September 22, 1975

MEMORANDUM FOR: William Colby, Director of Central Intelligence

RE: Legal Defenses to House Committee Suit to Enforce Subpoena

On September 11, 1975, the House Select Committee on Intelligence voted, over the objection of Counsel for the Director of Central Intelligence, to make public certain classified information obtained from the CIA in connection with the Committee's investigation of intelligence activities. In response to this release of classified information, President Ford, on September 12, directed the CIA and other intelligence agencies not to provide any further classified information to the Committee until the Committee "satisfactorily alters its position" with respect to the manner in which classified information would be made public. Consequently, when the Committee subpoenaed certain CIA documents on September 12, the Agency proffered the requested documents subject to the condition that they not be declassified by unilateral action of the Committee pending resolution of the underlying dispute. The Committee has refused to accept this condition.

At present, the Committee is considering whether to seek judicial enforcement of its subpoena. The

purpose of this memorandum is to determine whether, if the Committee attempts to enforce its subpoena, the Agency can successfully defend against such an enforcement action, or can otherwise preserve the confidentiality of its classified information.

I. Justiciability

Assuming that the Committee goes to court, a threshold question is whether the court would refuse to assume jurisdiction on grounds that the Committee's action would raise non-justiciable "political questions." Although it is possible to make a colorable argument that a suit brought by the Committee would raise political questions, the clear weight of authority holds that such a suit would be justiciable and that the court should not refuse to assume jurisdiction.

The leading case on this point is United States v. Nixon, 418 U.S. 683 (1974). In that case the Supreme Court considered whether the President of the United States could be compelled, by means of a third-party subpoena duces tecum, to produce certain documents and tape recordings in his possession. The

President resisted the subpoena on grounds that the specified materials were subject to his "executive privilege," and therefore, were immune from disclosure. Moreover, the President contended that the entire matter was non-justiciable because it was essentially an "intra-branch" dispute solely within the executive branch of government; in this regard, he pointed out that the materials in question were actually sought by the Watergate Special Prosecutor, a presidential appointee and member of the executive branch.

The Court rejected the President's contention that the matter was non-justiciable. In so doing, the Court stressed that where a government official, acting within the scope of his authority, seeks the production of certain evidence from the executive, and where the President refuses to provide it, the controversy presented is a justiciable one. The Court said:

> "In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. [The evidence here at issue] is sought by one official of the Government within the scope of his express authority; it is resisted by the Chief Executive on the ground of his

> duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are 'of a type which are traditionally justiciable.'" 418 U.S. at 696-97.

United States v. Nixon was cited as controlling authority in Senate Select Committee on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974). In Senate Select Committee, the district court was confronted by the precise issue that is involved here: whether a suit by a committee of Congress to obtain enforcement of a subpoena, calling for information which the President has refused to provide, constitutes a justiciable controversy. In that case, the Senate Watergate Committee sought access to five tape recordings in the President's possession, which, despite a Committee subpoena, he refused to provide. The President contended that the court could not enforce the subpoena because the case raised an issue that "constitutes a non-justiciable political question." 370 F. Supp. at 522. The court rejected this argument:

> "The President at the outset contends that the issue before the Court 'constitutes a non-justiciable political question,' but the decision of the United States Court

> of Appeals for the District of Columbia Circuit sitting en banc in [United States v. Nixon] is squarely to the contrary and no extended discussion is required. [The case of Baker v. Carr] establishes the tests for determining the existence of a 'political question,' and application of these tests leaves no doubt that the issues presented in the instant controversy are justiciable." 370 F. Supp. at 522.

Based on these precedents, it must be conceded that if the House Select Committee on Intelligence goes to court to seek enforcement of its subpoena, the issue before the court will be justiciable. Given the justiciability of the suit, two possibilities exist for preserving the confidentiality of the Agency's information: First, the Agency could attempt to secure a protective order from the court, pursuant to which the information in question would be provided to the House Committee, but Committee members, including staff, would be subject to a judicial decree prohibiting public disclosure of the information; second, the Agency could argue that, absent a protective order or other appropriate assurance that confidentiality will be preserved, the court should simply refuse to enforce the Committee's subpoena. Each of these arguments is discussed below.

II. Protective Order

As indicated, one possible means of preserving the confidentiality of the Agency's classified information is to obtain a protective order from the court prohibiting Committee members or staff from disclosing such information. The major problem with this approach is that the court may be prohibited by Article I, Section 6, Clause 1 of the Constitution from imposing a protective order on a member of Congress or his staff. Article I, Section 6, Clause 1 provides:

> "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House they shall not be questioned in any other Place." (Emphasis added.)

The underscored language, commonly referred to as the Speech or Debate Clause, has been consistently construed by the courts to prohibit judicial interference with the right of a member of Congress to speak about legislative matters, whether on the floor of his

respective house, or in committee. Although no court has specifically ruled on the question of whether members of Congress can be subjected to protective orders to preserve the confidentiality of classified information, the long line of cases interpreting the Speech or Debate Clause strongly suggests that it would be very difficult to persuade any court to impose limitations on what a Congressman may say in Congress, in committee, or even in a written committee report to his fellow members.

Judicial reluctance to interfere with a Congressman's right to speak -- even when his speech includes the release of classified information -- is best illustrated by the decision of the Supreme Court in Gravel v. United States, 408 U.S. 606 (1972). In that case, Senator Gravel, Chairman of the Subcommittee on Buildings and Grounds of the Public Works Committee, convened a special nighttime session of his subcommittee, where he read extensively from the Pentagon Papers, a classified Defense Department study on the Vietnam War. Gravel then placed the entire 47 volumes of the study in the public record. Finally, Gravel made arrangements with

Beacon Press for private republication of the classified material. The Justice Department, in response, convened a grand jury to investigate the release and publication of the study. In connection with this investigation, a member of Gravel's staff was subpoenaed to testify before the grand jury.

Gravel moved to quash the subpoena on grounds that any questioning of the staff member about his (Gravel's) actions would constitute executive and judicial interference with his rights under the Speech or Debate Clause. Gravel claimed that the Clause protected him not only from any criminal or civil liability arising from his conduct at the subcommittee hearing, but also from any questioning about his conduct. The Supreme Court agreed: "To us this claim is incontrovertible." 408 U.S. at 615. The Court explained:

> "The Speech or Debate Clause was designed to assure a co-equal branch of government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects members against prosecutions that directly Impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer -- either in terms of questions or in terms of defending himself

> from prosecution -- for the events that occurred at the subcommittee meeting." 408 U.S. at 616.

The Court observed that assuring wide freedom of speech, deliberation and debate to legislators requires protection not only from executive intimidation but also from interference by the judiciary. In this regard, the Court emphasized that the "fundamental purpose" of the Speech or Debate Clause is:

> ". . . freeing the legislator from executive and judicial oversight that realistically threaten to control his conduct as a legislator . . . ." 408 U.S. at 618.

Thus, the Court refused to permit Gravel's aide to be questioned before the grand jury about the Senator's conduct at the subcommittee hearing. Presumably, such questioning would have constituted a threat to "control [Senator Gravel's] conduct as a legislator."

There are two major distinctions between the Gravel case and the present situation. First, in Gravel, the Court dealt with the exercise of executive and judicial authority against a legislator on account of his speech after he had spoken while, in the present situation, the court would be asked to exert its authority

to restrain a legislator's speech before he has spoken; second, the nature of the interference with legislative speech in Gravel consisted of questions to an aide concerning the Senator's speech while, in the present situation, the nature of the interference would be a judicial decree preventing legislators from receiving certain information, concededly relevant to a legitimate legislative inquiry, unless they refrained from speaking.

Based on the Supreme Court's reasoning in Gravel, the two distinctions noted above would appear to militate against the issuance of a protective order. First, it would appear that a prior restraint on speech constitutes a greater interference with a legislator's freedom to speak, deliberate and debate than calling him to account for his words after they are spoken; at least in the latter situation the legislator would not be faced with the "chilling effect" of risking violation of a judicial decree whenever he began to speak. Second, depriving a legislator of information relevant to a legitimate legislative inquiry would seem to comprise a greater interference with his legislative conduct than merely questioning an aide about his speech;

depriving the legislator of information which could be essential to his role in preparing or voting on legislation goes right to the root of his ability to function as a legislator.

Thus, in light of the Gravel decision, it would be extremely difficult to persuade a court to issue any order whose purpose is to instruct a member of Congress to limit his speech either on the floor of his house or in committee. Moreover, it is unlikely that a court would attempt to limit the language that can be employed in a committee report; the Speech or Debate Clause has been held to protect committee reports as well as congressional speech. This interpretation of the Clause was expressed as early as 1881, in Kilbourn v. Thompson, 103 U.S. 168. In that case the Court said:

> "The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to do things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204.

The Court repeated this view in Gravel:

> "The Clause . . . speaks only of 'Speech or Debate,' but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. Committee reports, resolutions, and the act of voting are equally covered..." 408 U.S. at 617.

Although the Speech or Debate Clause prohibits judicial interference with committee reports to Congress, it does not provide immunity from judicial oversight for the public printer in printing and disseminating copies of committee reports to the public. In Doe v. McMillan, 412 U.S. 306 (1973), various members of Congress and the public printer were sued for libel based on the contents of a committee report that was disseminated, not only to other members of Congress, but also to the public. The Court distinguished between a committee report to Congress, which it said could not be the subject of judicial inquiry, and printing of the report for dissemination to the public, which it held not to be protected by the Speech or Debate Clause.

The Speech or Debate Clause has also been found not to apply to private republication of otherwise-protected congressional speech. In Gravel, itself, the

Court held that the Senator's conduct in arranging for the private republication of the Pentagon Papers was not protected by the Speech or Debate Clause; thus his aide could be asked questions about this subject.

In sum, although it might be possible to persuade a court to issue an order preventing the printing and dissemination of a committee report to the public, or preventing a Congressman from arranging for the private publication of classified information, it is extremely unlikely that any court could be persuaded to order a member of Congress not to say certain things on the floor of his house, in committee, or in a written committee report to his fellow members.

III. Resisting Enforcement

The second alternative is to argue that, in the absence of appropriate safeguards to preserve the confidentiality of the Agency's information, the court should simply refuse to enforce the Committee's subpoena. There are two possible bases for making such an argument:

1. The Agency can argue that the President has an absolute privilege to withhold from Congress any information when he determines that disclosure of such information is contrary to the public interest;

2. In the alternative, the Agency can argue that the President has a qualified privilege to withhold such information from Congress, and that it is up to the courts, upon close scrutiny of the information, to determine whether it is sufficiently sensitive to permit the President to withhold it from Congress.

Each of these arguments is discussed below:

A. Absolute Privilege

Historically, at least twenty-one Presidents, dating back to George Washington, have invoked what they considered an absolute privilege to withhold information from Congress when they, in the exercise of their own judgment, determined that the national interest required nondisclosure. Every President since Franklin Roosevelt has invoked this privilege. In

1941, President Roosevelt directed the FBI not to comply with a House committee request for reports of investigations of possible subversive activities in connection with certain labor disputes. In support of the President's action, Attorney General Robert Jackson issued an opinion in which he said:

> "It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest." 40 Ops. Atty. Gen. 46 (1941).

President Truman invoked this privilege in his refusal to provide Congress with information relating to loyalty investigations of government employees. */ President Eisenhower invoked the privilege in refusing to provide Senator McCarthy's Internal Security subcommittee with similar information. **/ It was during the Eisenhower presidency that the most extreme claim

*/ New York Times, May 18, 1954 at 24.

**/ Id. at 1, 24.

was advanced with respect to the scope of the executive privilege to withhold information from Congress. Under President Eisenhower, the Justice Department published a study that argued that the furnishing of information by the executive branch to Congress was solely a matter of comity and not a matter of constitutional duty. See Developments in the Law, The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1214 (1972).

More restricted views of executive privilege were advanced during the administrations of Presidents Kennedy, Johnson and Nixon. Id. Nevertheless, during the Johnson and Nixon presidencies, reports concerning national defense and foreign affairs matters were often denied Congress on the grounds that they contained highly sensitive military or diplomatic secrets. Id. at 1213. In particular, the Pentagon Papers, ultimately obtained and released by Senator Gravel (as well as the New York Times, Washington Post, and Boston Globe) were denied to the Senate Foreign Relations Committee by the Defense Department on grounds of sensitivity. Id.

Despite the long history of Presidential invocation of an absolute privilege to withhold information based on an exclusive executive determination that the national interest requires nondisclosure, the courts have never recognized such a privilege. In fact, the courts have uniformly rejected the argument that the executive branch alone has the authority to determine whether or not to disclose information in its possession. In United States v. Reynolds, 345 U.S. 1 (1953), for example, plaintiffs sued the government as a result of the crash of an Air Force plane that had taken flight for the purpose of testing secret electronic equipment. Plaintiffs sought disclosure of the Air Force's official accident investigation report. The Secretary of the Air Force refused to disclose the report on grounds that it contained confidential information which, in the public interest, should not be disclosed. The Secretary refused to even permit the district court judge to examine the report in chambers on grounds that "executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the

public interest." 345 U.S. at 6. The Court rejected this argument, holding that it is for the judiciary, not the executive branch, to determine whether the executive can withhold information or whether it must make disclosure. The Court said:

> "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." 345 U.S. at 8.

The Court added:

> "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9-10.

In Committee for Nuclear Responsibiliy v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971), the Chairman of the Atomic Energy Commission refused to provide plaintiffs, who sought to enjoin a planned underground nuclear test, with certain documents relating to the anticipated environmental impact of the test. The Chairman contended that the documents were subject to executive privilege because it would not be in the public interest to disclose them. Furthermore, the Chairman argued that his claim of executive privilege was not reviewable by the

court because his determination that disclosure would not be in the public interest "is conclusive upon the court." 463 F.2d at 792. The court flatly rejected the Chairman's argument:

> "In our view, this claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law." 463 F.2d at 792.

The court explained the reason for this holding:

> "An essential ingredient in our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive. Any claim to executive absolutism cannot override the duty of the court to assure than an official has not exceeded his charter or flouted the legislative will." 463 F.2d at 793.

The claim of absolute, exclusive executive privilege to withhold information was also advanced in United States v. Nixon, supra, in support of President Nixon's refusal to comply with a subpoena compelling him to produce various documents and tape recordings. The decision of the Court of Appeals in that case dealt extensively with the issue of the President's power to claim an absolute executive privilege. The court began its analysis of this issue by recognizing that:

> "Presidents and Attorneys General have often said that the President's final and absolute assertion of Executive privilege is conclusive on the courts." Nixon v. Sirica, 487 F.2d 700 at 714.

However, citing the Supreme Court's decision in Reynolds, supra, and its own previous decision in Seaborg, supra, the court launched into an extensive refutation of this contention. It is worth quoting at length:

> "Whenever a privilege is asserted, even one expressed in the Constitution, such as the Speech and Debate privilege, it is the courts that determine the validity of the assertion and the scope of the privilege. That the privilege is being asserted by the President against a grand jury subpoena does not make the task of resolving the conflicting claims any less judicial in nature. Throughout our history, there have frequently been conflicts between independent organs of the federal government, as well as between the state and federal governments. When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them -- one Supreme Court. To leave the proper scope and application of Executive privilege to the President's sole discretion would represent a mixing, rather than a separation, of Executive and Judicial functions. A breach in the separation of powers must be explicitly authorized by the Constitution, or be shown necessary to the harmonious operation of 'workable government.' Neither condition is met here. The Constitution mentions no Executive privileges, much

> less any absolute Executive privileges. Nor is an absolute privilege required for workable government. We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch. But this is an argument for recognizing Executive privilege and for according it great weight, not for making the Executive the judge of its own privilege." 487 F.2d at 714-15.

The Supreme Court affirmed the decision of the Court of Appeals. It, too, rejected the President's claim that it is the exclusive prerogative of the chief executive to determine when executive privilege may be invoked. In so doing, the Court stressed that, in each situation in which executive privilege is invoked, it is for the courts to determine whether or not the invocation is valid:

> "Notwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the federal courts by Art III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government . . . . We therefore reaffirm that it is 'emphatically the province and

> the duty' of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." (Emphasis added.) 418 U.S. at 704-05.

United States v. Nixon, and each of the other executive privilege cases discussed thus far, involved attempted assertions of an absolute privilege where information or materials were sought by private civil litigants or by the prosecution in a criminal proceeding. None of the cases discussed heretofore involved the assertion of an absolute executive privilege as a justification for withholding information from Congress. There is only one case in which such an assertion was made -- Senate Select Committee v. Nixon, supra -- and in that case, as well, the assertion was rejected.

As indicated, in Senate Select Committee, the Senate Watergate Committee sought to enforce a subpoena against President Nixon, who refused to provide the Committee with certain tape recordings. The President argued that he was not required to comply with the subpoena because, in his determination, the public interest required nondisclosure of the tape recordings. In response to this argument the court said:

> "[T]he Court rejects the President's assertion that the public interest is best served by a blanket, unreviewable claim of confidentiality over all Presidential communications. .and the President's unwillingness to submit the tapes for the Court's in camera ex parte inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds." 370 F. Supp. at 522.

Thus, every case in which a court has considered the claim of a President or the head of an executive agency to an absolute executive privilege to withhold information has resulted in a decision emphatically rejecting such claim. As shown, in circumstances precisely akin to those in the present case (i.e., in Senate Select Committee v. Nixon) the claim of absolute executive privilege to withhold information from Congress was clearly rejected. In such circumstances, it must be conceded that there is absolutely no firm legal basis for arguing that the court should refuse to enforce the House Committee's subpoena on grounds that the President has an absolute privilege to withhold information simply because he determines that disclosure would be contrary to the public interest.

B. Qualified Privilege

While there is no solid legal basis for arguing that the President has an absolute privilege to withhold information from Congress, there is, on the other hand, a very strong basis for asserting a qualified privilege. It has been firmly established that, when the court approves, the President can refuse to provide information to Congress.

The leading case in support of this principle is Senate Select Committee v. Nixon, supra. As indicated, the court, in that case, rejected the President's claim of absolute privilege to withhold information. However, despite this ruling, the court refused to enforce the Committee's subpoena because, it held, the public interest in preserving the confidentiality of the information in question outweighed the Committee's need for the tape recordings. The court based its conclusion on the fact that public disclosure of the information could have resulted in excessive pre-trial publicity and interfered with the criminal prosecution of individuals already under investigation by a federal grand jury. The court

stressed that it was this interest in due process and the orderly administration of justice which tilted the balance against disclosure:

> "The public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact finding in the criminal justice system. Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations. But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration." 370 F. Supp. at 523.

Thus, Senate Select Committee stands for the proposition that where the President can point to a discernible public interest in nondisclosure of certain information, and where this interest outweighs a congressional committee's need for the information, the court will support the right of the President to withhold it. However, the circumstances in Senate Select Committee were somewhat unique; nondisclosure of the information in question was permitted only because of the need to protect the

rights of individuals under criminal investigation who might be prejudiced by disclosure. Absent this unique set of circumstances, it is questionable whether the President will be able to demonstrate a compelling interest in nondisclosure. In this regard, there is language in some Supreme Court opinions that suggests that where information in question relates to military or foreign relations matters, the courts should show deference to the President's decision to withhold such information. For example, in United States v. Reynolds, supra, the Court said:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10.

Further, in United States v. Nixon, supra, the court said, with respect to "military or diplomatic secrets":

> "As to these areas of Article II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710.

Although the Supreme Court has acknowledged that the judiciary should show deference to the President's qualified privilege to withhold information relating to military or diplomatic secrets, it must be noted that these cases did not involve attempts by the President to withhold military or diplomatic information from Congress. Indeed, it is one thing to withhold such information from a private civil litigant (as suggested in Reynolds) or a prosecutor in a criminal case (as suggested in United States v. Nixon) and quite another to withhold it from Congress, which has important Constitutional responsibilities in the areas of defense and foreign relations. It has been pointed out, for example, that:

> "Congress must have information about national security matters in order to carry out its constitutional functions. These include appropriating funds for defense and foreign aid, supervising government expenditures to guard against waste and inefficiency, and evaluating the adequacy of the nation's defense posture and the wisdom of its military commitments to other nations." Developments in the Law, supra at 1207-08.

Moreover, the Supreme Court has repeatedly expressed the view that congressional committees should be accorded "far-reaching" powers to inquire and obtain information. For example, in Barenblatt v. United States, 360 U.S. 109 (1959), the Court said:

> "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." (Emphasis added.) 360 U.S. at 111.

Thus, even assuming that the court in the present case acknowledges the President's qualified executive privilege, it is by no means certain that it will show any deference to the President with respect to his desire to withhold information from Congress. In fact, a strong argument can be advanced -- on the basis of Barenblatt -- that it is Congress to which deference should be shown.

In any event, whatever the prospects for ultimately withholding information from Congress under the

qualified executive privilege argument, the argument has a serious practical drawback: it requires the court to make a word-by-word review of every item which the President seeks to withhold. In view of the enormous volume of materials subject to the House Committee's current and anticipated subpoenas, and the vast amount of classified information contained in such materials, to require the court to make a word-by-word review would be to place a tremendous burden on the court and to dramatically impede the turnover of information to the Committee. As a practical matter, this could turn out to be the most undesirable result for all parties.

IV. Conclusions

If the House Select Committee on Intelligence goes to court to enforce its subpoena, it is a virtual certainty that the court will assume jurisdiction of the case. The issue involved in the lawsuit would clearly be justiciable.

If the Committee goes to court, there is an excellent chance that it will persuade the court to enforce its subpoena. The Committee would have no trouble

demonstrating that the information it is seeking is relevant, and possibly even essential, to its performance of the duties assigned to it by the House of Representatives. Moreover, as indicated, it has never been established that the President has the power, under a claim of executive privilege, to withhold from Congress information about military or diplomatic matters -- matters for which Congress shares Constitutional responsibility with the President.

Clearly there is no legal basis for the President to claim that he can withhold any such information on grounds of an absolute executive privilege. The courts have consistently rejected the notion that such a privilege exists. On the other hand, there is a sound legal basis for arguing that the President may withhold information based on a qualified executive privilege. However, even if the President were to succeed with this argument, and even if the court were disposed to show deference to the President's decision to withhold certain information, such a resolution of the lawsuit would create serious practical problems. In particular, it would require

the court to review every word deemed confidential by the President in order to judge whether or not it is subject to the President's privilege. This would place a tremendous burden on the court and immeasurably impede the turnover of documents to the Committee.

Finally, it is not likely that the court would issue a protective order prohibiting the Committee and its staff from disclosing confidential information. In all probability, the court would rule that the Speech or Debate Clause of the Constitution prohibits it from imposing any kind of meaningful order.

In sum, if the House Committee goes to court, there does not appear to be any realistic way in which the Agency can come out the winner.

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CIA: Paper, "Legal Defense to House Committee Suit to Enforce Subpoena."
Mitchell Rogovin (special counsel to the DCI) – William E. Colby (DCI)
Sept. 22, 1975

GRFL: GRFP: James E. Connor Files: Intelligence Series, b. 56, f: "House Select Com – Legal Opinions on Subpoenas for CIA Documents (1)."

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