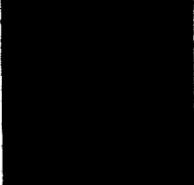


The original documents are located in Box C35, folder “Presidential Handwriting, 2/17/1976” of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

Copyright Notice

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THE WHITE HOUSE
WASHINGTON

February 17, 1976

MR. PRESIDENT:

SUBJECT: Subpoena for NSA and FBI
Records of Communications
Interceptions

The attached memorandum from Phil Buchen has been staffed to Jack Marsh, Brent Scowcroft, Don Rumsfeld and Ed Levi. They all concur with the recommendation (that you sign the memorandum at Tab F).

Jim Connor

Attachment

~~TOP SECRET~~**DECLASSIFIED****E.O. 12958 SEC. 3.6**DoJ Jan 11/2/09; NSC Jan 21/7/09; OSD Jan 4/16/09
MAR 07-63, #1: NSA Jan 4/18/07; FBI Jan 12/12/07**THE WHITE HOUSE**

WASHINGTON

February 17, 1976

BY dal NARA DATE 7/13/09

MEMORANDUM FOR:

THE PRESIDENT

FROM:

PHILIP BUCHEN

P.W.B.

SUBJECT:

Subpoena for NSA and FBI Records
of Communications InterceptionsBACKGROUND

The Committee on Government Operations, acting on behalf of its Subcommittee on Government Information and Individual Rights, has issued subpoenas to employees of the Federal Bureau of Investigation and the National Security Agency. Subpoenas have also been served upon Western Union International, RCA Globcom and ITT Worldcom. The subpoenas attach a schedule of the material required to be produced on or before February 18, 1976. That schedule appears at TAB A and covers all records concerning communications interceptions for use by any Department or agency of the U. S. Government which have taken place since January 1, 1947.

Both RCA and ITT have advised that they have no records covered by this subpoena. Western Union International indicates it has two lists of foreign government targets which are dated in the late 1960's.

The impact upon the national security of disclosure of the information sought by the subpoenas is described in the case of the FBI at TAB B and for NSA at TAB C. The NSA is preparing additional material concerning its radio intercept operations which are also covered by the subpoena, but the impact of disclosing those would be similar to the impact described concerning its wire access operations.

~~TOP SECRET~~

~~TOP SECRET~~

- 2 -

A recommendation from Assistant Attorney General Antonin Scalia of the Office of Legal Counsel, Department of Justice, that you claim Executive privilege with respect to the subpoenaed material is attached at TAB D. Although the Scalia memo mentions a draft letter by you to the Chairman, at my suggestion, a memo by you to the Attorney General and the Secretary of Defense has been prepared to take the place of the proposed letter to the Chairman. Under this plan, these two Cabinet officers will invoke the privilege in your behalf by direct communications to the subpoenaed employees and the Committee Chairman.

In a separate memo from the Attorney General to me (TAB E), the legal consequences of this claim of Executive privilege are explored, along with the possible need for litigation to enjoin Western Union International in responding to the Committee's subpoena which was addressed to its employees. It may be that Western Union International will willingly decline to furnish the documents, but if not, the Justice Department is prepared to seek an immediate restraining order.

RECOMMENDATION

I recommend, and Brent Scowcroft agrees, that you sign the memo to the Secretary of Defense and the Attorney General which is attached at TAB F.

Attachments



~~TOP SECRET~~

SCHEDULE

Any and all records* in his possession, under his dominion or control, or within his means to produce, concerning or relating to the interception by, examination by, requests by or from, or delivery to or for any employee or agent of any department, agency, bureau, or other entity of the United States, since January 1, 1947, of--

(1) information as to the existence, contents, substance, purport, effect, meaning, sender, or recipient of any interstate or foreign communication by wire, cable, radio, carrier frequency, or other means; and

(2) information as to users or customers of communications common carriers, including but not limited to, information as to the identity of such users or customers and the communications line distribution channel numbers of such users or customers.

*The term "records" as used herein includes, but is not limited to, writings, documents, contracts, agreements, memoranda, reports, correspondence, lists, tables, receipts, minutes, and electronic records and recordings.

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 00990

ion
Collection/Series/Folder ID No. : 004700173
Reason for Withdrawal : NS,National security restriction
Type of Material : MEM,Memo(s)
Creator's Title : Director
Receiver's Title : Asst. Attorney General,Civil Divis
Description : re intelligence matters
Creation Date : 02/13/1976
Volume (pages) : 4
Date Withdrawn : 05/25/1988

REMOVED 6/14/03



UNITED STATES GOVERNMENT

Memorandum ~~TOP SECRET~~ - COMINT

TO : Assistant Attorney General
Civil Division

DATE: February 13, 1976

FROM : Director, FBI

SUBJECT: HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

COMMUNICATIONS INTELLIGENCE PROGRAMS

On Friday, February 6, 1976, Robert Fink, staff member of the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations, served three subpoenas and three subpoenas duces tecum on Special Agent Dennis Miller, Office of Congressional Affairs, Legal Counsel Division. Service of these subpoenas was accepted at your instruction. Three of the subpoenas require Special Agents John Paul Loomis, Walter C. Zink, and David G. Jenkins to testify before the Subcommittee on February 25, 1976, and the other three subpoenas require these individuals to produce certain documents on or before February 18, 1976. Copies of these subpoenas were delivered to you on February 6, 1976.

You requested this Bureau to provide you with an analysis of the documents and materials which would be responsive to the subpoenas. You also requested an analysis of the risk or harm which would be created or result from an unauthorized disclosure of these documents and materials.

In the limited time available, we have conducted a preliminary review of the material collected in response to these subpoenas. These efforts disclose that the material covered is in excess of 350 file volumes with over 120,000 pages of sensitive and, for the most part, classified material. It includes information covering 29 years of discontinued and ongoing operations in the communications intelligence collection field. Documents included in this review relate to the following basic categories:

DECLASSIFIED • E.O. 12958 Sec. 1.6
With PORTIONS EXEMPTED
E.O. 12958 Sec. 1.5 (c)

mc 94-159, W 57, CIA 8/24/99, FBI 11/2/01, NSA 11/4/03

~~TOP SECRET~~ - COMINT

By del NARA, Date 6/16/03

Classified by Director, FBI
Exempt from GDS, Categories 2 and 3
Date of Declassification Indefinite



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Assistant Attorney General
Civil Division

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3.
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4. A large quantity of actual decrypted and/or plaintext
messages.

5.
.....
.....

6. Information impacting upon and relating to the opening and
conduct of an unknown number of counterespionage cases.

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.....

..... The information also includes with great
specificity the names of human sources
..... which, over the course of this period of time,
made this information available in good faith to representatives of the
United States Government.

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~~TOP SECRET~~ - COMINT

Assistant Attorney General
Civil Division

A sheet of dot grid paper with a grid of dots forming lines. The grid is 24 rows high and 100 columns wide. The first row is a header row, and the remaining 23 rows are for notes. The dots are small and black, spaced evenly to form horizontal and vertical lines.

The improper disclosure of any of the information outlined above would cause inestimable damage to the foreign relations posture of the United States. It would reveal the technical capabilities of the United States in capturing such information and would, of course, bring to an end the success of any ongoing operation. In addition to the disclosure of the identities of numerous past and present domestic sources of the FBI,

..... Should the Soviets learn of our own double agents, the usefulness of these agents would cease and their lives would be in danger. Efforts to recruit new sources would be most difficult, if not impossible.

Furthermore, our assessment of the potential risks must be combined with a similar analysis prepared by the Department of State, the Department of Defense, the National Security Council, and the Director of Central Intelligence before a complete and accurate estimate emerges.

~~TOP SECRET~~ - COMINT



Assistant Attorney General
Civil Division

The material outlined above does not include multivolume FBI file material not duplicated at FBI Headquarters but maintained at the FBI's Washington and New York Field Offices relating directly to the matter which is the subject of the House inquiry and subpoenas. A survey of comparable material for a four-year period only, as compared to the present 29-year period, required the full-time services of 15 to 18 FBI Agents throughout a three-week duration. It is not claimed that all of the above material would necessarily have to be reproduced to comply with the subpoenas at hand; however, it would have to be reviewed thoroughly, for compliance and classification purposes, and a substantial portion would have to be reproduced.

Since this matter is under review by the Criminal Division, we defer to the Department the question of whether we should comply with these subpoenas. As you will recall, the Senate Select Committee on Intelligence Activities scheduled a public hearing on the interception of cable traffic. After White House objections, the hearing was cancelled. The White House, I understand, was very concerned that public disclosure would have irreparable damage to the United States and its foreign intelligence efforts.

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 00992

Collection/Series/Folder ID No. : 004700173
Reason for Withdrawal : NS,National security restriction
Type of Material : MEM,Memo(s)
Creator's Name : Benson Buffham
Creator's Title : Deputy Director
Receiver's Name : Rex Lee
Receiver's Title : Asst. Attorney General (Civil Division)
Description : re intelligence matters
Creation Date : 02/14/1976
Volume (pages) : 1
Date Withdrawn : 05/25/1988

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 00994

Collection/Series/Folder ID No. : 004700173
Reason for Withdrawal : NS, National security restriction
Type of Material : MEM, Memo(s)
Creator's Name : Benson Buffham
Creator's Title : Deputy Director
Receiver's Name : Rex Lee
Receiver's Title : Asst. Attorney General
Description : re intelligence matters
Creation Date : 02/14/1976
Volume (pages) : 6
Date Withdrawn : 05/25/1988

Department of Justice
Washington, D.C. 20530

FEB 17 1976

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Claim of Executive Privilege with respect
to materials subpoenaed by the Committee
on Government Operations, House of
Representatives.

This memorandum is submitted to you pursuant to the procedures established in former President Nixon's Memorandum for the Heads of the Executive Departments and Agencies Establishing a Procedure to Govern Compliance with Congressional Demands for Information, dated March 24, 1969.

The Chairman of the Committee on Government Operations of the House of Representatives has issued subpoenas requiring the presence of, and production of records by, three agents of the Federal Bureau of Investigation, two officials of the National Security Agency and two officials of Western Union, returnable on or before February 18, 1976. The subpoenas demand any and all records relating to interception by the United States of information concerning interstate or foreign communications by wire, cable, radio, carrier frequency or otherwise or the users or customers of communications common carriers, since January 1, 1947. A copy of one of the subpoenas is attached.

The information sought is extremely sensitive and much of it is classified. It encompasses interagency communications dealing with the identification of certain diplomatic premises and the authorization of sophisticated methods of intercepting communications from such establishments. Actual decrypted and plaintext messages are included in the material as are descriptions of code-breaking techniques and procedures. Some of the material identifies individuals serving as double agents on behalf of the United States or individuals identified by the United States as agents of foreign powers. Information

~~TOP SECRET~~

..... MATERIAL ATTACHED.
WHEN SEPARATED FROM CLASSIFIED
ATTACHMENT, THIS DOCUMENT IS
UNCLASSIFIED.

relating to on-going counterintelligence cases of the Federal Bureau of Investigation is also included in the materials subpoenaed.

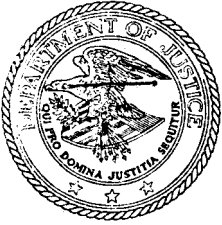
As described in the attached memoranda of the Federal Bureau of Investigation and the National Security Agency, disclosure of this information would severely hamper the foreign intelligence and counterintelligence efforts of the United States and would result in serious diplomatic repercussions. While the material subpoenaed may include information which is not, in itself, sensitive, the disclosure of even this material could reveal to other nations the techniques now utilized to obtain foreign intelligence, thus hampering our intelligence efforts. Moreover, systematic review of the quantity of information sought, in consultation with appropriate government agencies, would be impossible prior to the return date of the subpoena.

It is our view that the public interest requires that the information sought be withheld from disclosure to the Committee. We therefore recommend, with the approval of the Attorney General, that the President invoke Executive privilege with respect to the subpoenaed material and that the Chairman of the Committee be so advised. A draft letter to the Chairman, invoking privilege, is attached.

The implications of a claim of privilege with respect to a subpoena to a private corporation, such as Western Union, are discussed in a separate memorandum from the Assistant Attorney General in charge of the Civil Division of the Department of Justice. That Division will also review the possibility of litigation arising out of a claim of privilege in response to the Committee's subpoenas.



Antonin Scalia
Assistant Attorney General
Office of Legal Counsel



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

MEMORANDUM

TO: Honorable Philip W. Buchen
Counsel to the President

FROM: Edward H. Levi *EL*
Attorney General

The Committee on Government Operations, acting on behalf of its Subcommittee on Government Information and Individual Rights, has issued subpoenas to employees of the Federal Bureau of Investigation and the National Security Agency. A subpoena has also been served upon two employees of Western Union International. The subpoenas attach a schedule of the material required to be produced on or before February 18, 1976. That schedule provides as follows:

Any and all records* in his possession, under his dominion or control, or within his means to produce, concerning or relating to the interception by, examination by, requests by or from, or delivery to or for any employee or agent of any department, agency, bureau or other entity of the United States, since January 1, 1947, of--

(1) information as to the existence, contents, substance, purport, effect, meaning, sender, or recipient of any interstate or foreign communication by wire, cable, radio, carrier frequency, or other means; and

(2) information as to users or customers of communications common carriers, including but not limited to, information as to the identity of such users or customers and the communications line distribution channel numbers of such users or customers.

*The term "records" as used herein includes, but is not limited to, writings, documents, contracts,

agreements, memoranda, reports, correspondence, lists, tables, receipts, minutes, and electronic records and recordings.

In a separate memorandum, we are advising you concerning the impact upon the national security of the disclosure of the information sought by the subpoenas. In this memorandum, we will outline the types of litigation that might result in the event of a claim of privilege and a refusal to comply with the subpoenas.

A traditional means of challenging a congressional subpoena is to refuse to comply and, if the House votes to hold the witness in contempt, to defend in a criminal prosecution under 2 U.S.C. §192 which arises when the House refers the matter to the United States Attorney. The statute purports to leave no discretion concerning prosecution. Obviously, the attempt to administer such a statute in the context of this case would present important constitutional and policy problems, particularly in view of the national security implications of the material sought.

Another alternative would be the exercise by the House of its summary contempt power. See Jurney v. MacCracken, 294 U.S. 125 (1935); Groppi v. Leslie, 404 U.S. 496 (1972). Theoretically, this involves the Sergeant-at-Arms arresting the recalcitrant witness and imprisoning him until he either disgorges the information sought or until the legislative session ends. Judicial review would be invoked by the filing of a writ of habeas corpus on behalf of the witness to test the validity of his detention.

The remaining avenue for judicial resolution would be a civil suit by the Subcommittee or the Committee against the witnesses or their superiors to enforce the subpoena. As a prerequisite to such a suit, however, there would have to be legislation authorizing such a proceeding and granting jurisdiction to the appropriate district court. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D. D.C. 1973); see also, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (C.A.D.C. 1974).

An additional problem is raised by the subpoena directed to Western Union. Unless Western Union would be agreeable to

refusing to disgorge materials and information in response to the subpoena at the request of the President, it would require some action by the government to enjoin compliance by Western Union. Western Union's relationship to the government in these matters is either contractual or fiduciary or both, and its possession of classified information would appear to be as an agent of the United States. Therefore, it would be necessary to seek to enjoin Western Union's compliance based upon the assertion of executive privilege by the President. Any injunctive relief obtained against Western Union would serve to insulate it from any liability to the Congress for noncompliance with the subpoena and would serve to place the government in the shoes of Western Union in any attempt by the Congress to enforce compliance.

With the exception of a possible suit against Western Union, the present posture of the subpoenas requires the Congress to take the initiative in seeking compliance with the subpoenas against the government. All of the potential proceedings discussed above raise complex, difficult and novel questions of law. For example, any litigation by us to enjoin Western Union's compliance with the subpoena may raise questions relating to impingements upon the Speech and Debate Clause which has recently been given a broad interpretation by the Supreme Court in Eastland v. U. S. Servicement's Fund, 421 U.S. 491 (1975). However, neither in Eastland nor in any of the other cases of recent vintage did the clash arise between coordinate branches of the government. This factor clearly enhances our chances of success in the event the dispute results in litigation. Indeed, in United States v. Nixon, 418 U.S. 683, the Supreme Court noted that the "courts have traditionally shown the utmost deference to Presidential responsibilities" in the area of sensitive national security secrets.

THE WHITE HOUSE

WASHINGTON

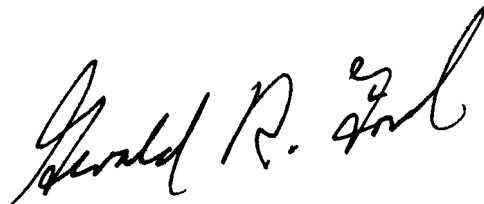
February 17, 1976

MEMORANDUM FOR:

THE HONORABLE DONALD S. RUMSFELD
THE HONORABLE EDWARD H. LEVI

I have been advised of the subpoenas of February 4, 1976, from the House Committee on Government Operations requiring officials of your respective agencies, as well as private corporations, to produce records relating to interception or examination by the United States of information concerning interstate or foreign communications by wire, cable, radio or otherwise, and information as to users of communications common carriers.

Upon review of the subpoenas, I have concluded that the scope of the records sought is so extremely broad as to encompass records containing the most sensitive national security information and that the public interest requires that the records not be disclosed to the Committee. As President of the United States, I am therefore instructing you to decline to comply with the subpoenas.

A handwritten signature in cursive script, reading "Gerald R. Ford". The signature is written in dark ink and is positioned in the lower right quadrant of the page.

THE WHITE HOUSE

WASHINGTON

February 17, 1976

MEMORANDUM FOR:

THE HONORABLE DONALD S. RUMSFELD
THE HONORABLE EDWARD H. LEVI

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Gerald R. Ford

THE WHITE HOUSE

WASHINGTON

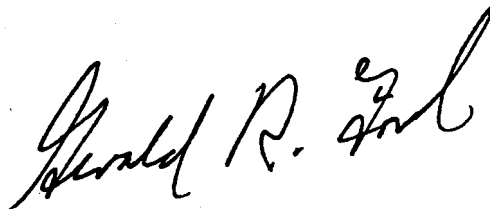
February 17, 1976

MEMORANDUM FOR:

THE HONORABLE DONALD S. RUMSFELD
THE HONORABLE EDWARD H. LEVI

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Upon review of the subpoenas, I have concluded that the scope of the records sought is so extremely broad as to encompass records containing the most sensitive national security information and that the public interest requires that the records not be disclosed to the Committee. As President of the United States, I am therefore instructing you to decline to comply with the subpoenas.

A handwritten signature in dark ink, reading "Gerald R. Ford". The signature is written in a cursive, flowing style with a large, prominent "G" and "F".

STAFFING

February 17, 1976

MR. PRESIDENT:

SUBJECT: Subpoena for NSA and FBI
Records of Communications
Interceptions

The attached memorandum from Phil Buchen has been staffed to Jack Marsh, Brent Scowcroft, Don Rumsfeld and Ed Levi. They all concur with the recommendation (that you sign the memorandum at Tab F).

Jim Connor

Attachment

TOP SECRET

UNCLASSIFIED UPON REMOVAL
OF CLASSIFIED ATTACHMENTS

THE WHITE HOUSE

WASHINGTON

February 17, 1976

5:55 PM

URGENT
PRIORITY

MEMORANDUM FOR: THE ATTORNEY GENERAL
FROM: JIM CONNOR

Ed, the President has asked that this material be reviewed by you. We need it back with your comments and/or recommendations by 7:30 pm tonight so that Dick Cheney can give it to the President prior to the press conference tonight at 8:00 pm. Sorry for the short notice; but it was just received from Phil Buchen.

The views of Don Rumsfeld are also being requested.

encl.

~~TOP SECRET~~

THE WHITE HOUSE

WASHINGTON

February 17, 1976

MEMORANDUM FOR:

THE PRESIDENT

FROM:

PHILIP BUCHEN

P.W.B.

SUBJECT:

Subpoena for NSA and FBI Records
of Communications Interceptions

BACKGROUND

The Committee on Government Operations, acting on behalf of its Subcommittee on Government Information and Individual Rights, has issued subpoenas to employees of the Federal Bureau of Investigation and the National Security Agency. Subpoenas have also been served upon Western Union International, RCA Globcom and ITT Worldcom. The subpoenas attach a schedule of the material required to be produced on or before February 18, 1976. That schedule appears at TAB A and covers all records concerning communications interceptions for use by any Department or agency of the U. S. Government which have taken place since January 1, 1947.

Both RCA and ITT have advised that they have no records covered by this subpoena. Western Union International indicates it has two lists of foreign government targets which are dated in the late 1960's.

The impact upon the national security of disclosure of the information sought by the subpoenas is described in the case of the FBI at TAB B and for NSA at TAB C. The NSA is preparing additional material concerning its radio intercept operations which are also covered by the subpoena, but the impact of disclosing those would be similar to the impact described concerning its wire access operations.

DECLASSIFIED

AUTHORITY Same as MR 07-63 #1 7/15/80 ~~TOP SECRET~~

BY 122 NARA DATE 8/31/12



~~TOP SECRET~~

- 2 -

A recommendation from Assistant Attorney General Antonin Scalia of the Office of Legal Counsel, Department of Justice, that you claim Executive privilege with respect to the subpoenaed material is attached at TAB D. Although the Scalia memo mentions a draft letter by you to the Chairman, at my suggestion, a memo by you to the Attorney General and the Secretary of Defense has been prepared to take the place of the proposed letter to the Chairman. Under this plan, these two Cabinet officers will invoke the privilege in your behalf by direct communications to the subpoenaed employees and the Committee Chairman.

In a separate memo from the Attorney General to me (TAB E), the legal consequences of this claim of Executive privilege are explored, along with the possible need for litigation to enjoin Western Union International in responding to the Committee's subpoena which was addressed to its employees. It may be that Western Union International will willingly decline to furnish the documents, but if not, the Justice Department is prepared to seek an immediate restraining order.

RECOMMENDATION

I recommend, and Brent Scowcroft agrees, that you sign the memo to the Secretary of Defense and the Attorney General which is attached at TAB F.

Attachments

~~TOP SECRET~~



SCHEDULE

Any and all records* in his possession, under his dominion or control, or within his means to produce, concerning or relating to the interception by, examination by, requests by or from, or delivery to or for any employee or agent of any department, agency, bureau, or other entity of the United States, since January 1, 1947, of--

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B

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 01002

Collection/Series/Folder ID No. : 004700173
Reason for Withdrawal : NS, National security restriction
Type of Material : MEM, Memo(s)
Creator's Title : Director
Receiver's Title : Asst. Attorney General, Civil Divis
Description : re intelligence matters
Creation Date : 02/13/1976
Volume (pages) : 4
Date Withdrawn : 05/25/1988

ion

C

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 01003

Collection/Series/Folder ID No. : 004700173
Reason for Withdrawal : NS, National security restriction
Type of Material : MEM, Memo(s)
Creator's Name : Benson Buffham
Creator's Title : Deputy Director
Receiver's Name : Rex Lee
Receiver's Title : Asst. Attorney General
Description : re intelligence matters
Creation Date : 02/14/1976
Volume (pages) : 1
Date Withdrawn : 05/25/1988

ITEM WITHDRAWAL SHEET
WITHDRAWAL ID 01004

Collection/Series/Folder ID No. : 004700173
Reason for Withdrawal : NS, National security restriction
Type of Material : MEM, Memo(s)
Creator's Name : Benson Buffham
Creator's Title : Deputy Director
Receiver's Name : Rex Lee
Receiver's Title : Asst. Attorney General
Description : re intelligence matters
Creation Date : 02/14/1976
Volume (pages) : 6
Date Withdrawn : 05/25/1988

D

Department of Justice

Washington, D.C. 20530

FEB 17 1976

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Claim of Executive Privilege with respect
to materials subpoenaed by the Committee
on Government Operations, House of
Representatives.

This memorandum is submitted to you pursuant to the procedures established in former President Nixon's Memorandum for the Heads of the Executive Departments and Agencies Establishing a Procedure to Govern Compliance with Congressional Demands for Information, dated March 24, 1969.

The Chairman of the Committee on Government Operations of the House of Representatives has issued subpoenas requiring the presence of, and production of records by, three agents of the Federal Bureau of Investigation, two officials of the National Security Agency and two officials of Western Union, returnable on or before February 18, 1976. The subpoenas demand any and all records relating to interception by the United States of information concerning interstate or foreign communications by wire, cable, radio, carrier frequency or otherwise or the users or customers of communications common carriers, since January 1, 1947. A copy of one of the subpoenas is attached.

The information sought is extremely sensitive and much of it is classified. It encompasses interagency communications dealing with the identification of certain diplomatic premises and the authorization of sophisticated methods of intercepting communications from such establishments. Actual decrypted and plaintext messages are included in the material as are descriptions of code-breaking techniques and procedures. Some of the material identifies individuals serving as double agents on behalf of the United States or individuals identified by the United States as agents of foreign powers. Information

~~TOP SECRET~~
~~FOR EYES ONLY~~

..... MATERIAL ATTACHED.
WHEN SEPARATED FROM CLASSIFIED
ATTACHMENT, THIS DOCUMENT IS
UNCLASSIFIED.

relating to on-going counterintelligence cases of the Federal Bureau of Investigation is also included in the materials subpoenaed.

As described in the attached memoranda of the Federal Bureau of Investigation and the National Security Agency, disclosure of this information would severely hamper the foreign intelligence and counterintelligence efforts of the United States and would result in serious diplomatic repercussions. While the material subpoenaed may include information which is not, in itself, sensitive, the disclosure of even this material could reveal to other nations the techniques now utilized to obtain foreign intelligence, thus hampering our intelligence efforts. Moreover, systematic review of the quantity of information sought, in consultation with appropriate government agencies, would be impossible prior to the return date of the subpoena.

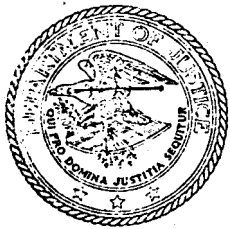
It is our view that the public interest requires that the information sought be withheld from disclosure to the Committee. We therefore recommend, with the approval of the Attorney General, that the President invoke Executive privilege with respect to the subpoenaed material and that the Chairman of the Committee be so advised. A draft letter to the Chairman, invoking privilege, is attached.

The implications of a claim of privilege with respect to a subpoena to a private corporation, such as Western Union, are discussed in a separate memorandum from the Assistant Attorney General in charge of the Civil Division of the Department of Justice. That Division will also review the possibility of litigation arising out of a claim of privilege in response to the Committee's subpoenas.



Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

E



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

MEMORANDUM

TO: Honorable Philip W. Buchen
Counsel to the President

FROM: Edward H. Levi *EL*
Attorney General

The Committee on Government Operations, acting on behalf of its Subcommittee on Government Information and Individual Rights, has issued subpoenas to employees of the Federal Bureau of Investigation and the National Security Agency. A subpoena has also been served upon two employees of Western Union International. The subpoenas attach a schedule of the material required to be produced on or before February 18, 1976. That schedule provides as follows:

Any and all records* in his possession, under his dominion or control, or within his means to produce, concerning or relating to the interception by, examination by, requests by or from, or delivery to or for any employee or agent of any department, agency, bureau or other entity of the United States, since January 1, 1947, of--

(1) information as to the existence, contents, substance, purport, effect, meaning, sender, or recipient of any interstate or foreign communication by wire, cable, radio, carrier frequency, or other means; and

(2) information as to users or customers of communications common carriers, including but not limited to, information as to the identity of such users or customers and the communications line distribution channel numbers of such users or customers.

*The term "records" as used herein includes, but is not limited to, writings, documents, contracts,

agreements, memoranda, reports, correspondence, lists, tables, receipts, minutes, and electronic records and recordings.

In a separate memorandum, we are advising you concerning the impact upon the national security of the disclosure of the information sought by the subpoenas. In this memorandum, we will outline the types of litigation that might result in the event of a claim of privilege and a refusal to comply with the subpoenas.

A traditional means of challenging a congressional subpoena is to refuse to comply and, if the House votes to hold the witness in contempt, to defend in a criminal prosecution under 2 U.S.C. §192 which arises when the House refers the matter to the United States Attorney. The statute purports to leave no discretion concerning prosecution. Obviously, the attempt to administer such a statute in the context of this case would present important constitutional and policy problems, particularly in view of the national security implications of the material sought.

Another alternative would be the exercise by the House of its summary contempt power. See Jurney v. MacCracken, 294 U.S. 125 (1935); Groppi v. Leslie, 404 U.S. 496 (1972). Theoretically, this involves the Sergeant-at-Arms arresting the recalcitrant witness and imprisoning him until he either disgorges the information sought or until the legislative session ends. Judicial review would be invoked by the filing of a writ of habeas corpus on behalf of the witness to test the validity of his detention.

The remaining avenue for judicial resolution would be a civil suit by the Subcommittee or the Committee against the witnesses or their superiors to enforce the subpoena. As a prerequisite to such a suit, however, there would have to be legislation authorizing such a proceeding and granting jurisdiction to the appropriate district court. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D. D.C. 1973); see also, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (C.A.D.C. 1974).

An additional problem is raised by the subpoena directed to Western Union. Unless Western Union would be agreeable to

refusing to disgorge materials and information in response to the subpoena at the request of the President, it would require some action by the government to enjoin compliance by Western Union. Western Union's relationship to the government in these matters is either contractual or fiduciary or both, and its possession of classified information would appear to be as an agent of the United States. Therefore, it would be necessary to seek to enjoin Western Union's compliance based upon the assertion of executive privilege by the President. Any injunctive relief obtained against Western Union would serve to insulate it from any liability to the Congress for noncompliance with the subpoena and would serve to place the government in the shoes of Western Union in any attempt by the Congress to enforce compliance.

With the exception of a possible suit against Western Union, the present posture of the subpoenas requires the Congress to take the initiative in seeking compliance with the subpoenas against the government. All of the potential proceedings discussed above raise complex, difficult and novel questions of law. For example, any litigation by us to enjoin Western Union's compliance with the subpoena may raise questions relating to impingements upon the Speech and Debate Clause which has recently been given a broad interpretation by the Supreme Court in Eastland v. U. S. Servicement's Fund, 421 U.S. 491 (1975). However, neither in Eastland nor in any of the other cases of recent vintage did the clash arise between coordinate branches of the government. This factor clearly enhances our chances of success in the event the dispute results in litigation. Indeed, in United States v. Nixon, 418 U.S. 683, the Supreme Court noted that the "courts have traditionally shown the utmost deference to Presidential responsibilities" in the area of sensitive national security secrets.

THE WHITE HOUSE

WASHINGTON

February 17, 1976

MEMORANDUM FOR:

THE HONORABLE DONALD S. RUMSFELD
THE HONORABLE EDWARD H. LEVI

I have been advised of the subpoenas of February 4, 1976, from the House Committee on Government Operations requiring officials of your respective agencies, as well as private corporations, to produce records relating to interception or examination by the United States of information concerning interstate or foreign communications by wire, cable, radio or otherwise, and information as to users of communications common carriers.

Upon review of the subpoenas, I have concluded that the scope of the records sought is so extremely broad as to encompass records containing the most sensitive national security information and that the public interest requires that the records not be disclosed to the Committee. As President of the United States, I am therefore instructing you to decline to comply with the subpoenas.