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THE WHITE HOUSE

WASHINGTON

September 24, 1975

MEMORANDUM FOR: THE PRESIDENT

FROM: JACK MARSH

Attached is the decision paper concerning release of classified materials to the Senate and House Select Committees.

Attachment

BACKGROUND

From the outset of the House and Senate Select Committees on Intelligence, you have directed the entire Executive branch to cooperate and provide materials requested by the Committee, subject to a narrow exception in the case of certain materials such as references to techniques, agents and sources. You specifically stated that under no circumstances would you permit the Executive branch to cover up evidence of illegal actions or failures by the intelligence community.

On September 10, the House Committee, chaired by Representative Otis Pike, unilaterally declassified a document containing a passage objected to by Executive branch intelligence officials. The passage contained the four words referring to a communications security.

Two days later, Assistant Attorney General Lee read to the Pike Committee a statement authorized by you, to the effect that the Executive branch would decline to provide additional classified materials until the Committee satisfactorily altered its position concerning declassification.

Although the Church Committee in the Senate has subpoenaed certain documents concerning Cyprus, we generally have a good working relationship with them as to procedure for transmitting classified information.

It is important to note that our arrangement with the Senate Committee has never been clearly defined, but relies on comity and a "gentleman's agreement". For these reasons, it is felt you should not publicly ratify or endorse the Senate arrangement.

As indicated at the Republican Leadership meeting this morning, we appear to be on a collision course with Congress on the question of release of classified materials to these two Committees.

Attached at Tab, Tab C and Tab D respectively are general comments of Secretary Kissinger, Attorney General Levi and Secretary Schlesinger. These comments present in a general way their views on this subject.

At Tab D is a statement by the Republican Members on the House Select Committee setting forth their position.

It should be pointed out that the option paper attached focuses principally on classified, written documents and the question of guidance for witnesses in testimony before the Committee remains to be addressed.

ISSUE FOR DECISION

First, what should your decision be concerning the procedures which will be acceptable for release of classified materials to the two Select Committees?

Two, how should your position on this issue be stated publicly, and what negotiating strategy should the Administration adopt for dealing with the Committees?

OPTIONS

Your advisors have concluded that there are two basic approaches you can take concerning how declassified materials should be provided to the Committees and how they should be declassified.

Option 1 (Compromise)

Materials to be supplied

Provided the Committee agrees to declassification procedures set out below, supply all materials with the narrow exception of:

- source, agents and methods
-
-
-

Verification procedures through Congressional Leadership would be available in case of Committee disagreement with the sensitivity of withheld portions of documents.

Declassification

Once the Committee decided to declassify (publish) something and the appropriate Executive agency objected, the following procedure would apply:

1. These documents, or portions thereof, will be considered to have been loaned to the Committee.

2. The Executive will have reasonable opportunity to make its case (to the Committee) why it should not be declassified.

3. If agreement is impossible, then the Committee submits the materials to the President (or first to the Leadership and then from them to the President).

4. The President makes the final (and personal) determination.

Note: At this point, the Congress can still exercise its right to subpoena the materials and litigate the issue in Court.

Option 2 (President retains maximum control)

Provide only those documents which we are willing to let Congress make the final determination concerning publication.

The Executive would provide all materials except:

- Source, methods and procedures.
- Information from foreign intelligence sources or governments.
- Information on the decision process of the Executive agencies.

Sensitive matters which we are willing to provide so long as they retain their classified status would be withheld until the Committee-Executive agreement is reached.

A verification system for audit of the deleted materials could be offered to assure the Committee that the deletions were in fact sensitive.

It should be noted that Options 1 and 2 address the great bulk of classified materials that might be requested. However, questions relating to executive privilege are not addressed in either of them.

Concerning the strategy of your public position and how this should be negotiated with the Hill, the following options exist:

Option A: At the Leadership meeting tomorrow morning, offer to have your representatives work out the procedures with the Committees directly under the guidelines set down by you. A public statement to this effect would be issued along the lines of that contained in Tab A.

Option B: Present a specific procedure to the Leadership

and release it publicly following the meeting. This procedure would be in accordance with your decision in the preceding paragraphs.

Option C: Regardless of the options you select above, your Advisors recommend that you immediately make available to the Committees that information which can be declassified or that you are unwilling to submit to the Pike Committee under their newly adopted rules for unilateral declassification.

DECISION

OPTION 1: (Compromise)

Favor: CIA, Justice, OMB, Defense

Oppose:

Approve NR7 Disapprove _____

OPTION 2: (President Retains Maximum Control)

if not successful

Favor: Defense (only if unable to get agreement on Option 1)

Oppose:

Approve NR7 Disapprove _____

Option A: (Issue general statement and offer to work with Congress)

Favor: CIA, Justice, Defense

Oppose:

Approve NR7 Disapprove _____

Option B: (Issue statement containing a specific procedure)

Favor:

Oppose:

Approve NR7 Disapprove _____

Option C: (Release unclassified and non-critical materials)

Favor: CIA, Justice, Defense, OMB

Oppose:

Approve NR7 Disapprove _____

TAB A

DRAFT (M.D.)

9/24/75

6:00 p.m.

STATEMENT BY THE PRESIDENT

A dispute has arisen between the Executive branch and the Select Committee of the House of Representatives, which is reviewing intelligence activities of the Federal Government. The only question concerns whether one Congressional committee may unilaterally declassify highly sensitive national security materials and release them to the public without Executive branch coordination.

I will do nothing to impede legitimate inquiries by the Congress. I will not allow the use of national security classification to cover up the failure of our intelligence community or conceal criminal activity. At the very beginning of the current hearings by the Senate and the House, I ordered all Executive branch agencies to fully cooperate with both committees and to provide the materials requested in a manner consistent with my Constitutional responsibility to protect national security.

I am in no way challenging the power of Congress or questioning their status as a co-equal branch of government. I am simply stating that I cannot abdicate my responsibility to safeguard critical materials which, if released publicly, could jeopardize the security of our country. I am absolutely bound by the Constitution. I must abide by its restrictions, and I must carry out my Constitutional responsibilities.

Nothing can be gained by letting this dispute with the House Select Committee grow into a confrontation between the Executive and the Congress. I am certain that reasonable men can work out procedures which will permit the Committee to have the fullest access to the materials it needs to conduct this investigation, and, at the same time, protect the national interest against improvident disclosure of highly sensitive materials relating to foreign intelligence gathering.

I am not trying to keep information away from the House Committee, from any Member of Congress or from the American people. I'm trying to keep this information out of the hands of potential enemies of the United States.

I believe we can find a procedure to protect the rights and obligations of both branches of government. To this end, I am prepared to have my personal representatives meet with the leaders of Congress to work out a mutually satisfactory arrangement.

I believe my position is completely consistent with the objective contained in Section 6 of House Resolution 591, which established the Select Committee:

"The Select Committee shall institute and carry out such rules and procedures as it may deem necessary to prevent (1) the disclosure, outside the Select Committee, of any information relating to the activities of the Central Intelligence Agency or any other department or agency of the Federal Government engaged in intelligence activities, obtained by the Select Committee during the course of its study and investigation, not authorized by the Select Committee to be disclosed; and (2) the disclosure, outside the Select Committee, of any information which would adversely affect the intelligence activities of the Central Intelligence Agency in foreign countries or the intelligence activities in foreign countries of any other department or agency of the Federal Government."

TAB B

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

September 23, 1975

MEMORANDUM FOR JACK MARSH

FROM: HENRY A. KISSINGER

SUBJECT: Administration Position toward the Handling of
Classified Information with the Pike Committee

On September 11, the House Select Committee, by a majority vote, declassified and made public classified information without the approval of the Executive Branch.

This action constitutes a challenge to the President's constitutional responsibility to conduct foreign affairs and protect the national security of the United States. Inherent in this responsibility is the authority to assure the protection of sensitive information associated with the execution of this responsibility.

Under the Constitution, the Congress is charged with making appropriations which enable the President to execute the above responsibilities. Historically, the Congressional oversight role has been carried out under an accommodation between the two branches which has provided for the exchange of information under conditions of mutual respect for its sensitivity. That good faith relationship has now been breached by a single committee of the Congress. In determining the Administration position for resolving this dispute, I believe it is important to make clear that the traditional ground rules remain a valid basis for doing business and that there is no objection--indeed we fully respect--the practices being followed by the other committees of the Congress. This is not to say that we will not face challenges of a similar nature from other committees. However, I believe that it would be unwise to broaden the confrontation unnecessarily.

The basic issue is the asserted right of the Pike Committee unilaterally to declassify classified information.

The Issues

All classified information or sensitive information

The nature of the classification system, by definition, makes clear that there are gradations of sensitivity. It is an Executive responsibility to assure that information is not classified frivolously. Pursuant to that criterion, however, once information is classified there must be the presumption that it should not be made public. Over time, information formerly classified may lose its sensitivity. Current regulations (Executive Order 11652) recognize this and provide a means for the downgrading of classification. In special circumstances, such as are represented by the Select Committee investigations, the regulations may be excepted to provide for urgent declassification in exigent cases. During the course of these investigations, I would concur in a position of responsiveness to Committee requests for declassification on a case-by-case basis.

More specifically, I believe that the Administration should respond to Committee requests by providing information under its current classification, expressing concurrently a willingness to deal promptly with Committee requests for declassification. When disagreements arise, however, over the declassification of certain information, I believe that the final determination must reside in the Executive branch. It is this question which is now at issue with the Pike Committee. It is my firm belief that Executive authority in this area is accepted by the Congress, as witnessed in statutes and the absence of challenge through the years.

The question then is how to bring the Pike Committee into conformity with traditional Congressional practice in this area.

I cannot comment on the legal merits of the case, although, as implied above, I believe that the President's constitutional authority is clear and the derived power to preserve classification obvious.

In the days ahead, I believe the Administration should seek the Committee's recognition of those rules which have traditionally been observed. These rules should provide for:

-- full and deliberate consultation between the Committee and the classifying Agency to include the highest level.

-- if the issue cannot be resolved in this manner, it should be referred to the Leadership of the House in question for a decision on the merits or further referral to the President.

-- if, following the President's decision, the leadership is dissatisfied, the matter could be referred to the courts.

Strategy

In the instant case, I believe that the approach outlined above should be presented to the House leadership in an early meeting with the President. If the House leadership is unwilling to accept such an approach, I believe that the President's current proscription against providing classified information to the House Select Committee should be maintained and that the Committee should be left to consider an early court test of its position on this issue.

TAB C

The Problem

I gather there is no doubt that there is a widespread feeling in Congress that it has the right to declassify documents. Documents are often overclassified. There, perhaps, is a feeling in the Executive branch that the declassification or publication of any classified document by a Congressional Committee threatens the whole classification system. The committees may not wish to give the Executive the necessary time to review documents line by line; the Executive branch may feel that to do this (as is required for other purposes in the Freedom of Information Act) is an enormous, time-consuming job.

There is a feeling in Congress that it should be and is the dominant branch. One congressman of some distinction indicated to me he did not believe that checks and balances were supposed to apply to Congress. There is a feeling in the Executive branch that a weakening of the President's position on maintaining confidentiality will have serious defense or international effects.

The two branches, unintentionally perhaps, may be on a collision course, with an escalation of the tension making a workable solution difficult. The result may be litigation with uncertain effects.

Lawyers for the Executive and lawyers for the Congress can read the same source materials as to the law and come to very different conclusions. On balance, if the Executive can maintain a reasonable position, I believe time is on the Executive's side. That is, the later the litigation comes, the more likely I think the Executive will be to have a favorable decision, provided the Executive's position is not perceived as unreasonable in the meantime.

For the sake of good government and the safeguarding of sensitive materials, it is essential that Congress feel it has a responsibility to protect confidentiality.

Court Strategy

The basic proposal for court strategy is that everything be done to make sure that the Executive position is a reasonable one. For this reason, the withholding of all classified documents, whether really sensitive or not, while it produces a confrontation, will jeopardize the Executive's position in Court. It may be that a court will not require that the documents be examined in camera. But in my judgment there is a considerable chance it may, which it is foolish to ignore. The presence of many documents, or parts of documents,

which the Court believes could be safely given to the Committee, even though the Committee might decide to publish them, is a threat to the Executive's position. I believe it would help with the Court strategy also if the Executive has suggested a procedure to the Congress.

Compromise Strategy

I doubt if the present withholding of documents should be continued. Rather, the Executive Branch should notify the Committee that the Executive Branch is going over the documents to make sure that the most sensitive information, where publication would be particularly harmful, is removed.

If the Committee releases information where the harm is genuine, this should be clearly pointed out. I think there has been some reluctance to do this for fear the explanation will increase the harm. But I think such a step will be necessary. The country does not understand, for example, the implications of the four words.

The Executive should propose a procedure whereby if a Committee wishes the whole or part of a document to be published, it agrees to (1) consult with the Executive; (2) to give the Executive an opportunity to make a judgment; (3) has an appellate procedure within the Congress to make a determination; (4) the top reviewing group will confer with the President before making its determination. The proposal could be adopted as an experimental working procedure if necessary. In any case, the President should reserve, as he must, since he cannot give it away, his own privilege to be used, if necessary when requests for documents to him are made.

9/23/75

EHL

TAB D

Procedures on Providing Classified Information to Congressional Committees

I. The President should meet with the leaders of both parties in the House (including Mr. Mel Price) and assure them that he wants to find a way to provide House committees the information they need to do their jobs. On the other hand, he needs to be assured that some process be instituted whereby the President--and the nation--can be sure that sensitive information relating to foreign relations and the national defense will not be released publicly as a result of the whim of one or another member or the vote of a single committee, and that assurance has not been forthcoming from Mr. Pike or the Committee.

It is in the national interest for both the Executive and Legislative branches to work together to resolve the situation that has arisen by the action of one select committee chairman. The national interest requires broad, enlightened experience in the area of protecting sensitive national security information. The Executive Branch has provided the country such protection for two hundred years. No one member or even one committee can be expected to have such a depth or sweep of experience. Perhaps legislation would be useful in this area. If so, it should include strong penalties for the disclosure of information contrary to the national interest. At present, highly classified information is being provided other committees of both houses of Congress. As a practical matter, if the chairman of any committee believes the Executive Branch is misusing security classifications to hide information which the public is entitled to, he is not without recourse. For instance, theoretically he could put such information in his report to the full House or Senate or he can insert the information into the record on the floor. Such action, however,

would be extremely unusual and should be taken only as a last resort and in a matter of grave national concern. The President should propose that the Executive Branch will continue to provide classified documents upon request to authorized committees of Congress and upon request will undertake to declassify as much information in such documents, as possible. The responsible Executive Branch departments and agencies will further undertake to paraphrase remaining classified information where possible in order to provide the substance of the information in unclassified form. Moreover, the Executive Branch will make available to the chairman of the committee a written rationale for retaining the classification of those portions of documents which the responsible department or agency wishes to keep classified.

The House leadership, for its part, should enact rules that no committee can unilaterally publicly release information which the Executive Branch judges should remain classified. The House should establish a review mechanism to include members from at least the Armed Services Committee and the International Relations Committee to review declassification items in dispute between the Executive Branch and committees of the House. The review committee shall forward its recommendations to the President for his action. If he does not respond favorably within thirty days, the Speaker shall decide whether or not the disputed information shall be included in the committee report or the record.

Accommodation Or Court Test

Accommodation

A Presidential appeal to the House leadership for an accommodation on the declassification issue raised by Mr. Pike along the lines suggested in the attached paper should be attempted.

One danger in this approach, however, is that the leadership will reject the proposal or that the House membership will refuse to go along with such an accommodation. If either of these developments occurs, the President will be in a ^{better} position to defend his stand publicly than he is at present.

This proposed accommodation could place a very large burden upon the departments and agencies should the various committees flood the Executive Branch with requests for declassification. This burden would have to be borne, however, and might be added to the Freedom of Information request volume. In addition, the President should declassify and release as much of the Tet-related information requested by the Select Committee as possible. The President should also offer to provide the Select Committee the remaining classified information as soon as adequate procedures are adopted by the House to ensure protection of such information.

Court Test

If the House leadership rejects the President's reasonable offer of accommodation, there would seem to be no other likely outcome than a court test.

To try to make a case in court based upon documents which even the Executive Branch would have to admit could be declassified is a poor proposition. Therefore, if we cannot make a strong enough case to carry to court on the Tet-related documents, we should declassify them all and wait

for a subpoena of documents we would be prepared to carry through to the Supreme Court.

TAB E

MEMORANDUM

To: The President

From: Robert McClory, M.C.

Date: September 23, 1975

The four Republican Members of the House Select Committee on Intelligence met on Tuesday, September 23, and agreed that the procedures adopted at the Full Committee meeting on September 17 should be accepted by the Executive Branch as a reasonable method for receiving classified materials necessary to our investigation.

While the 24-hour notice for comments by the intelligence agencies may appear too restrictive in some instances, the time element had general support -- for the reason that the intelligence agencies are centered in this area. It was understood that in cases where a longer period of time was required, this would be considered by the Committee -- without specifying this additional time element in the statement of procedures.

There was also general agreement by the Republican Members that the subpoenas heretofore issued should be complied with in reliance upon the new procedures adopted by the Committee. It is further the position of all of the Republican Members on the Committee that the procedures adopted by the Committee are in substantial compliance with the request directed to the Chairman of the Committee by Mr. McClory. Mr. McClory's letter was read on the telephone to Mr. Hills before delivery to the Chairman.

Draft

MEMORANDUM FOR: PHIL BUCHEN

FROM: JACK MARSH

SUBJECT: Implementing the CIA Commission
Recommendations

As you know, the President made several decisions last week on the CIA Commission recommendations. In order to implement these decisions, we need two Executive Orders which will:

- ° Extend the role of PFIAB to include oversight and change the name.
- ° Restrict the collection of information about the domestic activities of U.S. citizens and the clandestine collection of foreign intelligence from Americans by the entire Intelligence Community except the FBI.

I would like you to take the lead in drafting these Executive Orders and coordinating them with the appropriate agencies and departments. They should be ready for review by the President on October 3.