The original documents are located in Box 14, folder "Intelligence - House Select Committee: Subpoenas - Kissinger (2)" of the Loen and Leppert Files at the Gerald R. Ford Presidential Library.

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Complete ~~except for~~ [Nov. 1975?]
~~Mr. Tarr's Views~~

DRAFT REPORT

Citing

Henry A. Kissinger

(State)

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INTRODUCTION

On November 6, 1975, the Select Committee on Intelligence of the House of Representatives, established by House Resolution 591, 94th Congress, First Session, caused to be issued a subpena to Henry A. Kissinger, Secretary of State. (See Appendix A.) The subpena demanded that the Secretary of State, or any subordinate officer, official or employee with custody or control deliver to the Select Committee, of which the Honorable Otis G. Pike is Chairman, on November 11, 1975, at 10:00 a.m. in Room B-316 Rayburn House Office Building, Washington, D. C., certain materials set forth and described in the said subpena.(1) This subpena was duly served on November 7, 1975.

The said subpena was not complied with on the return date thereof nor any subsequent date thereafter.

On November 14, 1975, the Select Committee met in open session at 10:00 a.m. in Room 2118 Rayburn House Office Building for the purpose of determining what action should be taken in view of the failure of Secretary of State, Henry A. Kissinger, to comply with said subpena. The Select Committee, a quorum being present, on a record vote of 10-2, recommended the adoption of a resolution as follows:

> Resolved, That the Speaker of the House of Representatives certify the report of the Select Committee on

(1) "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".

SCHEDULE OF ITEMS REQUIRED TO BE PRODUCED
By Henry A. Kissinger, Secretary of State,
PURSUANT TO SUBPOENA OF THE
HOUSE SELECT COMMITTEE ON INTELLIGENCE,
Dated November 6, 1975

1. 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.

ORIGINAL

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To A. Searle Field, Staff Director, or his duly authorized representative.

You are hereby commanded to summon Henry A. Kissinger, Secretary of State, or any subordinate officer, official or employee with custody or control of the items described in the attached schedule and by service of a copy hereof the said Henry A. Kissinger, Secretary of State, or any subordinate officer, official or employee is hereby commanded to be and appear before the Select Committee on Intelligence

~~Committee~~ of the House of Representatives of the United States, of which the Hon. Otis G. Pike is chairman, and to bring with him the items described inthe schedule annexed hereto and made a part hereof in the office of the Select Committee on Intelligence, Room B-316 Rayburn House Office Building,

~~in their chamber~~ in the city of Washington, on November 11, 1975

, at the hour of 10:00 a.m.

then and there to produce and deliver said items to said Committee or ~~testify touching matters of inquiry committed to said Committee, and he is not to depart without leave of said Committee.~~ their duly authorized representative in connection with the Committee's investigation authorized and detailed by H. Res. 591, a copy of which is annexed.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 6th day of November, 19 75

Otis G. Pike

Otis G. Pike, *Chairman.*

Attest:

Clerk.

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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 connection 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.

CHRONOLOGY OF EVENTS

On November 6, 1975, the Select Committee on Intelligence met, after due notice, to consider the question of the issuance of subpenas to obtain materials pertinent to the investigative responsibility of the Committee, as well as the Congress as a whole, and necessary to the discharge of its mandate. Seven subpenas were authorized, each by a record vote of a majority of the members of the Committee. The subpena which is the subject of this resolution was approved by a vote of 8 ayes with five members voting present. The subpena is directed to the production of classified materials as to which there could be no public disclosure by the Committee without compliance with the release procedures previously agreed to.

No materials were furnished to the Committee on the return date of November 11, 1975, or until the time of the vote on the accompanying resolution. The materials which were the subject of the subpena are necessary to the Committee's ongoing investigation. The failure of the Secretary of State to comply obstructs that investigation, and the work of this Committee.

On November 13, 1975, at 9:00 a.m., two days after the return date of the subpena, the Select Committee met in open session in Room 2118 Rayburn House Office Building for the purpose of being advised by staff as to the status of compliance with said subpena. Staff reported that none of the subpenaed materials had been provided.

AUTHORITY

The Select Committee on Intelligence is a duly established Committee of the House of Representatives, pursuant to House Resolution 591, 94th Congress, First Session. H. Res. 591 was reported out of the Committee on Rules on July 11, 1975, and adopted by the House on a voice vote on July 17, 1975.

Section 2 of H. Res. 591 authorizes and directs the Select Committee to conduct an inquiry, inter alia, into:

> "(1) the collection, analysis, use, and cost of intelligence information and allegations of illegal or improper activities of intelligence agencies in the United States and abroad;
>
> (2) the procedures and effectiveness of coordination among and between the various intelligence components of the United States Government;
>
> (3) the nature and extent of executive branch oversight and control of United States intelligence activities;
>
> (4) the need for improved or reorganized oversight by the Congress of United States intelligence activities;
>
> (5) the necessity, nature, and extent of overt and covert intelligence activities by United States intelligence instrumentalities in the United States and abroad;
>
> .....
>
> (8) such other related matters as the select committee shall deem necessary to carry out the purposes of this resolution."

Section 3 of H. Res. 591 authorizes the Select Committee to inquire into the activities of several enumerated components of the intelligence community, including the National Security Council and the Central Intelligence Agency.

Further, Section 4 of H. Res. 591 authorizes the Select Committee to "require, by subpena or otherwise,...the production

of such books, records, correspondence, memorandums, papers, and documents as it deems necessary."

Pursuant, therefore, to its responsibilities and authority as mandated by the House of Representatives, the Select Committee has issued subpenas for documents and information which, by the vote of the Committee, were deemed essential to its inquiry. The subpena which forms the basis of the recommended resolution was issued in full conformance with this authority.

As indicated above, Secretary of State, Henry A. Kissinger, was summoned to furnish materials in his custody and control pursuant to a valid, duly executed subpena of the Select Committee, but he deliberately failed to comply with the terms of said subpena.

CONCLUSION

All substantive and procedural legal prerequisites have been complied with and the House of Representatives should adopt the accompanying resolution to refer the matter to the United States Attorney for the District of Columbia. Title 2, United States Code, Sections 192 and 194 states the necessary procedures for taking this action. (See Appendix B.)

It is the position of the Select Committee that the proceedings to date are in compliance with its mandate, its rules and the Rules of the House of Representatives and we recommend that the House adopt the resolution to report the fact of the refusal of Henry A. Kissinger, Secretary of State, to produce pertinent materials pursuant to a subpena duces tecum of the Select Committee together with all the facts in connection therewith to the end that he may be proceeded against as provided by law.

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APPENDIX B

Title 2, United States Code Sections 192 and 194 as follows:

Sec. 192. Refusal of witness to testify or produce papers

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. As amended June 22, 1938, c. 594, 52 Stat. 942.

Sec. 194. Certification of failure to testify; grand jury action failing to testify or produce records

Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate, or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action. As amended July 13, 1936, c. 884, 49 Stat. 2041; June 22, 1938, c. 594, 52 Stat. 942.

[Nov. 1975?]
File
Intelligence
File

Committee on International Relations

STAFF MEMORANDUM TO: The Honorable Thomas E. Morgan, Chairman

SUBJECT: Contempt Citation on Secretary Kissinger

1. Based upon (a) the facts that can be gleaned about the case without being privy to all of the classified material in the possession of the Select Committee on Intelligence;

(b) the law and existing precedent concerning Congressional subpoena power and Executive privilege and estimates of the possible attitude of the Supreme Court Justices toward a court test, and

(c) the experience of the Committee on International Relations in this area.

it appears that the Congress would be wise to avoid passage of the Resolution holding the Secretary of State in contempt of Congress.

2. If the Executive branch is to be truly accountable to the Congress in the area of foreign policy, then the ability of the Congress to obtain adequate information from the Executive must be carefully guarded and nurtured. Before theCongress should risk its Subpoena Power in a court test against Executive privilege, it should make certain that it has a strong and compelling case. Otherwise the courts decision may serve to weaken Congressional access to information from the Executive Branch. There are several alternative courses of action which should be investigated. Chief among them are:

(a). An amended resolution in the House extending the life of the Select Committee and directing it to study and explore further the impasse with the Secretary of State for a possible satisfactory compromise.

(b) A resolution of censure on the Secretary of State or the President for the refusal to comply with the subpoena.

(c) An amended resolution requiring the Secretary of State to show cause to the House, why he should not be cited for contempt.

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3. The Select Committee claims that it needs the following subpoened material:

> All documents relating to State Department recommending (sic) covert action made to the NSC and the Forty Committee and its predecessor Committee from January 20, 1961 to the present.

This material is needed to determine whether some covert activities may have been authorized by someone outside the established channel, i.e., the Forty Committee. The Select Committee claims that all other relevant Government Agencies such as CIA, DIA, NSA and DOD provided this requested material. Only the Department of State has not complied.

4. The Department of State, thus far has not presented a strong and compelling case for its refusal to submit the material. It's defense is mainly the invoking of Executive Privilege for broad national security interest reasons. There is also a suggestion simply that the Pike Committee is "out to get Kissinger". Perhaps the Department can present a better case. In any event the burden is on the Congress as the courts have held that there is a presumption in favor of Executive Privilege when it is invoked.

5. There is a growing realization that Congressional oversight of Executive Branch activities abroad should be tightened. While the Congress therefore should move to assure greater accountability by the Executive in this area, it should move slowly and surely as our sensitive and vital national security interests are heavily involved here.

6. The experience of the Committee on International Relations testifies to the fact that it is much more difficult for the Congress to obtain information independently of the Executive Branch concerning its activities in the area of foreign affairs than in domestic matters. The Executive Branch enjoys the practical advantage of a near monopoly on information and access to the foreign sources of information.

There is also the often justifiable secrecy which must shield these activities, which tends to create a presumption of this privilige of secrecy. However, this privilege can be abused by the Executive to the detriment of the national interest and it is up to the Congress to carefully see to it that this doesn't happen.

7. The law and legal precedent in this matter is sparse and as follows. Two recent cases resulted from the last notable exercise of subpoena

powers against Executive Privilege. One case involved Congressional Subpoena Power. This was the case of The Senate Select Committee vs Nixon, U.S. Ct of App. D.C. 498 Fed. 2d, 725 of May 23, 1974. This involved the Ervin Committee subpoena for the Nixon tapes. The court did not uphold the exercise of Congressional Subpoena Power in this instance. The precedent set by this case and the language of the court can be used by the Executive against any attempt by the Congress to exercise its subpoena power. The damaging dictum is as follows:

a. The court held that there was a presumption of Constitutionality to the exercise of Executive Privilege. Only if it could be shown that there was a greater need for the material for a valid legislative purpose of the Committee, than in the maintenance of confidentiality among the President and his aides, could the court order the material to be turned over to the Committee.

b. Further, the court stated that the need to legislate did not require the exact detail in terms of fact that a prosecution involved, since the act of legislating involves more general principles and policies.

8. The other recent and more famous case involved the exercise of the Subpoena Power by the Watergate Special Prosecutor against the President, United States vs Nixon, 418 US 683. There the Supreme Court held that it is the body to make decisions involving a conflict between the branches and that the claim of Executive Privilege can be rebutted. In this case, the Supreme Court ruled against the exercise of Executive Privilege in regard to confidential advice-giving at the highest level but divorced this ruling to some extent from Executive Privilege invoked to protect military, diplomatic or sensitive national security secrets. The court said:

> 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 materials for in-camera inspection with all the protection that a District Court would be obliged to provide.

9. In addition to the main alternative courses of action given in paragraph two, there are also the following additional possibilities:

a. The resolution could be referred to the Committee on the Judiciary for hearings and further consideration of the legal ramifications coming out of the constitutional conflict of Congressional Subpoena Power and Executive Privilege.

b. The House could adopt a strong statement of support for the Committee's right to the material.

c. The House could apply indirect pressure on the Executive Branch to supply the information by resorting to legislative sanctions readily available to it; i.e., withhold appropriations or pass restrictive legislation.

[Nov. 1975]

Committee on International Relations

STAFF MEMORANDUM TO: The Honorable Thomas E. Morgan, Chairman

SUBJECT: Contempt Citation on Secretary Kissinger

1. Based upon

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4. The Department of State, thus far has not presented a strong and compelling case for its refusal to submit the material. It's defense is mainly the invoking of Executive Privilege for broad national security interest reasons. There is also a suggestion simply that the Pike Committee is "out to get Kissinger". Perhaps the Department can present a better case. In any event the burden is on the Congress as the courts have held that there is a presumption in favor of Executive Privilege when it is invoked.

5. There is a growing realization that Congressional oversight of Executive Branch activities abroad should be tightened. While the Congress therefore should move to assure greater accountability by the Executive in this area, it should move slowly and surely as our sensitive and vital national security interests are heavily involved here.

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[Nov. 1975?]

Mr. Chairman and Members of the Committee,

I appreciate your permitting me to appear, at the President's request, to urge your reconsideration of the contempt resolutions voted by this Committee on November 14. We believe reconsideration is warranted because that action was based upon several misunderstandings which should not form the basis of action as serious as this. Although I intend to make the only formal presentation, I have with me several representatives of the various agencies involved in this matter who may assist in responding to your questions. They include Mr. Monroe Leigh, Legal Advisor of the Department of State; Lt. Colonel Robert C. McFarlane, Military Assistant to the Assistant to the President for National Security Affairs; Mrs. Jeanne W. Davis, Staff Secretary, National Security Council; and Mr. Daniel Christman, National Security Council Staff Member.

I would like to begin, Mr. Chairman, by placing this matter in its context. The subpoenas which are the subject of the Committee's present action were part of a long process of information gathering which the Committee has been engaged for the past _____ months. As you know, in the vast majority of situations, the information has been obtained informally, by Committee staff, without even the necessity of formal demand by a Committee member, much less a formal subpoena. In the course of that process there has developed a

constant day-to-day working relationship between your staff and those personnel in the various intelligence agencies who have responsibility for documents requested. There have also developed certain agreed upon practices as to the manner in which requests are interpreted and complied with -- a matter which I will come back to later on. I think you will agree that during these past _____ months, this Committee has received more information of a highly sensitive nature, involving the most confidential matters of military and foreign affairs, than has ever before been disclosed to any Congressional Committee, with the possible exception of the similar committee now functioning in the Senate.

On Friday morning, November 7, seven subpoenas issued by the Committee were served upon Executive Branch personnel. One was addressed to the Central Intelligence Agency; that is not at issue here. A second, which is at issue, was addressed to the Secretary of State. The remaining five were addressed to "the Assistant to the President for National Security Affairs or any subordinate officer, official or employee with custody or control of the items described in the attached schedule"; only two of those are at issue here. All seven subpoenas, served at approximately 10 o'clock on Friday, November 7, were returnable at 10 o'clock, Tuesday, November 11 -- approximately four days (and only two normal working days) after service. The subpoenas as a whole,

and particularly the five directed to the single agency, the National Security Council, which has a relatively small staff required an enormous amount of searching for the relevant documents or portions of documents; and in addition a large amount of examination of what had been discovered in order to determine whether there might be any proper basis for declining release. No complaint has been made as to the adequacy of compliance with four of these seven subpoenas. As to the remaining three, the Committee's action on November 14 asserts a willful and contumacious refusal to comply. It is that decision we urge you to reconsider.

Let me address first the two subpoenas directed to the National Security Council. One sought "all 40 Committee and predecessor committee records of decisions taken since January 20, 1965 reflecting approvals of covert action projects." (I will hereafter refer to this as the "40 Committee" subpoena.) The second sought "All documents furnished by the Arms Control and Disarmament Agency's Standing Consultative Commission, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, the Department of Defense, and the Intelligence Community Staff since May, 1972 relating to adherence to the provisions of the Strategic Arms Limitation Treaty of 1972 and the Vladivostok agreement of 1974." (I shall hereafter refer to this as the "SALT" subpoena.) I believe, Mr. Chairman and Members of the Committee, that those responsible for assembling and producing the requested documents

were -- with one notable exception -- in good faith compliance with the subpoenas; and even as to that exception did not mean to be contumacious or to violate the law. That is the principal point which I wish to urge upon you. Initially, however, I would like to discuss some technical matters which do not go to good faith compliance but rather to the propriety of the action you have taken in order to punish what you regard as the lack of compliance.

Specifically, there are several reasons why, as a matter of law, it is not in my view possible to charge Secretary Kissinger with responsibility for compliance with these subpoenas. As I indicated above, neither subpoena was directed to Mr. Kissinger by name. Both were addressed, initially, to "the Assistant to the President for National Security Affairs." In point of fact, this was not merely a technical distinction. The transcript of the Committee hearing on the day it issued the subpoenas indicates that the Committee did not know or care whether the subpoena was addressed to Mr. Kissinger or to someone else occupying the office. That transcript shows the following exchange:

"Chairman Pike: Who at the present time is the Assistant to the President?

"Mr. Field: I believe the subpoena would still be directed to Dr. Kissinger because General Scowcroft has not been sworn in yet. It will be directed to the office so it really makes no difference in terms of who is occupying the office."

As the President's letter to you of yesterday indicates, "After November 3 [Mr. Kissinger] was no longer my Assistant for National Security Affairs."

Even, therefore, if the subpoenas were addressed only to the Assistant to the President for National Security Affairs, on November 7 that designation did not describe Mr. Kissinger. But in fact the subpoenas were not addressed only to the Assistant to the President for National Security Affairs, they were addressed to him or "any subordinate officer, official or employee with custody or control of the items described...." And the return of the subpoena shows that it was in fact such an alternate individual that the process server sought to reach. That return is signed quite clearly "Barry Roth for Jeanne W. Davis." It is inconceivable that any receipt of this sort could support a contempt action against Mr. Kissinger. I may add that receipt on behalf of Mrs. Davis was not Mr. Roth's own suggestion; the process server specifically requested receipt in that fashion. (I have an affidavit of Mr. Roth to that effect, which I will be happy to present to the Committee.) For both of these grounds, therefore, -- both because he was not the Assistant to the President for National Security Affairs and because the subpoenas were not served upon or even sought to be served upon the Assistant to the President for National Security Affairs -- Mr. Kissinger cannot be held accountable for any deficiencies which the Committee believes to exist in compliance with these subpoenas.

But that would still leave us with the conclusion, Mr. Chairman, that the Executive Branch -- whether or not it was Mr. Kissinger or any other particular individual who could properly be held accountable on the basis of these particular subpoenas -- deliberately and willfully set out to disobey the law. Although I had no part in the compliance process myself, I have interviewed in some depth the individuals who had and on the basis of that inquiry I am convinced, first, that there was technical noncompliance, and indeed substantial noncompliance in the case of one subpoena; and second, that given the circumstances and the motivation you should not deem that noncompliance to constitute contumacy.

Let me address, first of all, the SALT subpoena -- and let me clear away some of the underbrush by discussing some elements which I believe the Committee regards as noncompliance but which in fact do not constitute that. There was discussion, in a staff interview on the day the contempt resolutions were voted, of a foot-high stack of documents which should have been supplied in addition to the half-inch that was supplied. Those documents have since been provided; they actually measure somewhat under one foot, I believe. The vast majority of them, however, were thought -- and I believe reasonably thought -- not to be required by the subpoena. The confusion stemmed from the fact that the subpoena requested, in part, "all documents furnished by the Arms Control and Disarmament Agency's Standing Consultative Commission."

In fact, the Arms Control and Disarmament Agency (ACDA) has no Standing Consultative Commission. The Standing Consultative Commission is not an agency of the United States but a joint US-USSR Commission established for purposes of working out SALT negotiations. There is, of course, a United States component of the Commission, but virtually none of the material which that component would furnish to NSC would relate to the details of SALT compliance, which were understood to be the main object of the inquiry. Thus, those responsible for assembling documents to comply with the subpoena interpreted the phrase, "Arms Control and Disarmament Agency's Standing Consultative Commission" to refer to ACDA documents bearing upon the work of the Commission. This interpretation is rendered all the more plausible an explanation of the erroneous language of the subpoena by virtue of the fact that the Chairman of the U.S. component of the Commission was Deputy Director of ACDA, and it was thus thought that the Commission staff had in mind documents of the sort which appear over his signature but on ACDA stationery. Thus, the failure to provide documents furnished by the Standing Consultative Commission does not, in my view, constitute any noncompliance, much less willful noncompliance, with this subpoena.

Another portion of the foot-high stack is explained by yet another ambiguity in the request. The subpoena seeks "all documents furnished" by a number of agencies -- but does not state furnished <u>to whom.</u>

Both because of our understanding from the Committee staff that NSC files were the object of the subpoena, and because of the fact that the service was explicitly made upon the Staff Secretary of the NSC, our personnel assumed -- and again, I think quite reasonably -- that the scope of the subpoena was limited to the NSC. There are many documents which come to the Assistant to the President for National Security Affairs (who by title is not, by the way, either the head of or a member of the NSC) which are not transmitted to the National Security Council, but are instead forwarded to an entirely separate system of files, outside the jurisdiction of the NSC, known as the "Presidential files." Some documents relevant to SALT compliance took this route, and hence were not found in the NSC files. I acknowledge, Mr. Chairman, that the decision not to examine the Presidential files for such information, though technically in compliance with the subpoena, was erroneous; it did not display that degree of cooperativeness in providing the substance of what the Committee desired which has been our objective. And when the decision to omit Presidential files came to the attention of those having supervisory authority over the project, that decision was reversed and a supplemental search of the Presidential files was ordered which resulted in a supplementary production of documents to the Committee on November 13, two days after the original return date. We wish these documents had been provided in the original submission. But they were not strictly

required, and in view of the extreme time limitations under which those charged with the search were operating, I hope you will find the initial decision to omit the Presidential files understandable.

Finally, there were omitted from the serach and from the production, internal documents and memoranda of the NSC itself. These are not called for by the subpoena unless one interprets the language "the Intelligence Community Staff" to refer to the NSC staff -- which is simply not a reasonable interpretation. Those responsible for the search interpreted that phrase to refer to the United States Intelligence Board, which is composed of staff representatives of the entire intelligence community. I believe that interpretation is correct.

Let me come now to those documents, very few in number -- about 25, I believe -- which were in my opinion withheld contrary to the technical requirements of the SALT subpoena. These consist of documents which were treated as immune from disclosure because they dealt with recommendations and advice giving to the NSC or to close Presidential advisors. I would like to say that these documents were merely temporarily withheld, in order to enable advice from the Justice Department and determination by the President with respect to the assertion of Executive privilege. Given the time frame within which production had to be completed (four days, only two of which were

normal working days) this course of action would not have been unreasonable. In fact, however, I can find no evidence of such clarity of intent. Though these documents were ultimately submitted to the Justice Department for its judgment as to assertion of Executive privilege, I have no reason to believe that was the clear original intent. Rather, I believe what occurred was merely the carrying over into this area subpoenaed documents the procedures which these personnel -- none of whom are lawyers -- had constantly been employing with respect to the numerous non-subpoena requests of the Committee. As you know, the procedure has been to permit withholding or deletion of information highly sensitive or inappropriate for production, with the understanding that the Committee staff will seek further disclosure if it has serious need for the information withheld. When dealing with a formal subpoena, I acknowledge that it is incorrect to proceed in this fashion. On the other hand, the error is understandable. It is difficult to change the rules in the middle of the game -- and indeed, this Committee and its staff have been tolerant of this practice with respect to other subpoenas, in determining that the withholding of a relatively small amount of information will not destroy substantial compliance. I believe that same situation exists with respect to this SALT subpoena, once the Committee realizes that the vast bulk of documents which it erroneously believes were withheld were not covered.

There remains the question what is to be done with respect to the information which, as I have described above, was wrongfully withheld. That is no longer a problem. All of the documents which I discussed -- not only the relatively few which were erroneously withheld, but even the much greater number that were withheld because not called for by the subpoena -- have either been provided to the Committee or made available for inspection by the Committee or its staff. Whatever the confused situation might have been on the return date for the subpoena (and I believe it constituted substantial compliance) we are now in full compliance, and indeed over-compliance.

Let me turn now to substance of compliance of the 40 Committee subpoena, which sought "all 40 Committee and predecessor committee records of decisions taken since January 20, 1965 reflecting approvals of covert action projects." Here it cannot be reasonably asserted that there has been substantial compliance. I was frankly appalled, as I expect you were, upon realizing the utterly uninformative nature of much of the material provided in response to the subpoena. There are really two deficiencies here, which must be explained separately.

First, there is the deletion of names of individuals and countries from all of the submissions. These are the only deletions made with respect to covert action approvals in those documents entitled "40 Committee decisions" or "40 Committee approvals." My investigation satisfies me

that the personnel responsible for this submission knew not only that the subpoena by its terms did not permit such deletions, but also that the Committee staff did not approve them. The reason for the deletions -- a position which I believe was well-known by the Committee staff -- was that to provide such information, identified by country and names of individuals, regarding all covert actions over a ten-year period, to be held in one place and to be distributed freely within and among the Committee and staff, would provide a security threat of unacceptable dimensions. This problem had been raised with the Committee staff before the subpoena was issued; and while an accommodation of interests had not been worked out, it was believed that the Committee understood and respected our difficulty, and that an arrangement satisfactory to both sides could be devised. I think these deletions were improper, but from my discussions with the individuals involved, I believe that they acted not in a spirit of contumacy but rather in conformance with what they regarded as a continuing process of reaching accommodation of very difficult problems with the Committee. Their action must be seen in light of the fact that Executive Branch intelligence personnel and the Committee staff had been regularly operating, before the subpoenas, on a day-to-day basis, under a system which would permit such deletions in making response to voluntary requests, with the expectation that the Committee staff, when the deletions were too disruptive to the purpose of the request, would seek further information. Indeed, shortly after these documents were delivered, our personnel proposed alternative methods to your Committee

staff which might accommodate their needs in some other fashion. Again, I do not dispute that this kind of haggling in response to a categorical subpoena is not proper. But in view of the extreme sensitivity of these materials; in recognition of the continuing process of which these subpoenas were only a part; and in acknowledgment of the fact that accommodations had in fact been accepted with respect to other subpoenas; I think you should not regard this action as motivated by a contumacious spirit.

The second totally separate problem with the 40 Committee production involves not specific deletions, but rather virtually incomprehensible summarization of 40 Committee approvals for meetings in which there was no separate "Decision" or "Approval" document. In these instances, the "records of decisions taken . . . reflecting approvals" (the language of the subpoena) had to be excerpted from minutes which did not lend themselves to the effort. The Committee staff had indicated that the totality of the minutes did not have to be provided, but it is clear that the excerpting here effected was beyond their expectation and, I think, beyond reason. Adding to the difficulty of the excerpting was the fact that the personnel working on this project misinterpreted the initial subpoena requests, so that it was only discovered on the day before the return date that nine additional years had to be covered. The attempt to make an intelligible excerpting of so many minutes in a single day was unsuccessful

in the highest degree. Here again, I urge you to consider that the unfortunate product was not the result of contumacy but of human error and poor judgment in an operation which had to be doncuted under unreasonable time constraints. On this last point, I might note that no careful lawyer would permit his client to make a production of subpoenaed documents without undergoing, at the last stage, a lawyer's review of the general adequacy of the production. That did not occur in the present case, simply because there was no time.

The excerpted and the edited documents which are the subject of the foregoing discussion are now in the process of being considered for possible assertion of Executive privilege. I hope, however, that such an assertion will not have to be made. In an attempt to provide a prompt resolution of this issue -- and, frankly, with some acknowledgment that our past action on this point, though well-intentioned, was not correct -- I am authorized to advise the Committee that we will be willing to provide access to all of this material at the Committee's request, though we retain our objections to providing a complete set of such sensitive material covering such a long period for use by the Committee.

Let me turn now to the third subpoena -- that addressed to "Henry A. Kissinger, Secretary of State" and accepted on his behalf. If one were to attempt a description of documents which would have the

highest possible claim to an assertion of Executive privilege, one could only with difficulty surpass the description contained in this subpoena. It asks for recommendations made to one of the closest circles of Presidential advisers (namely, NSC, the 40 Committee and its predecessors) on matters of the most sensitive nature relating to foreign and military affairs (namely, covert actions). Not surprisingly, all of the documents originally identified as responsive to this subpoena were found by the State Department to warrant consideration for the assertion of Executive privilege. On November 10, the day before the return date, the Department informed your Staff Director by telephone, and later the same day by letter, that as they were being identified these materials were being brought to the attention of the appropriate office in the White House and that "the final decision on their release to the Committee will have to be taken in the White House." On November 13, the day before your Committee took its action on this resolution, Mr. Buchen, Counsel to the President , wrote Chairman Pike advising him that the documents were being reviewed "prior to a decision by the President, concerning whether or not they should be made available to the Committee," and respectfully requesting, "in view of the very short time we have had to undertake this review," additional time to respond to your subpoena. This request was denied. On November 14, during the meeting at which the Committee voted on the contempt resolution relating to this subpoena (it appears from the transcript after the vote was taken, though I cannot be sure of that),

Chairman Pike was presented with a letter from the Acting Legal Adviser of the Department of State informing him that the President had instructed Secretary Kissinger respectfully to decline compliance to the subpoena "on the basis of the President's assertion of Executive privilege." I must add one further element to this chronology. Since November 14, by making use of files other than those of the State Department itself (an extension not strictly required by the subpoena) the Department has been able to identify seven additional documents which would be responsive to this subpoena. They are of generally the same character as the documents described in the Acting Legal Adviser's letter, and the President has instructed Secretary Kissinger respectfully to decline their production for the reasons there expressed.

I wish to discuss first, Mr. Chairman, the propriety of asserting Executive privilege with respect to these documents. In what has already been an overlong presentation, I do not mean to enter into a full-blown discussion of the doctrine of Executive privilege. As you know, the right to withhold certain documents from Congressional inquiry has been asserted by Presidents since George Washington and has been described by the Supreme Court in a recent decision as being constitutionally based [United States v. Nixon, _____ U.S. _____, _____ (1974)]. It has most frequently been exercised with respect to military or foreign affairs secrets, and with respect to confidential advice to the President or his closest advisers. Obviously, all of these elements are combined in the present case. In my view there is no question that the subject matter is appropriate for an assertion of Executive privilege; and this was the advice given to the

President by the Attorney General.

I understand that some Members of the Committee entertain doubts concerning the availability of a claim of Executive privilege in the present case because the documents in question were not addressed to the present President or his advisers, but rather to the Presidents and advisers of earlier administrations. I confess that this is an entirely new asserted limitation upon the doctrine which I have never heard before, although I have done some considerable study in this field. On its face, of course, it would not make much sense. Why does a fact which is a sensitive military or foreign affairs secret on January 20 suddenly become unsecret on January 21, when a new President is sworn in? It makes no sense whatever to say that his predecessor could protect it from Congressional inquiry but he can not. Similarly, with that aspect of Executive privilege which protects confidential advice-giving: The purpose of this protection is to enable advice-giving to be frank and forthright. It is hardly conducive to these values to maintain that advice can be protected only up to the date when a particul r President leaves office; and that once he is gone the most unguarded statements of his advisers cannot be protected.

A look at the historic record discloses what one would expect, that no such limitation upon the privilege has been observed. The following instances should suffice: In 1846 President Polk refused a request of the House of Representatives to furnish it "an account of all

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payments made on President's certificates . . . from the 4th day of March 1841 until the retirement of Daniel Webster from the Department of State," a period which included the Presidency of President Harrison and a part of that of President Tyler. Richardson, The Messages and Papers of the Presidents, Vol. IV, pp. 431-434. During the investigation of the attack on Pearl Harbor by a Joint Congressional Committee in 1945, President Truman reserved the right to claim privilege in certain areas, and the Committee's minority report indicates that there were some limitations on the access to information. Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Federal Bar Journal 103, 143-146. During the investigation by the Senate Committee on Armed Services of the Military Cold War Education and Speech Review Policies, which covered practices during the Eisenhower and Kennedy Administrations, President Kennedy prohibited the disclosure of information not limited to acts which had occurred during his own tenure. Military Cold War Education and Speech Review Policies, Hearings before the Special Subcommittee of the Committee on Armed Services, United States Senate, 87th Cong., Second Session, pp. 508, 725.

I understand that another reservation concerning the availability of Executive privilege in this case voiced by some Members of the Committee pertains to a supposed requirement that the privilege must not only be asserted by the President but must be communicated by him directly to the Committee involved. This is again a limitation I confess I have never

heard of. It would indeed seem strange that, although the Congress may delegate not merely the communication of a demand, but even the assertion of the demand, to one of its Committees, and although that Committee may serve the demand upon one of the President's subordinates rather than upon the President himself; nevertheless, the President must both personally decide upon the response of privilege and must personally convey it to the requesting Committee. There is again nothing in the historical record which would support such a practice.

The normal form of a claim of privilege is a letter from the President instructing a department head not to disclose certain information, with communication of the prohibition to the Congressional Committee involved. For example: President Eisenhower's claim of privilege during the Army-McCarthy investigation took the form of a letter to the Secretary of Defense. Public Papers of the Presidents, Dwight D. Eisenhower 1954, p. 483. During the Senate investigation of Military Cold War Education and Speech Review Policies, President Kennedy's claim of privilege took the form of letters addressed to the Secretaries of Defense and State. There have been, of course, instances where Presidents have communicated directly with Committees, especially where requests were directly addressed to them; the examples set forth above, however, indicate that such procedure is not mandatory.

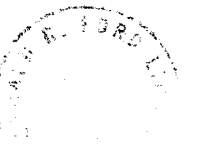
Finally, it may be noted that the assertion of Executive privilege against the Judicial Branch, which is another facet of the same doctrine, has been

sanctioned by the Supreme Court when made by Cabinet Secretaries without even evidence of specific Presidential consideration of the particular assertion, much less direct Presidential communication [Reynolds v. United States _____ U.S. _____ (19__)]; see _____.

The simplicity of the Executive privilege issue in the present case is marred by the fact that the final assertion was not made to the Committee until the day of (probably after the hour of) the original contempt vote. In the present circumstances, however, I think this is inconsequential. Surely the Presidential power to assert the privilege carries with it the Presidential ability to take the time necessary to consider its assertion. The four days (two business days) accorded to find the documents, identify the privileged material, obtain expert advice concerning the privilege and -- as the President desired --) to devote the President's own attention to the matter, was on its face insufficient. And the record shows a refusal of the Committee to provide a reasonable period of grace. In my view, it is clear that the assertion in the present instance was both proper and timely.

Even if it should be assumed, moreover, that the assertion of the privilege was improper, there still remains the issue of whether Secretary Kissinger could properly be held to be contumacious of the

Congress for having obeyed the President's instruction on the matter. At least where the claim of privilege is colorable, I think that highly unlikely. The Secretary, after all, is a subordinate of the President and must be permitted to follow apparently lawful instructions unless the Executive Branch is not to become a house divided. Indeed, it may be of questionable constitutionality to subject an Executive Branch officer in a matter such as this to the unavoidable risk of criminal liability for obeying an apparently lawful directive of the President.



I wish to make one final point, Mr. Chairman, which is in a sense quite technical and yet at bottom reflects basic considerations of fairness. I have been seeking this morning to induce this Committee to reconsider an action it has already taken -- a task which, as any lawyer knows, is an up-hill struggle. It is to my knowledge the invariable practice of Congressional committees -- and indeed a practice that may be required by due process -- to provide an opportunity to explanation and final categorical refusal before a citation for contempt is voted. This privilege was not accorded in the present case. I believe that if the Executive Branch had had the opportunity, before your action was initially taken, to provide the explanations for apparent non-compliance, and the reasons for the agreas of genuine non-compliance which existed in the present case, you might have been disposed to reach a different result. Since we did not have that opportunity, I hope you will not merely reconsider the matter but consider it anew, without the inertia that a decision once taken normally provides. In the one area covered by the State Department subpoenas, I hope the Committee will see that the spirit of mutual accommodation which must enliven our system of Government counsels that this Committee not press for the production of material so close to the heart of the Executive process -- just as, in many other areas during this inquiry (the SALT subpoena being one of them) the President has declined to make any assertion of Executive privilege though it might well have

been available. As to the other areas covered by these three subpoenas; we have, I believe, now made entire compliance with respect to the SALT documents and are willing to discuss possible alternatives with respect to the 40 Committee subpoena. I am confident that these matters can be worked out; I believe that the actions which Executive Branch officials have taken up until this time have not been meant to be contumascous of the role or the functions of this Committee; and I am hopeful that you will see that it would harm rather than benefit the nation to proceed with the present resolutions.

THE SECRETARY OF STATE

WASHINGTON

November 3, 1975

Dear Mr. Chairman:

I very much appreciated the opportunity to meet with you and the members of your Committee last week. The discussion was useful to me, as I hope it was to the Committee. Let me reiterate that my intention is not to withhold any information of use to the Committee or to win a theoretical dispute, but to reach a compromise that protects the legitimate interests of both the Department and the Committee. I remain as determined as ever to do everything possible to assist the Committee in its difficult and important task.

Having heard the concerns expressed by members of the Committee regarding access to documents, I have given much thought to how we might yet find an accommodation that serves our mutual interests, and those of the nation. In pursuance of that objective, I should like to propose that I provide the Committee an amalgamation of State Department documents criticizing our Cyprus policy. This collection of material would include, interspersed among the other paragraphs and without any identification of authorship, the full contents of Mr. Boyatt's memorandum to me.

In this way the Committee will receive the document it requests, while I will have assured that Mr. Boyatt cannot be identified with any particular criticism or recommendation. And no precedents -- either for the Congress or the State Department -- will have been established.

I make this offer, Mr. Chairman, in the hope that an "amalgamation" will prove satisfactory to the Committee; it is a solution that I can support

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

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without question. If this offer is acceptable to the Committee, I will have the promised document in your hands within 48 hours of hearing of the Committee's decision.

Sincerely,

Henry A. Kissinger

THE WHITE HOUSE

WASHINGTON

November 11, 1975

Dear Mr. Chairman:

In response to the five subpoenas received from the House Select Committee on Friday, November 7, 1975, we are submitting herewith the documents described on the attached list. We have complied with the subpoenas to the best of our ability given the time constraints and the bulk of the material involved, and in accordance with the clarifications received from and understandings reached with Messrs. Field, Boos and Rushford of the Select Committee staff on Saturday, November 8, and again with Messrs. Boos and Rushford on Monday afternoon, November 10. If you or your staff have questions concerning the enclosed material, we are prepared to discuss them at your convenience.

Some explanatory comments may be in order in connection with certain of the documents. With regard to SALT compliance information, the documents furnished have been sanitized to protect extremely sensitive intelligence sources and methods. In the interest of full cooperation with the Committee, however, we have not deleted any material required to understand the substance of the activities involved and their significance from an intelligence viewpoint. Nor do the deletions downgrade the original security classification of the documents, which remain sensitive and require the fullest protection by the Committee. The attached SALT Monitoring Reports are offered in the spirit of attempting to comply with the specific desires stated by your staff to pursue this particular subject. We are prepared to offer appropriate members of your staff access to the unsanitized versions of these documents as well as to other materials less suitable for sanitization but which might be helpful to your investigations. Included in the latter case would be a draft interagency report on compliance issues shown to members of your staff on Monday. In this regard we suggest your staff contact the CIA review staff who will be glad to put them in touch with Intelligence Community experts on SALT compliance. I am sure these experts will be able to resolve any concerns your staff may have with regard to completion of their inquiry.

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With regard to the subpoena for "all 40 Committee and predecessor committee records of decisions taken since January 20, 1965, reflecting approvals of covert action projects, "as you know, following discussions with Mr. Rushford, such records from 1966 through 1975 were provided the Committee on October 23-24, 1975. In addition, summaries were prepared of three actions per year designated by Mr. Rushford for each year from 1966 through 1974. Those for 1966 through 1968 were provided on October 24, and those for 1969 through 1974 on October 29. We have also attached the comparable record of 303 Committee decisions taken from January 20 through December 31, 1965, which we believe completes Mr. Rushford's request. Subsequent to our receipt of the subpoena, Mr. Boos of your staff met with members of my staff on Monday afternoon (November 10) and provided clarification as to the Committee's preferred format. We have undertaken to prepare our response in this area along the lines indicated by Mr. Boos as being desired. Those items we have so far been able to prepare to meet the revised requirements are also attached. We will, of course, continue to work toward completing this process as soon as possible.

With regard to the minutes of the Washington Special Actions Group on the Middle East, Cyprus and "the Portugal coup of April 24, 1974," there were no meetings of the WSAG on Portugal in 1974. As you know, we have previously supplied the Committee with the dates, list of attendance by principals and general subjects for WSAG meetings from October 1, 1973 to the present. We have now added to that information conclusions reached at each meeting on the Middle East and Cyprus, along with the text of the intelligence briefings given by the Director of Central Intelligence at these meetings where available.

We had also previously supplied the list of meetings and principal attendees of the NSC Intelligence Committee, its Working Group and Economic Subcommittee. We have now added to that information an indication of the subjects discussed at the meetings and any decisions reached.

With regard to the subpoena for intelligence reports submitted to the NSC from 15-28 October, 1973 (the Middle East War and associated Soviet military activities), we have compiled an extensive inventory of applicable reports. Attached are NSA reports covering this time period. Applicable CIA and DIA all-source intelligence summaries and reports (currently being sanitized for especially sensitive sources and methods

by interagency representatives) will be forwarded as soon as possible. My staff will be in touch with yours as soon as these reports are ready, probably within a day or two.

The material supplied herewith in response to your subpoenas is forwarded on loan with the understanding that there will be no public disclosure of the classified information it contains without a reasonable opportunity for us to consult with respect to it. In the event of disagreement, the matter will be referred to the President. If the President then certifies in writing that the disclosure of the material would be detrimental to the national security of the United States, the matter will not be disclosed by the Committee, except that it would reserve its right to submit the matter to judicial determination.

Sincerely,

Brent Scowcroft
Lieutenant General, USAF
Deputy Assistant to the President
for National Security Affairs

Honorable Otis G. Pike
House of Representatives
Washington, D.C. 20515

LIST OF ATTACHMENTS

SALT Compliance Reports, USIB

List of 303 Committee Decisions, Jan 20-Dec 31, 1965

WSAG Summary of Conclusions and DCI Briefings on Middle East and Cyprus

40 Committee Approvals, 1965/1972-75

Agenda Items and Decisions of NSCIC/NSCIC Working Group and Economic Subcommittee, 1971-1975

NSA Alert Cables and Messages on Middle East War and USSR-Associated Military Activities

DEPARTMENT OF STATE

THE DIRECTOR OF INTELLIGENCE AND RESEARCH

WASHINGTON

November 10, 1975

Dear Searle:

This is to confirm our telephone conversation this morning in which you clarified the scope of the Committee's subpoena to Secretary Kissinger, dated November 6, 1975. This was most useful, and our search for the relevant documents will be greatly facilitated by the more precise description of the material desired.

As I understand it the purpose of the subpoena is to obtain copies of all documents by which the Department of State took the initiative in proposing to the NSC or the Forty Committee (and its predecessors) the adoption of new covert action projects. In other words, the Committee seeks to identify situations in which the Department of State was the agency within the Government that conceived of the project and urged its consideration by the NSC or the Forty Committee.

The documents in these cases take various forms, e.g., memoranda to the President, memoranda to the Chairman of the Forty Committee, or memoranda to the Assistant to the President for National Security Affairs. We are moving as quickly as possible to identify them and bring them to the attention of the appropriate office in the White House. Because such memoranda were sent to the President or his close White House advisers, the final decision on their release to the Committee will have to be taken in the White House.

Sincerely,

William G. Hyland

William G. Hyland

Mr. A. Searle Field
Staff Director
Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C.

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STATUS OF HOUSE SELECT INTELLIGENCE COMMITTEE SUBPOENAS

- Subpoenas issued on Thursday, November 6, 1975. The following specific information was subpoenaed:

  - NSC: covert activities, SALT compliance, NSC sub-committee minutes, etc.

  - CIA: relationships with IRS

  - State Department: their recommendations to the President and NSC on covert activities.

- The subpoenaed documents were due at 10:00 a.m. this morning, November 11. In essence, we were only given two working days to comply.

- We will be in substantial compliance with the seven subpoenas. NSC and CIA will have delivered the documents subpoenaed from them by 10:00 a.m.

  In terms of the documents requested from State Department, the Staff Director of the House Select Committee, Searle Field, clarified the scope of the November 6 subpoena to Bill Hyland on Monday. The documents were identified the same day, and the matter was referred to the White House because that's where the documents were originally sent. Mr. Field was advised by letter yesterday that these documents are under review.

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11/11/75
M. D.

DEPARTMENT OF STATE
THE DIRECTOR OF INTELLIGENCE AND RESEARCH
WASHINGTON

Copy

November 10, 1975

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As we discussed in our conversation, the Department will concentrate on the period 1970 through the present, and send the documents for that period to the White House

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Signed

William G. Hyland

Searle Field
Staff Director
HSC

THE WHITE HOUSE

WASHINGTON

November 13, 1975

Dear Chairman Pike:

As stated to the Staff Director, Mr. Searle Field, by William Hyland in a letter dated November 10, the State Department has reviewed their files in response to your subpoena of November 6. They have identified documents that indicate that on eight occasions the Department of State submitted recommendations concerning the issue of Presidential approval of covert activities.

These documents were identified late Monday, and the White House along with other officials of the Executive Branch, are reviewing them prior to a decision by the President, concerning whether or not they should be made available to the Committee.

In view of the very short time we have had to undertake this review, and the demands on the President's schedule, we respectfully request additional time to respond to your subpoena. We believe that one week from today should be sufficient.

Thank you for your cooperation.

Sincerely,

Philip W. Buchen
Counsel to the President

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

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THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

November 14, 1975.

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.

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

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

George H. Aldrich
Acting

LIBRARY

THE WHITE HOUSE

WASHINGTON

November 18, 1975

MEMORANDUM FOR: JACK MARSH

FROM: CHARLES LEPPERT, JR.

SUBJECT: Member reaction to Pike's Select Committee on Intelligence

Morgan Murphy (D-Ill)

I believe the Committee is resolved on this one. Our transcript record shows that the documents were said to be non-existent and the Committee has testimony that they do exist. I think the Committee will go all the way on this one. When asked if something could be worked out, Morgan replied that he did not know; let him talk to some of the other members and he would get back to Leppert.

James P. Johnson (R-Colo)

Has no idea on how this will go but as far as he is concerned, it is simply a matter of the legalities. Either the Congress has the right to the documents or it has not. The best way to work this out would be simply to deliver the documents and comply with the subpoenas. It seems that people at the White House merely want to establish a principle of executive privilege. If there is compliance or substantial compliance with the subpoenas, there will be no further pursuit of it. The contempt will be purged by the supply of the documents. If there is no substantial compliance, he feels that the House will hold Kissinger in contempt on at least one of the three citations.

Les Aspin (D-Wis.)

He wants to be helpful in working something out. He thinks the Administration should look at the transcripts of the meeting on Friday, November 14th, when Aspin asked Pike to give a short explanation as to the need for this information. Look at these paragraphs and see what Pike said. Furnish the information in accordance with Pike's statement. This information should be sent to the Committee at one time and not in dribbles. The offer of documents should be good, complete and final. Thereafter, there should be a letter from Kissinger to Pike stating that he, Kissinger, is now in compliance with the Committee's subpoenas. A copy of that letter should go to

all Committee members and upon receipt, McClory should go to Pike and request a meeting of all members of the Committee for the purpose of discussing compliance with the subpoenas. This will permit members of the Committee to force a meeting on compliance procedurally under the Committee rules. It then becomes a question of votes. Basically, there are only four members with any degree of animosity against Kissinger. They are Pike, Giaimo, Stanton and Dellums. So you are really working with the other nine members of the Committee. In this situation you have two votes for a compromise and four against any compromise, and one trying to pick up the votes in the middle out of a total of 13 votes.

John J. McFall (D-Cal.)

The Committee action against Kissinger is a sad thing. He has not talked to the Leadership on this but several members have talked to McFall. He states that Rep. Murtha and Morgan will oppose any resolution of contempt. McFall wants to talk to the Speaker and see what his position is but understands that normally the Speaker tends to support the Committee. McFall will also talk to Tip O'Neill and get his feelings. McFall states that if fellows like Murtha, Morgan, Waggonner, Montgomery, etc. combine with a solid GOP vote against any contempt resolution it can be defeated on the floor. McFall states that there is no great feeling against Kissinger -- his performance on the Mid-east is highly commendable but he thinks this is not aimed at Kissinger but at the Presidential advisers claiming executive privilege.

Sonny Montgomery (D-Miss.)

Feels there is not much discussion on the issue and that the members have not been turned on by the Pike Committee's action. He feels that the general public does not like what the Pike Committee is doing and that the White House should "holler" and make good arguments against it. Montgomery will vote against any citation for contempt and will do what is necessary to help.

George Mahon (D-Tex.)

Feels that this matter should be diffused. Has not studied the matter and has not had a chance to talk to many members. He deplores the continual confrontation between the Committee and the executive branch and feels that we are in the process of tearing our country apart. He feels that Henry has done a good job but there is increasing skepticism of Kissinger's credibility on the Hill. Mahon says he certainly does not want to see the Congress vote on this issue and is disgusted with the Pike and Church Committee actions and revelations.

R0bert McClory (R-Ill)

Reports that the Committee meets Thursday and that Pike has advised him that the Committee report on the contempt citations will be ready on November 20th. Pike tells McClory that the minority has until November 27th to file minority supplemental and dissenting views. McClory feels this places major publicity value on the majority Committee report and thinks seriously that the minority dissenting views should be filed on Thursday also. McClory therefore requests any information of assistance be given to him this evening.

Joe D. Waggonner (D-La.)

Kissinger is not popular on the Hill. The hawks are not lovers of Kissinger. Says the Administration has its hands full with this one. The people opposing the investigation are not Kissinger fans which creates a problem. Waggonner says that the arguments on contempt citations generally begin and end by a process of elimination which goes this way:

- Is the Committee a legally constituted Committee of the Congress?

  Answer: Yes

- Does the Committee have proper subpoena powers?

  Answer: Yes

- Was the subpoena issued in due and lawful form?

  Answer: Yes

- Was the subpoena complied with?

  Answer: No

If the answer to the last question is no then the contempt citation falls and the individual is held in contempt of Congress. Waggonner says his instincts tell him that Kissinger will be cited for contempt. He says that his instincts are based only on the fact that there are only two Republican members of the Committee voting against the resolutions. Waggonner feels that the Administration is in real trouble on this one.

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THE WHITE HOUSE

WASHINGTON

November 19, 1975

Dear Mr. Chairman:

I want you to know of my deep concern because the Select Committee found it necessary on November 14 to vote in favor of three resolutions which could lead to a finding by the House of Representatives that Secretary of State Henry Kissinger is in contempt for failure to comply with three Committee subpoenas. This issue involves grave matters affecting our conduct of foreign policy and raises questions which go to the ability of our Republic to govern itself effectively. I know that you, Mr. Chairman, share my deep respect for the rights and powers of the House of Representatives -- where our cumulative service spans nearly four decades -- and for the obligations and responsibilities of the President. The two branches of government have an extremely serious responsibility to consider the issues raised in the ongoing foreign intelligence investigations dispassionately and with mutual respect.

Former Chief Justice Warren pointed out twenty years ago that there can be no doubt as to the power of Congress and its committees to investigate fully matters relating to contemplated legislation. Without this power, which includes the authority to compel testimony and the production of documents, the Congress could not exercise its responsibilities under Article I of our Constitution. However, this power, as broad as it is, is subject to recognized limitations. Not only is it limited by powers given to the other two branches, but it also must respect requirements of procedural due process as they affect individuals.

The action of your Committee concerning the November 14th resolutions raises, in my mind, three principal issues: the extent to which the Committee needs access to additional Executive Branch documents to carry out its legislative functions; the importance of maintaining the separation of powers between the branches and the ability of the Executive to function; and the individual rights of officials involved in this matter. I am not interested in recriminations and collateral issues which only serve to cloud the significant questions before us.

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From the beginning of the investigations of the intelligence agencies, I have taken action to stop any possible abuses and to make certain that they do not recur as long as I am President. I have also endeavored to make available relevant information in a responsible manner to the appropriate committees of Congress.

I have given great weight to my responsibility to maintain the integrity of our intelligence community and the ability of this Nation to develop and use foreign intelligence. This is one reason why I have insisted that much of the information I have made available to Congress be kept secret, so that current foreign intelligence operations, which are critical for the national security, can continue effectively. In accordance with these principles, your Committee and the Senate Select Committee have received unprecedented access to Executive Branch documents and information.

Your Committee's November 6th votes on seven subpoenas for additional Executive Branch documents came in the context of several months of working together on this very difficult subject and a record of cooperation on both sides. They were served on November 7. The documents were due on the morning of November 11, and the appropriate Administration officials immediately went to work collecting the information. Four of the subpoenas were complied with fully. However, problems arose as to the remaining three issued to:

- "Henry A. Kissinger, Secretary of State, or any subordinate officer, official or employee with custody or control of ... all documents relating to State Department recommending covert action made to the National Security Council and its predecessor committees from January 30, 1961 to present."

- "the Assistant to the President for National Security Affairs, or any subordinate officer, official or employee with custody or control of ... all 40 Committee and predecessor Committee records of decisions taken since January 20, 1965 reflecting approvals of covert action projects. [separate subpoena] ... All documents furnished by the Arms Control and Disarmament Agency's Standing Consultative Commission, and the Central Intelligence Agency, the National Security Agency, the Department of Defense, and the Intelligence Community staff, since May, 1972 relating to adherence to the provisions of the Strategic Arms Limitation Treaty of 1972 and the Vladivostok agreement of 1972."

These three subpoenas are the basis of the Committee resolutions of November 14.

The subpoena directed to the Secretary of State requests documents containing the recommendation of State Department officials to former Presidents concerning highly sensitive matters involving foreign intelligence activities of the United States. The appropriate State Department officials identified and referred to the White House documents which apparently fall within the subpoena. None of these documents are from my Administration. These were carefully reviewed and, after I received the opinion of the Attorney General that these documents are of the type for which Executive privilege may appropriately be asserted, I directed Secretary Kissinger not to comply with the subpoena on the grounds of Executive privilege. I made a finding that, in addition to disclosing highly sensitive military and foreign affairs assessments and evaluations, 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. Thus, in declining to comply with the subpoena, Secretary of State Kissinger was acting on my instructions as President of the United States.

With respect to the two subpoenas directed to "...the Assistant to the President for National Security Affairs, or any subordinate officer, official or employee with custody of control...", the really important point here is that the NSC staff has made a major effort to deliver the documents requested. As you know, additional documents were made available to the Committee after the deadline of the subpoenas and indeed after the Committee voted on the November 14th resolutions. There has been and continues to be an effort on the part of the NSC staff to provide the Committee with the information and documentation it needs. In fact, a very comprehensive volume of information has been made available which provides the Committee a substantial basis for its investigation.

This effort was undertaken, notwithstanding the fact that the subpoenas themselves were served on November 7, made returnable only four days later, and called for a broad class of documents, going back in one subpoena to 1965, and in the other to 1972. Substantial efforts were required to search files, identify items covered, and to review them for foreign policy and national security reasons in accordance with procedures which have been previously used with information requested by the Select Committee.

In addition to our efforts to substantially comply with these two subpoenas, I have been advised that there are serious and substantial legal and factual questions as to the basis on which the Committee seeks to find Secretary Kissinger to be in contempt. The subpoenas were directed to "...the Assistant to the President for National Security Affairs, or any subordinate officer..." and were in fact served on the Staff Secretary of the NSC. Secretary Kissinger had no responsibility for responding to these subpoenas nor for supervising the response to them. After November 3, he was no longer my Assistant for National Security Affairs, and he was neither named in the subpoenas nor were they served upon him. Thus there is no basis for the resolutions addressed to Secretary Kissinger on these subpoenas.

In summary, I believe that if the Committee were to reconsider the three resolutions of November 14, it would conclude that my claim of Executive privilege is a proper exercise of my Constitutional right and responsibility. As to the two subpoenas directed to the Assistant for National Security Affairs, they do not involve Secretary Kissinger, and there has been a substantial effort by the NSC staff to provide these documents. Furthermore, they will continue to work with you and your Committee to resolve any remaining problems.

It is my hope that the Select Committee will permit Executive Branch officials to appear at tomorrow's hearing to discuss the points I have raised in this letter.

It is my desire that we continue forward, working together on the foreign intelligence investigation. I believe that the national interest is best served through our cooperation and adoption of a spirit of mutual trust and respect.

Sincerely,

Gerald R. Ford

The Honorable Otis G. Pike
Chairman
House Select Committee
on Intelligence
House of Representatives
Washington, D.C. 20515

STATEMENT OF

ANTONIN SCALIA

ASSISTANT ATTORNEY GENERAL

OFFICE OF LEGAL COUNSEL

DEPARTMENT OF JUSTICE

BEFORE THE

SENATE SELECT COMMITTEE ON INTELLIGENCE

THURSDAY, NOVEMBER 20, 1975

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Mr. Chairman and Members of the Committee,

I appreciate your permitting me to appear, at the President's request, to urge your reconsideration of the contempt resolutions voted by this Committee on November 14. We believe reconsideration is warranted because that action was based upon several misunderstandings which should not form the basis of action as serious as this. Although I intend to make the only formal presentation, I have with me several representatives of the various agencies involved in this matter who may assist in responding to your questions. They include Mr. Monroe Leigh, Legal Advisor of the Department of State;

Mrs. Jeanne W. Davis, Staff Secretary, National Security Council; and Mr. Daniel Christman, National Security Council Staff Member.

I would like to begin, Mr. Chairman, by placing this matter in its context. The subpoenas which are the subject of the Committee's present action were part of a long process of information gathering which the Committee has been engaged for the past five months. As you know, in the vast majority of situations, the information has been obtained informally, by Committee staff, without even the necessity of formal demand by a Committee member, much less a formal subpoena. In the course of that process there has developed a

constant day-to-day working relationship between your staff and those personnel in the various intelligence agencies who have responsibility for documents requested. There have also developed certain agreed upon practices as to the manner in which requests are interpreted and complied with -- a matter which I will come back to later on. I think you will agree that during these past five months, this Committee has received more information of a highly sensitive nature, involving the most confidential matters of military and foreign affairs, than has ever before been disclosed to any Congressional Committee, with the possible exception of the similar committee now functioning in the Senate.

On Friday morning, November 7, seven subpoenas issued by the Committee were served upon Executive Branch personnel. One was addressed to the Central Intelligence Agency; that is not at issue here. A second, which is at issue, was addressed to the Secretary of State. The remaining five were addressed to "the Assistant to the President for National Security Affairs or any subordinate officer, official or employee with custody or control of the items described in the attached schedule"; only two of those are at issue here. All seven subpoenas, served at approximately 10 o'clock on Friday, November 7, were returnable at 10 o'clock, Tuesday, November 11 -- approximately four days (and only two normal working days) after service. The subpoenas as a whole,

and particularly the five directed to the single agency, the National Security Council, which has a relatively small staff, required an enormous amount of searching for the relevant documents or portions of documents; and in addition a large amount of examination of what had been discovered in order to determine whether there might be any proper basis for declining release. No complaint has been made as to the adequacy of compliance with four of these seven subpoenas. As to the remaining three, the Committee's action on November 14 asserts a willful and contumacious refusal to comply. It is that decision we urge you to reconsider.

Let me address first the two subpoenas directed to the National Security Council. One sought "all 40 Committee and predecessor committee records of decisions taken since January 20, 1965 reflecting approvals of covert action projects." (I will hereafter refer to this as the "40 Committee" subpoena.) The second sought "All documents furnished by the Arms Control and Disarmament Agency's Standing Consultative Commission, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, the Department of Defense, and the Intelligence Community Staff since May, 1972 relating to adherence to the provisions of the Strategic Arms Limitation Treaty of 1972 and the Vladivostok agreement of 1974." (I shall hereafter refer to this as the "SALT" subpoena.) I believe, Mr. Chairman and Members of the Committee, that those responsible for assembling and producing the requested documents

were -- with one notable exception -- in good faith compliance with the subpoenas; and even as to that exception did not mean to be contumacious or to violate the law. That is the principal point which I wish to urge upon you. Initially, however, I would like to discuss some technical matters which do not go to good faith compliance but rather to the propriety of the action you have taken in order to punish what you regard as the lack of compliance.

Specifically, there are several reasons why, as a matter of law, it is not in my view possible to charge Secretary Kissinger with responsibility for compliance with these subpoenas. As I indicated above, neither subpoena was directed to Mr. Kissinger by name. Both were addressed, initially, to "the Assistant to the President for National Security Affairs." In point of fact, this was not merely a technical distinction. The transcript of the Committee hearing on the day it issued the subpoenas indicates that the Committee did not know or care whether the subpoena was addressed to Mr. Kissinger or to someone else occupying the office. That transcript shows the following exchange:

"Chairman Pike: Who at the present time is the Assistant to the President?

"Mr. Field: I believe the subpoena would still be directed to Dr. Kissinger because General Scowcroft has not been sworn in yet. It will be directed to the office so it really makes no difference in terms of who is occupying the office."

As the President's letter to you of yesterday indicates, "After November 3 [Mr. Kissinger] was no longer my Assistant for National Security Affairs."

Even, therefore, if the subpoenas were addressed only to the Assistant to the President for National Security Affairs, on November 7 that designation did not describe Mr. Kissinger. But in fact the subpoenas were not addressed only to the Assistant to the President for National Security Affairs, they were addressed to him or "any subordinate officer, official or employee with custody or control of the items described...." And the return of the subpoena shows that it was in fact such an alternate individual that the process server sought to reach. That return is signed quite clearly "Barry Roth for Jeanne W. Davis." It is inconceivable that any receipt of this sort could support a contempt action against Mr. Kissinger. I may add that receipt on behalf of Mrs. Davis was not Mr. Roth's own suggestion; the process server specifically requested receipt in that fashion. (I have an affidavit of Mr. Roth to that effect, which I will be happy to present to the Committee.) For both of these grounds, therefore, -- both because he was not the Assistant to the President for National Security Affairs and because the subpoenas were not served upon or even sought to be served upon the Assistant to the President for National Security Affairs -- Mr. Kissinger cannot be held accountable for any deficiencies which the Committee believes to exist in compliance with these subpoenas.

But that would still leave us with the conclusion, Mr. Chairman, that the Executive Branch -- whether or not it was Mr. Kissinger or any other particular individual who could properly be held accountable on the basis of these particular subpoenas -- deliberately and willfully set out to disobey the law. Although I had no part in the compliance process myself, I have interviewed in some depth the individuals who had, and on the basis of that inquiry I am convinced, first, that there was technical noncompliance, and indeed substantial noncompliance in the case of one subpoena; and second, that given the circumstances and the motivation you should not deem that noncompliance to constitute contumacy.

Let me address, first of all, the SALT subpoena -- and let me clear away some of the underbrush by discussing some elements which I believe the Committee regards as noncompliance but which in fact do not constitute that. There was discussion, in a staff interview on the day the contempt resolutions were voted, of a foot-high stack of documents which should have been supplied in addition to the half-inch that was supplied. Those documents have since been provided; they actually measure somewhat under one foot, I believe. The vast majority of them, however, were thought -- and I believe reasonably thought -- not to be required by the subpoena. The confusion stemmed from the fact that the subpoena requested, in part, "all documents furnished by the Arms Control and Disarmament Agency's Standing Consultative Commission."

In fact, the Arms Control and Disarmament Agency (ACDA) has no Standing Consultative Commission. The Standing Consultative Commission is not an agency of the United States but a joint US-USSR Commission established for purposes of working out SALT negotiations. There is, of course, a United States component of the Commission, but virtually none of the material which that component would furnish to NSC would relate to SALT compliance policy, which was understood to be the main object of the inquiry. Thus, those responsible for assembling documents to comply with the subpoena interpreted the phrase, "Arms Control and Disarmament Agency's Standing Consultative Commission" to refer to ACDA documents bearing upon the work of the Commission. This interpretation is rendered all the more plausible an explanation of the erroneous language of the subpoena by virtue of the fact that the Chairman of the U.S. component of the Commission was Deputy Director of ACDA, and it was thus thought that the Commission staff had in mind documents of the sort which appear over his signature but on ACDA stationery. Thus, the failure to provide documents furnished by the Standing Consultative Commission does not, in my view, constitute any noncompliance, much less willful noncompliance, with this subpoena.

Another portion of the foot-high stack is explained by yet another ambiguity in the request. The subpoena seeks "all documents furnished" by a number of agencies -- but does not state furnished <u>to whom.</u>

Both because of our understanding from the Committee staff that NSC files were the object of the subpoena, and because of the fact that the service was explicitly sought to be made upon the Staff Secretary of the NSC, our personnel assumed -- and again, I think quite reasonably -- that the scope of the subpoena was limited to the NSC. There are many documents which come to the Assistant to the President for National Security Affairs (who by title is not, by the way, either the head of or a member of the NSC) which are not transmitted to the National Security Council, but are instead forwarded to an entirely separate system of files, outside the jurisdiction of the NSC, known as the "Presidential files." Some documents relevant to SALT compliance took this route, and hence were not found in the NSC files. I acknowledge, Mr. Chairman, that the decision not to examine the Presidential files for such information, though technically in compliance with the subpoena, was erroneous; it did not display that degree of cooperativeness in providing the substance of what the Committee desired which has been our objective. And when the decision to omit Presidential files came to the attention of those having supervisory authority over the project, that decision was reversed and a supplemental search of the Presidential files was ordered which resulted in a supplementary production of documents to the Committee on November 13, two days after the original return date. We wish these documents had been provided in the original submission. But they were not strictly

required, and in view of the extreme time limitations under which those charged with the search were operating, I hope you will find the initial decision to omit the Presidential files understandable.

Finally, there were omitted from the search and from the production, internal documents and memoranda of the NSC itself. These are not called for by the subpoena unless one interprets the language "the Intelligence Community Staff" to refer to the NSC staff -- which is simply not a reasonable interpretation. Those responsible for the search interpreted that phrase to refer to the United States Intelligence Board, which is composed of staff representatives of the entire intelligence community. I believe that interpretation is correct.

Let me come now to those documents, very few in number -- about 25, I believe -- which were in my opinion withheld contrary to the technical requirements of the SALT subpoena. These consist of documents which were treated as immune from disclosure because they dealt with recommendations and advice-giving to the NSC or to close Presidential advisors, I would like to be able to say that these documents were merely temporarily withheld, in order to enable advice from the Justice Department and determination by the President with respect to the assertion of Executive privilege. Given the time frame within which production had to be completed (four days, only two of which were

normal working days) this course of action would not have been unreasonable. In fact, however, I can find no evidence of such clarity of intent. Though these documents were ultimately submitted to the Justice Department for its judgment as to assertion of Executive privilege, I have no reason to believe that was the clear original intent. Rather, I believe what occurred was merely the carrying over into this area subpoenaed documents the procedures which these personnel -- none of whom are lawyers -- had constantly been employing with respect to the numerous non-subpoena requests of the Committee. As you know, the procedure has been to permit withholding or deletion of information highly sensitive or inappropriate for production, with the understanding that the Committee staff will seek further disclosure if it has serious need for the information withheld. When dealing with a formal subpoena, I acknowledge that it is incorrect to proceed in this fashion. On the other hand, the error is understandable. It is difficult to change the rules in the middle of the game -- and indeed, this Committee and its staff have been tolerant of this practice with respect to other subpoenas, in determining that the withholding of a relatively small amount of information will not destroy substantial compliance. I believe that same situation exists with respect to this SALT subpoena, once the Committee realizes that the vast bulk of documents which it erroneously believes were withheld were not covered.

There remains the question what is to be done with respect to the information which, as I have described above, was wrongfully withheld. That is no longer a problem. All of the documents which I discussed -- not only the relatively few which were erroneously withheld, but even the much greater number that were withheld because not called for by the subpoena -- have either been provided to the Committee or made available for inspection by the Committee or its staff. Whatever the confused situation might have been on the return date for the subpoena (and I believe it constituted substantial compliance) we are now in full compliance, and indeed over-compliance.

Let me turn now to the subject of compliance with the subpoena, which sought "all 40 Committee and predecessor committee records of decisions taken since January 20, 1965 reflecting approvals of covert action projects." Here it cannot be reasonably asserted that there has been substantial compliance. I was frankly startled, as I expect you were, upon realizing the utterly uninformative nature of much of the material provided in response to the subpoena. There are really two deficiencies here, which must be explained separately.

First, there is the deletion of names of individuals and countries from all of the submissions. These are the only deletions made with respect to covert action approvals in those documents entitled "40 Committee decisions" or "40 Committee approvals." My investigation satisfies me

that the personnel responsible for this submission knew not only that the subpoena by its terms did not permit such deletions, but also that the Committee staff did not approve them. The reason for the deletions -- a position which I believe was well-known by the Committee staff -- was that to provide such information, identified by country and names of individuals, regarding all covert actions over a ten-year period, to be held in one place and to be distributed freely within and among the Committee and staff, would provide a security threat of unacceptable dimensions. This problem had been raised with the Committee staff before the subpoena was issued; and while an accommodation of interests had not been worked out, it was believed that the Committee understood and respected our difficulty, and that an arrangement satisfactory to both sides could be devised. I think these deletions were improper, but from my discussions with the individuals involved, I believe that they acted not in a spirit of contumacy but rather in conformance with what they regarded as a continuing process of reaching accommodation of very difficult problems with the Committee. Their action must be seen in light of the fact that Executive Branch intelligence personnel and the Committee staff had been regularly operating, before the subpoenas, on a day-to-day basis, under a system which would permit such deletions in making response to voluntary requests, with the expectation that the Committee staff, when the deletions were too disruptive to the purpose of the request, would seek further information. Indeed, shortly after these documents were delivered, our personnel proposed alternative methods to your Committee

staff which might accommodate their needs in some other fashion. Again, I do not dispute that this kind of haggling in response to a categorical subpoena is not proper. But in view of the extreme sensitivity of these materials; in recognition of the continuing process of which these subpoenas were only a part; and in acknowledgment of the fact that accommodations had in fact been accepted with respect to other subpoenas; I think you should not regard this action as motivated by a contumacious spirit.

The second totally separate problem with the 40 Committee production involves not specific deletions, but rather virtually incomprehensible summarization of 40 Committee approvals for meetings in which there was no separate "Decision" or "Approval" document. In these instances, the "records of decisions taken . . . reflecting approvals" (the language of the subpoena) had to be excerpted from minutes which did not lend themselves to the effort. The Committee staff had indicated that the totality of the minutes did not have to be provided, but it is clear that the excerpting here effected was beyond their expectation and, I think, beyond reason. Adding to the difficulty of the excerpting was the fact that the personnel working on this project misinterpreted the initial subpoena requests, so that it was only discovered on the day before the return date that nine additional years had to be covered. The attempt to make an intelligible excerpting of so many minutes in a single day was unsuccessful

in the highest degree. Here again, I urge you to consider that the unfortunate product was not the result of contumacy but of human error and poor judgment in an operation which had to be conducted under unreasonable time constraints. On this last point, I might note that no careful lawyer would permit his client to make a production of subpoenaed documents without undergoing, at the last stage, a lawyer's review of the general adequacy of the production. That did not occur in the present case, simply because there was no time.

The excerpted and the edited documents which are the subject of the foregoing discussion are now in the process of being considered for possible assertion of Executive privilege. I hope, however, that such an assertion will not have to be made. In an attempt to provide a prompt resolution of this issue -- and, frankly, with some acknowledgment that our past action on this point, though well-intentioned, was not correct -- I am authorized to advise the Committee that we will be willing to provide access to so much of this material relating to covert action approvals as the Committee may request, though we retain our objections to providing a complete set of such sensitive material covering such a long period for use by the Committee.

Let me turn now to the third subpoena -- that addressed to "Henry A. Kissinger, Secretary of State" and accepted on his behalf. If one were to attempt a description of documents which would have the

highest possible claim to an assertion of Executive privilege, one could only with difficulty surpass the description contained in this subpoena. It asks for recommendations made to one of the closest circles of Presidential advisers (namely, NSC, the 40 Committee and its predecessors) on matters of the most sensitive nature relating to foreign and military affairs (namely, covert actions). Not surprisingly, all of the documents originally identified as responsive to this subpoena were found by the State Department to warrant consideration for the assertion of Executive privilege. On November 10, the day before the return date, the Department informed your Staff Director by telephone, and later the same day by letter, that as they were being identified these materials were being brought to the attention of the appropriate office in the White House and that "the final decision on their release to the Committee will have to be taken in the White House." On November 13, the day before your Committee took its action on this resolution, Mr. Buchen, Counsel to the President , wrote Chairman Pike advising him that the documents were being reviewed "prior to a decision by the President, concerning whether or not they should be made available to the Committee," and respectfully requesting, "in view of the very short time we have had to undertake this review," additional time to respond to your subpoena. This request was denied. On November 14, during the meeting at which the Committee voted on the contempt resolution relating to this subpoena (it appears from the transcript after the vote was taken, though I cannot be sure of that),

Chairman Pike was presented with a letter from the Acting Legal Adviser of the Department of State informing him that the President had instructed Secretary Kissinger respectfully to decline compliance to the subpoena "on the basis of the President's assertion of Executive privilege". I must add one further element to this chronology. Since November 14, by making use of files other than those of the State Department itself (an extension not strictly required by the subpoena) the Department has been able to identify seven additional documents which would be responsive to this subpoena. They are of generally the same character as the documents described in the Acting Legal Adviser's letter; the President has already instructed Secretary Kissinger respectfully to decline production of six of these; the last, most recently identified, is still under consideration.

I wish to discuss first, Mr. Chairman, the propriety of asserting Executive privilege with respect to these documents. In what has already been an overlong presentation, I do not mean to enter into a full-blown discussion of the doctrine of Executive privilege. As you know, the right to withhold certain documents from Congressional inquiry has been asserted by Presidents since George Washington, and has been described by the Supreme Court in a recent decision as being constitutionally based, United States v. Nixon, 418 U.S. 683 (1974). It has most frequently been exercised with respect to military or foreign affairs secrets, and with respect to confidential advice to the President or his closest advisers. Obviously, all of these elements are combined in the present case. In my view there is no question that the subject matter is appropriate for an assertion of Executive privilege; and this was the advice given to the

President by the Attorney General.

I understand that some Members of the Committee entertain doubts concerning the availability of a claim of Executive privilege in the present case because the documents in question were not addressed to the present President or his advisers, but rather to the Presidents and advisers of earlier administrations. I confess that this is an entirely new asserted limitation upon the doctrine which I have never heard before, although I have done some considerable study in this field. On its face, of course, it would not make much sense. Why does a fact which is a sensitive military or foreign affairs secret on January 19 suddenly become unsecret on January 20, when a new President is sworn in? It makes no sense whatever to say that his predecessor could protect it from Congressional inquiry but he can not. Similarly, with that aspect of Executive privilege which protects confidential advice-giving: The purpose of this protection is to enable advice-giving to be frank and forthright. It is hardly conducive to these values to maintain that advice can be protected only up to the date when a particular President leaves office; and that once he is gone the most unguarded statements of his advisers cannot be protected.

A look at the historic record discloses what one would expect, that no such limitation upon the privilege has been observed. The following instances should suffice: In 1846 President Polk refused a request of the House of Representatives to furnish it "an account of all

payments made on President's certificates . . . from the 4th day of March 1841 until the retirement of Daniel Webster from the Department of State," a period which included the Presidency of President Harrison and a part of that of President Tyler. Richardson, The Messages and Papers of the Presidents, Vol. IV, pp. 431-434. During the investigation of the attack on Pearl Harbor by a Joint Congressional Committee in 1945, President Truman reserved the right to claim privilege in certain areas, and the Committee's minority report indicates that there were some limitations on the access to information. Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Federal Bar Journal 103, 143-146. During the investigation by the Senate Committee on Armed Services of the Military Cold War Education and Speech Review Policies, which covered practices during the Eisenhower and Kennedy Administrations, President Kennedy prohibited the disclosure of information not limited to acts which had occurred during his own tenure. Military Cold War Education and Speech Review Policies, Hearings before the Special Subcommittee of the Committee on Armed Services, United States Senate, 87th Cong., Second Session, pp. 508, 725.

I understand that another reservation concerning the availability of Executive privilege in this case voiced by some Members of the Committee pertains to a supposed requirement that the privilege must not only be asserted by the President but must be communicated by him directly to the Committee involved. This is again a limitation I confess I have never

heard of. It would indeed seem strange that, although the Congress may delegate not merely the communication of a demand, but even the assertion of the demand, to one of its Committees, and although that Committee may serve the demand upon one of the President's subordinates rather than upon the President himself; nevertheless, the President must both personally decide upon the response of privilege and must personally convey it to the requesting Committee. There is again nothing in the historical record which would support such a practice.

The normal form of a claim of privilege is a letter from the President instructing a department head not to disclose certain information, with communication of the prohibition to the Congressional Committee involved. For example: President Eisenhower's claim of privilege during the Army-McCarthy investigation took the form of a letter to the Secretary of Defense. Public Papers of the Presidents, Dwight D. Eisenhower 1954, p. 483. During the Senate investigation of Military Cold War Education and Speech Review Policies, President Kennedy's claim of privilege took the form of letters addressed to the Secretaries of Defense and State. There have been, of course, instances where Presidents have communicated directly with Committees, especially where requests were directly addressed to them; the examples set forth above, however, indicate that such procedure is not mandatory.

Finally, it may be noted that the assertion of Executive privilege against the Judicial Branch, which is another facet of the same doctrine, has been

sanctioned by the Supreme Court when made by Cabinet Secretaries without even evidence of specific Presidential consideration of the particular assertion, much less direct Presidential communication, United States v. Reynolds, 345 U.S. 1, 7-8 (1952). See also Kaiser Alum. & Chem. Co. v. United States, 141 Ct. Cl. 38, 42-43 (1958).

The simplicity of the Executive privilege issue in the present case is marred by the fact that the final assertion was not made to the Committee until the day of (probably after the hour of) the original contempt vote. In the present circumstances, however, I think this is inconsequential. Surely the Presidential power to assert the privilege carries with it the Presidential ability to take the time necessary to consider its assertion. The four days (two business days) accorded to find the documents, identify the privileged material, obtain expert advice concerning the privilege and -- as the President desired -- to devote the President's own attention to the matter, was on its face insufficient. And the record shows a refusal of the Committee to provide a reasonable period of grace. In my view, it is clear that the assertion in the present instance was both proper and timely.

Even if it should be assumed, moreover, that the assertion of the privilege was improper, there still remains the issue of whether Secretary Kissinger could properly be held to be contumacious of the

Congress for having obeyed the President's instruction on the matter. At least where the claim of privilege is colorable, I think that highly unlikely. The Secretary, after all, is a subordinate of the President and must be permitted to follow apparently lawful instructions unless the Executive Branch is not to become a house divided. Indeed, it may be of questionable constitutionality to subject an Executive Branch officer in a matter such as this to the unavoidable risk of criminal liability for obeying an apparently lawful directive of the President.

I wish to make one final point, Mr. Chairman, which is in a sense quite technical and yet at bottom reflects basic considerations of fairness. I have been seeking this morning to induce this Committee to reconsider an action it has already taken -- a task which, as any lawyer knows, is an up-hill struggle. It is to my knowledge the invariable practice of Congressional committees -- and indeed a practice that may be required by due process -- to provide an opportunity for explanation and final categorical refusal before a citation for contempt is voted. This privilege was not accorded in the present case. I believe that if the Executive Branch had had the opportunity, before your action was initially taken, to provide the explanations for apparent non-compliance, and the reasons for the areas of genuine non-compliance which existed in the present case, you might have been disposed to reach a different result. Since we did not have that opportunity, I hope you will not merely reconsider the matter but consider it anew, without the inertia that a decision once taken normally provides. In the one area covered by the State Department subpoenas, I hope the Committee will see that the spirit of mutual accommodation which must enliven our system of Government counsels that this Committee not press for the production of material so close to the heart of the Executive process -- just as, in many other areas during this inquiry (the SALT subpoena being one of them) the President has declined to make any assertion of Executive privilege though it might well have

been available. As to the other areas covered by these three subpoenas; we have, I believe, now made entire compliance with respect to the SALT documents and are willing to discuss possible alternatives with respect to the 40 Committee subpoena. I am confident that these matters can be worked out; I believe that the actions which Executive Branch officials have taken up until this time have not been meant to be contumacious of the role or the functions of this Committee; and I am hopeful that you will see that it would harm rather than benefit the nation to proceed with the present resolutions.