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THE WHITE HOUSE

WASHINGTON

January 29, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP BUCHEN
FROM: JAMES E. CONNOR 
SUBJECT: Advisability of Bringing Suit for Injunction
to Stop Publication of the House Select (Pike)
Committee Report on Foreign Intelligence
Activities

Confirming phone call to your office last evening, the President reviewed your memorandum of January 27 on the above subject and approved the recommendation against bringing such a suit.

cc: Dick Cheney

THE WHITE HOUSE

WASHINGTON

January 27, 1976

MEMORANDUM FOR:

THE PRESIDENT

FROM:

PHILIP BUCHEN

P.W.B.

SUBJECT:

Advisability of Bringing Suit
for Injunction to Stop
Publication of the House
Select (Pike) Committee
Report on Foreign Intelligence
Activities

Attached at TAB A is a memorandum to you from the Attorney General on the above subject. He cites the agreement made by the Committee with you that it would not release or publish classified information if, after review by you, you personally determined and certified in writing that the disclosure of the information would be detrimental to the national security.

Although the Committee has furnished the intelligence community with an initial draft of its report, to comment on classified information contained in the report, this process has apparently resulted in relatively few deletions and changes. Now a majority of the Committee has voted to authorize and publish the report in its present state without referring disagreements over classified information still remaining in the report to you for your review and consideration.

If a suit were to be brought, it would be based in large part on the failure of the Committee to abide by its agreement with you. The Attorney General points out that there has been no case in which a court has considered a breach by a Congressional Committee of such an agreement. The Attorney General concludes that we would have only a 50/50

chance of avoiding a ruling by the court that the issue presented represents a political question involving a dispute between the Executive and Legislative branches of the government and that it would not be a proper case for Judicial determination.

For this and a variety of other reasons, the Attorney General recommends against bringing such a suit. Jack Marsh, Brent Scowcroft and I concur.

APPROVE THIS RECOMMENDATION JRC

DISAPPROVE THIS RECOMMENDATION _____

ATTACHMENT

TAB
A



Office of the Attorney General
Washington, D. C. 20530

January 26, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: THE ATTORNEY GENERAL *Schedule 1st. 7-*

SUBJECT: Advisability of suit to prevent publication of House Select Committee Report

This memorandum will discuss the legal considerations bearing on the advisability of a court action to enforce the agreement between the President and the House Select Committee concerning the release or publication by the Committee of classified material. Under that agreement, classified material was supplied to the Committee on the understanding that in the event of disagreement concerning release or publication between the Committee and the agency involved, "the items in disagreement shall be referred to the President for his review and if he personally determines and certifies in writing that the items in disagreement would, if disclosed, be detrimental to national security, then such material will not be published by the committee. Such determination by the President shall not in any way prejudice the rights of the committee for recourse to the courts." (Hearings Before the Select Committee on Intelligence, U. S. House of Representatives, Ninety-Fourth Congress, First Session, Part 2, Page 7.) Chairman Pike's characterization of the agreement is, "We are saying we would not release it if the President certified it were inimical to our national security, unless we got a court order." Id. at 768.

If the courts were to reach the merits of such a suit, we believe that our position would probably be upheld. The major issue, however, would be whether the case is justiciable, that is, whether it is the kind of dispute with which the courts may constitutionally concern themselves. In Powell v. McCormack, the court reviewed and invalidated the House of

Representatives' exclusion of Adam Clayton Powell on the ground that the House acted in violation of a constitutional provision. There is no case in which the courts have considered a breach by a congressional committee of an agreement with the President. It is our view that the likelihood that the courts would hold such a case justiciable is no more than 50/50.

The considerations for and against a suit to enforce this agreement by prohibiting the release of the Committee report are as follows:

Considerations in Support of a Suit to Enforce the Agreement.

1. The agreement between the President and this Committee may be unique in our Nation's history. In any event, it represents an important attempt to accommodate conflicting needs of coordinate branches of government. It arose out of an unauthorized release of classified information by official Committee action (also unprecedented, so far as we know), and a response by the President that in light of this release, no more classified information would be supplied until satisfactory arrangements could be made for its protection. Thus, it was on the basis of this agreement that the Committee obtained the classified information which it now proposes to release. Arguably, if the Committee is able to obtain classified information on the strength of an agreement with the President that it will not be released, and then violates its part of that agreement once the Executive Branch has supplied the classified information, the most formal kind of official Executive response is called for. In light of the importance of the agreement, the high levels at which it was negotiated, and the good faith reliance of the Executive Branch in fulfilling its part of the bargain, the Executive Branch should now be willing to take all steps available to it to prevent breach by the Committee.

2. A judicial determination that agreements such as this one are enforceable would provide a valuable precedent for future dealings with the Congress. A holding of non-justiciability, on the other hand, would arguably only strengthen our

position with Congress that since these agreements are not judicially enforceable, Congress must be concomitantly vigilant in policing unauthorized disclosures by its own members.

Disadvantages to a Suit to Prevent Publication by the Committee.

1. One of the most important issues that Congress will face in its consideration of legislative solutions to the issues raised by the Church and Pike Committees centers on congressional access to classified information. The Pike Committee's experience with classified information is our best example supporting the proposition that for whatever reasons, there are immense security risks in supplying classified information to Congress, and that these risks should not be magnified by increasing the number of committees and people who have access to such information. Filing a lawsuit could divert public attention from this central issue; it could also dissipate the attitudes of many congressmen that the responsibility for dealing with this problem is essentially theirs.

2. If the courts were to rule against us, it would likely be on the ground that this is a political question, and, therefore, not justiciable. The public would not understand such a ruling, and would interpret it simply as a ruling in the Committee's favor.

3. There is general agreement among Executive Branch representatives that it is in our interest that the Pike Committee go out of existence as soon as possible. A suit to prevent publication of the Committee's report will probably keep the Committee in existence. Alternatively, the defense of the suit could be taken over by the House itself; this would be equally disadvantageous, because the dispute would not then be with the Committee but with the entire House.

4. The effectiveness and the likelihood of success of a lawsuit have been largely diminished by the fact that several copies of the report have already been delivered to the media, and will almost certainly, therefore, be published. The courts would be reluctant to enter an order which, as a practical matter, would be ineffectual.

On balance, we recommend against filing a suit to prevent the unauthorized publication of classified material in violation of the agreement with the Pike Committee.

*I believe the suit in the present situation,
where publication will have resulted already,
would be a mistake.*

cc: Mitchell Rogovin
Special Counsel to the
Director, CIA