review. This exception would be particularly relevant if the transcript involved conversations with a foreign government official.

Special problems arise depending on the status of the other party to the conversation which was monitored and transcribed. If the other party is another official of the government, Exception 5 as well as Exception 1 may be plausibly invoked. If the other party is a foreign diplomat, Exception 1 is plausible enough and appropriate in principle. If, however, the other party is a member of the general public, neither Exception 5, nor Exception 1, seems plausible.

Finally, special problems arise depending on the status of the person requesting the transcript. If that person was the other party to the telephone call which has been transcribed, it will be very difficult to deny a request for a copy under the Freedom of Information Act. Indeed, none of the nine exceptions seems available to support denial and no precedent has been found in the cases. Accordingly, our opinion is that any request from a party to the telephone call must be met.

5. The fifth question is whether transcripts of monitored telephone conversations are subject to production in response to congressional subpoena.

The answer to this question depends not on the Freedom of Information Act but rather on the constitutional doctrine of executive privilege. As previously noted, specific Presidential approval must be secured before an official in the Executive Branch may interpose executive privilege. Assuming, however, that such approval is secured, a major legal issue is presented for decision.

The Supreme Court, for the first time in United States v. Nixon (No. 73-1766, decided July 24, 1974) addressed itself to the question of executive privilege. In this case the Court rejected a claim of absolute privilege for Presidential records needed as evidence in a criminal case not involving national security secrets. At the same time the Court recognized a constitutional basis for the concept of executive privilege and reserved its position as to whether "documents affecting military, diplomatic or sensitive national security secrets" were entitled to an absolute or only a qualified privilege. The Court's views on the scope and nature of the privilege are best conveyed by quoting the following passages from its unanimous opinion in the Nixon case:

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring).

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

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Since we conclude that the legitimate needs of the judicial process may outweigh presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President. *United States* v. *Burr*, 25 Fed. Cas. 187, 190, 191–192 (No. 14,694) (1807).

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." In *Nixon* v. *Sirica*, — U. S. App. D. C. —, 487 F. 2d 700 (1973), the Court of Appeals held that such presidential communications are "presumptively privileged," *id.*, at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual." *United States* v. *Burr*, 25 Fed. Cas. 187, 191 (No. 14,694) (CCD Va. 1807).

The Nixon case involved a judicial subpoena issued in a criminal case in which accused defendants sought the materials in question. But we are here considering the question whether a claim of executive privilege can be successfully asserted against a congressional subpoena. If a congressional subpoena is resisted by the Executive, the remedy for the Congress is to apply to the courts.

The Congress itself has no power to punish for contempt (Kilbourn v. Thompson, 103 U.S. 168 (1880) ). However, Congress can provide by law for the punishment of contempt (In re Chapman, 166 U.S. 661 (1897). 2 U.S.C. §192 makes it a misdemeanor to refuse "to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress."

There are cases in which the courts have refused to punish for refusal to respond to congressional subpoenas because of defects in congressional procedures. However, for our purposes it should be assumed the Congress will be able to correct any deficiencies which may be found in the enabling resolution or in the procedures which preceded the issue of the subpoena.

Ultimately, therefore, the courts will be called upon to decide whether a particular congressional subpoena is enforceable against a Presidentially approved assertion of executive privilege. In that event, one would predict, on the basis of the language quoted above from the Nixon case that the courts would reject a "generalized" claim of executive privilege for transcripts of monitored telephone calls but might recognize the claim as to those portions of the transcripts which relate to military, diplomatic, or sensitive national security secrets or to records of the internal deliberations of the Executive Branch.

At this point in the analysis, however, it is necessary to take account of the differences between judicial and legislative procedures. By long established tradition judicial proceedings are open to the public, except in rare instances. Moreover, the adversary system presupposes full access by counsel on both sides to all relevant information. In legislative proceedings, on the other hand, the executive session is a frequent occurrence. Customarily members of congressional committees are given access on a need-to-know basis to classified or secret information and documents. Staff members of congressional committees are given security

clearances. Classified files are maintained in the committee rooms. Thus the congressional committee can plausibly argue that it has procedures for protecting classified or secret information. The force of this argument should not be underestimated nor could it be disregarded by the President in making his decision as to whether to invoke executive privilege.

In the present state of the law, no one can safely predict how much scope the courts would allow to a claim of executive privilege in the face of a congressional subpoena.