MEMORANDUM

September 23, 1975

For the past several days Jeff Whieldon and I have been examining some of the legal problems presented by the failure of compliance with the subpoena served upon the Director of Central Intelligence on the "Tet" offensive.

By resolution of the House Select Committee at a Special Meeting on September 10, 1975, the Committee authorized the Chairman to sign and issue a subpoena to the Director of Central Intelligence for certain information concerning the Tet offensive of 1968. The subpoena was drawn and signed by the Chairman on September 12, 1975. (A copy of the subpoena is annexed hereto.) The subpoena was returnable at the office of the Select Committee on Wednesday, September 17, 1975 at 10:00 a.m.

Telephone calls were received on Tuesday, September 16, and even the morning of September 17, asking for an extension of time to comply with the subpoena. A. Searle Field and Aaron B. Donner indicated to Mitchell Rogovin, Esq., who called, that we had no authority to modify the terms of the Committee's subpoena. During that morning a letter from Mitchell Rogovin, as attorney for the Director of Central Intelligence, which was delivered to the offices of the staff, was directed to the Chairman and referred to certain accompanying documents and in substance indicated that the material had been "sanitized", that some "extremely sensitive" material had been omitted and that the material that was delivered was "on loan" to the Committee and could not be released without prior consent of the Director of Central Intelligence.

Chairman Pike wrote a letter to Rogovin which in substance rejected the "proffer" and stated that a partial compliance with the subpoena with conditions is non-compliance in his view and indicated that he would take this matter up with the full Committee.

As stated before, the subpoena of September 12 is directed to the Director of Central Intelligence. The Acts of 1947 and 1949 (copies of which are annexed) indicate this to be the official title, no matter which hat he may be wearing, i.e., the head of the Central Intelligence Agency is the Director of Central Intelligence and the DCI is head and coordinator for the Intelligence Community. Documents requested in the subpoena are primarily CIA documents in the opinion of the staff, and therefore the subpoena is directed to Colby as head of the Central Intelligence Agency.

This is an important distinction since the CIA is a creature of the Congress, created by statute of Congress, as opposed to an agency such as the National Security Agency which is created by Executive Order. In other words, notwithstanding that the agency is a member of the Executive Branch, it is created by Congress. If the subpoena is defied it raises the spectre of Frankenstein. That is,

Cong R Hns Office: Loen + Leppert Files, b.14, f. "Intell House Select Com: subpoenas - General."
Photocopy from Gerald R. Ford Library

Legal Analysis

In principle, and affirmed by the case law, subpoenas of Congressional Committees have been given a broad degree of approval by our courts. Generally, in the exercise of its legislative functions "the broadest degree of fact-finding" is permitted by such Committees. The limitations placed upon such committees have been few and limited solely to a broad area of "scope of inquiry" and certain First Amendment rights of individuals. (See Eastland v. U.S. Serviceman's Fund, et al., ___ U.S. ___, which is annexed hereto.) This is a recent case, May 27, 1975, which reaffirms the the right of the Senate Subcommittee on Internal Security to have the broadest scope of inquiry against an individual, in this instance a bank. However, the long line of cases affirming the rights of Congressional Committees against individuals and the attitude of the courts towards the enforcement of these subpoenas does not represent an accurate indication of its views of enforcement of subpoenas against the Executive Branch.

These cases have been treated entirely differently. In recent times, the foremost case has been a series of cases that are generally described as the Senate Select Committee v. Nixon. In the first case (366 F. Supp. 51, a copy of which is annexed hereto), the Senate Select Committee went to court in its own name and in the name of the United States. (There is a 1928 Resolution of the Senate authorizing Senate Committees to go to court to enforce their subpoenas; apparently, there is no similar resolution of the House. In any event, the Rules of this Committee require consent of the House before subpoenas are enforced.) In this case, the Senate Committee sought an enforcement of its subpoena by an action for Declaratory Judgment and Mandamus. The court first held that they could not sue in the name of the United States because a suit on behalf of the United States could only be instituted by the Department of Justice.

Next, mandamus did not lie for the enforcement of subpoenas since it was only appropriate for ministerial acts and compliance with a subpoena was not deemed to be a ministerial act, at least against a high-level official. There were other bases under which jurisdiction was sought which were denied by the court. In short, there was "standing" of the Committee to sue, but the court dismissed because it lacked jurisdiction and did not reach the question of justiciability or the merits of the case.

It is the view of ABD and JW, and confirmed in a telephone conversation of ABD with Mr. Raoul Berger, that Judge Sirica "copped out" and sought every means possible to avoid a decision of the case. It is our opinion that he could have, almost on his own motion, amended the pleadings to give the court jurisdiction instead of taking such a highly technical approach to the case. Be that as it may, this case was not appealed.

Photocopy from Gerald R. Ford Library

The Senate Select Committee then, in an effort to solve the jurisdiction question, returned and had a bill passed in both houses expressly conferring jurisdiction (Public Law 93-190, a copy of which is annexed hereto). However, it should be noted that this law only applies to this case.

Next, there is the second case of the Senate Select Committee v. Nixon (370 F. Supp. 521, a copy of which is annexed hereto) on a motion for summary judgment. This case came up before Judge Gesell. Of course, the question of jurisdiction had been resolved by the Act of Congress, and the court held that it was justiciable and not a political question. However, Judge Gesell instituted a probably novel doctrine in that it imposed upon the Committee to demonstrate a "pressing need" for the subpoenaed material. It should be added at this point that this seems to be the first time this question was raised and referred to the fact that the matter was already before the House and corollary matters in the judicial branch. This also seems to run contra to previous decisions.

Next, Judge Gesell relates to "pretrial publicity". This is a judicial concept and, to this writer's mind, had never been raised before with reference to a Congressional subpoena. More important, it represents a willingness by a court to consider a question as to what a Committee will do and what it should do with material that it has subpoenaed. Again, up until this time, it was an irrelevancy as to what a Committee would or should do with the material it had subpoenaed as long as it was within the scope of its inquiry. (See Berger, Columbia Law Review annexed, at p. 875, where he says, "such a conclusion represents an unwarranted interference with Congressional oversight powers".) In short, Judge Gesell denied the enforcement of the subpoena.

This case was appealed (498 F. 2d 725, a copy of which is annexed hereto). The Court of Appeals in effect affirmed the argument of Judge Gesell's decision of "no pressing need". Again, Raoul Berger, in the Law Review article (cited supra, p. 875), stated "...it rested its decision on the insufficiency of the Committee's showing that the subpoenaed evidence was 'demonstrably critical to the responsible fulfillment of the Committee's functions'".

While it is not square on point, and in a different line of cases, the Supreme Court case of U.S. v. Nixon (418 U.S. 683, annexed hereto) should be referred to. This case specifically involved the question of Executive Privilege and the President, and more or less, was directed to confidentiality of communications. The case was narrowly decided that Executive Privilege must yield in the face of evidentary requirements of a criminal prosecution. There was a willingness of the court to indicate that if other grounds were presented such as military or diplomatic matters, or national security Executive Privilege would hold. It is a cause of apprehension that this reasoning might be extended to pervade consideration of subpoena of Executive agencies.

Again, generally, it is recommended that the Columbia Law

Photocopy from Gerald R. Ford Library

were accepted and could pervade to the consideration of cases involving other agencies of the Executive Branch, there could be no Congressional oversight.

In all events, from recent cases, even if the Committee passed the question of standing, jurisdiction and justiciability, it is possible that the case could be decided adversely or, in the alternative, a "conditional order" be granted, i.e., subpoenaed materials must be supplied; however, resort must again be had to the court before materials could be released. ABD and JW think that this is an extremely dangerous precedent as relating to the function of Congress. Congress is called upon to fund these agencies and has no ability through the GAO to audit its functions nor find out whether or not these agencies may or may not be operating in violation of the law, committing criminal acts or acting contrary to the express authorization of the agencies or of Congress.

In this instance it should also be pointed out that it is contemplated by statute that the argument of "national security" or "classified documents" is no defense to compliance with the subpoena. This is given statutory authority in Title 18, Sec. 798(c):

> (c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committees thereof.

Photocopy from Gerald R. Ford Library

Possible Methods of Enforcement of Subpoena

First, again, attention is directed to the Columbia Law Review article (cited supra), and particularly to the section beginning on p. 889, entitled "Enforcement Procedure for Congressional Subpoenas."

It may be possible (after consent or approval of the House) for the Committee to come to court itself without a special act of Congress. however, the procedures are not clear at this moment, and, based upon precedents, it seems to be a difficult and hazardous course of action by which to bring about the enforcement of the subpoena.

The next, and more classic method, would be for the Committe to render a finding that there has been a failure to comply with the subpoena and file a report with the House setting forth the facts on non-compliance. Parliamentarian Bill Brown advised that it is then up to the House and the Speaker to decide on a remedy if a contempt citation is voted, as in the case of G. Gordon Liddy.

The common law power of Congressional arrest is also available. According to private conversations with Raoul Berger, it is

desirable since it demonstrates the jurisdiction of the House to enforce its own subpoena without resort to the judiciary and establishes the credentials of the House as a co-equal branch of government. It also demonstrates the ability of the House to handle its own affairs. However, as a caveat, it has not been used in many years and does constitute almost a novel approach.

The alternative method provided by statute is that the Speaker can certify the contempt and refer the matter to the U.S. Attorney whose duty it shall be to present the matter to a grand jury for criminal contempt proceedings (see Title 2, Sec. 192, 193, 194, annexed hereto). Realistically, the prospect of a vigorous enforcement of a criminal contempt proceeding by the Executive Branch (Department of Justice) against William Colby as Director of Central Intelligence does not seem to be a fruitful method of the enforcement of the subpoena.

Finally, we have considered the possibility of a Resolution of Inquiry. Again, resort must be had to the Parliamentarian, whose views are of extreme importance. He advised us that a Resolution of Inquiry cannot be referred to a Select Committee and would have to be referred to a standing committee with legislative responsibility of the subject matter, i.e., House Armed Services Committee.

This is not intended to be an exhaustive analysis of the la and represents preliminary research on this question. A further analysis will wait upon further instructions.

Before concluding, it is again urged that the Members of the Committee, or a member of their staff, spend the time to carefully read the article by Raoul Berger in the Columbia Law Review referred to herein. It represents the best analysis of the subject that we have found to date.

Photocopy from Gerald R. Ford Library

Photocopy from Gerald R. Ford Library

[ 9/23/75 ]

Memorandum as to Some of the Issues Raised

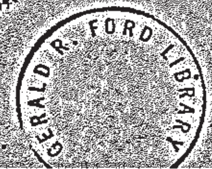
1. On the power of Congress to declassify documents --

It can be said that Congress does not have the right to declassify documents, and most certainly not without congressional legislation. It can be urged that it is constitutionally impermissible for Congress to declassify documents classified by the President in the national security and foreign affairs area. One can cite Justice Stewart's opinion (joined by Justice White) in the Pentagon Papers, 403, U.S. 713, 729-30, and the Nixon case, 418 U.S. 683, 704 (1974).

But the argument about this right somewhat misses the point. A Congressional committee may have no right to declassi a document, but it has the power to publish the document in its possession. The publication then places the writing in the public domain and works the declassification--a tantamount declassification. There is no legal remedy through the courts for the Executive to punish or restrain the publication. See Gravel v. U.S.606(1972); Doe v. MacMillan 412 U.S. 306 (1973).

2. On the right of the President to withhold documents whose disclosure would be harmful to the interests of the United States when there is no assurance that necessary confidentiality will be maintained.

The Supreme Court in the Nixon case for the first time explicitly recognized that there is an executive privilege constitutionally based. In a more general way, the privilege to withhold may arise out of statutory assigned duties, but, of course, those statutes can be changed. For the situation at hand, it seems clear that the President faced with the threat and the likelihood of the exercise of the congressional committee's ability to accomplish public dissemination, has the right and the duty to withhold particularly sensitive documents until he has received satisfactory assurances. If the document is sufficiently sensitive, it is almost certain this right would be upheld against a subpoena. But the necessity for confidentiality must be well based. I do not believe the withholding would be upheld as a sanction but rather as a necessary protection of a



particular document because of the effects of its disclosure. It would be well to recognize even when a strong claim of privilege can be advanced, that the scope of the privilege is not sufficiently defined in cases, that to some extent it is constitutionally based on the necessity to protect the decision-making process, but that when so viewed it may be quite narrow, that it is broader for those areas constitutionally assigned to the President, but in those areas, the Congress also has powers.

3. The suggested approach

The approach should be one of seeking to obtain from the Select Committees appropriate assurances that they will maintain the confidentiality of the documents where in the judgment of the Executive disclosure would be seriously harmful to the interests of the nation.

It should be made clear continually that the Executive is not seeking to withhold documents from the Committees, although in collaboration with the Committees there should be agreements (as there has been with the Church Committee) on certain most sensitive information which may be deleted.

But that the right of the Committees (Select Committees) to have the documents (1) can be suspended if the Committee's conduct and lack of assurances threatens the security of the information, and (2) is not tantamount to a right in the Committee to release the information.

Since as the President has indicated, classification may have been overused, it would be appropriate to make sure that documents withheld do come within the President's privilege.

One must expect that in a court test the privilege may be narrowly defined in terms of particular documents or parts of documents.

9/23/75
EHL

Photocopy from Gerald R. Ford Library

WH : Office of Counsel to the President

("EHL is unknown)    Sept. 23, 1975

Legal advice on dispute w/ Pike Committee over declassification

GRFL: GRFP: Max L. Friedersdorf Files, Subject Series

box 10 f. "CIA Investigation (2)."

National Security Archive,

Suite 701, Gelman Library, The George Washington University,

2130 H Street, NW, Washington, D.C., 20037,

Phone: 202/994-7000, Fax: 202/994-7005, nsarchiv@gwu.edu