The original documents are located in Box 51, folder "House Select Committee (Pike Committee) - State Department and NSC Subpoenas - Testimony: Scalia, Antonin - Nov. 20, 1975" of the John O. Marsh Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE
WASHINGTON

Scowcroft must review page 14. (at least)

M.D.

STATEMENT OF

ANTONIN SCALIA

ASSISTANT ATTORNEY GENERAL

OFFICE OF LEGAL COUNSEL

DEPARTMENT OF JUSTICE

BEFORE THE

House
~~SENATE~~ SELECT COMMITTEE ON INTELLIGENCE

THURSDAY, NOVEMBER 20, 1975

Mr. Chairman and Members of the Committee,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

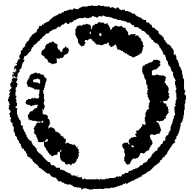
Let me turn now to the subject of compliance with the subpoena, which sought "all 40 Committee and predecessor committee records of decisions taken since January 20, 1965 reflecting approvals of covert action projects." Here it cannot be reasonably asserted that there has been substantial compliance.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

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

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

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

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



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

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

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

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

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

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

President by the Attorney General.

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

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

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

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

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

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

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

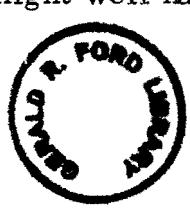
sanctioned by the Supreme Court when made by Cabinet Secretaries without even evidence of specific Presidential consideration of the particular assertion, much less direct Presidential communication, United States v. Reynolds, 345 U.S. 1, 7-8 (1952). See also Kaiser Alum. & Chem. Co. v. United States,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

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

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

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

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



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