The original documents are located in Box 14, folder "Intelligence - House Select Committee: Subpoenas - Kissinger (1)" of the Loen and Leppert Files at the Gerald R. Ford Presidential Library.

RESOLUTION

Les Aspin

RESOLVED by the Select Committee on Intelligence of the House of Representatives that an amalgamation of Department of State documents, to include in its entirety the papers described as the Dissent Memorandum prepared by Thomas Boyatt while director of Cypriot affairs in the Department, fulfills the requirements of the subpoena issued by the Committee on the 2nd day of October 1975;

PROVIDED the amalgamation is accompanied by an affidavit signed by a person mutually acceptable to the Department of State and the Committee (as represented by the chairman and the ranking minority member), attesting that the aforementioned Boyatt memorandum is contained unabridged within the amalgamation;

~~DUE to the unique circumstances surrounding the Boyatt memorandum such amalgamation will be considered to satisfy the well established legal rights of a duly authorized committee of Congress to have access to all documents of the executive branch within the purview of that committee's operations, pursuant to procedures which have been agreed upon between this Committee and the Executive Branch.~~

deleted by amendment

(Then amendment inserts language that passage of this resolution shall serve as a precedent for other Committees or the State Dept.)

As amended and adopted by the Committee on November 4, 1975

RESOLUTION

Les Aspin

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DELETED BY AMENDMENT

~~DUE to the unique circumstances surrounding the Boyatt memorandum such amalgamation will be considered to satisfy the well established legal rights of a duly authorized committee of Congress to have access to all documents of the executive branch within the purview of that committee's operations.~~

ADDED BY AMENDMENT: "The adoption of this resolution shall in no way be considered as a precedent affecting the right of this Committee with respect to access to Executive Branch testimony or documents."

FILE
HSCI

THE SECRETARY OF STATE

WASHINGTON

October 14, 1975

Dear Mr. Chairman:

I have given much thought to the Select Committee's October 2 request that I provide it with a copy of a dissent memorandum, on the Cyprus crisis, sent me by a Foreign Service Officer in August 1974. After careful consideration I have decided that I cannot comply with that request. I respectfully request the Committee to work with me on alternate methods of putting before it the information relevant to its inquiry.

The "Dissent Channel," through which this memorandum was submitted, provides those officers of the Department of State who disagree with established policy, or who have new policies to recommend, a means for communicating their views to the highest levels of the Department. "Dissent Channel" messages and memoranda are forwarded to the Secretary of State, and are normally given restricted distribution within the Department. They cannot be stopped by any intermediate office.

Mr. Chairman, I take this position reluctantly, and only because I have concluded that the circumstances are compelling. I am convinced that I would be remiss in my duty as Secretary of State were I to follow a different course.

The challenges that face our nation in the field of foreign affairs have never been more difficult; the pace of events has never been so rapid; the revolutionary character of the changes taking place around us has seldom been more pronounced. If we are to prosper -- indeed, if we are to survive -- it will require the confidence of the American people and of the nations of the world in the wisdom of our foreign policy and the effectiveness of our foreign policy establishment. Basic to this sense of confidence, of course, is the quality and professionalism of the Department of State and the Foreign Service. And the strength of those institutions depends, to a critical

The Honorable
Otis G. Pike, Chairman,
Select Committee on Intelligence,
House of Representatives.

degree, upon the judgment and strength of purpose of the men and women who serve in them. It is my view that to turn over the dissent memorandum as requested would inevitably be destructive of the decision-making process of the Department, and hence do great damage to the conduct of our foreign relations and the national security of the United States.

Since the founding of the Republic, every Secretary of State has been regarded as the principal adviser to the President in the formulation of foreign policy and in the conduct of foreign relations. If the Secretary of State is to discharge his obligations and duties to the President and the national interest, he must have the benefit of the best available advice and criticism from his subordinates; they in turn, if they are to give their best, must enjoy a guarantee that their advice or criticism, candidly given, will remain privileged.

As the Supreme Court has said: "the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."

As the Cyprus crisis evolved, I received many recommendations for various courses of action from my subordinates. Their views were freely offered and fully considered in the policy-making process. But the final choices of what policies to recommend to the President were mine, and they sometimes differed from the courses of action proposed to me by some of my associates. My decisions occasionally led to vigorous dissent, both during meetings with those of my colleagues who disagreed, and in written memoranda, as in the case presently before us. Should the Select Committee so desire, I am prepared personally to come before the Committee to describe in detail the dissenting views put to me, and my reasons for rejecting them.

But were I to agree to release the document requested, even on a classified basis, I would be party to the destruction of the privacy of communication which the Secretary of State must have with his subordinates regarding their opinions. Once the confidentiality of internal communications had been breached, it would be but a short step to public exploitation of the subordinate's views. The result would be to place Department officers in an intolerable position -- at times praised, at times criticized for their views; at times praised, at times criticized for dissenting; at times praised, at times criticized for not dissenting.

Thus, my decision to withhold the document is not based on a desire to keep anything from the Select Committee with regard to the Cyprus crisis or any other subject. On the contrary, the Department and I are both prepared to cooperate with the Committee in the pursuit of its legislatively established purposes. The issue is not what information the Committee should receive; we agree on that question. Rather, the issue is from whom the information should be sought, and the form in which it should be delivered.

It is my strong belief that the Committee should look to the policy levels of the Department, and not to junior and middle-level officers, for the policy information they seek. It is my principal advisers and I who are responsible for policy, and it is we who should be held accountable before the Congress and the American people for the manner in which we exercise the authority and responsibility vested in us by the President and Congress of the United States.

In keeping with this principle I am prepared now, as I have been from the beginning, to do the following:

-- Authorize any officer of the Department or the Foreign Service, regardless of rank, to testify before the Select Committee on all facts known by that

officer about the collection and use of intelligence information in foreign relations crises.

-- Authorize any policy level officer of the Department or the Foreign Service to testify before the Select Committee on recommendations received by him from his subordinates, but without identification of authorship, and any recommendations he forwarded to his superiors.

-- Supply the Committee with a summary from all sources, but without identification of authorship, of views and recommendations on the Cyprus crisis, and criticisms of our handling of it.

-- Appear personally before the Committee to testify as to the policy of the United States with regard to the Cyprus crisis, as well as the policy of this Department with regard to the accountability of junior and middle-level officers for their views and recommendations.

The issue raised by the request for the dissent memorandum runs to the fundamental question of whether the Secretary of State should be asked to disclose the advice, recommendations, or dissents to policy that come to him from subordinate officers.

That the nation must have the most competent and professional Foreign Service possible is surely beyond question. It must be the repository for the lessons learned over more than three decades of world involvement; the institution to which each new Administration looks for the wisdom garnered from the past and the initiatives so necessary to cope with the future. It must be loyal to the President, no matter what his political persuasion; it must inspire confidence in its judgment from the Congress, no matter what party is in power there. The Foreign Service, in a word, should be America's guarantee of continuity in the conduct of our foreign affairs.

We now have an outstanding, disciplined, and dedicated Foreign Service -- perhaps the best in the world. It is the continued strength and utility of this institution that will be undermined by revealing the opinions and judgments of junior and middle-level officers.

While I know that the Select Committee has no intention of embarrassing or exploiting junior and middle-grade officers of the Department, there have been other times and other committees -- and there may be again -- where positions taken by Foreign Service Officers were exposed to ex post facto public examination and recrimination. The results are too well known to need elaboration here: gross injustice to loyal public servants, a sapping of the morale and abilities of the Foreign Service; and serious damage to the ability of the Department and the President to formulate and conduct the foreign affairs of the nation. Mr. Chairman, I cannot, in good conscience, by my own failure to raise the issue of principle, be responsible for contributing to a situation in which similar excesses could occur again.

The considerations I have outlined relate to the broad question of testimony from, and documents authored by junior and middle-level officers. The request for a specific dissent memorandum raises a particular issue within that broader framework. The "Dissent Channel," established by my predecessor, had its origin in the recommendations of special Task Forces made up of career professionals from the Department of State, the Foreign Service and other foreign affairs agencies. Two of these Task Forces recommended that improved means be found to transmit new ideas to the Department's decision-makers, to subject policy to the challenge of an adversary review, and to encourage the expression of dissenting views.

The very purposes of the "Dissent Channel" -- to promote an atmosphere of openness in the formulation of foreign policy, to stimulate fresh, creative ideas, and to encourage a questioning of established policies -- are inconsistent with disclosure of such reports to an

investigative committee of the Congress, and perhaps ultimately to the public. Dissent memoranda are, by their very nature, statements of the author's opinions. If their confidentiality cannot be assured, if they are to be held up to subsequent Congressional or public autopsy, the whole purpose of the "Dissent Channel" will have been corrupted and the Channel itself will soon cease to be a viable instrument. Those whose legitimate purpose is to argue with a policy because they sincerely believe it to be ill-conceived, or because they have new but unorthodox ideas, will recognize the Channel for what it has become and cease to use it; those who care little about what the policy is, and even less about seeking to change that policy through the institutional processes open to them, will be encouraged to use the Channel as a tool for their own ends.

For these reasons, Mr. Chairman, I cannot agree to the release of "Dissent Channel" messages -- irrespective of their contents. I am, however, ready to supply a summary of all contrary advice I received on the Cyprus crisis, so long as it is not necessary to disclose the source of this advice.

Every Secretary of State has an obligation to his country and to his successor to build a professional, effective, dedicated, and disciplined Foreign Service. Were I to comply with the request before me I would have failed in that obligation. I would have been partly responsible for a process that would almost inevitably have politicized the Foreign Service, discouraged courageous advice and the free expression of dissenting opinion, and encouraged timidity and caution.

On another occasion when the State Department was under investigation my great predecessor, Dean Acheson, wrote that there is a right way and a wrong way to deal with the Department of State. "The right way," he said, "met the evil and preserved the institution; the wrong way did not meet the evil and destroyed the institution. More than that, it destroyed the faith of the country in its Government, and of our allies in us."

I am prepared to work with the House Select Committee on Intelligence in a cooperative spirit so that, for the sake of our country, we may jointly, on the basis of the proposals contained in this letter, find the "right" way to accommodate our mutual concerns. I am prepared to meet with the Committee at its convenience to search for a reasonable solution -- a solution which will meet the needs of the Committee, protect the integrity of the Department of State, and promote the effective conduct of the foreign relations of the United States.

Sincerely,

Henry A. Kissinger

[Nov. 1975?]

Resolved, That the Speaker of the House of Representatives certify the report of the Select Committee on Intelligence of the House of Representatives as to the contumacious conduct of Henry A. Kissinger, as Secretary of State, in failing and refusing to produce certain pertinent materials in compliance with a subpena duces tecum of said Select Committee served upon Henry A. Kissinger, as Secretary of State, and as ordered by the Select Committee, together with all the facts in connectio therewith, under the seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that Henry A. Kissinger, as Secretary of State, may be proceeded against in the manner and form provided by law.

RESOLUTION

Resolved, That the Speaker of the House of Representatives certify the report of the Select Committee on Intelligence of the House of Representatives as to the contumacious conduct of Henry A. Kissinger, as Assistant to the President for National Security Affairs, in failing and refusing to produce certain materials in compliance with a subpena duces tecum of said Select Committee, described in said subpena as all 40 Committee and predecessor committee records of decisions taken since January 20, 1965, reflecting approvals of covert action projects, which subpena was served upon the Assistant to the President for National Security Affairs, who was then and there Henry A. Kissinger, and as ordered by the Select Committee, together with all the facts in connection therewith, under the seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that the said Henry A. Kissinger, as Assistant to the President for National Security Affairs, may be proceeded against in the manner and form provided by law.

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[Nov. 1975?]

A. FOR THE REPORT ON THE
RESOLUTION REGARDING
THE RECOMMENDATIONS OF
THE SECRETARY OF STATE
FOR COVERT ACTIONS.

DAVID C. TREEN, M.C.

DISSENTING VIEWS OF

HONORABLE DAVID C. TREEN

The majority of the Select Committee has voted three resolutions of contempt against Secretary of State Henry Kissinger. In each instance the resolution recommends criminal prosecution of Secretary Kissinger under sections 192 and 194 of Title II of the United States Code.

First, I want to make some general comments applicable to the three resolutions taken together. Following will be my observations on the specific resolution covered by this report.

I. General Views on the Three Contempt Resolutions.

Like every member of this Committee I am interested in the Select Committee receiving whatever information is necessary and appropriate to our function. It is of vital importance that our intelligence community operate efficiently, economically, prudently, and with proper regard for the rights of individuals.

I differ with the majority on the question of what is "necessary and appropriate" to our function. I also differ with the majority as to the wisdom and appropriateness in these circumstances of our attempts to hold the Secretary of State in contempt.

The issue of a congressional committee's authority to obtain testimony and materials from the executive branch of the government is a most important and, indeed, a most interesting issue. This is a legal issue, a constitutional issue. It is the view of some, if not all, of the Committee majority that this fundamental issue must be thrashed out here and now.

In my opinion, neither this Committee nor any other congressional committee should feel compelled to assert its legal rights just for the sake of flexing its muscles or to prove a point. The assertion and prosecution to an ultimate disposition by the Supreme Court of a congressional committee's "rights" should only occur when it is vitally necessary to the legislative function to obtain the testimony or materials and when there is no other way to meet that legislative need.

Thus, it is my hope that the distinction between what the Select Committee, or the Congress, may be entitled to legally on the one hand, and the appropriateness and necessity of asserting and prosecuting those rights, on the other hand, will be kept clearly in mind in the debate on the issues raised by the resolutions of contempt.

I am not saying that the legal and constitutional questions should not be considered and debated. Indeed they should, because the legal and constitutional questions bear on the question of the appropriateness and wisdom of pursuing the contempt process. What I am saying is that one should not vote in favor of the resolutions of contempt just because that Member concludes that the Committee has the better side of the legal argument.

All factors, legal and otherwise, should be weighed by us in making this decision: is it wise for the House of Representatives to vote favorably on the resolutions? Our decision could have far-reaching consequences.

I would now like to give my own views on this question. I offer them without pretense of sagacity, but with assurances to my colleagues in the House that they have been reached sincerely, honestly, and with much reflection.

It is my opinion that it was not wise of the Select Committee to

vote the resolutions of criminal contempt against the Secretary of State. Thus, I believe it to be the better part of wisdom for the House to disapprove the resolutions. I say this for three principal reasons:

(a) To lay down the legal gauntlet now runs the risk of increasing hostility on both sides. This will lead to a freezing of positions. A conciliatory approach will probably result in the Committee getting more information. H.Res. 591, which established the Select Committee, directs the Committee to report to the House no later than January 31, 1976. If we send this matter to the courts there is no way that the issue can be resolved prior to that date nor prior to any reasonable extension of the life of the Committee.

(b) It is questionable that we need all of the information called for by the subpoenas. I am convinced that we can obtain, on a negotiated basis, sufficient information to carry out our legislative mandate. We should insist on our "legal rights" only when the information sought to be withheld from Congress is absolutely necessary to its legislative function. Especially is this true when the insistence of asserted legal rights involves the dissembling and enormously disruptive contempt proceedings against an executive official with heavy responsibilities. Whatever our views may be of the policies pursued by Secretary Kissinger and/or the President, we should have a decent regard for the effects of a judicial confrontation on the ability of the Secretary of State to carry out his duties. To require him to direct his time and energy to a judicial battle would cause a corresponding diminution of the time that he can devote to his responsibilities. This is

an important element to be placed on the scales in resolving the equation of wisdom.

(c) Thirdly, I believe it unwise to pursue contempt because there are serious legal questions as to whether the action proposed by the Committee will be successful. The Committee has chosen a course of action which will place the judicial branch in the position of being the arbiter. If the judicial proceedings are unsuccessful, because of weaknesses in the Committee's case, it behooves the House not to proceed for at least two reasons. First, we should seek to avoid the substantial expenditures of money and human effort, by both sides. Second, we should seek to avoid the possible establishment of an adverse precedent because of a weak case.

II. Specific Views on the Resolution Covered by this Report.

Let us turn now to the specific resolution covered by this report and the subpoena on which it is based. It may be useful to the Members to break out the details of the subpoena as follows:

Subpoena served: Friday, November 7, 1975.

Return date: Tuesday, November 11, 1975.

Directed to: Henry A. Kissinger, Secretary of State, or any subordinate officer, official or employee with custody or control of items described in the subpoena.

For the following: All documents relating to State Department recommending covert action made to the National Security Council and the Forty Committee and its predecessor committees from January 20, 1961 to the present.

On November 11, the return date on the subpoena, William G. Hyland, Director of the Bureau of Intelligence and Research, Department of State, notified the Committee staff director in writing that documents relating to recommendations by the State Department were at the White House for decision on the question of executive privilege.

On November 14 the Committee voted, 10-2, to bring contempt action against Secretary Kissinger for non-compliance with the subpoena. On the same day a letter on behalf of the Secretary of State was delivered to the Chairman of the Select Committee respectfully declining compliance. The letter reads, in part, as follows:

> "The subpoena sought 'all documents relating to State Department recommending covert action made to the National Security Council and the Forty Committee and its predecessor Committees from January 20, 1961, to present.' The Committee staff has made clear that this is intended to cover recommendations originating with the State Department. An examination of our records has disclosed ten such documents, dating from the period 1962 through 1972. These consist of recommendations from officials in the State Department, sometimes the Secretary of State, to the Forty Committee or its predecessor, 303 Committee, or to the President himself in connection with consideration by one of those Committees.
>
> The documents in question, in addition to disclosing highly sensitive military and foreign affairs assessments and evaluations, disclose the consultation process involving advice and recommendations of advisers to former Presidents, made to them directly or to Committees composed of their closest aides and counselors."

A very extensive effort was required to identify documents meeting the description in the subpoena. This was no small undertaking considering that a period of more than 14 years was involved. As of November 14, the date of the letter referred to above, the staff of the Secretary of State had discovered ten documents, dating from the period 1962 through 1972. It is my understanding that none of the ten documents or any similar documents subsequently located, involve the administration of President Ford, or the period of time in which Henry Kissinger has been Secretary of State, and that nine of the ten documents originated during the administrations of Presidents Kennedy and Johnson. Thus, any notion that the documents are being withheld to avoid embarrassment to the present administration should be discarded.

I question the need of the Committee to have recommendations by the State Department of covert actions. I admit that this is an interesting inquiry. But what pertinence do recommendations for covert actions have to the business of the Select Committee?

H.Res. 591 established the Select Committee "to conduct an inquiry into the organization, operations and oversight of the intelligence community of the United States Government." The recommendations of the Secretary of State, or the recommendations of anyone else for that matter, are not relevant to the "organization, operations, and oversight of the intelligence community." H.Res. 591 authorizes the Select Committee to inquire into "the necessity, nature, and extent of overt and covert intelligence activities by United States intelligence instrumentalities. . ." While the authority of the Committee extends to covert activities actually carried out, that authority does not give the Committee the power to force anyone to disclose what recommendations he made for covert activities. Perhaps there are some in the Congress who would like to know what the Secretaries of State from 1962 to 1972 were recommending. That would make fascinating reading and undoubtedly would make for some great headlines were the information divulged. But the mandate of the Select Committee is not to inquire into the imagination of our Secretaries of State; our mandate is to determine how our intelligence community operates.

There isn't any need for our Committee to look into the minds of the Secretaries of State over the last 14 years in order to determine how the intelligence community carried out its functions. Our inquiry begins with the process by which a decision is made to carry out a covert operation, not with a recommendation to the decision makers.

Therefore, I submit that there is no real need for the Committee to have the information sought by the subpoena. Regardless of our legal right, we should not pursue the criminal prosecution of the Secretary of State for something that we have no real need for in carrying out our legislative function.

But, there are also at least two serious legal impediments to the Committee's right to obtain the information.

First, there is the legal question as to whether or not the subpoenaed materials seek information which is beyond the scope of our inquiry. In making this determination the courts will look to the scope of our authority as defined by H.Res. 591, and will also look to the facts of the particular case to determine if the subpoenaed materials are critical to the performance of the Committee's function. The United States Court of Appeals for the District of Columbia (to which court such an issue as we have before us would travel) spoke to this issue in Senate Select Committee v. Nixon, 498 F. 2d 725 (1974). The court said:

> " . . . we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions."
>
> * * * *
>
> ". . . The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings."

Thus, in order to have any chance of success in judicial proceedings which, it should be remembered, are criminal in nature, the Committee must show that the recommendations of the various Secretaries of State during the 14 years in question are "demonstrably critical to the responsible fulfillment" of the Committee's function. There is little doubt in my mind but that this test cannot be met.

Then there is a second, and perhaps even more formidable, legal hurdle. It is the hurdle of executive privilege asserted in this instance by the President of the United States.

It is important to keep in mind that the assertion of executive privilege was made by the President and not by the Secretary of State. By letter from the President's counsel to Secretary Kissinger, the President advised the Secretary that he invoked executive privilege as to the documents covered by the subpoena. The Secretary then transmitted that decision to the Committee. This procedure followed the method established several years before by presidential order.

But the important question is whether or not the assertion of executive privilege is valid in this instance. That such a doctrine exists and has constitutional validity has been clearly recognized by our courts including the Supreme Court of the United States. United States v. Nixon, 418 U.S. 683. Any Member who is troubled about the limits and definition of executive or presidential privilege should afford himself the opportunity of reading the pertinent portion of that decision beginning at 418 U.S. 705.

In United States v. Nixon, the Supreme Court was confronted with a collision between executive privilege and the constitutionally

protected rights, as set forth in the Sixth Amendment, that every defendant in a criminal trial has: the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." The Supreme Court held that a generalized claim of executive privilege could not be invoked to prevent access by the judicial branch to material necessary in a criminal trial.

Although the Supreme Court in U.S. v. Nixon was not dealing with the issue of congressional access versus executive privilege, nevertheless, the decision stands as a strong pronouncement as to the existence and extent of the doctrine. When the privilege is asserted on the basis of national security interests it may even foreclose access in criminal cases.

For those who may not have the opportunity to read the decision of the Supreme Court in United States v. Nixon, the following pertinent portions thereof will be helpful:

> " . . . The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercize 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. Certain powers and privileges flow from the nature of enumerated powers; the protection of confidentiality of Presidential communications has similar constitutional underpinnings."
>
> * * * *
>
> "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 decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping

"policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution."

* * * *

"In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." (emphasis supplied)

* * * *

" . . . Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.' It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment."

Thus, the Supreme Court has given firm foundation to the doctrine of executive privilege. Its applicability to the circumstances now before us is hardly debatable. The claim of executive privilege is based on the assertion, set forth in the communication to the Select Committee, that the documents subpoenaed "in addition to disclosing highly sensitive military and foreign affairs assessments and evaluations, disclose the consultation process involving advice and recommendations of advisers to former Presidents, made to them directly or to Committees composed of their closest aides and counselors."

The argument is made that executive privilege may not be asserted by President Ford for communications directed to former Presidents or to advisory committees of former Presidents. On this point, as far as I know, there are no specific legal precedents. However, if the rationale of United States v. Nixon is applied it becomes apparent that the doctrine must extend to communications involving former Presidents.

The doctrine of executive privilege is bottomed not on some legal technicality but on plain and simple logic: the need for confidentiality. This need can be served only if those who make recommendations to the President know that their expressions will be protected even after the President to whom those expressions were made has left office. No Secretary of State, no high government official, no aide to the President has any assurance that the man he speaks to as President today may not be gone from the scene tomorrow. How can we expect him to advise the President with that candor of which the Supreme Court speaks in U. S. v. Nixon if he knows that the very next day the protection of executive privilege may be shattered because of a change in the occupant of the Oval Office?

If the need for a confidential channel of communication exists, isn't that need just as great on the day before the Presidency changes hands in orderly fashion every four or eight years? It is just as important on the last day of a President's term as it is on the first day. But if we deny the application of executive privilege to conversations with a former President then we have to conclude that communications which are fully protected on January 19 have absolutely no protection on January 20.

Those who do not believe that the doctrine of executive privilege can be invoked by a current President as to occurrences prior to his administration contend that such a proposition would lead to the ridiculous

result that a current President might invoke executive privilege as to communications to President Washington. The answer to that is quite simple: the doctrine is applicable as far back as reasonably necessary to protect the purpose of the privilege. After the passage of time has eliminated the dangers of exposure the need for confidentiality disappears and executive privilege dissolves.

In any event, Secretary Kissinger is charged by the Select Committee with a criminal act -- violation of 2 USC 192 -- for obeying the lawful order of his superior, the President. It is unconscionable -- and indeed likely unconstitutional -- to prosecute a subordinate official for obeying the lawful direction of his superior.

I submit, therefore, that the resolution of contempt based on this subpoena should be voted down because there is no critical need for the documents sought, and because there is very substantial doubt that prosecution for contempt in this instance would be successful.

[Nov. 1975?]

DISSENTING VIEWS OF REP. ROBERT McCLORY

TO

THE COMMITTEE REPORT ACCOMPANYING THE CONTEMPT RESOLUTION AGAINST DR. KISSINGER FOR FAILURE TO PRODUCE MATERIALS UNDER THE STATE DEPARTMENT SUBPOENA.

In the final sentence of his letter to the Select Committee dated November 19, 1975, the President of the United States voiced a sentiment with which I wholeheartedly concur. The President wrote, "I believe that the national interest is best served through our cooperation and adoption of a spirit of mutual trust and respect." It is my earnest contention that in this area of complex national security issues and in an atmosphere of ongoing serious negotiations with the Executive Branch, the Committee ought to have continued to work together with the President to resolve remaining differences rather than follow the precipitate route of voting a contempt citation against the chief foreign affairs officer in this Administration at such a crucial time in world events. As the President stated, there is a legitimate national interest at stake here that ought to transcend all the recriminations, misunderstandings, and personality conflicts which have brought the Committee to this unfortunate action.

The House Select Committee on Intelligence has been given one of the most sensitive and important responsibilities which has faced the Congress since World War II. It has been no easy task to pierce the veil of secrecy which has surrounded the intelligence community's operations since our nation became the most powerful country on earth -- and it has been more difficult still to come to grips with some of the most fundamental questions at the heart of the operation of a secret intelligence function in a democratic society. If I do say so, I believe that the Select Committee, with the aid of unprecedented cooperation on the part of the Ford Administration, has been conducting a crucially important investigation in a most honest and responsible manner.

It is in this context of respect for the dedication and hard work of the Committee that I must express my regret that the majority has chosen to take the hasty and mistaken action of voting a contempt resolution against the Secretary of State. In my opinion, the Committee has made an unfortunate and serious error in citing the Secretary for contempt, and this resolution does not merit the support of the full House of Representatives.

Secretary Kissinger ought not to have been cited in contempt for refusing to surrender State Department documents for which the President of the United States has asserted a claim of executive privilege. The Committee's subpoena to the Secretary sought "all documents relating to State Department recommending covert action made to the National Security Council and the Forty Committee and its predecessor committees from January 20, 1961 to the present." After service of the subpoena, the appropriate documents were identified and referred to the White House for review. The Attorney General was asked to carefully review these documents and rendered an opinion that executive privilege could appropriately be asserted. By letter dated November 14, 1975, the Counsel to the President confirmed in writing the President's instruction to the Secretary of State to respectfully decline compliance with the subpoena on the grounds of the President's personal assertion of executive privilege. The Majority Report fails to mention the fact of this assertion of executive privilege; neither does it, in any way, challenge the validity of the assertion.

In the above-mentioned letter from the President to the Committee, the Committee received the President's personal word that

> the documents revealed to an unacceptable degree the consultation process involving advice and recommendations to Presidents Kennedy, Johnson, and Nixon, made to them directly or to committees composed of their closest aides and counselors.

The Committee has no evidence, and has, in fact, made no claim that this is not the case. In the absence of any such claim, it seems to me that the President's claim in this respect ought to be honored and respected.

The Committee's action in pressing the contempt resolution in the face of the President's assertion of executive privilege in this case creates a conflict between the House of Representatives and the President which cannot be resolved by following any definitive precedent. However, there is a clearly established manner for the House to meet a challenge which it regards as contumacious. There is no need to refer this matter to the courts. If this House had the gumption, it could utilize its own authority to order the Sergeant-at-Arms to seize the Secretary and confine him to the common jail of the District of Columbia or the Guard Room of the Capitol Police. Of course, there is no apparent intention on the part of any members of the Committee to follow this course of action. Indeed, no Congress has ever undertaken to exercise its contempt authority in this manner -- but the members ought to be aware that if the full House approves this resolution, it will set in motion a course of events which can result in an equally disastrous spectacle.

My point is that there may never be a "good" time in the course of Congressional-Executive Department relations for seeking a definitive ruling on the question of the power of a House Committee to secure documents or information where a defense of "executive privilege" is raised. While, indeed, there may never be a "good" time for pursuing

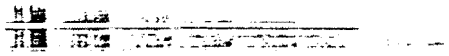
such a procedure, now would seem to be the "worst" time considering the turbulent situation in world affairs.

Several members of the Committee have questioned the President's authority to assert executive privilege on behalf of his predecessors in office. Bearing in mind that the raison d'etre of the privilege is the protection of the integrity of the consultation process between the Chief Executive and his closest advisors, it would seem obvious that the privilege runs to the Office of the Presidency rather than to the individual President himself -- and numerous precedents can be cited in support of this particular assertion. The President has not claimed a privilege which covers a period

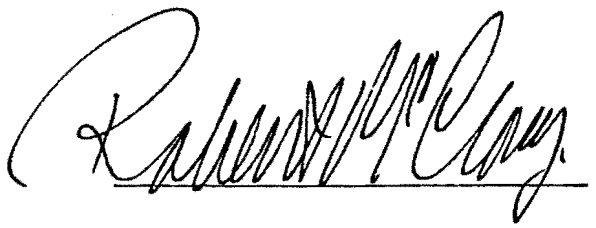
going back to the founding of the Republic -- rather he has sought to protect the consultation process in the immediate past three Administrations as it occurred over the past 15 years. Many people who served in the past three Administrations are still very much alive -- and to set a precedent in this case in which Presidents and their closest aides could fear revelation of their internal deliberations after they left the government would certainly have a chilling effect on the frank, forthright, and sometimes publicly unpopular advice which the Chief Executive has a right to expect from his advisors.

Finally, to help the members determine the validity of the assertion of executive privilege in their own minds, it may be useful to expand upon the sketchy description of the documents which is contained in the majority report. The Committee subpoenaed and the Executive has compiled a total of 19 documents prepared by the Department of State which were sent to the National Security Council and the Forty Committee in which the Department initiated a proposal for a covert action project. These documents cannot be described as a normal part of the tremendous paper flow between an Executive department and the White House. Rather, these documents contained highly sensitive information and went directly to the National Security Council, which is chaired directly by the President, or to the Forty Committee, which is chaired by the Assistant to the President for National Security Affairs -- one of the President's two closest advisors in matters of foreign affairs and national security. Furthermore, the Select Committee has received testimony from the Secretary of State that, in no instance of which he is aware, did any covert operation receive approval without the direct personal attention of the President. Clearly, these documents either went directly to the President or

were the basis for a Presidential briefing by one of his closest advisors. They are at the heart of the consultation process -- and as such, deserve protection under the doctrine of executive privilege if the doctrine is to have any vitality at all.



For the foregoing reasons it is the position of the undersigned that the resolution seeking to hold Dr. Kissinger in contempt for failure to produce materials under the State Department subpoena be rejected overwhelmingly by the Members of the House of Representatives.



[Nov. 1975?]

Concurring Views of Otis G. Pike

This Committee, since its inception, has had some difficulty penetrating veil after veil of secrecy thrown by the various intelligence agencies over the various intelligence activities of the United States government. One of the mandates of the Committee, as set forth in the resolution which created it, was to look at:

> "the nature and extent of executive branch oversight and control of United States intelligence activities"

This we have attempted to do and the results have been disturbing. In general, rather than being circumscribed by oversight and control, the CIA was acting in every activity of questionable legality and/or morality, on orders from "higher authority" --either the President himself or the National Security Council or its "40 Committee."

Those covert actions generated by the Central Intelligence Agency's professionals have tended to be that--professional. Those generated by the White House or the State Department have tended to be more questionable, yet apparently they were rarely questioned. In furtherance of our mandate, the Committee, on the motion of Mr. McClory, and by a vote of 8 ayes, 5 present, issued a subpoena asking for the production of all recommendations made by the State Department to the National Security Council for covert actions by the CIA. The National Security Council is a statutory body, created by Congress in the National Security Act of 1947. It is not simply an extension of the Presidency. If there is any legal authority for covert actions by the CIA (other than the alleged Constitutional power of the President to use covert actions by the CIA in the "conduct of foreign affaris"),

it lies in the National Security Act of 1947. It lies in that clause which authorizes "such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." This is the language on which the CIA has traditionally relied for its legal justification in conducting covert activities. It has habitually referred to its covert actions as "intelligence activities," as did the President himself in alleging that executive privilege prohibited the State Department from providing the Committee with its recommendations to the National Security Council for covert actions.

The State Department, for reasons unclear to this member, has held itself to be in a wholly different position from every other Department with which the Committee has dealt. At an earlier time, this Committee was investigating the performance of the intelligence community and the role of the CIA, if any, in the 1974 coup on Cyprus and the subsequent Turkish invasion of Cyprus. We learned that the man in charge of the Cyprus desk in the State Department had objected strongly to our actions during that period, had believed that both the coup and invasion could have been prevented, and had expressed his views in writing. The Committee sought, by subpoena, to obtain that document, and the State Department refused to provide it, raising the awful spectre of McCarthyism if Congress were able to get the recommendations of middle-level officers. In refusing to provide the recommendations of the man in charge of the Cyprus desk as to what we should have done in Cyprus, the Secretary of State, on October 14, 1975, wrote the Committee as follows:

"It is my strong belief that the Committee should look to the policy levels of the Department, and not to junior and middle-level officers, for the policy information they seek. It is my principal advisers and I who are responsible for policy, and it is we who should be held accountable before the Congress and the American people for the manner in which we exercise the authority and responsibility vested in us by the President and Congress of the United States.

"In keeping with this principle I am prepared now, as I have been from the beginning, to do the following:

. . .

"Authorize any policy level officer of the Department or the Foreign Service to testify before the Select Committee on recommendations received by him from his subordinates, but without identification of authorship, and any recommendations he forwarded to his supervisors."

Just stay away from the poor middle-level officers and we policy makers will be happy to tell you about our recommendations!

All that is at issue in this subpoena is precisely what the Secretary of State assured Congress it would get. We want the recommendations of the State Department's policy makers for covert actions.

If the recommendations of lower level officers in the State Department are to be denied to Congress on the grounds of "McCarthyism" and those of top level officers in the State Department on the grounds of "executive privilege" then the State Department has

arrogated unto itself total non-accountability for its recommendations as to operations by the CIA or the NSA or any other intelligence agency.

Oversight by Congress demands, first of all, the will and the stamina to exercise oversight. Secondly, it requires knowledge as to what actions are being undertaken. The Congress simply cannot exercise oversight if the Executive branch or any Department thereof unilaterally determines what facts Congress may have. There cannot be comity between the branches if the solemn commitments of October are broken by November.

The Secretary of State is in contempt of Congress and if Congress fails to meet its own responsibilities it will well merit that contempt.

Otis G. Pike

CONCURRING VIEWS OF RONALD V. DELLUMS

Throughout our investigations the Select Committee on Intelligence has encountered a pattern of non-cooperation from the executive branch agencies. The refusal to provide this information is yet another critical example of their unwillingness to cooperate. There is no doubt that the documents sought are essential to the Committee's inquiry.

The material requested is all of the documents relating to State Department's recommendations for covert actions to the National Security Council and the Forty Committee and the predecessor committees.

There is evidence that some covert actions were authorized and directed without 40 Committee and NSC approval, contrary to law. This specific information would be invaluable in establishing those actions forwarded for approval by the Forty Committee and in establishing ways and means of approval.

The subpoena was voted subsequent to unsuccessful staff attempts to secure the specified information.

After the subpoena was issued, no effort was made to comply with the request of the Committee. To preclude the Committee's review of this information would be contributing to a cover-up of possible wrong doing.

This committee has a finite life; its end is rapidly approaching. If we are to carry out as full an investigation as possible and still report on the date required, further negotiation and other interim steps will not be possible.

Within the framework of this investigation and as a precedent for the continuing oversight that must follow, the right of Congress and its duly appointed committees to obtain this information must be assured.

It is for these reasons and because of the unwillingness to cooperate shown by Secretary of State, Henry A. Kissinger, that I ur

the House to cite Mr. Kissinger for contempt of Congress.

Ronald V. Dellums

CONCURRING VIEWS OF JAMES P. JOHNSON

The response to the subpoena issued to Henry A. Kissinger as Secretary of State raised a fundamental issue and deserves the closest attention and scrutiny. The subpoena requested "all documents relating to State Department recommending covert action made to the National Security Council and the Forty Committee and its predecessor committees from January 20, 1961 to present."

On November 14, 1975, the Chairman received a letter read into the record by Mr. McClory as follows:

"Dear Mr. Chairman:

"The Secretary of State has been instructed by the President respectfully to decline compliance with your subpoena to the Secretary of November 6, 1975, for the reason that it would be contrary to the public interest and incompatible with the sound functioning of the Executive Branch to produce the documents requested.

"The subpoena sought 'all documents relating to State Department recommending covert action made to the National Security Council and the Forty Committee and its predecessor committees from January 20, 1961, to present.' The committee staff has made clear that this is intended to cover recommendations originating with the State Department. An examination of our records has disclosed ten such documents, dating from the period 1962 through 1972. These consist of recommendations from officials in the State Department, sometimes the Secretary of State, to the Forty Committee or its predecessor, 303 Committee, or to the President himself in connection with consideration by one of those committees.

"The documents in question, in addition to disclosing highly sensitive military and foreign affairs assessments and evaluations, disclose the consultation process involving advice and recommendations of advisers to former Presidents, made to them directly or to committees composed of their closest aides and counselors.

"Therefore, I advise you that the Secretary of State is declining to comply with such subpoena on the basis of the President's assertion of Executive privilege. Sincerely, George H. Aldrich, Acting Legal Adviser to the Department of State."

The key paragraph says, "The documents in question, in addition to disclosing highly sensitive military and foreign affairs assessments and evaluations, disclose the consultation process involving advice and recommendations of advisers to former Presidents, made to them directly or to committees composed of their closest aides and counselors." This language was nearly identically repeated in a Presidential letter to the Chairman dated November 19, 1975.

The secrecy issue raised peripherally by the letter must not be allowed to deflect attention away from the real issue. The President and the Chairman and Ranking Member previously worked out an agreement under which the committee would receive classified information. Pursuant to this agreement, no classified information received by the committee can be released without the President's prior approval. Since reaching this agreement, no information requested has been denied the committee on the grounds of its classification, and the President has not said here that the documents are denied because they are highly classified. Rather, the assertion is made that they "disclose the consultation process involving advice and recommendations of advisers to former Presidents, made to them directly or to committees composed of their closest aides and counselors."

But, the subpoena was for documents from the State Department to the National Security Council and Forty Committee and its predecessor. To allow the doctrine of Executive privilege to extend to government documents of prior Administrations where publication and classification is not an issue, is to my mind a dereliction of my duty as a Member of Congress. The claim was not made

by the Presidents involved. The documents were not removed at the expiration of the terms as being private. They are not being held in private, Presidential files. They were left as government documents in the State Department files. They are classified, but their classification is not asserted as a reason for withholding them from the committee which has access to secret documents ranging from assassination attempts to SALT compliance. They are withheld because they are allegedly "recommendations of advisers to former Presidents,made to them directly or to the committees composed of their closest aides and counselors." Thus, the claim is made, public documents become private communications which qualify for the doctrine of Executive privilege.

If the State Department documents recommending covert action, made to the National Security Council or the Forty Committee or its predecessor constitute recommendations of advisers to Presidents, then what government document doesn't become subject to similar claims of Executive privilege? The State Department is not a department of the United States Government under this assertion; rather, its employees are advisers to Presidents. State Department documents directed to another agency of government have become recommendations of advisers to Presidents, made to committees composed of their closest aides and counselors. Thus, the National Security Council, created by Congress through the Act of 1947 to be the chief advisory body to the President with respect to National Security affairs is reduced to a group of the "closest aides and counselors."

The doctrine of Executive privilege to protect the privacy of Presidentia policy making procedures is surely a sound one. But, to extend it to a prior President who did not assert it, to apply it to government documents between governmental agencies, amounts to a claim of the power of censorship that cannot be accepted, in my view.

I asked the representative of the Executive Branch who appeared before our committee, Mr. Scalia, if there was another way to get a court determination of the issue beside a contempt citation of the Secretary of State. He replied that this was not an issue for the courts. We are left with the choice of accepting this claim of Executive privilege or of citing the Secretary of State -- two distasteful alternatives.

In my opinion, the more serious consequence would result from allowing the doctrine of Executive privilege to be extended under this claim. The security classification system should not cloud the issue. The right of privacy of a sitting President is not challenged here. The right of privacy of private communication to previous Presidents is not the issue.

But, the President must not be allowed to censor material that goes from one department of government to another by hiding it from Congressional committees. The doctrine of Executive privilege must not be allowed to hide or distort the history of previous Administrations when the security classification system is not involved. The claim that government employees in the State Department or the National Security Council are advisers or aides or counselors to the President, who are part of the consultation process which qualifies for Executive privilege makes the Presidency, rather than the United States Government, the object of loyalty of those who work for the United States. This claim, if allowed to stand unchallenged, can be extended ad infinitum to nearly all important government documents or officials which would result in a complete destruction of the system of Congressional oversight. This claim, unchecked, makes the office of the President into a monarchy.

The same assertion can be made (though it hasn't been) for CIA documents to the National Security Council, going back to the inception of the agency. The same claim applies to Defense Department recommendations; to Transportation Department recommendations to the Federal Energy Administration; or Commerce Department recommendations to the Council of Economic Advisers in prior Administrations, etc., etc. Perhaps more illustrative of the serious potential consequences of this claim of Executive privilege is to try to differentiate between the present claim and the testimony of an official of a previous Administration before a Congressional committee. Could President Ford prevent former Secretaries Rogers or Rusk from testifying as to State Department recommendations during their tenure in office on the grounds of Executive privilege? If he can prevent the documents from being delivered, can't he stop testimony? It would seem so.

Most importantly, if this claim is allowed to stand, how is a Congressional committee to have oversight of the intelligence community? Recommendations from the CIA, the DIA, and the State Department with respect to covert action programs and other intelligence matters go through the Forty Committee and the National Security Council. If this material is subject to the claim of Executive privilege, then Congress can be effectively by-passed in the future, as it has been in the past in this critical area. The right of Congress to participate in decisions of utmost urgency would once again be emasculated. Obviously, the Legislative Branch cannot allow this claim to go unchallenged.

Hopefully, a solution will be forthcoming, short of pursuing this citation, but it must not be by Congressional acquiescence in this claim of Executive privilege.

James P. Johnson

DISSENTING VIEWS OF THE HONORABLE DALE MILFORD

The contempt of Congress citation against Secretary of State Henry Kissinger should be opposed by members of Congress for three very important reasons.

First, this unprecedented contempt action will force this nation into a full-fledged Constitutional confrontation between the Administrative and Legislative branches of this government, which could result in a disastrous loss of public confidence in both branches of government.

Second, while both the Administrative and Legislative branches can argue fine points of law that would tend to justify their positions in this dispute, both also have "dirty hands" and both have failed to make in-house corrections that would prevent a confrontation.

Third, Congress is not prepared to protect the extremely sensitive documents that it is seeking from the Administration, and its failure to protect these documents could bring irreparable harm to this nation's foreign relations and national defense efforts.

A Constitutional confrontation between branches of this nation is a very serious matter. As in any battle, there will be a loser. In this instance, both sides could very possibly lose.

Public confidence, in a government's structure and its system is an absolute necessity for the survival of a democratic regime. A Constitutional confrontation, brought about by a serious national need or as a result of well-defined issues, can maintain or even build public confidence. On the other hand, such a confrontation that is politically motivated or that is based on nebulous and abstract points of law can quickly destroy public confidence in both sides of the controversy. The latter is particularly the case when the people know or suspect wrong-doing or incompetence on the part of either competing branch.

During recent months, the media has literally saturated the American people with accounts of improper past activities conducted by Administrative agencies. Parenthetically, (although with less press coverage) the Congress has also been negligent by failing to maintain proper oversight responbilities. The sins must be equally shared.

The gist of the arguments involved in the resolution to cite Secretary Kissinger for contempt concerns the right of a Congressional committee to obtain extremely sensitive documents that are in the possession of the Administration. On the surface, this would appear to be a substantive issue and one of considerable importance.

Few, if any, members of Congress would disagree with the committee's position that Congress does indeed have a right to full knowledge of all activities that are carried out by our intelligence agencies. All responsible members of this body will also agree that the unauthorized release of extremely sensitive intelligence information can be very detrimental to this country's welfare.

Therefore, prior to demanding possession of extremely sensitive documents, the Congress must have a mechanism and an internal system that will provide safeguards for the protection of these vital national secrets. No such safeguards presently exist. Current House rules, committee structures diversified intelligence jurisdiction, and House customs must be altered before closely held secrets can be properly protected.

In past Congresses, highly classified matters and extremely sensitive situations have been handled by a few key members of Congress on behalf of the entire body. Exposure of these vital national secrets was very limited.

Beginning with the 93rd Congress, and accelerating rapidly in the 94th Congress, numerous "reforms" have drastically altered past practices. While the new reforms have greatly increased individual member participation in the legislative processes, these same reforms have proportionately placed the nation in jeopardy concerning official secrets.

As an example, present rules in the House of Representatives allow any member to have full and unlimited access to all committee files and to any document within those files. There is no practical way to keep any member from "leaking" any information to the press, regardless of the security classification. There is no legal way to prevent an individual member from unilaterally releasing all or any part of an official secret by simply going to the floor and making it public in a floor speech. The wide diversity of opinions between individual Congressmen makes this procedure dangerous to national security and foreign relations.

In summary, the Select Committee on Intelligence has presented a good "technical argument" but has failed to show significant cause for bringing contempt action against Secretary of State Henry Kissinger. The Congress, in citing Secretary Kissinger, would leave itself open for serious public criticism for failing to establish mechanisms to responsibly handle the classified and sensitive matters that it seeks in the subpoenas.

While the committee's contention that "Congress has a right to the material summoned in the subpoenas" has merit, there is no real pressing need for these documents, at this time. They can be subpoened at a later date, after the House has established firm rules and procedures that will properly protect the extremely sensitive and highly

classified national secrets that are involved.

By putting its own house in order before pressing this issue, Congress would then be able to rightfully and responsibly press ahead with proper oversight functions. If a Constitutional confrontation should then be necessary; the issue would be clear to the public, the Congress would not be subject to criticism, and national security would not be endangered.

Any possible benefits at this time, in citing Secretary Kissinger for contempt of Congress, are far outweighed by the grave dangers of undermining public confidence in both Congress and the Administration. Neither branch would win, and the nation would lose.

Members are strongly urged to oppose the resolution to cite the Secretary of State for contempt of Congress.

Dale Milford