The original documents are located in Box 56, folder "Privacy - Legislation (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

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C. F.
FG 6-15-1

MEMORANDUM OF INFORMATION FOR THE FILE

DATE 10/8/76

LETTER, MEMO, ETC.

~~TO:~~

~~FROM:~~

SUBJECT: Correspondence from Barry Roth's Office dated Aug. 1974 - Aug. 1976 re the Domestic Council Committee on the Right of Privacy

Filed CF Oversize Attachment #257.

CORRESPONDENCE FILED CENTRAL FILES – CONFIDENTIAL FILE

Privacy

THE WHITE HOUSE

WASHINGTON

August 10, 1974

Mr. Buchen:

In addition to the message I read you from Carole Parsons, she also had the following P.S. for you:

> "You looked great on TV this morning and do appoint lots of good women."

Eva

August 9, 1974

MEMORANDUM

To: Mr. Buchen
From: Carole Parsons

Markup on H.R. 16183 (the Moorhead/OMB bill) was cancelled this morning for the fourth time this week -- as always for lack of a quorum. They may try again late next week but don't expect much unless the President announces strong interest. If he does, I think we can get the Moorhead Committee to take our guidance on the bill's contents.

Markup on the Senate bill -- S.3418 -- has been postponed until August 20 at 10 a.m. The new draft has serious problems from our perspective. Again, an indication of Administration support, with drafting assistance volunteered, could carry the day.

Please urge the President to address the privacy issue in his Monday speech.

Joe Overton says that Barry Goldwater, Jr., is totally turned off on the Privacy Committee staff, which he regards as woolly-headed and supine (not a direct quote but it amounts to that).

I will be in the office tomorrow after 11:00 and probably Sunday also. I'm scheduled to go to Boulder Monday at 8:15 a.m., returning Tuesday at 2:30 p.m. However, I can cancel if necessary.

I don't mind being interrupted at home at any time-- if I can't be reached at the office.

293-7816

Joe - to them this afternoon

MEMORANDUM

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY
WASHINGTON, D.C. 20504

August 10, 1974

To: Philip W. Buchen
Henry Goldberg

From: Carole W. Parsons
Janet K. Mille

Subject: Wiretapping Amendment to H. R. 15404, "Appropriations for the Departments of State, Justice, Commerce and the Judiciary for FY '75"

This amendment to the Department of Justice Appropriations bill was introduced by Senators Ervin and Nelson on July 25, 1974. It would prohibit the use of any monies appropriated in H. R. 15404 for warrantless wiretaps by Federal agencies. The bill grows out of the Watergate-related controversy regarding the inherent power of the President to order warrantless wiretaps for the purpose of protecting national security.

Burkett Van Kirk, Minority Counsel to the Senate Appropriations Committee, has informed Janet that the earliest possible date for a markup of H. R. 15404 is August 15 or 16. According to Van Kirk, Chairman Pastore, ranking minority member of the subcommittee, Senator Hruska, Majority Counsel Joe McDonnell, and Van Kirk are the only persons aware of the Ervin and Nelson proposal. Van Kirk indicated that he would expect the subcommittee members to consider inclusion of the Ervin and Nelson proposal as a rider on an annual appropriations bill to be inappropriate and unnecessary in light of the funding that has been provided for the National Wiretap Commission. The Commission was chartered to address the concerns embodied in the Ervin and Nelson proposal. Van Kirk stressed, however, that it is really too early to assess where the subcommittee will end up on this question since the bill has not yet surfaced for subcommittee markup and knowledge of the proposal is not widespread among subcommittee members. (Majority Counsel McDonnell cannot be reached until Monday.) Mark Gittenstein, Counsel to the Senate Subcommittee on Constitutional Rights, says that Senator Ervin's primary objective is to get Justice to focus on and deal with the distinction that needs to be made between wiretaps on foreign nationals only, and wiretaps on foreign nationals that intercept conversations involving American citizens.

Larry Silberman, Deputy Attorney General, stated the official Department of Justice position that Federal agencies must be able to tap foreign nationals without a warrant since that kind of tap often does not turn on probable cause. Silberman said, however, that Justice has some ideas about how to deal with Senator Ervin's concerns.

Attachments:

(1) Nelson/Ervin statement in Congressional Record of July 25, 1974

(2) Harris poll on attitudes toward national security wiretaps, December 3, 1973.

S. 3327

At the request of Mr. CURTIS, the Senator from Hawaii (Mr. INOUYE) was added as a cosponsor of S. 3327 to amend section 208 of the Social Security Act.

S. 3783

At the request of Mr. FULBRIGHT, the Senator from New Jersey (Mr. CASE) was added as a cosponsor of S. 3783, to implement certain provisions of the International Convention on Fishing and Conservation of the Living Resources of the High Seas, and for other purposes.

SENATE CONCURRENT RESOLUTION 104—SUBMISSION OF A CONCURRENT RESOLUTION RELATING TO THE AVAILABILITY OF UNLEADED GASOLINE AND RELATED EQUIPMENT

(Referred to the Committee on Public Works.)

Mr. BIBLE. Mr. President, I rise to submit a concurrent resolution expressing the sense of Congress that the Environmental Protection Agency by regulation permit reasonable extensions of time to small business gasoline marketers so that they may obtain the equipment and product necessary to dispense unleaded gasoline without being subject to a $10,000 a day penalty.

A proud achievement of this body over the past 25 years has been its continuing concern over the years for the American small businessman. Those hardy entrepreneurs, as has so often been said, constitute the backbone of the American economy. In the petroleum industry, as in other segments of our economy, they are vigorous competitors, providing a major source of innovation, flexibility, lower prices and better service. Their value to many of our constituents was demonstrated in the imaginative actions taken by independent and other service station operators during the fuel crisis of this past winter.

In common with largest industrial and business organizations—they are subjected to the myriad regulations promulgated by our numerous, and I might say, ever-growing number of Federal regulatory agencies.

Small business petroleum marketers are required to prepare and file voluminous reports for IRS, OSHA, the Department of Commerce and others. Additionally, the energy crisis and the drive to clean up our environment have spawned a host of new problems and new reporting requirements for those dealing in petroleum products, such as vapor recovery, spillage control, allocation programs, and price controls.

These marketers now confront an additional classic small business regulatory problem.

By July 1—Sept. 1, 1974 upon extension applied for—gasoline stations are required to have available unleaded gasoline under penalties of up to $10,000 per day. In many instances this means that a third storage tank and special nozzles are needed. The requirement arises because 1975 model automobiles have been built with catalytic air pollution converters, which in turn call for the use of only unleaded fuels.

However, 1975 cars available this autumn will only constitute 10 percent of the car population by September 1, 1975. Thus, reasonable extension of the deadline for small marketers will not damage either the quest for cleaner air or the ability of small marketers to provide substantial service.

The difficulty faced by the independent small firms is in obtaining physical delivery of the equipment. Major oil companies appear in many instances to be taking care of their own stations. Independents are therefore in competition not only with these firms but with other businesses, industries, and agriculture in acquiring these scarce products. Surveys taken among these segments of the industry project delays reaching into the autumn of 1974 and in some instances beyond this. Yet EPA seems to be moving in the opposite direction, moving the deadline closer for some rural service stations in a recent action.

The intention of this resolution is to promote compliance with EPA requirements by the smaller gasoline station owners in order to preserve them in business. They are an important factor in many smaller towns and rural areas. For instance, there are some 13,000 gasoline wholesalers or jobbers. These firms own an average of seven service stations. Some years ago the report of the Senate Select Committee on Small Business indicated that independent retailers marketed between 20 percent and 25 percent of all the gasoline in the United States and were the balance wheel of competition in this industry.

The resolution is cast as a sense of Congress declaration of policy. Under such legislation, the Environmental Protection Agency would implement the policy by appropriate procedures and guidelines. EPA would presumably require a showing that the equipment and/or product involved has been ordered in good faith, so that the marketer has done everything he can do, and his inability to comply is due to factors beyond his control. This mechanism is apparent already in place under the current September 1 extension regulation.

The Agency has already proposed in its regulations that marketers who cannot obtain unleaded clear product on time can apply to EPA for an alternate supplier. This is a step in the right direction, and the language of the resolution as to products will provide congressional support for such a policy.

Mr. President, we are also familiar with the lines at service stations during the recent gasoline fuel crisis. Independent small gasoline retailers can, if equitably treated, be a substantial factor in avoiding such hardships in the future. The alternative would be that many good local businessmen would be forced to close their doors because of circumstances beyond their control. This resolution provides a reasonable means toward small business survival in this field. I hope the Senate can take expeditious action to enact the resolution.

Mr. President, I ask unanimous consent to have printed in the RECORD at the conclusion of my remarks the full text of the concurrent resolution.

There being no objection, the concurrent resolution was ordered to be printed in the RECORD, as follows:

S. CON. RES. 104

Whereas motor vehicles for the model year 1975 will be built with air pollution control equipment which requires unleaded fuel;

Whereas 1975 model motor vehicles may constitute up to 10 percent of the motor vehicles in use by the beginning of 1975;

Whereas the regulations of the Environmental Protection Agency require gasoline marketers to provided unleaded gasoline for such vehicles by July 1, 1974 (or upon application by September 1, 1974) under a possible fine of up to $10,000 per day; and

Whereas service station operators, marketers, suppliers, and especially small businesses, who are in good faith attempting to comply with this requirement, face delays in delivery and installation of equipment or gasoline which are beyond their control; Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That it is the sense of the Congress that the Administrator of the Environmental Protection Agency should, in the application of regulations pursuant to the Clean Air Act with respect to supplying, after July 1, 1974, unleaded gasoline for automobiles—

(1) grant reasonable extensions of time for compliance to retailers who are unable to obtain such gasoline or delivery systems for such gasoline; and

(2) consult with the Administrator of the Federal Energy Administration in order to obtain a fair allocation of such gasoline for all segments of the petroleum industry marketing structure.

DEPARTMENTS OF STATE, JUSTICE AND COMMERCE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS, 1975—AMENDMENTS

AMENDMENT NO. 1612

(Ordered to be printed and referred to the Committee on Appropriations.)

Mr. NELSON (for himself and Mr. ERVIN) submitted an amendment, intended to be proposed by them, jointly, to the bill (H.R. 15404) making appropriations for the Departments of State, Justice, and Commerce, the Judiciary and related agencies for the fiscal year ending June 30, 1975, and for other purposes.

THE SECURITY OF INDIVIDUAL PRIVACY

Mr. NELSON. Mr. President, I send to the desk on behalf of myself and the Senator from North Carolina (Mr. ERVIN) an amendment to House Resolution 15404 which provides that none of the funds appropriated by this title should be used for the installation, maintenance or operation of electronic devices for intercepting wire or oral communications not authorized by sections 2516 and 2518 of title 18, United States Code.

Mr. President, on July 11 the Senate, by an overwhelming vote of 64 to 31, repealed the "no knock" provisions of the federal drug law and the D.C. Criminal Code. In so doing, the Senate signaled its intention to correct a past mistake and to insure that individual liberties are not sacrificed on the altar of political expendiency.

That same sensitivity to individual liberty should now move the Senate to end the wiretapping abuses perpetrated in the name of "national security." The Senate should adopt legislation which

requires all wiretaps to have their prior approval of a neutral court.

The need for such legislation is beyond doubt. Attorney General Saxbe has already endorsed the concept of requiring prior judicial authorization of national security wiretaps. In its report, the Senate Watergate Committee likewise stated that "it is preferable" to have prior court approval of national security wiretaps.

Because the need is so clear, Senator ERVIN and I are proposing today an amendment to H.R. 15404, an appropriations bill for the Commerce, State and Justice Departments, which would prohibit the use of the appropriated funds by the Justice Department and the FBI for the installation, operation, or maintenance of wiretaps and electronic bugs which do not have the prior authorization of a judicial warrant. The effect of this amendment would be to put Congress on record as being against the Government's use of warrantless wiretaps for so-called "national security" reasons or for any other purpose. In so doing, it would help assure every American citizen that individual liberty—not unrestrained Government power—is the hallmark of our society.

This assurance would merely be a reaffirmation of the rights guaranteed to every individual by the fourth amendment to the Constitution. That amendment states explicitly that—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

One need not be an historian or a lawyer to understand the basic purpose of this amendment. It is designed to protect an individual's privacy against unreasonable intrusions by the Government. To provide this protection, the amendment contemplates that a neutral court—not the Government—shall first determine whether any planned search is reasonable enough to justify the issuance of an approving warrant based on probable cause. This procedure makes eminent sense. Without prior court review, the Government would be both advocate and judge of its own case.

It is noteworthy, moreover, that the fourth amendment's protection applies to all Government searches. No exception is made for "national security" cases.

In 1967, he Supreme Court ruled that, as a matter of constitutional law, telephone wiretaps constitute Government searches which are subject to fourth amendment limitations. This ruling means that Government wiretaps must have the prior authorization of a judicial warrant based on probable cause. The Court has upheld this position in every subsequent wiretap case—even in those situations where it was claimed that the wiretapping was necessary to protect "domestic security."

Despite the clear meaning of the fourth amendment and interpretive decisions by the Supreme Court, the Government continues to authorize warrantless wiretaps in so-called national security cases. A Justice Department spokesman testified at a recent congressional hearing that approximately 100 warrantless wiretaps are operative at any given point of time. It was argued there and elsewhere that such wiretaps are necessary to protect the Nation's security.

The short but essential answer to that argument was offered more than 200 years ago by William Pitt. Responding to the Government's pleas that general search warrants were necessary for the Government to execute its responsibilities, Pitt declared that—

> Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves.

That response applies with equal force to any argument in support of warrantless wiretaps. Such wiretaps pose a grave danger to the individual's right to privacy and other fundamental constitutional liberties.

Often they reflect nothing more than a desire to pry into an individual's private affairs. Generally they are not supported by concrete evidence to justify the invasion of an individual's privacy. And always they escape the scrutiny of the courts, the Congress, and the public at large because the Government is not required to disclose their existence unless it prosecutes the individual involved—a rare occurrence in the history of national security wiretaps.

In a word, warrantless wiretaps are dangerous because they confer unlimited and unreviewed power in the executive branch. There is virtually no way for either the Congress or the courts to check the exercise of that power. Warrantless wiretaps thus violate the basic premise underlying our Constitution that all power is "fenced about."

The dangers of warrantless wiretaps are not confined to the criminal and truly subversive elements within our society. Warrantless wiretaps are a serious threat to everyone, regardless of his or her station in life. Many distinguished Americans, for instance, have been subject to national security wiretaps.

Those wiretapped in recent years include Dr. Martin Luther King, Jr., who was wrongly suspected of being a Communist dupe in the early 1960's; Joseph Kraft, the syndicated newspaper columnist; 17 newspapermen and Government officials who were suspected of leaking or reporting sensitive information in 1969—despite the fact that some of those tapped did not even have access to such information; congressional aides who knew reporters involved in the publication of the Pentagon Papers; and friends of a White House official suspected of passing information to the Chairman of the Joint Chiefs of Staff of the U.S. Armed Forces.

These and other incidents show that often national security wiretaps have been used to protect an administration from adverse publicity rather than to protect the Nation against foreign attack or subversion.

The abuses of warrantless wiretaps have rightly aroused concern among the public. In a recent opinion poll for the Senate Subcommittee on Intergovernmental Relations, Louis Harris found that 75 percent of the public believes that "wiretapping and spying under the excuse of national security [are] a serious threat to people's privacy." Mr. Harris also found in another poll that more than 75 percent of the public now favors legislation to curb the Government's power to wiretap.

These opinion polls are not difficult to understand. The vast majority of the public instinctively recognize that lack of control breeds an official state of mind that condones the Government's invasion of a citizen's privacy. This official attitude is a dangerous threat to freedom. It led to Watergate and other illegal acts of political espionage.

The lesson of Watergate and other recent events is clear: warrantless wiretaps for so-called "national security" purposes should have no place in our society. It would indeed be ironic if the Government's invocation of national security could justify a violation of those constitutional rights and liberties which the Government is obligated to defend.

It is therefore incumbent on Congress to adopt action to prevent such wiretapping abuses and to alleviate public concerns. The amendment offered today provides the Senate with a timely opportunity to meet that responsibility. In essence, the amendment requires that wiretaps conducted by the Justice Department or FBI be subject to the court warrant procedures contained in title III of the Omnibus Crime Control and Safe Streets Act.

This requirement would not impinge on the Government's ability to install a wiretap when there is a legitimate need. Virtually every activity which endangers the Nation's security is a codified crime, such as treason or espionage. Section 2516 of title III explicitly allows for wiretaps to obtain information about such activities. Consequently, if the Government determines that it needs a wiretap to protect the Nation, it should be able to obtain the approving judicial warrant. This is particularly so since 6 years of experience under title III demonstrates that courts are very deferential to Government requests for wiretaps; of the thousands of wiretap applications made by the Government, the courts have denied only a handful.

This amendment, then, strikes a proper balance between the need to preserve fundamental constitutional liberties and the need to provide the Government with access to information concerning the Nation's security. For this reason, there should be no obstacle to Congress, approval of the proposed amendment. In fact, failure to adopt this amendment would be an admission to the American people that, for all their rhetoric, Members of Congress are unwilling to take concrete action to protect those rights and liberties which the Constitution guarantees to every individual. Mr. President, H.R. 15404 is now pending before the Senate Appropriations Committee. I ask that the amendment offered today be referred to that committee so that the amendment can be considered in the committee's deliberations.

I. THE SCOPE OF THE FOURTH AMENDMENT'S PROTECTION

To appreciate the need to prohibit the use of warrantless wiretaps, it is first necessary to understand the scope of the fourth amendment's protection. As noted earlier that amendment provides that—

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This amendment thus restricts the Government's power over the individual. As James Madison observed, this amendment, as well as the other amendments in the Bill of Rights:

"Limit and qualify the powers of Government, by excepting out the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." 1 Annals of Cong. 483 (June, 1789).

In this light, the basic purpose of the fourth amendment is clear. It protects each citizen's privacy from unreasonable invasion by the Government.

The fourth amendment was borne from the American Colonies' bitter experience with their British rulers. The English king's officers—armed with nothing more than a general warrant and a desire to suppress political dissent—frequently entered an individual's home and rumaged through his personal effects. Those warrants, and the indiscriminate searches which they sanctioned, quickly became a subject of dread among the American Colonies. See N. Lasson, "The History and Development of the Fourth Amendment to the United States Constitution," chapters 3 and 4 (1937).

In drafting a constitution to govern their new Nation, the American citizens were concerned that there be no resurrection of those indiscriminate searches by the Government. The fourth amendment was therefore, adopted to meet that justified concern.

The fourth amendment's protection is twofold. On the one hand, it precludes unreasonable invasions of an individual's privacy by the Government. On the other hand, the fourth amendment guarantees that that privacy can be invaded only when there is a judicial warrant based on probable cause. The fourth amendment's twofold protection was aptly summarized in a recent issue of the Arizona Law Review:

The fourth amendment was intended not only to establish the conditions for the validity of a warrant, but also to recognize an independent right of privacy from unreasonable searches and seizures. Justice Frankfurter, dissenting from the [Supreme] Court's decision in *Harris* v. *United States*, interpreted [t]he plain import of this [to be] . . . that searches are "unreasonable" unless authorized by a warrant, and a warrant hedged about by adequate safeguards.

Note, "Warrantless Searches in Light of Chimel: A Return to the Original Understanding," 11 *Ariz. L.Rev.* 455, 472 (1969).

It is quite clear, moreover, that the fourth amendment's protections were not to be suspended in cases of national security. When the fourth amendment was adopted, our Nation was only 11 years old. Foreign threats to the Nation's newly won independence remained ever present. Yet the fourth amendment provides for no exception to its application. The compelling conclusion is that the amendment should be applicable to all situations, including cases involving national security crimes. This conclusion is supported by innumerable constitutional scholars, including Justice William O. Douglas, who has stated:

There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes." *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (concurring opinion).

Our Founding Fathers, of course, did not contemplate the advent of telecommunications. Consequently, the amendment does not expressly include wiretaps of telephones within the ambit of its protection. But there is no question that the constitutional right to privacy is no less important in cases where the Government listens to a telephone conversation than when it physically enters an individual's home.

In the 1967 decisions of Berger against New York and Katz against the United States, the Supreme Court held that the fourth amendment therefore generally requires the Government to obtain a judicial warrant before it can wiretap a citizen's phone. In issuing the Katz decithat—

The fourth amendment protects people, not places.

The soundness of the Berger and Katz decisions has been reaffirmed repeatedly by the Supreme Court. See, for example, *Alderman* v. *United States*, 394 U.S. 165 (1969). Most recently, in *United States* v. *United States District Court* (407 U.S. 297 (1972)), commonly referred to as the Keith case, the Court held that the Government could not wiretap American citizens without a judicial warrant—even when the citizens' activities threatened the domestic security of the Nation. Again, the Court made clear that wiretaps must adhere to the safeguards delineated by the fourth amendment:

Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.

The Supreme Court has not yet decided whether the fourth amendment's protections apply to cases involving foreign powers and their agents. In the Keith case, the Court stated explicitly that it did not consider those situations where American citizens have a significant connection with foreign powers and their agents.

Because the Court has not ruled on these national security wiretaps, the present administration maintains that it may install warrantless wiretaps in certain stiuations. In a September 1973 letter to Senator WILLIAM FULBRIGHT, chairman of the Senate Foreign Relations Committee, then Attorney General Elliot Richardson stated that the administration would continue to install warrantless wiretaps against American citizens and domestic organizations if the administration believes that their activities affect national security matters.

Mr. Richardsons' comments apparently still reflect administration policy. A representative of the Justice Department testified at a recent congressional hearing that at any point in time approximately 100 warrantless wiretaps are operative. The representative stated, furthermore, that these wiretaps often include surveillances of American citizens. And that is precisely the problem of national security wiretaps.

The discretion to determine when such warrantless wiretaps are justified and properly executed has been the sole province of the executive branch. There has been virtually no opportunity for the Congress, a court, or any other public body to examine the exercise of that discretion in order to prevent abuses. The results are not surprising. Warrantless wiretaps have produced and continue to produce the very evils which the fourth amendment was designed to eliminate.

II. THE HISTORY OF WARRANTLESS WIRETAPS

Warrantless wiretaps were first employed early in the 20th century. Almost from the very beginning, constitutional scholars and law enforcement officials recognized the serious dangers of warrantless wiretaps. In an early surveillance case, the venerable Justice Oliver Wendell Holmes referred to warrantless wiretaps as "dirty business" (*Olmstead* v. *United States*, 277, U.S. 438, 470 (1928) (dissenting opinion)).

In 1931, J. Edgar Hoover, who by then had been FBI director for 7 years, commented that —

While [the practice of warrantless wiretaps] may not be illegal, I think it is unethical, and it is not permitted under the regulations by the Attorney General.

In 1939 Mr. Hoover wrote to the Harvard Law Review that he believed wiretapping to be "of very little value" and that the risk of "abuse would far outweigh the value."

By 1939, however, pervasive reservations about wiretapping had inspired enactment of a law by Congress. In 1934, Congress passed the Communications Act. Section 605 of that act prohibits the "interception and divulgence" or "use" of the contents of a wire communication. From the moment of enactment, the provision seemed to erect a total prohibition to wiretapping and the use of information obtained from wiretapping. See *Nardone* v. *United States*, 308 U.S. 338 (1939); *Nardone* v. *United States*, 302 U.S. 379 (1937). As the Supreme Court stated:

[T]he plain words of the statute created a prohibition against any persons violating the integrity of a system of telephone communication and that evidence obtained in violation of this prohibition may not be used to secure a federal conviction. *Benanti* v. *United States*, 355 U.S. 96, 100 (1957).

This interpretation was shared by civil libertarians acquainted with the legislative history. Indeed, subsequent efforts in the 1940's and 1950's to legalize certain kinds of wiretapping were repeatedly re-

buffed by those in Congress who feared the consequences which wiretapping would have for civil liberties. See Theoharis and Meyer, "The 'National Security' Justification for Electronic Eavesdropping: An Elusive Exception," 14 Wayne L. Rev. 749 (1968).

On the eve of World War II, however, President Franklin D. Roosevelt became convinced that use of warrantless wiretaps would be necessary to protect the Nation against the "fifth column" and other subversive elements. Roosevelt therefore instructed his Attorney General, Robert Jackson, to authorize wiretaps against subversives and suspected spies.

But Roosevelt was not insensitive to the risks which wiretapping could have for constitutional rights and liberties. In a memorandum to Jackson dated May 21, 1940, Roosevelt indicated that he was aware of section 605 and had read the Supreme Court's interpretive decisions. Roosevelt basically agreed with the restrictions against wiretapping:

> Under ordinary and normal circumstances wiretapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

Roosevelt consequently instructed Jackson—

> to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

Roosevelt's sensitivity to the dangers of warrantless wiretaps did not necessarily rescue their legality. Many legal scholars have suggested that until enactment of title III of the Omnibus Crime Control and Safe Streets Act of 1968, all wiretapping was illegal. See, for example, Navasky and Lewin, "Electronic Surveillance," in hearings before Senate Subcommittee on Administration Practices and Procedures. U.S. Senate, 92d Cong., 2d sess., pp. 173–74, 180 (June 29, 1972). Theoharis and Meyer, for instance, observed that until 1968:

> All wiretapping violated the absolute ban of section 605 of the Federal Communications Act of 1934, and all other electronic eavesdropping which resulted in trespass of a constitutionally protected area was prohibited.

The questionable legality of wiretapping did not deter its use after World War II. In the 1950's and 1960's the Government's reliance on warrantless wiretaps mushroomed. No precautions were taken, though, to minimize the dangers to civil liberties recognized by Roosevelt. Concern for "national security" consequently led to the use of warrantless wiretaps against political dissidents—including Dr. Martin Luther King, Jr., who was wrongly suspected of being an unwitting dupe of the Communists.

The use of warrantless wiretaps had become a monster with its own momentum. Even the President did not always know the full extent to which such taps were used. Thus, upon learning of the taps on Dr. King and others, President Lyndon Johnson became irate.

One June 30, 1965, Johnson issued a directive placing severe restrictions on the use of warrantless wiretaps. Johnson initially made clear his general opposition to warrantless wiretaps:

> I am strongly opposed to the interception of telephone conversations as a general investigative technique.

Johnson nonetheless ordered that wiretaps be permitted in national security cases—but only with the specific authorization of the Attorney General. Johnson apparently believed, in good faith, that authorization of warrantless wiretaps by the Attorney General would prove to be an adequate safeguard for the individual's constitutional right to privacy and other constitutional liberties.

Sadly, but not unexpectedly, Johnson's belief proved to be illusory. Recent events have demonstrated that warrantless wiretaps—no matter how benign the Government's motives—cannot insure the sanctity of the individual's right to privacy. Reference to the examples cited in my statement of December 17, 1973—S23026—makes this clear:

> On December 5, 1973, Eugene LaRocque, a retired rear admiral in the U.S. Navy, revealed that the Pentagon currently has a unit which is authorized to engage in the same kind of surveillance activities conducted by the "Plumbers Unit" in the White House. The purported basis of these activities is a need to protect "national security." Rear Adm. LaRocque emphasized that there is currently no procedure for Congress, the courts, or the public to determine the scope—or lawfulness—of the Pentagon unit's surveillance activities.
>
> In a report issued in October 1973, a House subcommittee found that certain White House officials invoked national security considerations to make the CIA their "unwitting dupe" in the burglary of Daniel Ellsberg's psychiatrist's offices and in other unlawful surveillance activities.
>
> Recently it was learned that in 1969 the administration installed warrantless taps on 13 government officials and 4 newsmen, for the purported reason that these individuals were leaking or publishing sensitive foreign intelligence information. In virtually all the cases there was little or no concrete evidence to justify the taps. In many cases the evidence shows that the individual tapped did not even have access to such information. Indeed, in at least two cases the taps were continued after the individual had left Government service and had joined the Presidential campaign staff of Senator Muskie.
>
> In 1969 the White House authorized the burglary of the home of newspaper columnist Joseph Kraft so that a warantless tap could be installed. The alleged basis for this action was again national security. But there was and is no concrete evidence to establish that Mr. Kraft was acquiring or reporting any information which compromised our national security.
>
> Testimony before the Senate Watergate Committee revealed that the White House authorized warrantless wiretaps "from time to time" when it was conducting an independent investigation of the publication of the "Pentagon papers" in 1971. The taps were placed on numerous citizens including aides of Members of Congress, whose only connection with the "Pentagon papers" was a personal relationship with some of the reporters involved. Again, the taps were justified on national security grounds and, again, there was and is no concrete evidence to support the need for the taps.
>
> In 1970, the White House conceived and drafted a broad plan which proposed warrantless wiretapping, burglary, and other insidious surveillance practices. The staff assistant responsible for the plan stated in a memorandum to the President that certain aspects were "clearly illegal." Nonetheless, the plan was approved on the basis of national security, only to be scrapped shortly afterward when FBI Director J. Edgar Hoover objected.

In addition to these abuses, the Washington Post disclosed last January four more warrantless wiretaps conducted by the White House "plumbers" in 1972 against American citizens. The presumed basis for these taps was again national security. But there was no involvement of foreign powers or their agents. Nor were the taps in any way necessary to protect our Nation from foreign attack or subversion. The taps were instead justified on the grounds that a White House official was distributing certain information to the Chairman of the Joint Chiefs of Staff of the U.S. Armed Forces. In order to stop this distribution, the plumbers believed it necessary to wiretap the official's friends.

The abuses of warrantless wiretaps underscore the wisdom of the fourth amendment's protections. It would be naive to assume that the Government can make a disinterested judgment as to whether a planned search by Government agents is reasonable. The Government cannot properly be both advocate and judge of its own case.

Our Founding Fathers recognized this problem and adopted the fourth amendment. That amendment contemplates that a disinterested court will decide whether searches desired by the Government are reasonable. See, for example, the Keith case; *Coolidge* v. *New Hampshire* (403 U.S. 443 (1971)). The need for this disinterested judgment is no less necessary in cases involving the national security than it is in other cases. This essential point was advanced eloquently by Justice Douglas in the Katz case:

> Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved, they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather, it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and the Attorney General are properly interested parties, cast in the role of adversary in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the positions of adversary-and-prosecutor and disinterested, neutral magistrate. 389 U.S. at 359–60 (concurring opinion).

In short, regardless of how beneficient the Government's intentions, warrantless wiretaps—whether in national security cases or in any other kind of case—pose serious dangers to the right to privacy as well as other constitutional rights and liberties.

III. AMENDMENT TO PROTECT AGAINST WIRETAP ABUSES IN NATIONAL SECURITY CASES

The history of warrantless wiretaps for national security cases demonstrates

the need for corrective action. For too long Congress has closed its eyes to the abuses of those wiretaps—perhaps in the hope that the country would be better served if implicit trust were placed in the executive branch to safeguard constitutional rights. The history underlying the fourth amendment should have given Congress pause before being so trusting.

But whatever the rationale for past inaction, the Watergate scandals make clear that Congress must act now to insure the preservation of precious constitutional rights—especially the right to privacy. Invocation of national security should not enable the Government to wiretap without regard to traditional constitutional limitations. The amendment offered today provides Congress with an opportunity to assure the sanctity of those limitations.

The amendment simply prohibits the use of appropriated funds for wiretaps which do not comply with the warrant procedures included within title III of the Omnibus Crime Control and Safe Streets Act of 1968. Under that title, a court will approve a Government wiretap if there is probable cause to believe that a certain crime has been or is about to be committed. Crimes for which wiretaps can be authorized include national security offenses, such as espionage, sabotage and treason.

The amendment is really a very conservative measure. It merely reasserts the traditional safeguards provided by the fourth amendment. That amendment states that the Government cannot invade an individual's privacy without first obtaining a judicial warrant based on probable cause. The history of the amendment suggests that, except in certain matters—such as housing inspections—the "probable cause" requirement must relate to the commission of a crime. See, for example, *Wyman* v. *James*, 400 U.S. 309 (1971); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

The history of the fourth amendment also underlies the need for prior judicial authorization for national security wiretaps. In United States against Brown, Circuit Judge Goldberg explained the importance of the court's role in supervising such wiretap:

> It remains the difficult but essential burden of the courts to be ever vigilant, so that foreign intelligence never becomes a pro forma justification for any degree of intrusion into zones of privacy guaranteed by the Fourth Amendment. 484 F. 2d 418, 427 (1973) (concurring opinion).

The Watergate scandals should teach us that the courts cannot carry this essential burden unless prior judicial approval is required for national security wiretaps.

There should be no concern that a requirement of judicial warrants for national security wiretaps will undermine the security of the Nation. Almost any activity which threatens the Nation's security is a codified crime for which a wiretap can be authorized. Courts, moreover, will be most responsive to Government requests for national security wiretaps. Past experience with title III indicates that judges are very deferential to Government requests for wiretaps to obtain information about domestic crimes; that deference is bound to be just as great—if not greater—when the crime is one involving national security. The convergence of these factors, then, makes clear that the amendment will not impose any undue restriction on the Government's ability to protect against foreign attack or subversion.

IV. CONCLUSION

For decades the Government has used warrantless wiretaps to serve its view of the national security. These wiretaps have always posed a fundamental danger to the freedoms guaranteed by our Constitution. The Watergate scandals and other recent events have exposed that danger in a dramatic and clear fashion.

We should not fail to heed the warning signs. Constitutional provisions empowering the Government to protect the Nation's security were never thought to justify the subversion of individual freedoms afforded by other constitutional provisions. As Judge Ferguson declared in the United States against Smith, a case concerning the use of warrantless wiretaps for national security purposes:

> To guarantee political freedom, our forefathers agreed to take certain risks which are inherent in a free democracy. It is unthinkable that we should now be required to sacrifice these freedoms in order to defend them. 321 F. Supp. 424, 430 (1971).

Congress cannot and should not tolerate governmental violations of the individual's constitutional rights to privacy by wiretaps or any other means. That right to privacy, as well as other constitutional liberties, are the cornerstone of our democratic system. If those rights and liberties are eroded, the very fabric of our constitutional system is imperiled. Congress should, therefore, act now to protect our cherished rights and liberties from abusive national security wiretaps.

Mr. President, I ask unanimous consent that the text of amendment offered today be printed in the RECORD.

There being no objection, the text was ordered to be printed in the RECORD, as follows:

On page 22, between lines 10 and 11, insert the following new section:

SEC. 208. None of the funds appropriated by this title shall be used for the installation, maintenance, or operation of electronic devices for intercepting wire or oral communications not authorized by sections 2516 and 2518 of title 18, United States Code.

WARRANTLESS WIRETAPPING AND INDIVIDUAL PRIVACY

Mr. ERVIN. Mr. President, I am pleased to join my colleague Senator NELSON in cosponsoring this amendment to the Justice Department appropriation bill, H.R. 15405, which would prohibit the use of appropriated funds for conducting warrantless wiretaps. By requiring that the Justice Department first obtain court approval before engaging in any wiretapping, this amendment seeks to protect the constitutional rights of all citizens and prevent against unwarranted invasions of their privacy.

To my mind, the purpose of this amendment is twofold. First, it is simply a stop-gap measure which would prohibit the Justice Department from engaging in any warrantless wiretap during this fiscal year, and second, by so doing, it recognizes the necessity for Congress to enact substantive legislation in the field.

That legislation to control national security wiretaps or any other kind of warrantless wiretap is necessary has long been recognized. In 1968 when Congress enacted title III of the Omnibus Crime Control and Safe Streets Act, the question of warrantless electronic surveillance for national security purposes was recognized but left unresolved. At that time, Congress only provided for court-authorized and stringently controlled use of wiretaps and electronic surveillance for certain major crimes. The comprehensive scheme adopted in the law prohibits the interception of wire or oral communications in such cases unless a court order based upon probable cause is first obtained. It was contemplated that whatever action the President deemed necessary to protect the national security would be taken under existing constitutional and legal procedures by the appropriate law enforcement agency of the Government.

But as succeeding events have graphically demonstrated, the critical area of national security wiretaps left unresolved in the 1968 act must now be addressed. Both the Keith decision and the case of the recently disclosed 17 national security taps have focused upon this particular area of wiretapping. In Keith, the Court rejected the President's assertion of an inherent power in domestic security cases to wiretap without a warrant. Writing for the Court, Justice Powell made the following points about the development of electronic surveillance:

> Even when employed with restraint and under judicial supervision[,] [t]here is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens . . . Though physical entry of the home is the chief evil against which the . . . Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance . . . [B]road and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate Fourth Amendment safeguards.
>
> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. 407 U.S. 313.

The amendment we propose today would bring some temporary control over the practice while at the same time continue to permit the Justice Department to conduct wiretaps in national security cases. All that is required under the provisions of this amendment is that the Justice Department comply with the warrant requirement of title III, before initiating any wiretaps.

At recent hearings held jointly by the Senate Judiciary Subcommittee on Constitutional Rights, and Administrative Practice and Procedure and the Foreign Relations Subcommittee on Surveillance, Attorney General Saxbe endorsed such a concept.

I would like to see the Congress take some action in this area. There are three things that could be done. First, you can just do away with all electronic surveillance and it would put us at some disadvantage but we would live with it. . . . The second would be to set up an impartial, . . . Board of Congress, the Executive, and the Judiciary, to sit on a continuing board and review week by week what should be done. . . . And the third would be to try to get statutory authority to work it under Title III. . . . We would be happy to live with that.

As an interim measure, the prior judicial authorization requirement proposed in this amendment strikes a fair balance between security and freedom. This warrant requirement may be the ultimate solution to the problem, but that remains to be seen. In any event, it is a practical and workable solution for the moment and I would urge the adoption of this amendment by the Appropriations Committee. To continue to permit an unrestrained power in the area of warrantless wiretapping until definitive legislation is enacted only encourages the misuse and abuse demonstrated in the recently disclosed national security wiretaps.

MILITARY CONSTRUCTION AUTHORIZATION, 1975—AMENDMENT

AMENDMENT NO. 1613

(Ordered to be printed and referred to the Committee on Armed Services.)

Mr. HOLLINGS (for himself and Mr. CRANSTON) submitted an amendment, intended to be proposed by them, jointly, to the bill (S. 3471) to authorize certain construction at military installations, and for other purposes.

TRADE REFORM ACT—AMENDMENT

AMENDMENT NO. 1614

(Ordered to be printed and referred to the Committee on Finance.)

Mr. HUMPHREY (for himself and Mr. BENTSEN) submitted an amendment, intended to be proposed by them, jointly, to the act (H.R. 10710) to promote the development of an open, nondiscriminatory, and fair world economic system, to stimulate economic growth of the United States, and for other purposes.

TRADE WITH THE DEVELOPING WORLD

Mr. HUMPHREY. Mr. President, an important issue in the upcoming multilateral trade negotiations is the role which the developing world will play in the attempt to equitably restructure the world trade order.

The multilateral trade negotiations have in the past largely been the domain of the developed countries. For the most part poorer countries have been only bystanders as the industrial countries negotiated between themselves for more open commercial exchange. While tariffs on products of the developed countries during the Kennedy round were reduced 36 percent on the average, the average tariff reduction for products of the developing countries was about 20 percent. According to Mr. Guy Erb of the Overseas Development Council:

Tariff rates applied to products of developing countries are roughly twice as high as those applied to products of rich countries. For the United States, post-Kennedy round nominal rates were estimated at 6.8 percent on imports from developed countries, and at 12.4 percent on imports from developing countries.

Furthermore, the growth of trade with the developing world had been significantly smaller than the growth of trade worldwide. Between 1958 and 1972, for eaxmple, exports to Latin America, as a percentage total world trade, actually dropped from 10.4 to 5.3 percent.

Clearly, if the developing world is to pay for the external resources such as capital and technology necessary for economic progress, these countries must be able to expand markets for their own production abroad.

But, these same countries are at a competitive disadvantage compared to the rich countries, having neither the clout to secure concessions for their own products in the multilateral trade talks, nor the sophisticated marketing and distribution resources to compete against the big manufacturing concerns of the developed world.

Foreign assistance efforts aimed at improving the quality of life for the two-thirds of the world's population living in poverty will only be like "pouring water through a sieve" unless developing countries can establish a firm economic base upon which the domestic economy can expand. And, as Mr. Erb warns:

Without a world economy which encourages the continuing growth of the exports of developing countries, many of their efforts to expand production and improve living standards will be hindered.

In recent years, developing countries have recognized trade as an important component in their economic development. "Trade not aid" has become a byward in the developing world to represent the importance of measures which countries can take to help their own economic development.

Not only does this concept of "self-help" preserve national dignity, but it represents sound economics. The development of export industries acts as a stimulus for the development of other sectors of a developing economy and provides a much more permanent base for economic development than direct grants from developed countries. And in the absence of much higher aid levels or accelerated private direct investment, exports must finance the bulk of imports needed for economic progress.

The expansion of export capability for the developing world also has significant implications for our own economy. The decline in the share of world trade enjoyed by the developing world means that these countries will have less to spend, in a real sense, in our own markets. Traditionally, the United States has realized a $2 billion trade surplus with the developing world. Yet this surplus dropped to $200 million in 1972 and will fall much further as most of the developing world diverts scarce foreign exchange to pay for the greatly increased costs of energy imports. Unless the developing world can increase their export markets and unless the oil producing countries adjust their prices to a more reasonable level, trade with much of the developing world could shrink to a negligible trickle.

An international plan, known as the generalized preference scheme, to promote the expansion of trade opportunities for the less developed world, was agreed to at the Second United Nations Conference on Trade and Development, 1968. The scheme is designed to assist developing economies realize their export potential by allowing duty-free or concessional rates on imports into developed countries for manufactured, semimanufactured and selected products of developing countries. Presently, the United States is the only major industrial nation which has not implemented this plan.

Title V of the proposed Trade Reform Act, currently before the Senate, would provide the President authority to extend duty-free treatment to certain imports from developing countries. This is an important step toward bearing our share of the responsibility under the worldwide generalized preference scheme. The scheme described in the Trade Reform Act represents a framework upon which meaningful trade preferences can be worked out with the less developed countries to assist them in their efforts to help themselves.

However, I feel that there are a few improvements which can be made in the scheme which is outlined in title V of H.R. 10710 to strengthen its mutual benefit.

Studies conducted by the United Nations Conference on Trade and Development and the U.S. Department of State show that the U.S. proposal is the most restrictive of the proposals yet implemented by other developed countries. It is estimated, for example, that even after the United States introduced our preference proposal the European Community and Japan would absorb three or four times more duty-free imports from less developed countries, as a percentage of GNP, than the United States.

At a time when the United States is encouraging regional economic development, the proposal penalizes less developed countries which require significant raw material inputs from other less developed countries in their manufactures. And the limitations on the level of exports which may receive beneficiary treatment, unduly restrict a potential for market growth. Instead of seeking an expanded level of trade, countries would be included to restrain exports to stay within the preferential margin.

There are several substantive adjustments, then, which must be made if we are going to participate in the worldwide scheme of generalized preference. Let us make our participation more than a token gesture.

When I began to consider measures to make U.S. participation in the generalized preference scheme more meaningful, I faced two important reservations. First, I wanted to be sure that tariff concessions to the developing world would not open up U.S. markets to a flood of cheap imports, impairing the competitiveness of industry and threatening the jobs of our own workers. I have become sufficiently satisfied that this would not be the case. The proposed Trade Reform Act, combined with existing statutory law, can achieve significant im-

Q.8(P)

AGREEMENT WITH STATEMENTS OF ALIENATION

	Total	East	Midwest	South	West	18 to 29	30 to 49	50 and Over	8th Grade	High School	College	White	Black
	%	%	%	%	%	%	%	%	%	%	%	%	%
The rich get richer and the poor get poorer	76	77	78	71	77	78	75	74	78	80	68	74	84
Wire-tapping and spying under the excuse of national security is a serious threat to people's privacy	75	76	75	70	79	77	71	76	74	75	74	74	78
The tax laws are written to help the rich, not the average man	74	76	77	67	75	74	75	72	78	75	69	74	74
Special interests get more from the government than the people do	74	76	75	67	78	72	78	71	69	75	74	73	75
What you think doesn't count very much anymore	61	56	60	62	67	61	59	62	68	64	54	60	66
Most elective officials are in politics for all they can get out of it for themselves	60	59	60	63	58	59	59	62	70	64	51	58	74
The federal government in Washington has been trying to dictate too much what people locally can and cannot do	59	53	63	66	55	57	60	61	58	64	53	60	52
The people running the country don't really care what happens to you	55	55	55	51	62	59	53	53	59	57	51	53	65
Most people with power try to take advantage of people like yourself	55	57	51	56	55	60	54	52	63	60	44	52	74
Local government is so disorganized, it's hard to know where to go for help	49	49	42	52	52	53	49	45	57	49	44	46	61
You feel left out of things going on around you	29	32	24	31	29	31	28	29	38	32	21	25	58
Important things that happen in the world don't affect your life	22	23	14	29	21	20	18	27	31	22	18	21	30

93d Congress
1st Session

COMMITTEE PRINT

CONFIDENCE AND CONCERN:
CITIZENS VIEW AMERICAN GOVERNMENT

A SURVEY OF PUBLIC ATTITUDES

BY THE

SUBCOMMITTEE ON
INTERGOVERNMENTAL RELATIONS

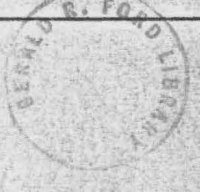
OF THE

COMMITTEE ON GOVERNMENT
OPERATIONS
UNITED STATES SENATE

PART 1

DECEMBER 3, 1973

Printed for the use of the Committee on Government Operations



MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 11, 1974

Dear Phil:

I have had the night to reflect on the attached material. On the FoIA amendments, I would recommend that we try to get the "effective 90 days after enactment" clause extended to at least six months. The agencies may have great difficulty gearing up to meet the indexing requirements in 90 days.

I think, however, that unless the FBI can come up with some perfecting language for the (b)(7) exemption (and by that I do not mean a major retrenchment from the proposed new language), the President should not oppose it. I assume, of course, that the conferees themselves will get rid of the controversial subsection (F) on sanctions against individual employees.

The prospect of a major contretemps over executive privilege arising from the proposed amendment of the (b)(1) exemption for national defense and foreign policy matters strikes me as a red herring. The proposed amendment would not give the courts authority to review the classification criteria established by Executive order; it would only permit them to review how adequately an agency has complied with those criteria in a specific case in dispute. This sounds like a rather ingenious solution to a difficult problem and the hand-wringers should be obliged to come up with an equally good alternative or else cease and desist.

My final recommendation on FOIA is that someone of the President's people be given marching orders to get the matter ironed out. This will mean a foray into Justice territory and negotiations on the Hill. Obviously, it has to be someone who understands the issues.

On the wiretapping rider, I recommend that we:

(1) refrain from addressing the substance of the issue;

(2) point to the work of the Wiretapping Commission now in progress; and

(3) promise to pay close attention to the Commission's recommendations.

Senator Ervin may argue that he only wants to suspend warrantless wiretapping while the Commission works (hence the rider strategy), but the complexity of the problem--and thus the dangers of precipitous action--should be a persuasive counterargument.

MEMORANDUM

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY
WASHINGTON, D.C. 20504

August 10, 1974

To: Philip W. Buchen
Henry Goldberg

From: Carole W. Parsons

Subject: H. R. 12471 -- Amendments to 5 U.S.C. 552, The Freedom of Information Act

This bill, which is said by the Moorhead Subcommittee Staff Director to be about to emerge from conference (see attached fact sheet) is the result of hearings held during the spring and summer of 1973 on the administration of the Freedom of Information Act by Executive branch agencies. Attached is a copy of all language agreed upon as of August 6, 1974.

The bill requires Federal agencies to compile, publish in the Federal Register at least quarterly, and distribute for sale, current indexes providing identifying information for the public as to any material required to be made available or published under the Freedom of Information Act. Requests for records under the Act would now only have to "reasonably describe" the records desired and each agency would be required to promulgate regulations specifying a uniform schedule of fees with charges limited to reasonable ones for document search and duplication.

The bill places specific limits, subject to court extension, on the amount of time an agency can take in responding to requests and appeals from initial denials and permits the courts to assess attorneys fees and other litigation costs to successful complainants against agency denials.

From the previous Administration's point of view, the most objectionable provisions of the bill are the so-called Hartke and Muskie amendments. The former amends the subsection b (7) discretionary exemption for investigatory records compiled for law enforcement purposes so that such records could now be withheld only under seven specific conditions (see page 5 of the attached conference language). The latter amends the subsection b (1) exemption for matters "required to be kept secret by Executive order in the interest of national defense

or foreign policy" to permit withholding such material only if it is (a) "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and (b) in fact properly classified pursuant to such Executive order." The propriety of the classification according to the specified criteria would be subject to in camera court review and subsection (b) is further amended to provide that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this [the discretionary exemption] subsection.

Other provisions of the bill require each agency to report annually to the Congress on its implementation of the Act and the Attorney General is required to report annually on litigation under the Act.

Section 3 (e) [page 6 of the attached conference language] redefines the operative Section 551 definition of "agency" to encompass "any executive department, military department, Government corporation, Government controlled corporation or other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency."

The amendments would take effect 90 days after enactment.

Discussion

The Moorhead Subcommittee Minority Counsel and the Staff Director both say that the only point on which the conferees still disagree is the subsection (F) provision on suspension without pay of a Federal Employee whom a court finds to have withheld a requested record "without reasonable basis in law." (See the attached Fact Sheet remarks on the conferees' next meeting.)

I have talked with Bob Soloschin, the Justice Department's FoIA expert, who advises that the Muskie amendment (which is intended to overthrow the Mink decision) could embroil the President in acrimonious litigation over the classification of information affecting national defense and foreign policy. He further advises that the FBI is adamantly opposed to the Hartke amendment.

I have made arrangements to go over the conference language with Soloschin tomorrow, if that seems desirable. (He has been on vacation for two weeks.) He has also given me the names and telephone numbers of knowledgeables in the Justice Department who can give more details.

In my conversation with Bob I took the position that we should avoid putting the President in the awkward position of vetoing a Freedom of Information bill the first week he is in office and that we, therefore, must have facts rather than rhetoric from those who strongly object to the bill. He is sympathetic and will help if called upon.

Recommendation

I would recommend that the Republican conferees (especially McCloskey) and Moorhead be contacted and asked to hold off for a week or so until the Administration can get its ducks in a row.

The Justice Department's credibility on this bill may be low. The House Government Operations Subcommittee was willing to move slowly so long as DoJ seemed serious about its FoIA study. However, Jerry Clark resigned last spring and Justice's hands-off policy since then seems to have reflected an estimate that the bill would not get through because of the pre-emption of the legislative calendar by other matters.

Attachments

H. R. 12471

FACT SHEET

House Report No. 93-876, March 5, 1974

Senate Report No. 93-854, May 16, 1974

Committee submitting:

House Government Operations, Holifield - Chairman
Senate Judiciary (Kennedy)

Conferees appointed June 7 (House)and June 10 (Senate)

Conferees:

House		Senate	
R	D	R	D
Horton	Moorhead	Thurmond	Kennedy
Erlenborn	Moss	Mathias	Hart
McCloskey	Alexander	Gurney	Bayh
	Holifield	Hruska	Burdick
			Tunney
			McClellan

Next meeting of conferees: Tuesday, August 12 at 2:30 p. m.

Only remaining disagreement is on subsection (F) (a Kennedy amendment) which calls for 60-day suspension without pay of any Federal officer or employee whom the court finds to have withheld records "without reasonable basis in law."

Moss is said to be the only House conferee firmly in favor. McCloskey is said to be seeking a face-saving compromise. Minority Counsel to the House Government Operations Subcommittee on Foreign Operations and Government Information (the originating subcommittee) does not expect the disagreement to be resolved in Tuesday's meeting; the staff director does. The majority staff wants this to be the first piece of legislation that President Ford signs.

Common Cause and the American Federation of Civil Service Employees oppose the enactment of subsection (F). Nader is lobbying for it.

Recently the principal Administration spokesmen (against the bill) have been Tom Korologos (White House Congressional liaison) and Robert Soloschin, Office of the Assistant Attorney General (Legal Counsel).

INCORPORATES ALL AGREED UPON LANGUAGE OF HOUSE & SENATE CONFEREES AT MEETING ON AUGUST 6, 1974

CONFERENCE VERSION -- H. R. 1 2 4 7 1 -- FREEDOM OF INFORMATION ACT AMENDMENTS

[redacted]

That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is deleted and the following substituted in lieu thereof:

"Each agency shall also maintain and make available for public inspection and copying [current indexes] providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. [Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.]

(b)(1) Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which [(A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees, (if any) and procedures to be followed, shall make the records promptly available to any person."

(2) Section 552(a) of such title 5 is amended by redesignating paragraph (4) as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that

waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. ~~Such fees shall not be charged whenever~~

~~"(i) the fees would, for a request or series of related requests, amount to less than $3:~~

~~"(ii) the records requested are not found; or~~

~~"(iii) the records located are determined by the agency to be exempt from disclosure under subsection (b).~~

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter do novo, [and may examine the contents of any agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section,] and the burden is on the agency to sustain its action.

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after the service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. ~~In exercising its discretion under this paragraph, the~~

~~court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought.~~

"(F) Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which Federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

THIS SUBSECTION IS IN DISAGREEMENT

IN DISAGREEMENT

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member."

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

"(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in

whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or (ii) of subparagraph (A) may be extended by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request--

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable

time limit provisions of this paragraph. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request."

SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:

"(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;"

~~covered by such criteria;"~~

(b) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute a clearly unwarranted invasion of personal privacy, (D) disclose the identity of an informer, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;"

(c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.".

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

"(4) a copy of every rule made by such agency regarding this section;

"(5) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

"(6) such other information as indicates efforts to administer fully this section.

"The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) Notwithstanding section 551(1) of this title, for purposes of this section, the term 'agency' means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

~~SEC. 4. There is hereby authorized to be appropriated such sums as may be necessary to assist in carrying out the purposes of this Act and of section 552 of title 5, United States Code.~~

SEC. ~~5~~ 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

DOMESTIC COUNCIL COMMITTEE
ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

8/11

PWB —

This is what you asked me to prepare for Doug. I will call him this evening.

CWP

MEMORANDUM

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY
WASHINGTON, D.C. 20504

TO: Douglas W. Metz

FROM: Carole W. Parsons

SUBJECT: Privacy legislation that demands immediate action or attention.

Phil asked Janet and me to make a list of privacy legislation that demands action or immediate attention by the Administration, including the possible issuance of Executive orders. We looked only at legislation that has some chance of passage this session. A brief note on the status of each item is attached. We have sent Phil a copy of this memorandum and the attachments.

Legislation	Possible Response
Ban on Warrantless Wiretaps (H. R. 15404)	Ask Congress to reject by August 15.
Buckley Amendments (H. R. 69)	Presidential signature by August 21.
Federal Agency Records (H. R. 16183/S. 3418)	Executive order by mid-September.
Criminal Justice Records (S. 2963/S. 2964)	Administration draft bill by mid-September.
Military Surveillance (S. 2318)	Administration draft bill by mid-September or Executive order.

Attachments

Attachment A

Immediate Action

Buckley Amendments.

H. R. 69, the Elementary and Secondary Education Amendments of 1974, which includes the Buckley Amendments on parent and student access to school records, was transmitted to the President on Friday, August 9. The last day for signature is August 21.

Immediate Attention

Criminal Justice Records.

The Justice Department is holding a strategy session on S. 2963/ S. 2964 on Monday, August 12. Justice now thinks that a CJIS bill may pass this session. Larry Silberman wants to see Phil about it on Tuesday, August 13. Mark Gittenstein wants to see the Privacy Committee staff also.

Warrantless Wiretaps.

The Senate Appropriations Subcommittee on State, Justice, Commerce, and the Judiciary has tentatively scheduled a mark-up on H. R. 15404, the Justice appropriations bill, for Thursday, August 15. Senators Ervin and Nelson will propose an amendment forbidding the use of appropriated funds for warrantless wiretaps.

Federal Agency Records.

Subcommittee mark-up on H. R. 16183 (the Moorhead/OMB bill) is tentatively scheduled for Tuesday, August 13. The next meeting of the Government Operations Committee is Thursday, August 15. The Committee meets every 3 weeks.

Mark-up on S. 3418, the Senate version of the Moorhead/OMB bill is scheduled for Tuesday, August 20.

Military Surveillance.

S. 2318 is ready to be reported to the Judiciary Committee. Communication between Defense and the Constitutional Rights Subcommittee appears to have broken down. Although adoption of S. 2318 by this Congress looks unlikely now, the situation may change in September.

Attachment B

August 1974

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
			1	2	3	4
5	6	7	8	9	10	11
12 Justice Dept. Strategy Mtg. on S. 2963/ S. 2964	13 Mark-up on H. R. 16183 (Moorhead/OMB bill) (tentative)	14	15 House Gov't Ops. meets (wld consider H. R. 16183 if ready) Senate Mark-up on H. R. 15404 Justice App. /Wiretap amendments	16	17	18
19	20 Mark-up of S. 3418, Senate version of the Moorhead bill	21 Last day for signing the Buckley Amend-ments (H. R. 69)	22 House recess.	23 Senate recess. House in recess.	24 House and Senate in recess.	25 House and Senate in recess.
26 House and Senate in recess.	27 House and Senate in recess.	28 House and Senate in recess.	29 House and Senate in recess.	30 House and Senate in recess.	31 House and Senate in recess.	

Attachment B

September 1974

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
						1 House and Senate in recess.
2 House and Senate in recess.	3 House and Senate in recess.	4 House and Senate in recess.	5 House and Senate in recess.	6 House and Senate in recess.	7 House and Senate in recess.	8 House and Senate in recess.
9 House and Senate in recess.	10 House and Senate in recess.	11 House and Senate in recess.	12 House returns. Senate in recess.	13 House in session. Senate in recess.	14 House in session. Senate in recess.	15 House in session. Senate in recess.
16 House and Senate in session.	17	18	19	20	21	22
23 30	24	25	26	27	28	29

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 11, 1974

For: Mr. Buchen
From: Henry Goldberg

The following is a summary response to the questions you raised about Freedom of Information Act amendments and a rider to the Juste Dept. Senate Appropriations bill; both of which were mentioned by the Attorney General as possible problems for the new Administration. Carole Parsons' more detailed responses are attached for your information.

FOIA amendments -- as agreed in a House-Senate conference committee on Aug. 6, the amendments would require Federal agencies to compile, publish and offer for sale indices of records required to be made available under the Act. The present FOIA exemptions for investigatory records and for national defense and foreign policy information would be sharply limited. The final conference meeting will take place Tuesday, August 12. Justice and many other Federal agencies strongly oppose the amendments.

As Carole recommends, you should authorize someone, probably Doug Metz, to seek delay in reporting out the amendments. This will give us time to seek an accommodation and avoid placing the President in the position of vetoing the bill.

Justice Senate appropriations bill rider -- which would prohibit use of appropriations in H.R. 15404 for warrantless wiretaps by Federal agencies, was introduced by Senators Ervin and Nelson on July 25. The earliest possible time it could be considered in a Senate appropriations committee markup session is August 15 or 16. Apparently, the rider is not yet a "do or die" issue with Ervin. He may be able to be persuaded that the matter should be considered by the Wiretap Commission, rather than dealt with in legislation. Larry Silberman, Deputy Attorney General, has some ideas for negotiating an accommodation with Ervin.

You should instruct Doug Metz to monitor the situation as it develops between Justice and the Senate Committee and advise you if a confrontation is brewing on the wiretap issue.

8/12/74

Mr Buchen:

Mr. Metz asked that I give you the attached ----

6:15 I have checked to see if he's still here ---- he will be awaiting a call if you can do so.

August 12, 1974

To: Mr. Buchen
From: Doug Metz

Re the Freedom of Information Act amendments, I am recommending Larry Silberman contact the conferees (especially John Ehrlenborn who seems to be the best person) and formally on behalf of the Administration to request a one-week delay in the reporting out of the bill to give the new President an opportunity to be briefed on the bill and to obtain from him his reaction. Fallback position is if they won't grant a delay this week, to meet with them to provide specific alternative language to portions of the bill that are ~~p~~/ particularly troublesome. Although Silberman, in his judgment, is the best person to make the ~~o~~/ official contact and official request for delay, H

Mr. Metz:

Although Mr. Silberman, in my judgment is the best person to make the official contact and official request for delay, I would want our staff involved in the substance of any negotiations and the preparation of alternative provisions. I would [redacted] to be able wi thin the next hour or so to call Larry and tell him to go ahead and contact the Committee and ask if they would grant the Administration a week's delay so we can study the bill and give them an informed reaction.

Re Warrantless Wiretap measures -- amendment offered by Sens. Nelson and Er[redacted] which is coming up Thursday.

I oppose the President taking a hard line against that amendment at this time and prevent s/ forcing Justice Dept, to come up with acceptable alternative language, and I know they are prepared as a last-ditch measure to do so, but I would not accept their recommendation for the President to draw the line right now on that issue.

Re Criminal Justice Data Bank Legislation --- Silberman also is prepared to be the official notifier to Sen. Ervin and others working for a ~~d~~/ delay of one month so we can come up with a positive Administration alternative bill in that area.

Re Item 1--FOI amendment -- Stan Ebner has been asked by Roy Ash to prepare a memorandum to give OMB's comments on the Freedom of Information Act amendments. Mentioned to Stan that Ken Cole's memo had been withdrawn. Nevertheless, Ash had asked him to prepare. I asked that the memo go through you and that the memo reflect our discussions this afternoon at the meeting on Freedom of Information Act amendments.

Unless that upsets the apple ca[redacted]ith having Cole withdraw the memo, I see no objection if he wants to do that.

WOULD LIKE TO TALK WITH YOU ABOUT THIS.

11:40 Mr. Buchen:
Geoff Shepard said Mr. Metz is holding a meeting at 2 o'clock ----

There is a memo for the President in the mill --- andyou need to make a decision about whether the memo is to be pulled or whether the meeting should be stopped.

11:45 Mr. Metz needs to talk with you.
His meeting is with Larry Silberman, Geoff Shepard, Stan Ebner and someone from Bill Timmons' office. (to discuss Freedom of Information).

Also apparently as a result of a meeting between Ash and Ken Cole -- there is a memo going forward to the President ---- which is on this issue -- and which you should intercept (since it is the Privacy area) and see if you want that memo to go forward ---- stop this meeting at 2 p. m. or what!

8/13/74
9:50

Mr. Buchen:

Mr. Metz has talked with Larry Silberman late yesterday.

Attorney General scheduled to meet with the President at 11 o'clock . Larry is developing a memo for the Atty. Gen. Mr. Metz is also developing one and will come over at 10:30 or shortly thereafter to bring it to you. Will be for your signature.

Re Wiretap amendments, FOB,

MEMORANDUM

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY
WASHINGTON, D.C. 20504

August 13, 1974

To: The President

From: Philip W. Buchen

Subject: Privacy-Related Legislative Matters -- Meeting Today with the Attorney General

This memorandum provides background on three priority legislative measures that will be discussed in your meeting this afternoon with the Attorney General.

The comments and recommendations which follow result from meetings with representatives from the Justice Department (Deputy Attorney General Silberman), OMB (General Counsel Stan Ebner), the Domestic Council (Geoff Shepard) and other knowledgeable and concerned parties. The Attorney General has been briefed on these subjects by Deputy Attorney General Silberman.

(1) Amendments to the Freedom of Information Act (H.R. 12471)

The final meeting of the Conference committee on this bill is scheduled for this afternoon. The attached article from this morning's Washington Post provides a good summary of the issues presented by this bill.

Although President Nixon had been advised to veto it, it would be contrary to your policy of furthering openness and candor in government to oppose this legislation. Efforts are being undertaken by Deputy Attorney General Silberman to seek a week's delay so that you can be more fully apprised of the issues posed by the bill, and to permit negotiations on some of the language which has troubled the Executive branch. If, however, delay and accommodation cannot be effected, you should sign this bill accompanied by comments strongly commending the Congress for action which tips the scales further in favor of the public's right to know about the processes of government.

(2) Ban on Warrantless Wiretaps (H. R. 15404)

The Senate Appropriations Subcommittee on State, Justice, Commerce and the Judiciary plans a markup on the Justice Appropriations bill for this Thursday, August 15. Senators Ervin and Nelson will propose an amendment forbidding the use of appropriated funds for warrantless wiretaps.

There is no question that recent well-publicized Presidential abuses of the authority to employ taps in national security matters compels reexamination of both policy and practice on this subject. Congress has established a National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance which has been working in parallel and in cooperation with the Privacy Committee. Warrantless wiretapping is a major agenda item for the Commission. The Commission will begin hearings on this subject on September 16 and 17 and is preparing to write ~~wait~~ an interim special report on this subject in late December or early January. This report can be the subject of consideration by you and the Congress early in the next session.

It is recommended, therefore, that Senators Ervin and Nelson and the Subcommittee be asked to defer action on warrantless wiretapping pending receipt of the report of the Wiretap Commission on this complex subject with vital implications for the ability of the President to provide effectively the nation's foreign policy and national defense.

Deputy Attorney General Silberman will communicate this position to the Senate Appropriations Subcommittee. In the interim, you might consider directing the Attorney General to report regularly to the appropriate oversight committees of the Congress on the scope and extent of the employment of warrantless wiretaps. This disclosure has precedent in Attorney General Saxbe's recent testimony on the Hill; however, this proposal would establish a system of regular accountability.

(3) Criminal Justice Records (S. 2963/S. 2964)

The Justice Department is holding strategy meetings on this legislation this week and now thinks that a bill may pass this session. Because of the change of administration at the Justice Department and the need to involve other law enforcement agencies, such as

the Treasury Department and State authorities, some additional time is needed to move from what has been reported as a Justice Department position to an Administration position. Specifically, the Justice Department will seek a delay until after the forthcoming recess to develop and coordinate a strong Administration bill. It is recommended that you continue to support the action of the Privacy Committee, giving priority to this legislation. Deputy Attorney General Silberman will communicate this position to Senator Ervin.

The Privacy Committee staff will continue to coordinate Administration positions with respect to the foregoing legislative items in close consultation with the Domestic Council, OMB and concerned agencies.

Attachment

Data Bill Showdown Near

By Bob Kuttner
Washington Post Staff Writer

A House-Senate conference committee is scheduled to meet this afternoon to complete action on a freedom of

formation "without reasonable basis in law." Officials could be suspended without pay for up to 60 days.

Kennedy, the main Senate sponsor of the amendment,

Monday 8/19/74

7:55 Mr. Metz said he has reviewed the final letter to go to the conferees in the Freedom of Information Act and it's O. K. There are about 20 conferees; they took the bundle to Timmons' office. Mr. Metz said he stressed that you should have a chance to look at it ---- so, in case you get it to check over, it is O. K. with Mr. Metz.

He thinks it is a good letter that is going to the Pres. this afternoon. Thes. -

MEMORANDUM

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY
WASHINGTON, D.C. 20504

TO: Stanley Ebner August 19, 1974

FROM: Douglas W. Metz

SUBJECT: Draft Letter Regarding Freedom of Information Act Amendments

Attached are my revisions and comments on your draft of the proposed letter from the President to the Conferees meeting to consider the Freedom of Information amendments at 2:30 p.m. Tuesday, August 20, 1974.

As you know, pursuant to our discussion last Monday and confirmed by the White House, the Justice Department (Larry Silberman) has been given negotiating responsibility in coordination with this office. Pursuant to that understanding and to lay the groundwork for a Presidential communication with the Conference Committee, meetings have been held with interested agencies and, without commitment of the respective principals, with key House and Senate staff members. They have regarded these meetings as productive and proof of the President's commitment to a new openness in Executive-Congressional, communications and relationships.

Our next steps should include:

1. Conduct and finalization by your office of the President's letter and its transmittal to the President through Phil Buchen, with copies to me and others as appropriate.

2. Delivery of the letter to all Conferees no later than Tuesday morning, August 20.

3. Attendance at the meeting of Conferees by the negotiators for the Administration (Silberman/Hawk) together with representation from White House Congressional Relations and other interested parties.

Attachment

cc: Phil Buchen
Larry Silberman
Vince Rakestraw
Malcolm Hawk
Pat O'Donnell

DRAFT Doug Metz

TO: Each member of the Conference
Senator Roman L. Hruska
Senator Edward M. Kennedy

I appreciate the time you have given me to study the amendments to the Freedom of Information Act (H.R. 12471) presently before you, so that I could provide you my personal views on this bill.

I share your concerns for improving the Freedom of Information Act and agree that now, after eight years in existence, the time is ripe to reassess this profound and worthwhile legislation. Certainly, no other recent legislation more closely encompasses my objectives for open Government than the philosophy underlying the Freedom of Information Act.

Although many of the provisions that are now before you in Conference will be expensive in their implementation, I believe that most would more effectively assure to the public an open Executive branch. I have always felt that administrative burdens are not by themselves sufficient obstacles to prevent progress in Government, and I will therefore not comment on those aspects of the bill.

There are, however, more significant costs to Government that would be exacted by this bill -- not in dollar terms, but relating more fundamentally to the way the Government has and must function. In evaluating the costs I must take care to avoid impairing the Government's operations we all seek to make more open. I am concerned with some of the provisions which are before you as well as some which I understand you may not have considered. I want to share my concerns with you on four specific matters in pursuit of a common objective.

(1) Sanctions on Government Employees

A provision which appears in the Senate version of the bill but not in the House version requires a Court, whenever its decision grants withheld documents to a complainant, to identify the employee responsible for the withholding and to determine whether the withholding was "without [a] reasonable basis in law" if the complainant so requests. If such a finding is made, the Court is required to direct the agency to suspend that employee without pay or to take other disciplinary or corrective action against him. Although I have doubts about the ~~good sense~~ appropriateness of diverting the direction of litigation from the disclosure of information to quasi-criminal hearings about employee conduct, I am most concerned with the inhibiting effect upon the vigorous and effective conduct of official duties that this potential personal liability will have upon employees responsible for the exercise of these judgments. Neither the best interests of Government nor the public would be served by subjecting an employee to this kind of personal liability for the performance of his official duties. Any potential harm to successful complainants is more appropriately rectified by the award of attorney fees to him. Furthermore, placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise. ~~Judgments concerning employee discipline must in the interests of fairness, be made initially by his supervisors and judicial involvement should then follow in the traditional form of review.~~ Although, if not triggered by judicial findings, ultimate accountability for employee discipline must rest with his agency subject to the traditional form of judicial review.

(2) In Camera Court Review

There are provisions in both bills which would place the burden of proof upon an agency to satisfy a court that a document classified because it concerns military secrets and diplomatic relations is, in fact, properly classified, following an in camera inspection of the document by the court. If the Court is not convinced that the agency has adequately carried the burden, the document will be disclosed. I simply cannot accept a provision that would risk ~~would~~ expose ~~our~~ the nation's military secrets and diplomatic relations because of a judicially perceived failure, without standards, to satisfy a burden of proof. My respect for the courts does not prevent me from observing that they are ill-equipped to adequately gauge the ramifications that a release of a document may have upon our national security. The Constitution commits this responsibility and authority to the President ~~of the United States~~. I understand that the purpose of this provision is to provide a means whereby improperly classified information may be detected and released to the public. This is an objective I can support as long as the

Moreover, many of the pending bills introduced to protect personal privacy provide Court imposed sanctions against federal employees for unwarranted disclosure of personal information to third parties. We should avoid placing federal employees on the horns of the sanction dilemma

We have been indicated to Hill staff that Senate Committee prepared to negotiate language (from Senate bill) would be acceptable.

means selected do not jeopardize our national security interests. I would prefer to accept a provision with an express presumption that the classification was proper and with in camera judicial review only after a review of the evidence did not indicate that the matter concerned our national security interests. Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. There should be a provision permitting a document to be withheld upon my personal statement in writing that the document should not be released in the interests of the nation's security. I recognize that these provisions are technically not before you in Conference, but the differing provisions of the bills afford, I believe, grounds to accommodate our mutual interests and concerns.

(3) Exemptions for Investigatory Records Compiled for Law Enforcement Purposes

The Senate but not the House version amends the exemption concerning investigatory files compiled for law enforcement purposes. I am concerned with any provision which would reduce our ability to effectively deal with crime. This amendment could have that effect. I am, however, greatly more concerned that an individual's right to privacy would not be appropriately protected by the current language which requires disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is clearly unwarranted. Although I intend to take action shortly to address more comprehensively my concerns with encroachments upon individual privacy, I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals. I urge that you strike the word "clearly" from this provision.

Finally, while I sympathize with an individual who is effectively precluded from exercising his right under the Freedom of Information Act because of the substantial costs of litigation, I hope that the amendments will make it clear that corporate interests will not be subsidized in their attempts to increase their competitive position by using this Act.

by seeking the disclosure of Soviet information heretofore given to Federal law enforcement agencies under blanket assurances of confidentiality. Subsection (b)(2) [illegible] investigative agencies to assure the knowledge of the requester [illegible] so that investigative records should be made public. I believe that specific language should be included which guarantees the confidentiality against disclosure of any file or portion thereof [illegible] about an individual

(4) Arbitrary Time Limits

The fourth major item of concern are provisions which give agencies a maximum of ten working days to make critical decisions on disclosure requests, particularly if the material sought is voluminous, complex, in the possession of or subject to consultation with other agencies, or stored in distant places. Although many agencies may and should be able to comply, the rigid time limits may, in significant cases, compel denials of disclosure requests which could be handled otherwise if the provisions permitted additional time

I have stated publicly and I reiterate here that I intend to go more than halfway to accommodate Congressional concerns. I have followed that commitment in this letter, and I have attempted where I cannot agree with certain provisions to explain my reasons and to offer a constructive alternative. Your acceptance of ~~my~~ these suggestions will enable us to move forward with ~~this~~ progressive effort to make Government still more ~~responsive~~ credible and responsive to the People.

The President

Executive Branch representatives have been instructed to seek accommodations and propose specific alternative language for consideration by the Conference

see the extension of time to

Mr. Buchen

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

GENERAL COUNSEL

August 23, 1974

Honorable Antonin Scalia
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D. C. 20530

Dear Nino:

This is to invite your attention to the enclosed signing statement issued by the President in connection with his approval of H.R. 69, the new omnibus education statute.

I wanted to confirm by this letter the request by the President to the Attorney General, found in the antepenultimate paragraph of the statement, for an opinion on those sections of the statute which include congressional veto and coming into agreement provisions relative to administrative functions of HEW under the law.

This opinion will be particularly significant because of the frequency with which provisions of this nature are appearing in bills reaching the President for action. If possible, therefore, the opinion should be expressed in sufficiently broad terms to provide guidance regarding other similar provisions.

Sincerely,

(Signed) Stanley Ebner

Stanley Ebner
General Counsel

Enclosure

EMBARGOED FOR RELEASE
UNTIL 2:00 P.M., EDT

AUGUST 21, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

I take special pleasure today in signing H.R. 69, an omnibus education bill.

As the first major legislation to become law during my administration, this bill symbolizes one of my greatest hopes for the future -- the hope that a new spirit of cooperation and compromise will prevail between the legislative and executive branches. Enactment of this bill was possible only because the two branches settled their policy differences in that spirit. If it continues, I am confident that we can make equally effective progress on other pressing issues.

While I would have preferred different provisions in some sections of this bill, the overall effect of H.R. 69 should be a significant step forward in our quest for more effective distribution of Federal education funds and for better administration of Federal education programs.

Federal funding will be improved through a new formula for distributing Federal assistance for training educationally deprived children. Under the old formula, assistance was directed to States and localities which needed help several years ago, but may no longer need it. Under the new formula, it will be directed to those areas where help is definitely needed today. This change should make the distribution of funds more effective and more equitable.

The Congress has also acted wisely to improve the administration of Federal programs by consolidating a number of categorical programs supporting libraries, educational innovation and other services. For the first time, State and local education officials will have an important degree of authority over Federal funds in these areas. I hope that this consolidation will become the trend of the future.

Another positive feature of this bill is that it provides for advanced funding of certain education programs. This provision should help to end much of the uncertainty that local school boards have had over the continuity and prospective funding levels of Federal education programs. In the near future, I will send to the Congress a supplementary appropriations request to carry out this advance funding provision.

I am also pleased that H.R. 69 provides new safeguards to protect the privacy of student records. Under these provisions, personal records will be protected from scrutiny by unauthorized individuals, and, if schools are asked by the Government or third parties to provide personal data in a way that would invade the student's privacy, the school may refuse the request. On the other hand, records will be made available upon request to parents and mature students. These provisions address the real problem of providing adequate safeguards for individual records while also maintaining our ability to insist on accountability for Federal funds and enforcement of equal education opportunity.

Alice of Privacy staff talked with Dick Theuss also did Doug.

(MORE)

(OVER)

Much of the controversy over H.R. 69 has centered on its busing provisions. In general, I am opposed to the forced busing of school children because it does not lead to better education and it infringes upon traditional freedoms in America.

As enacted, H.R. 69 contains an ordered and reasoned approach to dealing with the remaining problems of segregation in our schools, but I regret that it lacks an effective provision for automatically re-evaluating existing court orders. This omission means that a different standard will be applied to those districts which are already being compelled to carry out extensive busing plans and those districts which will now work out desegregation plans under the more rational standards set forth in this bill. Double standards are unfair, and this one is no exception. I believe that all school districts, North and South, East and West, should be able to adopt reasonable and just plans for desegregation which will not result in children being bused from their neighborhoods.

Another troublesome feature of this bill would inject the Congress into the process of administering education laws. For instance, some administrative and regulatory decisions of the Department of Health, Education and Welfare would be subjected to various forms of Congressional review and possible veto. As a veteran of the Congress, I fully appreciate the frustrations that can result in dealing with the executive branch, but I am equally convinced that attempting to stretch the Constitutional role of the Congress is not the best remedy. The Congress can and should hold the executive branch to account for its performance, but for the Congress to attempt to administer Federal programs is questionable on practical as well as Constitutional grounds. I have asked the Attorney General for advice on these provisions.

Closely related to this issue is my concern about substantially increased Federal funding for education, especially at a time when excessive Federal spending is already fanning the flames of inflation. I hope the Congress will exercise restraint in appropriating funds under the authorizing legislation included in H.R. 69, and will carefully avoid increasing the budget.

In conclusion, I would re-emphasize that this bill shows us the way for further legislative and executive branch cooperation in the future. I congratulate all of those who participated in this endeavor. Today, and for generations to come, America will benefit from this law which expresses our national commitment to quality education for all of our children.

# # #

September 3, 1974

Dear Lou:

I would like to acknowledge and thank you for your and Congressman Goldwater's August 27 letter to the President urging that he include the right to privacy legislation when he forwards to the Congress his list of legislative priorities for the remainder of the 93rd Congress.

As you indicated, the President shares your interest and concern regarding this issue, and you may be assured that your joint letter has been passed along for his attention.

With kind regards,

Sincerely,

Max L. Friedersdorf
Deputy Assistant
to the President

The Honorable Louis Frey, Jr.
House of Representatives
Washington, D. C. 20515

bcc w/inc to Philip Buchen - for approrpaiate handling

MLF:EF:emu

September 3, 1974

Dear Barry:

I would like to acknowledge and thank you for your and Congressman Frey's August 27 letter to the President urging that he include the right to privacy legislation when he forwards to the Congress his list of legislative priorities for the remainder of the 93rd Congress.

As you indicated, the President shares your interest and concern regarding this issue, and you may be assured that your joint letter has been passed along for his attention.

With kind regards,

Sincerely,

Max L. Friedersdorf
Deputy Assistant
to the President

The Honorable Barry M. Goldwater, Jr.
House of Representatives
Washington, D. C. 20515

bcc: w/inc. to Philip Buchen -for approrpiate handling

MLF:EF:emu

8-30

CHAIRMAN
LOUIS FREY, JR.
9TH DISTRICT, FLORIDA

ROOM 1620
LONGWORTH HOUSE OFFICE BUILDING
202-225-5107

HARRIETT HACKNEY
DIRECTOR

Republican Research Committee

Republican Conference

U.S. House of Representatives

Washington, D.C. 20515

August 27, 1974

Dear Mr. President:

We commend your vigorous efforts to maintain and restore the individual's right to privacy as Chairman of the Domestic Council Committee on the Right to Privacy during your tenure as Vice President. We are encouraged by your recent remarks on this topic and your willingness and determination to make privacy among the most urgent priorities of your Administration.

House Republicans agree that the right to privacy is an issue of paramount importance and concern. Our Task Force on Privacy recently released a comprehensive report on this subject. Task Force members intend to implement these recommendations through legislation.

We are aware of your intentions to forward to the Congress a list of legislative priorities for the remainder of the 93rd Congress. We respectfully urge you to include privacy legislation among your list of priorities. Hopefully, together we can further our mutual goal of restoring to the American citizen his basic right to privacy.

Most sincerely,

Lou Frey, Jr.
Chairman
House Republican Research Committee

Barry M. Goldwater, Jr.
Chairman
Task Force on Privacy

The Honorable Gerald R. Ford
President of the United States
The White House
Washington, D.C.

Congress of the United States
REPUBLICAN RESEARCH COMMITTEE
House of Representatives
Washington, D.C. 20515

OFFICIAL BUSINESS

WASHINGTON, DC
AUG
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1974

M.C.

The Honorable Gerald R. Ford
President of the United States
The White House
Washington, D.C.

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON, D.C. 20201

SEP 9 1974

Honorable Roy L. Ash
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This letter responds to your General Counsel's letter of August 21, inviting comments on a proposed Executive Order entitled, "To Protect the Rights of Individuals with Respect to Records Maintained About Them by Federal Agencies." Although the contrary impression might be inferred from the last sentence of your letter, it is my understanding that the Office of Management and Budget is not proposing to issue the Executive Order at this time to forestall the enactment of legislation on the same subject which is under active consideration in the Committees on Government Operations of both the House and Senate.

At its last meeting, the Domestic Council Committee on the Right of Privacy decided that the Administration should press for such legislation, and there still seems to be a good prospect that legislation will be passed by the Congress this year.

The bills now under active consideration differ in many significant respects from the OMB draft bill distributed for comments on May 20. In some respects, the differences would make for better legislation; in others, they would not. There have been many drafts in both the House and Senate Committees. There will surely be further changes made in the course of the legislative process that lies ahead, including many to be urged on behalf of the Administration. Under these circumstances, we believe that it is premature to be considering an Executive Order at this time and recommend that consideration of such an order should be deferred until our opportunity to obtain legislation this year has been exhausted.

If the Administration's legislative efforts fail, and an Executive Order becomes necessary, we should take account of all that we learn from the legislative efforts, both in terms of substantive policy and draftsmanship.

Although we are, in line with our above views, focusing our current attention on the legislation, there are two provisions of the draft order you have submitted about which we do wish to register particular concern. The first is subsection 3(a) dealing with disclosures; the second is Section 5 dealing with exemptions.

Subsection 3(a)

We recommend that this provision be omitted. It has no place in an instrument (Executive Order or legislation) whose purpose is to protect personal privacy through the establishment of principles of fair information practice. A fundamental such principle is to assure that information obtained about individuals for one purpose should not be transferred or used for additional other purposes without their consent. Any instrument whose aim is to protect personal privacy should therefore seek to constrain the existing authority of agencies to determine unilaterally that information they have obtained and hold about individuals for one (or more) specified purpose(s) will be transferred or used for additional other purposes. Subsection 3(a) has precisely the reverse effect. In particular, its paragraphs (4) and (5) would substantially enlarge the express authority of agencies to make such determinations. Given the disjunctive listing of paragraphs (1)-(5), the strong protection of the principle of requiring individual consent provided by paragraph (1) is rendered viftually nugatory by the succeeding paragraphs (2)-(5). Certainly the net effect of subsection 3(a) is not to strengthen personal privacy protection!

Section 5

We believe there are many difficulties with Section 5 permitting agencies to establish exemption from provisions of the proposed Executive Order. To mention a few, we see no reasons for establishing the possibility of blanket exemptions from subsections 2(a), 2(d), 2(e), 2(f), 2(g), 3(a)(4), 3(a)(5), 3(c), 4(a), 4(b), 4(c)(5), 4(c)(6), 4(d), 6(a), 6(b), 6(c), and Sections 7, 8, 9, 10 and 11. We realize that exemptions from these provisions could be made only for systems described by subsections 5(a) through (g). However, both in terms of the provisions of the order from which exemptions may be made as well as certain of the descriptions of systems exemptible, we believe Section 5 goes too far. Moreover, we believe a procedure affording full information to the public and opportunity for public comment should be

required as the means for an agency's making exemptions. Agencies should not, as a matter of principle, be left free to decide entirely for themselves and, covertly, whether or not their systems should be subject to requirements of fair information practice. Current drafts of the bill being developed in both the House and the Senate Committees seek to recognize this principle. Any Executive Order that may need to be issued should not fail to do so.

As I have suggested earlier, the comments in this letter do not exhaust our suggestions about the proposed Executive Order. If further consideration to this draft is to be given before we run out the string on legislative efforts in this Congress, we would wish to provide additional suggestions.

Sincerely,

/s/ Caspar W. Weinberger

Secretary

cc:
Honorable Philip W. Buchen, Esq.

/

Send copies to Doug Metz on IRS - memo for action - per discussion 9/24 w/ PWB

THE WHITE HOUSE
WASHINGTON

Date 9-23-74

TO: PHIL BUCHEN

FROM: WILLIAM TIMMONS

FOR YOUR INFORMATION _____

FOR YOUR COMMENTS ✓

FOR APPROPRIATE HANDLING _____

OTHER WE NEED A POSITION ON THIS LEGISLATION. CAN YOU FURNISH? Thank

TO: BT

SEP 18 1974

United States Senate

COMMITTEE ON
AERONAUTICAL AND SPACE SCIENCES
WASHINGTON, D.C. 20510

September 13, 1974

Dear Colleague:

On September 11, I introduced comprehensive legislation to preserve and protect the confidentiality of every American's tax return.

Responding to recent evidence of widespread abuse of IRS files, Congressman Jerry Litton and I have developed legislation setting up stringent safeguards to prevent the IRS from ever becoming a "lending library" for the President's agents or any other government agency.

The Weicker-Litton measure restricts access to tax return information for purposes of tax administration or enforcement of the Internal Revenue Code. The only persons allowed access to tax returns would be:

- the taxpayer himself and his authorized representative;
- officers and employees of the IRS and the Justice Department for enforcement of the Internal Revenue Code;
- State tax officials for the purpose of administering their tax systems;
- the Joint Committee on Internal Revenue Taxation; and
- The President, under certain limited circumstances.

To protect taxpayer anonymity, tax information in the form of statistical data only could also be made available to Congressional committees and other federal and state agencies. The President could obtain tax returns only upon his written request, specifying the return to be inspected in the performance of his official duties.

The imperative to legislate reform will soon fade in the public's mind - we must act now to assure that the constitutional right to privacy is not subverted by government's self-assumed "right to rummage" in confidential IRS files.

For your further information please refer to the enclosed Congressional Record reprint comprising a statement of introduction, a section-by-section analysis, and the full text of the measure. Should you have any questions or wish to cosponsor the bill, please contact Geoff Baker or Bob Dotchin of my staff at 54041.

With warmest regards,

Sincerely,

Lowell Weicker Jr.
United States Senator

TO: BT

United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, D.C. 20510

September 12, 1974

SEP 1[illegible]

Dear Colleague:

On August 21, we introduced legislation to prevent unauthorized inspection of any federal tax return without prior written consent of the taxpayer involved.

Section 6103 of the Internal Revenue Code states that tax returns "shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President." However, testimony given before the Senate Watergate Committee, the House Judiciary Committee (Vol. VIII, pp. 3-32) and the Appropriations Subcommittee on the Treasury, Postal Service, and General Government (Internal Revenue Service, Taxpayer Assistance and Compliance Programs, 1975, pp. 558-63), shows that various White House aides were able to acquire confidential tax information from IRS, and that there is nothing to prevent such abuse in the future.

Both over the telephone, in the case of former Democratic Committee Chairman Lawrence O'Brien, and in writing, when inspecting information from the return of prospective Committee to Re-elect the President Appointee Lawrence Goldberg, unauthorized personnel reviewed theoretically confidential tax matters without consent of the taxpayer.

The provisions of S. 3935 would (1) make it a felony for any person or agency of the United States to inspect tax returns without prior written consent from the taxpayer involved, and (2) make it a felony to receive any confidential tax material in violation of the new rules. Exempted from the provisions would be those employees of the IRS and the Justice Department who, for reasons of tax administration and criminal investigation, must retain access to tax returns. Also exempt would be the Joint Committee on Internal Revenue Taxation which must retain entree to tax returns and other confidential tax data in order to perform its oversight duties. All these agencies have formerly had access to tax information.

The only other bodies enabled under the measure to obtain returns are state income tax agencies. These offices are exempted for the sole purpose of administering income tax laws in the states. We believe

strict federal regulations can prevent other local bureaus from acquiring private data.

Intrusions on tax privacy in a highly-charged political climate have created fear among citizens for the sanctity of their tax matters. S. 3935 will install legal safeguards to insure that tax information will be carefully shielded.

We are enclosing a copy of the bill for your convenience. If you have any questions, or if you would like to co-sponsor, please see Lowell or myself, or call Bruce Jaques, Jr., on 55521 or Geoff Baker, on 54041.

Sincerely,

Lowell P. Weicker, Jr.
United States Senator

Joseph M. Montoya
United States Senator

THE WHITE HOUSE
WASHINGTON

Date 9-18-74

TO: PHIL BUCHEN

FROM: WILLIAM TIMMONS

FOR YOUR INFORMATION _____

FOR YOUR COMMENTS ✓

FOR APPROPRIATE HANDLING _____

OTHER WE NEED A STRATEGY TO HANDLE THESE MEASURES. ANY IDEAS?

Form DJ-140
(Edn 4-26-65)

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

TO : Patrick O'Donnell
Special Assistant to the President

DATE: September 17, 1974

FROM : W. Vincent Rakestraw
Assistant Attorney General
Office of Legislative Affairs

SUBJECT: Status of General Privacy Legislation

House: H.R. 16373 (Moorhead bill) was reported out of the Subcommittee on Foreign Operations and Government Information of the Committee on Government Operations on September 12. It is expected that the bill will come before the full Committee on Thursday, September 19.

The bill regulates the collection, maintenance, use and dissemination of personal information by Federal agencies and provides the right of access to such information by the individual to which it pertains. Criminal justice information is exempted from most of the regulatory provisions of the bill, however, we still have some concerns about the proposal.

From our view, the bill is much more acceptable than the Senate version, S. 3418, however, the proposal leaves subject to litigation what individually identifiable records come within the meaning of the criminal justice data exemption in terms of the notice, individual access and the sanction provisions.

Senate: S. 3814 (Ervin bill) has been reported out of the Government Operations Committee and it is expected that a report will be filed this week.

We are most concerned about this bill and have sent a report to the Committee in opposition to it. This bill would also regulate the exchange of individually identifiable records maintained by the Executive Branch of the Federal government, as well as such records maintained by state governments. The bill is very broad and does not exempt criminal justice data. S. 3418 would severely limit the use and dissemination of criminal justice information for both law enforcement purposes and non-criminal justice purposes. The bill is unacceptable to the Department in its present form and we are strongly opposed to its enactment.

THE WHITE HOUSE

WASHINGTON

September 27, 1974

MEMORANDUM FOR: MR. WILLIAM E. TIMMONS

FROM: Philip W. Buchen P.W.B.

SUBJECT: Legislation Protecting IRS Tax Returns

In response to your memo of September 23, 1974, Wilf Rommel, OMB, has been asked to prepare a letter containing the Administration's position on the Weicker-Litton legislation. Wilf is getting initial input from Treasury and Justice. I have asked Doug Metz to coordinate this for me.

As you know, Secretary Simon sent our bill to the Hill September 11, 1974, followed by issuance of an Executive order on September 20, establishing specific restrictions on White House access to tax returns. We should take immediate steps to assure that the advantages of our bill and our specific objections to the Weicker-Litton measure are more widely publicized on the Hill. We have been unnecessarily on the defensive.

cc: Richard Albrecht, DOL
Douglas Metz, Privacy Committee
Wilf Rommel, OMB
Laurence Silberman, Justice

THE WHITE HOUSE

WASHINGTON

September 27, 1974

MEMORANDUM FOR: MR. WILLIAM E. TIMMONS

FROM: Philip W. Buchen P.W.B.

SUBJECT: Status of General Privacy Legislation

This responds to your memorandum of September 18, relative to the status of general privacy legislation exclusive of specialized bills dealing with criminal justice information, Federal employees rights, IRS tax returns and military surveillance.

The House negotiations conducted by OMB and Privacy Committee staff with the majority and minority leadership of the House Government Operations Committee, resulted in an offer of the Administration's support for H.R. 16373, reported unanimously from the Government Operations Committee, September 24, provided that the exemption for Federal personnel investigatory records is restored to the bill. Congressman Erlenborn is prepared to lead the floor fight for restoration. Every effort should be made to assure passage of an appropriate amendment.

On the Senate side, OMB and the Privacy Committee have submitted extensive detailed comments on S. 3418. This bill is close to the more acceptable House version, but significant changes must be made before we can consider supporting this measure. The Senate has made significant progress in the direction of the House bill by eliminating from its scope the private sector, contractors and grantees, and by watering down significantly the powers of the Privacy Commission.

Our position is that there should be no slackening of effort to secure legislative action for this session. We are committed to issuing an Executive order only in the event that Congress fails to act this year. OMB, I believe, has been dealing effectively in allaying certain agency concerns about privacy legislation. Having first-hand knowledge of the extensive inter-agency dialogue of the past four or five months, I do not believe that we will have a significant problem in dealing with agency comments, particularly if Civil Service and Defense can make a pursuasive case for their exemption.

Doug Metz can give you a more detailed and up to the minute run-down on the foregoing matters. I suggest that you convene a legislative strategy session involving Doug and those with whom he has worked closely at OMB, including Walter Haase, Bob Marik and Stan Ebner.

cc: Robert Marik
Douglas Metz

Privacy

Friday 12/13/74

4:10 Lynn May advises he thinks we have a privacy bill and wondered if you would approve of a signing ceremony.

After checking with you, I advised that you thought it was a good idea, but would like to see a paper if he plans to prepare one. He will get one ready and let you see it.

Privacy

Tuesday 12/17/74

5:20 Geoff Shepard called. At 1:45 he placed a call to Silberman and directed that the FBI get off the Hill re privacy bill.

Rumor has it that Hruska may offer House privacy bill as a substitute.

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

December 18, 1974

MEMORANDUM FOR: PHIL BUCHEN
STAN EBNER
GEOFF SHEPARD
BILL TIMMONS

FROM: DOUG METZ

SUBJECT: Draft Presidential Statement and Fact Sheet for Privacy Act of 1974

Attached for your review and comment are drafts of a Presidential statement and Fact Sheet for use in connection with the planned signature ceremony this Friday.

I will appreciate your comments by noon Thursday, December 19, 1974.

Called in approval on 12/18/74
P.

Attachments - 2

cc: Lynn May
Wally Haase

FOR IMMEDIATE RELEASE DRAFT (DWM) 12/16/74

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

I am pleased to have before me this landmark piece of legislation--The Privacy Act of 1974. It represents an initial but essential advance in protecting a right precious to every American--the right of individual privacy.

I am, moreover, especially happy to sign this bill because of my own personal concern and involvement with efforts to bring about a new beginning in securing individual privacy against unwarranted invasions and abuses of power. As Chairman of the Domestic Council Committee on the Right of Privacy, I became increasingly aware of the vital need to provide adequate and uniform privacy safeguards for the vast amounts of personal information collected, recorded and used in our complex society. It was the Committee's objective then, as it is today, to seek first opportunities to set the Federal House in order before prescribing remedies for State and local governments and the private sector.

The Privacy Act of 1974 signifies an historic beginning in codifying fundamental principles to safeguard personal privacy in the collection and handling of recorded personal information by Federal agencies. This bill, in my judgment, strikes a reasonable balance between the right of the individual

to be left alone and the interest of society in open government, national defense, foreign policy, law enforcement, and a high quality and trustworthy Federal work force.

No bill of this scope and complexity--particularly initial legislation of this type--is free from imperfections. Certain provisions may need refinement and modification in the light of operational experience. I will not hesitate to propose needed amendments to assure that the bill's basic objectives are realized.

I want to pay personal tribute to the sponsors of this legislation. They have helped forge a strong bipartisan constituency in behalf of the constitutionally protected right of individual privacy. I commend these individuals, their Congressional staffs and officials in the Executive branch for their unwaivering dedication and hard work in enacting this bill. Many others whose unofficial contributions have made this legislation possible should also be congratulated. I take special pride in knowing that this historic legislation came to fruition in a spirit of communication, compromise, conciliation and cooperation between the legislative and executive branches of our government.

Despite the significant beginning marked by this occasion, the Administration will not falter in its determination to pursue aggressively needed additional legislative, administrative and voluntary measures to assure that the right of privacy in recorded personal information does not become a perishable commodity.

Let us continue to work together so that we can celebrate our Nation's Bicentennial confident that we have vindicated the best hopes of the architects of our constitutional liberties by adding sound legislative and administrative structures to secure the right of privacy for future generations.

— #

DRAFT (DWM) 12/18/74

EMBARGOED FOR RELEASE
UNTIL P.M., EDT

December 20, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

The purpose of the Privacy Act of 1974 is to safeguard individual privacy from the misuse of Federal records and to assure individual access, challenge, and correction, if necessary, of personal information in such records. In its scope the bill covers tens of millions of records containing information about individuals kept by agencies in thousands of manual and automated information systems. Excluded from its scope is criminal justice information, which because of its complexity, interstate use, and need for special safeguards, is the subject of separate legislation now pending in the Congress. By design also, the bill does not extend to State and local governments or to the private sector, where Federal action has consisted of the Fair Credit Reporting Act in force since 1971. The bill nevertheless establishes a Privacy Protection Study Commission to make suggestions concerning how the principles of this bill might apply to the handling of personal information by record-keeping systems not covered by this bill.

The Privacy Act of 1974, in summary:

- Prohibits secret record-keeping systems containing personal information by requiring agencies annually to give public notice of the existence and character of such systems and the uses made of such information.

- Limits the information that agencies may maintain about individuals to that needed to accomplish lawful purposes and, moreover, prohibits agencies from keeping records on how individuals exercise their political, religious and other rights guaranteed under the first amendment to the Constitution.

- Requires individuals to be informed by agencies when personal information is requested from them of the authority for its collection, its purpose and intended uses, whether its disclosure is mandatory or voluntary, and the consequences, if any, of not furnishing the requested information.

- Guarantees the right of an individual to see, challenge and correct, if necessary, a record containing information about him in an agency's files.

- Imposes explicit conditions for the disclosure and transfer of personal information and strict accounting requirements for all disclosures.

- Requires agencies to maintain personal information with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in decisions affecting his rights and benefits under Federal programs.

- Provides that agencies establish appropriate administrative, technical and physical safeguards to protect the integrity and security of personal information against loss, theft, or unauthorized access which might harm the individual.

- Gives the individual strong legal remedies to enforce his right to see and correct a record about himself and imposes criminal penalties on those who wilfully violate his rights.

- Makes it unlawful for any Federal, State, or local government agency to deprive an individual of any right, benefit, or privilege because he refuses to disclose his Social Security Number unless such disclosure is required by a law or regulation adopted prior to January 1, 1975.

- Forbids Federal agencies to sell or rent individual names and addresses for use on commercial mailing lists.

- Preserves existing requirements on Federal agencies to make information available to members of the public under the Freedom of Information Act.

Except for the immediate establishment of the Privacy Protection Study Commission, the operative provisions of this Act become effective 270 days after enactment.