

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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STATEMENT OF ROBERT F. KELLER
DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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Mr. Chairman and Members of the Committee:

We are glad to appear before you today to testify on [S. 1125] 92d Congress, with regard to the exercise of executive privilege.

S. 1125 would amend title 5 of the United States Code so as to provide that no employee of the executive branch summoned or requested to testify or produce documents before the Congress or its committees shall refuse to do so on the grounds that he intends to assert executive privilege; and no such employee shall assert the privilege unless at the time it is asserted he presents a statement signed personally by the President requiring that executive privilege be asserted as to the testimony or document sought.

We believe that S. 1125 is the first measure to specifically recognize the doctrine of executive privilege *in so many words.* as a basis for refusing information to the Congress. In this regard it is unlike the Foreign Assistance and Related Programs Appropriation Act, 1971, and kindred appropriation acts going back as far as the Mutual Security Appropriation Act, 1960, as well as section 634(c) of the Foreign Assistance Act of 1961. Those measures, in effect, excused production of certain documents to committees of Congress and the General Accounting Office upon certification by the President that he has forbidden the furnishing of such documents and his reason for so doing.

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The basis for the executive branch denial of information to the Congress is the constitutional doctrine of separation of powers which is interpreted by the executive branch as granting it a privilege to withhold information where such action is deemed necessary in the best interest of the country. While no court has addressed the precise issue, it has been the subject of many articles, studies and commentaries.

With regard to the effect of the privilege on the work of the General Accounting Office, one of the most important of our duties is to make independent reviews of agency programs and to report to the Congress the manner in which Federal departments and agencies carry out the laws enacted by the Congress. In establishing the General Accounting Office, the Congress recognized that the Office would need to have complete access to the records of the Federal agencies, and provided the basic authority in section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 54) as follows:

"All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment."

For the most part, refusals by the executive branch to grant us access to records have been premised upon departmental decisions that grant of access would not be in the public interest rather than a formal claim of executive privilege.

In recent years we generally have had good cooperation in obtaining access to the records of the executive departments except for the Department of State and the Department of Defense in those areas which involve our relations with foreign countries. While absolute denial of access to a document is quite rare, our reviews are hampered and delayed by the time-consuming tactics employed by the various organizational elements within and between these departments. These delays occur in the screening of records and in making decisions as to whether such records are releasable to the General Accounting Office. It is not unusual for our auditors to request access to a document at an overseas location and be required to wait several weeks while such documents are screened up the channels from the overseas posts and through the hierarchy of those departments.

Our experience in making a study of the Military Assistance Training Program at the request of the Chairman, Senate Committee on Foreign Relations is a good example of the problems we have encountered in obtaining access to information. In our February 1971 report on this study we summarized our problems with access to records and set forth conclusions which we believe point up the problems of access and the effect these problems have on our ability to carry out effective reviews.

The Department of Defense denied access to records which contained future planning information; routine reports prepared by personnel which were evaluative in nature; and program evaluation group reports.

It was and is our position that it is essential for us to have access to all information available to DOD personnel who make program decisions in order that we can determine how decisions were made and whether all pertinent data was considered in reaching decisions. With regard to evaluation material, we regularly make use of internal audit reports and other internal evaluations and perform such independent tests of such material as we feel justified under the circumstances.

If we are permitted extensive use of internal audits and other evaluative reports, we are able to concentrate a greater part of our efforts in determining whether action has been properly taken by responsible officials to correct identified program weaknesses. This also helps to eliminate duplication and overlapping in audit effort, and promotes full utilization of existing audit and investigative data.

In order for the GAO to carry out its responsibilities to review DOD programs it is essential that we have access to and make appropriate review and analyses of all DOD reports and records which evidence the expenditure of appropriated funds.

In commenting on a draft of this report, the Special Assistant to the Assistant Secretary of Defense, International Security Affairs, in a letter dated September 25, 1970, stated:

****, the Department of Defense cannot permit to go unchallenged that section of the report concerning complaints that the GAO auditors were hindered and delayed in their efforts because the Department of Defense had denied them access to 5 year MAP planning data and to inspection and evaluation reports known as PEG reports. Apart from the fact that custom, tradition and precedent have decreed that information of such internal nature will not be disclosed outside the Executive Branch in

order to preserve the confidentiality of the relationship of superior and subordinate, an understanding was also reached a number of years ago between the General Accounting Office and the Department of Defense whereby planning data and inspector type reports would not be provided. The Department is, therefore, both surprised and chagrined over the fact that the GAO would endeavor to make such an issue over these specific categories, an issue which had been resolved years ago."

A copy of this Department of Defense letter was sent to the Chairman of the Committee by the Department.

In making his report to the Chairman the Comptroller General took note of this Department of Defense letter and advised as follows:

"In regard to the Department's position concerning the access-to-records matters discussed in the report, the General Accounting Office has never reached such an understanding with the Department of Defense. To the contrary, we have always maintained that we are entitled by law to have access to, and the right to examine, all records of the Department of Defense and its component commands that we consider pertinent to the matter or subject under review.

"The inspection and evaluation reports referred to in the Department of Defense letter are management reports prepared by a program evaluation group of the Unified Command Headquarters. We have always regarded complete access to reports of this type as necessary in order for us to carry out the responsibilities we have to the Congress."

In early 1970, we undertook a review of the U.S. Assistance to the Philippine Government in support of the Philippine Civil Action Group at the request of the Chairman, Subcommittee on U.S. Security Agreements and Commitments Abroad, Senate Committee on Foreign Relations. The Departments of State and Defense delayed our work on this assignment to the extent that we had to curtail the scope of our review and qualify our report to the Chairman. Our work was seriously hampered and delayed because in general we were given access to only those documents,

papers, and records which we were able to specifically identify and request and as to those records we were given access only after time-consuming screening at various levels within the Departments.

We were restricted by ground rules established by the Departments. These rules effectively limited our review in the field to the very narrow departmental interpretations of what in their opinion was judged to be the scope of our review. This was perhaps the most restrictive limitation placed on our work, and it completely frustrated our attempts to review assistance to the Philippines that was not funded in the military functions appropriations.

Our staff members in the field were advised that documents which they requested that were releasable to us under the restrictions of the so-called ground rules had to be dispatched to Washington for departmental clearance. As a consequence, by early May 1970, only four of 12 documents which were requested by our staff members on January 28, 1970, had been released to them in Manila.

Following our review in the Philippines we initiated a study of United States assistance to the Government of Thailand. In an attempt to avoid the conditions previously experienced, the Comptroller General on June 26, 1970, wrote to the Secretaries of Defense and State citing the problems experienced in the Philippines review, requesting that they eliminate the necessity for the lengthy screening process, and citing the scope and authority for our review as follows:

***the scope of our review will be broad enough to permit our representatives to investigate all matters concerning the receipt, disbursement, and application of public funds related in any way to our relations with the Government of Thailand. Pursuant to the authority of Section 313 of the Budget and Accounting Act of 1921, 31 U.S.C. 54, representa-

tives of the General Accounting Office will be requesting officials in your Department for access to, and when we consider necessary, copies of any books, documents, papers, or records in the custody or control of your Department which we believe may contain information regarding the powers, duties, activities, organization, financial transactions, and methods of business related to the scope of the review."

Unfortunately, we have experienced similar problems in obtaining access to documents required for our review of assistance to Thailand.

The policy of the executive branch, with respect to release of information to the Congress, was set forth by the President in a Memorandum to the Heads of Executive Departments and Agencies, on March 24, 1969, as follows:

"The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive Branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest. This Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval."

Although the Departments of State and Defense indicate in their directives that it is their policy to provide maximum cooperation and assistance to the General Accounting Office, we have found it quite difficult to obtain the information which we need to conduct our reviews relating to foreign assistance activities.

In our discussions with departmental officials, they have frequently stated that the documents or information being withheld are not releasable to the GAO because of one or more of the following reasons:

- (1) review, examination, or disclosure would seriously impair relations between the United States and other countries, or otherwise prejudice the best interest of the United States,

- (2) access to documents including information and debates used in formulating policy decisions would seriously hamper a candid exchange of views within the agency, and
- (3) access to information on future planning would not be appropriate because it has not received the approval of the President or been presented to the Congress.

We have characterized our current problems over access to records as being those of frustrations and delays in carrying out our statutory responsibilities rather than those attending outright refusal of access on a claim of executive privilege. We do not know how close our experience parallels that of the Congress and its committees. We would however point out that insofar as they may be similar, enactment of S. 1125 should put an end to delays in appearance and reluctance to testify without invoking "executive privilege." Under S. 1125 those requested to appear must appear and the exercise of the privilege is restricted to the President. Under this procedure, if the privilege is to be exercised by the President there should be no delays in the hearing processes and if the privilege is not to be claimed there is no basis remaining that we can see which could justify failure to testify.

Leaving aside the legal arguments pro and con as to the constitutional basis for executive privilege, S. 1125 assumes the fact of its existence and realistically makes an effort to restrict its exercise to the President or by his written direction. The bill, if enacted, should result in a freer flow of information to the Congress and its committees except in those cases where the President himself has decided that disclosure shall be precluded on the ground of executive privilege.

This concludes our statement Mr. Chairman, and we would be pleased to answer any questions you may have.