

# Refusals by the Executive Branch to Provide Information to the Congress 1964-1973

A SURVEY CONDUCTED BY THE  
SUBCOMMITTEE ON SEPARATION OF POWERS  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

Of Instances in Which Executive Agencies of the Government  
Have Withheld Information From Members and Committees  
of the Congress and From the Comptroller General of the  
United States



Printed for the use of the Committee on the Judiciary

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*Special acknowledgment is made of the work of Mr. J. L. Pecore, Counsel of the Subcommittee on Separation of Powers, who had the major responsibility of conducting the survey. It was principally through his efforts that the survey was planned and coordinated, with the understanding and cooperation, direct assistance, and critical advice of Mr. Rufus L. Edmisten, and later Mr. Walker F. Nolan, Jr., successively the Chief Counsel and Staff Director of the Subcommittee. A major part of the workload fell upon the capable shoulders of Mrs. Jeanie O'Brien, former secretary and research assistant, for her long hours and dedicated effort in assisting in the organization, implementation, and control of the materials gathered by the survey.*

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## LETTER OF TRANSMITTAL

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON SEPARATION OF POWERS,  
*Washington, D.C., November 29, 1974.*

Hon. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The Subcommittee on Separation of Powers respectfully submits its report of a survey of all committees of the 93rd Congress, entitled "Refusals of the Executive Branch to Provide Information to the Congress, 1964-1973." The survey was conducted in conjunction with the Subcommittee's hearings and studies on the subject of Executive privilege.

With all kind wishes, I am  
Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers.*

Enclosure.

(III)



## FOREWORD

Within the pages of this document will be found an amazing and intriguing body of information concerned with the workings of our Government. My purpose in undertaking the survey described in this report was to satisfy the truth of the basis for my earlier apprehensions that no person really knew the full particulars of Congressional success and failure in obtaining information from the Executive Branch of Government. The actions of public officials, whether elected or appointed, to deny the Congress the information it requires in its legislative functions, or unilaterally to decide what information will be provided or which witnesses will appear, are clear encroachments upon the powers of Congress. Yet a study of the findings of the survey will reveal a full range of devices, subterfuges, preposterous extensions and assumptions of authority, and outright evasiveness used by the bureaucracy to thwart the Congress in its legitimate legislative inquiries.

This report contains detailed documentation of at least 284 reported instances in which the Executive Branch of our Government had refused to provide information which had been requested by committees and subcommittees of the Congress, from 1964 until the early months of 1973. I have preferred not to include the term "Executive Privilege" in the title of this report, for the matters reported by the survey are not limited to that means of withholding information, however dramatic those few instances of the invocation of Executive privilege have been.

The power of Congress, under our Constitution, to inquire never has been seriously in question. To the extent that Congress has acceded to Executive branch denials or the withholding of information, it has failed to enforce its authority and has vacated its power to inquire. The diversity of a legislative body, which is its very nature, easily permits incidents to become obscured. When one subcommittee or another is frustrated in its efforts to obtain essential data, the facts surrounding the rebuff often escape attention or seem too insignificant in the single instance to warrant vociferous action. It is these individual instances in which Congress is denied information, when regarded collectively, that contribute to the deterioration of the constitutional authority of Congress.

It might be productive and necessary for the Congress to take special and innovative measures to be more watchful over refusals of information. It has been suggested that procedures be devised whereby committee chairmen could report to a central office, on a continuing basis, instances of refusals of information. A similar suggested remedy is the proposal that in each House of the Congress there be established an office which would specialize in following up on requested information that had been denied, and in assisting individual Members in enforcing the processes available to the Congress.

These and other suggestions which would provide the means by which the Congress might more zealously guard its rightful prerogatives to inquire in an effective and efficient manner must be further explored and considered as a preliminary to legislative remedy.

The results of the survey conducted by the Subcommittee on Separation of Powers have shown conclusively the need for congressional action.

SAM J. ERVIN, Jr.,

*Chairman, Subcommittee on Separation of Powers.*

November 29, 1974.



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## *Part I*

### **Background and Analysis**

**Report of a Survey Undertaken by the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, in Preparation for the 1973 Hearings on Executive Privilege, Secrecy in Government, Freedom of Information, conducted April 10, 11, 12; May 8, 9, 10, 16; and July 7, 8, 11, 26, 1973.**

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# **Part I—Background and Analysis**

## **A. PURPOSE OF THE SURVEY**

In order to identify with some particularity the impediments to the flow of information from the Executive branch to the Legislative branch of government, the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary undertook to survey the experience of congressional committees in obtaining information needed to fulfill their legislative responsibilities. The survey had not the intent of inquiring merely into the exercise of so-called "Executive privilege". While technically "Executive privilege" has been invoked rarely by the Chief Executive throughout our history, nonetheless, denials by the Executive branch of information requested by the Legislative branch and by private citizens have reached proportions causing great concern in recent years. Thus, the purpose of the survey was "an effort to document all instances in which Federal officers or employees had refused to provide information requested by congressional committees and subcommittees, during the period January 1, 1964, through February 28, 1973."<sup>1</sup>

Herein are published the responses received from the various committees and subcommittees of both Houses of the Congress, and from the Comptroller General of the United States. The submissions will be found to reflect nearly every issue of national importance during the period treated by the survey, and in a majority of cases are documented by correspondence, excerpts from hearings records,<sup>2</sup> *Congressional Record* excerpts, or newspaper articles.

## **B. ORGANIZATION OF THE RESPONSES TO THE SURVEY**

In view of the wide variety of subject matter, personalities, circumstances, modes of refusal, and executive departments and agencies involved in the incidents reported by the respondent committees and subcommittees of the Congress, considerable thought has been given to the problem of organizing the material in a manner for presentation which would be most useful to the reader. It was realized early in the review of the documents received that a relatively complex system of indexing would be required if visibility was to be given to the survey responses. Subsequently, the computer services of the Congressional Research Service of the Library of Congress were utilized to assist the Subcommittee on Separation of Powers staff in generating the specialized indices which are found in Part II of this report.

In Part III of the report are presented the specific instances of refusals by the Executive branch to respond to inquiries by the Legislative branch. These are arranged in order of the file numbers assigned to the committees and subcommittees at the time the questionnaire was distributed. Appendix B provides a list of the file number assigned to each committee. The following table notes briefly the assignment of these file numbers:

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<sup>1</sup> The inclusive dates were selected to correspond roughly with President Lyndon B. Johnson's elected term of office through the end of the month prior to that in which hearings on Executive privilege and secrecy were to be held.

<sup>2</sup> Refusals of information relative to the proceedings of the Select Committee on Presidential Campaign Activities purposely have been excluded from this study. The reader is commended to the published hearings of that body, especially to the Appendix to those hearings entitled "Legal Documents Relating to the Select Committee Hearings," Parts I and II, U.S. Senate June 28, 1974.

*Table I.—File numbers used in this survey*

Committees of the Senate-----	1 through 17.
Subcommittees of the Senate-----	51 through 179.
Special and Select Committees of the Senate-----	38 through 41.
Committees of the House-----	18 through 37, 42.
Subcommittees of the House-----	180 through 298 and 304 through 309.
Special and Select Committees of the House-----	299 through 303.
Joint Committees of the Congress-----	43 through 49.
Office of the Comptroller General of the United States.	50.

In addition to the Table of Contents, at the commencement of each of the major sections in Part III will be found a detailed content listing. Additionally, each of the three major summary indices of Part II (Section A, Survey Form I; Section B, Survey Form II; Section C, Survey Form III) detail all reports in file order sequence.

The manner in which the committees organized their responses took various directions. In some cases, the committee chairmen chose to coordinate their reports at the full committee level. For example, the Senate Committee on Foreign Relations (File 9) provided a consolidated report containing thirty separate and distinct cases in which that committee and its subcommittees had experienced refusals of information by the Executive branch. Other committee chairmen encouraged their subcommittees to report direct.

In most instances the committee or subcommittee chairmen forwarded their responses under the cover of a letter of transmittal addressed to the chairman of the Subcommittee on Separation of Powers. The perceptive remarks contained in these letters are of extraordinary value in that they provide understanding of the problems encountered by the Congress in obtaining vitally needed information. Accordingly, these letters of transmittal have been reproduced in full at the commencement of each file section of Part III.

In a few instances, chairmen who offered positive information concerning refusal of information by the Executive branch chose to report entirely by letter rather than utilizing the survey forms.<sup>3</sup>

The foregoing pertains to reports of noncompliance by the Executive branch in providing information requested by Congress. In many instances chairmen who had not experienced difficulties in obtaining information nonetheless responded. These letters were gratefully received, and they provide worthwhile information descriptive of the congressional committee system. These letters are reproduced in Part IV of this report.<sup>4</sup>

### C. THE TENOR OF REFUSALS OF INFORMATION TO THE CONGRESS

The mode of refusal varies greatly, as does the language. A review of the language used in the correspondence found in Part III to justify a refusal of information to the Congress certainly underscores the ingenuity of staff in the Executive branch. Several categories may be identified which derive from the language of refusal:

#### (1) Executive Privilege

The survey turned up only three instances of the formal invocation of Executive privilege wherein the Chief Executive personally and unquestionably is identifiable in the invocation. (See Files 9-H, 9-1, and 247-B.) In these cases, a memorandum signed by the President will be found. In all other instances the claim that the exercise of Executive privilege precluded responsiveness to Congressional inquiry is exhorted by some other official with a claim of the personal knowledge and affirmation of the President but without evidence to conclusively indicate the personal intervention of the President. See especially File 245-B, in which Attorney General John Mitchell advised Chairman L. H. Fountain, Subcommittee on Intergovernmental Relations,

<sup>3</sup> See especially File Number 12, Senate Committee on the Judiciary.

<sup>4</sup> See pp. 517 *et seq.*

House Committee on Government Operations, that the release of certain investigative reports of the Federal Bureau of Investigation would not be in the public interest and that, "This invocation of privilege is being made with the specific approval of the President." In a subsequent letter to the President, Chairman Fountain stated, ". . . I am confident that your authorization to the Attorney General to invoke Executive privilege in your behalf was not given, and indeed I do not believe it would have been given, with full knowledge of the facts I am bringing to your attention. . . ." In a White House response to Mr. Fountain's letter, Mr. John D. Ehrlichman said, ". . . the President has decided to adhere to his earlier decision approving the invocation of privilege in this case."

Included as part of File 247-D (page 445) is the Honorable William S. Moorhead's insertion in the *Congressional Record*<sup>5</sup> of a statement, "Problems of Congress in Obtaining Information from the Executive Branch", which contains exchanges of correspondence between the Honorable John E. Moss, and Presidents Kennedy, Johnson, and Nixon, in which their views and policies in the exercise of Executive privilege were requested and expressed. President Nixon's letter of April 7, 1969, to Congressman Moss will be found, in which the President stated, ". . . executive privilege will not be asserted without specific Presidential approval." In the case of the Fountain-Mitchell-Ehrlichman correspondence, it must be for the reader to decide whether claims of the invocation of Executive privilege were in fact valid or were merely the assertions of persons subordinate to the President, acting without his specific approval.

In categorizing instances of refusal which may, or may not, have been cited by some as valid assertions of Executive privilege, the staff of the Subcommittee on Separation of Powers has been guided in part by the stated policies of various recent Presidents in their responses to inquiries by Congressman Moss, and by the definition of Executive privilege as stated by Senator Sam J. Ervin, Jr., Chairman, Subcommittee on Separation of Powers. In his opening statement at the commencement of 1971 hearings, Chairman Ervin voiced the following definition of Executive privilege:

"The term Executive privilege is most commonly used to refer to a situation where the executive branch of government refuses to divulge information requested by the Congress. It is a term more often used by members of the legislative branch and by scholars than by members of the executive branch who willfully withhold information. As I use the term, it refers to the withholding of any kind of information by the executive branch from any persons, be they members of Congress, or members of the taxpaying public."<sup>6</sup>

During the several years intervening since the 1971 hearings before the Subcommittee on Separation of Powers, Senator Ervin developed a much more restrictive definition of Executive privilege. He stated:

". . . as the result of the studies since that time, I think there is reason to infer from the Constitution, although not expressed in the Constitution, that the President has the power to keep secret, confidential communications occurring between the President and advisors, and confidential communications occurring among his advisors, which are had for the purpose of assisting the President to carry out in a lawful manner the obligations imposed upon him by the Constitution and the obligations imposed upon him by acts of Congress. That is the sum total in my judgment of the extent and scope of what is popularly called the executive privilege."

"It manifestly does not cover wrongdoing, either illegal acts or unethical acts; and it manifestly does not cover any transactions which are not official in character, and it manifestly does not embrace a power on the part of the Executive to withhold from Congress information collected at the expense of the taxpayers, which information is

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<sup>5</sup> *Congressional Record*, May 18, 1972, pp. 5501-5509.

<sup>6</sup> See *Executive Privilege; The Withholding of Information by the Executive*, Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 92nd Congress, 1st Session, July and August, 1971, pp. 1; hereinafter cited as Executive Privilege Hearings, 1971.

necessary to enable the Congress to exercise in a knowledgeable fashion, its legislative duties.”<sup>7</sup>

At a later point during the 1973 hearings, Senator Ervin restated the foregoing definition in slightly different words, and added:

“ . . . executive privilege cannot be invoked to conceal the doing of any unlawful or wrongful acts because there is nothing in the Constitution or laws of the United States which makes it an official act of the President to commit unlawful or wrongful acts; and also the privilege cannot be invoked to cover political activities, because seeking reelection to an office does not constitute an official act of the President under the constitutional laws of the United States.”<sup>8</sup>

Senator Ervin’s restatement of his definition of executive privilege was made during hearings on April 12, 1973. It is perhaps noteworthy that the White House on March 12,<sup>9</sup> and on May 3, 1973, expanded somewhat the definition of Executive privilege set forth by President Nixon in his response of April 7, 1969, to Congressman Moss. Past and present members of the President’s staff were authorized to invoke Executive privilege under certain conditions by the May 3, 1973, memorandum, and in a supplemental memorandum<sup>10</sup> issued on May 4, 1973, invocation of the privilege was extended to White House counsel, “ . . . only in connection with formal hearings before the Ervin committee.”

## (2) Refusals of Information as an Alleged Prerogative of Office

Departing from those refusals of information which quite clearly had Presidential approval or at least claimed Presidential approval, there comes a category of refusals which are based upon the character of the office held by the individual from whom Congress desired to obtain information. Although not in all such instances, the word “President” or “Presidential” is generally prominent among such language of refusal. Thus, the language of refusal is replete with phrases such as “members of the President’s staff”<sup>11</sup>, “Members of the President’s immediate staff,”<sup>12</sup> and so on, to explain that certain persons decline to appear as witnesses before committees of the Congress. In two instances, the prospective witnesses’ refusal to appear was based upon their status as former members of the President’s staff.<sup>13</sup> In requesting the appearance of witnesses of Cabinet rank, this Subcommittee was advised that the President had restricted the number of administration witnesses who would appear at the impoundment hearings to two persons.<sup>14</sup> When the Chairman suggested that a subpoena might be issued, the witnesses appeared.

In response to requests for documents, committee chairmen were advised that the documents they desired were for the “personal use of the President.”<sup>15</sup> or were “personal to the President.”<sup>16</sup>

Other officials relied upon their own offices in refusing information, e.g., as “Acting Attorney General of the United States,”<sup>17</sup> or, “ . . . only the director of an intelligence agency can represent his agency in testifying before the Congress.”<sup>18</sup> Testimony was likewise discouraged from members of the National Security Agency because of “established Executive branch procedures.”<sup>19</sup>

Referring to the question of who could invoke Executive privilege, the following exchange between Senator Muskie and Mr. William P. Bundy appears on the record:<sup>20</sup>

<sup>7</sup> See *Executive Privilege, Secrecy in Government, Freedom of Information*: Hearings before Subcommittees on Separation of Powers, and Administrative Practice and Procedure of the Committee on the Judiciary, and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, and the U.S. Senate, 93rd Congress, 1st Session, April and May 1973, Vol. 1, pp. 128. The record of these hearings hereinafter will be cited as *Executive Privilege Hearings, 1973*, for purposes of brevity.

<sup>8</sup> *Ibid.*, page 385.

<sup>9</sup> *Ibid.*, Vol. III, pp. 196-198.

<sup>10</sup> *Ibid.*, Vol. I, p. 276.

<sup>11</sup> Cf. Part III, File 27-B.

<sup>12</sup> Cf. Part III, File 9-W.

<sup>13</sup> Cf. Part III, Files 246-J, 246-K.

<sup>14</sup> Cf. Part III, File 165-A.

<sup>15</sup> Cf. Part III, File 9-F.

<sup>16</sup> Cf. Part III, File 50-K.

<sup>17</sup> Cf. Part III, File 151-A.

<sup>18</sup> Cf. Part III, File 9-S and 9-T.

<sup>19</sup> Cf. Part III, File 9-T.

<sup>20</sup> Executive Privilege Hearings, 1973, Vol. 1, p. 277. See also Senator Fulbright’s observations, at pages 39-40, Executive Privilege Hearings, 1971.

Senator MUSKIE. . . . Now it had not been clear at least to me in the statement of May 3, who would invoke executive privilege. Apparently it is White House Counsel who will do so.

Mr. BUNDY. Mr. Chairman, I think the doctrine on that should be nailed down every chance you get that the only person who can invoke Executive privilege in the formal sense of the word is the President of the United States and in the case of this particular nature he has to be forced to do it in the most explicit way.

I was very sympathetic before Senator Ervin's committee <sup>21</sup> in this respect because I thought it had been nailed down what had been obvious in the administration's habit of invoking Executive privilege without the President's say so.

Senator MUSKIE. I think that is a point on which this administration appears to try to generate ambiguity and then build on the ambiguity to expand the doctrine itself.

Mr. BUNDY. I think so too.

In responding to requests from the Congress for the appearance of members of the White House staff as witnesses before Congressional committees, Counsel to the President in declining such requests generally relied upon such phrases as, "As a matter of long established principle and precedent . . .", in justification of denial of the witnesses' appearance. Senator Ervin in his letter of April 21, 1972, inquired of President Richard M. Nixon concerning the specifics of the oft-cited "long established historical precedents". The exchange of correspondence, including the reply of the Counsel to the President, Mr. John W. Dean III, provides invaluable insight into the scope of the claimed principles and precedents.<sup>22</sup>

### (3) Refusals Which Are Predicated Upon Law or Pretext of Law

Certain refusals to provide information to the Congress cited statutes or attempted to rely upon one or another of several legal disablements. The United States Postal Service refused to provide information regarding names, salaries, and other biographical data of postmasters, on the basis that to provide such information would be in violation of 39 U.S.C. § 412. The wording of that section immediately raises questions as to its applicability to a Congressional inquiry.<sup>23</sup>

The Chairman of the Board of the Federal Deposit Insurance Corporation has precluded General Accounting Office access to certain banking records annually since 1965. The Comptroller General and the Chairman, FDIC, each claim that his interpretation of 12 U.S.C., § 1827 is the correct interpretation, and they remain at loggerheads,<sup>24</sup> on the point.

The Director of the Internal Audit Division, Internal Revenue Service, claims that § 6406 and § 8022 of the Internal Revenue Code preclude review by the House Committee on Government Operations,<sup>25</sup> and possibly the General Accounting Office.<sup>26</sup>

Other instances of disagreement as to the extent of jurisdiction are to be found among the survey reports submitted by the Comptroller General.<sup>27</sup>

A collection of refusals to provide information to the Congress is identified by those reports which cite words and phrases from the exclusionary subsection (b) of the Freedom of Information Act, 5 U.S.C., § 522. Examples of phraseology are: "internal interagency working draft,"<sup>28</sup> "internal working paper,"<sup>29</sup> "internal working documents,"<sup>30</sup> "safety of military personnel,"<sup>31</sup> "proprietary information,"<sup>32</sup> "investigative files,"<sup>33</sup> "trade secrets,"<sup>34</sup> "Presidential Directive of March 13, 1948,"<sup>35</sup> to mention a few. These refusals of

<sup>21</sup> Editor's note: The reference here is to *Executive Privilege Hearings*, 1971. Mr. Bundy's testimony appears at pp. 317 *et. seq.*

<sup>22</sup> See *Executive Privilege Hearings*, 1973, Vol. 111, pp. 200-203.

<sup>23</sup> File 119-A.

<sup>24</sup> File 50-C and 248-B.

<sup>25</sup> File 248-C.

<sup>26</sup> File 50-E.

<sup>27</sup> File 50, generally.

<sup>28</sup> File 9-G.

<sup>29</sup> File 9-K.

<sup>30</sup> File 9-O.

<sup>31</sup> File 9-R.

<sup>32</sup> File 92-B.

<sup>33</sup> Files 151-C, E and 154-A.

<sup>34</sup> File 245-E.

<sup>35</sup> File 12-A.

information were made notwithstanding the clear language of subsection (c) of the Act which, referring to subsection (b), states, "this section is not authority to withhold information from Congress."

Upon the recommendation of Mr. Dan Manelli, Chief Counsel, Special Subcommittee on Investigations, House Interstate and Foreign Commerce Committee, the legal arguments upon which the Chairman of the Federal Communications Commission opposed compliance with that Subcommittee's request and ultimate subpoena for documents relating to the radio station WIFE AM/FM licensing matter, are presented in File 29-E, along with staff legal memorandum and the court opinion in the case of *Pillsbury v. F. T. C.*, 354 F. 2nd 952.

#### **(4) Refusals on the Basis That Material is Classified Information**

That documents are classified information, and thereby specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy, is not of itself sufficient that their content be denied to the Congress, according to the Freedom of Information Act.<sup>36</sup> Indeed, relatively few instances of refusal of information are reported in which the material is denied merely because it is classified information. That appropriate committees of Congress have a "need to know" in order that the business of government go forward, seems generally recognized, and possibility of inadvertent revelation of secrets of a military or diplomatic nature seems not to be a problem.

Rather, problems in the flow of information to the Congress seem to occur more often when there is an appearance that the Executive branch classification of information was accomplished primarily to preclude the Congress or the public from learning of it, or that an intrinsic need for such classification was otherwise lacking. Under these circumstances instances of refusal were reported in which the Congressional committee or subcommittee questioned the propriety of the classification and requested that the material be declassified, with the objective of making public<sup>37</sup> its content. In some instances the materials were declassified,<sup>38</sup> or partially declassified.<sup>39</sup>

The Department of State refused to provide information to the Comptroller General of the United States, relating to costs of the occupation of Berlin by United States forces. The correspondence stating the reasons for the refusal were likewise classified.<sup>40</sup> The Comptroller General reported the matter to appropriate committees of the Congress in a report which was classified.<sup>41</sup> The Senate Foreign Relations Committee was refused access to State Department messages to posts in East and West Pakistan. The classified letter in which the State Department refused the request stated that the reason for retaining the classification was so as "... not to jeopardize our relations with the Government of Pakistan . . .".<sup>42</sup> Thus, it appears here that the judgments of the Executive branch as to the classification of the subject matter is acquiesced in by the Legislative branch.

#### **(5) Refusals Claiming That Litigation or Investigation Would Be Prejudiced**

One instance is reported wherein an Assistant Attorney General complied with a request for court documents but refused to testify in hearings related to enforcement by the Justice Department of the Refuse Act of 1899 (33 U.S.C. § 407 and related sections) on the basis that the case of *U.S. v. Armco Steel Corporation, et al.*, and other mercury pollution cases were pending in litigation.<sup>43</sup> Excerpts from hearings of the Conservation and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives,<sup>44</sup> illuminate the attitude of the Department of Justice toward providing

<sup>36</sup> Title 5, U.S.C., § 552.

<sup>37</sup> See Files 154-I through M.

<sup>38</sup> See File 154-L, Assistant Secretary of Defense Moot's letter of October 27, 1970, para. 3.

<sup>39</sup> See File 154-H.

<sup>40</sup> See File 50-F.

<sup>41</sup> See File 50-F.

<sup>42</sup> See File 9-J, especially Secretary of State Rogers' letter of July 6, 1971.

<sup>43</sup> See File 246-H, also 246-L.

<sup>44</sup> See File 246-L.

information to the Congress and particularly with regard to conflict between internal rules of the Department of Justice and the Freedom of Information Act as it pertains to the flow of information to the Congress.<sup>45</sup>

Materials dealing with refusals which were based upon matters under investigation will be found in Files 27-B, 29-B, 151-C and E, 245-B, and File 246, generally.

#### (6) Refusals Based Upon "Inappropriateness"

A class of refusals is found in which the principal basis for the refusals of information to the Congress, as couched in the responses of the Executive branch, is that disclosure would, in some way, be inappropriate. One instance dealt with requests that certain officials of the Department of Housing and Urban Development appear before a subcommittee of the Joint Committee on Economics. Secretary Romney responded to the effect that it would be inappropriate for him or certain other HUD officials to appear because of expected multiple resignations of HUD officials, including himself.<sup>46</sup>

Certain Major Generals of the Army and other persons were requested to be present for possible testimony<sup>47</sup> before the Senate Judiciary Subcommittee on Constitutional Rights by the Chairman, Senator Ervin, during its hearings on Federal data banks and computers, in March 1971. In responding, Mr. Buzhardt, General Counsel, Department of Defense, declared that it would be inappropriate for the generals to appear, on the basis that the generals "... could be material witnesses in formal proceedings which might grow out of the current investigations."

An official of the Environmental Protection Agency declared that it would be "... quite inappropriate and unproductive to explain the reasons behind each draft change . . ." of an agreement to settle a lawsuit.<sup>48 49</sup>

#### (7) Other Reasons for Refusing Information to the Congress

This sampling of the responses received by the Subcommittee on Separation of Powers in its survey is not intended to be all-inclusive, but is intended to suggest to the reader major patterns which appear in the information received. Several other patterns may be identified; for example:

(a) Refusals on the basis that the information desired already has been furnished, or has been furnished to another committee or subcommittee.

(b) Refusals based upon the contention that revelation to Congress would create "risk of adverse reaction," "hamper the IRS and create adverse publicity," "create public concern," or "set a precedent."

(c) Refusals based upon reasons of personal inconvenience.

There is another major category of non-responsiveness to Congressional inquiry which must be labeled simply as noncompliance or inadequate response. Within such a category would fall instances of outright refusal, unfulfilled promises to comply, or incomplete performance in providing Congress with information. Again, there are instances of neglect to respond, or unreasonable delay in responding. The cases of inadequate response would include those in which the information provided was useless, or so limited in its purview as to be of no value to the committee which had sought it.

### D. AN EXAMPLE OF SUCCESS

The survey has revealed largely those documented instances of the failure of Congress to receive information which it had requested from the Executive branch. A few instances were reported of success after an initial request had been refused or ignored. If persistence is thought to be the key to success, the experiences of Senator Frank Church,<sup>50</sup> Chairman of the Subcommittee on Western Hemisphere Affairs, Senate Committee on Foreign Relations, would bear review.

<sup>45</sup> See especially page 426, end of File 246-L.

<sup>46</sup> See File 45-A.

<sup>47</sup> See File 154-E.

<sup>48</sup> See File 246-E.

<sup>49</sup> See also Files 93-A, 9-B, D, N: 247-C.

<sup>50</sup> The documentation of Senator Church's experience is found in Part III of this report, File 9-CC.

In his quite firm letter of December 10, 1971, Senator Church refers to six different letters which he had addressed to the Department of State over the prior several months. His letter of December 10 asserts, in part, ". . . During the seven months which have intervened, you have neither furnished the study nor refused to do so. Nor have you replied to my letters of September 20 and November 10 on the subject . . . This is totally unacceptable and displays contempt for Congress in the literal, if not legal, sense of the term. I call upon you again . . . (to) either transmit the NSC study or assert a claim of Executive privilege consonant with President Nixon's letter of April 7, 1969 to Chairman Moss . . ."

By his letter of January 10, 1972, Senator Church notes his receipt of the documents which he had sought. Thus, persistence prevailed.

#### **E. SOME CAVEATS ON THE NUMBERS OF REFUSALS REPORTED**

While the responses to the survey provide a quantum of insights into the difficulties experienced by the Congress in obtaining information from the Executive branch, comments concerning certain limits to the comprehensiveness of this survey are felt to be in order.

First, the extensiveness of information received was limited by the priorities that committee staffs could allow the survey, in terms of the time required to search their files, and memories, in responding. As Senator Fulbright emphasized in his letter<sup>51</sup> transmitting the survey reports of the Senate Committee on Foreign Relations, "Unfortunately this could not be a complete list of such instances from January 1, 1964, through February 28, 1973, simply because of the time required for research." This, from the chairman of the committee which provided the most extensive input of the survey, would appear to be a general limitation.

A second limitation is adduced from a review of the calendar dates of the requests for information. It is quite evident that the volume of reported instances of refusal varies inversely with time. Reasons for this observation would appear to be as follows:

- (1) Turnover of staff personnel, changes in committee chairmanships, filing practices, and fallability of memory.
- (2) Changes in basic relationships among the Legislative and Executive branches, including styles of leadership in both of the separate branches.
- (3) Changes in committee structure in terms of the creation of new committees or subcommittees, coupled with the suspension or inactivation of others. Attendant upon such structural changes are the related dispersion of staff personnel and inaccessibility of older files.

As the consequence of these obvious limitations and others less obvious, any conclusions as to the ultimate total numbers of refusals of information which occurred during the term of the survey would be entirely speculative.

#### **F. THE SURVEY METHOD**

Samples of the instruction sheets and survey forms that were provided to respondent committees and subcommittees are illustrated in Appendix A. Three distinct forms were provided with the anticipation that they would permit reasonable latitude in the reporting of a variety of types of information, and would assist the staff of the Subcommittee on Separation of Powers in organizing and analyzing the survey results.

Forms I and II were intended to serve as vehicles for reporting instances of refusals of documentary and testimonial information, respectively, whereas Form III would permit the submission of narrative reports of instances of refusals in which complications were encountered beyond a flat refusal by the Executive branch to provide the desired information or witness. A typical Form III situation was foreseen as one in which there was a refusal to provide a requested document or to permit a witness to appear and the inquiring committee persisted in pursuing its objective beyond the initial refusal (e.g., by further correspondence, issuance of subpoena, use of Federal courts to enforce process, and so on); or, as another example, the desired information or testimony was delayed but ultimately provided.

<sup>51</sup> See File 9-A, Part III.

The survey forms were forwarded to the chairman of every committee and subcommittee of the Congress, on March 9, 1973. The Chairman of the Senate Subcommittee on Separation of Powers, Senator Sam J. Ervin, Jr., in his covering letter, elicited the cooperation and assistance of all elements of the committee system. Senate Majority Leader, Senator Mike Mansfield, a few days later, forwarded a letter<sup>52</sup> to the Senate Committee chairmen in which the Majority Leader underscored the importance of the survey and stated his support of the project.

In explaining the purpose of the survey a "refusal" to provide information was defined as "any failure to provide any information or testimony requested for any reason, except scheduling difficulties arising in the normal course of events." Thus, in addition to an outright denial of information, the negligence or inadvertence of a Federal officer in failing to reply to a request for information would constitute a refusal.

The instructions requested the return of completed forms and supporting documentation to the Subcommittee on Separation of Powers before March 26, 1973, a date which would allow time for collation of the survey results for use during the Subcommittee's hearings on *Executive Privilege, Secrecy in Government, Freedom of Information*, held in collaboration with two other Senate Subcommittees, which were commenced on April 10, 1973. A preliminary draft of the survey returns was prepared for use by members of the Subcommittees and their staffs during the hearings.

## G. STATISTICS OF RESPONSES TO THE SURVEY

### 1. Quantitative Responsiveness: The Addressed Group

Questionnaires were mailed March 9 through 13, 1973, to 308 committees and subcommittees of the Congress, and to the Comptroller General of the United States. Table II accounts for the responses.

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<sup>52</sup> See Appendix A.

TABLE II.—*Responses to the survey of Subcommittee on Separation of Powers*

	Units sur- veyed	Per- cent	Units reporting denials of informa- tion by the exec- utive branch		Units reporting compli- ance with requests for informa- tion or a lack of interface		Units not re- spond- ing	
			Per- cent	Per- cent	Per- cent	Per- cent	Per- cent	Per- cent
Standing, special, and select committees of the Senate-----	21	100	2	9.5	9	42.8	10	47.7
Subcommittees of the Senate-----	129	100	22	17.5	48	37.2	59	45.7
Senate subtotal-----	150	100	24	16.0	57	38.0	69	46.0
Standing, special, and select committees of the House of Representatives-----	26	100	8	30.8	12	46.1	6	23.1
Subcommittees of the House of Representatives-----	125	100	15	12.0	53	41.6	58	46.4
House subtotal-----	151	100	23	15.2	64	42.4	64	42.4
Joint committees of the Congress-----	7	100	1	14.3	2	28.6	4	57.1
Comptroller General of the United States-----	1	100	1	100	—	—	—	—
Total-----	309	100	49	15.9	123	39.8	137	44.3

<sup>1</sup> Includes subcommittees when their reports were combined at parent committee level.

Tabulating the results of the 309 questionnaires was somewhat complicated by the manner in which various committees chose to respond. For instance, it will be noted that Table II indicates positive responses by 49 of the units to which inquiries were made, while Table III (and Part III) of the report indicates only 36 units which submitted positive reports of instances in which information had been refused. This apparent discrepancy is due to procedures followed within certain committees, by which the parent committee consolidated reports which otherwise might have been submitted separately by one or another of its subcommittees. Likewise, the total of 123 responses shown in Table II which identified either successful experiences in obtaining information from the Executive branch, or a lack of a relationship with the Executive branch, may be compared with the documented negative responses reproduced in Part IV, which contains some 62 letter responses and refers to an additional 23 negative responses submitted by endorsement and return of the survey forms, for a total of 85 responses. Here again, the apparent discrepancy is the result of the practice of combining reports for subcommittees at the parent committee level.

Table II does contain a grey area in which accounting has not been entirely successful. This is with regard to 137 units indicated as having not responded. The mailing of the survey forms took place at a time when the organization of the committees of the Ninety-third Congress was not entirely complete. Some problems were encountered in formulating the mailing lists; mainly the problem was that of determining with precision the subcommittee organizations of some of the major committees of the Congress. It seems apparent that some of the subcommittees had not, at the time of the survey mail-out, become fleshed out with staff personnel, office space, and similar facilities. Consequently, it is probable, and in a few cases positive, that an undefined number of the 309 survey questionnaires was forwarded to subcommittees which were then not capable of responding directly, and for which their parent committee did not respond.

## 2. Quantitative Responsiveness: Reports of Refusals of Information

Table II shows that 49 offices addressed by the Subcommittee on Separation of Powers survey submitted one or more reports of instances in which documentary or testimonial information had been refused by the Executive branch of government. These reports have been regrouped into 36 major files, which with their subfiles, are presented in Part III of this report.

Table III has been devised to summarize the reports received from the offices addressed in the survey.

TABLE III.—*Analysis of responses reporting refusals of information by the executive branch.*

Offices reporting	Total reports	Form of report			Instances of refusal			Total refusal			
		Letter	I	II	III	Letter	I	II			
Senate, committees and subcommittees-----	14	68	3	31	16	18	15	93	36	23	<sup>1</sup> 167
House of Representatives, committees and subcommittees-----	20	60	5	20	22	13	5	37	35	31	98
Joint Economic Committee, Subcommittee on Priorities and Economy in Government-----	1	2	-----	-----	2	-----	2	-----	-----	-----	4
Comptroller General of the United States-----	1	14	-----	10	-----	4	-----	12	-----	3	<sup>2</sup> 15
Total-----	36	114	8	61	40	35	20	142	75	47	284

<sup>1</sup> This does not include refusals before the Senate Committee on the Judiciary. See File 12-A, pp. 113. Senator Eastland states, "\*\*\*\* there have been hundreds of instances in which the Judiciary Committee has been refused information or documents; but virtually all of these were involved in the Subcommittee's 3½ year investigation of security in the Department of State."

<sup>2</sup> As reported to the Subcommittee on Separation of Powers. However, these figures represent only instances of refusal at the level of head of agency vis-a-vis the Comptroller General. The multitude of refusals taking place at the various working levels of audit proceedings are not reported.

It is seen that 144 separate report forms or letter reports were received in which there were reported 284 instances of refusals of information.

The minds of men will differ as to the most efficacious method of counting instances of refusal. A refusal was defined by the questionnaire <sup>53</sup> as including "any failure to provide any information or testimony requested for any reason, except scheduling difficulties arising in the normal course of events." The information contained in Table III, as reported in the raw data received by the Subcommittee on Separation of Powers, has been regarded in the context of the foregoing definition. In general, a request by telephone, followed up within a day or so by a letter, requesting an appearance of a witness or the production of documents, has been treated as one request, and if refused, one refusal. A follow-up, two weeks or more after an initial request, has been treated as a second request and potentially a second refusal. Where several discrete documents have been requested or different witnesses invited to testify in one letter of request, the failure to provide any one of the documents or the failure to appear of any one of the desired witnesses has each been treated as an individual instance of refusal.

<sup>53</sup> See Appendix A.



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*Part II*

**The Specialized Indices**

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## ***Part II—The Specialized Indices***

Part II of this report has been formulated to accomplish two objectives; first, to capsulize the substantive reports and documents received by the Subcommittee on Separation of Powers so as to provide an overview; and second, to provide a systematic and detailed cross-index to the enormously heterogeneous scope of subject matter, organizations, places, and dates reported to the Subcommittee.

The variety of the subject matter encompassed within the reports elicited by the survey is uncommonly broad. There were very few public issues which occurred during the period embraced by the survey that have escaped mention somewhere or another in the survey reports. As a consequence the Subcommittee has been faced with a problem of Gordian proportions in devising a scheme by which the information presented by the survey would be effectively organized for presentation.

A technique was developed whereby the survey reports received by the Subcommittee were tabulated in abbreviated form so as to permit the report content to be manipulated into various indices. Part II presents these indices.

The three survey forms were first tabulated in columns closely similar to those columns of the Survey Form I and Form II formats.<sup>1</sup> Survey Form III, calling for free narrative reporting, was similarly tabulated; however, according to a somewhat different format. In abbreviating or captioning the survey forms into the tables every effort was extended toward preserving the vocabulary and emphasis of the full report form, for purposes of maintaining differentiation and discreteness among the various reports.

These basic index tabulations, one each for Form I, Form II, and Form III, are presented in "file order"; that is, the order of consecutive file numbers assigned to the committees and subcommittees of the Congress by the Subcommittee on Separation of Powers during the beginning stages of the survey. For example, all reports received from the Senate Committee on Foreign Relations are assigned file number "9". That and other Committee's reports of specific incidents are further designated by an alphabetic file suffix; e.g., "9-A", "9-B", "9-C", and so on, in the case of the Senate Committee on Foreign Relations.

These tabulations of the "file order" summary are reproduced below as follows:

	Page
Form I-----	19
Form II-----	34
Form III-----	45

Utilizing computer techniques and assistance provided by the Library of Congress, the three "file order" index tables were systematically re-sorted alphabetically within each of the several more significant columns. These subordinate indexes provide the reader with several alternative approaches to the report files printed in Part III of this report. The following is a table of the contents of the various index re-sorts:

**TABLE IV.—Survey indices and subindices**

**A.—Survey Form I. Refusals to Provide Exhibits, Documents, Charts or Written Information of Any Kind**

	Page
1. Instances of Refusals in File Order-----	19
2. Indexed Alphabetically by Agency Refusing-----	22

<sup>1</sup> See Appendix A, p. 541.

TABLE IV.—*Abbreviations used in the specialized indices*

	Page
A.—Survey Form I—Continued	
3. Indexed Alphabetically by Subject Matter-----	25
4. Indexed Alphabetically by Person Refusing to Provide Information-----	28
5. Indexed Alphabetically by Language of Refusal-----	31
B.—Survey Form II. Refusals to Appear and Testify:	
1. Instances of Refusal in File Order-----	34
2. Indexed Alphabetically by Refusing Agency-----	37
3. Indexed Alphabetically by Subject Matter of Inquiry-----	39
4. Indexed Alphabetically by Person Refusing to Provide Witness/s/-	41
5. Indexed Alphabetically by Language of Refusal-----	43
C.—Survey Form III. Requests of Testimony or Documents Initially Refused but Subsequently Provided:	
1. Instances of Refusal in File Order-----	45
2. Indexed Alphabetically by Refusing Agency-----	47
3. Indexed Alphabetically by Subject of Inquiry-----	49
4. Indexed Alphabetically by Subsequent Response-----	51

**Boldface type** is used to assist the reader in entering the various index tables.

TABLE V.—*Abbreviations used in the specialized indices*

ACFR	Advisory Council on Federal Reports
AFIG	Air Force Inspector General
AG	Adjutant General
BNDD	Bureau of Narcotics and Dangerous Drugs
CAB	Civil Aeronautics Board
CCOSSP	Cabinet Committee on Opportunities for Spanish Speaking People
CEA	Commodities Exchange Administration
CPSC	Consumer Product Safety Commission
DOA	Department of Agriculture
DOC	Department of Commerce
DOD	Department of Defense
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOS	Department of State
DOT	Department of Transportation
EPA	Environmental Protection Agency
EDA	Economic Development Administration
ELGB	Emergency Loan Guarantee Board
FAA	Federal Aviation Administration
FDA	Food and Drug Administration
FDIC	Federal Deposit Insurance Corporation
GSA	General Services Administration
HEW	Department of Health, Education and Welfare
HUD	Department of Housing and Urban Development
IG	Inspector General
IRS	Internal Revenue Service
LEAA	Law Enforcement Assistance Administration
NASA	National Aeronautic and Space Administration
NCUA	National Credit Union Administration
NHSA	National Highway Safety Administration
OEO	Office of Economic Opportunity
OMB	Office of Management and Budget
PBC	Public Broadcasting Corporation
POST	U.S. Postal Service
PRICE	The Price Commission
PVT	Private Citizen (former staff)
SEC	Securities and Exchange Commission
USIA	U.S. Information Agency
USPS	U.S. Postal Service
WH	White House

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND**

**1. Instances of Refusal in File Order**

**INQUIRIES BY SENATE COMMITTEES**

Date of request	To whom addressed, and agency represented	Nature of information requested, and nature of hearings or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, and documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2/25/72 5/--/70	State --- DOD --- Rogers ----- MACV -----	Europe, Radio Free, studies -- Cambodia and Vietnam (visit).	4/ 5/72 5/--/70	Abshire ----- Various -----	Inappropriate for disclosure. No authority to brief -----	9-B 9-C
4/20/71	DOD --- Nutter -----	Laos and Cambodia, monthly report on operation.	5/ 5/71	Nutter -----	Report not reliable -----	9-D
1/27/71 3/ 7/73 9/25/70	DOD --- do ----- State --- Rogers ----- State --- Rogers -----	Laird ----- Chile, copies of cables, ITT ----- Chile, reports of Ambassador Korry.	4/14/71 do ----- 9/28/70	do ----- Abshire -----	Inappropriate to discuss. No response. Practices established, historical.	9-D 9-E 9-E
12/ 3/70	State --- Abshire -----	Vietnam report by Sir R. Thompson.	do -----	do -----	No response -----	9-F
12/24/69 1/26/71 2/ 8/72	State --- Rogers ----- State --- Abshire ----- State --- Abshire -----	do ----- do ----- Oil, world supplies report -----	2/12/71 3/ 1/72	Abshire ----- do -----	President, personal use of Internal interagency working draft.	9-F 9-F 9-G
3/ 1/72	USIA --- Shakespeare -----	USIA country program -----	3/16/72	Shakespeare -----	Executive privilege, by Presidential memo.	9-H
5/21/69 5/ 1/71 3/30/71	DOD --- Laird ----- State --- Irwin ----- State --- Van Hollen -----	MAP plan, 5 yr. ----- Pakistan, telegrams ----- Pakistan, messages, East and West.	8/31/71 7/ 6/71 6/21/71	Laird ----- Rogers ----- Abshire -----	do ----- Internal working papers ----- Prejudice our relations, classified document.	9-I 9-J 9-J
3/14/72 9/23/71	DOD --- Laird ----- DOD --- Johnson -----	Taiwan, defense of North Vietnam, weather modification.	1/24/73 11/23/71	Johnson ----- do -----	Internal working paper. Non-responsive reply -----	9-K 9-L
12/ 3/71	DOD --- Laird -----	do -----	12/16/71	Foster -----	Selected congressional chairmen were advised.	9-L
1/18/73	State --- Schnee -----	Korean Armed Forces 5 yr. plan.	do -----	do -----	No response -----	9-M
11/ 5/69	DOD --- Nutter -----	Vietnam 6-nation military goal agreement.	11/26/69	Nutter -----	Inappropriate to release -----	9-N
7/14/71	State --- Abshire -----	State-Defense, security assistance program.	9/13/71	Abshire -----	Internal working documents.	9-O
5/ 4/71	State --- Irwin -----	U.S.S.R., Senator Muskie's conversations with Mr. Kosygin.	5/21/71	do -----	Will release only to Senator Muskie.	9-P
9/29/69	DOD --- DOD -----	Defense plans, foreign government.	12/18/69	Ware -----	Risk of adverse reaction -----	9-Q
6/23/70	DOD --- DOD -----	Cambodia, U.S. air operations.	9/24/70	Doolin -----	Safety of military personnel.	9-R
1963-65	DOS --- DOS -----	State Department security, Otepka.	8/12/63	Rusk -----	Presidential directive of 3/13/48.	12-A

**INQUIRIES BY HOUSE COMMITTEES**

2/28/73	DOA --- DOA -----	Flanigan report, annexes -----	3/---/73	Secretary's Office.	Refusal (oral) -----	18-A
6/ 1/72 5/23/72	DOD --- Laird ----- DOD --- Johnson -----	North Vietnam, bombing of do -----	6/ 6/72 6/ 6/72	Buzhardt ----- do -----	Oral refusal to produce. do -----	20-A 20-A
5/23/72	DOD --- Buzhardt -----	do -----	6/ 6/72	do -----	do -----	20-A
3/17/71	WH --- Domestic Council.	Report on legislation.	7/ 1/71	Cole -----	Unresponsive replies/no response.	25-B
6/ 2/71	OMB --- Shultz -----	Report on Government Organizations/Heineman.	6/ 2/61	Shultz -----	Not publicly available -----	25-C
9/21/72	SEC --- Casey -----	ITT, SEC files -----	10/ 6/72	Casey -----	Transferred to Justice Department.	29-B
10/ 2/72	HEW --- Kurzman -----	FDA, HEW proposals/ legislation.	Zapp -----	Zapp -----	Indecision -----	29-C
3/23/73	HEW --- Kurzman -----	do -----	do -----	do -----	Continued indecision -----	29-C

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**1. Instances of Refusal in File Order—Continued**

**INQUIRIES BY COMPTROLLER GENERAL**

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)
1/14/65	FDIC— Chairman	FDIC, records audit	2/ 2/65	Chairman, FDIC.	Refusal/authority dispute	50-C
6/ 5/67	DOD— Deputy Secretary of Defense.	IG (DOD) administrative practices reports.	11/16/67	Deputy Secretary of Defense.	Sensitive documents	50-D
11/16/67	IRS— Commissioner, IRS.	IRS operations and activities record.	5/20/68	IRS/legal	Refused access by IRS	50-E
11/ 1/68	IRS— Secretary of the Treasury.	IRS disputed position	12/ 5/68	Secretary of the Treasury.	Refused access by IRS, exceptions.	50-E
5/25/70	State— European affairs.	Berlin occupation costs	3/18/71	Assistant Secretary.	Refusal, classified letter	50-F
9/21/70	DOD— Commander, MACV.	Vietnam visit (verbal)	Various	Various	Prior clearance needed	50-G
9/25/70	State— Commander, MACV.	do	Indefinite.	do	Visits discouraged	50-G
12/16/70	State— Commander, MACV.	do	3/ 6/71	Secretary of Defense.	Disapproved the request	50-G
4/ 9/71	Multiple Intelligence agencies.	Soviet Union R. & D. studies.	5/ 5/71		Would set precedent	50-H
4/ 7/72	Treasury— Assistant Secretary.	Custom files	5/12/72	Assistant Secretary.	Inappropriate for disclosure	50-I
5/ 5/72	IRS— Deputy Commissioner.	Economic stabilization program.			Obfuscation by IRS	50-J
10/31/72	WH— Haldeman	Aircraft flights (political)	1/20/72	Dean	Personal to President	50-K
12/22/72	NCUA— Administrator	N. & L. Credit Union Administrator (files).	1/ 9/73	Administrator	Confidential information (see 50-L).	50-L

**INQUIRIES BY SENATE SUBCOMMITTEES**

3/ 2/73	NASA— Fletcher	NASA program priorities	3/22/73	Fletcher	Policy implication, costs	56-A
1964	CEA— Caldwell	CEA futures trading reports	1964	Bagwell	Proprietary information	92-B
1970	DOA— DOA	Housing self-help	1970	Schulman	Internal documents	92-B
1972	DOC— DOC	Shippers export declaration	1972	Unidentified	Proprietary information	92-B
1964-70	DOD— DOD	Aircraft (F-111) test	1964-70	McNamara	Internal documents	92-B
1968	OEO— OEO	OEO projects evaluation	1968	Mason	do	92-B
1971— present	USPS— Miller	Postal inspection reports	3/26/73	Cotter	No final refusal yet, stalling	92-C
1971— present	USPS— Cotter	do	3/26/73	do	do	92-C
1962-69	DOD— McNamara	Aircraft TFX (F-111)	1962-69	Various	See 92-D file. Extensive case data.	92-D
9/—/72	USPS— USPS	Postmasters: salary, status, etc.	9/—/72	Albert	Violation of 39 U.S.C. 412	119-B
8/ 3/71	Treasury— Connally	Lockheed loan guarantee	9/10/71	Pierce	Requests should be by chairman.	144-A
5/—/71	DOD— Laird	do			See summary	144-C
5/—/71	Treasury— Connally	do			do	144-C
4/27/72	DOJ— Kleindienst	Antitrust division documents	4/27/73	Kleindienst	Authority as Acting Attorney General.	151-A
3/—/69	DOT— DOT Secretary	DOT regulations equal employment occupation.	3/—/69	Special Assistant	Censored data provided	151-B
2/23/72	DOJ— Kleindienst	Kent State Report (hearing)			No substantial reply	151-C
2/21/72	DOJ— Mitchell	Kent State Report (letter)			do	151-C
2/ 1/72	DOJ— Erickson	Kent State Report (hearing)			do	151-C
10/28/71	DOJ— Mitchell	Kent State Report/executive privilege.	1/12/72	Mitchell	do	151-C
8/26/71	DOJ— Mitchell	Kent State investigation reports.	10/22/71	do	Investigation reports of FBI.	151-C
2/22/72	DOJ— Kleindienst	FBI Manual of Instructions	2/22/72	Kleindienst	Response promised, no response.	151-D

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**1. Instances of Refusal in File Order—Continued**

**INQUIRIES BY COMPTROLLER GENERAL**

Date of request	To whom addressed, and agency represented	Nature of information requested, and nature of hearings or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, and documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)
3/6/72	SEC	Casey	ITT (insider trading)	4/26/72	Casey	Investigative files
10/6/72	SEC	Casey	do	10/6/72	Whitman	Files at Department of Justice
8/15/72	SEC	Casey	do	8/31/72	Casey	Investigative files
1/18/73	DOJ	Olsen	False derogatory information	Now active	Olsen	Response incomplete
9/26/72	DOJ	Pellerizi	do	do	Pellerizi	Response pending
3/30/71	DOD	Laird	Surveillance by military	4/19/71	Laird	Investigation still open
2/25/71	DOD	Buzhardt	do	3/2/71	Buzhardt	do
9/26/72	GSA	A. Sampson	GSA contractor, civil rights	10/26/72	Rouch	Response inadequate

**INQUIRIES BY HOUSE SUBCOMMITTEES**

5/1/73	CPSC	Executive Director.	Budget documentation, consumers.	5/1/73	Unknown	Material furnished	207-B
5/1/72	NHSA	Liaison	Budget documentation, high way.	5/1/72	do	do	207-B
1/27/72	PRICE	Grayson	Price increases, automobile	2/11/72	Grayson	Confidential material	207-B
1/27/73	SEC	Unknown	Budget documentation	1/27/73	Unknown	OMB circular A-10	207-B
9/8/69	HEW	Finch	Scientists' exclusion of services	6/29/70	Mitchell	Investigative reports, FBI	245-B
11/15/72	DOI	Frizzell	Mercury pollution/Armco (WH-intervention).	11/21/72	Erickson	Department policy: open case.	246-B
12/21/72	DOI	Green	Mercury pollution (Armco)	12/21/72	do	Open case	246-C
12/21/72	DOI	Frizzell	do	12/21/72	Frizzell	Departmental file	246-D
1/29/73	EPA	Ruckelshaus	Houston L. & P. Co., pollution.	2/12/72	Baise	Inappropriate to discuss	246-E
2/16/73	EPA	Ruckelshaus	Virus study, Liu	3/1/73	Greenfield	Would create public concern	246-F
1/27/73	Army	Froehlke	Corps of Engineers, wetlands regions.	3/22/73	Ford, C. R.	Internal use only, OMB	246-M
3/27/73	Army	Froehlke	do	4/17/73	do	Not authorized to release, try OMB	246-N
2/9/72	State	Rogers	Cambodia: AID submission	3/15/72	Nixon	Executive privilege, Nixon memo.	247-B
1/14/65	FDIC	Barr	FDIC: files records	2/2/65	Barr	Violation 12 U.S.C. 1827	248-B
6/28/71	IRS	Geibel	Highway use tax records	7/1/71	Geibel	Internal Revenue Code 5406 and 8022.	248-C
9/11/72	IRS	Snyder	IRS: aliens	9/18/72	Rankin	Verbal denials to GAO (see 248-D).	248-D
9/11/72	IRS	Snyder	IRS: aliens work visas	9/18/72	do	Verbal denials to GAO	248-D
9/11/71	IRS	Snyder	IRS	9/18/72	do	do	248-D
9/11/72	IRS	Snyder	IRS: aliens	9/18/72	do	Verbal denials to GAO (see 248-D).	248-D
2/12/72	IRS	Commissioner, IRS	Tax form preparers, faulty IRS.	3/8/73	Commissioner, IRS	Hampers IRS, adverse publicity.	248-E
3/2/70	DOI	Hickel	Federal Coal Mine Act			Interim replies	287-A
3/5/70	DOI	Hickel	Federal Coal Mine Act/personnel.			Unsatisfactory responses	287-B
9/20/72	DOI	Ricco	Energy crisis information	10/2/72	Morrell	Promises, nothing delivered	309-A

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**2. Indexed Alphabetically by Agency—Continued**

Date of request	To whom addressed, and agency represented	Nature of information requested, and nature of hearings or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, and documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1/27/73	Army ---- Froehlke -----	Corps of Engineers, wetlands regions.	3/22/73	Ford, C. R. ....	Internal use only, OMB....	246-M
3/27/73	Army ---- Froehlke -----	do-----	4/17/73	do-----	Not authorized to release, try OMB.	246-N
1964 5/-/73	CEA ---- Caldwell ----- CPSC ---- Executive Director.	CEA futures trading reports. Budget documentation, consumers.	1964 5/-/73	Bagwell ----- Unknown-----	Proprietary information.... Material furnished.....	92-B 207-B
2/28/73	DOA ---- DOA -----	Flanigan report, annexes-----	3/-/73	Secretary's Office.	Rufusal (oral)-----	18-A
1970	DOA ---- DOA -----	Housing self-help-----	1970	Schulman-----	Internal documents.....	92-B
1972 5/-/70	DOC ---- DOC ----- DOD ---- MACV-----	Shippers export declaration.... Cambodia and Vietnam (visit).	1972 5/-/70	Unidentified----- Various-----	Proprietary information.... No authority to brief.....	92-B 9-C
4/20/71	DOD ---- Nutter-----	Laos and Cambodia, monthly report on operations.	5/ 5/71	Nutter-----	Report not reliable.....	9-D
1/27/71 5/21/69	DOD ---- Laird----- DOD ---- Laird-----	do----- MAP plan, 5 yr-----	4/14/71 8/31/71	do----- Laird-----	Inappropriate to discuss.... Executive privilege, by Presidential memo.	9-D 9-I
3/14/72 9/23/71	DOD ---- Laird----- DOD ---- Johnson-----	Taiwan, defense of..... North Vietnam, weather modification.	1/24/73 11/23/71	Johnson----- do-----	Internal working paper.... Nonresponsive reply.....	9-K 9-L
12/ 3/71	DOD ---- Laird-----	do-----	12/16/71	Foster-----	Selected congressional chairmen were advised.	9-L
11/ 5/69	DOD ---- Nutter-----	Vietnam 6-nation military goal agreement.	11/26/69	Nutter-----	Inappropriate to release....	9-N
9/29/69	DOD ---- DOD -----	Defense plans, foreign government.	12/18/69	Ware-----	Risk of adverse reaction....	9-Q
6/23/70	DOD ---- DOD -----	Cambodia, U.S. air operations.	9/24/70	Doolin-----	Safety of military personnel.	9-R
6/ 1/72	DOD ---- Laird-----	North Vietnam, bombing of	6/ 6/72	Buzhardt-----	Oral refusal to produce....	20-A
5/23/72	DOD ---- Johnson-----	do-----	6/ 6/72	do-----	do-----	20-A
5/23/72	DOD ---- Buzhardt-----	do-----	6/ 6/72	do-----	do-----	20-A
6/ 5/67	DOD ---- Deputy Secretary of Defense.	IG (DOD, administrative practices reports.	11/16/67	Deputy Secretary of Defense.	Sensitive documents.....	50-D
9/21/70	DOD ---- Commander, MACV.	Vietnam visit (verbal).....	Various	Various-----	Prior clearance needed....	50-G
1964-70 1962-69	DOD ---- DOD ----- DOD ---- McNamara-----	Aircraft (F-111) test..... Aircraft TFX (F-111).....	1964-70 1962-69	McNamara... Various-----	Internal documents..... See 92-D file. Extensive case data.	92-B 92-D
5/-/71	DOD ---- Laird-----	Lockheed loan guarantee.....	do-----	do-----	See summary.....	144-C
3/30/71	DOD ---- Laird-----	Surveillance by military-----	4/19/71	Laird-----	Investigation still open.....	154-B
2/25/71	DOD ---- Buzhardt-----	do-----	3/ 2/71	Buzhardt-----	do-----	154-B
3/ 2/70	DOI ---- Hickel-----	Federal Coal Mine Act.....	do-----	do-----	Interim replies.....	287-A
3/ 5/70	DOI ---- Hickel-----	Federal Coal Mine Act/ personnel.	do-----	do-----	Unsatisfactory responses.....	287-B
9/20/72	DOI ---- Ricco-----	Energy crisis information....	10/ 2/72	Morrell-----	Promises, nothing delivered.	309-A
2/ 1/72	DOJ ---- Erickson-----	Kent State report (hearing).....	do-----	do-----	No substantial reply.....	151-C
10/28/71	DOJ ---- Mitchell-----	Kent State report/executive privilege.	1/12/72	Mitchell-----	do-----	151-C
2/23/72	DOJ ---- Kleindienst-----	Kent State report (hearing).....	do-----	do-----	do-----	151-C
2/21/72	DOJ ---- Mitchell-----	Kent State report (letter).....	do-----	do-----	do-----	151-C
4/27/72	DOJ ---- Kleindienst-----	Antitrust division, documents.....	4/27/73	Kleindienst....	Authority as Acting Attorney General.	151-A
8/26/71	DOJ ---- Mitchell-----	Kent State investigation reports.	10/22/71	Mitchell-----	Investigation reports of FBI.	151-C
2/22/72	DOJ ---- Kleindienst-----	FBI Manual of Instructions..	2/22/72	Kleindienst....	Response promised, no response.	151-D

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**2. Indexed Alphabetically by Agency—Continued**

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)	
1/18/73	DOJ..... Olsen.....	False derogatory information.	Now active.	Olsen.....	Response incomplete.....	154-A	
9/26/72	DOJ..... Pellerizi.....	do.....	do.....	Pellerizi.....	Response pending.....	154-A	
11/15/72	DOJ..... Frizzell.....	Mercury pollution/Armco (WH-intervention).	11/21/72	Erickson .....	Department policy: Open case.	246-B	
12/21/72	DOJ..... Green.....	Mercury pollution (Armco) .....	12/21/72	do.....	Open case.....	246-C	
12/21/72	DOJ..... Frizzell.....	do.....	12/21/72	Frizzell.....	Department file .....	246-D	
1963-65	DOS..... DOS.....	State Department security, Otepka.	8/12/63	Rusk.....	Presidential directive of Mar. 13, 1948.	12-A	
3/.../69	DOT..... DOT Secretary.	DOT regulations equal employment opportunity.	3/.../69	Special assistant.	Censored data provided.....	151-B	
1/29/73	EPA..... Ruckelshaus..	Houston L. & P. Co., pollution.	2/12/73	Baise.....	Inappropriate to discuss.....	246-E	
2/ 6/73	EPA..... Ruckelshaus..	Virus study, Liu.....	3/ 1/73	Greenfield.....	Would create public concern.	246-F	
1/14/65	FDIC..... Chairman.....	FDIC, records audit.....	2/ 2/65	Chairman, FDIC.....	Refusal/authority dispute.....	50-C	
1/14/65	FDIC..... Barr.....	FDIC: files records .....	2/ 2/65	Barr.....	Violation 12 U.S.C. 1827.....	248-B	
9/25/72	GSA..... A. Sampson..	GSA contractor, civil rights.....	10/26/72	Rouch.....	Response inadequate.....	154-C	
10/ 2/72	HEW..... Kurzman.....	FDA, HEW proposals/legislation.	.....	Zapp.....	Indecision.....	29-C	
3/23/73	HEW..... Kurzman.....	do.....	.....	do.....	Continued indecision.....	29-C	
9/ 8/69	HEW..... Finch.....	Scientists: exclusion of services.	6/29/70	Mitchell.....	Investigative reports, FBI.....	245-B	
11/16/67	IRS..... Commissioner, IRS.	IRS operations and activities record.	5/20/68	IRS/legal.....	Refused access by IRS.....	50-E	
11/ 1/68	IRS..... Secretary of the Treasury.	IRS disputed position.....	12/ 5/68	Secretary of the Treasury.	Refused access by IRS, exceptions.	50-E	
5/ 5/72	IRS..... Deputy Commission.	Economic stabilization program.	.....	.....	Obfuscation by IRS.....	50-J	
6/28/71	IRS..... Geibel.....	Highway use tax records.....	7/.../71	Geibel.....	Internal Revenue Code 5406 and 8022.	248-C	
9/11/72	IRS..... Snyder.....	IRS: Aliens.....	9/18/72	Rankin.....	Verbal denials to GAO (see 248-D).	248-D	
9/11/72	IRS..... Snyder.....	IRS: Aliens work visas.....	9/18/72	do.....	Verbal denials to GAO.....	248-D	
9/11/71	IRS..... Snyder.....	IRS.....	9/18/72	do.....	do.....	248-D	
9/11/72	IRS..... Snyder.....	IRS: Aliens.....	9/18/72	do.....	Verbal denials to GAO (see 248-D).	248-D	
2/12/72	IRS..... Commissioner, IRS.	Tax form preparers, faulty.....	3/ 8/73	Commissioner, IRS.	Hampers IRS, adverse publicity.	248-E	
4/ 9/71	Multiple agencies.	Intelligence community.	Soviet Union R. & D. studies.	5/ 5/71	.....	Would set precedent.....	50-H
3/ 2/73	NASA..... Fletcher.....	NASA program priorities.....	3/22/73	Fletcher.....	Policy implication, costs.....	56-A	
12/22/72	NCUA.... Administrator	N. & L. Credit Union Administrator (files).	1/ 9/73	Administrator	Confidential information (see 50-L).	50-L	
5/.../72	NHSA.... Liaison.....	Budget documentation, highway.	5/.../72	Unknown.....	Material furnished.....	207-B	
1968....	OEO..... OEO.....	OEO projects evaluation.....	1968....	Mason.....	Internal documents.....	92-B	
6/ 2/71	OMB .... Shultz.....	Report on Government organization/Heineman.	6/ 2/71	Shultz.....	Not publicly available.....	25-C	
1/27/72	PRICE.... Grayson.....	Price increases, automobile.....	2/11/72	Grayson.....	Confidential material.....	207-B	
2/25/72	State.... Rogers.....	Europe, Radio Free, studies.....	4/ 5/72	Abshire.....	Inappropriate for disclosure.	9-B	
3/ 7/73	State.... Rogers.....	Chile, copies of cables, ITT.....	.....	.....	No response.....	9-E	
9/25/70	State.... Rogers.....	Chile, reports of Ambassador Korry.	9/28/70	Abshire.....	Practices established, historical.	9-E	
12/ 3/70	State.... Abshire.....	Vietnam report by Sir R. Thompson.	.....	.....	No response.....	9-F	
12/24/69	State.... Rogers.....	do.....	.....	do.....	.....	9-F	
1/26/71	State.... Abshire.....	do.....	2/12/71	Abshire.....	President, personal use of.....	9-F	
2/ 8/72	State.... Abshire.....	Oil, world supplies report.....	3/ 1/72	do.....	Internal interagency working draft.	9-G	
5/ 1/71	State.... Irwin.....	Pakistan, telegrams.....	7/ 6/71	Rogers.....	Internal working papers.....	9-J	

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**2. *Indexed Alphabetically by Agency—Continued***

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)
3/30/71	State.... VanHollen....	Pakistan, messages, East and West.	6/21/71	Abshire.....	Prejudice our relations, classified document.	9-J
1/18/73	State.... Schnee.....	Korean Armed Forces, 5 yr. plan.	.....	.....	No response.....	9-M
7/14/71	State.... Abshire.....	State-Defense, security assistance program.	9/13/71	Abshire.....	Internal working documents.	9-O
5/ 4/71	State.... Irwin.....	U.S.S.R., Senator Muskie's conversations with Mr. Kosygin.	5/21/71	do.....	Will release only to Senator Muskie.	9-P
9/21/72	SEC.... Casey.....	ITT, SEC files.....	10/ 6/72	Casey.....	Transferred to Justice Department.	29-B
10/ 6/72	SEC.... Casey.....	ITT (insider trading).....	10/ 6/72	Whitman.....	Files at Department of Justice.	151-E
8/15/72	SEC.... Casey.....	do.....	8/31/72	Casey.....	Investigative files.....	151-E
3/ 6/72	SEC.... Casey.....	do.....	4/26/72	do.....	do.....	151-E
7/.../73	SEC.... Unknown.....	Budget documentation.....	7/.../73	Unknown.....	OMB circular A-10.....	207-B
5/25/70	State.... European affairs.	Berlin occupation costs.....	3/18/71	Assistant Secretary.....	Refusal, classified letter.....	50-F
9/25/70	State.... Commander, MACV.	Vietnam visit (verbal).....	Indefinite	Various.....	Visits discouraged.....	50-G
12/16/70	State.... Commander, MACV.	do.....	3/ 6/71	Secretary of Defense.....	Disapproved the request.....	50-G
2/ 9/72	State.... Rogers.....	Cambodia: AID submission.....	3/15/72	Nixon.....	Executive privilege, Nixon memo.	247-B
4/ 7/72	Treasury Assistant Secretary.	Custom files.....	5/12/72	Assistant Secretary.....	Inappropriate for disclosure.	50-I
8/ 3/71	Treasury Connally.....	Lockheed loan guarantee.....	9/10/71	Pierce.....	Requests should be by chairman.	144-A
5/.../71	Treasury Connally.....	do.....	.....	.....	See summary.....	144-C
3/ 1/72	USIA.... Shakespeare....	USIA country program.....	3/16/72	Shakespeare....	Executive privilege, by Presidential memo.	9-H
1971—present.	USPS.... Miller.....	Postal inspection reports.....	3/26/73	Cotter.....	No final refusal yet, stalling.	92-C
1971—present.	USPS.... Cotter.....	do.....	3/26/73	do.....	do.....	92-C
9/.../72	USPS.... USPS.....	Postmasters: salary, status, etc.	9/.../72	Albert.....	Violation of 39 U.S.C. 412.	119-B
3/17/71	WH.... Domestic Council.	Report on legislation.....	7/ 1/71	Cole.....	Unresponsive replies/no response.	25-B
10/31/72	WH.... Haldeman....	Aircraft flights (political)....	1/20/72	Dean.....	Personal to President.....	50-K

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**3. Indexed Alphabetically by Subject Matter**

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)	
1964-70 10/31/72 1962-69	DOD WH DOD	DOD Haldeman McNamara	Aircraft (F-111) test Aircraft flights (political) Aircraft TFX (F-111)	1964-70 1/20/72 1962-69	McNamara Dean Various	Internal documents Personal to President See 92-D file, extensive case data.	92-B 50-K 92-D
4/27/72	DOJ	Kleindienst	Antitrust division of documents.	4/27/73	Kleindienst	Authority as Acting Attorney General.	151-A
5/25/70	State	European affairs.	Berlin occupation costs	3/18/71	Assistant Secretary	Refusal classified letter	50-F
5/--/73	SEC	Unknown	Budget documentation	--/--/73	Unknown	OMB circular A-10	207-B
5/--/73	CPSC	Executive Director.	Budget documentation, consumers.	5/--/73	do	Material furnished	207-B
5/--/72	NHSA	Liaison	Budget documentation, highway.	5/--/72	do	do	207-B
1964 5/--/70	CEA DOD	Caldwell MACV	CEA futures trading reports Cambodia and Vietnam (visit).	1964 5/--/70	Bagwell Various	Proprietary information No authority to brief	92-B 9-C
6/23/70	DOD	DOD	Cambodia, U.S. air operations.	9/24/70	Doolin	Safety of military personnel	9-R
2/ 9/72	State	Rogers	Cambodia: AID submission	3/15/72	Nixon	Executive privilege, Nixon memo.	247-B
3/ 7/73 9/25/70	State	Rogers	Chile, copies of cables, ITT Chile, reports of Ambassador Korry.	9/28/70	Abshire	No response Practices, established historical.	9-E 9-E
1/27/73	Army	Froehlke	Corps of Engineers, wetlands regions.	3/22/73	Ford, C. R.	Internal use only, OMB	246-M
3/27/73	Army	Froehlke	do	4/17/73	do	Not authorized to release, try OMB.	246-N
4/ 7/72	Treasury	Assistant Secretary	Custom files	5/12/72	Assistant Secretary	Inappropriate for disclosure	50-I
9/29/69	DOD	DOD	Defense plans, foreign government.	12/18/69	Ware	Risk of adverse reaction	9-Q
3/--/69	DOT	DOT Secretary	DOT regulations equal employment opportunity.	3/--/69	Special Assistant	Censored data provided	151-B
5/ 5/72	IRS	Deputy Commissioner	Economic stabilization program.	do	do	Obfuscation by IRS	50-J
9/20/72 2/25/72 1/18/73	DOI State DOJ	Ricco Rogers Olsen	Energy crisis information Europe, Radio Free, studies False derogatory information	10/ 2/72 4/ 5/72 Now	Morrell Abshire Olsen	Promises, nothing delivered Inappropriate for disclosure Response incomplete	309-A 9-B 154-A
9/26/72 3/ 2/70 3/ 5/70	DOJ	Pellerizi Hickel Hickel	do Federal Coal Mine Act Federal Coal Mine Act/personnel.	do	Pellerizi	Response pending Interim replies Unsatisfactory responses	154-A 287-A 287-B
2/28/73	DOA	DOA	Flanigan report, annexes	3/--/73	Secretary's Office	Refusal (oral)	18-A
2/22/72	DOJ	Kleindienst	FBI Manual of Instructions	2/22/72	Kleindienst	Response promised, no response.	151-D
10/ 2/72	HEW	Kurzman	FDA, HEW proposals/legislation.	do	Zapp	Indecision	29-C
3/23/73 1/14/65	HEW FDIC	Kurzman Chairman	do FDIC, records audit	do	Chairman, FDIC	Continued indecision Refusal/authority dispute	29-C 50-C
1/14/65 9/25/72 6/28/71	FDIC GSA IRS	Barr A. Sampson Geibel	FDIC: files records GSA contractor, civil rights Highway use tax records	2/ 2/65 10/26/72 7/--/71	Barr Rouch Geibel	Violation 12 U.S.C. 1827 Response inadequate Internal Revenue Code 5406 and 8022.	248-B 154-C 248-C
1970	DOA	DOA	Housing self-help	1970	Schulman	Internal documents	92-B

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**3. Indexed Alphabetically by Subject Matter—Continued**

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)
1/29/73	EPA-----	Ruckelshaus-----	Houston L. & P. Co., pollution.	2/12/73	Baise-----	Inappropriate to discuss--- 246-E
6/ 5/67	DOD-----	Deputy Secretary of Defense.	IG (DOD) administrative practices reports.	11/16/67	Deputy Secretary of Defense.	Sensitive documents----- 50-D
9/11/71 11/ 1/68	IRS----- IRS-----	Snyder----- Secretary of the Treasury.	IRS----- IRS disputed position-----	9/18/72 12/ 5/68	Rankin----- Secretary of the Treasury.	Verbal denials to GAO--- 248-D Refused access by IRS, exceptions. 50-E
11/16/67	IRS-----	Commissioner, IRS.	IRS operations and activities record.	5/20/68	IRS/legal-----	Refused access by IRS---- 50-E
9/11/72	IRS-----	Snyder-----	IRS: aliens-----	9/18/72	Rankin-----	Verbal denials to GAO (see 248-D). 248-D).
9/11/72	IRS-----	Snyder-----	do-----	9/18/72	do-----	do----- 248-D
9/11/72	IRS-----	Snyder-----	IRS: aliens work visas-----	9/18/72	do-----	Verbal denials to GAO--- 248-D
3/ 6/72	SEC-----	Casey-----	ITT (insider trading)-----	4/26/72	Casey-----	Investigative files----- 151-E
10/ 6/72	SEC-----	Casey-----	do-----	10/ 6/72	Whitman-----	Files at Department of Justice. 151-E
8/15/72	SEC-----	Casey-----	do-----	8/31/72	Casey-----	Investigative files----- 151-E
9/21/72	SEC-----	Casey-----	ITT, SEC files-----	10/ 6/72	do-----	Transferred to Justice Department. 29-B
8/26/71	DOJ-----	Mitchell-----	Kent State investigation reports.	10/22/71	Mitchell-----	Investigation reports of FBI. 151-C
2/23/72	DOJ-----	Kleindienst-----	Kent State report (hearing)-----			No substantial reply----- 151-C
2/ 1/72	DOJ-----	Erickson-----	do-----			do----- 151-C
2/21/72	DOJ-----	Mitchell-----	Kent State report (letter)-----			do----- 151-C
10/28/71	DOJ-----	Mitchell-----	Kent State report/executive privilege.	1/12/72	Mitchell-----	do----- 151-C
1/18/73	State-----	Schnee-----	Korean Armed Forces, 5 yr. plan.			No response----- 9-M
4/20/71	DOD-----	Nutter-----	Laos and Cambodia, monthly report on operations.	5/ 5/71	Nutter-----	Report not reliable----- 9-D
1/27/71	DOD-----	Laird-----	do-----	4/14/71	do-----	Inappropriate to discuss--- 9-D
8/ 3/71	Treasury-----	Connally-----	Lockheed loan guarantee-----	9/10/71	Pierce-----	Requests should be by chairman. 144-A
5/--/71	DOD-----	Laird-----	do-----			See summary----- 144-C
5/--/71	Treasury-----	Connally-----	do-----			do----- 144-C
11/15/72	DOJ-----	Frizzell-----	Mercury pollution/Armco (WH-intervention).	11/21/72	Erickson-----	Department policy: Open case. 246-B
12/21/72	DOJ-----	Green-----	Mercury pollution (Armco)-----	12/21/72	do-----	Open case----- 246-C
12/21/72	DOJ-----	Frizzell-----	do-----	12/21/72	do-----	Departmental file----- 246-D
5/21/69	DOD-----	Laird-----	MAP plan, 5 yr-----	8/31/71	Laird-----	Executive privilege, by Presidential memo. 9-I
6/ 1/72	DOD-----	Laird-----	North Vietnam, bombing of-----	6/ 6/72	Buzhardt-----	Oral refusal to produce----- 20-A
5/23/72	DOD-----	Johnson-----	do-----	6/ 6/72	do-----	do----- 20-A
5/23/72	DOD-----	Buzhardt-----	do-----	6/ 6/72	do-----	do----- 20-A
12/ 3/71	DOD-----	Laird-----	North Vietnam, weather modification.	12/16/71	Foster-----	Selected congressional chairmen were advised. 9-L
9/23/71	DOD-----	Johnson-----	do-----	11/23/71	Johnson-----	Nonresponsive reply----- 9-L
12/22/72	NCUA-----	Administrator N. & L. Credit Union Administrator (files).		1/ 9/73	Administrator-----	Confidential information (see 50-L). 50-L
3/ 2/73	NASA-----	Fletcher-----	NASA program priorities-----	3/22/73	Fletcher-----	Policy implication, costs--- 56-A
2/ 8/72	State-----	Abshire-----	Oil, world supplies report-----	3/ 1/72	Abshire-----	Internal interagency working draft. 9-G
1968	OEO-----	OEO-----	OEO projects evaluation-----	1968-----	Mason -----	Internal documents----- 92-B
5/ 1/71	State-----	Irwin-----	Pakistan, telegrams-----	7/ 6/71	Rogers-----	Internal working papers--- 9-J
3/30/71	State-----	Van Hollen-----	Pakistan, messages, East and West.	6/21/71	Abshire-----	Prejudice our relations, classified document. 9-J
1971—present	USPS-----	Miller-----	Postal inspection reports-----	3/26/73	Cotter-----	No final refusal yet, stalling. 92-C
1971—present	USPS-----	Cotter-----	do-----	3/26/73	do-----	do----- 92-C
9/--/72	USPS-----	USPS-----	Postmasters: salary, status, etc.	9/--/72	Albert-----	Violation of 39 U.S.C. 412. 119-B

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**3. Indexed Alphabetically by Subject Matter—Continued**

Date of request	To whom addressed, and agency represented	Nature of information requested, and nature of hearings or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, and documentation of refusal as available, and other remarks	File No.	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	
1/27/72	PRICE	Grayson	Price increases, automobile	2/11/72	Grayson	Confidential material	207-B
6/ 2/71	OMB	Shultz	Report on Government Organization/Heineman.	6/ 2/71	Shultz	Not publicly available	25-C
3/17/71	WH	Domestic Council.	Report on legislation	7/ 1/71	Cole	Unresponsive replies/no response.	25-B
9/ 8/69	HEW	Finch	Scientists: exclusion of services.	6/29/70	Mitchell	Investigative reports, FBI	245-B
1972	DOC	DOC	Shippers export declaration	1972	Unidentified	Proprietary information	92-B
4/ 9/71	Multiple Intelligence agencies.	commu- nity.	Soviet Union R. & D. studies	5/ 5/71		Would set precedent	50-H
1963-65	DOS	DOS	State Department security, Otepka.	8/12/63	Rusk	Presidential directive of Mar. 13, 1948.	12-A
7/14/71	State	Abshire	State-Defense, security assistance program.	9/13/71	Abshire	Internal working documents.	9-O
3/30/71	DOD	M. Laird	Surveillance by military	4/19/71	Laird	Investigation still open	154-B
2/25/71	DOD	Buzhardt	do	3/ 2/71	Buzhardt	do	154-B
3/14/72	DOD	Laird	Taiwan, defense of	1/24/73	Johnson	Internal working paper	9-K
2/12/72	IRS	Commissioner, IRS.	Tax form preparers, faulty	3/ 8/73	Commissioner, IRS.	Hampers IRS, adverse publicity.	248-E
3/ 1/72	USIA	Shakespeare	USIA country program	3/16/72	Shakespeare	Executive privilege, by Presidential memo.	9-H
5/ 4/71	State	Irwin	U.S.S.R., Senator Muskie's conversations with Mr. Kosygin.	5/21/71	Abshire	Will release only to Senator Muskie.	9-P
12/24/69	State	Rogers	Vietnam report by Sir R. Thompson.			No response	9-F
12/ 3/70	State	Abshire	do		do	do	9-F
1/26/71	State	Abshire	do	2/12/71	Abshire	President, personal use of	9-F
9/21/70	DOD	Commander, MACV.	Vietnam visit (verbal)	Various	Various	Prior clearance needed	50-G
9/25/70	State	Commander, MACV.	do	Indefinite	do	Visits discouraged	50-G
12/16/70	State	Commander, MACV.	do	3/ 6/71	Secretary of Defense	Disapproved the request	50-G
11/ 5/69	DOD	Nutter	Vietnam six-nation military goal agreement.	11/26/69	Nutter	Inappropriate to release	9-N
2/ 6/73	EPA	Ruckelshaus	Virus study, Liu	3/ 1/73	Greenfield	Would create public concern.	246-F

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

*4. Indexed by Person Refusing to Provide Information*

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)
5/--/70	DOD---- MACV-----	Cambodia and Vietnam (visit).	5/--/70	Various-----	No authority to brief-----	9-C
12/ 3/70	State---- Abshire-----	Vietnam report by Sir R. Thompson.			No response-----	9-F
12/24/69	State---- Rogers-----	do-----		do-----	do-----	9-F
1/18/73	State---- Schnee-----	Korean Armed Forces, 5 year plan.		do-----	do-----	9-M
5/23/72	DOD---- Johnson-----	North Vietnam, bombing of-----	6/ 6/72		Oral refusal to produce-----	20-A
5/23/72	DOD---- Buzhardt-----	do-----	6/ 6/72		do-----	20-A
4/ 9/71	Multiple Intelligence agencies.	Soviet Union R. & D. studies.	5/ 5/71		Would set precedent-----	50-H
5/ 5/72	IRS---- Deputy Com- missioner.	Economic stabilization pro- gram.			Obfuscation by IRS-----	50-J
2/ 1/72	DOJ---- Erickson-----	Kent State report (hearing)-----			No substantial reply-----	151-C
2/23/72	DOJ---- Kleindienst-----	do-----			do-----	151-C
2/21/72	DOJ---- Mitchell-----	Kent State report (letter)-----			do-----	151-C
5/--/71	DOD---- Laird-----	Lockheed loan guarantee-----			See summary-----	144-C
5/--/71	Treasury---- Connally-----	do-----			do-----	144-C
3/ 2/70	DOI---- Hickel-----	Federal Coal Mine Act-----			Interim replies-----	287-A
3/ 5/70	DOI---- Hickel-----	Federal Coal Mine Act/personnel.			Unsatisfactory responses-----	287-B
2/25/72	State---- Rogers-----	Europe, Radio Free, studies-----	4/ 5/72	Abshire-----	Inappropriate for disclosure-----	9-B
9/25/70	State---- Rogers-----	Chile, reports of Ambassador Korry.	9/28/70	do-----	Practices established historical.	9-E
1/26/71	State---- Abshire-----	Vietnam report by Sir. R. Thompson.	2/12/71	do-----	President, personal use of-----	9-F
2/ 8/72	State---- Abshire-----	Oil, world supplies report-----	3/ 1/72	do-----	Internal interagency working draft.	9-G
3/30/71	State---- VanHollen-----	Pakistan, messages, East and West.	6/21/71	do-----	Prejudice our relations, classified document.	9-J
7/14/71	State---- Abshire-----	State-Defense, security assistance program.	9/13/71	do-----	Internal working documents.	9-O
5/ 4/71	State---- Irwin-----	U.S.S.R., Senator Muskie's conversations with Mr. Kosygin.	5/21/71	do-----	Will release only to Senator Muskie.	9-P
12/22/72	NCUA---- Administrator N. & L. Credit Union administration (files).		1/ 9/73	Administrator-----	Confidential information, (see 50-7).	50-L
9/--/72	USPS---- USPS-----	Postmasters: Salary, status, etc.	9/ /72	Albert-----	Violation of 39 U.S.C. 412-----	119-B
4/ 7/72	Treasury---- Assistant Secretary.	Custom files-----	5/12/72	Assistant Secretary-----	Inappropriate for disclosure-----	50-I
5/25/70	State---- European affairs.	Berlin occupation costs-----	3/18/71	do-----	Refusal, classified letter-----	50-F
1964	CEA---- Caldwell-----	CEA futures trading reports-----	1964	Bagwell-----	Proprietary information-----	92-B
1/29/73	EPA---- Ruckelshaus-----	Houston L. & P. Co., pollution.	2/12/73	Baise-----	Inappropriate to discuss-----	246-E
1/14/65	FDIC---- Barr-----	FDIC: files records-----	2/ 2/65	Barr-----	Violation 12 U.S.C. 1827-----	248-B
6/ 1/72	DOD---- Laird-----	North Vietnam, bombing of-----	6/ 6/72	Buzhardt-----	Oral refusal to produce-----	20-A
2/25/71	DOD---- Buzhardt-----	Surveillance by military-----	3/ 2/71	do-----	Investigation still open-----	154-B
9/21/72	SEC---- Casey-----	ITT, SEC files-----	10/ 6/72	Casey-----	Transferred to Justice Department.	29-B
3/ 6/72	SEC---- Casey-----	ITT (insider trading)-----	4/26/72	do-----	Investigative files-----	151-E
8/15/72	SEC---- Casey-----	do-----	8/31/72	do-----	do-----	151-E
1/14/65	FDIC---- Chairman-----	FDIC, records audit-----	2/ 2/65	Chairman, FDIC-----	Refusal/authority dispute-----	50-C
3/17/71	WH---- Domestic Council.	Report on legislation-----	7/ 1/71	Cole-----	Unresponsive replies/no response.	25-B

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**4. Indexed by Person Refusing to Provide Information—Continued**

Date of request	To whom addressed, and agency represented	Nature of information requested, and nature of hearings or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, and documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2/12/72	IRS..... Commissioner, IRS.	Tax form preparers, faulty	3/ 8/73	Commissioner, IRS.	Hampers IRS, adverse publicity.	248-E
1971- present.	USPS..... Miller.....	Postal inspection reports	3/26/73	Cotter.....	No final refusal yet, stalling	92-C
1971- present.	USPS..... Cotter.....	do	3/26/73	do	do	92-C
10/31/72 6/ 5/67	WH..... Haldeman..... DOD..... Deputy Secretary of Defense.	Aircraft flights (political) IG (DOD) administrative practices reports.	1/20/72 11/16/67	Dean..... Deputy Secretary of Defense.	Personal to President Sensitive documents	50-K 50-D
6/23/70	DOD..... DOD.....	Cambodia, U.S. air operations.	9/24/70	Doolin.....	Safety of military personnel	9-R
11/15/72	DOJ..... Frizzell.....	Mercury pollution/Armco (WH-intervention).	11/21/72	Erickson.....	Department policy: Open case.	246-B
12/21/72 3/ 2/73 1/27/73	DOJ..... Green..... NASA..... Fletcher..... Army..... Froehlke.....	Mercury pollution (Armco) NASA program priorities Corps of Engineers, wetlands regions.	12/21/72 3/22/73 3/22/73	do..... Fletcher..... Ford, C. R.....	Open case Policy implication, costs Internal use only, OMB	246-C 56-A 246-M
3/27/73	Army..... Froehlke.....	do	4/17/73	do	Not authorized to release, try OMB.	246-N
12/ 3/71	DOD..... Laird.....	North Vietnam weather modification.	12/16/71	Foster.....	Selected congressional chairmen were advised.	9-L
12/21/72 6/28/71	DOJ..... Frizzell..... IRS..... Geibel.....	Mercury pollution (Armco) Highway use tax records	12/21/72 7/--/71	Frizzell..... Geibel.....	Departmental file Internal Revenue Code 5406 and 8022.	246-D 248-C
1/27/72 2/ 6/73	PRICE.... Grayson..... EPA.... Ruckelshaus.....	Price increases, automobile Virus study, Liu.....	2/11/72 3/ 1/73	Grayson..... Greenfield.....	Confidential material Would create public concern.	207-B 246-F
11/16/67	IRS..... Commissioner, IRS.	IRS operations and activities records.	5/20/68	IRS/legal.....	Refused access by IRS	50-E
3/14/72 9/23/71	DOD..... Laird..... DOD..... Johnson.....	Taiwan, defense of North Vietnam, weather modification.	1/24/73 11/23/71	Johnson..... do	Internal working paper Nonresponsive reply	9-K 9-L
4/27/72	DOJ..... Kleindienst.....	Antitrust division documents	4/27/73	Kleindienst.....	Authority as Acting Attorney General.	151-A
2/22/72	DOJ..... Kleindienst.....	FBI Manual of Instructions	2/22/72	do	Response promised, no response.	151-D
3/30/71 5/21/69	DOD..... M. Laird..... DOD..... Laird.....	Surveillance by military MAP plan, 5 yr.....	4/19/71 8/31/71	Laird..... do	Investigation still open Executive privilege, by presidential memo.	154-B 9-I
1968..... 1964-70..... 10/28/71	OEO..... OEO..... DOD..... DOD..... DOJ..... Mitchell.....	OEO projects evaluation Aircraft (F-111) test Kent State report/executive privilege.	1968..... 1964-70..... 1/12/72	Mason..... McNamara..... Mitchell.....	Internal documents do No substantial reply	92-B 92-B 151-C
8/26/71	DOJ..... Mitchell.....	Kent State investigation reports.	10/22/71	do	Investigation reports of FBI.	151-C
9/ 8/69	HEW..... Finch.....	Scientists: Exclusion of services.	6/29/70	do	do	245-B
9/20/72 4/20/71	DOI..... Ricco..... DOD..... Nutter.....	Energy crisis information Laos and Cambodia, monthly report on operation.	10/ 2/72 5/ 5/71	Morrell..... Nutter.....	Promises, nothing delivered Report not reliable	309-A 9-D
1/27/71 11/ 5/69	DOD..... Laird..... DOD..... Nutter.....	do Vietnam six-nation military goal agreement.	4/14/71 11/26/69	do	Inappropriate to discuss do	9-D 9-N
2/ 9/72	State..... Rogers.....	Cambodia: AID submission	3/15/72	Nixon.....	Executive privilege, Nixon memo.	247-B
1/18/73	DOJ..... Olsen.....	False derogatory information	Now active.	Olsen.....	Response incomplete	154-A
9/26/72 8/ 3/71	DOJ..... Pellerizi..... Treasury..... Connally.....	do Lockheed loan guarantee	do 9/10/71	Pellerizi..... Pierce.....	Response pending Requests should be by chairman.	154-A 144-A
9/11/72	IRS..... Snyder.....	IRS: aliens	9/18/72	Rankin.....	Verbal denials to GAO (see 248-D).	248-D

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**4. Indexed by Person Refusing to Provide Information—Continued**

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)	
9/11/72	IRS-----	Snyder----- IRS: Aliens work visas-----	9/18/72	Rankin-----	Verbal denials to GAO-----	248-D	
9/11/71	IRS-----	Snyder----- IRS-----	9/18/72	do-----	do-----	248-D	
9/11/72	IRS-----	Snyder----- IRS: Aliens-----	9/18/72	do-----	Verbal denials to GAO (see 248-D).	248-D.	
5/ 1/71	State-----	Irwin----- Pakistan, telegrams-----	7/ 6/71	Rogers-----	Internal working papers-----	9-J	
9/25/72	GSA-----	A. Sampson----- GSA contractor, civil rights-----	10/26/72	Rouch-----	Response inadequate-----	154-C	
1963-65--	DOS-----	DOS----- State Department security, Otepka.	8/12/63	Rusk-----	Presidential directive of Jan. 13, 1948.	12-A	
1970-----	DOA-----	DOA----- Housing self-help-----	1970-----	Schulman-----	Internal documents-----	92-B	
12/16/70	State-----	Commander MACV.	Vietnam visit (verbal)-----	3/ 6/71	Secretary of Defense.	Disapproved the request-----	50-G
11/ 1/68	IRS-----	Secretary of the Treasury.	IRS disputed position-----	12/ 5/68	Secretary of the Treasury.	Refused access by IRS, exceptions.	50-E
2/28/73	DOA-----	DOA----- Flanigan report, annexes-----	3/---/73	Secretary's Office.	Refusal (oral)-----	18-A	
3/ 1/72	USIA-----	Shakespeare----- USIA country program-----	3/16/72	Shakespeare-----	Executive privilege, by Presidential memo.	9-H	
6/ 2/71	OMB-----	Shultz----- Report on Government organizations/Heineman.	6/ 2/71	Shultz-----	Not publicly available-----	25-C	
3/---/69	DOT-----	DOT Secretary. DOT regulations equal employment opportunity.	3/---/69	Special Assistant.	Censored data provided-----	151-B	
1972-----	DOC-----	DOC----- Shippers export declaration-----	1972-----	Unidentified-----	Proprietary information-----	92-B	
5/---/73	CPSC-----	Executive Director. Budget documentation, consumers.	5/---/73	Unknown-----	Material furnished-----	207-B	
5/---/72	NHSA---	Liaison----- Budget documentation, highway.	5/---/72	do-----	do-----	207-B	
---/---/73	SEC-----	Unknown----- Budget documentation-----	---/---/73	do-----	OMB circular A-10-----	207-B	
5/---/70	DOD-----	MACV----- Cambodia and Vietnam (visit).	5/---/70	Various-----	No authority to brief-----	9-C	
9/21/70	DOD-----	Commander, MACV.	Vietnam visit (verbal)-----	Various-----	do----- Prior clearance needed-----	50-G	
9/25/70	State-----	Commander, MACV.	do-----	Indefinite-----	do----- Visits discouraged-----	50-G	
1962-69--	DOD-----	McNamara----- Aircraft TFX (F-111)-----	1962-69-----	do-----	See 92-D file. Extensive case data.	92-D	
9/29/69	DOD-----	DOD----- Defense plans, foreign government.	12/18/69	Ware-----	Risk of adverse reaction-----	9-Q	
10/ 6/72	SEC-----	Casey----- ITT (insider trading)-----	10/ 6/72	Whitman-----	Files at Department of Justice.	151-E	
10/ 2/72	HEW-----	Kurzman----- FDA, HEW proposals/legislation.	-----	Zapp-----	Indecision-----	29-C	
3/23/73	HEW-----	Kurzman----- do-----	-----	do-----	Continued indecision-----	29-C	

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**5. Indexed by Language of Refusal**

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)
4/27/72	DOJ..... Kleindienst....	Antitrust division documents.	4/27/73	Kleindienst....	Authority as Acting Attorney General.	151-A
3/.../69	DOT..... DOT Secretary.	DOT regulations equal employment opportunity.	3/.../69	Special Assistant.	Censored data provided....	151-B
12/22/72	NCUA.... Administrator.	N. & L. Credit Union Administrator (files).	1/ 9/73	Administrator	Confidential information (see 50-L).	50-L
1/27/72	PRICE.... Grayson.....	Price increases, automobile...	2/11/72	Grayson.....	Confidential material.....	207-B
3/23/73	HEW.... Kurzman.....	FDA, HEW, proposals/legislation	Zapp.....		Continued indecision.....	29-C
11/15/72	DOJ..... Frizzell.....	Mercury pollution/Armco (WH-intervention).	11/21/72	Erickson.....	Department policy: Open case.	246-B
12/21/72	DOJ..... Frizzell.....	Mercury pollution (Armco)....	12/21/72	Frizzell.....	Departmental file.....	246-D
12/16/70	State.... Commander, MACV.	Vietnam visit (verbal)....	3/ 6/71	Secretary of Defense.	Disapproved the request....	50-G
3/ 1/72	USIA.... Shakespeare....	USIA country program.....	3/16/72	Shakespeare....	Executive privilege, by Presidential memo.	9-H
5/21/69	DOD.... Laird.....	MAP plan: 5 yr.....	8/31/71	Laird.....	do.....	9-I
2/ 9/72	State.... Rogers.....	Cambodia: AID submission....	3/15/72	Nixon.....	Executive privilege, Nixon memo.	247-B
10/ 6/72	SEC.... Casey.....	ITT (insider trading)....	10/ 6/72	Whitman.....	Files at Department of Justice.	151-E
2/12/72	IRS.... Commis- sioner, IRS.	Tax form preparers, faulty....	3/ 8/73	Commis- sioner, IRS.	Hampers IRS, adverse publicity.	248-E
2/25/72	State.... Rogers.....	Europe, Radio Free, studies....	4/ 5/72	Abshire.....	Inappropriate for disclosure.	9-B
4/ 7/72	Treasury.... Assistant Secretary.	Custom files....	5/12/72	Assistant Secretary.	do.....	50-I
1/27/71	DOD.... Laird.....	Laos and Cambodia, monthly report on operation.	4/14/71	Nutter.....	Inappropriate to discuss....	9-D
1/29/73	EPA.... Ruckelshaus..	Houston L. & P. Co., pollution.	2/12/73	Baise.....	do.....	246-E
11/ 5/69	DOD.... Nutter.....	Vietnam six-nation military goal agreement.	11/26/69	Nutter.....	Inappropriate to release....	9-N
10/ 2/72	HEW.... Kurzman.....	FDA, HEW proposals/legislation.	Zapp.....		Indecision.....	29-C
3/ 2/70	DOI.... Hickel.....	Federal Coal Mine Act.....			Interim replies.....	287-A
1970.....	DOA.... DOA.....	Housing self-help.....	1970.....	Schulman.....	Internal documents.....	92-B
1964-70.....	DOD.... DOD.....	Aircraft (F-111) test.....	1964-70.....	McNamara.....	do.....	92-B
2/ 8/72	State.... Abshire.....	Oil, world supplies report....	3/ 1/72	Abshire.....	Internal interagency working draft.	9-G
1/27/73	Army.... Froehlke....	Corps of Engineers, wetlands regions.	3/22/73	Ford, C. R....	Internal use only, OMB....	246-M
7/14/71	State.... Abshire.....	State-Defense, security assistance program.	9/13/71	Abshire.....	Internal working documents....	9-O
3/14/72	DOD.... Laird.....	Taiwan, defense of.....	1/24/73	Johnson.....	Internal working paper.....	9-K
5/ 1/71	State.... Irwin.....	Pakistan, telegrams.....	7/ 6/71	Rogers.....	Internal working papers.....	9-J
1968.....	OEO.... OEO.....	OEO projects evaluation....	1968.....	Mason.....	Internal documents.....	92-B
6/28/71	IRS.... Geibel.....	Highway use tax records....	7/.../71	Geibel.....	Internal Revenue Code.... 5406 and 8022.	248-C
8/26/71	DOJ.... Mitchell.....	Kent State investigation reports.	10/22/71	Mitchell.....	Investigation reports of FBI....	151-C
3/30/71	DOD.... M. Laird.....	Surveillance by military.....	4/19/71	Laird.....	Investigation still open....	154-B
2/25/71	DOD.... Buzhardt.....	do.....	3/ 2/71	Buzhardt.....	do.....	154-B
8/15/72	SEC.... Casey.....	ITT (insider trading)....	8/31/72	Casey.....	Investigative files.....	151-E
3/ 6/72	SEC.... Casey.....	do.....	4/26/72	do.....	do.....	151-E
9/ 8/69	HEW.... Finch.....	Scientists: Exclusion of services.	6/29/70	Mitchell.....	Investigative reports, FBI....	245-B
5/.../73	CPSC.... Executive Director.	Budget documentation, consumers.	5/.../73	Unknown.....	Material furnished.....	207-B

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**5. Indexed by Language of Refusal—Continued**

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)
5/---/72	NHSA--- Liaison-----	Budget documentation, highway.	5/---/72	do-----	Material furnished-----	207-B
5/---/70	DOD--- MACV-----	Cambodia and Vietnam (visit).	5/---/70	Various-----	No authority to brief-----	9-C
1971—present.	USPS--- Miller-----	Postal inspection reports-----	3/26/73	Cotter-----	No final refusal yet, stalling.	92-C
1971—present.	USPS--- Cotter-----	do-----	3/26/73	do-----	do-----	92-C
3/ 7/73	State--- Rogers-----	Chile, copies of cables, ITT-----			No response-----	9-E
12/ 3/70	State--- Abshire-----	Vietnam report by Sir R. Thompson.		do-----	do-----	9-F
12/24/69	State--- Rogers-----	do-----			do-----	9-F
1/18/73	State--- Schnee-----	Korean Armed Forces, 5 yr. plan.			do-----	9-M
2/23/72	DOJ--- Kleindienst-----	Kent State report (hearing)			No substantial reply-----	151-C
2/21/72	DOJ--- Mitchell-----	Kent State report (letter)			do-----	151-C
2/ 1/72	DOJ--- Erickson-----	Kent State report (hearing)			do-----	151-C
10/28/71	DOJ--- Mitchell-----	Kent State report/executive privilege.	1/12/72	Mitchell-----	do-----	151-C
9/23/71	DOD--- Johnson-----	North Vietnam weather modification.	11/23/71	Johnson-----	Nonresponsive reply-----	9-L
3/27/73	Army--- Froehlke-----	Corps of Engineers, wetlands regions.	4/17/73	Ford, C. R.-----	Not authorized to release, try OMB.	246-N
6/ 2/71	OMB--- Shultz-----	Report on Government organization/Heineman.	6/ 2/71	Shultz-----	Not publicly available-----	25-C
5/ 5/72	IRS--- Deputy Commissioner.	Economic stabilization program.			Obfuscation by IRS-----	50-J
12/21/72	DOJ--- Green-----	Mercury pollution (Armco)	12/21/72	Erickson-----	Open case-----	246-C
6/ 1/72	DOD--- Laird-----	North Vietnam, bombing of	6/ 6/72	Buzhardt-----	Oral refusal to produce-----	20-A
5/23/72	DOD--- Johnson-----	do-----	6/ 6/72		do-----	20-A
5/23/72	DOD--- Buzhardt-----	do-----	6/ 6/72		do-----	20-A
7/---/73	SEC--- Unknown-----	Budget documentation-----	7/---/73	Unknown-----	OMB circular A-10-----	207-B
10/31/72	WH--- Haldeman-----	Aircraft flights (political)	1/20/72	Dean-----	Personal to President-----	50-K
3/ 2/73	NASA--- Fletcher-----	NASA program priorities-----	3/22/73	Fletcher-----	Policy implication, costs-----	56-A
9/25/70	State--- Rogers-----	Chile, reports of Ambassador Korry.	9/28/70	Abshire-----	Practices established historical.	9-E
3/30/71	State--- VanHollen-----	Pakistan, messages, East and West.	6/21/71	do-----	Prejudice our relations, classified document.	9-J
1/26/71	State--- Abshire-----	Vietnam report by Sir R. Thompson.	2/12/71	do-----	President, personal use of	9-F
1963-65	DOS--- DOS-----	State Department security, Otepka.	8/12/63	Rusk-----	Presidential directive of Mar. 13, 1948.	12-A
9/21/70	DOD--- Commander, MACV.	Vietnam visit (verbal)-----	Various	Various-----	Prior clearance needed-----	50-G
9/20/72	DOI--- Ricco-----	Energy crisis information-----	10/ 2/72	Morrell-----	Promises, nothing delivered.	309-A
1964	CEA--- Caldwell-----	CEA futures trading reports	1964	Bagwell-----	Proprietary information-----	92-B
1972	DOC--- DOC-----	Shippers export declaration	1972	Unidentified-----	do-----	92-B
2/28/73	DOA--- DOA-----	Flanigan report, annexes-----	3/---/73	Secretary's office.	Refusal (oral)-----	18-A
5/25/70	State--- European affairs.	Berlin occupation costs-----	3/18/71	Assistant Secretary.	Refusal classified letter-----	50-F
1/14/65	FDIC--- Chairman-----	FDIC records audit-----	2/ 2/65	Chairman, FDIC.	Refusal/authority dispute-----	50-C
11/16/67	IRS--- Commissioner, IRS.	IRS operations and activities record.	5/20/68	IRS/legal-----	Refused access by IRS-----	50-E
11/ 1/68	IRS--- Secretary of the Treasury.	IRS disputed position-----	12/ 5/68	Secretary of the Treasury.	Refused access by IRS, exceptions.	50-E
4/20/71	DOD--- Nutter-----	Laos and Cambodia, monthly report on operations.	5/ 5/71	Nutter-----	Report not reliable-----	9-D
8/ 3/71	Treasury--- Connally-----	Lockheed loan guarantee-----	9/10/71	Pierce-----	Requests should be by chairman.	144-A
9/25/72	GSA--- A. Sampson-----	GSA contractor, civil rights	10/26/72	Rouch-----	Response inadequate-----	154-C

**A.—SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND—Continued**

**5. Indexed by Language of Refusal—Continued**

Date of request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)	File No. (7)
1/18/73	DOJ..... Olsen.....	False derogatory information.	Now active.	Olsen.....	Response incomplete.....	154-A
9/26/72	DOJ..... Pellerizi.....	do.....	do.....	Pellerizi.....	Response pending.....	154-A
2/22/72	DOJ..... Kleindienst.....	FBI Manual of Instructions.....	2/22/72	Kleindienst.....	Response promised, no response.	151-D
9/29/69	DOD..... DOD.....	Defense plans, foreign government.	12/18/69	Ware.....	Risk of adverse reaction.....	9-Q
6/23/70	DOD..... DOD.....	Cambodia, U.S. air operations.	9/24/70	Doolin.....	Safety of military personnel.	9-R
5/___/71	DOD..... Laird.....	Lockheed loan guarantee.....			See summary.....	144-C
5/___/71	Treasury..... Connally.....	do.....			do.....	144-C
1962-69	DOD..... McNamara.....	Aircraft TFX (F-111).....	1962-69	Various.....	See 92-D file. Extensive case data.	92-D
12/ 3/71	DOD..... Laird.....	North Vietnam weather modification.	12/16/71	Foster.....	Selected congressional chairmen were advised.	9-L
6/ 5/67	DOD..... Deputy Secretary of Defense.	IG (DOD) administrative practices reports.	11/16/67	Deputy Secretary of Defense.	Sensitive documents.....	50-D
9/21/72	SEC..... Casey.....	ITT, SEC files.....	10/ 6/72	Casey.....	Transferred to Justice Department.	29-B
3/17/71	WH..... Domestic Council.	Report on legislation.....	7/ 1/71	Cole.....	Unresponsive replies/no response.	25-B
3/ 5/70	DOI..... Hickel.....	Federal Coal Mine Act/personnel.			Unsatisfactory responses...	287-B
9/11/72	IRS..... Snyder.....	IRS: aliens work visas.....	9/18/72	Rankin.....	Verbal denials to GAO.....	248-D
9/11/71	IRS..... Snyder.....	IRS.....	9/18/72	do.....	do.....	248-D
9/11/72	IRS..... Snyder.....	IRS: Aliens.....	9/18/72	do.....	Verbal denials to GAO (see 248-D).	248-D
9/11/72	IRS..... Snyder.....	do.....	9/18/72	do.....	do.....	248-D
9/___/72	USPS..... USPS.....	Postmasters: salary, status, etc.	9/___/72	Albert.....	Violation of 39 U.S.C. 412.....	119-B
1/14/65	FDIC..... Barr.....	FDIC: Files records.....	2/ 2/65	Barr.....	Violation 12 U.S.C. 1827.....	248-B
9/25/70	State..... Commander, MACV.	Vietnam visit (verbal).....	Indefinite	Various.....	Visits discouraged.....	50-G
5/ 4/71	State..... Irwin.....	U.S.S.R., Senator Muskie's conversations with Mr. Kosygin.	5/21/71	Abshire.....	Will release only to Senator Muskie.	9-P
2/ 6/73	EPA..... Ruckelshaus.....	Virus study, Liu.....	3/ 1/73	Greenfield.....	Would create public concern.	246-F L
4/ 9/71	Multiple Intelligence agencies. community.	Soviet Union R. & D. studies.	5/ 5/71		Would set precedent.....	50-H

## B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

### *1. Instances of Refusal in File Order*

#### INQUIRIES BY SENATE COMMITTEES

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
4/ 8/71	CIA----- Helms-----	Phillips, David	Brazil, U.S. policies	Un-known.	Liaison-----	Director only can testify.	9-S
4/ 8/71	DOD----- Laird-----	Moura, Col. Arthur S.	do-----	4/20/71	Nutter----- do-----	do-----	9-T
2/ 2/71	NSC----- Lehman-----	Lehman, John F., Jr.	Remarks to Committee staff.	1/ 3/71	Lehman-----	NSC staff member	9-U
12/29/72	WH----- Kissinger-----	Kissinger, Henry.	Vietnam, situation	1/16/73	Timmons-----	Presidential staff	9-V
2/10/72	WH----- Kissinger-----	do-----	Briefing-----	2/28/73	Dean----- do-----	do-----	9-W
1/25/67	DOS----- Clark-----	Hoover, J. Edgar.	Soviet, consular convention.	1/27/67	Clark-----	Views unchanged	9-X
1/19/67	FBI----- Hoover-----	do-----	do-----	1/20/67	Acting Attorney General.	Views supplied by	9-X
6/26/69	WH----- Kissinger-----	Kissinger, Henry.	Foreign policy question.	6/30/69	Kissinger-----	Presidential staff	9-Y
--/--/63	DOS----- Rusk-----	Many/various	Otepka, DOS security	8/12/63	Rusk-----	Presidential directive of Mar. 13, 1948.	12-A

#### INQUIRIES BY HOUSE COMMITTEES

11/13/72	DOJ----- Erickson-----	Erickson, Ralph E.	BIA seizure-----	11/22/72	Erickson-----	Investigation ongoing.	27-B
11/14/72	DOJ----- Colburn-----	Colburn, Wayne B.	do-----	11/22/72	do-----	do-----	27-B
11/14/72	WH----- Patterson-----	Patterson, Bradley.	do-----	11/22/72	Dean-----	Presidential staff	27-B
11/14/72	WH----- Krogh-----	Krogh, Egil, Jr.	do-----	11/22/72	do-----	do-----	27-B
11/13/72	WH----- Ehrlichman-----	Ehrlichman, John D.	do-----	11/22/72	do-----	do-----	27-B
11/13/72	WH----- Garment-----	Garment, Leonard.	do-----	11/22/72	do-----	do-----	27-B
11/13/72	WH----- Dean-----	Dean, John W., III.	do-----	11/22/72	do-----	do-----	27-B
11/21/72	DOJ----- Roman-----	Roman, Gill	do-----	11/28/72	Holman-----	42 U.S.C. 2000g-2	27-C
6/23/71	DOJ----- Mitchell-----	Mitchell, John N.	Voting Rights Act, oversight.	6/--/71	DOJ/sent David Norman.	42-B	
5/28/71	DOJ----- Mitchell-----	do-----	do-----	6/--/71	(Not reported)	42-B	
5/ 4/71	DOJ----- Mitchell-----	do-----	do-----	6/--/71	do-----	42-B	
11/18/71	DOA----- Campbell-----	Campbell, J. Phil.	Housing, equal opportunity.	11/30/71	Campbell-----	DOA/sent James V. Smith.	42-C
5/15/72	CCOSSP----- Ramirez-----	Ramirez, Henry M.	Civil rights/two instances.	5/31/72	Ramirez-----	Out of town/too busy.	42-D

## B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued

## 1. Instances of Refusal in File Order—Continued

## INQUIRIES BY JOINT COMMITTEES

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
11/17/72	HUD	Romney, George	Housing policies	11/27/72	Romney	Inappropriate/resignation.	45-A
12/ 8/72	CAB	Browne, Secor D.	SST (government support).	12/20/72	Browne	Family obligations	45-B
12/ 8/72	DOT	Volpe, Robert H.	do	12/28/72		Cannon unable to appear.	45-B
12/ 8/72	DOT	Volpe, John	do	12/28/72	Volpe	Agreed to send R. H. Cannon.	45-B
12/ 8/72	FAA	Shaffer	Ellis, Frampton E.	12/26/72		Unable to appear	45-B
12/ 8/72	FAA	Shaffer	Shaffer, John H	do	12/26/72	Agreed to send Ellis	45-B

## INQUIRIES BY SENATE SUBCOMMITTEES

6/27/72	DOD	Moot	Moot, Robert C.	Foreign assistance appropriations.	6/29/72	Failed to appear	55-B
11/24/70	ACFR	Stewart	Stewart, Charles W.	Advisory committees	12/ 1/70	Stewart	Inappropriate to appear.
4/19/72	ELGB	Connally	Connally, John B.	Lockheed loan/GAO access.	5/31/72	Pierce	Connally resigned
7/21/72	FBI	Gray	Gray, L. Patrick.	FBI access to bank records.	7/28/72	Gray	Wm. S. Lynch appeared.
2/18/71	DOD	Froehlke	Col. Downie, et al.	Surveillance by military.	3/ 4/71	Froehlke	Reluctant to provide.
2/18/71	DOD	Laird	Maj. Gen. McChristian.	do	4/19/71	Laird	Inappropriate to testify.
9/16/71	WH	Klein	Klein, Herbert	Freedom of press	9/21/71	Klein	Presidential staff
11/12/71	WH	Nixon	Malek, Colson	Investigation of D. Schorr.	2/ 1/72	Dean	do
1/29/73	HUD	HUD	R. & T. (Security).	Building—Systems concept.	2/ 6/73	Secretary of HUD.	Resignation of appropriate staff.

## INQUIRIES BY HOUSE SUBCOMMITTEES

3/27/72	Navy	Chaffee	Unspecified	Navy home ports in Greece.	4/ 4/72	Snyder	Navy had previously testified.	186-A
10/20/71	WH	Flanigan	Flanigan, Peter M.	Toxic wastes (Armco).	10/20/71	Dean	Presidential staff	246-G
10/19/71	DOJ	Kashiwa	Kashiwa, Shiro	Toxic wastes	10/20/71	Kashiwa	Pending litigation	246-H
12/13/72	Pvt. cit	Crawford	Crawford, George.	Mercury pollution (Armco).	12/19/72	Crawford	President's staff, former member.	246-I
12/13/72	WH	Flanigan	Flanigan, Peter M.	do	12/18/72	Dean	Presidential staff	246-I
12/13/72	Pvt. cit	Glancy	Glancy, W. John.	do	12/19/72	Glancy	Presidential staff, former member.	246-J
4/13/71	DOL	Hodgson	Secretary Hodgson.	Labor Department briefings.	4/20/71	Hodgson	Inappropriate as witness.	247-C
4/16/71	DOL	Hodgson	do	do	4/20/71	do	do	247-C
6/21/71	WH	Dean	Dean, John W., III.	Pentagon papers	6/28/71	Dean	Presidential staff	247-C
6/21/71	WH	Klein	Klein, Herbert	do	6/28/71	do	do	247-C
6/21/71	WH	Kissinger	Kissinger, Henry.	do	6/28/71	do	do	247-C
3/14/72	WH	Rumsfeld	Rumsfeld, Donald.	Freedom of information.	4/ 2/72	Mullaney	Declined (other witness).	247-C
2/23/72	WH	Rumsfeld	do	do	4/ 2/72	do	do	247-C
2/11/72	WH	Klein	Klein, Herbert	do	2/18/72	Klein	Presidential staff	247-C

**B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued*****1. Instances of Refusal in File Order—Continued*****INQUIRIES BY HOUSE SUBCOMMITTEES—Continued**

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
4/24/72	WH-----	Young-----	Young, David-----do-----	4/29/72	Dean-----	do-----	247-D
7/ 1/71	DOJ-----	DeMent-----	DeMent, Ira-----Law enforcement (Alabama) LEAA.	7/13/71	Kleindienst...	Investigation on-going.	248-F
4/18/72	DOA-----	Minyard-----	Butz, Earl-----U.S.S.R./U.S. agricultural exports.	4/18/72	Minyard-----	Would not appear (oral).	249-B
--/--/--	WH-----	Moynihan-----	Moynihan, Pat-----		Moynihan-----	Would not appear	273-A
--/15/70	DOL-----	Schultz-----	Schultz, George P.-----Fair Labor Standards Act.			No formal refusal	287-C
7/23/71	Postal----	Blount-----	Blount, Winton M.-----Postal building program.	7/26/71	Blount-----	Out of town, sent representative.	308-A

**INQUIRIES BY HOUSE SELECT COMMITTEES**

7/ 8/69	FBI-----	Hoover-----	Hoover, J. Edgar.	Crime in the United States.	7/--/69	Assistant-----	Testifying before Appropriations Committee.	299-B
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**B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued**

**2. *Indexed Alphabetically by Agency***

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
12/13/72	Pvt. cit. Crawford.....	Crawford, George.	Mercury pollution (Armco).	12/19/72	Crawford.....	Presidential staff, former member.	246-I
12/13/72	Pvt. cit. Glancy.....	Glancy, W. John.	do.....	12/19/72	Glancy.....	do.....	246-J
11/24/70	ACFR.....	Stewart, Charles W.	Advisory committees.	12/ 1/70	Stewart.....	Inappropriate to appear.	93-A
12/ 8/72	CAB.....	Browne.....	SST (government support).	12/20/72	Browne.....	Family obligations.	45-B
5/15/72	CCOSSP. Ramirez.....	Ramirez, Henry M.	Civil rights/two instances.	5/31/72	Ramirez.....	Out of town/too busy	42-D
4/ 8/71	CIA.....	Helms.....	Brazil, U.S. policies.	Un-known.	Liaison .....	Director only can testify.	9-S
11/18/71	DOA.....	Campbell.....	Housing, equal opportunity.	11/30/71	Campbell.....	DOA/sent James V. Smith.	42-C
4/18/72	DOA.....	Minyard.....	U.S.S.R./U.S. agricultural exports.	4/18/72	Minyard.....	Would not appear (oral).	249-B
4/ 8/71	DOD.....	Butz, Earl.....	Brazil, U.S. policies.	4/20/71	Nutter.....	Director only can testify.	9-T
6/27/72	DOD.....	Moot.....	Foreign assistance appropriations.	6/29/72.....	.....	Failed to appear.....	55-B
2/18/71	DOD.....	Froehlke.....	Surveillance by military.	3/ 4/71	Froehlke.....	Reluctant to provide.	154-D
2/18/71	DOD.....	Laird.....	Maj. Gen. McChristian.	do.....	4/19/71 Laird.....	Inappropriate to testify.	154-E
11/14/72	DOJ.....	Colburn.....	BIA seizure.....	11/22/72	Erickson.....	Investigation ongoing.	27-B
11/13/72	DOJ.....	Erickson.....	do.....	11/22/72	do.....	do.....	27-B
11/21/72	DOJ.....	Roman.....	do.....	11/28/72	Holman.....	42 U.S.C. 2000g-2	27-C
6/23/71	DOJ.....	Mitchell.....	Roman, Gill. Mitchell, John N.	6/---/71	.....	DOJ/sent David Norman.	42-B
5/28/71	DOJ.....	Mitchell.....	do.....	6/---/71	.....	(Not reported).....	42-B
5/ 4/71	DOJ.....	Mitchell.....	do.....	6/---/71	.....	do.....	42-B
10/19/71	DOJ.....	Kashiwa.....	Kashiwa, Shiro	Toxic wastes.....	10/20/71 Kashiwa.....	Pending litigation	246-H
7/ 1/71	DOJ.....	DeMent.....	DeMent, Ira	Law enforcement (Alabama) LEAA	7/13/71 Kleindienst	Investigation ongoing	248-F
4/16/71	DOL.....	Hodgson.....	Secretary Hodgson.	Labor Department briefings.	4/20/71 Hodgson.....	Inappropriate as witness.	247-C
4/13/71	DOL.....	Hodgson.....	do.....	4/20/71 do.....	.....	do.....	247-C
--/15/70	DOL.....	Shultz.....	Shultz, George P.	Fair Labor Standards Act.	.....	No formal refusal.....	287-C
1/25/67	DOS.....	Clark.....	Hoover, J. Edgar	Soviet, consular convention.	1/27/67 Clark.....	Views unchanged.....	9-X
--/---/63	DOS.....	Rusk.....	Many/various	Otepka, DOS security.	8/12/63 Rusk.....	Presidential directive of Mar. 13, 1948.	12-A
12/ 8/72	DOT.....	Volpe.....	Volpe, John	SST (government support).	12/28/72 Volpe.....	Agreed to send R. H. Cannon.	45-B
12/ 8/72	DOT.....	Volpe.....	Cannon, Robert H.	do.....	12/28/72	Cannon unable to appear.	45-B
4/19/72	ELGB.....	Connally.....	Connally, John B.	Lockheed loan/ GAO access.	5/31/72 Pierce.....	Connally resigned.	144-B
12/ 8/72	FAA.....	Shaffer.....	Ellis, Frampton E.	SST (government support).	12/26/72	.....	45-B
12/ 8/72	FAA.....	Shaffer.....	Shaffer, John H.	do.....	12/26/72	.....	45-B
1/19/67	FBI.....	Hoover.....	Hoover, J. Edgar.	Soviet, consular convention.	1/20/67 Acting Attorney General.	Views supplied by correspondence.	9-X
7/21/72	FBI.....	Gray.....	Gray, L. Patrick.	FBI access to bank records.	7/28/72 Gray.....	Wm. S. Lynch appeared.	144-D

## B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued

2. *Indexed Alphabetically by Agency—Continued*

Date of request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks (7)	File No. (8)
7/ 8/69 FBI-----	Hoover-----	Hoover, J. Edgar.	Crime in the United States.	7/---/69	Assistant-----	Testimony before Appropriations Committee.	299-B
11/17/72 HUD-----	Romney, George.	Romney,	Housing policies-----	11/27/72	Romney-----	Inappropriate/ resignation.	45-A
1/29/73 HUD-----	HUD-----	R. & T. (Secretary).	Building—Systems concept.	2/ 6/73	Secretary of HUD.	Resignation of appropriate staff.	172-A
3/27/72 Navy-----	Chaffee-----	Unspecified-----	Navy home ports in Greece.	4/ 4/72	Snyder-----	Navy had previously testified.	186-A
2/ 2/71 NSC-----	Lehman-----	Lehman, John J., Jr.	Remarks to committee staff.	1/ 3/71	Lehman-----	NSC staff member	9-U
7/23/71 Postal-----	Blount-----	Blount, Winton M.	Postal building program.	7/26/71	Blount-----	Out of town, sent representative.	308-A
12/29/72 WH-----	Kissinger-----	Kissinger, Henry.	Vietnam, situation	1/16/73	Timmons-----	Presidential staff	9-V
2/10/72 WH-----	Kissinger-----	do-----	Briefing -----	2/28/73	Dean-----	do-----	9-W
6/26/69 WH-----	Kissinger-----	do-----	Foreign policy question.	6/30/69	Kissinger-----	do-----	9-Y
11/13/72 WH-----	Garment-----	Garment, Leonard.	BIA seizure-----	11/22/72	Dean-----	do-----	27-B
11/13/72 WH-----	Dean-----	Dean, John W., III.	do-----	11/22/72	do-----	do-----	27-B
11/14/72 WH-----	Patterson-----	Patterson, Bradley.	do-----	11/22/72	do-----	do-----	27-B
11/14/72 WH-----	Krogh-----	Krogh, Egil, Jr.	do-----	11/22/72	do-----	do-----	27-B
11/13/72 WH-----	Ehrlichman-----	Ehrlichman, John D.	do-----	11/22/72	do-----	do-----	27-B
9/16/71 WH-----	Klein-----	Klein, Herbert.	Freedom of press	9/21/71	Klein-----	do-----	154-F
11/12/71 WH-----	Nixon-----	Malek, Colson.	Investigation of D. Schorr.	2/ 1/72	Dean-----	do-----	154-G
10/20/71 WH-----	Flanigan-----	Flanigan, Peter M.	Toxic wastes (Armeo).	10/20/71	do-----	do-----	246-G
12/13/72 WH-----	Flanigan-----	do-----	Mercury pollution (Armeo).	12/18/72	do-----	do-----	246-I
6/21/71 WH-----	Klein-----	Klein, Herbert.	Pentagon papers	6/28/71	do-----	do-----	247-C
6/21/71 WH-----	Kissinger-----	Kissinger, Henry.	do-----	6/28/71	do-----	do-----	247-C
3/14/72 WH-----	Rumsfeld-----	Rumsfeld, Donald.	Freedom of information.	4/ 2/72	Mullaney-----	Declined (other witness).	247-C
2/23/72 WH-----	Rumsfeld-----	do-----	do-----	4/ 2/72	do-----	do-----	247-C
2/11/72 WH-----	Klein-----	Klein, Herbert.	do-----	2/18/72	Klein-----	Presidential staff	247-C
6/21/71 WH-----	Dean-----	Dean, John W., III.	Pentagon papers	6/28/71	Dean-----	do-----	247-C
4/24/72 WH-----	Young-----	Young, David	Freedom of information.	4/29/72	do-----	do-----	247-D
----- WH-----	Moynihan-----	Moynihan, Pat	-----	-----	Moynihan-----	Would not appear	273-A

**B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued**

*3. Indexed Alphabetically by Subject Matter*

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
11/24/70	WH ACFR	Moynihan Stewart	Moynihan, Pat. Advisory committees	12/ 1/70	Moynihan Stewart	Would not appear Inappropriate to appear.	273-A 93-A
4/ 8/71	CIA	Helms	Phillips, David. Brazil, U.S. policies	Un-known.	Liaison	Director only can testify.	9-S
4/ 8/71	DOD	Laird	Moura, Col. Arthur S.	do	4/20/71 Nutter	do	9-T
2/10/72	WH	Kissinger	Kissinger, Henry.	Briefing	2/28/73 Dean	Presidential staff	9-W
1/29/73	HUD	HUD	R. & T. (Secretary).	Building—System concept.	2/ 6/73 Secretary of HUD.	Resignation of appropriate staff.	172-A
11/14/72	DOJ	Colburn	Colburn, Wayne B.	BIA seizure	11/22/72 Erickson	Investigation ongoing.	27-B
11/13/72	DOJ	Erickson	Erickson, Ralph E.	do	11/22/72 do	do	27-B
11/13/72	WH	Garment	Garment, Leonard.	do	11/22/72 Dean	Presidential staff	27-B
11/13/72	WH	Dean	Dean, John W., III.	do	11/22/72 do	do	27-B
11/14/72	WH	Patterson	Patterson, Bradley.	do	11/22/72 do	do	27-B
11/14/72	WH	Krogh	Krogh, Egil, Jr.	do	11/22/72 do	do	27-B
11/13/72	WH	Ehrlichman	Ehrlichman, John D.	do	11/22/72 do	do	27-B
11/21/72	DOJ	Roman	Roman, Gill.	do	11/28/72 Holman	42 U.S.C. 2000g-2	27-C
5/15/72	CCOSSP	Ramirez	Ramirez, Henry M.	Civil Rights/two instances.	5/31/72 Ramirez	Out of town/too busy.	42-D
7/ 8/69	FBI	Hoover	Hoover, J. Edgar.	Crime in the United States.	7/ 6/69 Assistant	Testifying before Appropriations Committee.	299-B
--/15/70	DOL	Shultz	Shultz, George P.	Fair Labor Standards Act.	do	No formal refusal	287-C
6/26/69	WH	Kissinger	Kissinger, Henry.	Foreign policy question.	6/30/69 Kissinger	Presidential staff	9-Y
6/27/72	DOD	Moot	Moot, Robert C.	Foreign assistance appropriations.	6/29/72	Failed to appear	55-B
3/14/72	WH	Rumsfeld	Rumsfeld, Donald.	Freedom of information.	4/ 2/72 Mullaney	Declined (other witness).	247-C
2/23/72	WH	Rumsfeld	do	do	4/ 2/72 do	do	247-C
2/11/72	WH	Klein	Klein, Herbert.	do	2/18/72 Klein	Presidential staff	247-C
4/24/72	WH	Young	Young, David	do	4/29/72 Dean	do	247-D
9/16/71	WH	Klein	Klein, Herbert.	Freedom of press	9/21/71 Klein	do	154-F
7/21/72	FBI	Gray	Gray, L. Patrick.	FBI access to bank records.	7/28/72 Gray	Wm. S. Lynch appeared.	144-D
11/17/72	HUD		Romney, George.	Housing policies	11/27/72 Romney	Inappropriate/ resignation.	45-A
11/18/71	DOA	Campbell	Campbell, J. Phil.	Housing, equal opportunity.	11/30/71 Campbell	DOA/sent James V. Smith.	42-C
11/12/71	WH	Nixon	Malek, Colson.	Investigation of D. Schorr.	2/ 1/72 Dean	Presidential staff	154-G
4/16/71	DOL	Hodgson	Secretary Hodgson.	Labor Department briefings.	4/20/71 Hodgson	Inappropriate as witness.	247-C
4/13/71	DOL	Hodgson	do	do	4/20/71 do	do	247-C
7/ 1/71	DOJ	DeMent	DeMent, Ira	Law enforcement (Alabama) LEAA.	7/13/71 Kleindienst	Investigation ongoing.	248-F

## B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued

3. *Indexed Alphabetically by Subject Matter—Continued*

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
4/19/72	ELGB.... Connally.....	Connally, John B.	Lockheed loan/GAO access.	5/31/72	Pierce.....	Connally resigned....	144-B
12/13/72	Pvt. cit.... Crawford.....	Crawford, George.	Mercury pollution (Armco).	12/19/72	Crawford.....	Presidential staff, former member.	246-I
12/13/72	WH..... Flanigan.....	Flanigan, Peter M.	do.....	12/18/72	Dean.....	Presidential staff....	246-I
12/13/72	Pvt. cit.... Glancy.....	Glancy, W. John.	do.....	12/19/72	Glancy.....	Presidential staff, former member.	246-J
3/27/72	Navy.... Chaffee.....	Unspecified.....	Navy home ports in Greece.	4/ 4/72	Snyder.....	Navy had previously testified.	186-A
---/---/63	DOS.... Rusk.....	Many/various....	Otepka, DOS security.	8/12/63	Rusk.....	Presidential direc- tive of Mar. 13, 1948.	12-A
6/21/71	WII..... Dean.....	Dean, John W., III.	Pentagon papers.....	6/28/71	Dean.....	Presidential staff....	247-C
6/21/71	WH..... Klein.....	Klein, Herbert.....	do.....	6/28/71	do.....	do.....	247-C
6/21/71	WH..... Kissinger.....	Kissinger, Henry.	do.....	6/28/71	do.....	do.....	247-C
7/23/71	Postal.... Blount.....	Blount, Winton M.	Postal building pro- gram.	7/26/71	Blount.....	Out of town, sent representative.	308-A
2/ 2/71	NSC.... Lehman.....	Lehman, John F., Jr.	Remarks to commit- tee staff.	1/ 3/71	Lehman.....	NSC staff member....	9-U
1/25/67	DOS.... Clark.....	Hoover, J. Edgar.	Soviet, consular convention.	1/27/67	Clark.....	Views unchanged....	9-X
1/19/67	FBI.... Hoover.....	do.....	do.....	1/20/67	Acting Attorney General.	Views supplied by correspondent.	9-X
2/18/71	DOD.... Froehlke.....	Col. Downie, et al.	Surveillance by military.	3/ 4/71	Froehlke.....	Reluctant to provide....	154-D
2/18/71	DOD.... Laird.....	Maj. Gen. McChristian.	do.....	4/19/71	Laird.....	Inappropriate to testify.	154-E
12/ 8/72	CAB.... Browne.....	Browne, Secor D.	SST (government support).	12/20/72	Browne.....	Family obligations....	45-B
12/ 8/72	DOT.... Volpe.....	Cannon, Robert H.	do.....	12/28/72	.....	Cannon unable to appear.	45-B
12/ 8/72	DOT.... Volpe.....	Volpe, John.....	do.....	12/28/72	Volpe.....	Agreed to send R. H. Cannon.	45-B
12/ 8/72	FAA.... Shaffer.....	Ellis, Frampton E.	do.....	12/26/72	.....	Unable to appear....	45-B
12/ 8/72	FAA.... Shaffer.....	Shaffer, John H.	do.....	12/26/72	.....	Agreed to send Ellis.	45-B
10/19/71	DOJ.... Kashiwa.....	Kashiwa, Shiro.	Toxic wastes.....	10/20/71	Kashiwa.....	Pending litigation....	246-H
10/20/71	WH.... Flanigan.....	Flanigan, Peter M.	Toxic wastes (Armco).	10/20/71	Dean.....	Presidential staff....	246-G
4/18/72	DOA.... Minyard.....	Butz, Earl.....	U.S.S.R/U.S. agricultural exports.	4/18/72	Minyard.....	Would not appear (oral).	249-B
12/29/72	WH.... Kissinger.....	Kissinger, Henry.	Vietnam, situation.	1/16/73	Timmons....	Presidential staff....	9-V
6/23/71	DOJ.... Mitchell.....	Mitchell, John N.	Voting Rights Act, oversight.	6/---/71	.....	DOJ/sent David Norman.	42-B
5/28/71	DOJ.... Mitchell.....	do.....	do.....	6/---/71	.....	(Not reported).....	42-B
5/ 4/71	DOJ.... Mitchell.....	do.....	do.....	6/---/71	.....	do.....	42-B

**B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued**

**4. Indexed by Person Refusing to Provide Witness**

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
6/23/71	DOJ..... Mitchell.....	Mitchell, John N.	Voting Rights Act, oversight.	6/.../71.....	DOJ/sent David Norman.	42-B	
5/28/71	DOJ..... Mitchell.....	do.....	do.....	6/.../71.....	(Not reported).....	42-B	
5/ 4/71	DOJ..... Mitchell.....	do.....	do.....	6/.../71.....	do.....	42-B	
12/ 8/72	DOT..... Volpe.....	Cannon, Robert H.	SST (government support).	12/28/72.....	Cannon unable to appear.	45-B	
12/ 8/72	FAA..... Shaffer.....	Ellis, Frampton E.	do.....	12/26/72.....	Unable to appear.....	45-B	
12/ 8/72	FAA..... Shaffer.....	Shaffer, John H.	do.....	12/26/72.....	Agreed to send Ellis.....	45-B	
6/27/72	DOD..... Moot.....	Moot, Robert C.	Foreign assistance appropriations.	6/29/72.....	Failed to appear.....	55-B	
---/15/70	DOL..... Shultz.....	Shultz, George P.	Fair Labor Standards Act.	-----	No formal refusal.....	287-C	
1/19/67	FBI..... Hoover.....	Hoover, J. Edgar.	Soviet, consular convention.	1/20/67 Acting Attorney General.	Views supplied by correspondence.	9-X	
7/ 8/69	FBI..... Hoover.....	do.....	Crime in the United States.	7/.. 69 Assistant.....	Testifying before Appropriations Committee.	299-B	
7/23/71	Postal..... Blount.....	Blount, Winston M.	Postal building program.	7/26/71 Blount.....	Out of town, sent representative.	308-A	
12/ 8/72	CAB..... Browne.....	Browne, Secor D.	SST (government support).	12/20/72 Browne.....	Family obligations.....	45-B	
11/18/71	DOA..... Campbell .....	Campbell, J. Phil.	Housing, equal opportunity.	11/30/71 Campbell.....	DOA/sent James V. Smith.	42-C	
1/25/67	DOS..... Clark.....	Hoover, J. Edgar.	Soviet, consular convention.	1/27/67 Clark.....	Views unchanged.....	9-X	
12/13/72	Pvt. cit.... Crawford.....	Crawford, George.	Mercury pollution (Armco).	12/19/72 Crawford.....	Presidential staff, former member.	246-I	
2/10/72	WH..... Kissinger.....	Kissinger, Henry	Briefing.....	2/28/73 Dean.....	Presidential staff.....	9-W	
11/14/72	WH..... Patterson.....	Patterson, Bradley.	BIA seizure.....	11/22/72 do.....	do.....	27-B	
11/14/72	WH..... Krogh.....	Krogh, Egil, Jr.....	do.....	11/22/72 do.....	do.....	27-B	
11/13/72	WH..... Ehrlichman.....	Ehrlichman, John D.	do.....	11/22/72 do.....	do.....	27-B	
11/13/72	WH..... Garment.....	Garment, Leonard.	do.....	11/22/72 do.....	do.....	27-B	
11/13/72	WH..... Dean.....	Dean, John W., III.	do.....	11/22/72 do.....	do.....	27-B	
11/12/71	WH..... Nixon.....	Malek, Colson.....	Investigation of D. Schorr.	2/ 1/72 do.....	do.....	154-G	
10/20/71	WH..... Flanigan.....	Flanigan, Peter M.	Toxic wastes (Armco).	10/20/71 do.....	do.....	246-G	
12/13/72	WH..... Flanigan.....	do.....	Mercury pollution (Armco).	12/18/72 do.....	do.....	246-I	
6/21/71	WH..... Dean.....	Dean, John W., III.	Pentagon papers.....	6/28/71 do.....	do.....	247-C	
6/21/71	WH..... Klein.....	Klein, Herbert.	do.....	6/28/71 do.....	do.....	247-C	
6/21/71	WH..... Kissinger.....	Kissinger, Henry.	do.....	6/28/71 do.....	do.....	247-C	
4/24/72	WH..... Young.....	Young, David.....	Freedom of information.	4/29/72 do.....	do.....	247-D	
11/13/72	DOJ..... Erickson.....	Erickson, Ralph E.	BIA seizure.....	11/22/72 Erickson.....	Investigation ongoing.	27-B	
11/14/72	DOJ..... Colburn.....	Colburn, Wayne B.	do.....	11/22/72 do.....	do.....	27-B	

**B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued*****4. Indexed by Person Refusing to Provide Witness—Continued***

Date of request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks (7)	File No. (8)
2/18/71 DOD	Froehlke	Col. Downie, et al.	Surveillance by military.	3/ 4/71 Froehlke	do	Reluctant to provide	154-D
12/13/72 Pvt. cit.	Glancy	Glancy, W. John.	Mercury pollution (Armco).	12/19/72 Glancy	do	Presidential staff, former member.	246-J
7/21/72 FBI	Gray	Gray, L. Patrick.	FBI access to bank records.	7/28/72 Gray	do	Wm. S. Lynch appeared.	144-D
4/13/71 DOL	Hodgson	Secretary Hodgson.	Labor Department briefings.	4/20/71 Hodgson	do	Inappropriate as witness.	247-C
4/16/71 DOL	Hodgson	do	do	4/20/71 do	do	do	247-C
11/21/72 DOJ	Roman	Roman, Gill	BIA seizure	11/28/72 Holman	do	42 U.S.C. 2000g-2	27-C
10/19/71 DOJ	Kashiwa	Kashiwa, Shiro.	Toxic wastes	10/20/71 Kashiwa	do	Pending litigation	246-H
6/26/69 WH	Kissinger	Kissinger, Henry.	Foreign policy question.	6/30/69 Kissinger	do	Presidential staff	9-Y
9/16/71 WH	Klein	Klein, Herbert.	Freedom of press	9/21/71 Klein	do	do	154-F
2/11/72 WH	Klein	do	Freedom of information.	2/18/72 do	do	do	247-C
7/ 1/71 DOJ	DeMent	DeMent, Ira	Law enforcement (Alabama) LEAA.	7/13/71 Kleindienst	do	Investigation ongoing.	248-F
2/18/71 DOD	Laird	Maj. Gen. McChristian.	Surveillance by military.	4/19/71 Laird	do	Inappropriate to testify.	154-E
2/ 2/71 NSC	Lehman	Lehman, John F., Jr.	Remarks to committee staff.	1/ 3/71 Lehman	do	NSC staff member	9-U
4/ 8/71 CIA	Helms	Phillips, David	Brazil, U.S. policies	Un-known	Liaison	Director only can testify.	9-S
4/18/72 DOA	Minyard	Butz, Earl	U.S.S.R./U.S. agricultural exports.	4/18/72 Minyard	do	Would not appear (oral).	249-B
WH	Moynihan	Moynihan, Pat	do	Moynihan	do	Would not appear	273-A
3/14/72 WH	Rumsfeld	Rumsfeld, Donald.	Freedom of information.	4/ 2/72 Mullaney	do	Declined (other witness).	247-C
2/23/72 WH	Rumsfeld	do	do	4/ 2/72 do	do	do	247-C
4/ 8/71 DOD	Laird	Moura, Col. Arthur S.	Brazil, U.S. policies	4/20/71 Nutter	do	Director only can testify.	9-T
4/19/72 ELGB	Connally	Connally, John B.	Lockheed loan/GAO access.	5/31/72 Pierce	do	Connally resigned	144-B
5/15/72 CCOSSP	Ramirez	Ramirez, Henry M.	Civil rights/two instances.	5/31/72 Ramirez	do	Out of town/too busy.	42-D
11/17/72 HUD	Romney	Romney, George.	Housing policies	11/27/72 Romney	do	Inappropriate/ resignation.	45-A
--/--/63 DOS	Rusk	Many/various	Otepka, DOS security.	8/12/63 Rusk	do	Presidential directive of Mar. 13, 1948.	12-A
1/29/73 HUD	HUD	R.&T. (Secretary).	Building—Systems concept.	2/ 6/73 Secretary of HUD	do	Resignation of appropriate staff.	172-A
3/27/72 Navy	Chaffee	Unspecified	Navy home ports in Greece.	4/ 4/72 Snyder	do	Navy had previously testified.	186-A
11/24/70 ACFR	Stewart	Stewart, Charles W.	Advisory committees.	12/ 1/70 Stewart	do	Inappropriate to appear.	93-A
12/29/72 WH	Kissinger	Kissinger, Henry.	Vietnam situation	1/16/73 Timmons	do	Presidential staff	9-V
12/ 8/72 DOT	Volpe	Volpe, John	SST (government support).	12/28/72 Volpe	do	Agreed to send R. H. Cannon.	45-B

**B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued**

*5. Indexed by Language of Refusal*

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	
5/28/71	DOJ	Mitchell	Mitchell, John N.	Voting Rights Act, oversight.	6/---/71	(Not reported)	42-B	
5/ 4/71	DOJ	Mitchell	do	do	6/---/71	do	42-B	
12/ 8/72	FAA	Shaffer	Shaffer, John H.	SST (government support).	12/26/72	Agreed to send Ellis	45-B	
12/ 8/72	DOT	Volpe	Volpe, John	do	12/28/72	Volpe	Agreed to send R. H. Cannon.	
12/ 8/72	DOT	Volpe	Cannon, Robert H.	do	12/28/72	Cannon unable to appear.	45-B	
4/19/72	ELGB	Connally	Connally, John B.	Lockheed loan/ GAO access.	5/31/72	Pierce	Connally resigned	144-B
3/14/72	WH	Rumsfeld	Rumsfeld, Donald	Freedom of information.	4/ 2/72	Mullaney	Declined (other witness).	247-C
2/23/72	WH	Rumsfeld	do	do	4/ 2/72	do	do	247-C
4/ 8/71	CIA	Helms	Phillips, David	Brazil, U.S. policies	Un-known	Liaison	Director only can testify.	9-S
4/ 8/71	DOD	Laird	Moura, Col. Arthur S.	do	4/20/71	Nutter	do	9-T
11/18/71	DOA	Campbell	Campbell, J. Phil.	Housing, equal opportunity.	11/30/71	Campbell	DOA/sent James V. Smith.	42-C
6/23/71	DOJ	Mitchell	Mitchell, John N.	Voting Rights Act, oversight.	6/---/71	DOJ /sent David Norman.	42-B	
6/27/72	DOD	Moot	Moot, Robert C.	Foreign assistance appropriations.	6/29/72	do	Failed to appear	55-B
12/ 8/72	CAB	Browne	Browne, Secor D.	SST (government support).	12/20/72	Browne	Family obligations	45-B
4/16/71	DOL	Hodgson	Secretary Hodgson.	Labor Department briefings.	4/20/71	Hodgson	Inappropriate as witness.	247-C
4/13/71	DOL	Hodgson	do	do	4/20/71	do	do	247-C
11/24/70	ACFR	Stewart	Stewart, Charles W.	Advisory committees.	12/ 1/70	Stewart	Inappropriate to appear.	93-A
2/18/71	DOD	Laird	Maj. Gen. McChristian.	Surveillance by military.	4/19/71	Laird	Inappropriate to testify.	154-E
11/17/72	HUD	Romney	George.	Housing policies	11/27/72	Romney	Inappropriate/ resignation.	45-A
11/14/72	DOJ	Colburn	Colburn, Wayne B.	BIA seizure	11/22/72	Erickson	Investigation ongoing.	27-B
11/13/72	DOJ	Erickson	Ralph E.	do	11/22/72	do	do	27-B
7/ 1/71	DOJ	DeMent	DeMent, Ira	Law enforcement (Alabama) LEAA.	7/13/71	Kleindienst	do	248-F
3/27/72	Navy	Chaffee	Unspecified	Navy home ports in Greece.	4/ 4/72	Snyder	Navy had previously testified.	186-A
--/15/70	DOL	Shultz	Shultz, George P.	Fair Labor Standards Act.	do	do	No formal refusal	287-C
2/ 2/71	NSC	Lehman	Lehman, John F., Jr.	Remarks to committee staff.	1/ 3/71	Lehman	NSC staff member	9-U
5/15/72	CCOSSP	Ramirez	Ramirez, Henry M.	Civil rights/two instances.	5/31/72	Ramirez	Out of town/too busy.	42-D
7/23/71	Postal	Blount	Blount, Win-ton M.	Postal building pro-gram.	7/26/71	Blount	Out of town, sent representative.	308-A
10/19/71	DOJ	Kashiwa	Kashiwa, Shiro	Toxic wastes	10/20/71	Kashiwa	Pending litigation	246-H

## B.—SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY—Continued

5. *Indexed by Language of Refusal*—Continued

Date of request	To whom addressed, and agency represented	Person requested to testify	Nature of testimony requested, nature of hearings, or other reason for which requested	Date of refusal	Person authorizing refusal	Reason given for refusal, documentation of refusal as available, and other remarks	File No.
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
--/--/63 DOS	Rusk-----	Many/various	Otepka, DOS security.	8/12 '63	Rusk-----	Presidential directive of Mar. 13, 1948.	12-A
12/13/72 Pvt. cit.	Crawford-----	Crawford, George.	Mercury pollution (Armeo).	12/19/72	Crawford-----	Presidential staff, former member.	246-I
12/13/72 Pvt. cit.	Glancy-----	Glancy, W. John.	do-----	12/19/72	Glancy-----	do-----	246-J
12/29/72 WH	Kissinger-----	Kissinger, Henry.	Vietnam, situation	1/16/73	Timmons-----	Presidential staff	9-V
2/10/72 WH	Kissinger-----	do-----	Briefing-----	2/28/73	Dean-----	do-----	9-W
6/26/69 WH	Kissinger-----	do-----	Foreign policy question.	6/30/69	Kissinger-----	do-----	9-Y
11/13/72 WH	Garment-----	Garment, Leonard.	BIA seizure-----	11/22/72	Dean-----	do-----	27-B
11/13/72 WH	Dean-----	Dean, John W., III.	do-----	11/22/72	do-----	do-----	27-B
11/14/72 WH	Patterson-----	Patterson, Bradley.	do-----	11/22/72	do-----	do-----	27-B
11/14/72 WH	Krogh-----	Krogh, Egil, Jr.	do-----	11/22/72	do-----	do-----	27-B
11/13/72 WH	Ehrlichman-----	Ehrlichman, John D.	do-----	11/22/72	do-----	do-----	27-B
9/16/71 WH	Klein-----	Klein, Herbert	Freedom of press	9/21/71	Klein-----	do-----	154-F
11/12/71 WH	Nixon-----	Malek, Colson	Investigation of D. Schorr.	2/ 1/72	Dean-----	do-----	154-G
10/20/71 WH	Flanigan-----	Flanigan, Peter M.	Toxic wastes (Armeo).	10/20/71	do-----	do-----	246-G
12/13/72 WH	Flanigan-----	do-----	Mercury pollution (Armeo).	12/18/72	do-----	do-----	246-I
6/21/71 WH	Dean-----	Dean, John W., III.	Pentagon papers-----	6/28/71	do-----	do-----	247-C
6/21/71 WH	Klein-----	Klein, Herbert	do-----	6/28/71	do-----	do-----	247-C
6/21/71 WH	Kissinger-----	Kissinger, Henry.	do-----	6/28/71	do-----	do-----	247-C
2/11/72 WH	Klein-----	Klein, Herbert	Freedom of information.	2/18/72	Klein-----	do-----	247-C
4/24/72 WH	Young-----	Young, David	do-----	4/29/72	Dean-----	do-----	247-D
2/18/71 DOD	Froehlke-----	Col. Downie, et al.	Surveillance by military.	3/ 4/71	Froehlke-----	Reluctant to provide.	154-D
1/29/73 HUD	HUD-----	R. & T. (Secretary).	Building—System concept.	2/ 6/73	Secretary of HUD.	Resignation of appropriate staff.	172-A
7/ 8/69 FBI	Hoover-----	Hoover, J. Edgar.	Crime in the United States.	7/../69	Assistant-----	Testifying before Appropriations Committee.	299-B
12/ 8/72 FAA	Shaffer-----	Ellis, Frampton E.	SST (government support).	12/26/72		Unable to appear	45-B
1/19/67 FBI	Hoover-----	Hoover, J. Edgar.	Soviet, consular convention.	1/20/67	Acting Attorney General.	Views supplied by correspondence.	9-X
1/25/67 DOS	Clark-----	do-----	do-----	1/27/67	Clark-----	Views unchanged	9-X
7/21/72 FBI	Gray-----	Gray, L. Patrick.	FBI access to bank records.	7/28/72	Gray-----	Wm. S. Lynch appeared.	144-D
WH	Moynihan-----	Moynihan, Pat			Moynihan-----	Would not appear	273-A
4/18/72 DOA	Minyard-----	Butz, Earl	U.S.S.R./U.S. agricultural exports.	4/18/72	Minyard-----	Would not appear (oral).	249-B
11/21/72 DOJ	Roman-----	Roman, Gill	BIA seizure-----	11/28/72	Holman-----	42 USC 2000g-2	27-C

**C.—SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED**

**1. Instances of Refusal in File Order**

**INQUIRIES BY SENATE COMMITTEES**

Date of request	Agency inquired of	Subject matter of inquiry	Basis for refusal on specifics of inquiry	Ultimate resolution of request	File No.
(1)	(2)	(3)	(4)	(5)	(6)
--/-/68	DOD	Tonkin Gulf (report)	Inappropriate to disseminate	Pentagon papers	9-Z
1/21/72	State	Exchange programs	Required further study	Yes/useful	9-AA
5/-/71	State	Brazil (NSC study)	Delay (7 mo.)	Moderately useful	9-BB
11/-/71	State	Guatemala, Dominican Republic studies	Delay, refused	(Viewed) moderately useful	9-CC
7/29/69	State	COMUSTAF Plan 1/64	Briefing suggested	(Viewed)	9-DD
9/17/70	DOD	Latin American/JCS	Would not appear	Adm. Moorer, JCS, appeared	9-EE

**INQUIRIES BY HOUSE COMMITTEES**

3/ 7/73	DOA	REA-loan statistics	Time limitation	Supplied, Mar. 8, 1973	18-B
3/13/69	ICC	Railroad merger/passenger service	Delay (3 mo.)	Supplied, Apr. 29, 1969	29-D
10/15/69	FCC	WIFE AM/FM license	Refused subpoena	Received after contempt citation.	29-E
5/14/69	DOJ	Mitchell/voting rights	Declined (4 times)	Mitchell appeared, June 26, 1969.	42-E
9/12/72	DOJ	Kleindienst/Federal grand jury	No reply/delay	DOJ replied Mar. 22, 1973	42-F

**INQUIRIES BY COMPTROLLER GENERAL**

--/-/71	Many	General problem, GAO	General problem, GAO	Crippling effect on GAO	50-B
12/-/71	Treasury	Emergency Loan Guarantee Board.	Review not intent of law	Legislative intent required	50-M
8/22/72	PBC	Public broadcasting	Delays/refused	Right to audit unclear	50-N
12/30/70	Treasury	Exchange stabilization, fund	Delays, refusals	Audit in progress	50-O

**INQUIRIES BY SENATE SUBCOMMITTEES**

1970	DOA	Consumer protection	Denied	Fat in hotdogs, re printout	94-A
11/16/71	DOJ	May day demonstration (D.C.), May 1, 1971.	No response	Report furnished (3 pages), Mar. 5, 1973.	151-F
3/ 9/71	DOJ	Federal data banks, Army	Classified	Partially declassified	154-H
10/ 3/70	DOD	Surveillance by military	Air Force Regulation 205-57	Declassification refused	154-I
10/ 5/70	DOD	do	Marine Corps Message 171500Z, November 1969.	do	154-J
10/ 5/70	DOD	do	AFIG letter No. 18, Dec. 16, 1969.	do	154-K
10/ 5/70	DOD	do	President Roosevelt's memorandum, 1939.	Unable to declassify	154-L
10/ 5/70	DOD	do	Army AG letters of July 11, 1969.	Declassification refused	154-M
10/30/70	DOD	do	Van Deman files	Response incomplete	154-N
3/17/71	DOJ	Civil disturbances	Interdepartment action plan	Internal working memorandum	154-O
9/14/71	Treasury	Dickey/handguns, proofing of	No response	No response	160-A
2/27/73	HEW	Methadone abuse	Delayed response	Arrived late from FDA	160-B
2/27/73	DOJ	do	do	Arrived late from BNDD	160-C
2/17/72	HEW	Barbiturates abuse	do	Late response from FDA	160-D
2/16/72	DOJ	do	do	BNDD reply 3 mo. late	160-E
1/14/72	DOJ	Juvenile crime funds	do	LEAA reply 4 mo. late	160-F
2/ 1/73	DOA	Butz, Earl L., impoundment	President restricted	WH—permission granted	165-A
2/ 1/73	EPA	Ruckelshaus, W. D., impoundment	do	do	165-A
9/28/72	GSA	Postal Service realty	Slow, inadequate	See 172-B, inadequate response	172-B

**C.—SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED—Continued**

**1. Instances of Refusal in File Order—Continued**

**INQUIRIES BY HOUSE SUBCOMMITTEES**

Date of request (1)	Agency inquired of (2)	Subject matter of inquiry (3)	Basis for refusal on specifics of inquiry (4)	Ultimate resolution of request (5)	File No. (6)
12/ 1/69	HEW-----	Chemical-biological warfare report.	Under review-----	Copy of report/useful-----	180-B
6/--/69	HUD-----	FHA/unsafe glass doors-----	Improper coordination-----	Official was overruled-----	245-C
12/ 8/71	FDA-----	Drugs: DES testing-----	Preliminary report-----	Copy of memo/very useful-----	245-D
5/--/62	FDA-----	New drugs: FDA files-----	Refused, trade secrets-----	Changed position-----	245-E
12/18/70	DOJ-----	Mercury pollution-----	Refused, open case-----	Data partially provided-----	246-L
7/ 1/71	DOJ-----	do-----	DOJ refused release-----	Partial disclosure-----	246-L
2/26/71	DOJ-----	do-----	Refused/ <i>Delany v. United States</i> -----	Open case/some data received-----	246-L
5/21/71	DOJ-----	do-----	Refused/DOJ order 116-56-----	do-----	246-L
5/21/71	DOS-----	do-----	Refused/legal ethics-----	do-----	246-L
5/21/71	EPA-----	do-----	Refused (see 246-L)-----	Confidential-----	246-L
10/28/71	FHA-----	Housing, FHA files-----	Verbal refusal, Boston-----	Viewed files in District of Columbia office.	248-G
3/ 3/72	DOJ-----	Fraud of FHA-----	Pending cases-----	Assistant Attorney General Person appeared-----	248-H
--/--/72	DOJ-----	Administration bill, private-pension plan.	Draft not final-----	Secretary appeared-----	287-D
2/--/70	DOL-----	Witness, private-pension plan-----	Refused-----	do-----	287-D
4/ 5/71	DOL-----	Hodges/Fair Labor Standards Act.	Cancelled appearance-----	do-----	287-E
12/ 7/65	EDA-----	All EDA publications-----	Public statements only-----	Minimal information received-----	307-A
1/26/73	OMB-----	Romney/Pollution control center-----	3 mo. delay-----	Letter response, 3 mo. later-----	308-B

**C.—SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED—Continued**

**2. *Indexed Alphabetically by Agency***

Date of request (1)	Agency inquired of (2)	Subject matter of inquiry (3)	Basis for refusal on specifics of inquiry (4)	Ultimate resolution of request (5)	File No. (6)
2/ 1/73	DOA	Butz, Earl L., impoundment	President restricted	WH—permission granted	165-A
3/ 7/73	DOA	REA-loan statistics	Time limitation	Supplied, Mar. 8, 1973	18-B
1970	DOA	Consumer protection	Denied	Fat in hotdogs, re printout	94-A
2/ 1/73	DOA	Butz, Earl L., impoundment	President restricted	WH—permission granted	165-A
9/17/70	DOD	Latin American/JCS	Would not appear	Adm. Moorer, JCS, appeared	9-E
10/ 1/68	DOD	Tonkin Gulf (report)	Inappropriate to disseminate	Pentagon papers	9-Z
10/ 3/70	DOD	Surveillance/by military	Air Force Regulation 205-57	Declassification refused	154-I
10/ 5/70	DOD	do	Marine Corps Message 171500z, November 1969.	do	154-J
10/ 5/70	DOD	do	AFIG letter No. 18, Dec. 16, 1969.	do	154-K
10/ 5/70	DOD	do	President Roosevelt's memorandum, 1939.	Unable to declassify	154-L
10/ 5/70	DOD	do	Army AG letters of July 11, 1969.	Declassification refused	154-M
10/30/70	DOD	do	Van Deman files	Response incomplete	154-N
5/14/69	DOJ	Mitchell/voting rights	Declined (4 times)	Mitchell appeared June 26, 1969	42-E
9/12/72	DOJ	Kleindienst/Federal grand jury	No reply/delay	DOJ replied Mar. 22, 1973	42-F
11/16/71	DOJ	May day demonstration (District of Columbia), May 1, 1971.	No response	Report furnished (3 pages), Mar. 5, 1973.	151-F
3/ 9/71	DOJ	Federal data banks, Army	Classified	Partially declassified	154-H
3/17/71	DOJ	Civil disturbances	Interdepartmental action plan	Internal working memorandum	154-O
2/27/73	DOJ	Methadone abuse	Delayed response	Arrived late from BNDD	160-C
2/16/72	DOJ	Barbiturates abuse	do	BNDD reply 3 mo. late	160-E
1/14/72	DOJ	Juvenile crime funds	do	LEAA reply 4 mo. late	160-F
7/ 1/71	DOJ	Mercury pollution	DOJ refused release	Partial disclosure	246-L
2/26/71	DOJ	do	Refused/Delany v. United States	Open case/some data received	246-L
5/21/71	DOJ	do	Refused/DOJ order 116-56	do	246-L
12/18/70	DOJ	do	Refused, open case	Data partially provided	246-L
3/ 3/72	DOJ	Fraud of FHA	Pending cases	Assistant Attorney General Peterson appeared	248-H
12/ 1/72	DOJ	Administration bill, private-pension plan	Draft not final	Secretary appeared	287-D
2/ 1/70	DOL	Witness, private-pension plan	Refused	do	287-D
4/ 5/71	DOL	Hodges/Fair Labor Standards Act.	Cancelled appearance	do	287-E
5/21/71	DOS	Mercury pollution	Refused/legal ethics	Open case/some data received	246-L
12/ 7/65	EDA	All EDA publications	Public statements only	Minimal information received	307-A
2/ 1/73	EPA	Ruckelshaus, W. D., impoundment	President restricted	WH—permission granted	165-A
5/21/71	EPA	Mercury pollution	Refused (see 246-L)	Confidential	246-L
10/15/69	FCC	WIFE AM/FM license	Refused subpoena	Received after contempt citation.	29-E
12/ 8/71	FDA	Drugs: DES testing	Preliminary report	Copy of memo/very useful	245-D
5/ 1/62	FDA	New drugs: FDA files	Refused, trade secrets	Changed position	245-E
10/28/71	FHA	Housing, FHA files	Verbal refusal, Boston	Viewed files in District of Columbia office.	248-G
9/28/72	GSA	Postal Service realty	Slow, inadequate	See 172-B, inadequate response	172-B
2/27/73	HEW	Methadone abuse	Delayed response	Arrived late from FDA	160-B
2/17/72	HEW	Barbiturates abuse	do	Late response from FDA	160-D
12/ 1/69	HEW	Chemical-biological warfare report	Under review	Copy of report/useful	180-B
6/ 1/69	HUD	FHA/unsafe glass doors	Improper coordination	Official was overruled	245-C

**C.—SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED  
BUT SUBSEQUENTLY HONORED—Continued**

**2. *Indexed Alphabetically by Agency—Continued***

Date of request	Agency inquired of	Subject matter of inquiry	Basis for refusal on specifics of inquiry	Ultimate resolution of request	File No.
(1)	(2)	(3)	(4)	(5)	(6)
3/13/69	ICC-----	Railroad merger/passenger service.	Delay (3 mo.)-----	Supplied, Apr. 29, 1969-----	29-D
--/--/71	Many-----	General problem, GAO-----	General problem, GAO-----	Crippling effect on GAO-----	50-B
1/26/73	OMB-----	Romney/pollution control center	3 mo. delay-----	Letter response, 3 mo. later-----	308-B
8/22/72	PBC-----	Public broadcasting-----	Delays/refused-----	Right to audit unclear-----	50-N
1/21/72	State-----	Exchange programs-----	Required further study-----	Yes/useful-----	9-AA
5/--/71	State-----	Brazil (NSC Study)-----	Delay (7 mo.)-----	Moderately useful-----	9-BB
11/--/71	State-----	Guatemala, Dominican Republic studies.	Delay, refused-----	(Viewed) moderately useful-----	9-CC
7/29/69	State-----	COMUSTAF Plan 1/64-----	Briefing suggested-----	(Viewed)-----	9-DD
12/--/71	Treasury-----	Emergency Loan Guarantee Board.	Review not intent of law-----	Legislative intent required-----	50-M
12/30/70	Treasury-----	Exchange stabilization, fund-----	Delays, refusals-----	Audit in progress-----	50-O
9/14/71	Treasury-----	Dickey/handguns, proofing of-----	No response-----	No response-----	160-A

**C.—SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED—Continued**

*3. Indexed Alphabetically by Subject*

Date of request	Agency inquired of	Subject matter of inquiry	Basis for refusal on specifics of inquiry	Ultimate resolution of request	File No.
(1)	(2)	(3)	(4)	(5)	(6)
12/1/72	DOJ	Administration bill, private pension plan.	Draft not final.	Secretary appeared.	287-D
12/7/65	EDA	All EDA publications	Public statements only.	Minimal information received.	307-A
2/17/72	HEW	Barbituates abuse	Delayed response.	Late response from FDA.	160-D
2/16/72	DOJ	do	do	BNDD reply 3 mo. late.	160-E
5/1/71	State	Brazil (NSC study)	Delay (7 mo.)	Moderately useful.	9-BB
2/1/73	DOA	Butz, Earl L., impoundment	President restricted.	WH—permission granted.	165-A
12/1/69	HEW	Chemical-biological warfare report.	Under review.	Copy of report/useful.	180-B
3/17/71	DOJ	Civil disturbances	Interdepartmental action plan.	Internal working memorandum.	154-O
1970	DOA	Consumer protection	Denied.	Fat in hotdogs, re printout.	94-A
7/29/69	State	COMUSTAF Plan 1/64	Briefing suggested.	(Viewed).	9-DD
9/14/71	Treasury	Dickey/handguns, proofing of	No response.	No response.	160-A
12/8/71	FDA	Drugs: DES testing	Preliminary report.	Copy of memo/very useful.	245-D
12/1/71	Treasury	Emergency Loan Guarantee Board.	Review not intent of law.	Legislative intent required.	50-M
12/30/70	Treasury	Exchange stabilization, fund	Delays, refusals.	Audit in progress.	50-O
1/21/72	State	Exchange programs	Required further study.	Yes/useful.	9-AA
3/9/71	DOJ	Federal data banks, Army	Classified.	Partially declassified.	154-H
3/3/72	DOJ	Fraud of FHA	Pending cases.	Assistant Attorney General Peterson appeared.	248-H
6/1/69	HUD	FHA/unsafe glass doors	Improper coordination.	Official was overruled.	245-C
11/1/71	Many	General problem, GAO	General problem, GAO.	Crippling effect on GAO.	50-B
11/1/71	State	Guatemala, Dominican Republic studies.	Delay, refused.	(Viewed) moderately useful.	9-CC
4/5/71	DOL	Hodges/Fair Labor Standards Act.	Canceled appearance.	Secretary appeared.	287-E
10/28/71	FHA	Housing, FHA files	Verbal refusal, Boston.	Viewed files in District of Columbia office.	248-G
1/14/72	DOJ	Juvenile crime funds	Delayed response.	LEAA reply 4 mo. late.	160-F
9/12/72	DOJ	Kleindienst/Federal grand jury	No reply/delay.	DOJ replied Mar. 22, 1973.	42-F
9/17/70	DOD	Latin American/JPS	Would not appear.	Admiral Moorer, JCS, appeared.	9-EE
11/16/71	DOJ	May day demonstration (District of Columbia), May 1, 1971.	No response.	Report furnished (3 pages), Mar. 5, 1973.	151-F
12/18/70	DOJ	Mercury pollution	Refused, open case.	Data partially provided.	246-L
7/1/71	DOJ	do	DOJ refused release.	Partial disclosure.	246-L
2/26/71	DOJ	do	Refused/Delaney v. United States.	Open case/some data received.	246-L
5/21/71	DOJ	do	Refused/DOJ order 116-56.	do	246-L
5/21/71	DOS	do	Refused/legal ethics.	do	246-L
5/21/71	EPA	do	Refused (see 246-L).	Confidential.	246-L
2/27/73	HEW	Methadone abuse	Delayed response.	Arrived late from FDA.	160-B
2/27/73	DOJ	do	do	Arrived late from BNDD.	160-C
5/14/69	DOJ	Mitchell/voting rights	Declined (4 times).	Mitchell appeared June 26, 1969.	42-E
5/1/62	FDA	New drugs: FDA files	Refused, trade secrets.	Changed position.	245-E
9/28/72	GSA	Postal Service realty	Slow, inadequate.	See 172-B, inadequate response.	172-B
8/22/72	PBC	Public broadcasting	Delays/refused.	Right to audit unclear.	50-N
3/13/69	ICC	Railroad merger/passenger service.	Delay (3 mo.).	Supplied, Apr. 29, 1969.	29-D
1/26/73	OMB	Romney/pollution control center	3-mo. delay.	Letter response, 3 mo. later.	308-B
2/1/73	EPA	Ruckelshaus, W. D., impoundment.	President restricted.	WH—permission granted.	165-A
3/7/73	DOA	REA-loan statistics	Time limitation.	Supplied, Mar. 8, 1973.	18-B

**C.—SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED—Continued**

***3. Indexed Alphabetically by Subject—Continued***

Date of request (1)	Agency inquired of (2)	Subject matter of inquiry (3)	Basis for refusal on specifics of inquiry (4)	Ultimate resolution of request (5)	File No. (6)
10/ 3/70	DOD	Surveillance by military	Air Force Regulation 205-57	Declassification refused	154-I
10/ 5/70	DOD	do	Marine Corps Message 171500Z, November 1969.	do	154-J
10/ 5/70	DOD	do	AFIG letter No. 18, Dec. 16, 1969.	do	154-K
10/ 5/70	DOD	do	President Roosevelt's memorandum, 1939.	Unable to declassify	154-L
10/ 5/70	DOD	do	Army AG letters of July 11, 1969.	Declassification refused	154-M
10/30/70	DOD	do	Van Deman files	Response incomplete	154-N
--/--/68	DOD	Tonkin Gulf (report)	Inappropriate to disseminate	Pentagon papers	9-Z
2/--/70	DOL	Witness, private-pension plan	Refused	Secretary appeared	287-D
10/15/69	FCC	WIFE AM/FM license	Refused subpoena	Received after contempt citation.	29-E

**C.—SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED—Continued**

*4. Indexed by Ultimate Response*

Date of request	Agency inquired of	Subject matter of inquiry	Basis for refusal on specifics of inquiry	Ultimate resolution of request	File No.
(1)	(2)	(3)	(4)	(5)	(6)
7/29/69	State	COMUSTAF Plan 1/64	Briefing suggested	(Viewed)	9-DD
11/-/71	State	Guatemala, Dominion Republic studies.	Delay, refused	(Viewed) moderately useful	9-CC
2/27/73	DOJ	Methadone abuse	Delayed response	Arrived late from BNDD	160-C
2/27/73	HEW	do	do	Arrived late from FDA	160-B
3/ 3/72	DOJ	Fraud of FHA	Pending cases	Assistant Attorney General Peterson appeared.	248-II
12/30/70	Treasury	Exchange stabilization, fund	Delays, refusals	Audit in progress	50-O
9/17/70	DOD	Latin American/JCS	Would not appear	Admiral Moorer, JCS, appeared.	9-EE
2/16/72	DOJ	Barbiturates abuse	Delayed response	BNDD reply 3 mo. late	160-E
5/-/62	FDA	New drugs: FDA files	Refused, trade secrets	Changed position	245-E
5/21/71	EPA	Mercury pollution	Refused (see 246-L)	Confidential	246-L
12/ 8/71	FDA	Drugs: DES testing	Preliminary report	Copy of memo/very useful	245-D
12/ 1/69	HEW	Chemical-biological warfare report.	Under review	Copy of report/useful	180-B
--/-/71	Many	General problem, GAO	General problem, GAO	Crippling effect on GAO	50-B
12/18/70	DOJ	Mercury pollution	Refused, open case	Data partially provided	246-L
10/ 3/70	DOD	Surveillance by military	Air Force Regulation 205-57	Declassification refused	154-I
10/ 5/70	DOD	do	Marine Corps Message 171500Z, November 1969.	do	154-J
10/ 5/70	DOD	do	AFIG letter No. 18, December 16, 1969.	do	154-K
10/ 5/70	DOD	do	Army AG letters of July 11, 1969.	do	154-M
9/12/72	DOJ	Kleindienst/Federal grand jury	No reply/delay	DOJ replied Mar. 22, 1973	42-F
1970	DOA	Consumer protection	Denied	Fat in hotdogs, re printout	94-A
3/17/71	DOJ	Civil disturbances	Interdepartmental action plan	Internal working memorandum	154-O
12/17/72	HEW	Barbituates abuse	Delayed response	Late response from FDA	160-D
12/-/71	Treasury	Emergency Loan Guarantee Board.	Review not intent of law	Legislative intent required	50-M
1/26/73	OMB	Romney/pollution control center	3 mo. delay	Letter response, 3 mo. later	308-B
1/14/72	DOJ	Juvenile crime funds	Delayed response	LEAA reply 4 mo. late	160-F
12/ 7/65	EDA	All EDA publications	Public statements only	Minimal information received	307-A
5/14/69	DOJ	Mitchell/voting rights	Declined (4 times)	Mitchell appeared June 26, 1969.	42-E
5/-/71	State	Brazil (NSC study)	Delay (7 mo.)	Moderately useful	9-BB
9/14/71	Treasury	Dickey/handguns, proofing of	No response	No response	160-A
6/-/69	HUD	FHA/unsafe glass doors	Improper coordination	Official was overruled	245-C
2/26/71	DOJ	Mercury pollution	Refused/Delaney v. United States	Open case/some data received	246-L
5/21/71	DOJ	do	Refused/DOJ order 116-56	do	246-L
5/21/71	DOS	do	Refused/legal ethics	do	246-L
7/ 1/71	DOJ	do	DOJ refused release	Partial disclosure	246-L
3/ 9/71	DOJ	Federal data banks, Army	Classified	Partially declassified	154-H
--/-/68	DOD	Tonkin Gulf (report)	Inappropriate to disseminate	Pentagon papers	9-Z
10/15/69	FCC	WIFE AM/FM license	Refused subpoena	Received after contempt citation.	29-E
11/16/71	DOJ	May day demonstration (District of Columbia), May 1, 1971.	No response	Report furnished (3 pages), Mar. 5, 1973.	151-F
10/30/70	DOD	Surveillance by military	Van Deman files	Response incomplete	154-N

**C.—SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED  
BUT SUBSEQUENTLY HONORED—Continued**

**4. Indexed by Ultimate Response—Continued**

Date of request	Agency inquired of	Subject matter of inquiry	Basis for refusal on specifics of inquiry	Ultimate resolution of request	File No.
(1)	(2)	(3)	(4)	(5)	(6)
8/22/72	PBC	Public broadcasting	Delays/refused	Right to audit unclear	50-N
8/22/72	DOJ	Administration bill, private-pension plan	Draft not final	Secretary appeared	287-D
2/28/70	DOL	Witness, private-pension plan	Refused	do	287-D
4/5/71	DOL	Hodges/Fair Labor Standards Act	Canceled appearance	do	287-E
9/28/72	GSA	Postal Service realty	Slow, inadequate	See 172-B, inadequate response	172-B
3/7/73	DOA	REA-loan statistics	Time limitation	Supplied, Mar. 8, 1973	18-B
3/13/69	ICC	Railroad merger/passenger service	Delay (3 mo.)	Supplied, Apr. 29, 1969	29-D
10/5/70	DOD	Surveillance by military	President Roosevelt's memorandum, 1939	Unable to declassify	154-L
10/28/71	FHA	Housing, FHA files	Verbal refusal, Boston	Viewed files in District of Columbia office.	248-G
2/1/73	DOA	Butz, Earl L. impoundment	President restricted	WH-permission granted	165-A
2/1/73	EPA	Ruckelshaus, W. D., impoundment	do	do	165-A
1/21/72	State	Exchange programs	Required further study	Yes/useful	9-AA

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## *Part III*

**Instances of Refusals of the Executive Branch**

**to**

**Provide Documentary or Testimonial  
Information**

**to**

**The United States Congress**

**and to**

**The Comptroller General of the United States**

**As reported to the Subcommittee on Separation of Powers of the Senate  
Committee on the Judiciary by the various committees and  
subcommittees of the 93d Congress and the  
Comptroller General of the United States**

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*A Note by the Subcommittee:* Hereinafter in Part III of this report are provided in full the submissions by the respondent committees and subcommittees of the 93d Congress and the Comptroller General of the United States, in file order. Supporting documents are provided in the order in which they were received.

In view of the wide variety of subject matter, and the broad scope of transactions reported upon within the various files, the attention of the reader seeking discrete areas of information is directed to the specialized indices found in Part II, of this report. A detailed central listing is provided at the commencement of each committee's or subcommittee's section of the report.

***Part III—Instances of Refusals of the Executive Branch to Provide Documentary or Testimonial Information to the United States Congress and to the Comptroller General of the United States***

**FILE 9**

**SENATE COMMITTEE ON FOREIGN RELATIONS**

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(9-A)

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*Washington, D.C., March 27, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your letter of March 9, I enclose documentation on a number of instances in which Federal officials have refused to provide information requested by the Committee on Foreign Relations, or its subcommittees.

Unfortunately, this could not be a complete list of such instances from January 1, 1964, through February 28, 1973, simply because of the time required for research. However, this list does give the Subcommittee on Separation of Powers an idea of the problems we have encountered in the Committee on Foreign Relations in the discharge of our responsibilities on behalf of the Senate.

I should point out that a great many of our difficulties in getting information from the executive branch are different (and sometimes greater) than can be elicited even by the carefully prepared forms you have submitted. For example, we frequently find a reluctance to tell the *whole* truth, or a lack of candor, or evasion, or obfuscation, or unresponsiveness, etc. We even had one during a secret session on Laos, of not being told about U.S. Military involvement there. The reason given (at a latter time when our own staff discovered the extent of our military activities) was that we hadn't asked when we didn't know there was anything to ask about!

Please call on us further if we may be of assistance.

Sincerely yours,

J. W. FULBRIGHT,  
*Chairman.*

(57)

## (9-B)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
2/25/72	William Rogers Secretary of State	Studies on Radio Free Europe and Radio Liberty programs	4/5/72	David Abshire	Some of the studies were sent to the Committee but others were not because it would be "...inappropriate for disclosure, particular as they are work products of the National Security Council system." (Unclassified correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee on Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 45615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
February 25, 1972.

Hon. WILLIAM P. ROGERS,  
Secretary of State,  
Washington, D.C.

DEAR MR. SECRETARY: It is my understanding that within the last few years the Executive Branch has had occasion to re-examine and re-evaluate the Radio Free Europe and Radio Liberty programs. In this connection, I believe that one such study, conducted by the Central Intelligence Agency, went so far as to include cost estimates for terminating the Radios' operations.

I should appreciate having a copy of this entire study as well as a brief explanation of why it was undertaken. In addition, I should appreciate a copy of any other studies bearing on the Radios, including any which may have been conducted on an inter-agency basis.

I submit this request to you in light of the legislative requirement contained in the Foreign Assistance Act of 1971:

"The Department of State shall keep the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives fully and currently informed with respect to all activities and responsibilities within the jurisdiction of those Committees. Any Federal department, agency, or independent establishment shall furnish any information requested by either such Committee relating to any such activity or responsibility."

I hope the information requested will be made available at your earliest possible convenience.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

DEPARTMENT OF STATE,  
*Washington, D.C., April 5, 1972.*

Hon. J. W. FULBRIGHT,  
*Chairman, Committee on Foreign Relations,*  
*U.S. Senate*

DEAR MR. CHAIRMAN: I am writing in regard to your letter to the Secretary of February 25, and my replies of March 6, 7 and 21, respecting studies pertaining to Radio Free Europe and Radio Liberty.

Under cover of my prior responses there have been conveyed to you several reports requested in your letter covering potential termination costs with respect to those radio operations.

We have continued to make further inquiry as to whether or not there are any other studies or reports

relating to the Radios which might be furnished to your Committee in response to your letter, and have determined that such other studies as exist, which, incidentally, do not include estimates of termination costs, would be inappropriate for disclosure, particularly as they are work products of the National Security Council system. I hasten to assure you, however, that you have now been furnished with the entirety of reports prepared in recent years containing cost estimates of termination of the operations of these Radios.

If I can be of any further assistance in this or any other matter, please do not hesitate to let me know.

Sincerely yours

DAVID M. ABSHIRE,  
*Assistant Secretary for Congressional Relations.*

(9-C)

SURVEY FORM L. REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)
May 1970	MACV (Military Assistance Command Vietnam)	Oral questions by staff members of the Committee on Foreign Relations on a visit to Cambodia and Vietnam.	May 1970		"...no authority to brief us." (Portion of staff members' printed report attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations

By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

[Excerpt from "Cambodia: May 1970," a staff report prepared for the use of the Committee on Foreign Relations, 91st Cong., 2d sess.; pp 11-12, June 7, 1970]

#### IV. The Mysteries of Military Assistance to Cambodia

By the time we left Phnom Penh on May 8, the Cambodian Government had received three kinds of military assistance of which we were aware. These were: some 6,000<sup>1</sup> captured AK-47 automatic rifles and ammunition therefor; 7,200<sup>1</sup> U.S. M-2 carbines; and several thousand Khmer CIDG soldiers, ethnic Khmers from Vietnam many, if not most, of whom had been serving as mercenaries under contract with U.S. Special Forces in Civilian Irregular Defense Group teams (Journalists reported from Phnom Penh that 2,100 had arrived, but President Thieu told reporters in Saigon on May 8 that 4,000 had been sent.

The AK-47's it was said in Phnom Penh, had been flown there from Saigon in South Vietnamese Air Force planes and had been drawn from stocks of weapons cap-

tured in Vietnam. U.S. officials in Phnom Penh said they did not have detailed information on the AK-47 shipments and suggested we inquire in Saigon. We were referred there to the South Vietnamese military. In the course of a briefing by a general on the Vietnamese Joint General Staff, one of the dozen or so most important generals in South Vietnam, we asked several detailed questions and were told, to our astonishment, that he knew nothing about the AK-47's and that they could not have been taken from ARVN stocks or flown to Phnom Penh in Vietnamese planes without his knowledge.

In response to further inquiries at the Embassy in Saigon and at MACV, we were told that the rifles had been sent in Vietnamese planes and that most had come from ARVN stocks. But everyone with whom we discussed the question at the Embassy and at MACV—including, in the latter case, a senior officer in the MACV logistics section who told us he had been assigned to answer our questions—said they did not know, or even who would know, how many of these rifles had come from U.S. stocks and how many from ARVN stocks, whether they had been reconditioned and if so by whom, when the first shipment had arrived,<sup>2</sup> what exact disposition was

<sup>1</sup> These figures were actually not released in Washington until May 14 in the course of a press conference after Ambassador Bunker had testified before the Committee in executive session.

made of the AK-47's captured by U.S. forces in Vietnam and what stocks of AK-47's the United States had.

In the case of the M-2's, MACV's responses to our questions were unequivocal. We were told that MACV had no authority to brief us on this matter, and it was suggested that our inquiries be made in Washington in writing to the Joint Chiefs of Staff. Similarly, in the case of the Khmer CIDG soldiers, officials in Phnom Penh referred us to Saigon. There we requested a briefing from MACV or Special Forces on such details as how many Khmer had been sent to Cambodia, whether all had been serving with U.S. Special Forces, when the first had arrived, when the United States had stopped paying their salaries, and whether the United States had paid for their arms. Again, we were told that Special Forces in Saigon had "no authority" to brief us.

We found in Phnom Penh that the arrival of the Khmer CIDG soldiers had first been discovered in the Cambodian capital by a correspondent who had spent years in Vietnam. He had noticed a Cambodian, who seemed to be wearing an American uniform, walking in the center of town and had asked him, in English, whether he was from Vietnam. The Cambodian replied: "Say again, sir," and when queried further replied, "I am not authorized to speak to the press, sir." The correspondent had little difficulty in concluding from the language of these replies that the Cambodian soldier in question had worked closely with American forces. Another reporter told us that he had talked to one of the Khmer soldiers who had told him that he had been in Phnom Penh for 4 to 6 weeks which would mean that he had arrived there during the month of March.

There had probably been other South Vietnamese, and perhaps United States, assistance to the Cambodian Government by the time we left Phnom Penh, but we were unable to discover what other assistance or its source. We had heard, for example, from several journalists in Phnom Penh, all experienced war reporters, that Chinook and Huey helicopters had been seen landing in the city. We visited the Embassy on our last morning in Phnom Penh and discussed these reports with the military attachés. They said that they knew nothing about either American or South Vietnamese helicopter flights into the capital and suggested that the reporters might have seen French Alouette helicopters, which the Cambodians have, and

concluded mistakenly that they were Hueys, which the Cambodians do not have.

At this point in the conversation, we heard the unmistakable sound of a helicopter approaching. Together with the military attachés, we ran out on the balcony of the Embassy in time to see a helicopter flying directly over the building at an altitude of a few hundred feet. The air attaché immediately identified the helicopter as a Huey, although none of us could see the markings on the fuselage, if indeed there were any. We asked repeatedly in Saigon for an explanation of this curious incident but without success. The mystery therefore remains, fleeting evidence of the difficulty of ascertaining what we and the South Vietnamese are doing in Cambodia.

So much for the willingness of U.S. military authorities in the field to provide representatives of the legislative branch with the details of U.S. assistance, or of U.S. involvement in South Vietnamese assistance, to the Government of Cambodia. If the details had been given to us on a classified basis, they could not have been discussed in a public report of this nature. But the fact of the matter is that the details were not provided.

In connection with the question of relations between the executive and legislative branches in the field, it may not be generally known that there is a practice in Vietnam of requiring that U.S. military officers and civilian officials report in writing on conversations with, and the activities of, legislative branch representatives. On both this trip and our last visit to Vietnam in December 1969, our military escorts, as well as the military officers and civilian officials we met in the course of our trip, were asked to submit memoranda of their conversations with us, and to report on what question we asked and what our views seemed to be. We were not told that this practice would be followed. We happened, by chance, to have seen several of these memoranda over the past 6 months and have found them to be inaccurate and incomplete in some important respects and to reflect the perhaps understandable desire of the reporting officer to put his comments in the best possible light and to report ours somewhat less generously. We have never been given the chance to confirm the accuracy of these reports. They thus stand as official records of conversations, although they are often reports of what might have been, but was never quite, said.

## (9-D)

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
1/27/71 4/20/71	Melvin Laird Secretary of Defense	Monthly report on certain operations in Laos and Cambodia.	4/14/71  5/5/71 (additional denial)	G.Warren Nutter Asst.Secretary for Internat'l Security Affs.	"...not be appropriate to discuss or disclose" this type of information "outside the Executive Branch." (Correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54013  
Extension

[Excerpt from the *Congressional Record*, Nov. 10, 1971, pp. S18132-S18134, correspondence, "Special Foreign Military and Related Assistance Act of 1971."]

### SPECIAL FOREIGN MILITARY AND RELATED ASSISTANCE ACT OF 1971

Mr. MANSFIELD. Mr. President, I ask unanimous consent, again, that H.R. 10947, an act to provide a job development investment credit, to reduce individual income taxes, to reduce certain excise taxes, and for other purposes, be laid aside temporarily and that the Senate turn to the consideration of Calendar 424, S. 2819; that it be laid before the Senate and made the pending business.

The PRESIDING OFFICER. The bill will be stated by title.

The second assistant legislative clerk read the bill by title, as follows: A bill (S. 2819) to provide foreign military and related assistance authorizations for fiscal year 1972, and for other purposes.

The PRESIDING OFFICER. Without objection, the Senate will proceed to its consideration.

What is the will of the Senate?

Mr. FULBRIGHT. Mr. President, I yield myself 2 minutes on the bill.

### INFORMATION ON LAOS AND CAMBODIA

Mr. President, in the course of the debate on foreign aid on November 9, I mentioned repeatedly the difficulty the committee has had in obtaining information from the executive branch. Let me cite one case, a case I cited before during the debate on the provision in the defense procurement authorization bill setting an expenditure limitation of \$350 million for this fiscal year in Laos.

I mentioned during that debate, on October 4 to be exact, that on January 27 of this year I had written the Secretary of Defense asking for certain information for Laos and Cambodia similar to the information that has been regularly supplied to the committee for some years with regard to Vietnam. Mr. G. Warren Nutter, Assistant Secretary of Defense for International Security Affairs, replied on April 14 and said that he could not comply with my request because—

"It would not be at all appropriate to discuss or disclose outside the executive branch highly sensitive information on military combat operations of the kind which your questions would elicit if answers were to be provided."

I wrote Mr. Nutter again on April 20 and asked him to provide the committee with a list of the items which he

considered to be "highly sensitive information on military combat operations." He replied on May 5 and used another argument which was that because there were no U.S. military advisory personnel in Laos and Cambodia the Defense Department did not have the information requested.

On August 9 I wrote Mr. Nutter again and pointed out that two members of the staff of the Subcommittee on U.S. Security Agreements and Commitments Abroad had visited Laos and had obtained virtually all of the information requested in my original letter of January 27. Furthermore, with the agreement of the Department of State, Department of Defense and the Central Intelligence Agency, a declassified version of that report had been published. I concluded that it did not seem to me any longer credible to claim that the information requested on Laos was not available or that, if it were, it could not be discussed or disclosed outside the executive branch. I then renewed my request for the information I had requested on January 27.

That letter, as I have said, was dated August 9. It is now more than 3 months later and, despite numerous inquiries by the committee staff to the Defense Department, I have still not received any reply whatsoever to my letter.

I ask unanimous consent that the full exchange of correspondence be printed in the RECORD at this point.

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

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
January 27, 1971.

Hon. MELVIN R. LAIRD,  
Secretary of Defense,  
Washington, D.C.

DEAR MR. SECRETARY: As you know, at the request of the Committee on Foreign Relations the Department of Defense has, for sometime, been supplying it with monthly statistical data relating to the situation in Vietnam. This information has proved to be extremely valuable in following developments there.

The Committee is finding it increasingly difficult to keep abreast of the rapid developments in Cambodia, Laos, and North Vietnam, and I believe that a monthly report containing data relating to those countries would be helpful. The Committee would, therefore, appreciate the Department's cooperation in supplying, on a monthly basis, the information requested on the enclosed list.

I, of course, have no objection to your making this information available to other interested congressional committees, as was done in the case of the Vietnam reports.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

MONTHLY DATA ON MILITARY OPERATIONS IN SOUTHEAST ASIA  
*Cambodia*

1. Size of Cambodian Armed Forces:

- (a) Trained and Combat Ready;
- (b) In training (specific location if outside Cambodia) or other;
- (c) On duty outside Cambodia (other than training).

2. Number of friendly foreign troops in Cambodia:

- (a) South Vietnamese;
- (b) Other (specify).

3. Number of enemy troops in Cambodia:

- (a) North Vietnamese/Viet Cong;
- (b) Cambodian Communist;
- (c) Engaged in combat operations:
  - 1. against Cambodian forces;
  - 2. against South Vietnam forces,

4. Combat air operations in Cambodia:

- (a) Sorties flown by:

- 1. U.S. planes;
- 2. Sorties flown by Cambodian planes;
- 3. Sorties flown by South Vietnamese planes;
- 4. Sorties flown by Thais or other forces;

- (b) Ordnance expended (bomb tonnage and other) by U.S. aircraft in Cambodia:

- 1. B-52.

- 2. other fixed wing aircraft;
- 3. helicopter gunships, etc.

5. Casualties (military):

- (a) Enemy killed, wounded and captured;
- (b) Cambodian killed, wounded and missing;
- (c) South Vietnamese killed, wounded and missing;
- (d) U.S. casualties or missing as a result of air or other operations.

6. Transport and Supply Operations:

- (a) Number of flights flown by U.S. military transport aircraft to Cambodian airports;
- (b) Number of U.S. helicopter transport flights flown in Cambodia;
- (c) Number of air drop missions flown by U.S. aircraft in Cambodia;
- (d) Number of transport flights by U.S. non-military aircraft (Air America, etc.);
- (e) Number of transport flights by South Vietnamese or other aircraft;

- (f) Number of supply missions by South Vietnamese naval vessels;

- (g) Please provide copies of any contracts or agreements with foreign government or private entities relating to supply or transport operations in Cambodia, including data on amounts paid or reimbursed for such services and the sources of the funding.

7. Payments made by the United States to South Vietnam or other countries for operations in or services rendered in behalf of Cambodia:

- (a) Amounts or any such payments and the purpose;

- (b) Provide copies of any agreements entered into by the United States concerning payments to foreigners for services rendered in or in behalf of Cambodia and the source of the funding.

8. Number of U.S. personnel involved:

- (a) Number of U.S. personnel attached permanently or temporarily to the U.S. Embassy in Cambodia—civilian, military;
- (b) Number of visits in Cambodia by U.S. personnel in a TAD or other temporary status and total number of days of such duty by all personnel during the month;

- (c) Number of U.S. personnel in South Vietnam, Thailand, or Laos whose duties relate to operations in Cambodia, including training and logistics operations.

9. U.S. Naval operations:

- (a) Number and type of U.S. ships operating in or near Cambodian waters during the month engaged in operations relating to Cambodia;
- (b) Number of visits to Cambodian ports by U.S. naval vessels engaged in supply or transport operations.

10. Estimated number of U.S. prisoners held in Cambodia.

*Laos*

1. Number of United States personnel in Laos:

- (a) Civilian (government employees);
- (b) Military;
- (c) Personnel on temporary duty, civilian and military (total number of man-days);
- (d) Contractor employees (Air America, etc.).

2. Number of friendly military forces:

- (a) Regular Laotian Armed Forces;
- (b) Irregular Forces;
- (c) Thai Forces in Laos;
- (d) Other Forces in Laos (Cambodian, South Vietnamese, etc.).

3. Enemy forces in Laos:

- (a) Pathet Lao;
- (b) North Vietnamese;
- (c) Viet Cong.

4. Air Operations in Laos:

- (a) U.S. air sorties over Northern Laos and munitions expended:
  - 1. B-52;
  - 2. Other aircraft.
- (b) U.S. air sorties over Southern Laos and munitions expended:
  - 1. B-52;
  - 2. Other aircraft.

- (c) Air sorties by Laotian forces and munitions used.

5. Casualties—killed or wounded:
  - (a) United States;
  - (b) Laotian;
  - (c) Other friendly;
  - (d) Enemy.
6. Incursions into Laos from South Vietnam or Cambodia:
  - (a) Purpose, date and number of U.S. and foreign personnel involved in each incursion.
7. Please provide copies of any contracts or agreements entered into during the month between the United States and other countries or private parties relating to military operations in Laos.
8. Estimated number of U.S. prisoners held in Laos.

*North Vietnam*

1. U.S. air operations over North Vietnam:
  - (a) Number of reconnaissance flights flown;
  - (b) Number of escort sorties flown;
  - (c) Number of helicopters or other manned aircraft sorties flown;
  - (d) Number of drone flights.
2. Enemy actions and U.S. losses:
  - (a) Number of times U.S. aircraft were fired upon while over North Vietnam;
  - (b) Number of times U.S. aircraft were fired upon from North Vietnam while over Laos;
  - (c) Number of U.S. aircraft lost (by type) over North Vietnam due to enemy fire;
  - (d) Number of U.S. aircraft lost over North Vietnam (by type) not as a result of enemy fire;
  - (e) U.S. personnel losses.
3. Retaliatory action taken:
  - (a) Number of times North Vietnam targets were attacked:
    1. Number of aircraft involved in retaliatory actions;
    2. Quantities of munitions used in retaliatory action.
4. Description of actions by South Vietnamese or other forces in North Vietnam.
5. Estimated number of U.S. prisoners held in North Vietnam.

ASSISTANT SECRETARY OF DEFENSE,  
INTERNATIONAL SECURITY AFFAIRS,  
*Washington, D.C., April 14, 1971.*

Hon. J. W. FULBRIGHT,  
*Chairman, Committee on Foreign Relations,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Secretary Laird has asked me to respond to your letter of 27 January in which you requested that the Senate Committee on Foreign Relations be furnished, on a continuing basis, a detailed monthly report on military operations in Southeast Asia.

I regret that we are unable to comply with your request in this instance. Deputy Secretary Packard's letter to Senator Symington of 11 June 1970, a copy of which Senator Symington forwarded to you, pointed out that it would not be at all appropriate to discuss or disclose outside the Executive Branch highly sensitive information on military combat operations of the kind which your questions would elicit if answers were to be provided.

Sincerely,

G. WARREN NUTTER.

THE DEPUTY SECRETARY OF DEFENSE,  
*Washington, D.C., June 11, 1970.*

Hon. STUART SYMINGTON,  
*Chairman, Subcommittee on U.S. Security Agreements and Commitments Abroad, Senate Committee on Foreign Relations, Washington, D.C.*

DEAR SENATOR SYMINGTON: I understand that when Generals Burchinal and Polk appeared as witnesses before your Subcommittee in late May, they were requested to make available to the Subcommittee copies of written instructions they had received both in connection with the European trip of staff members Pincus and Paul and with reference to their testimony before your Subcommittee.

I am sure you will appreciate that those instructions, by definition, were documents intended solely for internal use within the Department of Defense and I would hope that you would agree with me that such documents should not be distributed outside the Executive Branch.

From your personal experience as a former Secretary of the Air Force, you are well acquainted with the fact that, on the basis of custom, tradition, usage and precedent, the Legislative and Executive Branches have come to accept and recognize that there are certain matters which, for varying reasons, are not normally discussed outside the Executive Branch. The instructions in question contained topics meeting that general description for the most part and included such items as military contingency plans. National Security Council documents, Inspector-General Reports of Investigations, matters still in the planning, proposal stage upon which no decision has been reached, operation procedures and methods involving the risk of life or safety of military personnel and so forth.

Early in the Subcommittee hearings, a misunderstanding apparently developed in connection with the handling or manner of treatment of information on nuclear weapons, a misunderstanding which, as I understand it, has been resolved by the briefing given to the Senate Committee on Foreign Relations on 27 May 1970.

These categories of information are those which have become widely accepted and generally recognized as topics which in the national interest, should be strictly limited in either dissemination or discussion. Be assured that any prohibitions against discussing such topics apply to all testimony and were not, of course, restrictive solely to witnesses appearing before your Subcommittee.

Secretary Laird asked me to convey his apology for the delay in responding to your request, a delay which was occasioned by the urgency of preparing for his trip to Europe.

I trust that you will find this responsive to your Subcommittee's interest in this matter.

Sincerely,

DAVID PACKARD.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*April 20, 1971.*

Hon. G. WARREN NUTTER,  
*Assistant Secretary for International Security Affairs, Department of Defense, Washington, D.C.*

DEAR MR. NUTTER: I wish to acknowledge your letter of April 10 in reply to the Committee's request for a monthly report on certain developments in Cambodia and Laos.

You state that the information requested would involve "highly sensitive information on military combat operations" which would not be "appropriate to discuss or disclose outside the Executive Branch." Would you please provide the Committee with a list of the items requested which you consider to be in this category. In order to avoid further delay and without passing on the merits of the Department's position on those items, I would appreciate your providing the Committee with monthly reports on the other items not in this category.

Sincerely yours,

J. W. FULBRIGHT, Chairman.

ASSISTANT SECRETARY OF DEFENSE,  
INTERNATIONAL SECURITY AFFAIRS,  
*Washington, D.C., May 5, 1971.*

Hon. J. W. FULBRIGHT,  
*Chairman, Committee on Foreign Relations,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This will acknowledge the receipt of your letter of April 20, 1971, relative to our exchange of correspondence in connection with the request of the Senate Committee on Foreign Relations to be provided a monthly report on a continuing basis of certain military combat operations conducted by U.S. forces and the indigenous forces of the governments of Laos and Cambodia.

The information required to respond to questions concerning the size and combat readiness of indigenous armed forces, their air and ground combat operations, the enemy forces they encounter and the casualties they inflict and sustain, etc., is normally provided through U.S. military personnel acting in a military advisory assistance role who accompany the host country forces on combat operations. However, the Geneva Accords, the so-called Cooper-Church Amendment and certain other restrictions imposed by the Congress in enacting the Defense Authorization Bill have, in combination, prohibited by law the presence of U.S. military advisory personnel in Laos and Cambodia which, in turn, effectively precludes reliable reporting to the Department of Defense of information of that nature.

Additionally, there are a number of other questions that were posed such as those relating to U.S. civilian personnel in Laos and Cambodia who are employed either by other U.S. Government agencies or by private contractors that do not fall under the cognizance of the Department of Defense.

Finally, the possibility that identical or similar missions are military operations may be required in the same general geographical area at some indefinite future date creates a sensitivity that precludes discussing outside the Executive Branch, specific details with respect to cross border incursions by allied forces, intelligence gathering operations, frequency and area of coverage of reconnaissance and attack sorties, types of aircraft employed and types and tonnages of ordnance expended, etc.

Again I regret that we are unable to respond to your Committee's request in this instance.

Sincerely,

G. WARREN NUTTER.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
August 9, 1971.

Mr. G. WARREN NUTTER,  
*Assistant Secretary for International Security Affairs, Department of Defense, Washington, D.C.*

DEAR MR. NUTTER: On January 27, 1971, I wrote Secretary Laird, noting that the Department of Defense had been supplying the Committee for some time with monthly statistical data relating to the situation in Vietnam and asking for a monthly report relating to developments in Cambodia, Laos and North Vietnam. You replied, for Secretary Laird, on April 14 and said that you were unable to comply with my request because "it would not be at all appropriate to discuss or disclose outside the Executive Branch highly sensitive information on military combat operations of the kind which your questions would elicit if answers were to be provided."

I then wrote you on April 20 and asked whether you could provide the Committee with a list of the items requested which you considered to be in the category of "highly sensitive information on military combat operations" which would not be "appropriate to discuss or disclose outside the Executive Branch."

You replied on May 5, saying in your letter:

"The information required to respond to questions concerning the size and combat readiness of indigenous armed forces, their air and ground combat operations, the enemy force they encounter and the casualties they inflict and sustain, etc., is normally provided through U.S. military personnel acting in a military advisory assistance role who accompany the host country forces on combat operations. However, the Geneva Accords, the so-called Cooper-Church Amendment and certain other restrictions imposed by the Congress in enacting the Defense Authorization Bill have, in combination, prohibited by law the presence of U.S. military advisory in Laos and Cambodia which, in turn, effectively includes reliable reporting to the Department of Defense of information of that nature.

I now renew my request for the information on Laos on a monthly basis requested in my original letter of January 27, 1971. Since our exchange of correspondence, two members of the Committee staff have visited Laos and they have obtained the answers to virtually all of the questions regarding the situation in Laos in the enclosure to my letter of January 27. Furthermore, as you know, their report has now been declassified and published, after review by the Departments of State and Defense and the Central Intelligence Agency. Thus, it does not seem to me any longer credible to claim that you cannot provide answers to these questions on the ground that "it would not be at all appropriate to discuss or disclose outside the Executive Branch highly sensitive information of military combat operations of the kind which your questions would elicit if answers were to be provided." Nor, it seems to me, can you sustain the argument that "The information required to respond to questions concerning the size and combat readiness of indigenous armed forces, their air and ground combat operations, the enemy forces they encounter and the casualties they inflict and sustain, etc., is normally provided through U.S. military personnel acting in a military advisory assistance role who accompany the host country forces on combat operations."

Semantic arguments aside, the fact of the matter is that the information I have requested is available because it has been provided to members of the Committee staff. I would now like to receive this information on a monthly basis.

I am enclosing a copy of the questions I sent the Department of Defense regarding Laos as an enclosure to my letter of January 2.

Sincerely yours,

J. W. FULBRIGHT,  
*Chairman.*

## (9-E)

## SURVEY FOR 1 L: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/25/70	William Rogers Secretary of State	Copies of the reports of Amb. Korry in Chile as well as all instructions sent to him, since September 4, 1970.	9/28/70	David Abshire	Departure from practices that have been well established throughout the Department's history.  (Correspondence attached.)
3/7/73	William Rogers Secretary of State	Copies of cables to Chile and to Department from August 1, 1970 to January 31, 1971. (For use by the Subcommittee on Multinational Corporations in its investigation of activities of ITT in Chile.)	No response		

Separation of Powers Subcommittee SURVEY,  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations

By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
September 25, 1970.

Hon. WILLIAM P. ROGERS,  
Secretary of State,  
Washington, D.C.

DEAR MR. SECRETARY: I am very disturbed by reports which have reached me concerning possible American intervention, direct or indirect, in Chile. This is one of the subjects I want to discuss with Under Secretary Irwin and

Assistant Secretary Meyer when they appear before the committee next week.

In preparation for that hearing, I would appreciate it if you would supply to the Committee in advance copies of the reports from Ambassador Korry since September 4 as well as copies of all instructions which have been sent to him since that date.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

DEPARTMENT OF STATE,  
Washington, D.C., September 28, 1970.

Hon. J. W. FULBRIGHT,  
Chairman, Committee on Foreign Relations,  
U.S. Senate.

DEAR MR. CHAIRMAN: In response to your letter to the Secretary dated September 25, I am pleased to confirm that Under Secretary Irwin will appear in executive session before the Committee on Foreign Relations at 10 a.m. on September 30.

With regard to your request for the reports from our Ambassador to Chile and the instructions sent him by the Secretary of State since September 4, I hope you will understand that the Department is unable to accede to this request which would lead to a departure from practices that have been well established throughout our history. In this regard, I trust that the testimony on Wednesday can satisfy the Committee's need for information.

As requested, the Under Secretary will be accompanied by Assistant Secretary of State for Inter-American Affairs Charles Meyer, Deputy Assistant Secretary of State for Near Eastern and South Asian Affairs Roy Allerton, and the Country Director for Andean and Pacific Affairs John W. Fisher.

Sincerely yours,  
DAVID M. ABSHIRE,  
*Assistant Secretary for Congressional Relations.*

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
March 7, 1973.

Hon. WILLIAM P. ROGERS,  
*Secretary of State,*  
*Washington, D.C.*

DEAR MR. SECRETARY: As you know, the Subcommittee on Multinational Corporations is engaged in the investigation of the activities of the International Telephone and Telegraph Company in connection with the election of Salvador Allende Gossens as President of Chile.

In connection with this investigation, it would be helpful to the Subcommittee if the Department would make available the cables from Santiago to the State Department and from the State Department to Santiago for the period August 1, 1970, through January 31, 1971. Either Mr. Jerome Lenvison or Mr. Jack Blum of the staff of the Subcommittee would be available to examine the documents at your convenience.

Your cooperation will be greatly appreciated.  
Sincerely,

FRANK CHURCH,  
*Chairman, Subcommittee on Multinational Corporations.*

## (9-F)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
12/24/69	William Rogers Secretary of State	Report by Sir Robert Thompson on the situation in Vietnam.			
12/3/70 1/26/71	David Abshire Department of State	" " "	2/12/71	David Abshire	Report "was prepared for the President personally." (Correspondence attached)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

FILE 9

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
December 24, 1969.

Hon. WILLIAM P. ROGERS,  
Secretary of State,  
Washington, D.C.

DEAR MR. SECRETARY: As you know, in the President's recent television speech on Vietnam he mentioned a report which he had received from Sir Robert Thompson. Would it be possible for this report to be made available to the Committee on Foreign Relations?

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
December 3, 1970.

Hon. DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations,  
Department of State,  
Washington, D.C.

DEAR MR. ABSHIRE: This morning's *New York Times* reports that Sir Robert Thompson has prepared a report on the situation in Vietnam for the Executive Branch. I should appreciate it if you would supply the Committee with a copy of this report.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*January 26, 1971.*

Hon. DAVID M. ABSHIRE,  
*Assistant Secretary for Congressional Relations,*  
*Department of State,*  
*Washington, D.C.*

DEAR MR. ABSHIRE: On December 3, 1970, I wrote to you requesting that the Committee be supplied with a copy of a report by Sir Robert Thompson on the situation in Vietnam. I would appreciate it if you would advise me when the Committee might expect to receive a copy of the report.

Sincerely yours,

J. W. FULBRIGHT,  
*Chairman.*

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ASSISTANT SECRETARY OF STATE,  
*Washington, D.C., February 3, 1971.*

Hon. J. W. FULBRIGHT,  
*Chairman, Committee on Foreign Relations,*  
*U.S. Senate.*

DEAR MR. CHAIRMAN: This is in reply to your letter of January 26, inquiring about the status of your earlier request for a copy of Sir Robert Thompson's most recent report on the situation in Vietnam. I wish you to know that we are actively working on your request and that I will be in touch with you as soon as it is possible to give you a definite answer.

Sincerely,

DAVID M. ABSHIRE.

DEPARTMENT OF STATE,  
*Washington, D.C., February 12, 1971.*

Hon. J. W. FULBRIGHT,  
*Chairman, Committee on Foreign Relations,*  
*U.S. Senate.*

DEAR MR. CHAIRMAN: This is in further reply to your letter of January 26, and my interim reply dated February 3 concerning a recent report prepared by Sir Robert Thompson on the situation in Viet-Nam.

I regret it is not possible to comply with your request. Sir Robert's most recent report, as was the case with the earlier one (a copy of which your Committee requested last year) was prepared for the President personally. Thus, in line with the Administration's policy in such instances and our reply to your request of last December, the report is not being made available to the Congress nor to the public.

Sincerely yours,

DAVID M. ABSHIRE,  
*Assistant Secretary for Congressional Relations.*

(9-G)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
2/8/72	David Abshire Department of State	Request for the report on world oil supplies.	3/1/72	David Abshire	"The paper is a preliminary working draft that is being used internally for discussions with other agencies with interests in the energy field." (Correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

Submitted by: (Comm/Subcomm) Committee  
on Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
extension

FILE 9

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
February 8, 1972.

Hon. DAVID ABSHIRE,  
Assistant Secretary for Congressional Relations,  
Department of State, Washington, D.C.

DEAR DAVE: In the Washington Daily News of Thursday, February 3, (copy attached) there was reference to a new State Department report on world oil supplies which suggests that in the relatively near future the United States may need to import much greater quantities of oil than is now the case.

I would appreciate it if the Committee might receive a copy of the report for its study.

Sincerely yours,

CARL MARCY,  
Chief of Staff.

[Excerpt from the Washington Daily News, Washington, D.C., Feb. 3, 1972]

ACT NOW ON ALASKAN OIL

A new State Department report on world oil supplies offers more evidence that the United States may be headed for a serious fuel squeeze in the 1980s.

The report cautions against delaying a decision on how to pump oil out of Alaska's northern slope—a decision that should have been reached long before this.

It also urges the government to promote mass transit systems as a way to save auto fuel, and recommends more research on nuclear power and other sources of energy. Both are good suggestions.

The key finding in the report is that the United States, which now is not dependent on Middle East oil, may be forced to import more than one-third of its needs from that area as daily oil consumption rises from 15.5 million barrels to 24 million barrels by 1980.

This is risky business for two reasons: Arab oil nations are increasingly difficult to deal with, and our national security would be threatened if our oil supply suddenly were cut off.

Failure to act on the Alaska pipeline is particularly vexing because the various proposals have been under study by the Interior Department for nearly two years.

The administration seems to be leaning toward running a pipeline down the spine of Alaska, then shipping the oil to West Coast refineries. Conservationists prefer a longer pipeline thru Canada to eliminate the danger of tanker spills.

Congress cleared the way for a possible Alaskan route in December by settling an old dispute with the Aleuts, Eskimos and Indians over native land claims.

Whichever route is chosen, the government has had plenty of time to document its case and come up with a final recommendation.

Carefully weighing all sides of an argument has its virtues, of course. But by now the powers-that-be should stop hedging, make up their minds and get on with the job.

DEPARTMENT OF STATE,  
*Washington, D.C., March 1, 1972.*

Mr. CARL MARCY,  
*Chief of Staff, Committee on Foreign Relations, U.S. Senate,*  
*Washington, D.C.*

DEAR CARL: I am pleased to reply to your letter of February 8, 1972 requesting that a copy of a Department of State report on world oil supplies be made available to the Committee on Foreign Relations.

The report is a paper drafted in the Department which deals with the international oil situation and the possibility of a serious energy crisis in the United States. The paper is a preliminary working draft that is being used internally for discussions with other agencies with interests in the energy field.

We would be most pleased to brief the Committee on our views on the energy crisis and its implications for our foreign policy, and we shall contact you to discuss arrangements for such a briefing.

Sincerely yours,

DAVID M. ABSHIRE,  
*Assistant Secretary for Congressional Relations.*

## (9-H)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
3/1/72	Frank Shakespeare Director, U. S. Information Agency	USIA Country Program Memoranda	3/16/72	Shakespeare	President Nixon's directive of Mar. 15, 1972 and Aug. 30, 1971 invoking Executive Privilege. (Correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee  
on Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
March 1, 1972.

Mr. FRANK SHAKESPEARE,  
Director, U.S. Information Agency,  
Washington, D.C.

Dear Mr. SHAKESPEARE: I am enclosing a copy of Mr. Ablard's letter of February 28 to Mr. Robert Dockery of the Committee staff concerning the status of the Country Program Memoranda prepared by the United States Information Agency. I understand from Mr. Ablard's letter that the Memoranda are regarded as "internal planning or working documents" and as such, the Agency believes that "it would not be appropriate to provide these documents to the Committee."

As you know, the "Agency in Brief 1972" publication describes this material in the following way:

"These CPM's (Country Program Memoranda) are designed to integrate USIS planning and resource alloca-

tion with overall U.S. objectives in the country. The CPM's encompass total Agency resources devoted to the country, including media products and materials supplied from Washington." (p.19)

I believe this information would be of interest to all Members of the Committee and of particular assistance to them in connection with the Agency's authorization hearings, beginning March 20.

In view of this, I am requesting that the Agency reconsider its decision and agree to make this information available to the Committee. I should appreciate hearing from you on this matter at your earliest convenience and, hopefully, no later than March 10. If the original decision is maintained, I should like to know what the Agency's legal authority is for withholding this type of information from the Congress.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

U. S. INFORMATION AGENCY,  
Washington, D.C., March 16, 1972.

Hon. J. WILLIAM FULBRIGHT,  
Chairman, Committee on Foreign Relations, U.S. Senate,  
Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of March 1, I am enclosing herewith the President's directive dated March 15 from which you will note that I am unable to comply with your request for the USIA Country Program Memoranda and associated planning documents. I find that the material you request clearly falls within the scope of the President's directive.

My staff and I have carefully examined the so-called Country Program Memoranda and find that, for the most part, these are planning or working documents subject to subsequent discussion and final approval. These documents are under constant review, and programs are changed in the light of changing developments in Washington and in the host countries.

You will note from the President's directive that he wishes the Administration to be wholly responsive to Congressional requests subject only to restrictions necessary for the proper functioning of the Executive Department.

With this objective in view, I shall be happy to supply your Committee with summaries of the approved country objectives together with a description of the activities proposed to implement them. Also, our key officers, including myself and the Assistant Directors for each geographic area, are ready to provide your staff with country-by-country briefings as well as being available at all times for questioning by you and your colleagues.

Sincerely,

FRANK SHAKESPEARE.

THE WHITE HOUSE,  
Washington, D.C., March 15, 1972.

MEMORANDUM FOR: THE SECRETARY OF STATE, THE DIRECTOR, U.S. INFORMATION AGENCY

As you know, by a memorandum of August 30, 1971 to the Secretary of State and the Secretary of Defense, I directed "not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions." In that memorandum, I fully explained why I considered that the disclosure of such internal working papers to the Congress would not be in the public interest.

I have now been informed that the Senate Foreign Relations Committee and the House Foreign Operations and Government Information Subcommittee have re-

quested basic planning documents submitted by the country field teams to the United States Information Agency and the Agency for International Development, and other similar papers. These documents include all USIA Country Program Memoranda and the AID fiscal year 1973 Country Field Submission for Cambodia, which are prepared in the field for the benefit of the agencies and the Department of State and contain recommendations for the future.

I hereby reiterate the position of this Administration so that there can be no misunderstanding on this point.

My memorandum for the Heads of Executive Departments and Agencies, dated March 24, 1969, set forth our basic policy which is to comply to the fullest extent possible with Congressional requests for information. In pursuance of this policy, the Executive Departments and Agencies have provided to the Congress an unprecedented volume of information. In addition, Administration witnesses have appeared almost continuously before appropriate Committees of the Congress to present pertinent facts and information to satisfy Congressional needs in its oversight function and to present the views of the Administration on proposed legislation.

The precedents on separation of powers established by my predecessors from first to last clearly demonstrate, however, that the President has the responsibility not to make available any information and material which would impair the orderly function of the Executive Branch of Government, since to do so would not be in the public interest. As indicated in my memorandum of March 24, 1969, this Administration will invoke Executive Privilege to withhold information only in the most compelling circumstances and only after a rigorous inquiry into the actual need for its exercise.

In accordance with the procedures established in my memorandum of March 24, 1969, I have conducted an inquiry with regard to the Congressional requests brought to my attention in this instance. The basic planning data and the various internal staff papers requested by the Senate Foreign Relations Committee and the House Foreign Operations and Government Information Subcommittee do not, insofar as they deal with future years, reflect any approved program of this Administration, but only proposals that are under consideration. Furthermore, the basic planning data requested reflect only tentative intermediate staff level thinking, which is but one step in the process of preparing recommendations to the Department Heads, and thereafter to me.

I repeat my deep concern, shared by my predecessors, that unless privacy of preliminary exchange of views between personnel of the Executive Branch can be maintained, the full frank and healthy expression of opinion which is essential for the successful administration of Government would be muted.

Due to these new requests for documents of a similar nature to those covered by my August 30, 1971 directive,

Due to these facts and considerations, it is my determination that these documents fall within the conceptual scope of my directive of August 30, 1971 and that their disclosure to the Congress would also, as in that instance, not be in the public interest.

I, therefore, direct you not to make available to the Congress any internal working documents concerning the foreign assistance program or international information activities, which would disclose tentative planning data, such as is found in the Country Program Memoranda and the Country Field Submissions, and which are not approved positions.

I have again noted that you and your respective Department and Agency have already provided much information and have offered to provide additional information including planning material and factors relating to our foreign assistance programs and international information activities. In implementing my general policy to provide the fullest possible information to the Congress, I will expect you and the other Heads of Departments and Agencies to continue to make available to the Congress all information relating to the foreign assistance program and international information activities not inconsistent with this directive.

RICHARD NIXON.

## (9-I)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
5/21/69	Melvin Laird Secretary of Defense	Five Year MAP Plan	8/31/71	Laird transmitted memo from the President	<p>President directed Defense not to make available any internal working document not approved as Executive Branch positions. (Exec. Privilege</p> <p>(There is attached a staff memorandum listing the letters sent by the Committee and the replies. Texts can be furnished upon request.)</p>

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee on

Foreign Relations

By:	Carl Marcy
Title:	Chief of Staff 54615
Extension	

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*September 14, 1971.*

STAFF MEMORANDUM ON THE COMMITTEE'S EFFORTS TO OBTAIN ACCESS TO THE FIVE YEAR PLAN FOR THE MILITARY ASSISTANCE PROGRAM

## I. Summary of the Issue

Beginning in early 1969 the Committee has made a number of attempts to obtain, on a confidential basis, a copy of the "Five Year Plan" for the military assistance program in order to enable it to appraise the Executive Branch's annual request for military aid in the context of the long-range planning of which the annual authorization request is a part. These plans were described by Secretary Laird, in a letter to the Chairman dated June 26, 1969, as ". . . five year, time-phased schedules of action, by areas and by countries, intended to assure that each year's Military Assistance Program conforms to a consistent purpose which has been projected well ahead . . . The military assistance plans are revised annually and projected an additional year, thus maintaining the five-year projection."

If a further effort to obtain the information, on July 28, the Committee decided, by a vote of 15-0, to invoke a provision of the Foreign Assistance Act of 1961 which was designed to insure Congressional access to Executive Branch documents and materials relating to the foreign aid program. The provision had never been invoked until then. The text follows:

SEC. 634(c) "None of the funds made available pursuant to the provisions of this Act shall be used to carry out any provision of this Act in any country or with respect to any project or activity, after the expiration of the thirty-five-day period which begins on the date the General Accounting Office or any committee of the Congress charged with considering legislation, appropriations or expenditures under this Act, has delivered to the office of the head of any agency carrying out such provision, a written request that it be furnished any document, paper, communication, audit, review, finding, recommendation, report, or other material in its custody or control relating to the administration of such provision in such country or with respect to such project or activity, unless and until there has been furnished to the General Account-

ing Office, or to such committee, as the case may be, (1) the document, paper, communication, audit, review, finding, recommendation, report, or other material so requested, or (2) a certification by the President that he has forbidden the furnishing thereof pursuant to request and his reason for so doing."

In a memorandum to the Secretaries of State and Defense dated August 30, the President directed them "...not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions."

## *II. Background of the Problem*

1. The Committee's initial request of May 21, 1969 stemmed from the Defense Department's refusal to allow the General Accounting Office access to the "Five Year Plan" and other documents the GAO considered necessary to enable it to carry out a study for the Committee of the foreign military training program. In reply to the Chairman's letter to Secretary Laird, asking that the Defense Department give the GAO access to the information needed to comply with the Committee's request, the Secretary replied on June 26, 1969 stating that "...the reason the entire Five Year Plan was not made available is because it is regarded as a staff study, an entirely tentative planning document at the staff level . . ."

2. On February 26, 1971, the Chairman again wrote to Secretary Laird asking that the "Five Year Plan" and similar long-range planning materials be made available to the Committee to enable it to comply with a requirement in the recently enacted Legislative Reorganization Act of 1970 that committee reports on bills contain five-year estimates of the costs of carrying out the program involved. No substantive reply was received to that letter.

3. On April 30, 1971, the Chairman wrote to Secretary Laird requesting that three documents the Committee had requested (the "Five Year Plan", the History of the Decision Making Process on the Vietnam War, and the Command and Control Study of the Tonkin Gulf Incident) be furnished or that the President invoke Executive Privilege as a reason for refusing to make them available. No substantive reply was received to that letter. Subsequently, after disclosures in the press, the Vietnam documents and the Tonkin Gulf study were made available by the Defense Department.

4. On July 12, 1971<sup>1</sup>, the Chairman wrote to Secretary Laird again urging that the issue as to the "Five Year Plan" be resolved.

5. On July 28, 1971<sup>1</sup>, the Committee voted to invoke the authority of Section 634(c) of the Foreign Assistance Act and a letter was sent to Secretary Laird which referred to the previous requests and asked that he "...furnish the Committee with the current Five Year Plan for the Military Assistance Program for all countries."

6. On August 5, 1971, Secretary Laird replied, stating that "...we have no document or documents which constitute a 'current Five-Year Plan for the Military Assistance Program' in the Department of Defense."

7. On August 6, 1971, the Chairman replied to Secretary Laird's letter saying he hoped the "Committee's request will not get bogged down in a dispute over semantics" and referred to references by the Secretary himself

to the "Five-Year Plan." He also asked the Comptroller General of the United States for an opinion as to whether the Committee's request was sufficiently precise.

8. On August 17, 1971, the Comptroller General replied that the GAO viewed the Committee's July 28th request "as sufficiently clear to indicate to the Department the documents or materials desired."

9. On August 31, 1971, Secretary Laird sent a letter to the Committee transmitting a memorandum<sup>2</sup> from the President to the Secretaries of State and Defense. In the memorandum the President stated:

"I have determined, therefore, that it would not be in the public interest to provide to the Congress the basic planning data on military assistance as required by the Chairman of the Senate Foreign Relations Committee in his letters of July 28 and August 6, 1971, to the Secretary of Defense.

"I, therefore, direct you not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions."

THE WHITE HOUSE,  
Washington, August 30, 1971.

MEMORANDUM FOR: THE SECRETARY OF STATE,  
THE SECRETARY OF DEFENSE

It has been brought to my attention that the Senate Foreign Relations Committee has requested various internal working papers, and planning data of the Executive Branch relating to the Military Assistance Program.

As you know, the policy of this Administration, as directed in my memorandum for the Heads of Executive Departments and Agencies, dated March 24, 1969, is to comply to the fullest extent possible with Congressional requests for information. In pursuance of this policy, the Executive Departments and Agencies have provided to the Congress an unprecedented volume of information. In addition, Administration witnesses have appeared almost continuously before appropriate Committees of the Congress to present pertinent facts and information to satisfy Congressional needs in its oversight function and to present the views of the Administration on proposed legislation.

The precedents on separation of powers established by my predecessors from first to last clearly demonstrate, however that the President has the responsibility not to make available any information and material which would impair the orderly function of the Executive Branch of the Government, since to do so would not be in the public interest. As indicated in my memorandum of March 24, 1969, this Administration will invoke Executive Privilege to withhold information only in the most compelling circumstances and only after a rigorous inquiry into the actual need for its exercise. I have accordingly conducted such an inquiry with regard to the Congressional requests brought to my attention in this instance.

The Senate Foreign Relations Committee has requested "direct access to the Executive Branch's basic planning data on Military Assistance" for future years and the several internal staff papers containing such data. The basic planning data and the various internal staff papers

<sup>1</sup> See Executive Privilege Hearings, 1971, pp. 44 et seq.

<sup>2</sup> Attached.

requested by the Senate Foreign Relations Committee do not, insofar as they deal with future years, reflect any approved program of this Administration, for no approved program for Military Assistance beyond the current fiscal year exists. Furthermore, the basic planning data requested reflect only tentative intermediate staff level thinking, which is but one step in the process of preparing recommendations to the Department Heads, and thereafter to me, for one-year programs to be approved for the ensuing budget year.

I am concerned, as have been my predecessors, that unless privacy of preliminary exchange of views between personnel of the Executive Branch can be maintained, the full frank and healthy expression of opinion which is essential for the successful administration of Government would be muted.

I have determined, therefore, that it would not be in the public interest to provide to the Congress the basic planning data on military assistance as requested by the Chairman of the Senate Foreign Relations Committee in his letters of July 28 and August 6, 1971, to the Secretary of Defense.

I, therefore, direct you not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions.

I have noted that you and your respective Departments have provided much information and have offered to provide additional information including planning material and factors relating to the military assistance program to the Senate Foreign Relations Committee. These planning materials and factors will enable the Congress to consider current year approved programs in light of considerations bearing on the future which can now be foreseen. In accordance with my general policy to provide the fullest possible information to the Congress, I will expect you and the Secretaries of other Executive Departments to continue to make available to that Committee all information relating to the military assistance program not inconsistent with this letter.

RICHARD NIXON.

(9-J)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
3/30/71	Christoper Van Hollen Department of State (during hearing)	Texts of messages from U.S. posts in East and West Pakistan	6/21/71	David Abshire Assistant Sec. of State for Congressional Relations	Mr. Abshire's letter is classified. The following is quoted from his letter: [The question was discussed with the Secretary.] "The reason for retaining the classification of this document is that we have special concern not to prejudice our relations with the Government of Pakistan nor to jeopardize the presence and effectiveness of our Consulate General in Dacca."
5/1/71	John N. Irwin, II Under Secretary of State	Texts of Pakistan telegrams and departmental policy with respect to information available to Committee	7/6/71	Wm. P. Rogers Secretary of State	Supplying "internal working papers" would not "safeguard the efficiency, the integrity and the independence of the Department and of its individual officers in the decision making and policy recommending process." (Correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

FILE G

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
Washington, D.C., May 1, 1971.

Hon. JOHN N. IRWIN, II,  
Under Secretary of State,  
Washington, D.C.

DEAR MR. SECRETARY: In the absence of Secretary Rogers, I address this letter to you and ask that the reply come from you or the Secretary.

Mr. Van Hollen, Deputy Assistant Secretary of State for Near Eastern and South Asian Affairs, has doubtless informed you of his Executive Session meeting with the Committee on Foreign Relations of Friday, April 30.

During the course of the discussion, Mr. Van Hollen made it clear that he was under instructions not to make available or to read to the Committee from any reports or communications related to the situation in Pakistan. He also confirmed that from time to time on a selective basis classified documents, telegrams, and similar materials

have been made available to the Committee or to selected Members (in the Committee's opinion, when it has served the Department's purposes).

The Committee would like to have a full, forthright, unequivocal statement of departmental policy with respect to the kinds of information which it will make available to this Committee or to any Member thereof, and to the circumstances under which such information will be made available or denied. This statement of policy should also make it clear whether under any circumstances such information is made available to any non-governmental officials including consultants, advisors, members of advisory commissions, scholars, and the like. In order to determine its future course of action, the Committee feels strongly that it must have such a statement on an urgent basis.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

THE SECRETARY OF STATE,  
Washington, July 6, 1971.

Hon. J. W. FULBRIGHT,  
Chairman, Committee on Foreign Relations,  
U.S. Senate.

DEAR MR. CHAIRMAN: I understand and I am sympathetic with your need for a full flow of information from the Department of State. It is the President's wish and my intention to accommodate the needs of your Committee to the greatest extent possible and consistent with the practical needs of confidentiality in the conduct of our foreign relations.

It is because of our awareness of your needs that I will continue to make every effort to respond to requests for information and will re-examine our procedures in this regard. I have tried to provide the best informed officials of the Department to testify in both public and executive sessions. Since December 1, I have appeared three times in Executive Session, and three times in Open Session before your Committee. I have made responsible and informed officials available to the Committee as a whole, to individual members and to members of the staff to provide information at our disposal. I have supplemented such oral communication with many letters and reports prepared especially for the Committee at its request. The situation reports on Greece and on East Pakistan are two examples. I have called back Ambassadors and other senior officials to meet with the Committee whenever that has been feasible. Officers returning for leave and reassignment, most recently Counsul General Blood, have also appeared before the Committee.

In such ways, I have tried to make available to the Committee, its members and its staff the most complete and the most comprehensive account of developments and policies in our foreign relations.

It has seemed to me best to provide information by one of these methods rather than to supply copies of field reports and internal memoranda concerned with policy in the process of formulation, or other internal working papers that have been prepared for Executive Branch use. This is to safeguard the efficiency, the integrity and the independence of the Department and of its individual officers in the decision-making and policy recommending process.

I hope that you will understand the need for confidentiality as an element of this process. It is important that officers reporting from the field and making recommendations in Washington should feel free to give me their candid

views, whether or not they agree with policy at the time, and to know that such views will not be widely circulated.

We certainly do not intend for this practice to have the effect of denying to the Committee the substance of the information contained in classified material. We hope that the Department will be able to provide very complete information by one of the methods presently employed.

It is with these considerations as guidance that we weigh specific requests for classified documents. Our rule has been to comply whenever feasible. It was on this basis that we provided classified documents during the Committee's inquiry into United States commitments to other countries.

As a result of the President's initiative in January of this year, the subject of classification of documents has been under review within the Department. We are re-examining our policies and procedures concerning classification, declassification and handling of documents governed by Executive Order 10501. I hope that these efforts will lead to a more expeditious exchange of information between the Congress and the agencies and departments of the executive branch.

I am anxious to cooperate with you in other ways to improve the regular provision of information. You may recall that I spoke of this when I met with your Committee on May 14. I suggested, by way of example, that we begin regular private briefings on current developments by the regional Assistant Secretaries for the full Committee or for regional Subcommittees, if that would be preferable. We are also reviewing whether additional documents analyzing international developments from our Intelligence and Research Bureau may be made available.

The provision of classified information to non-governmental officials such as consultants, advisors, members of advisory panels, scholars and the like is somewhat different. Here the Department's policy is to make classified information available to the extent and of the kind required for them to carry out their functions in accordance with their individual authorizations and security clearances. It is, of course, the policy of the Department to declassify classified materials for scholarly use to the greatest extent possible consistent with the effective conduct of our foreign relations. As I indicated earlier, these procedures are also under review.

I hope that you will find this statement responsive to your inquiry.

Sincerely,

WILLIAM P. ROGERS.

## (9-K)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
3/14/72	Melvin Laird Secretary of Defense	A Pentagon study relative to the capacity of Taiwan to defend against amphibious assault from the mainland.	1/24/73	Rady Johnson Assistant to the Secretary	An internal working level paper that has never receive approval or implementation. (Correspondence attached).

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE. 9

Submitted by: (Comm/Subcomm) Committee on

Foreign Relations

By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
March 14, 1972.

Hon. MELVIN R. LAIRD,  
Secretary of Defense,  
Washington, D.C.

DEAR MR. SECRETARY: I enclose a copy of a column by Mr. Jack Anderson which purports to quote from a Pentagon study relative to the capacity of Taiwan to defend against amphibious assault from the mainland. If such a study exists I would appreciate your providing the Committee with a copy of it.

I would also welcome any comments you or other Department of Defense officials may care to make concerning this column.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

OFFICE OF THE SECRETARY OF DEFENSE,  
Washington, D.C., January 24, 1973.

Hon. J. W. FULBRIGHT,  
Chairman, Committee on Foreign Relations,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in answer to your letter regarding "a Pentagon study relative to the capacity of Taiwan to defend against amphibious assault. . ." The "study" referred to in the Jack Anderson column of March 4, 1972 is not in the files of the Defense Department. However, we have located an internal working document which in some ways resembles the information published in Mr. Anderson's column.

Since the document is an internal working level paper prepared some years ago and has never received any approval or implementation in the department, its use would serve no purpose.

We regret the inordinate delay in replying to your request.

Sincerely,

RADY A. JOHNSON,  
Assistant to the Secretary for Legislative Affairs.

## (9-L)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/23/71	Rady Johnson Assistant Secretary of Defense for Legislative Affairs	Air Force weather modification activities against the North Vietnamese -- 5 specific questions	11/23/71	Rady Johnson	A non-responsive reply was received. (See attached.)
12/3/71	Melvin Laird Secretary of Defense	" " "	12/16/71	John Foster, Jr Dir. of Defense Research and Engineering	The Foreign Relations Committee was advised that the chairmen of the committees of Congress with primary responsibilities for the operation of the Defense Dept. have been completely informed regarding details of all classified weather modification undertakings by the Dept. and they respectfully declined to give any further details. (See correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Penone, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Clerk of Staff 54615  
Extension

[Excerpt from the *Congressional Record*, Jan. 26, 1972, pp. S507-S508]

## WEATHER MODIFICATION TECHNIQUES

Mr. PELL. Mr. President, I yesterday made public an exchange of correspondence I have had during the past 4 months with the Department of Defense regarding military application of weather modification techniques.

As chairman of the Subcommittee on Oceans and International Environment, I have been very much concerned over unofficial and unconfirmed reports that the United States has in fact attempted to modify weather conditions in Southeast Asia as an instrument of warfare.

I believe that my correspondence with the Defense Department is self-explanatory. I ask unanimous consent that it be printed in the RECORD. The Department, when pressed for definitive answers, declined to answer publicly questions regarding possible military use of weather modification techniques in Southeast Asia, citing national security reasons.

In my own view, attempts by any nation to harness the weather, or to use geophysical modification as an instrument of warfare, would be shortsighted. It would be the final ironic commentary on man as an intelligent

being, if he should deliberately use the natural environment as a weapon against his fellow man, inviting retaliation in kind.

In the closing days of the first session of this Congress, I urged the President to announce that this country would dedicate all geophysical and environmental research to peaceful purposes. I also stated my intention to introduce a resolution in the Senate pointing toward an international agreement to prohibit all environmental and geophysical warfare.

I regret very much that the Defense Department has concluded that it cannot trust the American people with information regarding its possible military weather modification activities.

This reluctance only reinforces my belief that we must move quickly to place weather, climate, and geophysical modification off limits in the international arms race. I will in the near future submit my resolution, with the intention of conducting hearings on it at the earliest possible time.

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

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*September 23, 1971.*

Mr. RADY JOHNSON,  
*Assistant to the Secretary (Legislative Affairs), Department of Defense,  
Washington, D.C.*

DEAR MR. JOHNSON: During the past few weeks, the Foreign Relations Committee has received a number of inquiries concerning the Air Force weather modification activities against the North Vietnamese. In view of my position as Chairman of the Subcommittee on Oceans and International Environment, I would appreciate the Department providing the Committee with whatever information it may have on this matter, including answers to the following questions:

1. What are the objectives of the project known by the code name "Intermediary—Compatriot"?
2. How long has this project been in existence? Would you provide a rather detailed description of this project?
3. In what specific countries is this project conducted?
4. What amounts have been spent on this project over the last three years?
5. Is the Department conducting any similar offense-oriented weather modification programs? If so, what are the names of these projects and where are they being conducted?

Sincerely yours,

CLAIBORNE PELL,  
*Chairman, Subcommittee on Oceans and  
International Environment.*

OFFICE OF THE SECRETARY OF DEFENSE,  
*Washington, D.C., September 24, 1971.*

Hon. CLAIBORNE PELL,  
*Chairman, Subcommittee on Oceans and International Environment,  
Committee on Foreign Relations, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This will acknowledge your recent letter concerning the Air Force weather modification activities against the North Vietnamese.

I have asked the Director of Defense Research and Engineering to look into this matter. You may expect a further reply from his office at an early date.

Sincerely,

RADY A. JOHNSON,  
*Assistant to the Secretary for Legislative Affairs.*

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*November 9, 1971.*

Mr. RADY JOHNSON,  
*Assistant to the Secretary (Legislative Affairs), Department of Defense  
Washington, D.C.*

DEAR MR. JOHNSON: On September 23, 1971, as Chairman of the Subcommittee on Oceans and International Environment, I requested information about the Air Force weather modification activities against the North Vietnamese. I have not yet received a reply.

Attached is a copy of my original communication. I would appreciate a written response to that inquiry.

Sincerely yours,

CLAIBORNE PELL,  
*Chairman, Subcommittee on Oceans and  
International Environment.*

OFFICE OF THE SECRETARY OF DEFENSE,  
*Washington, D.C., November 23, 1971.*

Hon. CLAIBORNE PELL,  
*Chairman, Subcommittee on Oceans and International Environment,  
Committee on Foreign Relations, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The following information is provided in response to your recent inquiry with respect to military use of weather modification techniques by the Department of Defense.

The possibilities inherent in weather modification techniques to support military operations have been the subject of discussion for more than 20 years. For a number of these years the Department

of Defense has been conducting several modest research and development programs relating to various forms of weather modification. These programs are carried out, in concert with other Government Departments and Agencies, under the aegis of the Interdepartmental Committee for Atmospheric Sciences (ICAS). The results of the programs are reported annually to ICAS, and are additionally reported in appropriate scientific journals for consideration by the scientific community.

Weather modification research on the part of the Department of Defense stems principally from two major interests. The first of these is the enhancement of our own operational posture through weather modification activities. Two examples of this type of employment are: the suppression of hail and lightning (to reduce damage to military property and equipment, and to increase safety of operations), and the dissipation of fog at airfields and within harbors (to enhance operational safety of aircraft and ships). The other interest is an understanding of what capabilities our potential enemies may possess in the area of weather modification operations. For example, the Soviets have demonstrated a technique for hail suppression. Suitably designed artillery shells are fired into cumulus clouds to reduce hailfall from these clouds. These experiments are conducted by Soviet military personnel using military equipment.

DoD research in this area is conducted in the laboratory and in the field. The field efforts, usually joint ventures with one or more other government agencies, are all carefully controlled operations, based on the best available theoretical knowledge. One example of fruitful field research has been the investigation of precipitation augmentation. This research has established a significant point: There is no known way to "make rain" under all conditions. When the proper meteorological conditions prevail (that is, when clouds capable of producing natural rain exist), it is a relatively simple matter to increase the amount of rain which will fall. The amount of increase is frequently of the order of 30 to 50%. This augmentation is well within the natural limits of rainfall for regions within which experiments have been conducted. Massive downpours, far in excess of natural occurrences, have not been produced, and theoretical knowledge at hand indicates that this will probably always be the case. Similarly, there is no known technique which will permit the steering of storms into a specific area. The closest approach to large storm modification thus far attempted is the Department of Commerce (NOAA)/Department of Defense joint effort known as Project STORMFURY. In this project, studies are being made on ways to ameliorate the maximum wind speed in hurricanes and typhoons in order to reduce the severity of damage caused by these very destructive storms.

The field capabilities of the Department of Defense have been utilized on several occasions in attempts to alleviate severe drought conditions. In 1969 at the request of the Government of the Philippines, the Department of Defense conducted a six months' precipitation augmentation project in the Philippine archipelago. The Philippine Government considered the undertaking so successful that they have subsequently taken steps to acquire an independent capability to augment rainfall on an annual basis when required. Similarly, we have just completed a one-month project in Texas at the request of the Governor of that State. The operation appears to have been moderately successful in alleviating Texas' severe water shortage. On the other hand, attempts to solve similar problems in India and at Midway Islands were near or total failures due to the absence of suitable cloud formations.

Laboratory efforts conducted by the Department of Defense are designed in large part to explore the questions concerning ecology. Many of these experiments are numerical investigations which utilize large computers to model the atmosphere. Because of the magnitude of the problem, this effort is currently quite limited by the size and capabilities of existing computers. When new computers now being designed are placed in service, however, we hope this effort can be expanded to include models on a global scale. Such work is being undertaken because DOD recognizes that large scale weather modification operations must not be attempted until there is full and reliable theoretical knowledge which assures that such operations will not have an adverse effect upon the World's climate.

I trust that the foregoing information will be helpful to you and regret the delay in responding to your inquiry.

Sincerely,

RADY A. JOHNSON,  
*Assistant to the Secretary for Legislative Affairs.*

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*December 3, 1971.*

Hon. MELVIN R. LAIRD,  
*Secretary of Defense,*  
*Washington, D.C.*

DEAR MR. SECRETARY: On September 23 of this year, I submitted to your department several questions regarding weather modification activities in Southeast Asia by the Air Force.

Subsequently, Mr. Rady Johnson, your assistant for legislative affairs, asked to meet with me in my office to discuss the questions I had raised. I advised Mr. Johnson that I would prefer a written response to my questions before participating in a briefing or discussion of the matter. Mr. Johnson on November 23 of this year provided a reply, in writing, as I had requested. I have enclosed a copy of this correspondence.

As you can see, Mr. Johnson's letter, while providing interesting background information on some Defense Department weather modification activities, does not respond to the specific question in my letter of September 23.

I am deeply concerned over the entire question of military application of weather modification technology, and would appreciate very much a written response to the specific questions submitted in my letter of September 23.

Sincerely,

CLAIBORNE PELL,  
*Chairman, Subcommittee on Oceans  
and International Environment.*

DIRECTOR OF DEFENSE,  
RESEARCH AND ENGINEERING,  
*Washington, D.C., December 16, 1971.*

Hon. CLAIBORNE PELL,  
*Chairman, Subcommittee on Oceans and International Environment,  
Committee on Foreign Relations, U.S. Senate, Washington,  
D.C.*

DEAR MR. CHAIRMAN: Your letter of 3 December 1971, which was addressed to the Secretary of Defense, has been referred to this office for reply. In your letter you expressed dissatisfaction with information previously furnished to you by Mr. Rady Johnson on the subject of Department of Defense weather modification activities.

Certain aspects of our work in this area are classified. Recognizing that the Congress is concerned with the question of the military application of weather modification technology I have, at the direction of Secretary Laird seen to it that the Chairmen of the Committees of Congress with primary responsibility for this Department's operations have been completely informed regarding the details of all classified weather modification undertakings by the Department. However, since the information to which I refer has a definite relationship to national security and is classified as a result, I find it necessary to respectfully and regretfully decline to make any further disclosure of the details of these activities at this time.

Sincerely,

JOHN S. FOSTER, JR.

## (9-M)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
1/18/73	Alexander Schnee Office of Congressional Relations, Department of State	Plan for U.S. Assistance for a Five-Year Modernization Plan for the Korean Armed Forces and U.S. agreements relating thereto. Requested for use in connection with the Committee's consideration of military aid legislation.	No response		No response was received concerning the plan. Some information was provided for the hearing record relating to the U.S.-Korean agreement.

Separation of Powers Subcommittee SURVEY.  
 U.S. SENATE, March 5, 1973  
 Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

Submitted by: (Comm/Subcomm) Committee  
 on Foreign Relations  
 By: Carl Marcy  
 Title: Chief of Staff 54615  
 Extension

FILE 9

## (9-N)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
11/5/69	G.Warren Nutter Assistant Secretary of Defense	Copy of a six-nation agreement relating to military goals and force levels in Vietnam. For use in evaluating Vietnam policy.	11/26/69	Nutter	This was a document of the South Vietnamese Government and it would be "inappropriate" to make it available without the consent of South Vietnam. (Mr. Nutter's letter is classified.)

Separation of Powers Subcommittee SURVEY.  
 U.S. SENATE, March 5, 1973  
 Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations

By: Carl Marcy  
 Title: Chief of Staff 54615  
 Extension

(9-O)

SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
7/14/71	David Abshire Assistant Secretary of State	A copy of a State-Defense memorandum providing policy guidance for the security assistance program.	9/13/71	Abshire	"As you know, the President has directed that internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions should not be made available to the Congress." (Correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee

on Foreign Relations

By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
July 14, 1971.

Hon. DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations,  
Department of State, Washington, D.C.

DEAR MR. ABSHIRE: In the answers submitted by the State Department to the Committee's questions for the record on the foreign aid program, there appears the following statement concerning the document providing policy guidance for the security assistance program:

"Issued on an annual basis a State-Defense memorandum that specifies military assistance and sales program levels and major program content by country and region, and sets out the major policy lines for military assistance, grant and credit. This document is the basic military assistance policy guidance for all agencies."

Would you please provide the Committee with a copy of this memorandum for use in connection with work on foreign assistance legislation.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

DEPARTMENT OF STATE,  
Washington, D.C., September 13, 1971.

Hon. J. WILLIAM FULBRIGHT,  
Chairman, Senate Foreign Relations Committee,  
U.S. Senate.

DEAR MR. CHAIRMAN: We have delayed replying to your letter of July 14 in which you requested that we provide the Committee with a State/Defense memorandum concerning guidelines for the foreign military assistance and foreign military sales programs until the determination was made on your request to Secretary Laird.

As you know, the President has directed that internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions should not be made available to the Congress.

Consonant with the President's memorandum, we are prepared to provide planning material and factors relating to the military assistance program, to the Senate Foreign Relations Committee, to enable Congress to consider current year programs in light of considerations bearing on the future which can now be foreseen.

This is to assure you that as soon as such material is ready, we will be in touch with Carl Marcy.

Sincerely yours,

DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*September 15, 1971.*

Hon. DAVID M. ABSHIRE,  
*Assistant Secretary for Congressional Relations, Department  
of State, Washington, D.C.*

DEAR MR. ABSHIRE: I have your letter of September 13 concerning the Committee's request for a copy of the document which the Department of State has described as "the basic military assistance guidance for all agencies."

I note that the Department relied on the President's memorandum as justification for refusing to provide the Committee with a copy of this document. The operative paragraph of the President's memorandum reads:

"I, therefore, direct you not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions."

I fail to understand how the Department can allege that a document which contains the "policy guidance for all agencies" concerned with the military assistance and sales programs does not constitute "approved Executive Branch positions." I want the record to show that the Committee does not accept the Department's rationale for refusing to furnish the document.

Sincerely yours,

J. W. FULBRIGHT,  
*Chairman.*

(9-P)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
5/4/71	John N. Irwin II Acting Secretary of State	Reports on Senator Muskie's conversations with Mr. Kosygin	5/21/71	David Abshire Asst. Secretary of State for Congressional Relations	Department did not consider it appropriate to release it to the Committee but it is available to Sen. Muskie. (Correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel. 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee on

Foreign Relations

By: Carl Marcy  
Title: Chief of Staff 54015  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
May 4, 1971.

Hon. JOHN N. IRWIN II,  
Acting Secretary of State,  
Washington, D.C.

DEAR MR. SECRETARY: In view of our discussion yesterday of the Department's attitude toward making information available to the Committee, I was interested to read the enclosed article by Jack Anderson in this morning's *Washington Post*.

If his report is accurate regarding the Muskie conversations in Moscow with Premier Kosygin, it seems to me that the Department, aside from violating an agreement to keep Mr. Muskie's conversation secret, is more concerned about the press than the Senate.

I will appreciate it if you will supply the Committee the reports on the Muskie conversations with Mr. Kosygin and other Soviet leaders which were given to Mr. Anderson.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

DEPARTMENT OF STATE,  
Washington, D.C., May 21, 1971.

Hon. J. W. FULBRIGHT,  
Chairman, Committee on Foreign Relations, U.S. Senate,  
Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter to the Acting Secretary of May 4 concerning the report of Senator Muskie's conversations in Moscow carried in recent newspaper columns.

I want to assure you that the Department of State did not release to any news source the report which was quoted in these columns.

I am informed that there was never any agreement, as alleged in the columns, that notes of the conversations "would belong to the Senator, not to the State Department." We do not consider that it would be appropriate for the Department to release to the Committee on Foreign Relations the records of Senator Muskie's conversations at this time. However, the records of conversations are available to Senator Muskie.

If I can furnish other information that will assist you in considering this matter I shall be happy to do so.

Sincerely yours,

DAVID M. ABSHIRE,  
Assistant Secretary for  
Congressional Relations.

(9-Q)

SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/29/69	Department of Defense	Internal defense plans for foreign governments which are prepared by the U.S.	12/18/69	Richard A. Ware Principal Dep. Asst. Secretary	"...viewed as tentative planning documents the release of which outside the Executive Branch could risk adverse reactions by the governments concerned."

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 9

Submitted by: (Comm/Subcomm) Committee on

Foreign Relations

By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

(89)

(9-R)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks, (6)
6/23/70 <del>9/24/70</del>	Dept. of Defense	Details on U.S. air operations in Cambodia	9/24/70	Dennis Doolin Deputy Asst. Secretary	"...operational procedures and methods involving the risk of life or safety of military personnel [are] not to be disseminated outside the Executive Branch..."

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILF 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

(90)

(9-S)

SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
4/8/71	Richard Helms Central Intelligence Agency	David Phillips	U.S. policies & programs in Brazil	? oral response	Liaison office	On grounds that only a director of an intelligence agency can testify. (Letter attached.)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm) Committee on  
Foreign Relations

By: Carl Marcy  
TITLE: Chief of Staff 54615  
Extension

FILE 9

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
April 8, 1971.

Hon. RICHARD HELMS,  
Director, Central Intelligence Agency,  
Washington, D.C.

DEAR MR. HELMS: The Subcommittee on Western Hemisphere Affairs of the Foreign Relations Committee intends to have executive hearings on the United States policies and programs in Brazil.

For this purpose, we are asking the Departments of State and Defense and the Agency for International Development to make available Ambassador William Roundtree; Mr. William Ellis, AID Mission Director; Mr. Theodore D. Brown, Chief Public Safety Advisor; Major General George S. Beatty, Commander of the U.S. Military Group; and Colonel Arthur S. Moura, Defense Attaché.

We also want to hear from the Central Intelligence Agency. Following the precedent established in the hearings of the Symington Subcommittee in 1969 and 1970, I request that you appear on behalf of the CIA, but that you be accompanied by Mr. David Phillips from Rio de Janeiro.

It is our intention to publish the record of the testimony of the other witnesses after it has been edited to delete classified information, but we would expect to handle the transcript of your testimony in the usual way.

I am enclosing similar letters which I am sending to Secretaries Rogers and Laird and Dr. Hannah.

Sincerely yours,

FRANK CHURCH,  
Chairman, Subcommittee on Western Hemisphere Affairs.

(9-T)

SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
4/8/71	Melvin Laird Secretary of Defense	Maj.Gen. Geo. S. Beatty & Col. Arthur S. Moura (Military in Brazil)	Hearings on U.S. policies & programs in Brazil.	4/20/71 -5/15/71	G. Warren Nutter Nutter	Maj.Gen. Beatty, Commander, U.S. Military Group and Joint Brazil-US Military Commission, was made available but the Defense Department refused the request for Col. Moura, Defense Attaché.  "...established Executive Branch procedures whereby only a director, an intelligence agency can represent his agency in testimony before the Congress."  (Exchange of correspondence attached.)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 9

Submitted by: (Comm/SubComm) Committee on Foreign Relations  
By: Carl Marcy  
TITLE: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
April 8, 1971.

Hon. MELVIN LAIRD,  
*Secretary of Defense,*  
Washington, D.C.

DEAR MR. SECRETARY: The Subcommittee on Western Hemisphere Affairs of the Foreign Relations Committee intends to have hearings on United States policies and programs in Brazil.

For this purpose, we are asking various departments of the Government to make available specified U.S. officials in Brazil for testimony in executive session during the week beginning May 3 or the week beginning May 10.

From the Department of Defense the Subcommittee would like to have Major General George S. Beatty and Colonel Arthur S. Moura. From other agencies, the Subcommittee wants to hear from Ambassador William Rountree, Mr. William Ellis and Mr. Theodore D. Brown of AID, and Mr. David Phillips. I am sending similar letters to the heads of these other agencies.

I anticipate that the hearings will run for two or three days, morning and afternoon. We also expect to publish

the record of the hearings after it has been edited for the deletion of classified material.

Sincerely yours,

FRANK CHURCH,  
Chairman, Subcommittee on Western Hemisphere Affairs.

ASSISTANT SECRETARY OF DEFENSE,  
INTERNATIONAL SECURITY AFFAIRS,  
Washington, D.C., April 26, 1971.

Hon. FRANK CHURCH,  
Chairman, Subcommittee on Western Hemisphere Affairs,  
Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Secretary Laird has asked me to reply to your letter of April 8 concerning hearings you are planning to hold on United States policies and programs in Brazil.

We will be glad to make Major General George S. Beatty, USA, Commander, U.S. Military Group and Joint Brazil-U.S. Military Commission, available to your Subcommittee for the duration of your hearings. However, Colonel Arthur S. Moura, USA, Defense Attaché, cannot be made available.

If we can be of further assistance at this time, please let us know.

Sincerely,

G. WARREN NUTTER.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
April 28, 1971.

Hon. G. WARREN NUTTER,  
Assistant Secretary for International Security Affairs,  
Department of Defense,  
Washington, D.C.

DEAR MR. SECRETARY: I have received your letter of April 26 replying to my letter to Secretary Laird of April 8 concerning hearings on United States policies and programs in Brazil.

I look forward to seeing Major General George S. Beatty on May 4 at 10:00 a.m. in room S-116 of the Capitol. His testimony will follow that of Mr. Theodore Brown, the chief AID Public Safety advisor in Brazil.

I am disturbed and puzzled by your refusal to permit Colonel Arthur S. Moura, the Defense Attaché, to testify. The effect of this decision, if it stands, will be to deprive the Senate of any knowledge of the organization and operation of the Defense Attaché's office in Brazil. This is not acceptable, and I am sure that the parent Committee on Foreign Relations will want to give more serious consideration to the problem this raises.

In the meantime, I ask you to make available a witness to testify in detail on the work of the service attaches in Brazil. We will expect to take this testimony in executive session at 2:30 Tuesday afternoon May 4 in room S-116. I would appreciate it if I can know the identity of the witness in advance.

Sincerely yours,

FRANK CHURCH,

Chairman, Subcommittee on Western Hemisphere Affairs.

ASSISTANT SECRETARY OF DEFENSE,  
INTERNATIONAL SECURITY AFFAIRS,  
Washington, D.C., May 15, 1971.

HON. FRANK CHURCH,  
Chairman, Subcommittee on Western Hemisphere Affairs,  
Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It is my understanding that you have been orally advised of the fact that your letter of April 28, 1971, requesting an additional witness to appear before your Subcommittee on May 4th, did not reach my office until late in the afternoon of that day. An unsigned copy of your letter was received by a member of my staff from Mr. Holt earlier in the afternoon of May 4; however, in neither case was there adequate time to comply with that request.

Colonel Arthur Moura, the Defense Attaché in Brazil, is a member of the Defense Intelligence Agency and, therefore, could not be made available to appear before your Subcommittee on Western Hemisphere Affairs because

of established Executive Branch procedures whereby only a director of an intelligence agency can represent his agency in testimony before the Congress. The effect of the rule, contrary to denying information to the Congress, insures that the Congress shall be given information from the most authoritative source available within such an agency. It is assumed that this was the reason for substituting Mr. Helms in lieu of Mr. Phillips for testimony on May 5.

I regret that we did not receive timely notice to respond to your request.

Sincerely,

G. WARREN NUTTER.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
June 8, 1971.

Hon. G. WARREN NUTTER,  
Assistant Secretary for International Security Affairs,  
Department of Defense, Washington, D.C.

DEAR MR. NUTTER: I regret that the press of other business has precluded an earlier reply to your letter of May 15 with further reference to the non-appearance of Colonel Arthur Moura, the Defense Attaché in Brazil, before the Subcommittee on Western Hemisphere Affairs.

It had been my understanding that the "established Executive Branch procedures" to which you refer applied only to the Central Intelligence Agency and to the National Security Agency, whose operations are in major part covert.

Defense attaches operate overtly. If they cannot appear before Congressional committees, there could with equal logic be a rule that the Secretary of State would appear in lieu of ambassadors.

Finally, despite what you refer to as "established Executive Branch procedures," the Defense Department did make available to the Subcommittee on U.S. Security Agreements and Commitments Abroad the Air Attaché in Vientiane and the former Army Attaché Representative in Luang Prabang.

Sincerely yours,

FRANK CHURCH,  
Chairman, Subcommittee on Western Hemisphere Affairs.

ASSISTANT SECRETARY OF DEFENSE,  
INTERNATIONAL SECURITY AFFAIRS,  
Washington, D.C., June 29, 1971.

Hon. FRANK CHURCH,  
Chairman, Subcommittee on Western Hemisphere Affairs,  
Committee on Foreign Relations, U.S. Senate; Washington, D.C.

DEAR MR. CHAIRMAN: In reply to your letter of June 8 concerning hearings on Brazil conducted by your Subcommittee, the Executive Branch procedure which I referred to in my previous letters has always been applicable to the Defense Intelligence Agency as well as the Central Intelligence Agency and National Security Agency.

The two attaches you noted in your letter, who testified before the Foreign Relations Subcommittee on U.S. Security Agreements and Commitments Abroad, testified on matters other than those related to their normal responsibilities as attaches and representatives of the Defense Intelligence Agency. The Air Attaché in Vientiane testified on his duties as air operations officer on the Embassy staff and the former Assistant Army Attaché in Luang Prabang testified on his experiences with the Royal Laotian Army.

Both officers were made available, despite the fact that they were members of the Defense Intelligence Agency and only the Director of that Agency can testify on intelligence matters, because it was understood beforehand that they were testifying on matters not connected with their normal attaché duties.

Sincerely,

G. WARREN NUTTER.

(9-U)

SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
2/2/71	John F. Lehman, Jr. Staff Member National Security Council	Lehman	Concerning his remarks about the Foreign Relations Committee made at a meeting of Senate staff members.	2/3/71	Lehman	Because of his position on NSC staff. (Correspondence attached.)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 9

Submitted by: (Comm/SubComm) Committee  
on Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
February 2, 1971.

Mr. JOHN LEHMAN, Jr.,  
National Security Council,  
Washington, D.C.

DEAR MR. LEHMAN: In the meeting of the Foreign Relations Committee this morning, there was discussion of the *Washington Post* story (copy attached) concerning your remarks January 27 at an off-the-record meeting of Senate staff members and Foreign Service Officers. It was noted that you were quoted as saying the reports of the discussions had been taken out of context.

The Committee agreed that, in order to clarify this matter further, you should be requested to meet with the Committee in Executive Session tomorrow afternoon Wednesday, February 3, at 2:30 o'clock in Room S-116 of the Capitol.

The Committee also took note of the fact that the remarks in question were made to representatives of both the Executive and Legislative Branches in a meeting not involving your official relationship to the President and therefore beyond the scope of Executive Privilege.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

THE WHITE HOUSE,  
Washington, February 3, 1971.

Hon. J. W. FULBRIGHT,  
U.S. Senate,  
Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of 2nd February requesting my appearance before the Committee on Foreign Relations.

I must inform you that I shall be unable to appear because of my position on the National Security Council Staff.

Yours,

J. F. LEHMAN, Jr.,  
Staff Member, National Security Council.

(9-V)

## SURVEY FORM III: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
12/29/72	Dr. Henry Kissinger Assistant to the President for National Security Affairs	Kissinger	Situation in Vietnam	1/16/73	Wm. Timmons	By precedent "members of the President's immediate staff do not appear to present testimony before Congress in matters related to their duties to the President." (Correspondence attached.)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 9

Submitted by: (Comm/SubComm) Committee

on Foreign Relations

By: Carl Marcy

TITLE: Chief of Staff 54615

Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
December 29, 1972.

Hon. HENRY A. KISSINGER,  
Assistant to the President for National Security Affairs,  
The White House, Washington, D.C.

DEAR DR. KISSINGER: I have scheduled a meeting of the Foreign Relations Committee in Executive Session for 2:30 Tuesday afternoon, January 2 in room S-116 of the Capitol to consider the situation in Vietnam and to discuss future activities of the Committee.

I hope very much that you can be with us at that time to brief the Committee, with particular reference to the status of peace negotiations, and to give us the benefit of your views. I am extending a similar invitation to Secretary Rogers.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

THE WHITE HOUSE,  
Washington, January 16, 1973.

Hon J. W. FULBRIGHT,  
Chairman, Committee on Foreign Relations,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is to acknowledge your letter of December 29, which has been referred to me for reply. As I am sure you are aware, by long-standing precedent and practice members of the President's immediate staff do not appear to present testimony before Congress in matters related to their duties to the President.

Therefore, because of Dr. Kissinger's position on the immediate staff of the President your invitation to appear before the Committee must respectfully be declined. We hope, however, that the Committee will be able to meet informally with Dr. Kissinger at an early opportunity.

Sincerely,

WILLIAM E. TIMMONS,  
Assistant to the President.

(9-W)

SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
2/10/72	Dr. Henry Kissinger Assistant to the President	Kissinger	A briefing before the Committee	2/28/73	John Dean III Counsel to the Pres.	- Position as member of the President's immediate staff. (Correspondence attached.)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 9

Submitted by: (Comm/SubComm) Committee on Foreign Relations

By: Carl Marcy  
TITLE: Chief of Staff 5/615  
Extension

[Excerpt from the *Congressional Record*, Mar. 28, 1972, p. S4906.]  
GROWTH AND INFLUENCE OF NATIONAL SECURITY COUNCIL

Mr. FULBRIGHT. Mr. President, several articles in the press recently have discussed the growth and influence of the National Security Council, and more specifically, Dr. Henry Kissinger, who controls the NSC, but not under the title of Executive Director. I, along with others, have raised the question of the wisdom of extending the immunity for accountability to the Congress, under the guise of Executive privilege to those in the White House, such as Dr. Kissinger, who appear to have the greatest influence upon the formulation of our foreign policy. This is a matter of fundamental importance to the conduct of our foreign relations, and in order to make clear the position of the Committee on Foreign Relations as well as the White House, I ask unanimous consent to have printed in the RECORD my letter of February 10, 1972, to Dr. Kissinger, and the reply thereto of February 28, 1972, signed by Mr. John W. Dean III, counsel to the President.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
Washington, D.C., February 10, 1972.

Hon. HENRY A. KISSINGER,  
Assistant to the President for National Security Affairs, The White House, Washington, D.C.

DEAR HENRY: In view of the wide public exposure you have received as a result of your recent press and television briefings, I

wondered whether you might wish to reconsider your earlier reluctance to appear before the Committee on Foreign Relations. I doubt that the Founding Fathers contemplated that the Executive and Legislative branches should exchange views on foreign policy by reading press accounts.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

THE WHITE HOUSE,

Washington, D.C., February 28, 1972.

Hon. J. W. FULBRIGHT,  
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge receipt and thank you for your letter to Dr. Henry A. Kissinger dated February 10, 1972, which in his absence has been referred to me for response.

Consistent with long established principle and precedent, because of Dr. Kissinger's position as a member of the President's immediate staff he will be unable to accept your gracious invitation to appear before the Committee on Foreign Relations.

However, please be assured that we share your belief that the Executive and Legislative Branches should exchange views on foreign policy, and we are confident that such exchange can be carried out to the fullest extent by the constituted officers of the Executive Branch.

With warm regard,  
Sincerely,

JOHN W. DEAN III,  
Counsel to the President.

## (9-X)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY.

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
1/19/67	J. Edgar Hoover FBI	Hoover	Hearings on Consular Convention with the Soviet Union	1/20/67	Referred request to Acting Attorney General	Mr. Hoover supplied Committee with his correspondence with Secretary Rusk & stated that his views had not changed since that time.
1/25/67	Ramsey Clark Acting Attorney General	J. Edgar Hoover	"	1/27/67	Clark	Mr. Hoover felt that his testimony could not add anything to his views as expressed in his letter of 1/20/67.  (Correspondence attached.)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 9

Submitted by: (Comm/SubComm) Committee on Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
January 19, 1967.

Hon. J. EDGAR HOOVER,  
Director, Federal Bureau of Investigation,  
Washington, D.C.

DEAR MR. HOOVER: The Committee on Foreign Relations has scheduled a public hearing at 10:00 o'clock on Monday, January 23, in Room 318, Senate Office Building, on the Consular Convention with the Soviet Union (Ex. D, 88th Cong., 2d sess.). Several Members of the Committee have expressed an interest in your views with respect to this Convention, particularly in the light of your testimony before a Subcommittee of the House Committee on Appropriations in March, 1965.

The purpose of this letter, therefore, is to invite you to appear before us, together with Secretary Rusk and other witnesses from the Executive Branch on Monday morning so that we may explore your views further.

Sincerely yours,

J. W. FULBRIGHT, Chairman.

U.S. DEPARTMENT OF JUSTICE,  
FEDERAL BUREAU OF INVESTIGATION,  
Washington, D.C., January 20, 1967.

Hon. J. W. FULBRIGHT,  
Chairman, Committee on Foreign Relations,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of January 19, 1967, inviting me to appear before the Committee on Foreign Relations of the Senate on Monday, January 23, 1967.

While I, of course, desire to be helpful in any matter of mutual interest, I must of necessity refer you to the Acting Attorney General, who quite properly is the ranking member of the Department of Justice to pass on matters of legislation.

Frankly, the subject of your referenced letter—the matter of a Consular Convention with the Soviet Union—has been a chief item of correspondence between Secretary of State Rusk and me. I advised Mr. Rusk on September 16, 1966, in answer to his letter of September 14, 1966, that he was basically correct in his assumption that rather than my opposing a Consular Treaty, I had pointed out

to a House Appropriations Subcommittee the possibilities of an increased problem of internal security proportionate to the number of consulates to be established. I did not imply that this problem could not be handled by the Federal Bureau of Investigation. My testimony before this Subcommittee occurred prior to such legislation being considered by the Congress.

My views today are, of course, the same as those expressed in my letter to Mr. Rusk of September 16, 1966. An appearance before your Committee would result in my testifying to the same views. For your convenience, a copy of Mr. Rusk's letter to me and my reply will be found attached to this letter.

Sincerely yours,

J. EDGAR HOOVER.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
January 25, 1967.

Hon. RAMSEY CLARK,  
*The Acting Attorney General,*  
*Department of Justice, Washington, D.C.*

DEAR MR. CLARK: As you know, the Committee on Foreign Relations is now considering the proposed Consular Convention with the Soviet Union. There has been considerable discussion in the Committee about the views of Mr. J. Edgar Hoover, the Director of the Federal Bureau of Investigation. Mr. Hoover has expressed an opinion on certain facts relevant to the proposed Convention in letters to Secretary Rusk dated September 16, 1966, and to Senator Karl E. Mundt dated January 23, 1967.

Because Mr. Hoover's views have attracted considerable attention, I wrote him on January 19, 1967 and invited him to appear before the Committee on Monday, January 23. As you know, he replied on January 20 saying: "While I, of course, desire to be helpful in any matter of mutual interest, I must of necessity refer you to the Acting Attorney General, who quite properly is the ranking member of the Department of Justice to pass on matters of legislation."

At the request of the Committee on Foreign Relations, I am therefore writing to ask that you request Mr. Hoover to appear before the Committee at a mutually convenient time.

Sincerely yours,

J. W. FULBRIGHT, Chairman.

OFFICE OF THE ATTORNEY GENERAL,  
Washington, D.C., January 27, 1967.

Hon. J. W. FULBRIGHT,  
*Chairman, Committee on Foreign Relations,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Your letter of January 25 has been reviewed with Mr. Hoover. After careful considera-

tion, Mr. Hoover and I have reached the following conclusions.

The primary purpose of the Consular Convention with the Soviet Union is protection for and assistance to United States citizens in the event they are arrested or otherwise detained while in the Soviet Union. While this purpose is obviously a matter of great national importance in the field of foreign relations, the means of implementing it is a subject clearly beyond the competence of this Department and its officials.

Though the Convention is not necessary to authorize the establishment of Soviet consulates in the United States, the power to do this being lodged by the Constitution in the President, an issue that may appropriately be considered in connection with ratification of the Convention is whether the establishment of one or more consulates by the Soviet Union in the United States poses any threat to our internal security.

We need only refer to the numbers involved to show that this proposal would not add significantly to the problems of protecting our internal security. In 1966, there were approximately 900 Soviet tourists and exchange visitors who travelled in the United States. This compares with more than 18,000 United States citizens who travelled in the Soviet Union. In addition, there are at the present more than 1,000 citizens of the Soviet Union residing in our country, of whom 452 have diplomatic immunity. The one Soviet consulate which might be opened under the Convention would add only 10 or 15 Soviet citizens having immunity.

While adding any number of potential espionage agents of course makes a commensurate increase in the work of the FBI, the Bureau is fully capable of handling such additional work. The contemplated number of Soviet officials would not place an undue burden on the FBI.

Because the FBI is an investigative agency which since 1924 has not injected itself into the area of legislation, because the proposal under consideration is foreign to the competence of this Department with the limited exception noted, and because as to that exception the impact on our responsibilities is minimal, we do not believe that Mr. Hoover, by appearing before your committee, could add to what has been said here and in Mr. Hoover's earlier letters which are before the Committee:

In spite of these considerations, I would not hesitate to request Mr. Hoover to testify if he thought his testimony could add to your deliberations. He does not, since, as he said in his letter to you of January 20, he could state only the same views expressed in his correspondence.

If I can be of further assistance, please advise.

Sincerely,

RAMSEY CLARK,  
*Acting Attorney General.*

(9-Y)

SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
6/26/69	Dr. Henry Kissinger Assistant to the President	Kissinger	To meet informally for a general review of major foreign policy questions.	6/30/69	Kissinger	Nature of position. (Correspondence attached.)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

File 9

Submitted by: (Comm/SubComm) Committee  
on Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
June 26, 1969.

Hon. HENRY A. KISSINGER,  
Assistant to the President for National Security Affairs,  
The White House.

Dear DR. KISSINGER:

I wonder if you would be willing to meet with the Committee on Foreign Relations informally and in executive session for a general review of major foreign policy questions. I think that such a meeting would be most beneficial to the Committee, for we would then have a much clearer idea of the new Administration's objectives and intentions.

Sincerely yours,

J. W. FULBRIGHT, Chairman.

THE WHITE HOUSE,  
Washington, D.C., June 30, 1969.

Hon. J. W. FULBRIGHT,  
U.S. Senate,  
Washington, D.C.

DEAR SENATOR FULBRIGHT: I have carefully considered the request in your letter of June 26 that I meet informally in executive session with the Committee on Foreign Relations. I have concluded that the nature of my position and the necessary traditions which have been established to insure that the President's staff can serve him effectively preclude me from accepting your invitation.

Best regards,

HENRY A. KISSINGER.

[P.S.] I am of course always happy to meet you on a personal basis.

(100)

(9-Z)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In 1968, 1969 and 1971, the Department of Defense refused to furnish the Committee on Foreign Relations a copy of the study, "Command and Control of the Tonkin Gulf Incident, 4-5 August 1964." It was refused because it was "...considered to be a privileged Executive document" and "...inappropriate to disseminate it outside the Executive Branch." The study was later received by the Senate as part of the "Pentagon Papers."

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

(101)

(9-AA)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

On January 21, 1972 the Committee on Foreign Relations requested from the Department of State a study regarding various exchange programs being administered by all agencies of the U.S. Government. The reply stated that the study was one initiated by the President and carried out by the Under Secretary's committee. Thus, the Committee's request required further study; however, the study was later received and proved to be useful for the purpose it was requested. (Correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422  
FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
January 21, 1972.

Hon. DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations, Department  
of State, Washington, D.C.

DEAR MR. ABSHIRE: I understand that during the last year the Department of State conducted a study of the various exchange programs being administered by all agencies of the United States Government. I would appreciate your making a copy of the report of that study available to the Committee.

Sincerely yours,  
J. W. FULBRIGHT, Chairman.

DEPARTMENT OF STATE,  
Washington, D.C., February 3, 1972.

Hon. J. W. FULBRIGHT,  
Chairman, Committee on Foreign Relations, U.S. Senate,  
Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of January 21 requests a copy of the study of various Government exchange programs for use by the Committee on Foreign Relations.

The study you refer to is one initiated by the President and carried out by the Under Secretary's Committee. Thus your request requires further study. You can be assured that you will receive a more detailed reply very soon.

Please do not hesitate to let me know whenever you believe we can be of assistance.

Sincerely yours,  
DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations.

**(9-BB)**

**SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED**

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In May 1971 during hearings on U.S. policy toward Brazil, the Department of State was requested to furnish the Committee on Foreign Relations a copy of the National Security Council study on Brazil. It was refused but subsequently after a delay of seven months and repeated requests, a staff member of the Committee was permitted to read a copy at NSC offices. The material was moderately useful.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

(103)

(9-CC)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In November 1971 in connection with a study on Guatemala and the Dominican Republic, the Foreign Relations Committee requested an ISPEG report on Guatemala and CASP reports for Guatemala and the Dominican Republic. In December the Committee was forwarded the ISPEG report but told that the request for the CASPs was "under consideration." In 1972 a staff member of the Committee went to the Department of State to read the CASPs which were moderately useful.

(Unclassified letters attached)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
November 11, 1971.

Hon. DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations, Department  
of State, Washington, D.C.

DEAR MR. ABSHIRE: In connection with a study the Subcommittee on Western Hemisphere Affairs of the Senate Committee on Foreign Relations is undertaking of United States policies and programs in Guatemala and the Dominican Republic, I would appreciate it if you could supply the subcommittee with the following documents:

The report of the combined State/AID Internal Programs Evaluation Group (ISPEG) on the internal security program in Guatemala. This is the report referred to on page 104 of the General Accounting Office report "Observations on United States Assistance to Guatemala" (B-167675) dated February 9, 1970 and classified secret.

The most recent Country Analysis and Strategy Papers for Guatemala and the Dominican Republic.

Your cooperation in this will be appreciated.

Sincerely yours,

FRANK CHURCH,

Chairman, Subcommittee on Western Hemisphere Affairs.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
December 10, 1971.

Hon. DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations, Department  
of State, Washington, D.C.

DEAR MR. ABSHIRE: I refer to our earlier correspondence of June 28, June 30, July 21, September 20 and November 10 concerning the National Security Council study on Brazil and to our correspondence of November 11 and December 1 concerning the *Country Analysis and Strategy Papers for Guatemala and the Dominican Republic*.

I first asked for the National Security Council study on Brazil in May during hearings before the Subcommittee on Western Hemisphere Affairs on United States policies and programs in Brazil. During the seven months which have intervened, you have neither furnished the study nor refused to do so. Nor have you replied to my letters of September 20 and November 10 on the subject. This protracted delay has the effect of denying information to the Congress without formally refusing the Congressional request. This is totally unacceptable and displays contempt for Congress in the literal, if not legal, sense of the term. I call upon you again, as I did in my letter of June 30, that you either transmit the NSC study or assert a claim of Executive privilege consonant with President Nixon's

letter of April 7, 1969 to Chairman Moss of the House Foreign Operations and Government Information Subcommittee.

With respect to my request for the Country Analysis and Strategy Papers for Guatemala and the Dominican Republic, I am at a loss to understand why the matter requires the consideration to which you referred in your letter of December 1. These papers for other countries have been supplied to the Foreign Relations Committee in the past without any question being raised. The papers for Guatemala were obviously supplied to the General Accounting Office, as appears on page 85 of the GAO report, "Observations on United States Assistance to Guatemala" (B-167675). Furthermore, as reflected in the GAO report, the papers are classified no higher than confidential. I would appreciate your early attention to this matter.

I do want to thank you for sending the subcommittee the ISPEG report on Guatemala. Although somewhat outdated, it has been helpful, and its classification will be respected.

Sincerely yours,

FRANK CHURCH,  
Chairman, Subcommittee on  
Western Hemisphere Affairs.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
January 10, 1972.

Hon. DAVID M. ABSHIRE,  
*Assistant Secretary for Congressional Relations, Department of State, Washington, D.C.*

DEAR MR. ABSHIRE: I refer to my letters of November 11 and December 10 dealing with my request for the ISPEG report on the United States internal security program in Guatemala, the most recent Country Analysis and Strategy Papers for Guatemala and the Dominican Republic, and the National Security Council study on Brazil.

On December 1, you sent me the ISPEG report, for which I am grateful.

On December 28, the NSC study on Brazil was made available to the Committee staff.

I hope we can resolve the matter of the CASPs so as to put an end to these problems in the near future.

Sincerely yours,

FRANK CHURCH,  
Chairman, Subcommittee on  
Western Hemisphere Affairs.

(9-DD)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

July 29, 1969 the Committee on Foreign Relations requested from Elliot L. Richardson, Acting Secretary of State, a copy of agreement identified as COMUSTAF Plan 1/64. It was refused on 8/4/69 but a briefing was suggested. Ultimately a staff member of the Committee read the document at the Pentagon. (Correspondence attached)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl W. Marcy  
Title: Chief of Staff 54615  
Extension

[Excerpt from the *Congressional Record*, Aug. 8, 1969, p. S9504; Chairman Fulbright's correspondence with Elliot L. Richardson, Acting Secretary, DOS, plus Fulbright's brief statement about the correspondence]

[Mr. FULBRIGHT] . . . This agreement is designated a "contingency plan" by the executive. The plan is formally known as COMUSTAF Plan 1/64. I ask unanimous consent that my most recent exchange of correspondence with Acting Secretary Richardson may be inserted in the RECORD at this point.

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

DEPARTMENT OF STATE,  
Washington, D.C., August 4, 1969.

Hon. J. WILLIAM FULBRIGHT,  
Chairman,  
Senate Foreign Relations Committee.

DEAR MR. CHAIRMAN: I have discussed with Secretary Laird the letter you handed me on July 29, 1969, regarding military contingency plans for Thailand, developed in connection with the SEATO Treaty.

In this case—as in the case of any contingency plan—the Department of Defense is extremely reluctant to allow the full text to get out of its own hands. Secretary Laird would, however, be happy to provide the Committee with an extensive briefing on these plans by officers from the Joint Staff at whatever time is convenient to the Committee. He has stressed to me that this is the same arrangement worked out with Senator Stennis and the Armed Services Committee.

I hope that this arrangement will be satisfactory to you and your colleagues on the Foreign Relations Committee.

With warm regards,

Sincerely,

ELLIOT L. RICHARDSON,  
Acting Secretary.

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
July 29, 1969.

Hon. ELLIOT L. RICHARDSON,  
Acting Secretary,  
Department of State,  
Washington, D.C.

DEAR MR. SECRETARY: During an executive session of the Committee on Foreign Relations this morning, discussion turned to the nature of America's commitments to Thailand, and it was recalled that on July 14, 1969, Secretary Rogers told the Committee that he would make available to it the agreement of 1964-65 relating to plans for U.S.-Thai cooperation in the event of aggression.

This subject was discussed in Secretary Rogers' letter to me of July 21, 1969, but the agreement under reference was not included in that letter.

Upon motion, the Committee unanimously instructed me to renew in writing the request that the agreement identified as COMUSTAF Plan 1/64 be delivered to it for its examination.

Sincerely yours,

J. W. FULBRIGHT,  
Chairman.

Mr. FULBRIGHT. Mr. President, it will be noted that in his letter to me of August 4, Acting Secretary Richardson relays an offer by the Secretary of Defense "to provide the committee with an extensive briefing on these plans by officers from the Joint Staff."

This is not acceptable.

A briefing is no substitute for supplying the document in question. Every lawyer knows that a description or a summary of a document does not suffice as evidence in place of the document itself. It is not a question of trusting or distrusting the briefing officers. It is a question of sound procedure.

Not without some effort, the Foreign Relations Committee has already been able to learn a good deal of the provisions of the so-called contingency plan. It was signed on behalf of Thailand by the Prime Minister of that country in his capacity as a commander in chief of the Thai armed forces. It was signed on behalf of the United States by the commander of the U.S. Military Assistance Advisory Group and was subsequently approved by the Joint Chiefs of Staff. Out of respect for its top secret classification, I shall not go further, at this time, into its main provisions except to say that it provides, in certain circumstances, for the commitment of substantial numbers of American troops to Thailand.

The Secretary of State argues that this plan does not represent any commitment to Thailand beyond that contained in the SEATO treaty. From what I have been able to learn of the plan, I believe it does go beyond the SEATO commitment. But the best evidence on this issue would be the plan itself, if we could examine it in its totality. That is why the Foreign Relations Committee asked for it.

On July 14, the Secretary of State, in open session and in unequivocal terms, told the committee he would make the plan available. Now he has apparently been overruled by the Department of Defense—another example of the trend toward Defense Department domination of foreign policy. Indeed, I have some reason to believe that the Department of State itself is not allowed to have a copy of the plan, despite the fact that the plan could very well involve us in another Vietnam-type war.

Nor is this so-called United States-Thai contingency plan the first example of executive branch refusal to furnish to the Senate documents bearing on very serious and far-reaching U.S. commitments to foreign nations. The Foreign Relations Committee has repeatedly asked, without success, for a copy of the letter from our Ambassador to Korea to the Korean Government detailing U.S. commitments to Korea in return for the furnishing of Korean troops in South Vietnam.

We have repeatedly asked, without success, for a copy of a study by the Institute of Defense Analysis of the functioning of command and control procedures during the Gulf of Tonkin incident.

These refusals are clearly contemptuous of the Senate, in a substantive, if not in a strictly legal sense. They can only be based on the assumption that the Senate is not to be trusted with questions which may involve war or peace or that these questions are none of the Senate's business—a very curious assumption indeed in view of the plain provisions of the Constitution.

I raise this matter at this time, Mr. President, so that the Senate and the country at large may be put on notice of a fundamental constitutional issue. Indeed, with a new administration—one not responsible for any of the documents the committee seeks—the issues can be judged on its constitutional merits. It is not too late for the executive branch to reconsider its position. I hope very much that it will do so. If it does not, the Foreign Relations Committee and the Senate as a whole will have to give further consideration to the matter.

Mr. President, in connection therewith I ask unanimous consent to have printed in the Record an editorial in today's Washington News expressing its view on this same subject.

There being no objection, the editorial was ordered to be printed in the Record, as follows:

#### WHY ALL THE SECRECY?

Why can't Sen. J. W. Fulbright (D., Ark.), see the text of that "non-secret" military agreement the United States made with Thailand?

The State and Defense Departments say the 1965 paper is not secret but only a "military contingency plan" which simply sets forth what the United States would do to help defend Thailand against invasion. The United States has "many" such contingency plans with countries around the globe, the two departments say.

They insist the Thailand plan does not extend the United States commitment to Thailand's defense beyond what is committed already in the 1954 Southeast Asia Treaty (SEATO).

Well, then, if everything is as they say, and all is above-board and out in the open, what's wrong with letting Sen. Fulbright see it?

The Senator suspects the document does in fact go beyond the SEATO commitment, and as chairman of the Senate Foreign Relations Committee—which traditionally advises the Administration on foreign policy—he asked to see a copy.

State ducked the request, passing the buck to Defense Secretary Melvin R. Laird. Mr. Laird said he wouldn't let Sen. Fulbright see the plan but would send somebody to tell the Senator and the committee what's in it.

That kind of shiftiness leaves the impression there really might be something to hide.

(9-EE)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

On September 17, 1970 the Committee on Foreign Relations requested that a member of the Joint Chiefs of Staff appear on hearings on the Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America. By letter of September 21, 1970 the Department of Defense informed the Committee that the schedule of the Chairman of the Joint Chiefs of Staff "will not permit him to appear" but that Rear Admiral Lemos would appear. On February 22, 1971 Admiral Thomas H. Moorer, Chairman JCS, appeared in open hearings. (Correspondence attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 9

Submitted by: (Comm/Subcomm) Committee on  
Foreign Relations  
By: Carl Marcy  
Title: Chief of Staff 54615  
Extension

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
September 17, 1970.

Hon. MELVIN R. LAIRD,  
*Secretary of Defense,*  
*Washington, D.C.*

DEAR MR. SECRETARY: The Committee on Foreign Relations has scheduled a hearing in open session in Room 4221, New Senate Office Building, for 10:00 A.M. on Tuesday, September 22, 1970, on Executive H, 91-2, the Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America.

At this time the Committee desires to receive testimony from the Joint Chiefs of Staff on the military implications of the Protocol, and I would appreciate it if a Member of the Joint Chiefs of Staff could appear at that time.

Sincerely yours,  
J. W. FULBRIGHT, Chairman.

OFFICE OF THE SECRETARY OF DEFENSE,  
Washington, D.C., September 21, 1970.  
Hon. J. W. FULBRIGHT,  
*Chairman, Committee on Foreign Relations, U.S. Senate,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: Secretary Laird has asked that I reply to your letter of September 17 concerning the scheduled hearing of the Committee on Foreign Relations in the Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America. The Department of Defense welcomes the opportunity to testify before the Committee on Foreign Relations on the military implications of United States adherence to Additional Protocol II. Rear Admiral William E. Lemos, Director, Policy Plans, in the Office of the Assistant Secretary of Defense (International Security Affairs) will appear before your Committee to discuss this important subject. He will be prepared to answer any questions your Committee may have concerning this matter.

Although the current schedule of the Chairman, Joint Chiefs of Staff, will not permit him to appear before the Committee as requested in your letter, he will provide the views of the Joint Chiefs of Staff on this topic by separate correspondence. I trust this will meet the needs of the Committee on Foreign Relations and if any questions do arise concerning the military implications of the Treaty of Tlatelolco, Rear Admiral Lemos will be prepared to discuss the Department of Defense position with regard to these implications, including the position of the Joint Chiefs of Staff.

Sincerely,

RICHARD G. CAPEN, Jr.,  
*Assistant to the Secretary for Legislative Affairs.*

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STATEMENT BY ADM. THOMAS H. MOORER, USN,  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

Mr. Chairman and Members of the Committee: I welcome the opportunity of appearing before this Committee to discuss the military implications of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America.

The Joint Chiefs of Staff wish to acknowledge the unique and special relationship which has historically existed

between our country and the nations of Latin America. Our common interests and understanding contribute meaningfully to our mutual security.

We have followed with interest the development of the nuclear free zone of Latin America, as set forth in this treaty. We have participated in various considerations relevant to Protocol II and the formulation of the accompanying interpretative statement.

The Joint Chiefs of Staff understand that the interpretative statement which was an integral part of the United States signature of Protocol II on 1 April 1968 has received international acceptance. Further, we understand that the Additional Protocol II, with its accompanying interpretative statement, which is currently being considered for ratification, would be accorded the same international acceptance.

With these understandings in mind, we would be assured of the continuance of the United States right to historic transit and transport privileges throughout the Latin American area, including military overflights and naval ship visits, without regard to the question of the presence of nuclear weapons aboard the aircraft or naval vessels.

In view of these considerations, the Joint Chiefs of Staff interpose no objection to the ratification of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America.

Thank you, Mr. Chairman.



## **FILE 12**

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### **SENATE COMMITTEE ON THE JUDICIARY**

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(12-A)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON INTERNAL SECURITY,  
*Washington, D.C., May 4, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,  
Senate Office Building, Washington, D.C.*

DEAR SAM: Through the cooperation of your Counsel, Mr. Edmisten, the legal staff of the Internal Security Subcommittee has been trying to work out a satisfactory answer to your request for information about instances in which Federal officers or employees have refused to provide information. By satisfactory, as used above, I mean satisfactory to you and satisfactory for the purposes of your Subcommittee.

As Mr. Edmisten is aware, there have been hundreds of instances in which the Judiciary Committee has been refused information or documents; but virtually all of these were involved in the Subcommittee's three and a half year investigation of security in the Department of State.

Most of these instances are documented on the record; but the record runs about 8 inches thick in printed form.

Our problems in these State Department hearings were more or less epitomized in our dealings with the then Secretary of State, who at one time instructed all employees of his Department to refuse to provide information of any kind to the Subcommittee. Eventually, this instruction was changed to an order that employees should not appear and testify until after the Secretary himself had appeared before the Subcommittee. Eventually he did appear, and subsequent to that we took the testimony of a great many State Department employees. (While many instances of refusal to provide information or documents occurred thereafter, there is very little difference in the nature of such refusals and the earlier refusals, i.e. those which occurred before the Secretary interjected himself into the matter.)

The record of the Subcommittee's clash with the Secretary is fairly well presented in a separate statement of the hearing record, a copy of which I enclose for your information. We still have some additional copies of this if you should want them.

From this, I hope you may be able to determine whether a fuller canvass of the documentation with respect to refusals of information or testimony by the Department of State will serve the purposes of your Subcommittee.

(The Internal Security Subcommittee's Chief Counsel, Jay Sourwine, has talked this matter over at length with Mr. Edmisten, and tells me there is a possibility your staff may wish to pick out certain specific instances or examples from the hearing record of our State Department hearings. These hearings are no longer available for distribution, but Mr. Sourwine has a bound set of the hearings which belong to the Subcommittee, and tells me he has arranged to make this available to Mr. Edmisten upon his request.)

I do hope that we may be of every possible assistance to you and your Subcommittee in connection with your investigations in this area, while at the same time we avoid loading you down with a multiplicity of instances which may not be exactly what you are seeking to investigate, or which may be at best only repetitive and cumulative.

With best personal regards, I am  
Sincerely,

JAMES O. EASTLAND, *Chairman.*

[Excerpt from hearings entitled "State Department Security—1963-65, The Otepka Case—IV," before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary; 89th Cong., 1st sess., pt. 5, pp. 266-93.]

## STATEMENT OF HON. DEAN RUSK, SECRETARY OF STATE

MONDAY, OCTOBER 21, 1963

Senator Thomas J. Dodd presiding.

Present: Senators Dodd, John L. McClellan, Sam J. Ervin, Everett McKinley Dirksen, Roman Hruska, Kenneth B. Keating, and Hugh Scott.

Also present: J. G. Sourwine, chief counsel.

For the Department: Thomas Ehrlich, Office of Legal Adviser.

Senator DODD. Come to order, please.

Mr. Secretary, I must say we are very pleased to have you here with us.

As I understand the situation, there is only one question really involved and that is the question whether or not this committee can examine witnesses from the State Department concerning security matters within the Department, arising particularly out of the Otepka case.

I should say, in addition, that I am sure you understand that our letter was not a letter of charges in any way and I am sure we all here do not want you to so consider it.

We do not want you here to answer any charges. There is no such thing in our mind.

Secretary RUSK. Thank you very much, gentlemen. I would appreciate a chance to make some opening remarks in order to try to put some of these things in perspective. Perhaps the committee may like to have copies to follow along with me.

I have requested this opportunity to appear before you, because it is apparent that sound relations between the subcommittee and the Department of State require the personal attention of the members of the subcommittee and of myself. It is important to me, as I hope it is to you, that we maintain a constructive relation so that we can work together to carry out our respective responsibilities.

I have a statutory responsibility for the Department's security program, as I have for all other programs within the Department. The subcommittee has a responsibility to review regularly the security programs of the Department, as well as of other executive agencies, to determine whether legislative or other action may be required. Both the Department and the subcommittee have a common goal, protection of our national security, and it seems to me clear that we should work together to this end.

My own approach to this problem is that we should not hurry toward the impasses that are possible under our constitutional system, but rather try to find the reasonable, constructive and mutually helpful arrangements which will allow us both to carry out our responsibilities.

Let me say to the subcommittee that the Department of State, like any foreign office in any important country, has real security problems. These are never ending and require constant vigilance. The most serious are those resulting from the attempts of other governments to penetrate the Department both physically and through personnel. Another source of trouble is leaks to the press, whatever may be the motives, that in fact reveal to

foreign powers information which involves our national security interests.

Our communications network, much of it proceeding via commercial channels, must be kept secure. A fourth problem is the security of personnel, both those seeking employment and those already on our rolls.

I give the combination of these problems a considerable amount of personal attention and am in regular touch with the various agencies who assist us in dealing with them. I would be glad to arrange a special briefing for the subcommittee on our comprehensive security program for protecting the Department of State against security failures.

Mr. Chairman, I would like to emphasize that because there are some problems in this field I think the committee would be interested in. I think they ought to know, for example, something about the struggle in the electronics field between us and other governments that is going on. I would be happy to arrange for a briefing on that.

I have a number of suggestions concerning ways in which I think a sound relationship between the subcommittee and the Department can be built. But before discussing these ideas, I would like to try to clear away the underbrush of misunderstanding and suspicion on a number of specific issues which, I think, has brought us to the difficult situation we are now in.

There are four principal issues of this kind, as I see it.

First, the charges filed against Mr. Otto F. Otepka.

Second, the regulations of the Department governing denials of passports under section 6 of the Internal Security Act.

Third, the question of reorganization of the Bureau of Security and Consular Affairs.

Fourth, certain aspects of the security practices within the Department.

Let me address each of these in turn.

### I. THE CHARGES AGAINST MR. OTTO F. OTEPKA

#### A. ORIGIN OF THE CASE

During the past summer, evidence came to my attention concerning alleged activities of Mr. Otepka. This evidence, if true, seemed to me on its face to present some serious questions of security in the Department. I asked the appropriate officers to make a thorough investigation of all the evidence and to analyze the questions of law involved. I directed them to prefer charges only if they were satisfied that there was evidence and basis in law sufficient to warrant such action.

I abstained from further participation in the matter because I will make the ultimate departmental decision, as the President mentioned in his last press conference.

And as he also indicated in his press conference, the President himself will review the matter.

I can assure you, however, that the charges were not brought in retaliation for Mr. Otepka's testimony before the subcommittee, nor do they mark any attempt by the Department to interfere with the work of the subcommittee. Mr. Otepka appeared several times before the subcommittee this year with the Department's knowledge and consent.

#### B. THE NATURE OF THE CHARGES AND MR. OTEPKA'S RESPONSE

The Department of State has not previously released the charges, nor has it issued any statement discussing the substance of them.

This is the Department's practice with respect to all pending personnel actions of this kind. It is designed to protect the employee against public dissemination of charges that may later prove unfounded. Complete reports of the charges against Mr. Otepka have appeared in the press, however, and not on the initiative of the Department. For these reasons, I believe that I may properly summarize the charges for you.

There are three main groups of charges. The first is that Mr. Otepka furnished to Mr. Jay Sourwine, chief counsel to the Senate Internal Security Subcommittee, classified information concerning the loyalty of prospective State Department appointees. The letter of charges states that this conduct violated a Presidential directive issued on March 13, 1948, of which Mr. Otepka was aware.

A second group of charges is that, in two cases, Mr. Otepka furnished a detailed series of questions for the use of Mr. Sourwine in his interrogation of Mr. Otepka's superiors.

The third group of charges is that Mr. Otepka was responsible for cutting off the classification indicators from a number of classified documents, and that he thereby declassified the documents in violation of the Department's procedures, although the information contained in the documents remained classified. By the same act, it is charged, he mutilated the documents in violation of a criminal statute.

Mr. Otepka was afforded the opportunity to reply to the charges, which he has now done. In substance he admits having done the acts alleged in the first two groups of charges summarized above, but denies that this violated any applicable standard of conduct. As to the third group, he denies having done the acts charged.

#### C. FUTURE STEPS

The charges and Mr. Otepka's response raise a number of issues of law and fact that are now in the process of being resolved.

Both the law and applicable regulations fully protect the rights of Mr. Otepka and assure that the issues will be decided fairly according to established procedures and due process of law. If there should be a determination adverse to Mr. Otepka, he may appeal it within the Department. If the departmental decision on the matter is adverse to him it is subject to review by the Civil Service Commission and, ultimately, the courts. . . .<sup>1</sup>

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#### V. FUTURE RELATIONS BETWEEN THE DEPARTMENT AND THE SUBCOMMITTEE

As I stated at the outset, my primary purpose here is to discuss a sound relationship between the subcommittee and the Department. In past weeks, I have come to feel that these relations have fallen under the shadow of

misunderstandings on both sides. It has been suggested that we are trying to withhold information and testimony required for the subcommittee's investigations. This is not the case. Let me briefly summarize the two incidents which, I think, led to this misunderstanding.

First, I have already discussed the origin of the study now being conducted by former Ambassador Wilson C. Flake. When that study was begun, I directed that:

\* \* \* the matters concerned in this review and recommendation, or proposed recommendations, including any that involve personnel, that have been advanced in relation to such matters should not be discussed outside the Department.

This procedure is in accordance with sound management practice and was necessary if there was to be full expression of ideas within the Department on the numerous contentious issues involved and to prevent speculation about changes that individuals might recommend prior to my own consideration and judgment on the issues. When Ambassador Flake and I have completed our task, the restriction I have imposed will, of course, disappear. But I would suggest to the subcommittee that I myself would be the appropriate person with whom to discuss any resulting action.

Second, during the week of August 5, Mr. Sourwine informally scheduled the appearance of 19 Department witnesses. At that time, an investigation of personnel in the Office of Security, having a direct bearing on our security situation, was being conducted by the Department. I felt it important to discuss the matter with the subcommittee to avoid any prejudice to the investigation. On August 13, therefore, I wrote to Senator Dodd requesting an opportunity to appear before the subcommittee. I said that:

Until I have an opportunity to discuss this matter with your subcommittee, I have asked all subordinate State Department personnel not to appear as requested by Mr. Sourwine.

Accordingly, Mr. Schwartz and Mr. Reilly issued instructions that their subordinates were not to testify before the subcommittee prior to my appearance. I had understood that I would appear before the subcommittee within a short time after that letter. In fact, arrangements were made for me to testify on August 30, but this appointment was canceled by the subcommittee.

The instruction in my August 13 letter was, on its face, a temporary measure. Now that I have had an opportunity to present my views to you, it is, by its own terms, of no further effect. Of course, to avoid prejudicing pending personnel cases, I am confident the subcommittee will agree that Department officers should not comment on the substance of such cases.

Let me turn now to the future. It seems clear that, as two parts of the same Government, the subcommittee and the Department should work together toward the objectives we share. I have frequently emphasized my desire to cooperate fully with all committees of Congress. I reiterate that intention here. Department personnel have been instructed by me to meet the needs of congressional committees as fully and promptly as possible.

The records of the subcommittee will show that, during my term of office, it has had very full access to officers of the Department. But I think we can each do our part better if relations between us are carried on in an orderly manner, and in accordance with recognized and agreed procedures. I have some suggestions—I emphasize "sug-

<sup>1</sup> Parts II, III, and IV of Mr. Rusk's statement have been deleted, in view of irrelevance of this content to this Separation of Powers report.

gestions"—for these procedures, which I think will provide a sound basis for future cooperation.

First, I can assure the fullest assistance to the subcommittee if all requests for information, documents, interviews with Department personnel, and appearances of Department witnesses are made by timely letter from the chairman or acting chairman of the subcommittee directly to me or to the Assistant Secretary for Congressional Relations.

Second, before beginning a subcommittee investigation relating to the Department, the chairman of the subcommittee should send to the Department a statement of the scope and nature of the inquiry. Department witnesses can best be prepared if they are informed of the matters about which they will be questioned. This will also permit me to know the nature of the problems in which the subcommittee is interested.

Third, since I have direct responsibility for the work of the Department of State, good practice would suggest that I be furnished with transcripts of the testimony of any Department witness who appears before the subcommittee, within a reasonable time after his appearance, and that I be able to designate an observer in cases where the proceedings will not be fully transcribed. I believe it is important to the subcommittee to have my own views on matters relating to the Department.

Fourth, before publication of the testimony of any Department witness who appears before the committee, I should have the opportunity to review it for security purposes. I think this practice has, in general, been followed in the past.

As a final point, the Presidential directive of March 13, 1948, provides that "no reports, records or files relating to the loyalty of employees or prospective employees" may be furnished to the subcommittee except upon the determination of the President. Neither I nor any of my subordinates should be asked to violate that directive.

I do think it important that we keep clear about lines of responsibility, and that the subcommittee and I be in regular touch with each other about problems of common interest. I do not believe the subcommittee wishes to permit unauthorized underground relations about which neither you nor I are informed. I am sure you would also agree that your staff should work for you and the Department's staff should work for the Secretary of State.

The subcommittee has raised the question of the applicability of 5 U.S.C. 652(d), which confirms the right of persons employed in the civil service—

to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or any committee or member thereof \* \* \*.

Nothing in these guidelines, or any other action by me or my subordinates is in conflict with that statute.

The act, I am advised, was adopted solely to insure that civil servants would not be deprived of their first amendment rights to free speech and to petition Congress. The precedents of the Senate itself confirm this view.

During the Senate select committee hearings concerning censure charges against the late Senator McCarthy, that Senator's counsel contended that under the statute—

no qualifications or restrictions are imposed upon the right of Federal employees to take up matters with and give information to Members and committees of the Congress of the United States.

This interpretation of the statute was rejected, however, by the select committee, which concluded that the statute does no more than—

affirm that Federal employees do not lose or forfeit their rights merely by virtue of their Federal employment.

Obviously, an employee does not forfeit his rights when he complies with reasonable and orderly procedures for the exercise of those rights.

In conclusion, the select committee said:

\* \* \* a failure of the Congress or any Member to adapt itself or himself, to reasonable regulations by the President or his authorized department heads \* \* \* with respect to matters involving national security might readily expose the Congress to an equally sound criticism.

The guidelines I have suggested seem to me to be reasonable standards of orderly procedure. They will insure that I am informed of what is going on in the Department, as I must be to discharge my duties. And they will allow me to make sure that the subcommittee is fully informed on matters of interest to it.

If the guidelines I have suggested are followed, and if we concentrate on our joint concern to assure the highest security standards in the Department of State, I am confident that we can work together effectively in pursuit of our common objectives.

May I conclude, Mr. Chairman, by reminding the subcommittee again that I point to these as suggestions. I am not suggesting that the subcommittee accept them out of hand—not at all. I am putting them before the subcommittee for its consideration and discussion.

Senator DODD. That is what I understood, Mr. Secretary.

I believe that this issue came up directly while Mr. Abba Schwartz was here as a witness. If my recollection serves correctly, he was asked a question to this effect: whether he had altered the format of the passports issued for the Foreign Service.

It was then, I believe—Am I right about this, Mr. Sourwine?

Mr. SOURWINE. This is correct.

Senator DODD. Whether he had altered the format of the passport for the Foreign Service. It was then, my recollection tells me, that he refused to answer on the grounds that he had been instructed not to answer such a question.

Senator HRUSKA. It seems to me, Mr. Chairman, on that question that he might have interpreted it more broadly than it was intended. That does not bother me at all.

Mr. SOURWINE. In fairness, it should be said that the subcommittee did take issue with Mr. Schwartz on whether that came within the ambit of the order and he did subsequently testify about that particular matter.

Senator DODD. I see, but am I not right, that this is how it came up?

Mr. SOURWINE. That is exactly how it came up; yes, sir.

Senator DODD. I know there might be some questions by the other members of the committee.

I do not know just which order to observe in asking questions.

Senator Johnston?

Senator JOHNSTON. I have no questions.

Senator DODD. Senator Dirksen?

Senator DIRKSEN. No.

Senator DODD. Senator McClellan?

Senator McCLELLAN. I am not familiar enough with the details to immediately interrogate the Secretary.

I think this: I think there ought to be a basis for working together and I think, at the same time, the subcommittee ought to be able to get any information it really needs. I do not see any reason why there is such a great secrecy between the executive branch and this committee in working out these problems.

There should not be. I have no ax to grind in it. I am opposed to some arbitrary attitudes in the executive branch of the Government from time to time. As I find them, I will press my opposition to them. In this I am not as familiar with the details as I should be, maybe.

Secretary RUSK. May I comment very briefly on that, that I agree fully with what Senator McClellan has just said. There are about nine committees of the Congress that are interested in these and similar problems in the administration of the Department. I have particularly wanted this chance to meet with this subcommittee at this time, because it has been my continued effort in dealing with other committees interested in this problem not to permit the difficulties that have been encountered here. I think the other members of the subcommittee who are on other committees will agree. What I am trying to do is get what is good policy and good procedure on both sides so you will get all the information you need and we can administer the Department to our best ability.

\* \* \* \* \*

Secretary RUSK. The committee has had a very considerable number of Department witnesses in front of it this past year, in 1962, and the first part of 1963. I have not, myself, imposed restrictions on any of them except in the two cases I mentioned. I had, myself, directed an investigation to see if there were not violations of security in the Department.

There were indications that the violations of the Executive order might involve members of the staff of this committee.

I felt that this was not the right time for this committee to call my investigators down, in the middle of an investigation—now, you can call them down since that particular investigation is completed.

Because that raises some very serious problems of conflict of interest between the committee and myself. Maybe the committee would want to hear from me the full circumstances before they proceeded.

\* \* \* \* \*

Secretary RUSK. There is a standard in the Executive order of 1948 on the handling of certain kinds of materials.

Senator HRUSKA. Security materials, yes. I am not talking about security materials.

Secretary RUSK. If Mr. Otepka's conduct is not in violation of that Executive order, that will come out in the course of these proceedings. He has claimed he did what was charged, but they are not involved in the Executive order. That is one of the points at issue.

But on the question of higher loyalty, of course, there is a higher loyalty. But how is it given embodiment? I would think that, for example, if there are Executive orders that would impose certain limitations upon an officer of the Department of State, that he at least ought

to inform some of its superiors as to the action he feels he must take in contravention of that Executive order.

My concern is that—I must assume, since I have no notice of anything to the contrary, that the committee has not authorized or instructed that its staff, for example, obtain information which would require members of the executive branch to violate the Executive order of the President.

Senator HRUSKA. There is no such intention, nor has any such effort been made.

Secretary RUSK. That is right. Therefore, this is something I think the committee and I can clarify between us. If we get to the point where certain information is vital to the committee and it is in contravention of the Executive order for someone else to make that available, this is the kind of point that I, myself, in the case of certain of the committees, have discussed with the President and have made certain information available to the committee.

I think it is at my level or a very senior level of the Department that that kind of issue is involved. Otherwise, the whole administration of Government just erodes away.

Let me throw myself on the mercy of the committee to tell you the practical problem I am faced with in this whole security field, at the present time. There is an erosion of confidence among people who are working at adjoining desks. They do not know whether they can give confidence to each other or not. They spend a great deal of time writing memos, building up records in case these records are needed. This is not good administration. I think the committee and I can work together so we do not have these shadows lurking over the Department so people cannot trust their own colleagues and deal in good faith.

That is why it is of so much value to deal with the committee to get your feeling of the matter and to offer to come back as much as necessary to get these things cleared up.

\* \* \* \* \*

Senator McCLELLAN. Now, let me ask you this, is this man Otepka in danger of losing his job because he testified before this committee?

Secretary RUSK. His testimony before this committee has nothing to do with it, Senator.

Senator McCLELLAN. Nothing at all?

Secretary RUSK. Nothing. There is nothing in the charges against him about his testimony before this committee and nothing in his answer about his testimony before this committee.

Senator McCLELLAN. You are telling the committee that the action against him, the proceedings now pending against him or any consequence of those proceedings will in no way be related to his appearance before this committee or testimony he gave to this committee?

Secretary RUSK. That is right.

Senator HRUSKA. Would it go so far as any information he gave to the committee?

Senator McCLELLAN. I just asked it.

Secretary RUSK. No; I cannot say that if you include the committee staff or include transactions which, so far as I know, neither the committee nor the Department of State authorized.

Senator HRUSKA. Now, that gives a different answer, then, to Senator McClellan's question, because these charges are quite clear on their face.

Senator McCLELLAN. That is not the impression I got. I got the impression that that is what he is charging.

Secretary RUSK. I thought the Senator's remark was about testimony before this committee.

Senator McCLELLAN. I used the word "testimony." But that includes information given to the committee.

Secretary RUSK. To the committee's staff?

Senator McCLELLAN. I regard the committee's staff in the pursuit of its duties as you regard somebody under you.

Senator ERVIN. I think page 5 clarifies that.

It says, on these charges, there are three main groups of charges. The first is that Mr. Otepka furnished to Jay Sourwine, chief counsel to the Senate Internal Security Subcommittee, classified information concerning the loyalty of prospective State Department appointees. The letter of charges indicates that this conduct violated a Presidential order issued on March 13, 1948, of which Mr. Otepka was aware.

This states further that Mr. Otepka admits that he furnished such information, if I construe it right, but he denies that it constituted a violation of the Executive order.

Secretary RUSK. As I said a little earlier, I have not availed myself of the information at this stage, because I may be involved at another stage, a later stage, than the charges have proceeded to. But if this does not fit the facts, it will come out in the testimony in the proceedings. Testimony before this committee and information given informally to the committee's staff, without necessarily the authorization of the committee or the Department of State, I would suppose, is in violation of the Executive order of the President, if it is the kind of material covered by the Executive order.

Senator ERVIN. As I construe the statement, two of the charges have their foundation in transactions between Mr. Otepka and the committee's staff.

Secretary RUSK. I believe that is right.

Senator McCLELLAN. That is what I had understood.

Senator DODD. I think there is a practical problem here. I think it is normal that, before a witness is examined as a matter of record, in executive session or in public session, he is interviewed by the staff.

I think this happened in the case of Otepka. Am I right, Mr. Sourwine?

Mr. SOURWINE. Yes, sir.

Senator DODD. And what he told the staff in the interview was later made a part of the official record. He did not tell the staff anything that he did not testify to later.

Is this true? I want to be sure I am right about this.

Mr. SOURWINE. Yes, sir.

Senator JOHNSTON. There are two reasons why we have that happen. One is to conserve the time of the committee. The staff can look into these matters and find out whether or not it is worthwhile to bring the matter before this committee.

Senator DODD. I am sure the committee understands that, and the Secretary.

Senator JOHNSTON. Another reason is, if there is anything we think is of importance, we call witnesses in before the committee.

Secretary RUSK. My understanding is that some of the charges involved the transfer of some documents in violation of the Executive order. Again, these are all questions that are being examined and looked into in the proceedings that are now underway.

Senator DODD. Well, what about that? Do you have any answer to that, Mr. Sourwine?

Mr. SOURWINE. Well, the fact is that Mr. Otepka did furnish the committee with certain documents. These documents have been identified by him in testimony and placed in the committee's record.

Mr. Otepka was asked to read the testimony of another State Department witness—who had, in his testimony, contradicted what Otepka had testified to—and to support with a memorandum and documentation each point on which there was a conflict. Mr. Otepka did this and he provided a memorandum which has been made a part of the record.

I do not know of any information that Mr. Otepka has furnished that has not now been made a part of the executive record.

I would like to say, if the committee will permit, that I have never sought nor received any information from Mr. Otepka except in my capacity as counsel for the committee. He never gave Sourwine, individually, anything. He gave Sourwine, counsel, information.

And I will state this one further thing: Mr. Otepka did not come to the committee to volunteer any information. He was sought out and called before the committee and asked for information. And he furnished it only in response to the committee's request.

Senator McCLELLAN. Well, Mr. Chairman, I would like to make this observation. I realize that sometimes the staff is energetic. I have had a little experience in this field. They feel that there is a duty, they know the general things in which the committees are interested, and they take some action on their own initiative.

I take the position that the committee is responsible for it. They may do wrong. If so, it is our duty to correct it, if they are engaged in something we do not want them in.

But I think something can very well go wrong down there in the Department of State that the Secretary would very much disapprove of, but it is Department of State action. The only thing to do is to iron these things out as we are trying to do. I think whatever Mr. Sourwine did in this connection was a committee action, though the committee, had it known it and been fully advised, everybody present and deciding on it, might have decided different.

But it is committee action.

The same thing is true of what goes on down there. I regard it as State Department action.

As I understand it now, it is a question of an interpretation of whether the man has violated the rule or law by giving this committee information that was classified. That is the main issue.

Secretary RUSK. That was one of the main issues. There is a second issue which has to do with furnishing questions to the committee to be asked of his own superior. This is a matter of policy and judgment as to whether or not an organization can function on that basis.

Senator McCLELLAN. Let me ask you this:

What would be wrong in that? Here I am called up here. I work for the State Department. I am called up

here before a congressional committee which asks me questions. I state a given state of facts. And the counsel or the committee raises some question about it, "Well, now, how do you know that?" and so forth.

I say, "Well, you can get the truth, possibly, if you will ask so and so certain questions."

Now, tell me what is wrong with it? I mean have I stated the premise correctly?

Secretary RUSK. Yes, sir; and as you know, committees and prospective witnesses and departmental officials frequently consult on the nature of the investigation, the inquiry on a particular subject, and what kind of questions are likely to come up.

I think if these things are fully on the table between the committee and myself or my responsible representative, these are things that can be worked out without all sorts of shadows lurking over everybody who is working on these matters.

Senator McCLELLAN. I would think so. I think whenever an issue comes up here like this—I know you are awfully busy and you have many, many things to do. And we have some things to do. But there can come a situation where we ought to sit right here with you and you make yourself available for us to go into it.

Because I think, Mr. Secretary, we are not likely to be too careful about the security of our country in any branch of our Government.

Senator HRUSKA. Will the Senator yield?

Senator McCLELLAN. Yes.

Senator HRUSKA. On that score, I have followed this matter quite closely, and frankly, Mr. Secretary, in some levels of your Department, there seems to have been a resentment at our chief counsel here going into matters that were not gone into by Senators themselves. If we were to undertake to do these things ourselves we would be completely immobilized. It is totally impossible. To deprive the chief counsel here of his truly delegated powers within the scope of the authority extended by the Senate committee would be a travesty.

I do hope that, if there are any lingering thoughts in that regard that are resident in the minds of any that have anything to do with this, they may be dispelled in a hurry. Because we could not do it any more than any department, or even the head of the security agency, can do all the things. He must delegate, as obviously the Secretary must delegate.

So I would think we ought to, perhaps, get to an understanding on those things, that because there is not somebody here from the committee, asking and interviewing these people, does not mean that it is not an action of the committee.

Senator McCLELLAN. I took the position that any action of his is action of the subcommittee. If it is wrong, we are responsible, although we probably would not have done it had we been sitting here.

Though we repudiate his action, give opposite instruction that may violate this, his action is action of the subcommittee, as I see it.

Secretary RUSK. Senator, I do not challenge what you have said. I do have responsibility, as Secretary, for Executive orders of the President and the appropriate orders, statutes, and regulations.

Now, I think the committee and the Department can resolve these problems with the kind of consultation we are now having and can have further on these matters.

The thing that I must say I find very difficult is the idea that there are all sorts of unknown leaks, unknown to the committee and unknown to me or unknown to the senior officers of the Department that serve as channels for communication which may or may not be in accordance with the regulations of the President and relevant regulations of the Department.

I think we ought to get these things up on top of the table and talk them out. That is all I am talking about.

Senator HRUSKA. We can, certainly as far as principles are concerned, and practices.

When we get down into application thereof and details, then we get a little bit stuck.

Now, I refer to page 18 of your statement there, where you suggest that we give the fullest assistance of the committee as to information, documents, and interviews with the Department personnel, and that that be made by timely letter. Now, that has been done in an orderly fashion heretofore, but through the offices of Jack Leahy, congressional liaison officer; not by letter but certainly by ample notice.

In the first place, I want to say with reference to these four points here: I am not prepared to concede that it is in the Secretary of State's or the State Department's jurisdiction to prescribe under what conditions we shall be able to call witnesses from the State Department or any other department.

Senator DODD. I think the Secretary said that this was a suggestion he was making.

Secretary RUSK. I am not trying to dictate to the committee on that.

Senator HRUSKA. I am addressing myself to these things here. What kind of information would you want, what kind of information about documents and interviews would be necessary in this timely letter? You see, the principle is good, but how do you fasten it down? A witness comes in here and the general subject is the organization of the Passport Department, let us say. Now, we do not know. We have been told that there are certain, some certain complaints, there are certain inadequacies or certain abuses, so we have to inquire. Now, we get a witness in here and question her on certain work. We say to her: "The general topic is your work."

Now, if we are, in advance, to give information as to the interviews, the documents, and so on, how will we know what we are to ask for?

Secretary RUSK. Well, I think that in the first place, there have been many dozens of, as I understand it—I am not sure I am personally informed of all of them—but there have been many appearances by the Department of State last year and this year before the committee.

In terms of documents, I think we have a special problem there because of the Executive order that covers the transmission of documents in certain fields.

But I am sure that the committee has had many documents furnished to it by the Department of State and its officers.

Senator HRUSKA. Yes; and by and large, we have had no trouble on that score.

Secretary RUSK. We have had very little trouble of this sort in dealings between some 9 or 10 committees

of the Congress and the Secretary of State, and I am hoping we can proceed in a manner that will avoid difficulty in this area.

Senator HRUSKA. As far as I know on that point, there has been no trouble with regard to documents, no trouble with interviewing Department personnel, nor timely information directed to the Assistant Secretary for Congressional Relations or his duly authorized representative.

Now, then, the next thing I wish to mention, it is suggested that a statement of the scope and nature of the inquiry be divulged. On that score, I am sure we have no objection.

I do not know that we have ever failed to do it.

Senator DODD. Do you do that now?

Mr. SOURWINE. I think this question depends upon degree. There has not been, in most instances, a detailed advance divulging of the questions which would be asked. We have had one request on the part of an official, in advance of a scheduled appearance which was later canceled—I am talking of Mr. Crockett—for a memorandum respecting the matters concerning which he might be questioned.

This memorandum, upon Senator Dodd's instructions, was promptly furnished.

Senator DODD. I believe in that case, I thought he ought to know.

Secretary RUSK. It is a matter of practical convenience so that the witnesses coming down will have a chance to inform themselves generally.

Senator McCLELLAN. Mr. Secretary, I think you can indicate generally the source, the character of information that you want.

I often hedge on that. I do not have any idea what a Senator will ask.

I cannot control them.

Secretary RUSK. I think there is no difficulty on that.

Senator HRUSKA. On the third point, you suggested that good practice would suggest that the Secretary be furnished with transcripts of the testimony of any Department witness who appears before this subcommittee within a reasonable time after his appearance.

That I think we can understand. But there is a timeliness about the release of that testimony which should be observed. Certainly, if it is done currently, from day to day, punches would be telegraphed and witnesses who would be called up here after that would be in a position to anticipate what their answers should be and they probably would not give the kind of answers that the true record reflects. We have had examples of that repeatedly, where the testimony of the initial witness has been made known in advance of the questioning of further witnesses on the same subjects.

Now, within a reasonable time, yes; I think that would be fair. I just wanted to make that observation at this time.

Did you have in mind at the conclusion of the testimony, or did you have in mind concurrently, Mr. Secretary? Because we would like to know.

Secretary RUSK. I am not thinking of an adversary relationship here, Senator, quite frankly. I do believe that I ought to have a chance, and I think the committee ought to have a chance for me to give my views on questions that come up before the committee if they involve the security of the Department.

Some of these may be on the basis of incomplete information. It may be directly contrary to the facts as I know them, for example. I think it gives me a chance to respond responsively to the committee on these questions, with the full responsibility of the Department that I have.

Senator McCLELLAN. Will you yield at that point?

Senator HRUSKA. Sure.

Secretary RUSK. I am not thinking about intimidation of witnesses and that kind of thing.

Senator HRUSKA. Well, I am. Not at your level, Mr. Secretary, but at a lower level. And when it is suggested by a witness sitting right at this table that his loyalty runs to the Secretary of State and he believes it and that is his doctrine, then you see, we get just a little scared, because if that is their idea, they may go just a step further.

As I say, we do not feel easy about it.

I am sorry, Senator.

Senator McCLELLAN. That is all right. I just want to get it clear, we are in the course of a hearing, an investigation. We have called in four or five witnesses, maybe, from the State Department. I am just using this as an illustration. Do you have in mind, now, that in the course of that hearing, every time a witness finishes testifying as soon as his testimony is transcribed, it must go to the State Department?

My feeling is this: I would think before the committee releases any testimony or releases any report, certainly the Secretary ought to have a chance, or somebody at a high level, to go over it and make comments.

Secretary RUSK. This is the primary point I have in mind.

Senator McCLELLAN. I have no objection to that. But you cannot do it in the course of an investigation every day, just release the testimony.

We could not operate that way. But I think you are entitled to know when we get testimony, before we release anything to the public, I think you would be entitled to come in here. It is only right that we ask you to come here, to let you read it, let you see it, let you help us get the facts.

Secretary RUSK. Let me illustrate that with something I have no reason to think has any connection with this committee or any case that should come up.

I saw in the newspaper not long ago something that indicated that Harlan Cleveland, an officer in the Department of State, had recommended that the Department of State rehire Alger Hiss.

Senator McCLELLAN. They want to know if he is back on the payroll. Is he?

Secretary RUSK. What I want to say to this committee is: Get that testimony under oath and send it to the Department of Justice, because that is what it would require.

Senator HRUSKA. Was that information given by this committee or was that conjecture started by a news reporter?

Secretary RUSK. No; I am just giving it as an illustration to have the committee give me a chance on this.

Senator McCLELLAN. I agree. I think it is right that you should have. But I do not think it is right that you require of us that, every time we have a witness here, we immediately transcribe his testimony and send it to you.

Secretary RUSK. I am not suggesting that this be done on a daily basis, but before you transcribe or release the information, you and I ought to have a chance to discuss it.

Senator McCLELLAN. Before we reach a decision, before we issue a report, before we give all that information out to the public, I think you should have an opportunity to be heard.

Senator HRUSKA. I do think the procedures of this committee have been virtually exemplary in that regard. That is one reason for these executive hearings, so that if there is something like that which comes out, and there is something later, which the practice is, for clearance with the Department for security purposes. If it is submitted at all, whether it is for security purposes or otherwise, the Department is always privileged to say, here, it is alleged that Alger Hiss was on the list to be reemployed. We would want to send the testimony to the Department on that point and we want the record clear.

Senator McCLELLAN. Off the record.

(Discussion off the record.)

\* \* \* \*

Senator HRUSKA. There is something on page 19 to the effect that the Secretary should be able to designate an observer in cases where the proceedings would not be fully transcribed.

Mr. Secretary, I do not know how familiar you are with investigation procedures, but if that is done, there will be a clamping up of the witness to an extent that it will destroy the usefulness of the interview and of any information we want to get from a witness. Obviously, the observer will be there for one purpose, to report back to the Department and that is what he will be there for, to represent the Department.

We have had it repeatedly in the room here, where I have occupied the chair occupied now by Senator Dodd, and a witness will be asked, "Does Mr. Leahy represent you or does he represent the Department?"

The answer will be given, "He represents the Department."

"Would you want him to be present or would you rather he were excused?"

The answer sometimes is, "I would rather he were excused." And I think that is fair.

Now, if we are going to get into the matter of having an inhibition, either latent or otherwise, in the interviewing of witnesses, then again, we will be somewhat stultified in our investigatory procedures.

Senator Dodd. I think we can work that out.

Senator HRUSKA. I hope so.

Secretary RUSK. I think the transcripts may take care of that problem. But again, Senator, I may be old fashioned, but I do feel and I think any organization feels this and I suspect the committees of Congress feel it—I feel that, on official matters, I should have the right to know what is going on in my Department.

Senator HRUSKA. Well, no one wants to—

Secretary RUSK. You see, this is my problem.

Senator HRUSKA. No one wants to deny you that right, Mr. Secretary, this committee least of all, but we cannot let you know what is happening in your Department unless you give us a free hand to find out, within our legitimate framework, what is going on.

And we often cannot find out when the witness has, right next to him, an eye, and ear, and mouth, and arm of the Secretary of State. Because then we get into this recrimination business and other things which, as a

practical matter, do happen sometimes, not always known to you, and you cannot be and are not to blame.

Senator SCOTT. I want to say something on that, because as the Secretary says, there is no charge against Otepka which relates to his testimony here.

But Otepka's defense goes always to the hearing before the committee.

His defense goes not so much to what he said to Mr. Sourwine as counsel but to the testimony which he gave. This raises the question Mr. Hruska raised a moment ago. He said: "Mr. Sourwine voluntarily informed me there were conflicts"—this is on page 3 of Otepka's statement—"there were conflicts between my testimony and the testimony of Mr. Reilly," and that, after reading the transcript, he, Otepka, "prepared a memorandum consisting of 39 double-spaced pages annotated by exhibits." I would assume a great deal of it referred back to Mr. Reilly.

Then we get to that mention that "Mr. Reilly testified concerning eight prospective appointees to the Advisory Committee on International Organizations, that there was no substantial derogatory information respecting any of them, that the case of only one had ever been brought to his attention prior to their appointment."

Now, Mr. Otepka, without going into detail, makes a direct traverse of that statement, saying in substance, it is a lie, to be blunt about it. He points out that he knew the testimony to be incorrect because he had indeed submitted to Mr. Reilly a memorandum with regard to each of the eight individuals and so on.

Now, he is asked to testify. He does not volunteer there. He is asked to testify and then he does testify on the conflict between him and Mr. Reilly. I am not talking about the merits of this charge at all. What I am getting at is: How could we—Is there any other way by which this committee could ascertain that there exists the Reilly side of this story and the Otepka side?

In other words, is there any way in which the committee could have learned, than by the method pursued, that either Mr. Reilly is not telling the truth about these clearances or the failure to provide derogatory information, or that Mr. Otepka is not telling the truth in asserting that he gave it to Mr. Reilly?

That sort of illustrates this business of an observer. If Mr. Otepka, for example, had been the observer when Mr. Reilly testified, would he have so testified? If Mr. Reilly had been the observer when Mr. Otepka testified, would he have so testified?

We are searching for the truth. I am talking as a lawyer. I think you understand that.

Secretary RUSK. The truth in these circumstances is my own concern, also.

Apparently, we had conflicting testimony before that. The committee showed the conflicting testimony to Mr. Otepka so he could comment on it. And I presume they also showed the conflicting testimony to Mr. Reilly so he could comment on it?

Mr. SOURWINE. Mr. Reilly has not yet been called back for that purpose. Each time Mr. Reilly has testified when there was then existing conflict, he has been told about it, but we do have some conflicting testimony and Mr. Reilly is one of these whom we would like to have back.

Secretary RUSK. In that situation, the observer issue disappears, because we do have conflicting testimony and the Department necessarily becomes involved in it.

But I think Senator Hruska's point is more difficult, where there is no conflicting testimony that is handled that way, but where there is testimony which I might feel, myself, is contrary to the facts as I know them on a particular point, or, say, contrary to the policy of the Department on a particular point and the committee ought to be informed about my view of the facts on the policy.

Let me make my point very clear. I am not at the present time raising any question about saying to any officer of the Department of State, "When you go down there, you can only say 'X'."

If they, on the questioning, want to say "Y" and "Z," all I am saying is that I think good practice—but this is for the committee to consider—that good practice would give me a chance to know about it so I can inform the committee of my own views on the question.

Senator SCOTT. You would agree, I am sure, that at the point where Mr. Otepka is asked to testify on whether or not the statements of Mr. Reilly are accurate, there is no course open to him when he is here and under oath except to tell all that he knows. He cannot withhold anything.

Secretary RUSK. Now, the committee is aware that there is the Executive order issue which will have to be worked out. But again, the Executive order, I do not think, is going to provide any problem at the level where it belongs, where the executive and the legislative branches are in full and responsible contact with each other.

Now, I have, on occasion, taken action which, in a technical sense, were it not for my own Cabinet responsibilities and my discussions with the President, would appear to be in violation of that Executive order.

But this is the level at which exceptions to the Executive order are made, in consultations between the President and the Cabinet officer and the Cabinet officer in consultation with the committee. This is where I have not run into any trouble in the past few years.

Senator HRUSKA. Does that Executive order dominate over the statute that—

Senator DODD. Senator Hruska, would you yield just a moment? I know Senator McClellan wants to leave. I hope you will pardon me.

I think this has been very helpful to us, let me say right away. We are going to be bombarded when we go out by these newspaper people.

I think the only truthful thing to say is that we talked about these things, we have reached some understanding about how we will proceed with respect to this problem. Assuming they ask what the situation is with respect to the Department witnesses, can we say that they will be permitted to testify?

Secretary RUSK. I would say yes; that the answer to that is "Yes," in a normal fashion. But I would hope the committee would give me further chance, in the particular case of Ambassador Flake, give me a further period of time with Ambassador Flake before calling me in to talk about these organizational matters.

Senator McCLELLAN. How long would it take before you will be ready?

Secretary RUSK. I would think another couple of weeks.

Senator McCLELLAN. I know you have already had him working on it.

Senator SCOTT. I think Mr. Sourwine's question went to whether he, acting as counsel, could call Mr. Reilly.

I am only concerned here, as a lawyer, as to how much we have a right to ask and whether or not there are persons present. I am going into that aspect of it without regard to the merits. The merits are before you as Secretary and before the committee.

Mr. SOURWINE. Mr. Chairman, may I clarify that just one moment? The Senator spoke of Sourwine calling witnesses.

Senator SCOTT. Counsel calling.

Mr. SOURWINE. I do so only as a channel. I have never called a witness without authorization and direction to that effect from the committee, the chairman, or the vice chairman of the committee.

Senator DODD. That is all right; we understand that.

Secretary RUSK. In order that we do not get into a failure of understanding at a later stage, I do think that I would have to make an exception since it is a pending proceeding, on going ahead in the case of Mr. Otepka. The President and I have indicated that we will be the review authority on that, subject to his own choice about whether he goes to the Civil Service Commission or not. I do not know about the officer who will be responsible for making the next judgment on it, what his judgment is going to be.

We have not heard from the Director of Personnel.

Senator SCOTT. It does not go to the Civil Service Commission unless and until there is an adverse decision.

Secretary RUSK. I do not believe that is so—not unless there is first a departmental decision on the basis of a charge and an answer, that some proceeding should be taken.

But I would hope that the committee will understand and sympathize with the thought that, during this proceeding, the substance of the Otepka case should be left to the pending proceedings for the time being.

Otherwise, I have no trouble with your calling anybody you wish in the Department.

Senator McCLELLAN. And on the Otepka issue, you want us to defer calling any witnesses?

Secretary RUSK. I mentioned the Otepka proceeding and the Ambassador Flake report.

Senator McCLELLAN. You mentioned there would be a report from Ambassador Flake in a couple of weeks. That is primarily, now, the Passport Division.

Secretary RUSK. That is the organizational thing.

Senator McCLELLAN. The Passport Office and the Bureau of Security and Consular Affairs.

Secretary RUSK. Right; passport, visas, things of that sort.

Senator McCLELLAN. And the other is—this Otepka thing is the one, from my viewpoint, that is the most pressing.

Here is a man being charged and being ousted, maybe, and this committee apparently is involved in it.

I do not know—We are going to have to talk about that some. I would just like to let you state your views how you think it ought to be handled.

I am not prepared at the moment to make a final decision on that.

Senator HRUSKA. Mr. Chairman, did I understand the Secretary that he would like to have those witnesses held in abeyance that might testify as to things pertaining to Otepka's testimony and his functions, and so on?

Is that your suggestion, Mr. Secretary?

Secretary RUSK. No; I was thinking of the immediate proceedings on the charges and the answers.

Senator HRUSKA. We are not involved in the charges and the answers. But we have a number of witnesses—we have as many as 8 or 10 witnesses in this general area that have been under inquiry here for some time.

What we would like to do, frankly, speaking as one member of the committee, I would like to see that this matter go forward so we complete that picture, at which time, I think, it would be very fruitful if we sit down at an executive or informal session and go over the facts as we think they are and give you an advance copy so you can come back and say in a prepared and deliberate fashion, "I think you need more information on this point."

Secretary RUSK. That is the point I had in mind.

Senator HRUSKA. But if we are foreclosed from calling these witnesses in the meantime, it is going to circumscribe our efforts, which we believe to be legitimate and very, very vital.

Secretary RUSK. What I was referring to, I think, was not the general questions of Mr. Otepka's responsibilities and activities in that part of the Department, but the precise questions that are involved in the present proceedings.

Senator HRUSKA. Well, of course, we have had a little experience with that, saying the witnesses can come here but they cannot testify on certain things. We have had witnesses sit at this table and they would be asked about an area of activity in the Department and they would say, "Well, we cannot testify about that because that is involved in this reorganization thing." And in some cases I cannot say that it was.

Maybe I am being prejudiced. Maybe I have been a little too eager to get at things. But if they are going to be asked to come in here and not testify to matters related to the charges against Otepka and they would seek that as a curtain and a shield not to get into something—For example, if Mr. Reilly were called back and were told what disclosures were made by Otepka and he would be asked to give any statement in rebuttal if he chose, and he would say, "I am foreclosed from answering," where are we going to get?

Secretary RUSK. Let me say, Senator, while I cannot pinpoint this problem further, I believe it will take some advice on this and I would discuss it with the President, but in the case of the organization problem, I am not concerned about the committee's knowing everything that is going on in these parts of the Department.

What I did not want to do was to have Ambassador Flake's consideration of judgments that he and I will be discussing intruded into prematurely, frankly, by the committee before he and I have had a chance to talk together.

Senator SCOTT. I think that is a reasonable request.

Senator HRUSKA. That would entail a release of our report before publication of it. I am sure we can agree no such thing will be done, because as far as I know, there is no intention of this committee to make a release of that sort until a logical point of the whole picture on the table has been reached.

Secretary RUSK. The committee may not agree with me, but I think I am entitled to have Ambassador Flake's first judgment first, you see, and when he and I get through on this, then I can come down and talk to the committee.

Or you can call Ambassador Flake. All I want is a man I have selected from past experience to help me on a problem in which I have direct interest.

Senator HRUSKA. On the other hand, we will not be ready to meet with you on the Ambassador Flake problem until we finish the present proceedings.

We will not be able to deal with them.

Senator SCOTT: I think the Senator makes a reasonable point, but I do not think you have to have any concern about Mr. Reilly or anybody else testifying, because the Secretary has already made it clear that the charges against Mr. Otepka have no relationship to anything he testified to.

Since that is the case, I see no reason why witnesses could not come down to testify to the general questions of security and to all the matters raised in the hearing by any witness, since the charges against him have to do, as I understand it, with statements that he made to counsel but not to testimony on the record.

Are we not in the clear on that?

Senator McCLELLAN. Everything he has said to counsel has been put in the record as far as I understand it.

Mr. SOURWINE. As far as I know.

Senator SCOTT. He is not being charged with anything he said on the record, therefore, if anybody challenges him and says, "I think he is not telling the truth—"

Secretary RUSK. As far as we know, he is not being charged with anything he gave in testimony to the committee. We do not have the transcripts. I have asked for the transcripts for some time and I do not have them. All I can say is the charge is not related to the testimony before the committee.

Now, if it turns out that the documents in question—

Senator HRUSKA. That is a fair reservation.

Secretary RUSK (continuing). I have no way of knowing. We do not have the transcripts.

Senator HRUSKA. That is a fair reservation.

Mr. SOURWINE. Mr. Chairman, the documents in question are a part of our record. They were furnished by Mr. Otepka as documentation for his testimony earlier given, that he had given certain memorandums to Mr. Reilly. He furnished us with copies of the memorandums.

That is an example. It is in our record. It was furnished for the purpose of going in the record.

Secretary RUSK. Whether those are the same documents—as I say—in these cases, I stay out of it until my stage comes, because I have a certain semijudicial function.

\* \* \* \* \*

Senator McCLELLAN. Well, I do not know where we are. You said something about what we would say to the press. My thought was you would say to them we had a very amicable discussion, some progress was made toward an understanding of it.

Secretary RUSK. And I would—

Senator McCLELLAN. That is about as far as I would want to go.

Secretary RUSK. If the chairman of the committee would wish perhaps we could indicate that this is the first meeting with the Secretary and we would expect there would be further.

Senator DODD. Very well, I think that is entirely right.

Senator McCLELLAN. I do not think we should put it down in black and white; one way or another without qualifications. The Secretary has submitted his views, he has some concern in certain aspects of it and yet there have been some areas where any misunderstanding apparently has been resolved, but I think there would still be need for consultation as we go along.

Senator DODD. Would it not be good to add to that that there will be further consultation with the Secretary as we do go along?

Do you agree?

Senator McCLELLAN. I am not caring about issuing any statement to the press myself.

Senator DODD. I am not, either, but you know we are going to run into them.

Senator ERVIN. The press is sort of like the Pennsylvania Dutchman on the Yadkin River in North Carolina when the floods came—what he said about Providence. The rains came and flooded the stream and washed out the gristmill. He went up on the top of the hill and surveyed the ruin. He said: "We will take Providence up one side and down the other, it does about as much harm as it does good."

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Senator Hruska. Mr. Chairman, I want to say I apologize for having been so verbose in this thing and so garrulous.

However, we have sweated out many an hour in this committee room, Mr. Secretary. And I want to assure you, certainly on my part and I know my colleagues have the same idea, that there should not be and as far as I am aware, there is no adversary relationship between your Department and ourselves. You have your job to do and goodness only knows how you keep up with it.

We also feel we have a little part in this business and we would like to discharge it as thoroughly and as conscientiously as we can and as fully as we can.

Secretary RUSK. I understand that.

\* \* \* \* \*

Senator DODD. Unless there is something else, Mr. Secretary, we are very grateful to you for taking the time to come down. I know it is not easy for you to do and you have been very helpful to us.

If I may say so, I will keep in touch with you and see if we cannot work out these procedures, so that we can work along and get ahead.

Secretary RUSK. All right, sir, fine. I am at the committee's disposal at any time except, I am afraid, the rest of this week. I am involved with the President of Bolivia and a quick trip to Germany.

(Whereupon, at 12:25 p.m., the subcommittee adjourned, subject to the call of the Chair.)

Mr. SOURWINE. Those were the seriously derogatory cases which had been investigated by the FBI under Executive Order 9835 because of a loyalty question?

Mr. OTEPKA. That is correct.

Mr. SOURWINE. Now, this report states that of the 545 cases, 254 resulted in favorable findings while 287 persons left either by resignation, transfer to other agencies, or for some other reason except dismissal prior to a final determination of their cases. And four were removed for cause as security risks after charges and hearings.

I find something of a discrepancy in these figures. You had 545 seriously derogatory cases, 254 favorable findings, 287 left and 4—only 4 removed.

Now, were any of the 287 who left made the subject of removal proceedings?

Mr. OTEPKA. There may have been some, Mr. Sourwine, against whom action was contemplated under the security order but they were separated for various other reasons than removal, before the adverse processing took place.

Mr. SOURWINE. Now, you had 1,398 derogatory cases of a lesser order?

Mr. OTEPKA. Yes.

Mr. SOURWINE. And your report indicated that 958 of those were resolved by favorable findings, 435 left by resignation, transfer, and so forth, prior to final security determination, and only 5 were removed for cause after charges and proceedings, and those under the personnel suitability procedures—not because of information of a security nature in their records.

Mr. OTEPKA. Yes, sir.

Mr. SOURWINE. So, that out of a total of deragatory cases of nearly 1,950—1,943—just 9 individuals were removed?

Mr. OTEPKA. By adverse proceedings.

Mr. SOURWINE. By adverse proceedings.

Mr. OTEPKA. Yes.

Mr. SOURWINE. And more than half had favorable determinations. Since 1957 has the relationship between favorable and unfavorable determinations and removals in security cases been about the same?

Mr. OTEPKA. Yes, sir; about the same.

Mr. SOURWINE. You say this is normal for the Department?

Mr. OTEPKA. Yes, sir; probably normal for the Government.

Mr. SOURWINE. Have you any information about the number of seriously derogatory security cases in the Department at any given time, either at the time you prepared this résumé or subsequently? I am talking about persons employed by the Department as of that particular date, whatever date it may have been, concerning whom there was seriously derogatory information in the files?

Mr. OTEPKA. Yes; I have information on those.

Mr. SOURWINE. Did you ever make an effort to identify the seriously derogatory cases?

Mr. OTEPKA. Yes, sir.

Mr. SOURWINE. What was the result of that effort?

Mr. OTEPKA. Well, I prepared a study which was directed toward identifying where those persons were employed amongst the various bureaus and offices of the Department of State, what kind of positions they occupied, whether or not they were policymaking positions.

Mr. SOURWINE. When did you do this?

[Excerpt from hearings entitled "State Department Security—1963-65, The Otepka Case—VIII," before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary; 89th Cong., 1st sess. pt. 10, pp. 592-598, August 12, 1963]

Mr. SOURWINE. In this 1957 report, Mr. Otepka, you referred to 545 derogatory cases. Those were not the total number of derogatory cases?

Mr. OTEPKA. No, sir.

Mr. OTEPKA. I did this in 1957, shortly after I prepared that other résumé.

Mr. SOURWINE. How many seriously derogatory cases did you identify?

Mr. OTEPKA. Approximately 800.

Mr. SOURWINE. Approximately 800. And they were all, at that time, still employed in the Department?

Mr. OTEPKA. Yes, sir.

Mr. SOURWINE. Do you recall the breakdown, where they were employed?

Mr. OTEPKA. I recall, yes, where they were employed; that is, where the majority of the greatest concern to me were employed.

Mr. SOURWINE. Where?

Mr. OTEPKA. In the Bureau of Intelligence and Research.

Mr. SOURWINE. How many of the 800 were there?

Mr. OTEPKA. I don't have that information at this time, but I will be glad to provide it.

(The subcommittee, by letter dated January 2, 1964, requested the list, along with other pertinent information, from the Secretary of State. The following letter is in reply to that request:)

DEPARTMENT OF STATE.  
Washington, January 27, 1964.

Hon. JAMES O. EASTLAND,  
Chairman, Subcommittee on Internal Security, Committee on the Judiciary, U.S. Senate.

DEAR MR. CHAIRMAN: I have been asked to acknowledge receipt of the committee's request, forwarded by letter dated January 2, 1964, from Mr. Sourwine to the Secretary, concerning certain information sought from Mr. Otepka during his testimony before the Senate Internal Security Subcommittee on August 12, 1963.

As Secretary Rusk has indicated, the Department is most concerned about any question concerning security practices and procedures, and always investigates such questions immediately when they arise. In particular, it has been careful to examine each allegation that there is derogatory security information concerning an employee of the Department, and every officer in the Department who has access to top secret material has been cleared after a full field investigation. It is true, of course, that no security investigation is ever closed; and if new questions arise concerning an officer, they must be promptly resolved. The Department makes every effort to carry out this policy and appreciates the work of your committee in helping in this connection.

In regard to the specific requests in the January 2 letter, the Department must reiterate the statement made by the Secretary in his testimony to the subcommittee on October 21, 1963:

"the Presidential directive of March 13, 1948, provides that 'no reports, records, or files relating to the loyalty of employees or prospective employees' may be furnished to the subcommittee except upon the determination of the President. Neither I nor any of my subordinates should be asked to violate that directive."

Since the requests in Mr. Sourwine's letter relate entirely to matters covered in that directive, it is not possible to comply with those requests.

If I may be of further assistance in this matter, please do not hesitate to let me know.

Sincerely yours,

FREDERICK G. DUTTON,  
Assistant Secretary for Congressional Relations.

[Excerpt from the *Code of Federal Regulations*, Title 3—The President—1943–48 Compilation]

## DIRECTIVE OF MARCH 13, 1948

[CONFIDENTIAL STATUS OF EMPLOYEE LOYALTY RECORDS]

MEMORANDUM TO ALL OFFICERS AND EMPLOYEES IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

The efficient and just administration of the Employee Loyalty Program, under Executive Order No. 9835 of March 21, 1947,<sup>1</sup> requires that reports, records, and files relative to the program be preserved in strict confidence. This is necessary in the interest of our national security and welfare, to preserve the confidential character and sources of information furnished, and to protect Government personnel against the dissemination of unfounded or disproved allegations. It is necessary also in order to insure the fair and just disposition of loyalty cases.

For these reasons, and in accordance with the long-established policy that reports rendered by the Federal Bureau of Investigation and other investigative agencies of the executive branch are to be regarded as confidential, all reports, records, and files relative to the loyalty of employees or prospective employees (including reports of such investigative agencies), shall be maintained in confidence, and shall not be transmitted or disclosed except as required in the efficient conduct of business.

Any subpoena or demand or request for information, reports, or files of the nature described, received from sources other than those persons in the executive branch of the Government who are entitled thereto by reason of their official duties, shall be respectfully declined, on the basis of this directive, and the subpoena or demand or other request shall be referred to the Office of the President for such response as the President may determine to be in the public interest in the particular case. There shall be no relaxation of the provisions of this directive except with my express authority.

This directive shall be published in the FEDERAL REGISTER.

HARRY S TRUMAN.

THE WHITE HOUSE, March 13, 1948.

<sup>1</sup> CFR, 1947 Supp.



## **FILE 18**

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### **HOUSE COMMITTEE ON AGRICULTURE**

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#### **C O N T E N T S**

<i>Subfile</i>		<i>Page</i>
18-A	Form I: Annexes to the Flanigan Report, with excerpts from the <i>Congressional Record</i> -----	129
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## (18-A)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
approx. Feb. 28 1973	Office of the Secretary, Department of Agriculture	Annexes to the Flanigan Report	few days after request	Office of the Secretary	Verbal refusal to the effect the department could not make the annex available.

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel. 225 8422, 8421

FILE

Submitted by: Comm/Subcommittee House Committeeon AgricultureBy: Fowler C. West  
Title: Staff Director 5-2171  
Extension

(129)

(18-B)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REJECTED AND SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

On March 7, 1973, a telephone request was made by the Committee Counsel for statistical data from the Rural Electric Administration, Department of Agriculture. The request was made for an estimate of the number of REA borrowers who would qualify for 2 percent loans under the criteria of a legislative proposal being considered by the House Committee on Agriculture. The information was requested pursuant to a meeting with the Department which the Chairman was planning. The REA official advised a computer printout would be necessary and information would be given to the Counsel as soon as possible. When the request was made, it was emphasized that time was of the essence because consideration was being given to changes in the legislative proposal depending on what the figures showed. On the afternoon of March 7, the REA official advised the Counsel the information could not be supplied until the following day because of the length of time required to obtain the computer printout.

On the following morning, March 8, the Chairman met with the Secretary of Agriculture and during discussion of the provisions of the legislative proposal, the Secretary confronted the Chairman with precisely the statistical data the Committee Counsel had requested. The Chairman indicated to the Secretary that this information had been requested on March 7 but the Counsel was unable to obtain it. This placed the Chairman in a very awkward position. The Secretary possessed superior knowledge to that of the Chairman because of his awareness of the figures and placed the Chairman in the unfortunate position of knowing less about his own proposal than the Secretary.

This same information was later formally furnished to the Committee later in the day of Thursday, March 8. The REA official indicated at that time that a new policy at the Department required him to furnish all responses to information requests by the Committee to the Office of the General Counsel, Department of Agriculture.

Secretary of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Fecore, Asst. Counsel  
205-8421, 8422  
cc: [redacted] 10

Submitted by [redacted] House Committee on  
Agriculture  
By: Fowler C. West  
Title: Staff Director  
52171  
Exhibit 1

[Excerpt from the *Congressional Record*, Apr. 12, 1973, pp. S7201-S7214]

## THE FLANIGAN REPORT ON AGRICULTURE TRADE POLICY

Mr. HUMPHREY. Mr. President, I said to the Senate yesterday, that today I would address myself briefly to the Flanigan report on agricultural trade policy. I call the attention of the Senate to the importance of the report.

Mr. President, I ask unanimous consent to have printed in the Record, following the completion of my remarks, the so-called Flanigan report on agricultural trade policy, which was prepared at the request of Peter J. Flanigan, Assistant to the President for International Economic Affairs.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HUMPHREY. Mr. President, the development of this report was under the direction of the Foreign Agricultural Service of the U.S. Department of Agriculture, with several other USDA agencies participating, including the Economic Research Service of the Agricultural Stabilization and Conservation Service. The director of this effort was Mr. Howard L. Worthington, now serving as a Special Assistant for International Trade to Secretary of the Treasury Shultz.

While neither Mr. Flanigan nor USDA wish to claim "parenthood" concerning this report, the report was, in

fact, developed by USDA at the specific request of Mr. Flanigan. To remove any doubt as to who requested this study and who conducted it, I ask unanimous consent, Mr. President, that a memorandum which was prepared in October 1972 by Mr. Carmen O. Nohre, assistant study coordinator for this project, be printed at this point in the Record.

There being no objection, the memorandum was ordered to be printed in the Record, as follows:

### FLANIGAN TRADE STUDY TASK FORCE

(By Carmen O. Nohre)

The Flanigan Study was an attempt to bring together the skills of a large number of people in USDA to analyze within a very short time period the implications of policy alternatives in agricultural trade. The study was requested by Peter J. Flanigan, Assistant to the President for International Economic Affairs. It was under the overall direction of the Foreign Agricultural Service. Representatives of several USDA agencies participated in the study and especially the Economic Research Service and the Agricultural Stabilization and Conservation Service. While no formal titles were assigned, the following may be used for purposes of exposition: Study Director, H. L. Worthington; Study Coordinator, K. E. Ogren; and Assistant Study Coordinator, C. O. Nohre.

Mr. Worthington had final responsibility for the study. Mr. Ogren had the major operational role in assigning responsibility and in working with personnel in identifying tasks and attempting to assure that satisfactory progress was made. Mr. Nohre assisted Mr. Ogren, particularly in arranging for participation of ERS personnel and in coordinating the work of these personnel.

Before the study was initiated, a detailed outline (prepared mainly by the Study Coordinator) was circulated to and discussed with representatives of the following staff offices of the President—the Special Trade Representative, Council of Economic Advisers,

and the Council of International Economic Policy. These offices gave their general approval to the objectives, content and procedures proposed in the outline, but they did not participate directly in the study or the writing of the report.

Preliminary discussions on substantive matters and procedures to be followed got underway about mid-March 1972 and the study outline was approved in early April. The target date for completion was June 1, 1972. The study was actually completed and submitted on July 4.

The study outline states that "the basic purpose (of the study) is to develop, with respect to agricultural trade, a U.S. strategy for the proposed round of multilateral negotiations." It called for a preliminary report to be completed by June 1, based on whatever analyses were available or could be completed within this time deadline. The study was supposed to identify additional analyses that could provide information for the negotiations proper as well as preparations for the negotiations. It was recognized that in some instances, the report would contain preliminary estimates subject to further study and analyses.

The outline provided for a report containing sections on: (1) overall U.S. goals for international trade in agricultural products, (2) problems and barriers to achieving these goals, (3) how to achieve these goals, and (4) recommendations on a particular strategy (or strategies) to be adopted. Part of the section on how to achieve the goals was concerned with commodity studies. The rationale for these studies was that a selection of an approach or combination of approaches must be made with respect to situations on trade barriers, domestic policies, etc., for specific commodity groups.

Rather early in the planning, it was decided that a good deal of emphasis should be placed on studies of a few selected commodities. This decision was made by the Study Director after meetings with several participants. Ideally, that should have been completed first to serve as major inputs to the general report. However, due to the limited time available, work on all parts went forward concurrently with the intention of making the necessary revisions in the general report as late as possible.

Groups were set up for the following commodities: grains, beef, dairy products, sugar and tobacco. FAS personnel were designated as committee chairmen. Two were division directors, two were branch chiefs and one was an assistant to an assistant administrator. Personnel from FAS, ERS, and ASCS were assigned to each committee. There were five to seven members on each committee with, generally, two to four from FAS, one from ASCS, and two from ERS. The norm for ERS representation was one person from FDICD and one from ESAD, MED, or FPED. Major sections in the commodity reports were to be (1) historical data on production, utilization, and trade for major countries, (2) a description of the domestic and trade policies of these countries, (3) alternative sets of assumptions of different levels of trade liberalization and (4) projections of production, utilization, and trade of the major countries under the different sets of policy assumptions.

In general, work got underway in early April 1972. Existing U.S. agricultural export and import projections for 1980 were reviewed and adjusted. In addition, a set of projections of "liberalized" trade were developed under the leadership of the Study Coordinator in discussions with commodity experts in FAS and ERS. These served as a basis for estimating the potential impact of trade liberalization on U.S. farm income, government costs, and the balance of payments. Assignments were made by the Study Coordinators for drafting sections in the report. Most of these drafts ended up as annexes to the overall report. The commodity groups started by developing historical data and policy descriptions. The sugar and tobacco groups were able to proceed into the remaining phases of the commodity studies more or less independently except for continuing liaison and coordination with the study coordinators. It was decided that the grain, beef and dairy products studies should be combined for the sections concerned with policy alternatives and projections because of the interrelationships among the commodities. These sections were developed largely by the chairmen of the three committees involved. Because of the importance of the grain-livestock products in the export trade of the U.S., this portion of the study received the most emphasis in the report prepared by the Study Director.

October, 1972.

Mr. HUMPHREY. Mr. President, I have had a copy of the "Flanigan Report" for several weeks. I withheld release of it until today, because I was hopeful that the administration would officially release it. I also was concerned about releasing certain parts of it for fear that

the public release of these parts might unduly expose our Nation's negotiating strategy with respect to upcoming multilateral agricultural trade negotiations with other nations.

However, several factors and developments have occurred that make it imperative that the report now be made public—not only to some newspapers, or certain selected people, but to the Congress and the entire country.

First, copies of this report have been circulated not only to members of the national press, but also it is now in the hands of foreign embassy officials, a few farm and business groups, and numerous individuals throughout this country and the world. Details of the report are now common talk at most Washington cocktail parties, and are grist for most national newspaper columns. Many having an interest in international agricultural trade policy today either has a copy, or has seen a copy of the report—that is, of course, with the exception of Congress. No report has been sent here. There has been some editorial opinion on it in selected newspapers. It is in the hands of certain columnists. It is in the possession of certain embassies. But no report has been made available to the elected representatives in Congress.

Should you be wondering, Mr. President, why the administration has withheld this particular report from Congress, let the words of the report speak to that.

On page 72 of the report, it reads:

We should not approach Congress until after the negotiations have been concluded. . . . It has been traditional under the trade agreement program to seek legislation before beginning negotiations and to implement the results by Executive Order. This procedure has been the strength of the program. . . .

Going to the Congress in advance, however, would require spelling out the kind of authority we need to complete the negotiation. This is reasonably easy when all that is proposed is reduction or elimination of import duties; but when changes in support systems become involved, matters become more complicated. . . . Legislation could thus attract crippling amendments on points which subsequently may become critical. Also we may find ourselves battling strongly on, and paying dearly for, points which may drop by the wayside in negotiations. Moreover, in the negotiations matters may take a direction unforeseen when legislation is sought, and for which no authority has been gotten. The remedy for this, of course, is to get authority from the Congress for the broadest possible changes, but it is inconceivable that the agriculture committees of the congress would give this kind of authority, and it is quite possible that it would be unconstitutional for them to do so. On the other hand, it is possible that some of the changes in program, or policy, which we might wish to make could be made without recourse to Congress.

Mr. President, as I study this report, I feel that I may have been remiss for not releasing it sooner. Already much has been done behind the back of Congress and out of sight of the public. While the Secretary of Agriculture has been patting the farmer on the back and telling him how great things are, the Secretary and other high officials of this administration have been hard at work carrying out their secret strategy.

Included in this report, Mr. President, is a step-by-step chronology of actions to be taken with respect to revealing the contents and implementing the recommendations of this report. For example, at one point in the report, it states:

(1) The report and our proposal should be placed before a group of eminent agriculturalists for review, discussion and recommendation. This review would be confidential. Some of the people we might want to call in are Gale Johnson, Dale Hathaway, Vernon Sorenson,

Hendrick Houthakker and Lawrence Krause (July-September, 1972).

Mr. President, I understand that something of this sort has already been done on a highly selected basis and was the subject of a leaked story to the press. The report continues:

(2) If it stands this test, the report should then be considered in a restricted interagency CIEP review (October-December, 1972) and additional supporting studies should be begun.

Mr. President, I do not know what a restricted interagency CIEP review may be. But I doubt whether it should have been taken in a manner which excluded Congress from knowing what is going on. I continue now with the strategy outlined in the report:

At the turn of the year (1973) we could convene an Advisory Committee of farm and commodity groups to review and comment upon the proposal. Alternatively, we could publish the proposal and call for public hearings either by the Department or by the Trade Information Committee. This move should be considered at the time we decide how to handle other parts of our liberalization program.

I hope my colleagues all noted that nothing was said here about consultation with any Member of Congress or any of our committees. Also, to the best of my knowledge, no farm advisory committee either has been formed or convened to review this report.

Mr. President, when I consider the limitless funds which the executive branch is provided to hire talent, I am surprised at the naivete of some of the remarks in this report. For example, one sentence in the report would seem to undermine and explode the entire Flanigan strategy to disregard Congress until after an international agreement is already signed, sealed and delivered. It says:

Other countries, and particularly the Europeans, have made it clear that they will take us seriously only when we have obtained legislation which will allow us to implement the results of negotiation without returning to Congress.

Listen to this:

A shift away from high price supports and downward adjustments in supply to meet market demand is not easy to achieve politically—in the United States as well as in other countries. Farmers are deeply suspicious of any moves to reduce prices and shift them to dependence of payments from national treasuries. A rapid decline in farm numbers is taking place generally in all countries; it alarms farmers, and their political representatives in national legislatures.

Nevertheless, farm people in all of the developing countries continue to have strong political influence.

Mr. President, I would add here, thank God they do. Let me continue with the report:

While the number of farm voters continue to decline in the U.S., farm organizations still pack legislative power increasingly through commodity organizations which can rally support for specific issues because of a unity of goals among the membership.

The general farm organizations—the American Farm Bureau Federation, the Grange, the Farmers Union, and the National Farmers Organization—are less effective because of a diversity of members views and of viewpoints between the organizations.

Now let me read what the report has to say about a farm bill this year:

In this connection, new farm legislation will be up for consideration in 1973. We could seek in our own new farm program to move farther toward the kind of system we wish to see in the world and to build into the new program as much flexibility as possible to adapt to a negotiated situation without further recourse to Congress.

For agriculture, therefore, from these standpoints it appears to make more sense to negotiate before we approach the Congress.

How do you like them apples?

Mr. President, seen in the light of the Flanigan report language I have just read, the President's recent farm message is right on time and on target with the strategy outlined in the report.

President Nixon, as Senators know, has called for the abolishment of our Nation's farm commodity programs and wants to substitute in lieu thereof a general cropland retirement program, a proposal one of his top agricultural economists, Dr. Don Paarlberg, suggests will not work.

Let us examine once again a few of the things that President Nixon had to say about all this in his recent message to Congress on Natural Resources:

#### AMERICAN AGRICULTURE—A BASIC NATURAL RESOURCE

Government influence in the farm commodity market place must be reduced. Old fashioned Federal intrusion is as inappropriate to today's farm economy as the old McCormick reaper would be on a highly sophisticated modern farm.

We must allow farmers the opportunity to produce for expanding domestic demands and to continue our vigorous competition in export markets. We will not accomplish that goal by telling the farmer how much he can grow or the rancher how much livestock he can raise. Fidelity to this principle will have the welcome effect of encouraging both fair food prices for consumers and growing income from the marketplace for farmers.

We must reduce the farmers' dependence on Government payments through increased returns from sales of farm products at home and abroad. Because some of our current methods of handling farm problems are outmoded, the farmer has been unfairly saddled with the unflattering image of drinking primarily at the Federal well. Let us remember that more than 93 percent of gross farm income comes directly through the marketplace. Farmers and ranchers are strong and independent businessmen; we should expand their opportunity to exercise their strength and independence.

Finally, we need a program that will put the United States in a good posture for forthcoming trade negotiations.

Even a most cursory review of the contents of the Flanigan report and the actions taken these past several months by the President and Secretary Butz should leave little or no doubt in anyone's mind as to what the administration is up to concerning the development and implementation of this Nation's future domestic and foreign agricultural policy.

In reviewing these matters, it is most obvious that this administration is orchestrating all aspects of this policy without consultation with Congress.

Mr. President, while I have many questions and serious concerns about many of the premises, proposals and recommendations contained in this "fatherless" report, I want to make it clear that I am not condemning either the contributors to this report or the right of the Executive to request its agencies or experts to develop and submit recommendations of this type to it for consideration. However, when such studies and research are undertaken, I believe that both the Congress and the public are entitled to share and review the basic analysis underlining such efforts. In short, why was not the basic economic analysis released to the Congress and to the public, omitting the sections of this report on strategy? Is the Congress and the public expected as a matter of course to finance research in the Department of Agriculture for the exclusive use of the White House? What plans does Secretary Butz or Secretary Shultz have for releasing this basic analysis of trends in export markets in the absence of a liberalization of existing policies and estimated effect of liberalization through full market orientation?

Analyses such as provided in the Flanigan report are expected of USDA researchers—but Congress, farm leaders and others also are the clientele of that Department—not just the White House.

The procedure that has been followed by the White House in this instance, is but another example of the attitude that the President and his associates in the White House have for the Congress and the people of this Nation—an attitude characterized by lack of trust, confidence or respect for the legislative process. Yes, the attitude of only "they" know what is best and therefore only "they" should be permitted to make all of the important decisions relating to the future policies of this Nation.

In making the Flanigan report available today, I hope Congress and others interested or who have a stake in our Nation's agricultural policies will take the time to carefully study and comment on its contents. It is time for all the cards to be laid on the table for everyone to see and assess for themselves.

What this report reveals, in other words, is a strategy for the administration to follow in terms of trade, particularly in the agricultural area, without having an agreement, without having any legislation in advance, to get all the details of negotiation tied down, to make commitments, and then come to Congress and say, "Here is what we have agreed to. Now we want you to pass a bill that will certify the legality of what has been done."

I am not saying that all the factors of this report are in error or represent policy with which I do not concur. As a matter of fact, I think many areas of the report are sound and commendable. My purpose today is not merely to endorse or condemn the contents of this report, but to call attention to secrecy with which surrounds it and the actual manner in which many of the report's recommendations either have or are being carried out beyond public view.

For instance, one set of recommendations contained in this report that disturbs me in particular are those relating to our Nation's dairy industry. The report offers dismantlement of our dairy industry as one of our Nation's gifts to the world at the international bargaining table. The report states:

On the import side there would be an increase of a billion dollars, entirely accounted for by dairy products.

	1970	Base	Situation III
Production (billion pounds, milk equivalent).....	117.4	112.5	104.0
Production value (billions of dollars).....	6.7	8.4	7.8
Consumption (billion pounds, milk equivalent).....	117.4	113.5	116.0
Net trade quantity (billion pounds, milk equivalent).....		-1.0	12.0
Net trade value (millions of dollars).....		-15	-944
Farm prices (hundredweight, milk equivalent).....	\$5.70	\$7.50	\$7.50

The above table indicates that dairy production in the United States will drop more in a fully liberalized situation than if current policies and programs are continued. The projections show milk production dropping from 117.4 billion pounds in 1970 to 112.5 billion pounds in base 1980, and to 104.0 billion pounds in case III 1980. The fact that dairy production would decline even without liberalization suggests that liberalization would not mean a reverse of existing trends in dairy production. Rather it would intensify those already in motion.

The trend in dairy for some time has been to convert grassland from milk cows to beef cattle. The increased profitability of beef relative to milk would pull more resources out of dairy in Case III

than is base 1980, even though the price of milk would not be significantly different in either situation. Net income to the dairy industry would be less under free trade than under a continuation of present policies, but it would still be greater than in 1970. Furthermore, the presence of alternative employment opportunities in agriculture under free trade would mean that some farmers going out of dairy could improve their income position without leaving agriculture altogether, while the per capita income of those farmers remaining in dairy could increase because the aggregate would be shared among a smaller number.

Tobacco farmers in States like North Carolina, Virginia, Kentucky, Tennessee, and Georgia are also being set up for eventual elimination of their price support program. The report says:

For this report tobacco leaf trade and consumption have been projected by the major world trading partners to 1980 under three sets of assumptions. Generally speaking, these sets of assumptions provide for:

I. No trade liberalization and a continuation of present domestic and foreign policies.

II. Certain liberalized trade policies, including lower U.S. price support levels.

III. Maximum liberalization resulting in a reasonably free and competitive world market for tobacco.

The countries involved in liberalization in Cases II and III would be the United States, the European Community and Australia.

Assuming improvement in the U.S. balance of payments position to be the principal objective of trade negotiations, the study group concluded that some liberalization along the lines of Case II would produce the most balanced package of results. The potential gains would be about \$200 million. However, it is recognized that this would be an awkward package to negotiate. Furthermore, the lower prices would result in income losses to U.S. tobacco farmers.

This study group therefore felt that a better alternative to general trade liberalization in tobacco would be to subsidize tobacco exports as necessary to keep them flowing into world markets at approximately 1970 levels. This is a useful possibility whether or not the tobacco support program is continued in its present form. In the latter event, the cost of export subsidies would be substantially less but there would probably be a drop in farm income in the tobacco sector.

As you see, the report acknowledges that many of America's dairy and tobacco farmers would be injured. But the report also tries to make a case for claiming that America's wheat, feed grain, soybean, pork, poultry and beef producers would be greatly aided.

Personally I do not believe that this report's projections in this regard will be as bullish as indicated. But here is what the report recommends be done with respect to these products:

#### A Negotiating Strategy.

The potential gains from negotiating a policy Alternative III liberalization in the grain-feed-livestock sector as set out in the percent every two years. For variable levies, a ceiling would be calculated and this ceiling would be reduced by 20 percent each two year period. For import quotas a liberalization schedule involving increased quantities over the five year period before full liberalization would have to be agreed upon. Wheat boards and state trading agencies present a more difficult problem. They may have to progressively relinquish their import function allowing the international trading companies to take over this function.

(2) Agree that internal support systems will be adjusted on a similar schedule or schedule designed to allow the progressive liberalization to proceed unhindered.

(3) Agree that export subsidies will be progressively reduced.

(4) Establish a coordinating council to oversee the operation of the new system. Such a council would be absolutely necessary to keep track of changes that were taking place and to make necessary adjustments in commitments if the course and burden of adjustments did not go as anticipated. It is conceivable that the present IWA structure—the Council and Secretariat—could be the nucleus of such a coordinating council. The council could, but need not be, within the GATT framework.

What we are proposing, therefore, is a commodities agreement, but not one of the traditional kind limited to a single commodity

which seeks to rig international prices at artificially high levels. The commodities agreement we foresee would cover a family of commodities. It would be a liberalizing agreement removing restrictions from trade, permitting supply and demand to have free reign within this economic family of commodities, and allow prices to seek their own natural levels.

Mr. President, this surely puts a new twist on the International Wheat Agreement. In fact, it is such a twist that it is a 180-degree turn. As further explanation of this recommendation, the report states on page 65:

As our analysis shows there is an element of balance in the grain feed-livestock negotiations for the developed countries, except Japan, even though the major trade benefit accrues to the United States. Europe will export considerably larger quantities of dairy products inasmuch as she will be efficient in dairy products, a point which she has made to us consistently for a considerable period of time.

This report is the base for our Nation's future agricultural trade policy and it has been under implementation for the past several months by this Government. It has been talked about; it has been circulated; it has been commented upon in the foreign press; it has been commented upon generously and with actual quotations in what we call the business and commodity press; its contents are known all over the world. Yet, a copy of this report has not been shared officially with appropriate committees of Congress. It was only by some very good fortune on my part that I was able to obtain a copy of this report. Today, I have made it part of the Record.

Nothing in this report is damaging to our country. It is merely a matter of recommended policy and strategy to be pursued. I hope it will be reviewed carefully by Members of Congress.

The Senate Subcommittee on Foreign Agricultural Policy plans to thoroughly review and study this report, along with the President's proposed Trade Reform Act of 1973.

\* \* \* \* \*

*(Note by the Subcommittee on Separation of Powers: Mr. Humphrey, a Senator from Minnesota, entered into the Congressional Record for April 12, 1973, following his foregoing comments, the verbatim text of the Flanigan Report. In view of the limited relevance of the full report to the Separation of Powers problem of obtaining information from the Executive Branch by the Legislative branch of government, only a portion of Part III, Strategy and Tactics for Achieving Goals, and Part IV, Summary of Conclusions and Recommendations, are reproduced in the present report.)*

### III. STRATEGY AND TACTICS FOR ACHIEVING GOALS

\* \* \* \* \*

#### D. DOMESTIC TACTICS TO SUPPORT A U.S. TYPE OF NEGOTIATION

(1) The report and our proposal should be placed before a group of eminent agriculturalists for review, discussion and recommendation. This review would be confidential. Some of the people we might want to call in are Gale Johnson, Dale Hathaway, Vernon Sorrenson, Hendrick Houthakker and Lawrence Krause (July-September?).

(2) If it stands this test, the report should then be considered in a restricted interagency CIEP review (October-December), and additional supporting studies should be begun.

(3) At the turn of the year we could convene an Advisory Committee of farm and commodity groups to review and comment upon the proposal. Alternatively, we could publish the proposal and call for public hearings either by the Department or by the Trade Information Committee. This move should be considered at the time we decide how to handle other parts of our liberalization program.

(4) We should not approach the Congress until after the negotiation has been concluded. In deciding when to approach the Cong-

ress we have three options: 1) to seek legislation before beginning negotiations as we have in the past, 2) to seek a general authorization by the Congress which will specify that the results of the negotiation must be authorized by Congress before being implemented by the President, and then to seek implementation by the treaty route (or by legislation).

It has been traditional under the trade agreements program to seek legislation before beginning negotiations and to implement the results by Executive order. This procedure has been the strength of the program. The Tariff Commission has pointed out that prior to 1934, a number of trade agreements requiring Congressional action were negotiated by the President, "but most of these failed to receive the necessary legislative approval and thus never came into effect." The most recent example of the kind of problem we run into when we don't follow this procedure is the American Selling Price (ASP) Agreement in which the Executive Branch negotiated away ASP, as a part of a chemicals tariff agreement, only to have the Congress refuse to implement it. Other countries, and particularly the Europeans, have made clear that they will take us seriously only when we have obtained legislation which will allow us to implement the results of negotiation without returning to Congress.

Going to the Congress, in advance, however, would require spelling out the kind of authority we need to complete the negotiation. This is reasonably easy when all that is proposed is reduction or elimination of import duties, but when changes in support systems become involved, matters become more complicated. Several committees of Congress are involved. Lengthy hearings may be contemplated at which each interested pressure group will seek to protect its interest by writing exceptions into the legislative history. It is most unlikely that we will know enough about what can be negotiated at that time to satisfy the Congress or the groups involved that their interests will be protected. Legislation could thus attract crippling amendments on points which may subsequently become critical. Also, we may find ourselves battling strongly on, and paying dearly for, points which may drop by the wayside in negotiations. Moreover, in the negotiations, matters may take a direction unforeseen when legislation is sought, and for which no authority has been gotten. The remedy for this, of course, is to get authority from the Congress for the broadest possible changes, but it is inconceivable that the agricultural committees of the Congress would give this kind of authority, and it is quite possible that it would be unconstitutional for them to do so. On the other hand, it is possible that some of the changes in program, or policy, which we might wish to make could be made without recourse to the Congress.

In this connection, new farm legislation will be up for consideration in 1973. We could seek in our new farm program to move further toward the kind of system we wish to see in the world and to build into the new program as much flexibility as possible to adapt to a negotiated situation without further recourse to the Congress.

For agriculture, therefore, from these standpoints it appears to make more sense to negotiate before we approach the Congress.

## IV. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

### A. Conclusions

1. Liberalization of one sector of agricultural trade would result in substantial export gains for the United States. This is the grain-feed-livestock sector. Although there would also be export gains in certain other commodities, they would be minor compared to those obtainable from freer world market conditions for grains and livestock.

2. The U.S. balance of trade position in agriculture might be improved so that ten years from the beginning of fullscale movement toward liberalization in the grain-feed-livestock sector it would be around \$8 billion better annually than would otherwise be the case.

3. Other benefits to the United States from this full liberalization in the grain-feed-livestock sector would include an improvement of at least \$4 billion in net farm income and a reduction of \$3.8 billion in government support cost for wheat and feedgrains.

4. Compared to the potential balance of trade benefits in the grain-feed-livestock sector, the trade gains possible from liberalization of markets for other individual commodities such as tobacco and citrus seem small. But these gains, which could amount to around \$200 million for each commodity, are significant from the standpoint of the commodity sectors involved, and could have important economic benefits for certain regions of the country and political benefits for trade legislation.

5. Full liberalization in the grain-feed-livestock sector would provide benefits to other countries as well as to the United States.

Argentina, Australia, and New Zealand would obtain balance of trade benefits, while consumers in the major importing countries—Western Europe and Japan—would benefit both from lower food prices and from increased availability of animal products.

6. For all countries concerned, partial liberalization in the grain-feed-livestock sector would provide much more modest benefits than full liberalization, although it would probably be equally difficult to negotiate.

7. The difficulties which stand in the way of achieving full liberalization in the grain-feed-livestock are great because influential farm groups in all countries of the world are deeply suspicious of any moves to reduce price supports, or otherwise threaten the level and stability of their income expectations, and because the CAP is politically sensitive in the EC.

*B. Recommendations*

1. The potential benefits from liberalization of agricultural trade are so great that agriculture definitely warrants inclusion in any future round of multilateral trade negotiations.

2. Such negotiations should be broadly-based, involving both agricultural and industrial trade and monetary reform.

3. In agriculture, the negotiations should concentrate on the grain-feed-livestock sector, in which we would seek to eliminate barriers to international trade in the entire sector through negotiating a commodities agreement.

4. Product-by-product negotiations for other politically or economically sensitive commodities should be entered into for the purpose of obtaining whatever specific concessions would be meaningful for the commodities involved.

5. We should make clear to our trading partners right from the start that we are seriously prepared to withdraw from GATT protective levels if we cannot arrive at a satisfactory trade and monetary settlement, including liberalization of the grain-feed-livestock sector along with appropriate additional settlements for other agricultural commodities.

THE PRESIDING OFFICER. The Senator's time has expired.

Mr. ROBERT C. BYRD. Does the Senator need additional time?

Mr. HUMPHREY. No, I do not.



## **FILE 20**

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### **HOUSE COMMITTEE ON ARMED SERVICES**

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(20-A)

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON ARMED SERVICES,  
*Washington, D.C., March 13, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*Committee on the Judiciary, U.S. Senate,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for your letter of March 9 relative to the survey being conducted by the Senate Judiciary Subcommittee on Separation of Powers.

Within my memory, neither the Armed Services Committee, nor any of its subcommittees has ever had an instance in which federal officers or employees have refused to testify when so requested. And there is only one instance in which requested documents were not made available. The circumstances are set forth on the attached Survey Form I.

Sincerely,

F. EDW. HÉBERT, *Chairman.*

(139)

## (20-B)

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
May 23, 1972	J. Fred Buzhardt General Counsel Dept. of Def. and Rady A. Johnson Asst. to the Secy. (Legis. Affairs) Dept. of Def.	Re: Alleged unauthorized bombing of military targets in North Vietnam, resulting in the retirement of Gen. John D. Lavelle, Commander, 7th Air Force.  Subcommittee requested copies of the pertinent Rules of Engagement and MACV Directives in effect at the time of the first alleged unauthorized bombing mission, plus all subsequent changes and modifications. Request was also made for copies of the field strike reports of each alleged unauthorized bombing mission.			
June 1, 1972	Hon. Melvin R. Laird Secretary of Defense	The Secretary was informed that the Subcommittee not only required the above information, but also a list of all alleged unauthorized bombings involved in this case, indicating the date, time, and place of each incident with a brief description of the results.	June 6, 1972	J. Fred Buzhardt	Verbally advised the Subcommittee that DOD would not produce the pertinent Rules of Engagement, nor would DOD give the Subcommittee a verbatim copy of the Operating Authorities. (A 1½ page "Summary of Operating Authorities" was produced). The documents, themselves, and the other information requested were never produced or made available to the Subcommittee.

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 20

Submitted by: (Comm/Subcomm)

Committee on Armed Services, House of Representatives

By: F. Edw. Hebert

Title: Chairman

Extension

(140)

## FILE 25

### HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

#### C O N T E N T S

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(25-A)

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., April 11, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*New Senate Office Building,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: On March 30,<sup>1</sup> I wrote to you regarding instances of withholding information from Congress by the Executive Branch involving the Legislation and Military Operations Subcommittee. You also wrote to me as Chairman of the Committee on Government Operations. Consequently I had a check made on any such withholding actions involving the Full Committee.

We have found one instance, involving two bills, in which the Executive Director of the Domestic Council refused to supply the Committee with reports on pending legislation which related directly to the Domestic Council despite repeated requests for such reports. This is described in one of the attached statements.

We also found that in the Legislation and Military Operations Subcommittee's overview hearings on the President's 1971 Executive Branch reorganization proposals there was a refusal by the current administration to supply the Committee with a study report written by the previous administration. This is described and discussed in the second enclosed statement and in the accompanying material.

With best personal regards.  
Sincerely yours,

CHET HOLIFIELD, *Chairman.*

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<sup>1</sup> The March 30, 1973 letter referred to appears in Part IV, File 243, p. 534.

## (25-B)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
March 17, 1971 May 13, 1971	Executive Secretary Domestic Council	Report on H.R. 4383 (92d Congress), Proposed Federal Advisory Committee Standards Act. Report on H.R. 8210, Proposed Department of Education Act.	July 1, 1971	Kenneth R. Cole, Jr. Deputy Assistant to the President and Deputy Director of the Domestic Council	"The Council is available to the President as a forum for formulating and coordinating Domestic Policy recommendations and for providing rapid response to needs for advice on pressing domestic issues." See item 4 on page 118 of enclosed report entitled "Activities of the House Committee on Government Operations, Ninety-Second Congress, First and Second Sessions, 1971-1972," and pages 95-97 of enclosed hearings entitled "Advisory Commissions (hearings of House Committee on Government Operations on H.R. 4383, November 4, 1971)."

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 25

Submitted by: (Comm/Subcomm).

House Committee on Government Operations

By: James A. Lanigan

Title: Consultant 55051

Extension

[Excerpt from committee print, 92d Cong., 2d sess., "Activities of the House Committee on Government Operations," December 1972, pp. 118-119]

## 4. REFUSAL OF DOMESTIC COUNCIL TO REPORT ON LEGISLATION

The Domestic Council was asked to report on two bills before the committee which specifically and directly involved the Domestic Council. They were H.R. 4383, the proposed and later enacted "Federal Advisory Committee Standards Act" and H.R. 8210, a proposed "Department of Education Act." Despite five letters from the chairman requesting the Domestic Council's views, Mr. John D. Ehrlichman, Assistant to the President for Domestic Affairs and Director of the Domestic Council refused to

provide to the committee a report on the two bills. In his letter of December 13, 1971, to Mr. Ehrlichman, the chairman concluded: "In my opinion, your refusal to comment on bills referred to the Government Operations Committee is unjustified, particularly with respect to H.R. 4383, which in section 6(a) involves assignment of a specific responsibility to the Domestic Council." The basic correspondence is printed in the subcommittee<sup>1</sup> hearings on H.R. 4383, entitled "Advisory Committees," at pages 95-97.

<sup>1</sup> Hearings of the Subcommittee on Legal and Monetary Affairs of the Committee on Government Operations, House of Representatives, 92d Cong., 1st sess., Nov. 4, 1971.

[Excerpt from hearing entitled "Advisory Committees," before a subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 1st sess., on H.R. 4383, pp. 95-97]

THE WHITE HOUSE,  
Washington, May 26, 1971.

Hon. CHET HOLIFIELD,  
Chairman, Committee on Government Operations, U.S.  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your recent request for a Domestic Council report with regard to H.R. 8210, the Department of Education Act and H.R. 4383, the Federal Advisory Committee Standards Act. I would very much like to meet with you at your earliest convenience to discuss these bills, and request that you call my office to advise me of a time that would be convenient for you.

Sincerely,

KENNETH R. COLE, Jr.,  
Deputy Assistant to the President  
and Deputy Director of the Domestic Council.

JUNE 1, 1971.

Mr. KENNETH R. COLE, Jr.,  
Deputy Assistant to the President and Deputy Director of the  
Domestic Council, The White House, Washington, D.C.

DEAR MR. COLE: I have your letter of May 26 regarding H.R. 8210, the Department of Education Act and H.R. 4383, the Federal Advisory Committee Standards Act. Your letter requests that I call your office to advise you of a time when I could meet with you to discuss the bills.

As you know, I am extremely busy at present arranging for and chairing hearings on the President's four bills to replace seven existing departments with four new ones. In addition, we are holding hearings on and will soon be marking up the consumer protection legislation, and we are reviewing the President's rural development revenue sharing proposal. My duties as Vice Chairman of the Government Procurement Commission place even further demands on my time, and, finally, I have a number of pressing requirements from my district and from my State delegation as well as from my situation as immediate past Chairman of the Joint Committee on Atomic Energy.

Under these circumstances, I must limit my meetings to only matters of great urgency and importance. Neither H.R. 8210 nor H.R. 4383 are currently within that category. Consequently, I would very much appreciate your sending to the Committee the Domestic Council's report on the bills without the meeting you suggest.

Sincerely yours,

CHET HOLIFIELD, Chairman.

THE WHITE HOUSE,  
Washington, D.C., July 1, 1971.

Hon. CHET HOLIFIELD,  
Chairman, Committee on Government Operations, House of  
Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in answer to your recent request for comment from the Domestic Council on pro-

posed legislation. I had originally hoped to discuss this with you personally. Since your schedule would not permit this, I am providing the requested comment in writing.

The Council is chaired by the President and has as members the Vice President, the Attorney General, the Cabinet officers of the agencies administering the domestic programs, the Director and Deputy Director of the Office of Management and Budget and such other heads of agencies as the President may designate. The agencies represented include the Departments of Agriculture, Commerce, Health, Education and Welfare, Housing and Urban Development, the Interior, Labor, Transportation and the Treasury.

The Council is available to the President as a forum for formulating and coordinating domestic policy recommendations and for providing rapid response to needs for advice on pressing domestic issues.

As has always been the practice, Cabinet officers and agency heads are available to the Congress to discuss actions resulting from Presidential decisions. These would include actions taken as a result of advice and counsel received from the Domestic Counsel.

Comments on proposed legislation and programs undertaken pursuant to new legislation can best be discussed by the Council members dealing with the subject matter. The agencies affected by proposed legislation have available the specific and comprehensive information necessary to provide meaningful comments. Their comments will inherently reflect the decisions made as a result of discussions held in the Domestic Council.

Inasmuch as the Office of Management and Budget is represented on the Council, and legislative responses are coordinated by OMB, comments on broad issues which cross agency lines will also reflect Council discussions.

Accordingly, we believe that the present procedure for clearance and comments provides the necessary substantive review of proposed legislation and reflects those decisions to which the Domestic Council contributes.

Sincerely,

KENNETH R. COLE, Jr.,  
Deputy Assistant to the President  
and Deputy Director of the Domestic Council.

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., July 20, 1971.

MR. JOHN D. EHRLICHMAN,  
Assistant to the President for Domestic Affairs, The White  
House, Washington, D.C.

DEAR MR. EHRLICHMAN: I have the July 1, 1971 letter from Mr. Kenneth R. Cole, Jr., responding to my request, as Chairman of the Committee on Government Operations, for reports from the Domestic Council on two bills, H.R. 4383, the Federal Advisory Committee Standards Act, and H.R. 8210, the Department of Education Act.

Mr. Cole's letter stresses the availability of Cabinet officers and agency heads to discuss "actions taken as a result of advice and counsel received from the Domestic Council." He also mentions the Office of Management and Budget as a coordinating mechanism in the Executive Branch.

Since the letter provides no comment or views on the two bills, it could logically be read as a refusal to provide the Committee with the reports it requested.

It is our view that the Domestic Council has been established as a statutory office in the Executive Office of the President in the same manner and with the same status as the Office of Management and Budget, the Office of Science and Technology and the Office of Telecommunications Policy. On page 68 of the Budget for Fiscal Year 1972, the Domestic Council is equated with the Office of Management and Budget and the Office of Telecommunications Policy, both of which are responsive to Congressional inquiries.

With its projected staff of 79 employees and budget of almost \$2,000,000, the Domestic Council is obviously a key repository and source of information on domestic matters which would go beyond that available from individual departments or agencies. In particular, the Director and Deputy Director could, I am sure, answer many questions on domestic policy issues which could not be answered by others.

The Rules of the House of Representatives charge the Committee on Government Operations with supervisory jurisdiction over the Domestic Council as well as with the responsibility for studying the effect of reorganizations in the Executive Branch. In view of these responsibilities, we would like you to let the Committee know exactly to what extent the Director, the Deputy Director and other employees of the Domestic Council will respond to requests for information from Congressional Committees.

I would appreciate having this information as soon as possible to consider in connection with our current study of the President's departmental reorganization proposals.

Sincerely yours,

CHESTER H. HOLIFIELD, Chairman.

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., December 13, 1971.*

MR. JOHN D. EHRLICHMAN,  
*Assistant to the President for Domestic Affairs, The White  
House, Washington, D.C.*

DEAR MR. EHRLICHMAN: Checking unfinished business of my committee for this past year, I have reviewed an inconclusive exchange of letters involving requests for comment from the Domestic Council on proposed legislation. They are:

- (a) Our letter to you dated March 17, 1971, re H.R. 4383.
- (b) Our letter to you dated May 13, 1971, re H.R. 8210.<sup>1</sup>
- (c) Mr. Kenneth R. Cole's letter to me dated May 26, 1971.
- (d) Our letter to Mr. Cole dated June 1, 1971.
- (e) Your letter (sic) to me dated July 1, 1971.<sup>2</sup>
- (f) Our letter to you dated July 20, 1971.

It is evident that notwithstanding the fact that the Domestic Council was established by congressional action, your policy is not to appear before congressional committees or to provide them with formal reports for the purpose of giving the Congress information in regard to the functions of the Domestic Council.

There is no doubt that the work of your office in planning programs and establishing priorities has a great deal to do with the functions of all agencies and departments of Government. In my opinion, your refusal to comment on bills referred to the Government Operations Committee is unjustified, particularly with respect to H.R. 4383, which in section 6(a) involves assignment of a specific responsibility to the Domestic Council.

To my knowledge, this is the first time that an agency created by the Congress has refused to comply with a congressional request for comment on legislation affecting the functions of the executive branch of Government.

I would trust you might reconsider this policy before we start the next session of Congress.

Sincerely yours,

CHESTER H. HOLIFIELD, Chairman.

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<sup>1</sup> Letters (a) and (b) were not provided to the Subcommittee on Separation of Powers.

<sup>2</sup> This letter appears to have been signed by Mr. Cole.

## (25-C)

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
June 2, 1971	George P. Shultz Director, Office of Management and Budget	Copy of report of the 1967 President's Task Force on Government Organization (Heineman Task Force).	June 2, 1971	George P. Shultz Director of the OMB	Not publicly available. See pages 170, 194, 233, 234, 251, 252, 275, 396, 401 and 405 of enclosed Hearings of House Committee on Government Operations entitled "Reorganization of Executive Departments (Part I - Overview), 92d Congress, 1st Session, on H.R. 6959, H.R. 6960, H.R. 6961 and H.R. 6962.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

\* FILE 25

Submitted by: (Comm/Subcomm)

House Committee on Government Operations

By: James A. Lanigan

Title: Consultant 55051

Extension

[Excerpts from hearings entitled "Reorganization of Executive Departments (pt. I—Overview)," before a subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 1st sess., on H.R. 6959, H.R. 6960, H.R. 6961, H.R. 6962, Nov. 4, 1971, pp. 170, 194, 233-34, 251-52, 396, 401-02, and 405]

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Mr. HORTON. Would the gentleman yield?

Mr. ERLENBORN. Yes; I will be glad to yield.

Mr. HORTON. One question I neglected to ask you, Mr. Shultz. Can you make those studies that you utilized in arriving at these concepts available to the subcommittee? Are any of them unavailable because they are deemed privileged?

Mr. SHULTZ. Well, the Heineman report that was made to President Johnson I don't believe is publicly available. I believe you will have Mr. Heineman as a witness before this committee, so presumably he will give you his thoughts on that. The others are available. Of course, much of the work that Mr. Weber outlined is available in the sense that the bills are before you, as are the supporting analysis and background material, and so forth. The results of all that are before you. Some of the work that Dwight Ink has done over the years is on the record in the form of organizational rearrangements and some of it is part of the lore and subtlety of government organizations, just as the

work of this committee is, and I guess you best get at that through discussion and testimony.

\* \* \* \* \*

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The Advisory Council on Executive Organization had no illusions that it could, or should, develop entirely new solutions to the longstanding problems of executive branch organization and management.

The Council therefore started its work with a review of the studies of both Hoover Commissions, the second of which the chairman of this committee was a member. In addition, we gave careful attention to the reports of the Rockefeller committee, the Price task force, the Heineman task force and the Lindsay task force. Contained in one or more of those efforts is almost every proposal made by the Ash Council.

\* \* \* \* \*

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Chairman HOLIFIELD. The subcommittee will resume its hearings this morning. We are privileged to have before us Mr. Ben W. Heineman, who made a study which has disappeared into the realms of the unobtainable, known as the Heineman study, and so this morning we have the man who is responsible for that mysterious study, which cannot be found, before the subcommittee to give us some advice.

Mr. Heineman, you may come forward, please, and you may proceed, sir.

**STATEMENT OF BEN W. HEINEMAN, PRESIDENT,  
NORTHWEST INDUSTRIES, INC.**

Mr. HEINEMAN. Thank you, Mr. Chairman. It is a privilege to be here before this committee, and I appreciate the opportunity to speak here.

My name is Ben W. Heineman. I am president of Northwest Industries. I have had a certain amount of governmental experience. In 1941 I came to Washington as a full-time Government employee with the Office of Price Administration, participated in the drafting of that legislation, and participated to a degree on its passage. I remained in the Office of Price Administration throughout the rest of 1941 and 1942, and early 1943 when I went with the State Department, went to north Africa as Assistant Director of the North African Economic Board in March of 1943.

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Subsequently, at the request of President Johnson, I participated in a number of reorganization activities. I was a part of the group that helped Congress establish HUD. That group, at the President's request, came up with a proposed organization of it. You will recall, he did not appoint a Secretary for some time, and this was because he wished to try to organize it before the Secretary was appointed, and I was chairman of the subcommittee that basically came up with a field organization for HUD.

In addition, of course, I was Chairman of the President's 1966 Conference on Civil Rights, or conference to fulfill these rights.

I was Chairman, in 1966 and 1967, of the President's Committee on Government Organization, which produced the mysterious report to which the chairman has referred.

There we were concerned with three basic activities. We studied the Office of the President itself, we studied the executive department, and we studied the State Department and the intelligence community, and each of those, plus one or two special reports that the President asked for, were made the subject of separate special reports to the President.

Chairman HOLIFIELD. In those reports, Mr. Heineman, was there a separate report on the domestic reorganization of the executive branch?

Mr. HEINEMAN. Yes, Mr. Chairman, there were, as I recall it, three separate reports on various segments of the domestic side and one report, which was quite separate, on the foreign and intelligence side.

Chairman HOLIFIELD. There is no doubt that the one on foreign affairs is a classified report.

Mr. HEINEMAN. We were given top ranking ratings on the classification.

Chairman HOLIFIELD. But the others were not concerned with classified material, the other three?

Mr. HEINEMAN. No.

**SUBSTANCE OF HEINEMAN REPORTS**

Chairman HOLIFIELD. What were the divisions of that report?

Mr. HEINEMAN. There were three reports, as I recall it. One was basically on the Executive Office of the President. The other was on various segments of the organization of the so-called, at that time, Great Society programs, or the

social programs; and the third was a long-range look at what the Government ought to look like, which comes very close to this plan of reorganization about which I would like to comment.

Chairman HOLIFIELD. Would you say that the present four plans that are before us to set up the Departments of Natural Resources, Human Resources, Economic Affairs, and Community Development follow quite closely or not so closely the recommendations which you made?

Mr. HEINEMAN. I would say, sir, that there was a great similarity between them. I am not talking about the names of the departments and things of this kind, but I would say there is a great similarity.

\* \* \* \* \*

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\* \* \* \* \*

Mr. FUQUA. Thank you, Mr. Chairman.  
Chairman HOLIFIELD. Mr. Horton.

**WORK OF HEINEMAN COMMITTEE**

Mr. HORTON. Thank you, Mr. Chairman.

I think it is appropriate, Mr. Heineman, and I know I speak for all members of the subcommittee, to thank you for taking your time to come here and testify on a subject on which you have already spent a lot of your time. Certainly you were not paid for the work that you did, and you have come here on your own today to testify on something in which you are interested, even though you are not required to do so. I do want to commend you on the very fine statement that you have made here and the manner in which you have answered the questions that have been asked of you.

I do want to go back just for a moment or two and ask a few more questions about the work that you did. You were appointed by President Johnson to study certain areas, as you have already testified. Now you have also testified to the composition of the group that worked with you. How many staff did you have?

Mr. HEINEMAN. I do not recall.

Mr. HORTON. Well, just roughly.

Mr. HEINEMAN. It was a substantial staff and I would, if I may be permitted to, estimate it and I am sure we can supply the actual number—.

Mr. HORTON. Right.

Mr. HEINEMAN. I would say in total between 30 and 40 people.

Mr. HORTON. What was the period that you worked on this subject?

Mr. HEINEMAN. My recollection, sir, is that it was about a year.

\* \* \* \* \*

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Mr. HORTON. Another question I would like to ask with regard to the report: Did you make the report directly to President Johnson?

Mr. HEINEMAN. That is correct, sir.

Mr. HORTON. When was that submitted?

Mr. HEINEMAN. Well, there were a series of reports. I think I can give you the dates.

Mr. HORTON. I don't need the specific dates, just the year.

Mr. HEINEMAN. There were several reports, as I testified. We also were involved in the foreign side, and they ran over a period of mostly 1967. We also had one or two special assignments on special problems that the President wanted us to look into.

Mr. HORTON. There came a time when you made the report with regard to the domestic organizations?

Mr. HEINEMAN. Yes, sir.

Mr. HORTON. And apparently—

Mr. HEINEMAN. There were several such reports on several subjects.

Mr. HORTON. But generally you made a recommendation similar to the one that is before us now.

Mr. HEINEMAN. Yes.

Mr. HORTON. That is, to take existing departments, consolidate them, and set up some type of managerial function and also some type of regional function.

Mr. HEINEMAN. Yes, sir.

Mr. HORTON. And that basically was the result of your report; is that correct?

Mr. HEINEMAN. Yes, sir.

Mr. HORTON. Now, why didn't President Johnson act on it?

Mr. HEINEMAN. If you will forgive me for being a little frivolous, sir, I worked for him. He didn't work for me, and he never told me.

I will say one thing: he did say on one occasion that this was going to be the No. 1 priority of his second term.

\* \* \* \*

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Mr. CALIFANO. Yes, Mr. Horton; I think there would be because of the peer group problem I mentioned before. It is a combination of human nature and the nature of bureaucracy, but it is very difficult to put one peer over another.

The President put out an Executive order trying to make the Secretary of Housing and Urban Development superior, so to speak, to the other Cabinet officers in terms of programs going into cities, an Executive order signed by the President of the United States, and it did not work.

Every time we had a problem of whether another Department's funds should go to Philadelphia or New York or Los Angeles, it ended up in the White House, and we would end up sitting around in my office, with me acting as an arbitrator.

Mr. HORTON. So you feel the domestic Council will still be needed as a coordinating agency?

Mr. CALIFANO. Yes, but I by no means think you will need a Domestic Council of 90 people. If you have this realinement—

Mr. HORTON. In other words, you feel that its functions could be reduced?

Mr. CALIFANO. Sharply reduced.

#### HEINEMAN REPORT

Mr. HORTON. What about the Heineman report? It has not been released, apparently on orders from President Johnson. Do you recall anything in the report that you feel would be pertinent to the discussions that we are having with regard to the present reorganization?

Mr. CALIFANO. I think that the main point, I suppose, would be that the report is so similar in the recommendations that functions be concentrated in a smaller number of departments, and they made another central point perhaps a lot stronger than the Ash Council report made, which was that there are just too many people reporting to the President, and what happens is that they, in effect, do not report to the President. He just cannot see them, and even his top staff people do not have time to see them on any regular basis.

I would have to say that I think, and I really should leave this to Mr. Ash, but I think he would agree that his proposals track the Heineman proposals, not quite word for word, but certainly very, very closely. I am surprised that this committee does not have the Heineman report. I did not realize that.

Mr. HORTON. It has not been made available to us, but we did have testimony from Mr. Heineman and also from Mr. Ash, and I think it is certainly clear from their testimony that the Ash report, the followup on recommendations, and the reorganization bills that we have before us now are not something that were just pulled out of the air, but represent an evolution going back over several years and including several studies.

The Ash Council apparently did rely quite heavily on the Heineman report. I guess you would, having looked at both of them, of course, probably come to that same conclusion, would you not?

Mr. CALIFANO. Yes, I have; no question about that.

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#### DEPARTMENT OF EDUCATION

Mr. ERLENBORN. Thank you, Mr. Chairman. I think really this question is core to what we are considering. That is, whether we are going to have departments constituency-oriented or oriented by function. I would like your comments on this. If we continue with the constituency-oriented philosophy of departments, do we not then, if we fail to have a Department of Education, in substance, tell the people in education that they are not important enough as a constituent to have that representation? Or if we fail to have a Department of Consumer Affairs, do we tell people as consumers that they are not important enough constituents to have their own department?

In other words, there would continue to be pressures for more and more departments to represent more and more important groups of constituents.

Mr. CALIFANO. Well, I think that is true, and I happen, personally, to feel that a Department of Education, for example, would be a very serious mistake because, you know, it is like the old statement that, "War is too important just to leave to the generals."

Education is too important in this country just to leave it to the professional educators. One, it is so related to jobs and so related to social development, and economic development; and two, it so obviously needs an enormously hard look. You know, 4 years of college is too long. Should it be 3 and why is it so expensive and why is it so inefficient? It is hard to get someone whose job it is to protect the interests of education to take that kind of a hard look at it.

As far as the consumer point goes, you know, every department should be a department of consumer affairs. We are all consumers.

Chairman HOLIFIELD. But they are not.

Mr. CALIFANO. They are not.

Mr. ERLENBORN. Yes. I think there is that hazard that you have suggested with your last comment; that when we do create a department for that constituent, other agencies and departments feel that they do not have to have the same obligation to those constituents. For instance, other agencies would say, "Look to the head of the Department of Education for educational problems," or "You can go to the Secretary of Consumer Affairs. He is your man in Government."

I think it also presupposes that questions of policy would be decided in the White House, because your Cabinet heads would, by definition, be representing only the viewpoint of one constituency and conflicts would then necessarily flow to the White House for resolution. Would you agree?

Mr. CALIFANO. Yes; too many of them flow to the White House for resolution under the current system. There is no question about that, and one of the advantages of this plan would be, hopefully, that a lot of them would be resolved below the White House.

#### HEINEMAN REPORT

Mr. ERLENBORN. One last question. We have talked about the Heineman report. Do you know what plans there were for implementing the Heineman report?

Mr. CALIFANO. Well, it is very difficult to speculate, Mr. Erlenborn. My own judgment is that had the President run successfully for reelection we would have pro-

[402]

posed at least one or two of these departments in early 1969. I think the tendency at the staff level, which is really all I can speak for, was in terms of the Natural Resources Department and the Department of Human Resources of Social Services, as we were calling it then, both because we thought those problems were urgent problems and because we thought that we had a more realistic chance of getting them enacted into law, because, as you and the chairman know so well, it is enormously difficult to enact into law major changes in the structure of the Federal Government for a whole variety of reasons, many of them legitimate.

Mr. ERLENBORN. Thank you very much.

Chairman HOLIFIELD. Mr. Fuqua.

Mr. FUQUA. Thank you, Mr. Chairman.

Mr. Califano, I have had an opportunity to review your statement, and you mentioned the Heineman report. As well, Mr. Heineman was before the subcommittee and mentioned the fact that one of the strengths of reorganiza-

tion was a decentralization out of Washington and re-creation of more regional offices with authority to make the decisions that in many cases wind up here in Washington for some final decision.

From your experience in the White House, and might I say very successful experience, do you not think that the personality of the Secretaries or of the President, for that matter, reflects clear down into the department?

Suppose you have a strong Secretary of one of the new departments. He wants to keep everything under his own grip to make sure he knows what is happening to do, in his opinion, an effective job, so he removes this so-called decisionmaking at the regional level. Do you not think that this could really somewhat stop up the machinery of Government?

Mr. CALIFANO. Well, I would think that the tendency of any Secretary as he started, or anyone that goes into a Government job like that, as he starts, is to pull everything to himself until he gets a sense of the competence and confidence that he can have in the people that are working for him.

Mr. FUQUA. But, every time you change Secretaries you have this same thing happening. I think that if I were a Secretary I would want to do this, as you said, until I found out what was going on, and then maybe release it back to the field.

Mr. CALIFANO. That is right; but I think that the structure that is suggested here would make it easier and more efficient for him to release it back to the field.

Now, there are always going to be limits on that and you know that maybe that will never really happen in this country unless we went to some form of regional government and drastically changed the whole State-city-county structure of the country, because there is no question that no matter how you are organized, when problems get very hot, if the President is concerned about them, or the Cabinet Secretary is concerned about them, he is going to make those decisions right here in Washington, no matter what the problems look like.

\* \* \* \*

[405]

Mr. CALIFANO. Yes, that is correct; and the reason I suppose, for the different levels which we considered at that time was more practical than anything else. As you know, we had a substantial fight about the Department of Transportation. We were fresh out of that fight. Just before that, we had substantial difficulties with the Department of Housing and Urban Development, and our attitude at that time, at least, was to go piece-by-piece.

#### EXECUTIVE PRIVILEGE FOR HEINEMAN REPORT

Mr. ROBACK. You expressed some surprise that the committee did not have the Heineman report. We understand that the report remains in the orbit of executive privilege, perhaps partly because of the sensitivity of classified material. Do you think it is practical to break out the domestic part of the report? Could you undertake to refer this matter to President Johnson?

Mr. CALIFANO. I would happily undertake to refer it to him. I can almost guarantee the answer, I suppose.

Mr. ROBACK. What would that be?

# HEINONLINE

Citation:

151 (1974) <br> <span class="cite\_title"> Refusals by the Executive Branch to provide information to the Congress, 1964-1973 : a survey conducted by the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, of instances in which executive agencies of the government have withheld information from members and Committees of the Congress and from the Comptroller General of the United States. </span>

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Mr. CALIFANO. Well, I know, I think he wants to release those papers in the archives in what he considers to be an orderly fashion. There is no problem in separating the domestic from the foreign part of the Heineman report, as I recall it.

Mr. ROBACK. Would you, as legal counsel, rate this as a part of the Presidential papers?

Mr. CALIFANO. Oh, I suppose I would; yes, I mean—

Chairman HOLIFIELD. Why would you? It was paid for by the taxpayers' money and should belong to the taxpayers and to the Congress rather than to the President as his private papers. He did not pay for them personally.

Mr. CALIFANO. Well, have not Presidential papers really been considered the Archives papers; and does not the National Archives run the Presidential Library and control those papers? I suppose I was answering it in the sense that it is the kind of document that traditionally would be privileged in terms of communication to the President, and in that sense I think it probably is.

But, it has been so widely discussed that I was just surprised that the document was not before this committee.

Chairman HOLIFIELD. It very frankly puts this committee at a disadvantage when Mr. Ash, and you and other witnesses, and Mr. Heineman himself, have referred to this study, and yet we do not have it to refer to. It is like reading a line or two out of a letter and not having the rest of the letter in front of you. It puts us at a disadvantage. For instance, I had to draw up a question on the fact that the Heineman report did not recommend the Domestic Council, and that he personally was opposed to that concept, or where it was placed, not in its function, but in the placing of it beyond the reach of Congress because they were making appraisals of programs on setting priorities, in effect, on which programs the Congress had inaugurated.

Mr. ROBACK. The Washington Post had an editorial on Saturday about this reorganizational proposal, Mr. Califano, and it cited you in several instances. It concluded by saying that it hopes that the Congress will read all of the testimony that you and the other gentlemen gave in this case, referring particularly to the Senate. . . .



## FILE 27

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### HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

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(27-A)

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
*Washington, D.C., March 27, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Senate Committee on the  
Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is to advise, in response to your letter of March 9, 1973, the only instance in which the executive branch has refused to testify on hearings before this committee was in connection with the hearings on the seizure of Bureau of Indian Affairs Headquarters.

The form covering this instance has been completed and a copy is attached.  
Sincerely yours,

JAMES A. HALEY, *Chairman.*

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## (27-B)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
11-12-72	John D. Ehrlichman Assist. to President The White House	John D. Ehrlichman	Seizure of BIA Headquarters	11-22-72	John W. Dean, III	Executive privilege (See attached copy of hearings pages 4 - 6)
11-13-72	Leonard Garment Special Consultant to Pres/ The White House	Leonard Garment	Seizure of BIA Headquarters	11-22-72	John W. Dean, III	Executive privilege
11-13-72	John Wesley Dean, III Counsel to the President The White House	John Wesley Dean, III	Seizure of BIA Headquarters	11-22-72	John W. Dean, III	Executive privilege
11-14-72	Egil Krogh, Jr. Deputy Assist. to President The White House	Egil Krogh, Jr.	Seizure of BIA Headquarters	11-22-72	John W. Dean, III	Executive privilege
11-14-72	Bradley Patterson Executive Assistant to Mr. Garment The White House	Bradley Patterson	Seizure of BIA Headquarters	11-22-72	John W. Dean, III	Executive privilege
11-14-72	Ralph E. Erickson Deputy Attorney General Department of Justice Washington, D. C.	Ralph E. Erickson	Seizure of BIA Headquarters	11-22-72	Ralph E. Erickson	Department's investigation into possible violation of Federal laws.
11-14-72	Wayne B. Colburn, Dir. U.S. Marshals Service Department of Justice Washington, D. C.	Wayne B. Colburn	Seizure of BIA Headquarters	11-22-72	Ralph E. Erickson	Department's investigation into possible violation of Federal laws.

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 27

(Continued)

Submitted by: (Comm/SubComm)

on Interior & Insular Affairs

By: James A. Haley, Chairman

TITLE: 5-2761

Extension

[Excerpt from hearings entitled "Seizure of Bureau of Indian Affairs Headquarters," before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 92d Cong., 2d sess., Dec. 4 and 5, 1972, pp. 4-6]

[Mr. ASPINALL] . . . I have seen the destruction of war. I have been in Europe during World War II—in England, in France, in Belgium. I have seen the destruction of war at its worst. But it was an impersonal destruction to a great extent, not a personal vendetta. I have never seen anything that showed up to be such wanton disregard of other people's rights, of other people's property, of other people's persons, as I saw when I went through the Bureau of Indian Affairs Building the second day after the members of this group left town; and supposedly, from what I understand, the fourth day after the destruction took place. It was human meanness at its worst.

Congress is entitled to a direct explanation from all of the executive and administrative officials who had a hand in the affair. That is the purpose of this hearing. Unfortunately, however, a group of men in the White House who have been reported to have issued orders to the Secretary of Interior and his aides and who undoubtedly must bear the responsibility for the actions taken by the Government, have refused to participate in this hearing.

The committee requested the following men to appear and testify: John D. Ehrlichman, assistant to the President; Leonard Garment, special consultant to the President; John Wesley Dean III, counsel to the President; Egil Krogh, Jr., deputy assistant to the President; Bradley Patterson, executive assistant to Mr. Garment; Ralph E. Erickson, Deputy Attorney General; Wayne B. Colburn, Director of the U.S. Marshal Service; and Gilbert Román, Chief of Special Projects, Community Relations Service.

According to the information which I have, all of these men issued orders to the Department of the Interior specifying what could and could not be done, and they were reported to have assumed complete control over the efforts to get the Indians out of the building, even to the extent of excluding the Secretary and Assistant Secretary. Notwithstanding these facts, John Dean, on behalf of the members of the President's personal staff, informed me that under the doctrine of executive privilege, they must refuse to testify. His letter, dated November 22, 1972, is offered for inclusion in the record, together with a letter which I have received this morning from the U.S. Marshal's Office. I ask unanimous consent that these letters, plus additional letters, be placed in the record at this point, Mr. Chairman.

Mr. HALEY. Are there objections? The Chair hears none, and it is so ordered.

[The information follows:]

THE WHITE HOUSE,  
Washington, D.C., November 22, 1972.

Hon. WAYNE N. ASPINALL,  
Chairman, Committee on Interior and Insular Affairs,  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: By letters of November 13-14, 1972, you have requested Messrs. John Ehrlichman, Leonard Garment, Egil Krogh, Bradley Patterson and myself, all members of the President's personal staff, to appear and testify at hearings before your Subcommittee on Indian Affairs regarding the recent seizure and occupation of the Bureau of Indian Affairs Headquarters building. On behalf of all of the above individuals receiving invitations, I wish to thank you and respond.

As you know, it is a matter of well established principle and precedent that members of the President's staff do not appear before Congressional committees to testify in respect to the performance of their duties on behalf of the President. This practice is, indeed, fundamental to the operation of our system of government. I must, therefore, respectfully advise you that the members of the President's staff that you have invited to testify must decline.

Sincerely,

JOHN W. DEAN III,  
Counsel to the President.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, D.C., November 22, 1972.

Hon. WAYNE N. ASPINALL,  
Chairman, Committee on Interior and Insular Affairs,  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of November 13, 1972, regarding proposed hearings by the Subcommittee on Indian Affairs in connection with the recent illegal seizure and occupation of the Bureau of Indian Affairs Headquarters building.

I must respectfully decline your invitation to appear and testify at the proposed hearings. As I am sure you are aware, the Department of Justice has undertaken a comprehensive investigation of possible violations of the federal law in connection with the alleged theft and destruction of Bureau of Indian Affairs property. For me to appear before your Committee during the pendency of our investigation would be inappropriate and quite possibly prejudicial to the conduct of that investigation.

I understand a similar invitation to appear and testify has been directed to Wayne Colburn, Director of the United States Marshals Service. Inasmuch as the Marshals Service involvement in these matters has been under my general supervision, the same consideration applies to the Marshals Service. Accordingly, you should consider my declination to appear and testify to relate to Mr. Colburn as well.

The Department does not wish in any way to deny the Committee access to information that you may consider helpful. However, I am sure you can realize the restraints under which we must conduct ourselves at this critical point in time.

Finally, as you know, court action was undertaken to obtain the eviction of the occupants during the illegal seizure and occupation of the Bureau of Indian Affairs Headquarters. The pleadings and court records are, of course, readily available to your Committee. For your convenience, we would be pleased to supply you copies of those documents upon request.

Sincerely,

RALPH E. ERICKSON,  
Deputy Attorney General

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
U.S. HOUSE OF REPRESENTATIVES,  
Washington, D.C., November 30, 1972.

Mr. RALPH E. ERICKSON,  
Deputy Attorney General, Department of Justice,  
Washington, D.C.

DEAR MR. ERICKSON: I have your letter dated November 22, 1972 refusing to attend the hearings by the Subcommittee on Indian Affairs on December 4, 5, and 6, and refusing to permit Mr. Wayne Colburn to attend.

The information desired by the subcommittee has nothing to do with your investigation of possible violation of law in connection with the alleged theft and destruction of Federal property. The subcommittee wishes to know the facts regarding the assembling of a police force on the night of November 2 for the purpose of evicting the Indians from the building. I am informed that the United States Marshals were among that group, and the subcommittee wishes to question the United States Marshal in charge of that group.

I have no desire to interfere with your investigation of possible violations of law, but I hope that you will choose to cooperate with the subcommittee in this request. Please call the committee office on Code 180 Extension 2761 and give the name of the representative of the Marshal's office who can testify regarding the facts.

You indicated that you would provide copies of the judicial proceedings initiated by the Department of Justice. Those papers, without any explanation of the facts which lead to their filing, will not meet the needs of the subcommittee. The subcommittee is entitled to know why you chose to initiate judicial proceedings, as a substitute for police arrest action, and since you are the responsible Federal official involved we regard your testimony on that subject as necessary. I must, therefore, request that you attend the hearings for that limited purpose. You will not be required to make premature disclosures that would affect your criminal investigation.

Sincerely yours,

WAYNE N. ASPINALL, Chairman.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, D.C., December 1, 1972..

Hon. WAYNE N. ASPINALL,  
Chairman, Committee on Interior and Insular Affairs, House of  
Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of November 30, 1972, reiterating your request that a representative of the U.S. Marshals and I attend and testify at the forthcoming hearings by the Subcommittee on Indian Affairs.

As I stated in my letter of November 22, 1972, the Department of Justice is currently involved in a comprehensive investigation of possible violations of federal law in connection with the illegal seizure and occupation of the Bureau of Indian Affairs Building and theft and destruction of government property. I appreciate your suggestion regarding limiting the scope of our testimony, however, I remain of the opinion that any testimony on our part at this time would be inappropriate and possibly prejudicial to the conduct of that investigation.

Under the circumstances, I must again respectfully decline your invitation to appear and testify at the proposed hearings.

Sincerely,

RALPH E. ERICKSON,  
Deputy Attorney General.

(27-C)

SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
11-21-72	Gill Roman, Chief of Special Projects Community Relations Services Department of Justice	Gill Roman ✓	Seizure of BIA Headquarters	11-28-72	Ben Holman	Citing Title 42 U.S. Code 2000g-2.

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

27  
FILE:

Submitted by: (Comm/SubComm)  
on Interior and Insular Affairs  
By: James A. Haley, Chairman  
TITLE: 5-2761  
Extension

DÉPARTMENT OF JUSTICE,  
COMMUNITY RELATIONS SERVICE,  
Washington, D.C., November 28, 1972.

Hon. WAYNE N. ASPINALL,  
Chairman, Committee on Interior and Insular Affairs,  
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge your letter of November 21, 1972, to Mr. Gilbert Román of my staff in which you requested that he be present and testify before your committee concerning matters relating to the Indian occupation of the Bureau of Indian Affairs.

It is my opinion that Mr. Román's testimony will be contrary to the intent of Title 42 United States Code 2000g-2, which reads in part as follows:

"The activities of all officers and employees of the Service in providing conciliation assistance shall be conducted in confidence and without publicity, and the Service shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held."

I therefore respectfully decline to permit Mr. Román to testify in accordance with your request. I know you can appreciate the position of the Community Relations Service in this matter in seeking to preserve the confidential relationships which are vital for our continued effectiveness.

Sincerely,

BEN HOLMAN.

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[Excerpt from the United States Code Title 42, § 2000g, § 2000g 1-3]

## SUBCHAPTER VIII.—COMMUNITY RELATIONS SERVICE

### SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 2000a-3 of this title.

### § 2000g. Establishment of Service; Director of Service: appointment, term; personnel; experts and consultants.

There is hereby established in and as a part of the Department of Commerce a Community Relations Service (hereinafter referred to as the "Service"), which shall be headed by a Director who shall be appointed by the President with the advice and consent of the Senate for a term of four years. The Director is authorized to appoint, subject to the civil service laws and regulations, such other personnel as may be necessary to enable the Service to carry out its functions and duties, and to fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of Title 5. The Director is further authorized to procure services as authorized by section 55a of Title 5, but at rates for individuals not in excess of \$75 per diem. (Pub. L. 88-352, title X, § 1001(a) July 2, 1964, 78 Stat. 267.)

### § 2000g-1. Functions of Service.

It shall be the function of the Service to provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce. The Service may offer its services in cases of such disputes, disagreements, or difficulties whenever, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby, and it may

offer its services either upon its own motion or upon the request of an appropriate State or local official or other interested person. (Pub. L. 88-352, title X, § 1002, July 2, 1964, 78 Stat. 267.)

### § 2000g-2. Cooperation with other agencies; conciliation assistance in confidence and without publicity; information as confidential; restriction on performance of investigative or prosecuting functions; violations and penalties.

(a) The Service shall, whenever possible, in performing its functions, seek and utilize the cooperation of appropriate State or local, public, or private agencies.

(b) The activities of all officers and employees of the Service in providing conciliation assistance shall be conducted in confidence and without publicity, and the Service shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held. No officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service. Any officer or other employee of the Service, who shall make public in any manner whatever any information in violation of this subsection, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000 or imprisoned not more than one year. (Pub. L. 88-352, title X, § 1003, July 2, 1964, 78 Stat. 267.)

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2000g-3 of this title.

### § 2000g-3. Reports to Congress

Subject to the provisions of sections 2000a-4 and 2000g-2(b) of this title, the Director shall, on or before January 31 of each year, submit to the Congress a report of the activities of the Service during the preceding fiscal year. (Pub. L. 88-352, title X, § 1004, July 2, 1964, 78 Stat 267.)



## **FILE 29**

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### **HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE**

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(29-A)

MARCH 26, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to your letter of March 9, concerning the survey of instances in which Federal officers or employees have refused to supply information to Congressional committees and subcommittees during the period from January 1, 1964 through February 28, 1973.

Enclosed herewith are appropriate survey forms with attachments describing four instances in which this Subcommittee met with resistance in obtaining requested information.

Two of the instances are reported on Survey Form I and two are reported on Survey Form III.

Should you or your staff have any questions regarding the information furnished herewith, please do not hesitate to contact Daniel J. Manelli, Acting Chief Counsel of the Subcommittee at Extension 54442.

With kind regards, I am  
Sincerely,

HARLEY O. STAGGERS,  
*Chairman, Special Subcommittee on Investigations,  
House Interstate and Foreign Commerce Committee.*

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## (29-B)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
		SUBCOMMITTEE ATTEMPT TO OBTAIN FILES IN POSSESSION OF SEC DURING FALL, 1972 (SEE NARRATIVE ATTACHED)			

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 29

Submitted by: (Comm/Subcomm) Special Subcommittee on Investigations, House Interstate and Foreign Commerce Committee  
By: Daniel J. Manelli  
Title: Acting Chief Counsel X 54442  
Extension

[Attachment to File 29-B, Survey Form I]

**SUBCOMMITTEE ATTEMPT TO OBTAIN FILES IN POSSESSION OF SEC DURING FALL 1972**

During September 1972, the Subcommittee received definite and strong allegations that certain documents in the possession of the SEC detailed numerous contacts between the ITT Corporation and high government officials seeking preferred treatment for that corporation under the law. If supported, these allegations would have raised serious questions about the policies and procedures of the SEC itself.

It was felt that the SEC documents themselves would provide the best evidence to refute or substantiate the allegations. Therefore, on September 12, 1972, in carrying out the oversight responsibility of the Subcommittee, Chairman Staggers wrote to Chairman Casey of the SEC requesting access to the documents in question. It was pointed out that these files would be examined at the SEC and the examination would not therefore in any way interfere with SEC staff work in progress at the time.

On September 26, Chairman Casey wrote Chairman Staggers refusing access to the files and stating in part that the SEC staff was working diligently to complete its investigation.

On September 27, Chairman Casey visited Chairman Staggers in his office and promised him that the SEC would reconsider the matter and advise him of its decision the next day. Chairman Staggers was never so advised.

On September 28, Chairman Staggers renewed his request for the files. With his written request still unanswered and without a word of warning, on October 6, Chairman Casey wrote Chairman Staggers, and later testified, that the Department of Justice had asked for the files on October 4 and that the SEC had immediately complied with the request. (The Public Information Office of Justice continues to state, contrary to Mr. Casey, that Casey initiated transfer of the files by first contacting Justice.)

The Subcommittee's subsequent request of the Department of Justice for the files was met by refusal.

On December 14, 1972, Chairman Casey and several other SEC officials testified before the Subcommittee. At this time SEC summaries of the ITT documents in question were provided, some of which were described by the executive assistant to Chairman Casey as being "politically sensitive."

During his testimony, Chairman Casey stated that prior to sending the files to the Department of Justice, he consulted with the President's Counsel, John Dean.

According to Casey, Mr. Dean advised him not to turn the files over to the Subcommittee but rather to send them to Justice.

There are two additional aspects of the precipitous file transfer that are of particular interest. The files were transferred on October 6 to Justice with a stated need for urgency and for the alleged purpose of consolidating two investigations. It was learned on March 8, 1973, however, through the testimony of L. Patrick Gray, before the Senate Judiciary Committee, that Justice did not request the FBI to investigate the matter until December 5, 1972, two months later. This lapse of time was hardly consistent with the expression of urgency accompanying the transfer.

Moreover, Chairman Casey testified that in transferring the files, he was acting in accordance with a new Justice Department memorandum of September 28, 1972, setting forth guidelines controlling investigations of this nature. The Subcommittee since learned, however, that the memorandum dated September 28 was not actually distributed to the various agencies until about October 24, nearly four weeks after the documents were transferred.

It should be noted that during the aforementioned meeting between Chairman Staggers and Chairman Casey on September 27, Chairman Staggers strongly indicated that the Subcommittee was prepared to subpoena the files in question if the SEC did not supply them.

This entire episode is a shocking example of the perversion of an arm of Congress by the Executive, thereby leading to a frustration of Congressional intent and authority.

A copy of the transcript (page proofs) of the Subcommittee's December 14 hearing is attached. It should be noted that while some of the "politically sensitive" documents have now been made available to the Subcommittee by ITT, the vast majority of documents continue to be sequestered within the Department of Justice.

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[Excerpt from the *Wall Street Journal*, June 28, 1973]

#### CASEY DISCLOSES "IMPROPER" KENNEDY, EHRLICHMAN CALLS

"The Securities and Exchange Commission was subject to a series of outside pressures and inquiries last year in connection with its case against International Telephone & Telegraph Corp., former SEC Chairman William J. Casey said.

"Mr. Casey, currently Under Secretary of State for Economic Affairs, detailed the outside contacts before a House Commerce Investigative subcommittee.

"He characterized as 'improper' phone calls made to him by then-White House aide John Ehrlichman and by Sen. Edward Kennedy (D., Mass.) prior to the filing of the SEC's civil suit against ITT on June 16, 1972.

"He described discussions with John Dean, since fired as White House counsel, and with former Attorney General and Nixon campaign chief John Mitchell about how to keep from Congress a batch of politically sensitive documents subpoenaed from ITT in the course of the SEC investigation.

"He also disclosed that he had copies of the documents made for then-Attorney General Richard Kleindienst,

who had previously disqualified himself from Justice Department handling of ITT investigations.

"Mr. Casey said Mr. Ehrlichman suggested in his phone call that the SEC was being 'overzealous' in its investigation of ITT. Sen. Kennedy's call came a few days before the suit was filed and, according to Mr. Casey, consisted, basically, of a character reference for Andre Meyer, principal partner in Lazard Freres & Co., an investment banking firm accused in the ITT case of violating registration provisions of federal securities laws.

"Mr. Casey said the call from Mr. Ehrlichman occurred in March or April 1972 when SEC enforcement officials were pressing ITT to turn over a set of the controversial documents. The SEC staff suspected that the documents hadn't been included in files provided in response to an earlier subpoena after they found that the widely publicized 'Dita Beard memo' wasn't among the documents they'd been given.

"'Apparently the ITT lawyers somehow got word to Mr. Ehrlichman that the commission was pursuing the additional documents,' Mr. Casey told the Congressmen. He said he 'wouldn't want to say' that Mr. Ehrlichman asked him to curtail the investigation, but added, 'I guess he raised the question whether this was necessary.' Mr. Casey said he replied that the SEC's enforcement staff thought it was necessary and that he wasn't going to interfere.

"Mr. Casey related that Sen. Kennedy in his June phone call explained that Mr. Meyer was a trustee of the Kennedy family's foundation, that he was a 'man of high reputation' and 'had been very helpful' to the Kennedy family. Mr. Casey testified that the SEC wasn't considering naming Mr. Meyer personally in the suit but that Sen. Kennedy apparently was 'concerned that the firm would be named and perhaps besmirch his reputation.' The former SEC chairman said he thanked the Senator for the information and 'assured him the case would be considered on its merits.'

"A spokesman for Sen. Kennedy said his recollection is that Mr. Meyer 'apparently felt there was some question being raised about his reliability and trustworthiness.' "

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[Excerpt from hearing entitled "Legislative Oversight of SEC: Inquiry Into Withholding and Transfer of Agency Files Pertaining to ITT," before the Special Subcommittee on Investigations, the Committee on Interstate and Foreign Commerce, House of Representatives, 92d Cong., 2d sess., Dec. 14, 1972, pp. 28-35]

The CHAIRMAN (Mr. Staggers). I told you at that meeting that you were responsible to the Congress of the United States, did I not?

Mr. CASEY. And I said the Commission, I of course agreed, was responsible to the Congress of the United States. We couldn't agree that that required us to take documents out of a pending investigative file and turn them over. It is a matter which is an open legal question. Chairman Eastland of the Senate Judiciary Committee, made a statement recently in which he said that he certainly did not think that any file that has to do with an investigation should be given to any congressional committee.

Now, this is an open legal question and we don't want to argue it. If you will subpoena us we are going to give it to you. We —

The CHAIRMAN. I think you knew that in my office you were going to be subpoenaed for those documents, and 2 days after, they appeared then over at the Justice Department.

Let me ask you this: My information is that at about 9:10 a.m. on October 6—at a time, let me add, when the files were still in the SEC building—that the assistant counsel of the Senate Subcommittee on Administrative Practice and Procedure called your office on behalf of the subcommittee chairman, Senator Edward Kennedy. In your absence he was referred to Mr. Charles Whitman, your assistant.

On behalf of Senator Kennedy, who had apparently learned on October 5 that you were preparing to transfer the files, the subcommittee counsel requested that the Commission maintain the status quo by either retaining the files in question, or retaining copies of them, until Senator Kennedy could talk directly to you. Is this in accord with your recollection?

Mr. CASEY. I didn't have the conversation. I think I was told that there had been such a call, but we didn't feel any obligation to acquiesce in that request.

The CHAIRMAN. You didn't feel any responsibility; all right.

Mr. CASEY. Our responsibility is to you, the oversight committee.

The CHAIRMAN. At this point, without objection, I will direct that a letter from Senator Kennedy to me, which I have just received this morning, be inserted in the record giving these facts. It contains an account of the facts I have just outlined.

[The letter referred to follows:]

COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE  
AND PROCEDURE,  
Washington, D.C., December 18, 1972.

Hon. HARLEY O. STAGGERS,  
Chairman, Committee on Interstate and Foreign Commerce,  
Washington, D.C.

DEAR MR. CHAIRMAN: It is my understanding that on this Thursday, December 14, 1972, your Committee will open hearings into the refusal of the Securities and Exchange Commission to comply with your requests for documents relating to the SEC proceedings against International Telephone and Telegraph Corporation and its officers. It may be useful for you to have for your background, the various communications between the SEC and the Senate Judiciary Committee, and thereafter the Administrative Practice and Procedure Subcommittee, on this issue.

Shortly after commencement of hearings in February 1972 on the nomination of Richard G. Kleindienst to be Attorney General, members of the Judiciary Committee requested that Chairman Eastland secure from the SEC its files relating to ITT and ITT's antitrust cases. We were told informally that the request had been denied because it involved investigative data.

On April 19, 1972, five members of the Committee formally requested the chairman to narrow the request to the SEC to ITT documents in the possession of the Commission, so as to exclude agency investigative memoranda. Because of the evidence of extensive shredding of the documents in the Washington ITT office, we believed that those documents in the SEC's possession could have been the only unshredded ITT documents relating to the antitrust settlement under Committee investigation. SEC Chairman Casey's response indicated that investigative proceedings were underway and that disclosure would, in his view, be improper at the time. (See Hearings before the Committee on the Judiciary, United States Senate, 92d Congress, 2d Session, on Nomination

of Richard G. Kleindienst to be Attorney General, April 1972, volume 3, p. 1664.)

Following the conclusion—by consent decree—of the SEC's investigation into insider trading by ITT and its officials during the period in which settlement of its antitrust litigation was reaching conclusion, I requested directly from Chairman Casey access to those files on behalf of the Subcommittee on Administrative Practice and Procedure, Mr. Casey again refused this request, indicating that the Commission investigation was still open on the matter.

On October 5, I learned that the SEC would be sending files, which included the material I had requested, to the Justice Department. I was not in town at the time and instructed the Subcommittee staff to call Mr. Casey to request that the Commission maintain the status quo by either retaining the files in question or keeping copies of them until I could talk directly to him. This request was communicated by the Subcommittee Assistant Counsel to Mr. Charles Whitman, Assistant to SEC Chairman Casey, at about 9:10 a.m. on October 6. I spoke with Mr. Casey the following week and he told me that the files had already been transmitted to Justice in spite of our October 6 request. Our request for those materials remains in force at the present time.

I am enclosing copies of the Hearings and correspondence referred to above. Feel free to use this letter and enclosures in whatever manner you deem appropriate. If we can be of any further assistance to you, let me know.

Sincerely,

EDWARD M. KENNEDY, Chairman.

The CHAIRMAN. Senator Kennedy has also provided copies of his letter to Chairman Casey, dated August 15, 1972, requesting the files, and Chairman Casey's response of August 31, denying access.

Without objection I direct that these materials also be included in the record.

(The letters referred to follow:)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
Washington, D.C., August 15, 1972.

Hon. WILLIAM J. CASEY,  
Chairman, Securities and Exchange Commission,  
Washington, D.C.

DEAR MR. CHAIRMAN: In June 1972 the Securities and Exchange Commission initiated civil actions against officials of International Telephone and Telegraph Corporation, the company itself, and affiliated firms. On June 20 the Commission announced a consent settlement decree on all charges with regard to all defendants. This would constitute a termination of the ITT stock trading investigation as to the defendants and issues involved.

During the course of the SEC's study of these cases, documents, statements, and other materials were received by the Commission relating to ITT, its subsidiaries and affiliates, and their mergers, settlement negotiations, settlements, and related matters covering or affecting the period 1969 to June 1972. Because of certain document-destruction activities undertaken by ITT earlier this year, many of these documents may presently be unavailable from any source other than the Commission. I am thus requesting that the Commission provide the Subcommittee on Administrative Practice and Procedure, in connection with its continuing study of federal antitrust settlement and consent judgment procedures, with access to the documents and materials described above. We are particularly interested in ITT documents in the possession of the SEC, for example, correspondence, memoranda, and depositions.

I believe that Subcommittee access to the requested material is timely and appropriate. Because of the settlement in June, disclosure could not impair any federal enforcement actions. As to any materials which may be classified, we are prepared to maintain proper protection.

I will look forward to hearing from you concerning how we might work out a mutually convenient procedure for Commission compliance with this request that might avoid unnecessary duplication of lengthy documents. Thank you for your assistance in this matter.

Sincerely,

EDWARD M. KENNEDY,  
Chairman, Subcommittee on Administrative Practice and Procedure.

SECURITIES AND EXCHANGE COMMISSION,  
OFFICE OF THE CHAIRMAN,  
*Washington, D.C., August 31, 1972.*

Hon. EDWARD M. KENNEDY,  
U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: This is in response to yours of August 13, [sic] 1972, requesting material from the Commission's investigating files on matters relating to the International Telephone & Telegraph Corporation.

The Commission has, as your letter points out, initiated and settled civil actions involving some of the transactions under investigation. However, the staff informs me that it is still investigating other collateral matters which might lead to further appropriate proceedings.

In such investigations the Commission has been likened to a grand jury and like a grand jury it is the Commission's policy to conduct its investigations on a confidential basis. Accordingly, in order to protect the contents of its investigatory files and the integrity of its investigative procedures, the Commission refrains from giving out material from its pending investigations. Pursuant to this established procedure, it is the Commission's decision to respectfully refuse your request.

Sincerely,

WILLIAM J. CASEY, Chairman.

The CHAIRMAN. Was the request of the Justice Department really so urgent that Senator Kennedy's request, as well as my own, had to be disregarded?

Mr. CASEY. No. We made the decision for better or for worse. We all agreed with the decision that the Justice Department request should be honored and directed that the files be sent over. I don't know when I heard about Senator Kennedy's request.

The CHAIRMAN. Was there any pressing reason why copies of the files should not be retained by anybody at SEC?

Mr. CASEY. I don't know. Nobody was told not to make copies. That was done by the staff. In the course of all the decisionmaking, nobody was directed not to make any copies.

The CHAIRMAN. Chairman Casey, isn't it a fact that it was you who initiated the contact with the Justice Department, and it was on your suggestion that they agreed to accept files?

Mr. CASEY. No. I didn't initiate the contact with the Justice Department. The Justice Department initiated the contact with me.

The CHAIRMAN. Let me just say this: At this point in the record, without objection, I will insert a number of newspaper accounts—

Mr. CASEY. Oh, Mr. Chairman, that is hearsay and it is obviously statements by uninformed people. You have Deputy Attorney General Erickson's statement that he asked for the file, so what relevance does a newspaper statement by a public relations officer have? I don't object to it being stated in the record. I want to make clear that that is the kind of misinformation—

The CHAIRMAN. We will have a witness to be sworn in in a few minutes to refute that statement. I just want to say this, that I will insert in the record a number of newspaper accounts which describe the events that we are considering here this afternoon. I will not specifically enumerate the various articles, except to point out that a number of them relate that it was you, Chairman Casey, who initiated the transfer of files.

(The documents referred to follow.)

[From the *Chicago Sun-Times*, Friday, Oct. 13, 1972]

NADER AIDE, CONGRESSMEN HIT ITT SHIFT

(By Morton Kondracke, Sun-Times Bureau)

WASHINGTON.—The Securities and Exchange Commission files on the ITT case were shipped to the Justice Department in order to conceal politically damaging new evidence until after the election, it was charged Thursday.

Those making the charges, two congressmen and an associate of consumer advocate Ralph Nader, said that they were not sure what the evidence contains but they were sure it was important because of "desperate" efforts to conceal it.

Rep. John E. Moss (D-Calif.) said he suspects the evidence indicates that either the SEC or the Internal Revenue Service, or both, acted improperly in handling their respective phases of the transaction that allowed the International Telephone & Telegraph Corp. to acquire and keep the Hartford Fire Insurance Co. in U.S. history's largest corporate merger.

Previously, the Justice Department's decision to drop antitrust action against the merger was the subject of lengthy Senate hearings triggered by allegations linking the decision to a \$400,000 ITT pledge to support the Republican National Convention.

The Justice Department announced on Tuesday that it would not complete until after the Nov. 7 election its investigation to determine whether perjury was committed at the Senate hearings. Justice's inquiry began on June 27.

In the latest development, Moss and House Commerce Committee Chairman Harley O. Staggers (D-W. Va.) disclosed that they had requested the SEC's file after receiving "definite and strong allegations" that it contained documents detailing "numerous contacts between big business interests of ITT and high government officials seeking to obtain preferred treatment under the law."

When they sought access to the files, the two congressmen said in a joint statement, the SEC "stalled and then willfully obstructed our investigation" by sending its documents to Justice.

Once material becomes part of a Justice Department criminal investigation file, it is protected from disclosure to Congress and the public under regulations designed to guard the civil liberties of potential defendants.

Staggers and Moss released copies of a letter in which SEC Chairman William J. Casey told them that "on Oct. 4, the Justice Department asked that our files in this matter be referred to them."

However, when reporters asked the Justice Department how it happened to request the SEC documents, a spokesman said that they were offered first by Casey.

The spokesman said that "early this month" Casey called Deputy Atty. Gen. Ralph Erickson and "asked if we (Justice) were interested in looking at the documents. We said, 'Sure, send them along.'"

Moss charged in an interview that "there was obviously collusion" between the SEC and Justice. "They were acting in concert to cover up something. The timing suggests that they were trying to avoid an embarrassing situation" before the election.

Moss vowed that the committee would pursue the case by interrogating SEC staff members and subpoenaing, if necessary, Casey and other commissioners.

Besides Moss and Staggers, Nader associate Reuben B. Robertson and staff aides to Sen. Edward M. Kennedy (D.-Mass.) have been seeking access to the SEC files.

Kennedy said "I deplore" shipment of the files to Justice. Robertson said, "There's got to be something very hot politically in those documents for the SEC and Justice to go to such extreme lengths to keep them out of the hands of Congress before the election."

Moss said that he has told Casey personally that he suspects the SEC of "not doing its job" in investigating the ITT-Hartford case.

Last June 16, late on a Friday afternoon, the SEC filed a complaint in New York charging ITT with distributing 1.7 million shares of unregistered stock. On June 19, the following Monday the SEC entered a consent decree in which ITT admitted no past wrongdoing but promised to obey the law in the future.

The SEC charges grew out of ITT's placing of Hartford stock in an Italian bank, Mediobanca of Milan, in order to secure IRS approval for its acquisition of Hartford.

Nader and Robertson have charged that IRS seemingly violated its own regulations by approving a transaction that was less than an "arms-length" sale. ITT, not Mediobanca, retained control of the stock, they said.

[From the *Los Angeles Times*, Saturday, Dec. 10, 1972]

#### HOUSE UNIT PRESSES ITT RECORDS BATTLE

**SEC CHIEF CALLED TO EXPLAIN TRANSFER OF SECRET DOCUMENTS TO JUSTICE DEPARTMENT**

(By Robert L. Jackson, Times Staff Writer)

**WASHINGTON.**—The chairman of the Securities and Exchange Commission has been summoned before a House subcommittee in a widening battle between Congress and the Administration over secret documents of the International Telephone & Telegraph Corp.

In what has become an increasingly bitter sequel to last spring's ITT affair, SEC Chairman William J. Casey will be asked to explain why his agency abruptly shipped 34 boxes of ITT documents to Justice Department in early October after two congressional subcommittees had asked to see them.

In an interview, Casey refused to comment on reports that the company records, which the SEC obtained by subpoena last year, detail numerous private contacts between ITT executives and high government officials regarding federal regulation of the firm.

But Casey said he would reiterate to the House commerce subcommittee on investigations at next Thursday's special session what he told them previously by letter—that he gave the Justice Department the ITT files because the department had requested them.

#### *Transfer disputed*

This point is in dispute. Some Justice Department officials have claimed that Casey initiated the file transfer without being asked.

Two members of the House Commerce Committee—Chairman Harley O. Staggers (D-W. Va.) and Rep. John E. Moss (D-Calif.)—say that Casey "thwarted" a congressional review of the SEC's actions on the ITT case.

The senate administrative practices and procedures subcommittee headed by Sen. Edward M. Kennedy (D-Mass.), was seeking to look at the files when they were removed to the Justice Department.

The department, part of the executive branch of government, can more easily resist congressional scrutiny than can the SEC, which is a creature of Congress although its members are presidential appointees.

Two months of Senate hearings were conducted last spring on accusations that ITT sought to influence the Nixon Administration by pledging support for the Republican national convention, then scheduled for San Diego. Testimony early in the investigation showed that ITT had shredded many memos and other documents in its Washington office—an action for which ITT chief Harold S. Geneen later apologized to the Senate Judiciary Committee.

Duplicates of many of these shredded documents are believed to be among the 34 boxes of records now in Justice Department custody. They were obtained by the SEC in the fall of 1971—long before the ITT furore—as part of the agency's investigation into alleged "insider trading" by ITT officials.

The upcoming congressional hearing climaxes weeks of bitter charges and behind-the-scenes efforts by House investigators to gain access to the documents.

#### *By request*

Casey, in two letters to Staggers in October, insisted that the SEC files were transferred "at the request of the Justice Department." The government has been investigating possible perjury and obstruction of justice charges growing out of the Senate hearings.

Justice Department spokesman Mark Sheehan subsequently told reporters that the SEC chairman had phoned Dep. Atty. Gen. Ralph E. Erickson to initiate the transfer.

"He (Casey) asked if we were interested in looking at the records," Sheehan said. "We said we were, and they sent them along."

Erickson, in an interview two weeks later, said it was "not important who initiated the contact" between himself and Casey. He later wrote the subcommittee in support of Casey, saying the Justice Department had requested the ITT documents.

**The CHAIRMAN.** Specifically, that it was you, yourself, who telephoned the Justice Department suggesting to Deputy Attorney General Erickson that the Justice Department accept these files, and that he agreed to your suggestion.

Is that an accurate statement of the facts?

Mr. CASEY. No; it is not.

**The CHAIRMAN.** All right. Then you are saying that these reports are erroneous?

Mr. CASEY. Oh, yes.

**The CHAIRMAN.** All right. For the record, then, I—

Mr. CASEY. Erroneous statement of what happened.

**The CHAIRMAN** (continuing). Will specify the news accounts to which I made reference.

I have reference to an article by Mr. Morton Kondracke, of the *Chicago Sun Times*, dated October 13, 1972, and an article to the same effect by Mr. Robert Jackson of the *Los Angeles Times* dated December 10, 1972.

Mr. CASEY. They are inaccurate.

**The CHAIRMAN.** I will also note that a member of our staff personally telephoned the Department of Justice and spoke with Mr. Mark Sheehan on this subject.

Mr. CASEY. That is hearsay. Mr. Sheehan wasn't there when Mr. Erickson asked me for the files.

**The CHAIRMAN.** At this point, without objection, I will insert in the record a memorandum of a telephone conversation between Mr. Mark Sheehan and Mr. Michael F. Barrett, attorney on this subcommittee staff, which conversation took place on October 13, 1972.

(The document referred to follows:)

Memorandum of telephone conversation between: Michael F. Barrett, Jr. and Mark Sheehan.  
Subject: SEC/ITT.

A joint press release was issued by Chairman Staggers and Congressman Moss on October 12, 1972, making public the fact that certain SEC files requested by the Subcommittee had been transferred to the Department of Justice. Thereafter, I was notified by reporters from two different newspapers that a spokesman for the Department of Justice was answering press inquiries by stating that Chairman Casey of the SEC, rather than Deputy Attorney General Erickson, had initiated the action resulting in the transfer of the files. A copy of one newspaper account to this effect is attached.

To verify the accuracy of this information, on October 13, 1972, I telephoned Mark Sheehan, at the Department of Justice (telephone 739-2007). I explained the press reports and asked for verification. Mr. Sheehan advised me that because of Department procedures, Congressional inquiries had to be cleared through the appropriate Associate Deputy Attorney General dealing with Congressional relations, but that I would be further advised. About one hour later, Mr. Sheehan called me back to say he had been authorized to tell me what I wanted to know.

I asked him who initiated the file transfer. He said Mr. Casey called Mr. Erickson, he believed on October 4. He was uncertain as to the time or exact date. He said Mr. Casey advised Mr. Erickson that the SEC had developed an extensive record during the course of its investigation of the ITT—would he [Erickson] be interested in looking at the records. To this extent, Mr. Sheehan said, you could say the Justice Department asked for the files. He also said to the best of his knowledge there was nothing in writing requesting the transfer.

I asked Mr. Sheehan whether the request by Mr. Erickson was an accommodation to the SEC. He replied, he could not answer that question because he did not know.

I also asked where the SEC files were within the Department of Justice and was told, "in the Criminal Division." I asked whether the Department of Justice request for the files was for everything the SEC had and was told he did not know.

**The CHAIRMAN.** I will not read the memorandum in its entirety but I will read the following paragraph:

"I asked him who initiated the file transfer. He said Mr. Casey called Mr. Erickson, he believed"—

Mr. CASEY. He believed.

The CHAIRMAN. Now, wait a minute—"he believed, on October 4."

Now, he said you called but he said he believed it was October 4:

He was uncertain as to the time or exact date. He said Mr. Casey advised Mr. Erickson that the SEC had developed an extensive record during the course of its investigation of the ITT; would he [Erickson] be interested in looking at the records.

To this extent, Mr. Sheehan said, you could say the Justice Department asked for the files.

Only when he said send them over: "He also said to the best of his knowledge there was nothing in writing requesting the transfer."

Chairman Casey, when it was decided that the files would be transferred to the Justice Department, what instructions did you give as to the actual collection, packing, and transportation?

Mr. CASEY. I didn't give any instructions.

Mr. Chairman, could I interject something? I want to say that that statement by the Justice Department spokesman obviously shows he doesn't know what he is talking about. He said I called the Justice Department to say we had a lot of files here on the ITT. Well, the Justice Department knew we had been working on these files for a period going back several months. I didn't have to tell him we had the files. And I want to say also, to the best of my recollection, Deputy Attorney General Erickson called me on the day before.

The CHAIRMAN. We have further developments than this, so if you will allow me to go on. Who in your staff did you entrust with this operation of sending these files over?

Mr. CASEY. Well, the Commission made the decision and the staff——

The CHAIRMAN. Who on your staff did this?

Mr. CASEY. I guess it was under the direction of Mr. Sporkin.

The CHAIRMAN. Mr. who?

Mr. CASEY. Mr. Sporkin.

The CHAIRMAN. All right. Was it your instructions that there be no copies retained by the Commission of these materials?

Mr. CASEY. No.

The CHAIRMAN. Chairman Casey, our information is that when the people at the Justice Department saw this material arrive, they expressed surprise and some dismay at the volume of material you had sent over.

Mr. CASEY. As I understand it, that was the shipping clerk. The documents came in some place and they said, what do we do with these boxes? I don't know what happened.

The CHAIRMAN. Our information is that they questioned your staff as to the necessity of sending over such a large volume of material, and suggested that this was an inappropriate point in your own agency's investigation for this material to be sent over. Does this coincide with your information?

Mr. CASEY. I wasn't there. I never heard that. My dealing was with the Deputy Attorney General, and he requested the files.

The CHAIRMAN. We are also advised that the personnel at the Justice Department were also somewhat puzzled at the absence of a criminal reference report from the SEC as is customary in these cases. Does this coincide with your information?

Mr. CASEY. I don't know, because I didn't talk to those people. I do repeat that we did send the letter spelling out what it was all about, which was I think the equivalent of a criminal reference report.

The CHAIRMAN. Well, throughout this matter you have made references to your desire to avoid anything which might jeopardize an enforcement action. You have made references, both direct and indirect, to improper publicity which might prejudice the rights of potential defendants. I would like to explore this issue with you for a minute or two.

Would you state, for the record, exactly what type of improper publicity you had in mind?

Mr. CASEY. Mr. Chairman. I don't think any of us have to be naive about this. There had been continuing efforts on the part of other committees in the Congress seeking not the files, not to examine our handling of the case, but seeking particular documents, some of the files which we viewed as evidence in a possible criminal prosecution. And there was publicity in the press to the effect that Senator Kennedy was expected to get information and get documents which might have political interest. I think we ought to recognize that in the climate at the time that it was considered that there was impatience on the part of some people to get this information and publicize it.

Now, I don't want to charge anybody with anything, but I think in the exercise of ordinary prudence the Commission had to recognize that this was a particularly bad time for documents to be floating around.

The CHAIRMAN. Let me just say this: If, as a hypothetical situation, the subcommittee and staff had been given access to the files, as I requested on September 21, and no improper discussion of their contents had been made, would that have jeopardized anyone's rights, or constituted improper publicity?

Mr. CASEY. In my view the mere act of turning documents over which had been subpoenaed in an enforcement action to anybody, any other agency, without giving the person from whom those documents were subpoenaed the right to assert his protective rights in full, would have cut off rights that other person had, and I stated that and we stated that in our letter to you, as one of the reasons we felt we should not deliver documents in an open file to the committee.

The CHAIRMAN. Let me say that in all of our correspondence, all of our open questioning, and all of our contacts that there had never been any publicity given to anybody. On what basis do you presume that the subcommittee or its staff would misuse the files in question?

Mr. CASEY. I made no such presumption.

(29-C)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
10/2/72	Staff met with Mr. Steven Kurzman, Assistant Secretary for Legislation, HEW, and Dr. John Zapp, Deputy Assistant Secretary for Health, HEW	In connection with Subcommittee's oversight jurisdiction regarding the FDA, the following information was requested over a 10-year period:  (1) FDA's requests for legislation made to HEW; (2) HEW's proposals for legislation concerning the FDA which were submitted to OMB; and (3) HEW's eventual legislative recommendations involving the FDA which were sent to Congress			This information was initially requested of FDA and the staff was referred to Messrs. Kurzman and Zapp at HEW.  Messrs. Kurzman and Zapp did not give an outright refusal but stated that the HEW generally considers such information as in-house and confidential. The request was to be taken up with the Secretary.  A number of follow-up calls have failed to produce a decision on releasing this information. The decision has been described as imminent. Allegedly, there have been intervening circumstances causing this delay.
3/23/73	Letter to Mr. Kurzman from Subcommittee's Acting Chief Counsel	Reiterating the request for the above information.			

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

Submitted by: (Comm/Subcomm) Special Subcommittee on Investigations, House Committee on Interstate and Foreign Commerce

By: Daniel J. Manelli  
Title: Acting Chief Counsel X 54442  
Extension

FILE 29

(170)

(29-D)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

1969 Request of Non-Public Files of the Interstate Commerce Commission

In connection with the oversight jurisdiction of this Subcommittee, Chairman Staggers, by letter of March 13, 1969, requested ICC Chairman Brown to make available to the staff certain non-public files involving five dockets pertaining to railroad discontinuance, merger and passenger service decisions. The staff had previously (February 18, 1969) conferred with the ICC Chairman and Vice Chairman Hardin and received their assurance of full cooperation.

By letter dated March 25, 1969, the ICC Chairman expressed misgivings about making such information available and requested Chairman Staggers to reconsider.

On March 31, 1969, Chairman Staggers reiterated the original request.

On April 3, 1969, ICC Chairman acknowledged receipt of the request and advised that the matter would be considered by the entire Commission.

On April 29, 1969, an article appeared in the Washington Star entitled "ICC Agrees Reluctantly to Open Files to Probers." (copy attached)

On May 14, 1969, Chairman Staggers wrote to ICC Chairman expressing understanding as to availability of files. By letter of May 15, 1969, the ICC Chairman acknowledged that such files would be available to the Subcommittee in the future without consideration by the full Commission (copy attached)

The information contained in the non-public files was useful to the Subcommittee in fulfilling its oversight responsibility. It is noted that approximately three months elapsed from the initial contact in February until accessibility was granted in May.

Attachments

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 29

Submitted by: (Comm/Subcomm) Special Subcommittee  
on Investigations, House Committee on Interstate  
and Foreign Commerce

By: Daniel J. Manelli

Title: Acting Chief Counsel

X 54442

Extension

INTERSTATE COMMERCE COMMISSION,  
Washington, D.C., May 15, 1969.

Hon. HARLEY O. STAGGERS,  
Chairman, Special Subcommittee on Investigations of the  
Committee on Interstate and Foreign Commerce, House  
of Representatives, Washington, D.C.

DEAR CHAIRMAN STAGGERS: This is in response to your letter of May 14, 1969, in which you indicate that it is your understanding that the Commission has acknowledged the Subcommittee's right to the non-public files of this Commission and has authorized the Chairman, or the Commissioner acting as Chairman, to make such files available without further deliberation by the other Commissioners.

I wish to hereby confirm that your understanding in this regard is correct and that any future requests by the Subcommittee will not require further action by the entire Commission.

With kind personal regards, I remain

Sincerely,

VIRGINIA MAE BROWN, Chairman.

[Excerpt from the *Washington Star News*, Apr. 29, 1969]

ICC AGREES RELUCTANTLY TO OPEN FILES TO PROBERS  
HOUSE INVESTIGATIVE UNIT SEEKS CONFIDENTIAL MEMOS  
(By Stephen M. Aug)

A House investigative subcommittee appears to have won the Interstate Commerce Commission's reluctant consent to examine confidential ICC documents concerning some of the commission's largest and most controversial cases, it was learned today.

The commission's decision to give the investigators a look at the files was granted only after a 6-5 vote, and over the advice of its general counsel, Robert W. Ginnane.

The investigation of the ICC has been proceeding quietly since last February. It is being conducted by a special investigative subcommittee of the House Commerce Committee which has jurisdiction over federal regulatory agencies.

The confidential files which the investigators have been seeking deal with these cases:

*Penn Central link*

The merger of the Pennsylvania and New York Central railroads, the biggest business merger in the nation's history. The ICC approved the merger in 1966, but because of continuing court battles it wasn't completed until 1968. The ICC retains jurisdiction in the case.

Two cases involving massive cutbacks in passenger train service on the old New York, New Haven & Hartford Railroad, which now is part of the merged Penn Central. One case, decided in 1966, was heard personally by William H. Tucker, former ICC chairman who now is a Penn Central vice president in charge of the New Haven division. The other was filed last December and still is under ICC study.

The highly controversial case involving the Southern Pacific Co. An examiner has accused the railroad of purposely downgrading passenger service in order to discourage passengers and eventually end passenger trains. He has recommended the ICC assert jurisdiction over the quality of rail passenger service and for the first time set down requirements for minimum required on-board services.

A 1967 case in which the Chicago & Eastern Illinois Railroad sought twice to discontinue a round-trip passenger train between Chicago and Danville, Ill.

ICC Chairman Virginia Mae Brown said the commission declines to make public the correspondence between herself and Rep. Harley O. Staggers, D-W. Va., chairman of the Commerce Committee. She said the commission does not "feel the letters in this instance with the chairman of our responsible committee are public documents."

*Request rejected*

But sources within the ICC say the exchange of correspondence between Staggers and Mrs. Brown began

March 13 with the first request to see the documents. The request was rejected because the commission felt it should not make the papers public.

Later, Staggers wrote back that the intent of the committee was not to make the confidential ICC files public—especially in pending cases—but that without the chance to examine the internal memos it would be impossible for Congress to determine whether the commission was doing its job properly. Mrs. Brown referred the matter to the full commission.

On April 16, apparently after some debate, the commissioners voted 6 to 5 to release the documents. Those opposed were Commissioners Kenneth H. Tugge, Rupert H. Murphy, John W. Bush, Dale W. Hardin and Donald L. Jackson. The five did, however, agree to allow the investigators to see the files on the 1966 New Haven train discontinuance case, and part of the Penn Central merger matter. They would have rejected the others on the grounds the matters are either in court or still before the commission.

*Minutes not final*

The ICC has declined to make public the record of the meeting. H. Neil Garson, commission secretary said late yesterday that the minutes were not final. He added that after the commissioners had reviewed them, the minutes could be made public.

Attached to Mrs. Brown's most recent letter to the committee is a 10-page memo from Ginnane, who wrote that while the committee has the right to examine commission files, the matters dealing with pending cases, if disclosed to the public, could jeopardize the outcome of the cases, or future appeals.

Mrs. Brown hinted in her April 18 letter also that the commission was considering advising participants in the still-active cases that it was releasing confidential memos to the investigators.

(29-E)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

1969 Attempt by the Subcommittee to Obtain FCC's Non-Public Files Concerning its WIFE-AM and WIFE-FM Proceeding.

The Subcommittee's oversight interest commenced in September 1969 when the FCC voted to renew the broadcast license of WIFE-AM and WIFE-FM. The matter had originated at the Commission in 1964 when the FCC found that WIFE and WIFE-FM had engaged in fraudulent promotions, submission of untruthful accounts to advertisers, and other conduct inimical to the public interest. Based on these findings, the stations were denied the usual three-year renewal of their license; instead, a limited one-year renewal was imposed.

At the conclusion of the one-year probationary license period, a hearing was held to determine if the station had corrected the abuses previously found. During the period of this review, the stations continued to operate on an interim extension of their licenses. On December 19, 1967, the FCC hearing examiner released his initial decision, finding that the licensee had repeatedly defrauded numerous advertisers and the public during the short-term renewal period. On this basis, it was his recommendation that the application for renewal of the stations' licenses be denied. According to information obtained by the Subcommittee at the time, but not verified by reference to the FCC non-public files, it was the recommendation of both the FCC's general counsel and the Broadcast Bureau that the hearing examiner's decision be affirmed by the Commission and the stations' licenses not be renewed.

Nevertheless, on September 17, 1969, the FCC, by a vote of four to three, and over a vigorous dissenting opinion, decided to reject the hearing examiner's findings and recommendation. The Commission renewed the stations' licenses for an additional six months while finding that "WIFE's operation has only minimally met the public interest standard."

As a result of the FCC's decision, Chairman Staggers, by letter dated October 15, 1969, requested that the Subcommittee staff members be provided with all materials in the non-public files of the Commission relating to the WIFE matter. FCC Chairman Hyde requested on October 17, 1969 a conference with Chairman Staggers and met with him on October 20. At that conference, Chairman Hyde transmitted a letter of the same date setting out the FCC's position -- namely, that absent the charge of wrongdoing which can be investigated at any time in the Subcommittee's sole discretion, other oversight -- as to whether a sound decision was reached -- should wait until the end of the adjudicatory hearing process, in this instance, November 3, 1969.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 29

(Continued on page 2)

Submitted by: (Comm/Subcomm) Special Subcomm on  
Investigations, House Interstate and Foreign Commerce  
Committee  
By: Daniel J. Manelli  
Title: Acting Chief Counsel X54442  
Extension

FILE 29

Page 2

1969 Attempt by the Subcommittee to obtain FCC's Non-Public Files Concerning its WIFE-AM and WIFE-FM Proceedings

On October 22, Chairman Staggers reiterated the Subcommittee's request for the non-public files and the same was refused by Chairman Hyde in a letter of the same date.

As a result of the FCC's refusal, the Subcommittee issued a subpoena on October 22, 1969, requesting all public and non-public files in the Star Stations, Inc. matter, including those involving WIFE-AM and WIFE-FM. Chairman Hyde refused to comply with the subpoena on October 23 and in a letter dated October 24 communicated to the Subcommittee that the Commission as a whole had decided not to make the files available until November 3.

On October 30, 1969, Chairman Hyde was voted in contempt by the full committee. This contempt finding was rendered somewhat moot, however, when the files were turned over to the Subcommittee on the following Monday, November 3. The legal arguments advanced by Chairman Hyde and the Subcommittee are set forth in the attached Committee print which was not issued as an official report. It is furnished to you for internal use only.

When the files in this matter were made available to the staff a number of inquiries were made and the Subcommittee conducted hearings. The Subcommittee's review prompted the FCC to order further hearings. Ultimately a total of 25 issues were specified for determination of the question as to whether or not all of Star Stations Inc. should be revoked.

The FCC held hearings and the Broadcast Bureau in forwarding its findings and conclusions to the Administrative Law Judge described the matter as follows: "The scope and magnitude of the transgressions revealed by this record are unparalleled ... it must therefore be concluded that the public interest would not be served by a grant of any of the renewal licenses and that they must all be denied."

In a decision announced February 14, 1973, the Administrative Law Judge denied the application of Star Stations, Inc. for renewal of the license of WIFE-AM and proposed granting the application for renewal of the other stations of Star Stations.

## Attachment

*Note by the Subcommittee on Separation of Powers: The following excerpts from the hitherto unpublished record of proceedings against Rosel H. Hyde, Chairman, Federal Communications Commission, are included in view of the implications of their content toward the separation of powers problem. It should be understood that the materials subpoenaed by the House subcommittee were delivered on November 3, 1969, thereby rendering moot the question of contempt. These excerpts are reprinted here by special permission of the Subcommittee on Investigations of the Committee on Interstate Commerce, House of Representatives.*

[Excerpt from "Proceeding Against Rosel H. Hyde, Chairman Federal Communications Commission," committee print, Report of the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce of the House of Representatives, 91st Cong., 1st sess., pp. 17-46]

In order to fully inform itself as to the facts in this case, it is necessary that this subcommittee obtain immediate access to the files requested. There will be an extensive turnover in the control and direction of the FCC in the near future, possibly before the expiration of the statutory period which Chairman Hyde has stated must expire before he will grant our request. Unknown numbers of staff participants may be leaving the Commission and become less available for furnishing of information to the subcommittee. The persons accountable for the renewal action with respect to station WIFE are now in office; by the end of the statutory period they may not be.

This Congress and this subcommittee have a responsibility to the people to see to it that the administrative agencies are operating in conformity with the law. We cannot shirk this responsibility and remain true to our

trust. Attempts to raise obstacles and conditions on the power of the Congress to investigate matters of legitimate legislative concern cannot and will not be permitted.

At this time is Mr. Chairman Hyde in the room?

Chairman HYDE. Present.

The CHAIRMAN. Mr. Hyde, will you please rise and be sworn?

Do you solemnly swear or affirm that the testimony you are about to give before this subcommittee is the truth, the whole truth, and nothing but the truth, so help you God?

Chairman HYDE. Yes, sir.

The CHAIRMAN. You may be seated.

**TESTIMONY OF ROSEL H. HYDE, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; ACCOMPANIED BY HENRY GELLER, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION**

The CHAIRMAN. Chairman Hyde, did you hear my statement concerning the legislative purpose of the meeting?

Chairman HYDE. I did.

The CHAIRMAN. Were you duly served with the subcommittee's subpoena?

Chairman HYDE. I was.

The CHAIRMAN. As Chairman of the FCC you are in charge of the nonpublic records and files of the Agency?

Chairman HYDE. I am the chief administrative officer of the commission, and in that office I would be the person in charge.

The CHAIRMAN. The subpoena calls for the production of several documents. These are described in two paragraphs of the subpoena. It is my understanding that the materials called for in paragraph 2 have been assembled at the FCC and set aside in a separate room for use by the subcommittee staff. Is that correct?

Chairman HYDE. That is correct.

The CHAIRMAN. Have you brought the remainder of the material requested by the subcommittee's subpoena?

Chairman HYDE. I have not. I do have a statement to the committee stating the reasons why I thought it was not appropriate for me to bring them.

The CHAIRMAN. We will hear your statement in a minute.

Is there any physical or practical reason why these records have not been provided?

Chairman HYDE. There is no physical or practical reason, no condition that would make it impossible to deliver them had we found that we should, in line with our duties, bring them.

The CHAIRMAN. So that the record may be clear on this point, speaking as the chairman of this subcommittee, I hereby order and direct you to comply with the subcommittee's subpoena and to provide forthwith the records therein described.

What is your response?

Chairman HYDE. Chairman Staggers, I would request that you hear me on the reasons why I think we should not produce the papers at this time. I wish you would hear me because I believe that some of the reasons I would give might appeal to your sense of duty here and I am hopeful that you will find that in discharging our duties to maintain the integrity of the hearing and decisional process that we should—

The CHAIRMAN. Just a moment. You will have plenty of time, I assure you, Mr. Chairman, to present your side.

Do I understand you clearly to be saying that you have not now fully complied with the subcommittee's subpoena and do not propose to do so?

Chairman HYDE. I have not brought the papers you requested with me.

The CHAIRMAN. And you do not intend to?

Chairman HYDE. I am hoping that the committee will agree to my suggestion that they should not be produced until after the case becomes final.

The CHAIRMAN. You are stating that you are not going to produce them?

Chairman HYDE. It is not my intention to produce them until the case becomes final.

The CHAIRMAN. In view of your refusal to comply, I might let the subcommittee here see if they have any questions that they would like to ask you.

Is it the wish of the subcommittee that we hear his statement at this time?

Mr. Moss. I believe, Mr. Chairman, that the statement has probably been read by each member of the subcommittee by now.

Mr. KEITH. I have not read it.

Mr. MACDONALD. I think in the interest of due process it would be well to give him a chance to read his statement at this time.

Chairman HYDE. May I first state that the Commission wishes to be fully cooperative. We wish to comply with the wishes of the Congress.

Mr. Moss. Mr. Chairman, before the chairman proceeds, I would like to ask some questions to clarify the nature of his statement.

The CHAIRMAN. All right.

Mr. Moss. Because I think it is very important for the record.

Did the Commission assemble and discuss this matter and formally vote to instruct you as to the nature of your response to the committee?

Chairman HYDE. This matter was fully discussed with the Commission yesterday. As my letter to Chairman Staggers states—

Mr. Moss. Mr. Chairman, my question was a very, very brief one and can be answered briefly. Did the Commission meet, upon the service of the subpoena, and discuss the matter and instruct you?

Chairman HYDE. Mr. Moss, I am trying to be as responsive as possible. The Commission was in session when I talked with Chairman Staggers about this subpoena.

Mr. Moss. Did it act formally?

Chairman HYDE. Yes, it did.

Mr. Moss. By a vote?

Chairman HYDE. Yes.

Mr. Moss. Will you supply for the record at this point the minutes of that meeting, and particularly the minutes specifically instructing you on this matter?

Chairman HYDE. Yes, I will supply that.

Mr. Moss. Mr. Chairman, I ask unanimous consent to hold the record open at this point to receive this information.

(The material supplied follows:)

UNITED STATES OF AMERICA,  
FEDERAL COMMUNICATIONS COMMISSION,  
Washington, D.C., October 24, 1969.

I, Ben F. Waple, hereby certify that the attached is a true and correct copy of the following document on file in this Commission, and that I am official custodian of the same:

Minute #461-A-69 of the Federal Communications Commission Meeting held at its offices in Washington, D.C., on October 22, 1969, in re Hearing Matters (particularly in re WIFE—see Item 5).

In witness whereof, I have hereunto set my hand, and caused the seal of the Federal Communications Commission to be affixed, this twenty-fourth day of October, 1969.

BEN F. WAPLE, Secretary.

MINUTES OF THE FEDERAL COMMUNICATIONS COMMISSION

Minute #461-A-69 Commission Meeting (Hearing Matters)  
October 22, 1969 11:40 A.M.

Present: Commissioners Hyde, Chairman; Bartley, Robert E. Lee, Cox, Wadsworth, Johnson and H. Rex Lee.

At a session of the Federal Communications Commission held at its offices in Washington, D.C. this date, the above-named Commissioners being present, the Commission, by unanimous vote, took the following actions on Hearing Matters:

*Agenda Item No.*

1. Approved the following minutes:  
Minute #434-A-69, Commission Meeting of October 1, 1969  
on Hearing Matters.

Minute #442-A-69, Commission Meeting of October 8, 1969  
on Hearing Matters.

2. Adopted Memorandum Opinion and Order, FCC 69-1141 attached (Commissioner Bartley concurring in the result.)

*Added to the Agenda*

4. Adopted Order, FCC 69-1142 attached.  
 5. Adopted Letter, FCC 69-1149 to the Chairman, House Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce in response to a request for the non-public files relating to the proceeding in Docket No. 16612 and stating that the request raises questions concerning the integrity of the Commission's quasi-judicial hearing process.

BEN F. WAPLE, *Secretary.*

(The following letter was received by Chairman Staggers from Rep. John E. Moss, a member of the Subcommittee on Investigations, commenting on the above material supplied for the record.)

NOVEMBER 3, 1969

Hon. HARLEY STAGGERS,  
*Chairman, Interstate and Foreign Commerce Committee, Washington, D.C.*

DEAR MR. CHAIRMAN: At the Subcommittee's Executive Session, held on the 23rd of October, 1969, I asked FCC Chairman Hyde (at pages 14-15 of transcript) if the Commission had assembled to discuss the Subcommittee's subpoena of the FCC's non-public files in Docket No. 16612, and whether the Commission had formally voted to instruct him as to the nature of his response to this subpoena.

Under oath Chairman Hyde stated that "this matter was fully discussed with the Commission yesterday" (October 22, 1969) and that by a vote the Commission formally acted with respect to the subpoena.

I thereupon asked Chairman Hyde if he would supply for the record the minutes of that meeting and particularly the minutes specifically instructing him on the subpoena. Chairman Hyde stated that he would supply such information.

The document which Chairman Hyde has furnished to the Subcommittee, purporting to be a certified copy of the minute which I requested, is completely erroneous. On its face it fails to establish facts which Chairman Hyde under oath testified exist and, worse, it contains complete misstatement of facts.

First, the time shown on the minute is 11:40 AM, October 22, 1969; the Subcommittee's subpoena was served at 5:45 PM on that day. This discrepancy calls for an explanation.

Second, the minute does not refer to an agenda item relating to the Subcommittee's subpoena, nor to any action taken by the Commission with respect to this subpoena.

Third, the minute does not refer to the Commission's specific instructions to Chairman Hyde regarding a response to this subpoena.

Fourth, the minute indicates that the Commission "by a unanimous vote took the following actions on Hearing Matters." Since the Subcommittee's subpoena is not a hearing matter, it could not have been an item under consideration.

Fifth, there was no FCC letter 69-1149 adopted by the Commission as shown in item 5 of the minute. This letter, FCC 69-1149, was in fact, the Commission's letter of October 20, 1969, which Chairman Hyde signed and delivered to you, as Chairman of the Subcommittee on October 20, 1969. It could not have been adopted two days after being written and delivered. Nor did this letter relate in any way to the Subcommittee's subpoena. Indeed, the Subcommittee did not even meet to sanction the issuance of a subpoena until October 22, 1969, two days after Chairman Hyde's letter of October 20.

Sixth, the Commission's attempt to palm off this piece of paper as a so-called "minute" is an affront to the Congress and to the public. This document merely shows an agenda item and summary vote. It does not contain a record or resume of discussions held, opinions expressed, instructions given or individual votes taken. In fact, the summary reference to a unanimous vote appears to violate the letter and spirit of 5 U.S.C. 552(a)(4) [The Freedom of Information Act] which requires that each agency "having more than one member shall maintain . . . a record of the final votes of each member in every agency proceeding."

I would urge that the deficiencies in the minute purportedly covering Commission action of October 22, 1969 and the failure to supply information, as Chairman Hyde testified he would do, be cited in the Committee's Report to the House on this matter.

Sincerely,

JOHN E. MOSS, *Member of Congress.*

Chairman HYDE. I would like to make this explanation. I did not have my draft statement before me in the Commission meeting yesterday but the decision of the Commission is reflected in the statement I have here.

Mr. PICKLE. Will you yield to me?

Was your vote unanimous?

Chairman HYDE. It was.

Mr. PICKLE. Did it include three members who had voted previously against the renewal?

Chairman HYDE. It did.

The CHAIRMAN. Any further questions at this point?

If not, you may proceed.

Chairman HYDE. The Commission herewith responds to the subpoena, served October 22, 1969, upon Chairman Rosel H. Hyde, directing that he appear before the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee on October 23, 1969, and bring with him: "1. All correspondence, records, letters, memorandums, work sheets, agenda items, staff studies and any and all papers in the nonpublic files of the Commission pertaining to docket No. 16612, file Nos. BR-1144 and BRH-1276 WIFE AM-FM, Indianapolis, Ind.). The Commission respectfully declines to produce such material at this time, on the ground that present oversight of this case by the subcommittee would undermine the integrity of this quasijudicial hearing proceeding. We shall briefly set out the background and our reasons for this position.

#### BACKGROUND

By letter dated October 15, 1969 (and attached as appendix B hereto), Chairman Staggers requested "that in connection with the Special Subcommittee's continuing investigation and study of broadcast station license transfers and renewals, staff members of the subcommittee be provided with all materials in the nonpublic files of the Commission relating to the proceeding in docket No. 16612, BR-1144 ad BRH-1276 (WIFE AM-FM, Indianapolis, Ind.)." Chairman Hyde requested on October 17, 1969, a conference with Chairman Staggers, and met with Chairman Staggers on October 20, 1969. At that conference, Chairman Hyde transmitted the attached letter (appendix C), setting out the Commission's position—namely, that absent the charge of wrongdoing which can, of course, be investigated at any time in the subcommittee's sole discretion, other oversight—as to whether we reached a sound decision—should await the end of the adjudicatory hearing process; that that process had not yet ended in WIFE; and that the material would thus not be available until November 3, 1969 (assuming the WIFE case terminated on that date). Chairman Hyde specifically indicated that if the subcommittee were investigating charges of alleged corruption such as bribery, the Commission would want the matter fully investigated immediately. In response, Chairman Staggers indicated that this was not an investigation of alleged corruption but rather a matter of the subcommittee exercising its regular oversight; that the subcommittee was entitled to obtain the material; and that if the Commission failed to produce such material, subpoenas would be issued.

The CHAIRMAN. I never said to you this wasn't a matter of corruption or bribery or anything else.

Chairman HYDE. I do recall saying to you, Chairman Staggers, that if there were a charge of bribery—

The CHAIRMAN. We could not make a charge of bribery because we don't know whether there is any. I could not state anything to you at all about this. I did not so state, I am sure, anything in relation to this.

Chairman HYDE. But you do recall that I did say to you that if there were such a charge that I would want it investigated immediately?

The CHAIRMAN. That is what we are trying to do.

You are hindering the investigation in that you are not letting us take a look at these things, and I want that on the record, too.

Chairman HYDE. I understand that this was an oversight investigation with no charges as to any individuals being corrupted.

Mr. VAN DEERLIN. Will the chairman yield?

The CHAIRMAN. Yes, I will be glad to yield.

Mr. VAN DEERLIN. It seems to me, Mr. Chairman, the question of corruption would not be ruled out here but the immediate concern was the right of the committee to these files on a matter of our regular oversight responsibility.

The CHAIRMAN. That is true.

Mr. VAN DEERLIN. And this is possibly beside the point whether ultimately what was found in the file might suggest corruption.

Chairman HYDE. That is my point, that the files were requested in connection with the oversight investigation.

Mr. Moss. Will you yield?

The CHAIRMAN. Yes.

Mr. Moss. The chairman recalls quite vividly the oversight investigations of 1957 and 1958 where we were engaged in a normal oversight investigation which ultimately led to the indictment of a member of the Commission. We were not at that time studying alleged wrongdoing. We were looking at material very, very closely related to the type of material requested by the committee in this instance. It clearly is within the purview of the powers of the committee in exercising oversight to judge the scope of that oversight, not to delegate it to the Federal Communications Commission.

Chairman HYDE. I am not questioning for the moment the right of the committee to investigate wrongdoing at any time. I am not questioning for one moment the right of the committee or its duty to maintain an appropriate oversight study of the regulatory agencies.

I am urging on the committee at this time that you would do that under conditions that would not interfere with the hearing process. That is all I am urging.

Mr. MACDONALD. Mr. Chairman.

The CHAIRMAN. Mr. Macdonald.

Mr. MACDONALD. Maybe this thing could be resolved, if I understand your position correctly.

If you are informed by the subcommittee that the files which are sought are to be used to seek out any possible corruption, would that change your attitude?

Chairman HYDE. No, it would not.

Mr. MACDONALD. Because I would like to point this out, that all matters here within the subcommittee are not going to be made public, therefore they could not possibly jeopardize any hearing that is presently being adjudicated.

Chairman HYDE. I think I have not been understood. Let me see if I can make my point a little better. It is

this: that any intervention in a hearing matter before it becomes a final case could result in the interposition of outside forces in a case which, according to the direction of Congress, and the Administrative Procedure Act and the Communications Act, should be determined on the record of that case. I understand that you are exercising care to conduct an executive meeting so as to not make a public argument on hearing the case. But the point is that any time a committee or anyone else calls upon the Commission for all the files in a given case this carries the implication that the committee is unhappy with that case. That kind of message conveyed to the Commission could influence its decision and that would constitute consideration of factors outside the hearing record.

Mr. MACDONALD. To sum up, you won't release this file even though it is part of an investigation about, perhaps, corruption?

Chairman HYDE. I am still hopeful that I can persuade the committee in the interest of maintaining the integrity of the hearing process that you would defer your oversight for just a few days until the case is beyond reconsideration or beyond the consideration of petitions for reconsideration. That is all I am urging. In the meantime, the files would be sequestered and kept inviolate where they would be available to you.

Mr. Moss. The case I referred to in 1958, WKAT, the committee moved ahead on that while it was in the courts and it did it in open hearing and the Commission responded to the demands of the committee for all records, public and nonpublic.

Chairman HYDE. Yes.

Mr. Moss. You cite it as an authority in your refusal. I cite it as an authority in support of the demands and of the rights of this committee to access. This is a successor committee to the oversight committee which was then sitting and which heard that matter, not in executive but in open session.

Chairman HYDE. Congressman Moss, you are quite right. I am citing the case as a reason for the committee not demanding the papers at this time. You of course are citing it as a reason why we should produce the papers now. In the WKAT case, Katzenstein was one of the applicants; there were several. There were complaints of off-the-record representations. This is why I cite the case. The court found the conduct of the hearing unsatisfactory for the reason that influences outside the hearing record were brought to bear.

Mr. Moss. Mr. Chairman, on that point, the reason that those complaints were made and the examples of ex parte contacts cited was because the investigators of this committee in reviewing the very files you are now denying, found the evidence of those instances of ex parte contact with Commissioner Mack and the cozy arrangement with Mr. Katzenstein. So again I emphasize that it was the availability of the records to Dr. Schwartz and his staff at that time which gave us the material leading to the final and full disclosure of the acts of impropriety on the part of at least one Commissioner and practices which were strongly condemned by the committee in its final filing, and I think ultimately the courts held that the license was up for grabs and you had to reconsider.

Chairman HYDE. Congressman Moss, as you pointed out, there were extra-record influences brought to bear in that case and Congress was very much concerned about an administrative hearing, a hearing by an agency

which took into consideration influences from outside the hearing, and rightly so. I am urging you now that not even Congress or a committee should interfere in a hearing case unless—

Mr. Moss. That we deny ourselves the access and go along with you which, had we agreed to in 1958, would have led to none of the material being developed on the *WKAT* case.

Chairman HYDE. No. I will tell you right now that if you have evidence in any hearing case before us—

Mr. Moss. You have the evidence, Mr. Chairman.

Chairman HYDE. I have no evidence.

Mr. Moss. We seek it. The files are the evidence.

Chairman HYDE. I have no evidence of any improper actions in the conduct of this hearing.

Mr. Moss. That is not your judgment, that is ours.

Chairman HYDE. But if there is any indication of a likely case of improper procedure—

Mr. Moss. The chairman related to you the need for this committee to have timely notice of any such instance and you are trying to deny us that right.

Chairman HYDE. If I understand the chairman's statement correctly, he is urging that he should examine the whole business for oversight reasons.

Mr. Moss. He related it to a legislative reason, too.

Chairman HYDE. And legislative reasons.

Mr. Moss. They are very extensive and very broad in their implications.

Chairman HYDE. Indeed they are, and I support them.

Really, I am only asking you, as a matter of timing, to do this at a time when it will not interfere with the hearing process.

The CHAIRMAN. Will you yield for a minute?

Mr. Moss. I yield.

The CHAIRMAN. Are you trying to say an inquiry from us is the same thing as an *ex parte* presentation?

Chairman HYDE. As a legal matter it would have the same—

The CHAIRMAN. I see a man shaking his head. What is your name?

Mr. GELLER. My name is Henry Geller, the General Counsel of the Federal Communications Commission.

The CHAIRMAN. Your name again?

Mr. GELLER. G-e-l-l-e-r, Mr. Chairman.

The CHAIRMAN. I wanted to know who was shaking his head.

Mr. GELLER. Sorry, sir, I will not do so any more.

Chairman HYDE. I did not want to suggest that a request of the committee performing its duty as an oversight committee is comparable to a case where some person having no respect for the hearing process comes around and tries to influence a commissioner. But I do say that as a matter of legal effect, any kind of representation to the hearing group which is not on the hearing record is an inappropriate interference. That is the principle of the *Pillsbury* case.

Mr. Moss. If that is the case, Mr. Chairman, that has already occurred, because we have expressed interest.

The CHAIRMAN. We certainly have.

Mr. Moss. We have expressed it forcefully, utilizing all the authority of the Congress at this point. There is additional authority we can use, and I certainly would support using, in order to require the records be made available. So that if you feel any sense of pressure it will

be not greater upon giving the records to the Congress than it is at this moment.

Mr. MACDONALD. Will you yield?

Chairman HYDE. If I do acquiesce in that proposal it would establish the principle that this could be done in all other hearing cases.

Mr. Moss. It has been established repeatedly.

Mr. MACDONALD. Have you ever thought that the news of your coming up here today, and the word will get out somehow or other, it always does, will have a worse effect than if you just went through the regular motions of furnishing information. Doesn't it make the case stronger to insert mystery and hassle, which will be blown up I am sure, between this committee and the Commission? Won't that put the Commission and the plight of WIFE in a worse light? So aren't you talking against yourself?

Chairman HYDE. I don't believe I am talking against myself, but I will agree with you that if there are going to be any actions taken with respect to a hearing case they ought to be as open as possible. They ought to be on the record.

Mr. MACDONALD. We want to review the files. That is all we are asking for.

Chairman HYDE. Mr. Macdonald, I am just suggesting to you that if you could find it convenient to study these files after it is determined that the case is final, and which will happen very shortly, in my judgment, that your problem and mine will be solved with no difficulties whatever.

Mr. Moss. What you are really saying is that you want the Congress to await the time chosen by the Commission and to be subservient to the will of the Commission in determining when and what it will see.

Remember, we have only delegated you authority. That is all we have ever given you. We have never given you responsibility. That is ours.

Chairman HYDE. I am really earnestly trying to comply with the requirements of Congress in two areas: One of them is expressed in the Administrative Procedure Act and in section 409(c) of the Communications Act, to see that no off-the-record influences are brought to bear on a hearing case. On the other hand, I have this request for the papers in a hearing case.

Mr. Moss. There is the record right there, see it? It is an official record being taken. It is not off the record.

Chairman HYDE. Yes. I am talking about the hearing record in which the applicant participated. He is entitled to a judgment on that hearing record. I really have conflicting demands upon me from Congress. On the one hand, it demands that we protect the integrity of the hearing process, and on the other hand your request for the papers in a hearing case before it becomes final.

Mr. Moss. I can only observe, and I will wind up now, that this is a record which has been played over and over and over again. In my approximately 15 years on chairing the information subcommittee I have heard you people make that plea and rarely has it ever been sustained.

In order to give Mr. Geller an exercise in the matter of information, we will arrange later on for him to come in and we will examine the whole field of information down at the Commission.

Mr. KEITH. Mr. Chairman.

The CHAIRMAN. Mr. Keith.

Mr. KEITH. I really am under a handicap. Our attorney

in on our side of the aisle, and I am certain this is in no way partisan; members of the committee on our side were invited yesterday, the subpoena was issued without protest by those who were present and others who chose not to be present.

It seems to me what we are trying to say is that we gave you authority and responsibility as an administrative agency not only of the Congress but of the executive branch.

Chairman HYDE. Independent agency.

Mr. KEITH. To conduct semijudicial proceedings in licenses which certainly are beyond the scope of the Congress to deal with. And if we have the right to intervene in the midst of a proceeding, whether it is justified or not, without a definition, I might add, of the specifics which we are seeking, which leaves open to question whether or not the applicant is part of the problem or the Commission, itself, we inadvertently might be giving some interested party grounds for making a plea for a rehearing.

Chairman HYDE. That is essentially what I am saying.

Mr. KEITH. This is the point I tried to express before, I would like to have some members of the committee comment on it, or the committee staff. Is this Mr. Geller?

Mr. GELLER. Yes, sir.

Mr. KEITH. Is that what it is all about?

Mr. GELLER. Yes, sir. May I speak, sir?

The CHAIRMAN. Yes.

Mr. GELLER. Yes; that is what it is about. You see, when the Commission has issued a decision and Congress says, "We intend to investigate that decision," immediately after it is issued, while the case is still pending, it means that anything we subsequently do—suppose a party files a petition for reconsideration—

The CHAIRMAN. Just 1 minute. Did anybody ever say to you they wanted to investigate that decision?

Mr. GELLER. Nobody has ever said so.

The CHAIRMAN. At no time has it ever been questioned that that decision was wrong or right or anything else. You are reading into the record something that is not true, because I notice they never told you this.

Mr. Moss. Is it not also true that if this matter goes through to the date you request us to accede to, that there will be no right of judicial review?

Mr. GELLER. That is correct.

Mr. Moss. This is not an adversary proceeding in any sense of the word?

Mr. GELLER. Yes; it is. It is an adversary proceeding between Broadcast Bureau and WIFE.

Mr. Moss. Who is going to review it?

Mr. GELLER. Anybody who now petitions for reconsideration under 405, Congressman Moss, could come in. If we denied that petition they could go to court.

Mr. Moss. That is the only way it could get there?

Mr. GELLER. Yes.

Mr. Moss. The review here, the only one, will be the review made by this committee.

Mr. GELLER. In all likelihood that is true. That is why we say you have a complete right to review it. But if during that 30-day period the petitioner came in, you have really, and this is what we are saying in all sincerity, you have really undermined what we can do with that petition. Because if we have granted it, WIFE would argue, "You granted it, of course you granted it, you were under threat of congressional investigation if you adhered to that

present course." That is the argument that would be made in court.

Suppose on our own motion or on a petition for reconsideration filed by some interested group we granted and reopened the record and took the license away from WIFE? We have that legal power to do so during this 30-day period.

The CHAIRMAN. Do you think you are going to do that?

Mr. GELLER. I must talk to you as a lawyer that that is legally possible.

The CHAIRMAN. I know it is possible. We have given you the reason why we wanted these files. We have said so many times that on November 3 there are going to be so many changes down there that we want to do it now.

Mr. GELLER. Let me say one more thing to you: When we were up for reconsideration after the *WHDH* case, and you asked us questions, we told you, as we have told others, we cannot answer those questions while it is subject to reconsideration or it will undermine the entire proceeding.

The CHAIRMAN. Do you mean to say we have asked anything about the case?

Mr. GELLER. When you come to say you are going to investigate, you adhere to your present course—

The CHAIRMAN. All we want is the records as to the procedures and things that are done.

Mr. GELLER. That is the beginning of the investigation while the case is still pending. It says clearly to us, as a powerful external influence it says: We, the Congress, are disturbed by the decision you have reached.

The CHAIRMAN. That has never been on the record. I want the record to show that it has never been said. We care about what you have done here. We have said there are certain things that have been done. We want to see why, and so forth, and whether there has been perjury.

As the examiner said in his statement, so many things are wrong. We want to see if this is true, that is all.

Mr. GELLER. I understand that, and you are entitled fully to oversight of that. But what I am trying to say to you is that when you say you are disturbed in view of what the examiner has found, and what we have done, you are going to, as Pillsbury said, and there is a quote in here, "reach a sound decision."

The CHAIRMAN. They were brought before a committee and we had on the record and we did not intend to bring anybody here. We only intended to let the records stay where they are, to look at them. By you gentlemen refusing and coming up here, this will be a matter of record from now on. You are the ones who have chosen to do this.

I want to ask Mr. Hyde, do you equate a congressional inquiry with a threat?

Chairman HYDE. Of course not.

The CHAIRMAN. That is what you have been saying.

Chairman HYDE. Oh, no.

Mr. GELLER. The implication, however, of seeing that the case is subject to investigation.

The CHAIRMAN. You are saying it right now.

Mr. GELLER. I have said it to a pleading and the Commission has.

The CHAIRMAN. At any time if we are going to have an inquiry as to what is going on, and you say it is a threat—

Mr. Moss. I must insist if Mr. Geller is going to continue that he be placed under oath.

Mr. GELLER. I will be glad to do so.

The CHAIRMAN. Wait a minute. I don't know why you are talking anyhow. This is to Mr. Hyde.

Chairman HYDE. Chairman Staggers, I would like to give further reply to your question as to whether I consider a congressional request a threat. Your letter of the 15th asked us to produce all correspondence, records, papers, letters, memorandums, worksheets, and agenda items and staff studies in the nonpublic files of the Commission in relation to this case.

The CHAIRMAN. That is right.

Chairman HYDE. That does convey the message that you are unhappy with the decision.

The CHAIRMAN. Oh, no.

Chairman HYDE. This is my reading of it, that I would consider an external influence in the case.

The CHAIRMAN. That is your interpretation.

Mr. Moss. Mr. Chairman, the gentleman is arguing with himself. He previously made the statement that he did not consider this a threat. You now just read something to support considering it a threat. It seems to me you are confused or engaged in self-disagreement.

Chairman HYDE. I want to make clear that I did not consider Chairman Staggers and his request for papers something threatening in the sense that they are going to do violence to us. But I do want to be understood as indicating his request for all the papers does carry a message of interest in the case and obvious displeasure with the decision which has been made. I think that could very well be an external influence which interferes with the judicial handling of the case.

Mr. Moss. Could we legislatively grant that license?

Chairman HYDE. You could do all the licensing and allocating.

Mr. Moss. We would not have to change the statutes to grant a license, would we?

Chairman HYDE. No.

Mr. Moss. We would have a right to look at all of this that has gone into it.

Chairman HYDE. Yes. I am urging very respectfully that you exercise your right to look at it in a manner and at a time that will not interfere with the hearing process.

Mr. Moss. You are choosing. That is what you are asking. You want to sit in judgment on the Congress and determine what and when it will receive.

Chairman HYDE. Most respectfully, I do believe that the two points of view here could be reconciled. It is more a matter of timing than anything else.

The CHAIRMAN. Mr. Pickle.

Mr. PICKLE. Do I understand you to say, Mr. Chairman, that if a charge was made, presumably by this committee, that there was bribery or corruption involved in this license that you would make the record available?

Chairman HYDE. Yes, of course. You know, if a charge came up in the midst of a hearing we would want to open the whole matter up.

Mr. PICKLE. Normally, Mr. Chairman, the records and the evidence to substantiate bribery or corruption would lie in the hands of your Commission in this instance, and not in outside sources. It might be that we would have other evidence.

Chairman HYDE. Mr. Pickle, let me tell you if we had any evidence of corruption in this case, we would reopen it on our own motion and prosecute the investigation vigorously.

Mr. PICKLE. If this committee served you with a charge that says based on the evidence that we have that there is evidence of bribery and corruption, would you then open—

Chairman HYDE. Indeed I would. As a matter of fact, I would. I would hope in that situation you would have as expeditious an investigation as possible.

Mr. PICKLE. But you also put an investigating committee such as this at a great disadvantage in the sense that we either must have written evidence over and above what we have already and be furnished here in a period of 2 weeks' time. Now if you would say to us if we have evidence, submit it, then you are saying to the congressional committee you must substantiate the charge, and you must do it yourself.

Chairman HYDE. No, really, if the Congress on reasonable cause or some significant evidence of wrongdoing in the case asks for the records to further explore that, I would say you should have them. I am not presuming to pass upon the adequacy of your proof, no, I am not.

The CHAIRMAN. Does the gentleman wish to pursue his presentation?

Chairman HYDE. Congressman Staggers, I had not completed the reading of my statement but I presume that you will incorporate it all in the record.

Mr. Moss. I ask unanimous consent that it be included in the record at this point.

The CHAIRMAN. Without objection, it will be done.  
(The document follows.)

**RESPONSE OF THE FEDERAL COMMUNICATIONS COMMISSION TO SUBPOENA, SERVED OCTOBER 22, 1969, TO PRODUCE NON-PUBLIC MATERIALS IN DOCKET NO. 16612 (WIFE AM-FM, INDIANAPOLIS, INDIANA)**

The Commission herewith responds to the subpoena, served October 22, 1969, upon Chairman Rosel H. Hyde, directing that he appear before the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee on October 23, 1969, and bring with him: "1. All correspondence, records, letters, memorandums, work sheets, agenda items, staff studies and any and all papers in the nonpublic files of the Commission pertaining to Docket Number 16612, File Numbers BR-1144 and BRH 1276 (WIFE AM-FM, Indianapolis, Indiana);".<sup>1</sup> The Commission respectfully declines to produce such material at this time, on the ground that present oversight of this case by the Subcommittee would undermine the integrity of this quasi-judicial hearing proceeding. We shall briefly set out the background and our reasons for this position.

**BACKGROUND**

By letter dated October 15, 1969 (and attached as Appendix B hereto), Chairman Staggers requested "that in connection with the Special Subcommittee's continuing investigation and study of broadcast station license transfers and renewals, staff members of the Subcommittee be provided with all materials in the non-public files of the

<sup>1</sup> There is also a request for other non-public files pertaining to KISM-AM, KOIL-AM, KICN-FM, and WP DQ-AM, and other specified stations. This requested material has already been made available to the Subcommittee, as was stated in Chairman Hyde's letter of October 21, 1969 to Chairman Staggers (attached as Appendix A). The persons charged with service of the subpoena accordingly indicated that the subpoena was directed to the above quoted material in Item 1.

Commission relating to the proceeding in Docket No. 16612, BR-1144 and BRH 1276 (WIFE AM-FM, Indianapolis, Indiana)." Chairman Hyde requested on October 17, 1969 a conference with Chairman Staggers, and met with Chairman Staggers on October 20, 1969. At that conference, Chairman Hyde transmitted the attached letter (Appendix C), setting out the Commission's position—namely, that absent the charge of wrongdoing which can, of course, be investigated at any time in the Subcommittee's sole discretion, other oversight—as to whether we reached a sound decision—should await the end of the adjudicatory hearing process; that that process had not yet ended in WIFE; and that the material would thus not be available until November 3, 1969 (assuming the WIFE case terminated on that date). Chairman Hyde specifically indicated that if the Subcommittee were investigating charges of alleged corruption such as bribery, the Commission would want the matter fully investigated immediately. In response, Chairman Staggers indicated that this was not an investigation of alleged corruption but rather a matter of the Subcommittee exercising its regular oversight; that the Subcommittee was entitled to obtain the material; and that if the Commission failed to produce such material, subpoenas would be issued. On October 22, 1969, Chairman Staggers notified the Commission that the Subcommittee must be given access to the non-public documents immediately, and that otherwise he is directed to issue a subpoena. The Commission responded by letter dated October 22, 1969 (attached as Appendix D). The subpoena (Appendix E) was thereupon issued and served upon Chairman Hyde.

#### BASIS FOR COMMISSION'S POSITION

The Commission thus stands ready to cooperate fully with the Committee at any stage in any investigation of wrongdoing or corruption—a matter recognized as coming solely within the Committee's discretion as to the need for investigation, timing, etc. (p. 2, Chairman Hyde's letter). The main purpose of the October 20 meeting was to clear up any misunderstanding as to the nature of the request (p. 3, Chairman Hyde's letter), and the Commission understands that the investigation is not now concerned with corruption or wrongdoing but rather is a regular oversight investigation. It would thus appear similar to other such past investigations, being this time triggered by the WIFE decision and concerned with the soundness of that decision. However, unlike other proceedings, WIFE is an adjudicatory hearing case, and at the least, will remain so until November 3, 1969.<sup>2</sup> It follows, we believe, that we must make all efforts to insure that ". . . the exercise of [our] judicial function [remains] free from powerful external influences . . ." (*Pillsbury Co. v. F.T.C.*, 354 F. 2d 952, 964 (CA. 5, 1966)). The Committee's oversight of an adjudicatory hearing case, as to its soundness, must, we believe, await the ending of the adjudicatory hearing process, or else the integrity of that process will be completely undermined. See, e.g., *Pillsbury Company v. F.T.C.*, *supra*.

<sup>2</sup> Until that date either the Commission, on its own motion, or a party in interest, under Section 405 of the Communications Act, may act or seek to re-open the case. For example, the Commission would be obligated to pass upon any petition for reconsideration filed by the Broadcast Bureau or by a competing station or a group of listeners. See Section 405; Section 1.106(c), 47 CFR 1.106(c); *Springfield Television Broadcasting Corp. v. F.C.C.*, 117 U.S. App. D.C. 214, 328 F. 2d 186 (1964). Similarly, the Commission's ex parte rules govern such proceedings until 30 days after the issuance of the decision. Section 1.1203(a), 47 CFR, 1.1203(a).

For, the law is clear that the adjudicatory hearing case must be conducted exclusively upon the record, free from external pressures. Section 409(c)(1) of the Communications Act of 1934, as amended, 47 U.S. 409(c)(1); Section 7(d) of the Administrative Procedure Act, U.S.C. 556(e); *WKAT, Inc. v. F.C.C.*, 2964 F. 2d 375 (C.A.D.C.); *Pillsbury Co. v. F.T.C.*, *supra*. Further the courts have stressed that not only must such agency process be fair and impartial but that there must be ". . . the appearance of impartiality—the *sine qua non* of American judicial justice . . ." (*Pillsbury Co. v. F.T.C.*, *supra*, at p. 964).

The Committee has thus recognized that it cannot properly address questions concerning the soundness of a Commission decision, while it is subject to reconsideration. Such oversight must, the Committee has recognized time and again, await the termination of the adjudicatory hearing process. But that is this case also. The case is presently subject to reconsideration, either on the Commission's own motion or on petition of an interested party (see Note 2, *supra*). The Committee, however, by intervening at this stage to request the non-public files, has in effect said to the Commission: "Our reaction to your decision, to renew WIFE's license is to commence an investigation—to exercise oversight concerning the soundness of the decision." Clearly, in view of the Committee's prestigious position to review Commission activities, this is a "powerful external influence" (*Pillsbury Co. v. F.T.C.*, *supra*, at p. 964). Were the Commission to take any action during the reconsideration period against WIFE, the latter could argue that the Commission had acted not impartially upon the exclusive record but rather under the threat of a Congressional investigation.<sup>3</sup>

The problem is not limited just to this case. In a comparative hearing case, where the Commission granted A's application and denied that of B, a Subcommittee request for materials such as here involved, made immediately after the Commission's decision, would again undermine the Commission's processes. If the Commission were subsequently to grant B's reconsideration request, A could argue, with considerable cogency, in court that the Commission had acted under threat of Congressional investigation.

We will not multiply the examples. Our position is simply that oversight by the Committee of the correctness of a Commission decision must await the termination of the agency's hearing process. Upon such termination, we will cooperate fully with the Committee, as we have done in the past and indeed as shown by our full compliance as to the material listed in your letter of October 20, 1969 (and in Item 2 of this subpoena). We believe that we are compelled to take the position here outlined because of our obligation not to acquiesce or participate in any action which would undermine the "appearance of impartiality" of this quasi-judicial proceeding.

Accordingly, we respectfully request that the Committee hold in abeyance, until the conclusion of the adjudicatory hearing process, its oversight of this matter, including the effort to obtain the material specified in Item 1 of the attachment to the subpoena. We stress that there is not

<sup>3</sup> Stated differently, no member of the Committee would call or write the Commission, after issuance of the WIFE decision, to say that if the Commission did not act to re-open the case and deny WIFE's renewal, a congressional investigation would be held. Yet, however unintended, the practical effect of the present Commission action, coming at this stage of the proceedings, is the same.

involved the authority of the Committee to obtain the materials, but rather the issue of timing, and specifically the preservation of the integrity of the agency's quasi-judicial process, in accordance with the very Congressional scheme which this Committee has established and strengthened throughout the years.

#### APPENDIX A

FEDERAL COMMUNICATIONS COMMISSION,  
Washington, October 21, 1969.

Hon. HARLEY O. STAGGERS,  
Chairman, Special Subcommittee on Investigations of the  
Committee on Interstate and Foreign Commerce, House  
of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of October 21, 1969, requesting non-public materials pertaining to "All correspondence, records, letters, memorandums, work sheets, agenda items, staff studies and any and all papers in the public and non-public files of the Federal Communications Commission, or in its possession, pertaining to KISN AM, Vancouver, Washington; KOIL AM and KICH (now KDIL) FM, Omaha, Nebraska; WPDQ AM, Jacksonville, Florida; and any other broadcast stations in which Star Stations, Inc. and/or Don W. Burden have an ownership interest or in which Star Stations and/or Don W. Burden exercise any supervision or control or for whom they perform any consulting or other services."

I will not repeat the policy arguments which I have set forth to you in prior letters concerning similar requests. I have, therefore, directed the staff to afford immediate access to the staff members of the Subcommittee of the cited materials and to assemble such materials as promptly as possible.

I appreciate your assurance that the documents will be maintained in confidence. Please be assured of the Commission's continuing cooperation in all appropriate ways.

Sincerely yours,

ROSEL H. HYDE, Chairman.

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CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
SPECIAL SUBCOMMITTEE ON INVESTIGATIONS OF THE  
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,  
Washington, D.C., October 21, 1969.

Hon. ROSEL H. HYDE,  
Chairman, Federal Communications Commission,  
Washington, D.C.

DEAR CHAIRMAN HYDE: In connection with the Special Subcommittee's continued investigation and study of broadcast station license transfers and renewals, will you kindly arrange to provide staff members of this Subcommittee with the following documents relating to the below listed broadcast stations:

All correspondence, records, letters, memorandums, work sheets, agenda items, staff studies and any and all papers in the public and non-public files of the Federal Communications Commission, or in its possession, pertaining to KISN AM, Vancouver, Washington; KOIL AM and KICN (now KOIL) FM, Omaha, Nebraska; WPDQ AM Jacksonville, Florida; and any other broadcast stations in which Star Stations, Inc. and/or Don W. Burden have an ownership interest or in which Star Stations and/

or Don W. Burden exercise any supervision or control or for whom they perform any consulting or other services.

Rest assured that these documents will be maintained in confidence by members of our staff.

Sincerely yours,

HARLEY O. STAGGERS, Chairman.

#### APPENDIX B

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
SPECIAL SUBCOMMITTEE ON INVESTIGATIONS OF THE  
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,  
Washington, D.C., October 15, 1969.

Hon. ROSEL H. HYDE,  
Chairman, Federal Communications Commission,  
Washington, D.C.

DEAR CHAIRMAN HYDE: In connection with the Special Subcommittee's continuing investigation and study of broadcast station license transfers and renewals, will you kindly arrange to provide staff members of this Subcommittee with the following documents relating to the proceeding of Docket Number 16612, File Numbers BR-1144 and BRH 1276 (WIFE AM-FM, Indianapolis, Indiana):

All correspondence, records, papers, letters, memorandums, work sheets, agenda items, and staff studies in the non-public files of the Commission.

Rest assured that these documents will be maintained in confidence by members of our staff.

Sincerely,

HARLEY O. STAGGERS, Chairman.

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#### APPENDIX C

OCTOBER 20, 1969.

Hon HARLEY O. STAGGERS,  
Chairman, Special Subcommittee on Investigations of the  
Committee on Interstate and Foreign Commerce, U.S.  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of October 15, 1969 requesting that in connection with the Special Subcommittee's continuing investigation and study of broadcast station license transfers and renewals, staff members of your Subcommittee be provided with all materials in the non-public files of the Commission relating to the proceeding in Docket No. 16612, BR-1144 and BRH 1276 (WIFE AM-FM, Indianapolis, Indiana).

As you know, the Commission, while vigorously raising policy questions in this area (see my previous letters to you on this subject), has cooperated fully in all requests of the Special Subcommittee. We shall continue to do so, including the above matter. However, I do wish to raise a substantial issue of timing.

First, I wish to make clear that the Commission of course recognizes the Subcommittee's authority to investigate at any time matters involving wrongdoing (e.g., bribery of a public official) and, after the case has ceased to be in an adjudicatory hearing posture, to exercise oversight concerning the decisions reached by the Commission (e.g., the soundness of the Commission's legal or policy basis for decision). As to the latter type of oversight,

we are all in agreement, I am sure, that the Subcommittee could not properly exercise its oversight function prior to the termination of the hearing status, and indeed, I can recall no instance where the Subcommittee has sought to do so. For, the statute requires the Commission to decide cases strictly on the record and to eschew ex parte presentations from any quarter. See, e.g., 409(c)(1), 47 U.S. 409(c)(1); Section 7(d) of the Administrative Procedure Act, 5 U.S.C. 556(e); *WKAT, Inc. v. F.C.C.*, 296 F 2d 375 (C.A.D.C.); *Pillsbury Co. v. F.T.C.*, 354 F 2d 952 (C.C.A. 5). The Commission has appreciated the restraint which you and the Committee have always exercised in this respect, when the Commission has appeared before you (e.g., the last hearing where the Committee courteously acknowledged that we could not discuss the recent *WHDH* case, because it was subject to reconsideration).

While the Committee is clearly the sole arbiter of its own purposes in any investigation, it would appear, from the timing of your letter, coming as it did just after the issuance of the *WIFE* decision, that the Subcommittee desires to exercise its oversight function concerning the soundness of that decision. If that is so, I think it appropriate to point out that while understandably the Subcommittee might have thought that the *WIFE* case is no longer a pending adjudicatory hearing matter, it is, and will remain so until November 3, 1969. For, until that date either the Commission, on its own motion, or a party in interest, under Section 405 of the Communications Act, may act or seek to re-open the case. It is for this reason that our ex parte rules govern such proceedings until 30 days after the issuance of the decision. Section 1.1203(a), 47 CFR 1.1203(a).

In short, the thrust of our position is that, absent the matter of wrongdoing which can, of course, be investigated at any time in the Subcommittee's sole discretion, other oversight—as to whether we reached a sound decision—should await the end of the adjudicatory hearing process. Let me illustrate this by a few hypothetical situations. If a Congressman were to call the Commission prior to the decision in *WIFE*, and threaten an investigation unless the Commission denied *WIFE*'s renewal, it would clearly constitute illegal action which, upon being subsequently established, would lead to reversal of a Commission order denying the renewal. So, also, if there were such a call after issuance of the decision—that is, threatening an investigation unless the Commission set aside its action and denied renewal, and the Commission thereupon did go act. Here the situation is not really different, since if the Commission were to set aside its action, either on its own motion or that of a petitioner, it would be argued that it did so, under threat of a possible investigation.

The examples could be multiplied. In a comparative hearing case, where the Commission granted A's application and denied that of B, a Subcommittee request for materials such as here involved, made immediately after the Commission's decision, would, I believe, undermine the Commission's processes; if the Commission were subsequently to grant B's reconsideration request, A could argue, with considerable cogency, in Court that the Commission had acted under threat of Congressional investigation.

I will not add other examples. The Committee, as I have said, has always acted most scrupulously to lessen our

problems in this respect, and we greatly appreciate your forbearance. We ask that it continue.

In doing so, I wish to stress again that we acknowledge fully your right to investigate for wrongdoing at any time and, at the appropriate time, for oversight of the soundness of the decision. I would also stress our past cooperation and, as an earnest of full cooperation in this case, my directive to the staff to collect all the requested materials, so that it can be made promptly available to you. Finally, if I have misunderstood in any way the nature of the request, or if there is any disagreement as to any aspect of the above, I would greatly appreciate the opportunity to confer with you and our colleagues, at the very earliest opportunity convenient to you. For, we recognize the need and the desirability of the fullest possible cooperation between the Commission and the Subcommittee.

Sincerely yours,

**ROSEL H. HYDE, Chairman.**

#### APPENDIX D

FEDERAL COMMUNICATIONS COMMISSION,  
Washington, D.C., October 22, 1969.

Re: Docket No. 16612

Hon. HARLEY O. STAGGERS,  
*Chairman, Special Subcommittee on Investigations of the  
Committee on Interstate and Foreign Commerce, U.S.  
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your further request of this day for non-public files relating to the proceeding in Docket No. 16612 (*WIFE-AM-FM*, Indianapolis, Indiana.)

As shown by its previous actions and indeed by its action just yesterday, the Commission stands ready fully to cooperate with the Committee in all appropriate ways. Assuming that the *WIFE* case ceases to be in an adjudicatory hearing posture on November 3, 1969, the Commission has also stated that on that date it will promptly supply the requested materials which, I would note, have been assembled. However, the Commission unanimously believes that the request for oversight of this pending adjudicatory hearing case raises most serious questions concerning the integrity of the quasi-judicial hearing process. I would therefore appreciate greatly the opportunity to discuss these questions with the Committee, and am prepared to do so at the Committee's earliest convenience.

By direction of the Commission:

**ROSEL H. HYDE, Chairman.**

#### APPENDIX E

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF  
THE CONGRESS OF THE UNITED STATES OF AMERICA

To James P. Kelly, James F. Broder and/or S. Arnold Smith, Special Subcommittee on Investigations, House Interstate and Foreign Commerce Committee.

You are hereby commanded to summon Rosel H. Hyde, Chairman, Federal Communication Commission, 1919 M Street, NW., Washington, D.C., to be and appear before

the Special Subcommittee on Investigations (vested under authority of H. Res. 116, 91st Congress) of the Interstate & Foreign Commerce Committee on the House of Representatives of the United States, of which the Hon. Harley O. Staggers is chairman, and to bring with him all items shown on the attachment hereto, in their chamber in the city of Washington, on October 23, 1969 at Room 2323, Rayburn House Office Building, at the hour of 2:00 PM then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 22nd day of October 1969.

HARLEY O. STAGGERS, *Chairman.*

Attest:

W. P. JENNINGS, *Clerk.*

ATTACHMENT INCORPORATED IN THE INSTANT SUBPENA DATED OCTOBER 22, 1969, ISSUED BY HARLEY O. STAGGERS, CHAIRMAN, SPECIAL SUBCOMMITTEE ON INVESTIGATIONS OF THE HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE TO ROSEL H. HYDE, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, 1919 M STREET NW, WASHINGTON, D.C.

1. All correspondence, records, letters, memorandums, work sheets, agenda items, staff studies and any and all papers in the non-public files of the Commission pertaining to Docket Number 16612, File Numbers BR-1144 and BRH 1276 (WIFE AM-FM, Indianapolis, Indiana);

2. All correspondence, records, letters, memorandums, work sheets, agenda items, staff studies and any and all papers in the public and non-public files of the Commission, or in its possession, pertaining to KISN AM, Vancouver, Washington, KOIL AM and KICN FM (now KOIL FM) Omaha, Nebraska and WPDQ AM, Jacksonville, Florida and any other broadcast stations in which Star Stations, Inc. and/or Don W. Burden have an ownership interest or in which Star Stations, Inc. and/or Don W. Burden exercise any supervision or control or for whom they perform any consulting or other services.

The CHAIRMAN: Do you have anything further in your presentation?

Chairman HYDE. Really, nothing additional. If you will indulge the moment necessary for it I would appeal to you to conduct your oversight study of this at such time as will not impinge upon the integrity of the hearing process.

I urge again, as I did earlier in my statement, that we are trying earnestly to comply with the directives we get from you in the act we administer and the Administrative Procedure Act to maintain the integrity of the hearing process against any intervention off the record, in matters in which this committee has previously had great interest. At the same time we also want to cooperate with you in your oversight investigation.

I listened with interest to your recitation of your duties to study the present act, to study possible changes in it, to study administration of the act, to inform yourselves as to any actions that might be necessary by the committee. I think this can be done without intervention in a case not yet final.

Mr. Moss. Mr. Chairman, could I point out the fact that the Commission as recently as the *WPIX* case complied with the request of this committee when the case was in precisely the same posture as the case now before us.

Mr. Geller, you are not under oath so I want neither your gestures nor your advice.

Mr. GELLER. I apologize.

Mr. MOSS. We have had this one before you previously, so control your emotions.

Mr. GELLER. Yes, sir.

Mr. PICKLE. Mr. Chairman, if the committee chooses to make a charge of evidence or bribery, do you have the legal authority in the FCC to postpone the date of the decision, that is, of making it final on November 3? Can you go 30 or 60 days beyond this? Do you have the legal authority to do it?

Chairman HYDE. The only way we can do it, I believe, in my judgment the way to do that would be the Commission within the present 30 days to reconsider the case. I don't believe we can extend the statutory period as such.

Now we would be in a very awkward position because, let us say that we would reconsider it, there would be substantial argument for the proposition that it was being reopened because of the intervention of the committee.

Mr. PICKLE. Assuming you did reconsider or if a 30- or 60-day postponement was made, you are also saying to this committee that we have to prove the case for you.

Chairman HYDE. No, I am not saying you have to prove it for us. Let me say this to you, I hope that I can make myself clear on this, we are not presuming to pass upon the adequacy of the proof that the committee might have as to some wrongdoing. At the same time, we would hope and expect, of course, that you would proceed in good faith, that you would not charge wrongdoing without having some reason for it, some reasonable basis for the charge. If I would say you could have the records in any case, just by simply saying, "There must be something evil in it and I demand the records," that would open—

Mr. FRIEDEL. There has not been a charge of evil.

Chairman HYDE. That is my understanding. It is my understanding that this is an oversight examination of the case. For this reason I suggest—

Mr. FRIEDEL. There may not be anything to it. On the other hand, there might be.

The CHAIRMAN. I will say this: by refusal of the Commission to grant it, it looks like there is something terribly dark and bad, and I am sure the public is going to interpret it this way. I am sure the Congress does when you refuse because I gave the reasons why we need them now when I read my statement to you.

Chairman HYDE. Chairman Staggers, there will be two new members of the Commission. There will be five of them still there—

The CHAIRMAN. We want them now while you are there, and the rest of them are there, and the staff are there, and the employees are there.

Mr. PICKLE. May I ask this question? :

The CHAIRMAN. Yes.

Mr. PICKLE. Following up the first question, I asked if we did make a charge of bribery, you said you would step aside. You also said you could not do it or you would postpone it. What authority does the FCC have, or can you cite it, which requires Congress to characterize the nature of its investigation?

Chairman HYDE. I can't give you a specific citation, but I would state this: we could not defend ourselves against a request for records where it appeared that a prompt and expeditious investigation of possible corruption was necessary. I would not even seek to prevent such an investigation.

Mr. PICKLE. You do not have any authority then that would state that we would have to characterize the type of investigation we want to have?

Chairman HYDE. I think the authority is in these terms, that in the regular course of business we should not permit any interventions of materials into a case in a manner that would result in the Commission making a decision taking into consideration factors outside the hearing record in which all parties have participated. What I am saying is that notwithstanding this requirement that you must keep extraneous influences out of a hearing record, in a case of corruption you forget that principle and investigate the corruption.

Mr. VAN DEERLIN. The minutes of yesterday's Commission session on this subject have already been offered for the record. Will they reflect, Mr. Chairman, any discussion of the possible ultimate step of a contempt citation growing out of it?

Chairman HYDE. No. The Commissioners expected that I would be able to persuade you folks that this case could be investigated in an oversight manner in a way that would not interfere.

Mr. VAN DEERLIN. What I have in mind, Mr. Chairman, is the possibility that the committee mistakenly would be acting foolishly, but there might still be no clearcut question of the committee's right as representatives of the people to make mistakes.

I was wondering how far the Commission was expecting its Chairman to go in his last week of service after 42 years of very substantial and commendable public service in upholding this claimed privilege.

Chairman HYDE. I don't think I am here as being expendable.

The Commission feels we have an important principle here. They might feel that I haven't adequately explained it here. They do not want to appear to be in contempt of the committee or Congress. They do not want to appear to be uncooperative. But they would hope, I would hope, that you would share our concerns about the necessity of maintaining the integrity of the adjudicatory case. When it is only 10 days difference in time it does not seem too much to ask that you bear with us.

Mr. Moss. Would the gentleman yield?

The CHAIRMAN. Mr. Moss is recognized.

Mr. Moss. It seems to me that you are asking us precisely what we are demanding of you, that you consider our situation. You know we differ from you in that we are representative of constituents. We are elected and we are specifically charged by the Constitution with certain duties. I don't know of anything that charges you in the Constitution to perform any function. You are asking us to stand aside and let you make the judgment for us as to whether there is anything in that file which might concern us until after the matter has become final, the date for appeal or reopening has passed by.

You are asking us to give you an absolute vote of confidence that the Commission has acted properly on the record before it and on the materials employed by the staff, and you are asking us to accept your word that everything has been proper and, as you say, your colleagues hoped that you would be persuasive.

Mr. Chairman, when were you ever persuasive on this point with this committee?

Chairman HYDE. I am really not asking you to assume that every aspect of this case has been handled in the

optimum way. I am simply asking you to defer that examination until the hearing procedures can be—

Mr. Moss. When were you ever successful in that request before this committee?

Chairman HYDE. The last time I was up here I was asked to discuss—

Mr. Moss. There was no particular issue involved, and the committee did not press at that time. It did not yield its right to press but it didn't press.

Chairman HYDE. It did, as I understood, recognize that it would be inappropriate to discuss the hearing matter.

The CHAIRMAN. When was this?

Chairman HYDE. I can't give you the date.

Mr. MACDONALD. I was acting chairman at the time. It was before our subcommittee. You were being pressed by Mr. Springer.

Chairman HYDE. I was.

Mr. MACDONALD. And Mr. Springer was pressing you, asking you was this going to set a precedent.

Chairman HYDE. Yes.

Mr. MACDONALD. And you did not want to go into that because it had not been adjudicated, an appeal was on. But the situation was completely different from this. I happened to have been there and I ruled that you were correct at the time—

Chairman HYDE. You did indeed.

Mr. MACDONALD (continuing). In invoking the *Pillsbury* case. But the facts then and the facts here are X to A.

Chairman HYDE. I think in broad principle that they were similar, because in both instances we are asking the Congress not to interfere in the handling of a hearing case.

The CHAIRMAN. Let me say to the Chairman this: That that case has nothing to do with the precedent in this case here, not one single item under the sun. Here we have demanded that we receive records. We have done everything that has been courteous and in a good way to ask you to do it. When you refused we served you with a subpoena.

Now we are going to take any recourse we can, and we have said this before. You know the consequence of it, you certainly do. You know that a committee of this Congress is not going to stand by and let an agency tell us what we are going to do, because we are elected by the people to make the laws of this land and we are going to do that, Mr. Chairman.

Chairman HYDE. I am distressed—

The CHAIRMAN. No, you should not be distressed because you have been distressed before. I want to say this to you to get the record clear on the matter: Do you regard a congressional review of nonpublic files as an ex parte presentation?

Chairman HYDE. In certain circumstances—

The CHAIRMAN. Do you in this case?

Chairman HYDE. Yes.

The CHAIRMAN. Do you regard it as a threat?

Chairman HYDE. Well, perhaps I should ask you to say what you mean by threat, because I had a little difficulty with Congressman Moss on that phraseology before.

Mr. Moss. Webster's Standard Unabridged would be my definition of threat. You are familiar with it.

The CHAIRMAN. I am using the word because you or your counsel used the word once.

Chairman HYDE. I would say it would be a threat to the proper handling of the hearing case.

The CHAIRMAN. Do you regard it as an improper influence?

Chairman HYDE. I would regard it as an external influence in the context of the *Pillsbury* case.

The CHAIRMAN. And the Congress has not the right, then, to do these things that they think within their own mind they should do, and that is just your opinion. We have an opinion too. We have a counsel and they say this is the thing that the Congress should do.

Chairman HYDE. Congressman Staggers, would you be kind enough to let us respond to the memorandum of your counsel? Could I see a copy of it for the purpose of submitting a legal paper?

The CHAIRMAN. Listen, I gave the essence of it in my presentation today for the record.

Mr. MOSS. Mr. Chairman.

The CHAIRMAN. Mr. Moss.

Mr. MOSS. I would suggest that there is no point in doing that. We are faced here with a clear act of contempt of the committee.

Chairman HYDE. I am distressed to have it suggested that I am in contempt.

Mr. MOSS. You should not be distressed because you have gone through this before. You were a member of the Commission back in 1957 and 1958 when the members of the regulatory commissions got together and determined not to cooperate with the Oversight Committee and we had to hold your feet to the fire and force every bit of evidence out of you that we got.

Chairman HYDE. I was not a party to any understanding—

Mr. MOSS. You were still on the Commission.

Chairman HYDE. I was on the Commission.

Mr. MOSS. You are well aware of the situation that existed and the very extensive hearing we had to hold onto the rights of the committee for information. You know you finally yielded, as did every other regulatory commission that we had jurisdiction over.

Chairman HYDE. I was not any party to an agreement to resist.

Mr. MOSS. In view of your full knowledge of that, your action here today can only be regarded as one of blatant contempt for a committee of Congress.

As for me, the refusal raises in my mind serious doubts that the case was handled appropriately and raises in my mind questions as to whether or not improper outside influences were brought to bear. I shall make that statement quite publicly at the appropriate time.

Mr. PICKLE. Mr. Chairman.

The CHAIRMAN. The gentleman from Texas.

Mr. PICKLE. It seems to me that we are caught here in a dilemma as to the investigatory power of a congressional committee, and the power of a regulatory agency with respect to the time element. You don't question our authority to do this but you request that we don't. I would like to read you a statement for the purpose of hearing comments from our distinguished but obstinate Chairman of the FCC. This is the statement:

"The leading authority on congressional investigatory power"—the case is *McGrain v. Daugherty*, 273 U.S. 135 (1926) held that such power was so much a part of the legislative function, as to be implied, and I quote, "A legislative body cannot legislate wisely or effectively in the absence of information respecting the condition which

the legislation is intended to affect or change, and when the legislative body does not, itself, possess the requisite information, which not infrequently is true, recourse must be had to others who do possess it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two Houses are intended to include this attribute to the end that the function may be effectively exercised."

Now here is a case by the Supreme Court which is saying that an investigative congressional committee does have this authority and power and should look to those agencies which have the information.

Chairman HYDE. I subscribe to that.

Mr. PICKLE. The whole question is, what is your legal answer to the fact that you say that the time is running and we therefore cannot do it until a time specific?

Chairman HYDE. My answer is that certainly you have this legal power and responsibility of oversight and certainly the right of Congress to inquire is basic to our system of government.

Mr. PICKLE. At any time.

Chairman HYDE. And with certain qualifications. The qualification I would urge on you is this, that you should not invoke that to intrude into a hearing case until it is decided.

Mr. PICKLE. For my own information, and I don't have the background a lot of these men have, are we saying that this is the case that in no instance can an investigative committee of Congress interfere with or ask for specific information that any regulatory agency has if there is a case pending?

Chairman HYDE. I would say you should not exercise that authority in such a way as to bring forces to bear extraneous of the hearing record unless there is significant evidence of some corruption.

Mr. PICKLE. You are saying the information we have here and the various documents entered into the record are not sufficient evidence?

Chairman HYDE. It is my understanding that you are asking for these files incident to your oversight work.

Mr. MACDONALD. Will you yield for one short comment?

Mr. PICKLE. I yield.

Mr. MACDONALD. I asked you earlier, and I repeat my question: How can you ask this committee concretely to investigate corruption unless we have the files on which to base such a charge?

Chairman HYDE. The public files in this case are available to you.

Mr. MACDONALD. Sir?

Chairman HYDE. The public files in this case are available to you.

Mr. MACDONALD. Apparently the counsel feels that we need the private files. Without knowing much about it, I think it is true.

Chairman HYDE. It is my understanding, and I may be mistaken on this, that you want the nonpublic files on this to investigate in an oversight manner into the Commission's handling of the case.

Mr. MOSS. The entirety of the case.

Chairman HYDE. Yes; the Commission's handling of it.

Mr. MOSS. Every relevant fact in the case.

The CHAIRMAN. Just a minute. I don't believe the Chairman is stating this correctly.

Mr. MOSS. He is not. He is twisting it.

The CHAIRMAN. I don't believe you are saying this right. You are putting words on the record which are not true. We are not trying to indict any member of the Commission. If you say that, there must be something wrong.

Chairman HYDE. I don't think you are.

The CHAIRMAN. Why didn't you say it, then?

Chairman HYDE. I am in agreement with you, Chairman Staggers, because it is—

The CHAIRMAN. We think we have the right to look at the nonpublic files and certainly the Commission, if they don't have anything to hide, should not have anything to say about it because we don't intend to make it public.

Chairman HYDE. I would not be raising any objections at all if this case were completed, none at all.

The CHAIRMAN. We are not getting anywhere and we have to go. I might say to you—

Chairman HYDE. Chairman Staggers, I am not in contempt of the subcommittee or the Congress.

The CHAIRMAN. You are not?

Chairman HYDE. No, sir; I am not.

The CHAIRMAN. You are by the law of this Congress.

Chairman HYDE. I am asking you to recognize that we have a delegation from Congress itself to maintain the integrity of the hearing process.

The CHAIRMAN. You do so far as it does not conflict with the functions of this Congress and their rights. And you are now, by refusing to bring these records up here, in contempt of this Congress. I am asking you once again, will you make these available to our staff?

Chairman HYDE. I shall, of course, discuss the case further with the Commissioners, but at this moment I am not in a position to say I will bring them.

Mr. MOSS. Will you please instruct the witness to produce the records promptly, make them available to the staff for the study necessary for this committee to ascertain the facts.

The CHAIRMAN. He has been told that and I say it again—

Mr. MOSS. I suggest he be reinstructed at this point.

The CHAIRMAN. The committee, and I am speaking for the committee, requests that you do make these nonpublic files available to our staff to examine, not to carry away or do anything like that.

Mr. MOSS. We are quibbling over semantics. I wish the chairman would specifically instruct the witness that they be available in not less than a period of 24 hours to the staff of this committee.

Chairman HYDE. I shall report your request to the Commission.

Mr. PICKLE. May I ask one question?

Mr. MOSS. Is he now instructed, Mr. Chairman?

The CHAIRMAN. He is instructed. I instructed him.

Mr. PICKLE. I would like your counsel to furnish this committee such legal authority as they have which touches on the legality which this committee has to request information on a case that is in the adjudicatory process. Do we have the authority to go in, legally speaking now, and command and ask for these records, or is it just a practice that generally you do not intervene while a case is pending?

Mr. LISHMAN. I think Chairman Hyde admits that the committee has the power. I have not heard him in the course of his presentation deny that the committee has

the power to get these records. What he has in mind, and I sympathize with him, he is afraid that there will be a misuse of this power in such a way as would equate in his mind with improper external influence.

As counsel of the committee, I don't agree with that for one minute because I say that under the Constitution and the appropriate laws and practices, it is perfectly clear that at any time, to investigate how agencies of Congress are conducting this operation, Congress may step in and get all the information it needs in order to fulfill its constitutional responsibility.

Mr. PICKLE. Mr. Chairman, may I ask one question?

The CHAIRMAN. Make it brief.

Mr. PICKLE. I noticed in the hearings yesterday and this morning, and I want my colleague from Massachusetts to hear this, yesterday only one representative of the minority side—

The CHAIRMAN. There were two there.

Mr. PICKLE. Were there?

The CHAIRMAN. Yes.

Mr. PICKLE. I just hope there is no indication that this is a partisan matter, because I am not familiar with the case.

The CHAIRMAN. He stated that.

Mr. KEITH. I would not say that I agree with counsel as to what he has said. I would say that what he has said is that by our action here he feels that in this instance we can cause a miscarriage of justice, and that by waiting until November 3 we would have more pertinency and more relevancy.

Chairman HYDE. That is right.

Mr. MOSS. I would not like to let that stand. As I say, I have spent 15 years as chairman of a committee which has dealt with every agency of this Government. The prospect raised of there being a miscarriage of justice because the Congress is given information just does not square with the facts, nor with the precedents or practices or anything else. It does not even square with the practices of the Communications Commission. Justice has been better served by revelation to the Congress than by withholding.

Chairman HYDE. Chairman Staggers, may I make one final observation, and that is this: We do wish to cooperate but we do have a directive from the Congress to protect the integrity of the hearing process.

Congress does have the power in general to inquire, as they must have. But Congress itself has put qualifications on that power in terms of protecting the hearing process. They have done that by such statutes as the Administrative Procedure Act and section 409 of the Communications Act, and in other instances.

The CHAIRMAN. I will make this statement and then the committee will have to adjourn.

In view of the proceedings as they have taken place, we have requested the Commission and given them 24 hours to respond again to our request. If this is not granted, the committee will take such action as it might deem advisable at that time.

The committee is adjourned.

(Whereupon, at 3:25 p.m., the committee was recessed subject to call of the Chair.)

During the course of the above-described proceedings, Chairman Hyde was granted an additional 24 hours in which to comply with the subcommittee's subpoena. On

the following day, October 24, 1969, the following letter was caused to be delivered to the chairman of the subcommittee by Chairman Hyde repeating his refusal to comply with the subpoena:

FEDERAL COMMUNICATIONS COMMISSION,  
Washington, D.C., October 24, 1969.

Hon. HARLEY O. STAGGERS,  
Chairman, Special Subcommittee on Investigations of the  
Committee on Interstate and Foreign Commerce, U.S.  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request at the close of the hearing on October 23, 1969, that the Commission notify the subcommittee within 24 hours as to whether its investigators would be given immediate access to the materials described in item 1 of the subpoena served upon me on October 22, 1969.

The Commission has carefully considered the matters raised at the hearing. As shown by our prior actions, and particularly our action as to item 2, we wish to cooperate fully with the subcommittee, and have given the assurance of such cooperation on November 3, 1969, assuming that the *WIFE* case ceases to be in an adjudicatory posture as of that date. However, for the reasons stated in its response, filed with the subcommittee at the October 23, 1969 hearing, the Commission believes that it must respectfully decline to acquiesce or participate in any action which would undermine the "appearance of impartiality" of this quasi-judicial proceeding. Accordingly, we again urge that the Subcommittee hold in abeyance, until the conclusion of the adjudicatory hearing process, its regular oversight of this matter, including the effort to obtain the material specified in item 1 of the attachment to the subpoena.

Sincerely yours,

ROSEL H. HYDE, Chairman.

In view of Chairman Hyde's refusal to comply with the subcommittee's subpoena, a meeting of the Special Subcommittee on Investigations was held on October 28, 1969, at 11 a.m., in room 2322, Rayburn House Office Building, to consider what actions to take concerning the matter.<sup>1</sup>

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*Note: The legal position taken by Mr. Hyde in the WIFE-FM case is discussed in the following excerpt from the unpublished print prepared by the Subcommittee on Investigations, House Interstate and Foreign Commerce Committee. The Pillsbury case is likewise included here.*

## LEGAL CONSIDERATIONS

The refusal of Rosel H. Hyde, Chairman of the Federal Communications Commission, to honor a congressional subpoena calling for the production of agency records and documents was grounded on an asserted legal premise. That is, that the law prohibits the release of such material to the Congress until such time as the proceedings to which they pertain have ceased to be in the adjudicatory stage.

A review of the relevant legal authorities, including the two cases relied on by Chairman Hyde, demonstrates that there is no such legal restriction on the investigatory power of the Congress of the United States.

<sup>1</sup> Editor's note.—The materials demanded in the subpoena were delivered to the Special Subcommittee on the following Monday, November 3, 1969, and the proceedings against Mr. Hyde were dropped.

### A. GENERAL

The question of congressional access to agency files has been the subject of numerous studies over the years. An 85-page memorandum of law on congressional right of access was printed for the use of the House Commerce Committee during the 85th Congress, first session, and contains numerous citations of law upholding the right of the Congress to access to agency files (see "Staff Report: Right of Access by Special Subcommittee on Legislative Oversight to Civil Aeronautics Board Files and Records").

Since this report is already available in printed form, it would be redundant to repeat all of the authorities cited therein. Those legal authorities are applicable to the present case involving the FCC. The memorandum discusses the question of access to files on pending cases as follows:

In raising a wholesale bar to the subcommittee's access to files in all pending matters, the Civil Aeronautics Board is once again relying upon a privilege wholly unsupported in law. It is true that a congressional committee should normally not exercise its investigatory power to suggest how an administrative agency should decide particular cases or issues pending in those cases. And it is certainly not the desire of this subcommittee to coerce administrators with regards to action still pending before them.

There is, however, a vast difference between the possession of power and the propriety of its exercise. The abnegation of a congressional committee in pending matters is an instance of self-limitation by the Congress upon its own sovereignty.

\* \* \* \* \*

The power is that of the Congress, not of its creature, to determine what matters will inquiry into. To hold otherwise would be to give an agency being investigated too easy a device to shield particular matters from congressional scrutiny. To do so, it would need only to hold up final action in cases it wishes to cloak until after the particular congressional probe has passed. This is particularly true if one realizes that it is common, in cases of consequence, for losing parties to file petitions for rehearing or reconsideration. By simply holding off its decisions on such petitions, an agency could effectively stifle congressional inquiries from going into matters of legitimate legislative concern if congressional committees may be entirely barred by agency fiat from investigating such "pending" cases. (See, similarly, Newman, 41 Calif. L. Rev. 565, 575-76 (1953).) (See pp. 42-43.)

A similar collection of authorities is to be found in "The Right of Congress To Obtain Information From the Executive and From Other Agencies of the Federal Government," study by the staff of the Committee on Government Operations (May 3, 1956).

In *Quinn v. United States*, 349 U.S. 155, 160 (1965) the Supreme Court stated that the congressional power to investigate and exact testimony is co-extensive with the

power to legislate. The Court said that "Without the power to investigate—including of course the authority to compel testimony either through its own processes or through judicial trial—Congress would be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively."

In *McGrain v. Daugherty*, 273 U.S. 135 (1926), the leading authority on congressional investigatory power, the Court stated:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and when the legislative body does not itself possess the requisite information—which not infrequently is true—the recourse must be had to others who do possess it. \* \* \*

The House of Representatives is "the grand inquest of the Nation," its powers of inquiry as broad as those of a grand jury. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). And the congressional power to investigate is not limited to matters which may be the subject of legislation but extends to all matters "germane to the proper and intelligent exercise of any constitutional power of Congress or of either House." *Seymour v. United States* 77 F. 2d 577 (1935).

In the case of *Watkins v. United States* 354 U.S. 178 (1957) certain standards were set for congressional investigations involving the private affairs of individual citizens. The Supreme Court, however, stated the basic rule as follows:

We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste \* \* \* (P. 187.)

Information relating to activities within the range of congressional power may be sought not only by congressional investigation for purposes of appropriate legislation but also for the purpose of the continuous supervision of Congress over the administrative agencies. (*Electric Bond Co. v. Securities and Exchange Commission*, 303 U.S. 419, 437 (1937); *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194, 211 (1912).

The authorities do not recognize any exemption from congressional inquiry for materials relating to pending or adjudicatory matters. Furthermore, the relevant laws and statutes do not contain any such exception.

Section 136 of the Legislative Reorganization Act of 1946 (60 Stat. 812) imposes the following responsibilities on congressional committees:

#### LEGISLATIVE OVERSIGHT BY STANDING COMMITTEES

SEC. 136. To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.

Since this statute requires "continuous" watchfulness over the acts of the administrative agencies, it would preclude holding the legislative oversight function in suspension for the months or years required to move a matter through all the adjudicatory stages of agency action.

House Resolution 116 of the 91st Congress authorizes the Commerce Committee to conduct investigations and studies concerning communications matters and to require by subpoena the attendance and testimony of such witnesses "and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary."

As is the case with section 136 of the Legislative Reorganization Act, there is no limitation placed on the investigatory power with respect to pending or adjudicatory matters.

The Investigations Subcommittee and its predecessor the Legislative Oversight Subcommittee have not previously experienced any difficulty in obtaining access to files relating to pending or adjudicatory matters.

For example, in the case of *WKAT, Inc. v. F.C.C.*, 296 F. 2d 375 (1961), certiorari denied 368 U.S. 841 (1962) the FCC had granted a construction permit to an applicant. Shortly afterward other unsuccessful applicants appealed to the courts. While the matter was still before the courts, and thus still in the adjudicatory stage, the Legislative Oversight Subcommittee held hearings on this matter; these hearings involved the FCC Commissioners. During the course of the hearings, it was disclosed that one of the Commissioners who had participated in the proceedings should have disqualified himself and that some of the applicants for the permit might have been guilty of ex parte presentation. The FCC did not object to the subcommittee's investigation into this adjudicatory matter. Rather, the FCC relied on information disclosed by the subcommittee's investigation to appeal the matter to the courts asking that the case be remanded to the FCC for further consideration because of charges made during the course of the subcommittee's investigation.

Thus, knowing full well that a congressional investigation had taken place during the adjudicatory stage, both the court and the FCC raised no objection. Instead, both the court and the agency relied on the information which

had been produced in reaching the decision that the case should be remanded to the agency for further consideration.

The same result was reached in the case of *Sangamon Valley Television Corp. v. United States*, 358 U.S. 49 (1958). In this case the FCC decided a case relating to the assignment of television channels. This case was appealed to the courts. The court of appeals held in favor of the FCC decision. The unsuccessful party before the court of appeals petitioned the Supreme Court for certiorari. After the filing of the petition but before the hearing of the case by the Supreme Court, and while the case was thus still in the adjudicatory stage, the Subcommittee on Legislative Oversight conducted an investigation and held hearings on the matter. The FCC offered no objection to the investigation or the hearings, and participated in them. The Solicitor General filed a brief with the Supreme Court calling its attention to certain facts disclosed at the subcommittee hearings. This information had to do with the possibility of ex parte presentations by interested parties in the FCC proceeding.

The Supreme Court then granted the petition for certiorari and stated:

In view of the representations in the Solicitor General's brief on pages 7 and 8, concerning testimony given before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce subsequent to the decision by the court of appeals in this case, the judgment of the court of appeals is vacated and the case is remanded to the court of appeals for such action as it may deem appropriate (358 U.S. 49-50).

The case was remanded to the court of appeals and the FCC order was vacated and remanded to the agency. Thus in this case it can be seen that the Solicitor General, the U.S. Court of Appeals for the District of Columbia, the Supreme Court of the United States, and the Federal Communications Commission itself, were all fully aware of the investigatory activities of the Legislative Oversight Subcommittee, and, far from criticizing, relied on its findings in reaching their decision. This would seem to conclusively rebut any suggestion that such investigatory activity is improper or illegal.

Either the *WKAT* or the *Sangamon* case is sufficient authority to refute the contention made by Chairman Hyde that congressional investigatory activity constitutes "external pressure" or an "ex parte presentation." The very courts which condemned these abuses of the administrative process simultaneously recognized that congressional investigations, and even hearings, are not improper during the adjudicatory stages of a case.

The investigations subcommittee has customarily availed itself of the right of access to nonpublic files in pending cases before administrative agencies. In doing so, however, the subcommittee has been careful not to interject itself so as to interfere with the agency's decisionmaking process.

Thus, nonpublic files were obtained from the ICC in the following matters: Docket No. 34733, Adequacies—Passenger Service—Southern Railroad Company Trustees—Discontinuance of Interstate Passenger Trains (was pending before the Commission); Finance Docket No. 25415, New York, New Haven & Hartford Railroad Co. Trustees—Discontinuance and Change in Service Between New

York, N.Y., New Haven, Conn., Boston and Springfield; Mass. (petition for reconsideration was pending before the Commission); Finance Docket No. 24726, Chicago and Eastern Illinois R. Co., Discontinuance of Trains Nos. 3 & 4 Between Chicago and Danville, Ill. (suit for judicial review of ICC action was pending before U.S. District Court); Finance Docket No. 21989, Pennsylvania Railroad Company—Merger—New York Central Railroad Company (was involved in five cases pending before a U.S. District Court).

In obtaining these particular files, the subcommittee considered and rejected the ICC contention that the *Pillsbury* case (discussed below) precluded congressional review of these files. (See exchange of letters between Chairman Staggers and ICC Chairman Brown dated March 13, March 25, April 18, April 22, and April 24, 1969, and legal authorities cited therein.)

On December 8, 1967, the FCC consented to the transfer of five television station construction permits from D. H. Overmyer to U.S. Communications Corporation (FCC 67-1312, 9408, File Nos. BTC 5376/80 and BALCT 327). Just 1 week later, the subcommittee began its investigation and conducted hearings into the legislative oversight issues raised by this transfer. Not only did the Commissioners participate in these subcommittee hearings, but made available to the subcommittee immediately all of their nonpublic files in the matter. (H. Rept. No. 256, 91st Cong., first sess.)

The subcommittee also conducted an investigation into the program "Pot Party at a University," which was broadcast by station WBBM-TV on November 1, 2, and 3, 1967. At the same time that the subcommittee was conducting its investigation and holding hearings, the FCC was also investigating allegations with respect to the program. But, it gave the subcommittee access to all nonpublic files concerning the program. And, prior to the Commission's final determination of the pot party matter and prior to its renewal of WBBM-TV's license, which had been held up pending the outcome of these hearings, the subcommittee issued its report. (H. Rept. No. 108, 91st Cong., first sess.) This report, adopted by the full committee and filed by the House was not considered by the Commission to be abusive of its processes. Nor did WBBM-TV claim that the Congress had been guilty of ex parte presentation during this sensitive period of adjudication.

On May 22, 1969, the Commission voted to renew the license of WPIX-TV channel 11, New York. Immediately thereafter, the subcommittee began an investigation into this renewal grant. It requested and received prompt access to all nonpublic records relating to WPIX-TV. On June 18, 1969, the Commission reversed its previous order and withheld the renewal of WPIX-TV's license. It authorized an investigative hearing into allegations of improper conduct by the licensee and scheduled comparative hearings with respect to its renewal application. Despite the adjudicatory position of this matter, the subcommittee has continued its investigation, with complete cooperation by the FCC, into all areas, public and non-public, which may affect the outcome of these proceedings.

The availability of information from the administrative agencies is controlled by section 3 of the Administrative Procedure Act (5 U.S.C. 552). This was enacted as the

"Freedom of Information Act" and became law on July 4, 1967. Subsection (f) reads as follows:

(f) LIMITATION OF EXEMPTIONS—Nothing in this section authorizes withholding information or limiting the availability of records to the public except as specifically stated in this Section nor shall this section be authority to withhold information from Congress.

Legislative history makes clear that the purpose of this section is to require the agencies to disclose all information which is not specifically exempted from disclosure by the statute. It also makes clear that nothing in the section can be concluded as a limitation on the right of Congress to information possessed by the agencies. Thus, the Senate report states:

The purpose of [subsection (f)] is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions of subsection (e). Further, it is made clear that, because this section only refers to the public's right to know, it cannot, therefore, be back-handedly construed as authorizing the withholding of information from the Congress, the collective representative of the public. (S. Rept. 813, 89th Cong., first sess. p. 10.)

Similarly, the House report states:

The purpose of [subsection (f)] is to make clear beyond doubt that all the materials of Government are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) or limitations spelled out in earlier subsections. And subsection (f) restates the fact that a law controlling public access to Government information has absolutely no effect on congressional access to information. Members of the Congress have all the rights of access guaranteed to "any person" by S. 1160, and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions." (H. Rept. No. 1497, 89th Cong., first sess.)

Subsection (e) of the Freedom of Information Act sets forth nine exemptions describing various types of information which are not subject to disclosure under the terms of the act. There is no blanket exemption made for pending or adjudicatory matters per se. While this statute governs the rights of the public to information from administrative agencies, it is also relevant to the rights of Congress since the congressional prerogatives are at least as great as those specified for the general public.

Furthermore, in view of the FCC's reliance on the *Pillsbury* case, it is relevant to note that this case was decided on January 7, 1966, while the Freedom of Information Act became law as mentioned above, on July 4, 1967. Thus, the presumption in construing the statute is that the Congress was aware of the *Pillsbury* decision and did not deem the Freedom of Information Act to be in conflict with it. As will be seen in the discussion of the FCC's position, below, it does not appear that there is

any conflict between the *Pillsbury* case and the Freedom of Information Act.

## B. POSITION OF THE FCC

In his letter to Chairman Staggers delivered on October 20, 1969, and his statement submitted for the record on October 22, 1969, Chairman Hyde has cited only two court decisions and three statutory provisions.

None of these citations is deemed applicable to the question of congressional access to nonpublic agency materials. These citations will be discussed separately:

### 1. THE WKAT CASE

This case has already been discussed in this memorandum (see above, page 57). As already noted, the case is a persuasive authority supporting the legality and propriety of congressional investigation of matters which are in the adjudicatory stage. Chairman Hyde's statement mentions this case only in support of his proposition that adjudicatory hearing cases must be conducted exclusively upon the record free from external pressures. This statement is not disputed, but the case provides no authority for suggesting that a congressional inquiry or investigation constitutes "external pressures." In point of fact, as already stated above, it was the Special Subcommittee's investigation in 1957 which led to the disclosure of improper ex parte influence being exerted upon the Commission.

### 2. THE "PILLSBURY" CASE

The FCC relies principally upon the case of *Pillsbury Co. v. F.T.C.*, 354 F.2d 952 (1966).

But this case involved no question of congressional access to nonpublic files. In the *Pillsbury* case, the FTC was considering the legality of a merger between the Pillsbury Company and two other concerns. Before the FTC had reached its decision, a hearing was held before a subcommittee of the Senate Judiciary Committee. The Chairman of the FTC and members of his staff were called as witnesses.

The Court noted that at the hearing, the FTC Chairman had to face "a barrage of questioning" challenging his interpretation of the applicable law. The Court found that the Senators on the subcommittee "forcefully expressed their own opinions" as to the proper determination of the specific case which the FTC was then in the process of deciding. The Court extensively quoted from the questions put to the FTC members. (See 354 F. 2d 952, pp. 956-962). The Court noted that the *Pillsbury* matter was referred to "more than 100 times" during the hearings.

It was this questioning, not any review of nonpublic files, which the Court found to be improper:

The alleged interference \* \* \* was not alleged improper influence behind closed doors but was rather interference in the nature of questions and statements made by members of two Senate and House subcommittees having responsibility for legislation dealing with antitrust matters, all clearly spread upon the record. (Pp. 954-955.)

\* \* \* \* \*

We conclude that the proceedings just outlined constituted an improper intrusion into the adjudicatory processes of the Commission. \* \* \* (P. 963, emphasis added.)

\* \* \* \* \*

[C]ommon justice to a litigant requires that we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the United States Senate, however innocent they intended their conduct to be, to arrive at the ultimate conclusion which they did reach. (P. 963.)

Thus, the *Pillsbury* case is not authority for the refusal of congressional access to nonpublic files in pending cases. This much was even recognized by the plaintiff in the case, the *Pillsbury* Company:

"[P]illsbury's Motion to Dismiss involved no question as to the congressional right of investigation, which may be exercised without interfering with the performance of the judicial or quasi-judicial function in a pending case, and 'cannot be extended to sanction a legislative trial' \* \* \*" (Brief for the Petitioner, the *Pillsbury* Company, page 42. Emphasis added.)

It is clear, as the plaintiff in *Pillsbury* recognized, that congressional investigation need not interfere with the performance of the agency's judicial functions.

### 3. STATUTES—RULES

The statutes cited in Chairman Hyde's letter to the chairman and his statement before the subcommittee are not deemed relevant to the question at issue. They are summarized briefly:

*47 U.S.C. 409(c)(1).*—This section merely prohibits ex parte representations by persons who have participated in the presentation or preparation for presentation at a hearing or upon review.

*47 C.F.R. 11.203.*—This regulation implements 47 U.S.C. 409(c)(1) by prohibiting ex parte presentations for a 30-day period in connection with 'restricted adjudicative proceedings.'

*Sec. 7(d) of the Administrative Procedure Act.*—This states that ex parte representations are not to become part of the official record of an agency proceeding.

### C. CONCLUSIONS

A review of the relevant case law, statutory enactments, and regulations of the House of Representatives demonstrates that the Congress is entitled to access to nonpublic files pertaining to pending or adjudicatory cases. Many congressional investigations have involved a review of such materials and, on several occasions in adjudicated cases, the courts have made use of the information obtained in such investigations.

Furthermore, Chairman Hyde's position would seem to be seriously eroded by his statement in his letter to Chairman Staggers, delivered October 20, to the effect that nonpublic files on pending matters would be made available "at any time" on matters involving allegations of wrongdoing. If, as Chairman Hyde maintains, it would

be permissible to grant access in cases where wrongdoing was alleged, then it is difficult to understand how, as Chairman Hyde also maintains, the granting of access to the same files would be illegal in cases where no wrongdoing was alleged.

### The PILLSBURY COMPANY, Petitioner,

v.

### FEDERAL TRADE COMMISSION, Respondent

No. 18825

United States Court of Appeals Fifth Circuit.

Jan. 7, 1966.

(354 F. 2nd 952)

Petition to review and set aside an order of the Federal Trade Commission. The Court of Appeals, Tuttle, Chief Judge, held that senate subcommittee proceedings, held before hearing examiner made initial decision on merits of divestiture case and in which senators questioned two of the four who participated as commissioners in final divestiture decision, deprived corporation involved of procedural due process, where thrust of senators' comments and questions was directed to the correctness of commission's approach in this specific case.

Order vacated and case remanded.

### 1. CONSTITUTIONAL LAW $\Leftrightarrow$ 318

Senate subcommittee proceedings, held before hearing examiner made initial decision on merits of divestiture case and in which senators questioned two of four who participated as commissioners in final decision, deprived corporation of procedural due process, where thrust of comments and questions was directed to the correctness of commission's approach in this specific case. Clayton Act, §§ 7, 11(c) as amended 15 U.S.C.A. §§ 18, 21(c); Administrative Procedure Act, § 1 et seq., 5 U.S.C.A. § 1001 et seq.; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

### 2. MONOPOLIES $\Leftrightarrow$ 24(5)

While Court of Appeals was required to vacate Federal Trade Commission divestiture order on ground that senate members had intruded into adjudicatory processes of Commission, court was convinced that passage of time coupled with changes of Commission personnel sufficiently insulated present members from any outward effect from what had occurred nearly 10 years earlier and that Commission was not permanently disqualified to decide the case, and it would accordingly remand the matter.

E. Barrett Prettyman, Jr., Joseph J. Smith, Jr., Washington, D.C., William J. Powell, Minneapolis, Minn., Philip F. Sherman, Gen. Counsel, Pillsbury Co., Minneapolis, Minn., on the brief, Hogan & Hartson, Washington, D.C., of counsel, for petitioner.

J. B. Truly, Asst. Gen. Counsel, Gerald Harwood, Frederick H. Mayer, Attys., F.T.C., Washington, D.C., James McI. Henderson, Gen. Counsel, for respondent.

Before TUTTLE, Chief Judge, JONES and ANDERSON,\* Circuit Judges.

TUTTLE, Chief Judge.

This is a petition by the Pillsbury Company to review and set aside an order of the Federal Trade Commission requiring Pillsbury to divest itself of the assets of Ballard & Ballard Company and of Duff's Baking Mix Division of American Home Products Corporation which the Federal Trade Commission found it had acquired in violation of § 7 of the Clayton Act, as amended, and further requiring Pillsbury to restore the acquired companies to the status of "effective competitors." Alternatively, Pillsbury seeks leave to adduce additional evidence pursuant to § 11(c) of the Clayton Act.

After the adoption by Congress of the Celler-Kefauver Antimerger Act of 1950, § 7 of the Clayton Act reads as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Supreme Court has construed the words "may be substantially to lessen competition" in *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510, in the following language:

"\* \* \* Congress used the words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties. (Footnote omitted) Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act."

The Commission found the following facts relating to the alleged violations:

On June 12, 1951, Pillsbury purchased the assets of Ballard & Ballard Company for around \$5,177,000 and began operating Ballard's business as part of its own organization. On March 7, 1952, Pillsbury acquired Duff's assets, including a 5-year-old baking mix plant at Hamilton, Ohio.

Both Pillsbury and Ballard milled, manufactured, and sold a full line of wheat flour products. Specifically, both companies produced "family flour" (sold for home use), "bakery flour" (sold for use by bakeries), "flour-base mixes" (labor-saving preparations such as cake mixes, pancake mixes, etc.), and "formula feed" (for animal consumption). Duff was only in the flour-base mix business, having been one of the pioneers in this field. Although the complaint alleged competitive injury in each of the specific product fields mentioned, the Commission's decision dealt with only three "lines of commerce:" "family flour," "flour-base mixes," and a general category which the Commission found appropriate to include encompassing

all of the products of Pillsbury and Ballard which it called "the wheat flour milling products industry." So much for the products involved.

As to the geographic market, both Pillsbury and Duff did business on a nationwide basis; therefore, it was charged that injury to competition in the flour-base mix industry throughout the United States occurred as a result of Pillsbury's acquisition of Duff. Ballard, although its business was more diversified than Duff's, as indicated, substantially restricted its operations to the southeast. The Commission therefore charged that Pillsbury's acquisition of Ballard resulted in unlawful injury to competition in (1) the family flour industry in the southeast and (2) the wheat flour milling products industry in the southeast. Additionally, it charged that Pillsbury's acquisition of both Ballard and Duff resulted in unlawful injury to competition in the flour-base mix industry in the southeast. For purposes of this case, the "southeast" is defined as "that part of the United States generally lying east of the Mississippi River and south of the Ohio and Potomac Rivers."

Because of the disposition we make of this petition no statement need be made of the specific findings of the Commission. These may be found in the published report, 15 FTC 1274. Suffice it to say that the Commission found that the acquisitions violated the Act, since the probable effect would be "substantially to lessen competition" in the described fields of industry. It further ordered divestiture of the acquired businesses.

This appeal raises several questions. The first is: Assuming the Commission's findings of fact are sustained, did Pillsbury violate § 7 of the Clayton Act, as amended, in (a) acquiring Ballard? (b) in acquiring Duff? The second question is whether some of the evidence which the Commissioner relied on, notably the Mintener Letters and the Commission surveys, was either so lacking in reliability or obtained in such a manner, violating procedural due process requirements, as to make it improper for the Commission to have based its conclusions even partially on such testimony. The third question is whether there were other violations of procedural due process of such a nature as to seriously infect the proceedings in such a manner as to require a reversal of the Commission's order. A fourth question is whether assuming none of the foregoing grounds of error requires a reversal, should the Court grant Pillsbury's motion to adduce additional evidence? Finally, is the Commission's order of divestiture legal?

Since a resolution of one of the attacks made under the procedural due process heading, if decided favorably to Pillsbury, would make unnecessary our consideration of any of the other matters, we shall deal with that first. It is the alleged improper interference by committees of Congress with the decisional process of the Federal Trade Commission while the Pillsbury case was pending before it. The alleged interference, we hasten to add, was not alleged improper influence behind closed doors but was rather interference in the nature of questions and statements made by members of two Senate and House subcommittees having responsibility for legislation dealing with antitrust matters, all clearly spread upon the record.

Briefly stated, the criticism of the conduct of the members of the House and Senate arises in this manner: following the filing of the complaint against Pillsbury on June 16, 1952, the Government undertook to make out its case in

\*Of the Second Circuit, sitting by designation.

chief. On April 22, 1953, the hearing examiner granted Pillsbury's motion to dismiss, taking the position that the record lacked figures showing the sales volume of the various Pillsbury products after the challenged acquisitions had taken place and that there were no "authentic or reliable" figures showing the sales and production of competing companies in the industry. On appeal, the Commission reversed by an order dated December 21, 1953. Thereafter, the Pillsbury Company undertook to introduce its evidence, and evidence for both parties continued to be received for the next several years.

During the months of May and June, 1955, hearings were held before the subcommittee on antitrust and monopoly of the Committee on the Judiciary of the United States Senate, and before the antitrust subcommittee of the Committee on Judiciary of the House of Representatives. At these hearings, Mr. Howrey, the then Chairman of the Commission, and several of the members of his staff, appeared including Mr. Kintner, the then General Counsel and later Chairman of the Commission, who wrote the final opinion from which this appeal is prosecuted.

It is to be noted that these hearings were held after the Commission had issued its interlocutory order, but long before the examiner made his Initial Decision on the merits, and, of course, before the Commission made its Final Decision in 1960.

In this interlocutory opinion of the Commission, reversing the dismissal of the Pillsbury case by the examiner, the Commission rejected an argument made by the Government (counsel supporting the complaint) to the effect that where a showing that a company in the field having a substantial share of the business of the industry acquires the assets of competitors so that the resulting merged entity would meet the "substantiality" test of Standard Oil Co. of California v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371, no further proof need be introduced in support of the complaint. This is what will be hereafter spoken of as the "per se" doctrine. The Commission in its order reversing the order of dismissal rejected this contention and expressly held that the per se doctrine did not apply under § 7, as amended.

The posture of the case at the time of Mr. Howrey's appearance before the Senate Committee, therefore, was that the Commission had found sufficient evidence to make a prima facie case of acquisition of competitors by a company having a substantial share of the business in the specified fields of industry, and a prima facie case of other conditions in the industry to make out an affirmative case of a "substantial lessening of competition." The Commission had, thus, given Pillsbury an opportunity to introduce countervailing evidence. Some had already been introduced and the prospects were that this would continue for a considerable period of time.<sup>1</sup>

When Chairman Howrey appeared before the Senate subcommittee on June 1, 1955, he met a barrage of questioning by the members of the committee challenging his view of the requirements of § 7 and the application of the per se doctrine announced by the Supreme Court in the Standard Stations case, Standard Oil Co. of California v. United States, 337 U.S. 293, 69 S. Ct. 1051, 93 L.Ed. 1371 (1949), in a Clayton Act § 3 case, to § 7 proceedings. A

number of the members of the committee challenged the correctness of his and the Commission's position in holding that a mere showing of a substantial increase in the share of the market after merger would not be sufficient to satisfy the requirement of § 7 of a showing that "the effect of such acquisition may be substantially to lessen competition."

Much of the questioning criticized by the petitioner here is in the nature of questions and comments by members of the committee in which they forcefully expressed their own opinions that the per se doctrine should apply and that it was the intent of Congress that it should apply.

The thrust of the comments and questions was that there was no need to carry on the long and complicated inquiry into all of the surrounding matters reflecting on the conditions in the industry if the Commission should determine that there was a substantial acquisition by a substantial number of the industry; that monopolies ought to be stopped quickly, and that Congress did not intend the Commission to apply the "rule of reason" in § 7 proceedings.

The questions were so probing that Mr. Howrey, the chairman of the Commission, announced to chairman Kefauver of the subcommittee that he would have to disqualify himself from further participation in the Pillsbury case (see quotations below).

Unfortunately, substantial portions of the question and answers must be quoted in order that our opinion can be understood. The persons present and the positions they occupied at the time of the hearing, and their participation in the Commission's final Order are here outlined:

On Wednesday, June 1, 1955, FTC chairman Edward F. Howrey appeared before the Senate subcommittee on Antitrust and Monopoly. This was, as already stated, after the remand of the Pillsbury proceedings to the hearing examiner by the Commission in 1953, and the Pillsbury matter was still pending before the hearing examiner at the time of this Senate hearing. In the afternoon session, chairman Howrey was accompanied by Robert P. Secrest, Earl W. Kintner, and Joseph E. Sheehy. Mr. Secrest was a Commissioner both at the time of the hearings in question and at the time of the Commission's final Pillsbury decision in 1960; Mr. Kintner was, at the time of the 1955 hearings, General Counsel to the Commission, and at the time of the Commission's final Pillsbury decision, he was chairman of the Commission (and, in fact, wrote the final Pillsbury decision itself); Mr. Sheehy was Director of the Bureau of Litigation at the time of the hearings and his then assistant, Mr. William C. Kern, was a Commissioner at the time of the final Pillsbury decision. Of the remaining two Commissioners in 1960, one, Commissioner Mills, did not participate in the final Pillsbury decision, since he had not heard the oral argument therein, and the other Sigurd Anderson, had no apparent connection with the 1955 hearings. Thus, of the four commissioners who actually participated in the final 1960 Pillsbury decision, two (Commissioners Secrest and Kintner) were substantially exposed to whatever "interference" was embodied in the hearings and one (Commissioner Kern) was at least indirectly "affected" by reason of his FTC status in 1955 as Secrest's assistant<sup>2</sup>.

The following quotations of questions and answers are taken from Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary,

<sup>1</sup> After the presentation of the parties' cases was completed the hearing examiner filed his Initial Decision on Feb. 1, 1959. The Commission's Decision and Order, largely following the examiner's Initial Decision, was entered on Dec. 16, 1960. This appeal followed.

United States Senate, Eighty-Fourth Congress (First Session) Part I.

[p. 84]

[Chairman Kilgore]: "On the problem of mergers Congress enacted the Celler-Kefauver Antimerger Act of 1950 primarily for the purpose of plugging a loop-hole in section 7 of the Clayton Act in order to slow down the merger movement and stop those which might substantially lessen competition. We wish to learn why mergers have continued at a great pace. Is it because section 7 is still not adequate to prohibit undesirable mergers? Is it because the law has not been vigorously enforced? Or can it be said that most of the mergers do not substantially lessen competition and should not be prohibited? This subcommittee hopes to throw light on this perplexing problem through testimony at these and succeeding days' hearings."

\* \* \* \*

[p. 125]

[Chairman Kilgore]: "In the legislative history of the Act and in the Attorney General's Committee report, it is emphasized that the tendency to monopoly provision would reach even a relatively minor acquisition in the light of a historical pattern of acquisition. What has the Committee done to combat this type of acquisition since the enactment of the law?"

[Mr. Howrey]: "Well, I think I agree with that wholeheartedly, that is, where there was been a pattern of minor acquisitions, and that is exactly what occurred in our Pillsbury case, where they had acquired a couple of small mills in Iowa and other mills in various parts of the country and there was a historical pattern of acquisitions of small companies."

And so, we agree, we follow that policy and work on it in our examination."

\* \* \* \*

[p. 126]

[Mr. Howrey]: "That is, if it [Standard Stations case] held, just as International Salt did under section 3, that just dollar volume was enough why, clearly, we did not—we rejected that in Pillsbury."

Now, if that held that quantitative substantiality meant share of the market, why, we rejected that in the Pillsbury case, standing alone. I mean, we rejected that theory as being applicable to all cases."

\* \* \* \*

[p. 128]

[Chairman Kilgore]: "Now, under the Pillsbury case, I think you pointed out that this company by acquiring two competitors, the second largest miller in the country, increased its share of the mix market in the Southeast from approximately 20 to 23 percent to 45 percent, which also put it in first place nationally in the mix field, its share increasing from 16 percent to 23 percent."

Shouldn't those figures have been practically sufficient to determine the issue of substantial lessening of competition or tendency to monopoly in the Southeast markets?

[Mr. Howrey]: "That is something that is a hard question for me to answer. The other facts are in the record."

I think that the share of the market, where it is of sufficient size, may in many cases be enough, standing by itself.

On the other hand, I can think in some instances where the share of the market might be insufficient, where there is plenty of remaining competition, and where there may have been other reasons for the merger, such as bad financial condition or something, which might involve a substantial share but still might not affect competition.

I think the goal in each case to determine whether the competitive pattern in the market has been involved and the percentage share of the market may in some cases be enough to show that and in other cases may not.

I hate to fix on any one percentage, because Judge Hand did that in the ALCOA case and has never been able to live it down.

[The Chairman]: "Yes."

Now, has the Commission found that the Department of Justice does not deem it necessary to consider all the factors relied upon by the Commission in its Pillsbury decision in deciding the legality of certain horizontal acquisitions.

[Mr. Howrey]: "I don't know, of course, what the Department of Justice thinks."

\* \* \* \*

[p. 137]

[Senator Kefauver]: "Then, Mr. Howrey, on the statement you made this morning, and as set forth in your opinion here, generally, insofar as dough mix or whatever it may be, in the southeastern part of the United States, Pillsbury had approximately 22 or 23 percent, and Duff and Ballard had 22 or 23 percent, and so somewhere they were winding up with between 45 and 48 percent of the dough-mix business in the southeastern part of the country. Those are rough figures, but that is substantially correct, is it not?"

[Mr. Howrey]: "Yes, that is substantially correct. I can give you the precise figures."

[Senator Kefauver]: "Well, they are in your opinion here. But that would be quite an obvious lessening of competition, particularly in view of the fact that there have been so many acquisitions prior to that time in the flour business. Wouldn't you have thought so?"

[Mr. Howrey]: "Yes, and I so said and so held."

[At this point, it should be noted that members of the Committee spoke as if the basic facts as to substantiality of shares in the market had already been determined. Actually, these facts were still being litigated before the Commission. The Commission's order which Howrey was being questioned about held merely that a *prima facie* case as to substantiality had been made out by the Government. Pillsbury had not yet had its turn at bat].

\* \* \* \*

[pp. 138-141]

[Senator Kefauver]: "It would seem to me that in a case where it is quite obvious and plain that there is a

lessening of competition and, therefore, a violation of section 7 of the law, that perhaps the companies themselves would be relieved of future headaches if, upon their refusal to hold off until after the litigation can be settled, the Department of Justice were asked to institute injunction proceedings.

[Mr. Howrey]: "I want to say, if I may, that the opinion we rendered was after the close of the Government's case, and we said in the opinion, and I should say in my testimony, because I am a quasi-judicial officer, and if anybody reads it, they will see that I made up my mind, and will ask that I disqualify myself and, I think, rightly so—I should qualify what I said before, that we so held that the history of acquisitions and the relative share, and so forth, when I characterized that, I meant to characterize that solely what they made was what we think is a *prima facie* case and, of course, Pillsbury has an opportunity to come back and is putting in its case right now so that the case has not been decided and I should not indicate that it has.

[Senator Kefauver]: "Mr. Howrey, that is another thing that worries me about this decision. I do not see how you can hardly ever get to an end of litigation if the decision of the Federal Trade Commission is merely that [a] *prima facie* case violation has been found, and then it goes eventually to the courts, where there is still more argument.

Did not Pillsbury already submit information at the time this decision was rendered?

[Mr. Howrey]: "Yes; but under long established procedures and more particularly under the Administrative Procedure Act, every person, every corporation, has his right to his day in court, and we have to decide these things on sworn testimony made upon the public record and under the procedures established by Congress.

So whatever delay occurs in that respect, I think is due to the type of jurisprudence under which this country lives.

But I should, if I may, just add to that, the record in the Pillsbury case at the close of the Government's case was not a big record. It was 3,500 pages.

Now, in an antimonopoly or antitrust case, unfortunately or fortunately that is considered a small record.

[Senator Kefauver]: "Well, I appreciate the fact that there must be some consideration given to size and the effect upon competition, and you must have some standards to go by. But is not this Pillsbury case a pretty good example of what your rule of reason is going to get you into?"

[Mr. Howrey]: "Yes; I think it is a very good example of it, and, of course, I conclude differently from you. I think it proves 100 percent that you can apply the rule of reason approach and have a relatively small record and relatively quick trial because, as I say, the case in chief was put in in 3,500 pages.

Now, the old Cement case went to 30,000 pages.

[Senator Kefauver]: "But, Mr. Howrey, it has just started. The thing has been going on ever since December 1953, and the hearing examiner is still hearing all this, that and the other, under your rule of reason. When does this terminate?"

[Mr. Howrey]: "Well, Pillsbury is putting in its case now, and I do not know just when they will finish. But you cannot try merger cases like you can try a personal injury case or a contract case or a promissory-note case."

All of the restraint-of-trade cases that we have on our books are long cases. I would say that the Pillsbury record is shorter than almost any other."

\* \* \* \* \*

[Senator Kefauver]: "This illustrates what I have been talking about, Mr. Howrey. I think Congress expected that where there was manifestly a lessening of competition, under the amended Clayton Act a merger should not take place.

Now, here in the Southeast, a section of the country, there is a lessening of competition because one firm had 20 and something percent and the other had 20 and something percent.

It would seem to me by applying the rule of reason and running the record up to 9,000 pages with more to come, and bringing in every possible economic factor, this, that, and the other, that the Federal Trade Commission is rather taking over the prerogative of congressional intent.

[Mr. Howrey]: "I would not think so, Senator. I think a careful study of the legislative history of amended section 7 requires the law-enforcement agency, and the quasi-judicial agency, to examine the market facts. I think the fact is that you did away with the test originally which was whether there was a lessening of competition between the acquiring and the acquired company. You did away with that test. We have to show that there is a lessening or maybe there is a probability of a lessening of competition in a segment of the market involved."

Now, the question is how are you going to show that. There is no one factor that I think conclusively demonstrates that. In one case you might have a very large share of the market involved and that might be enough.

In another case you might have a fairly substantial share of market involved, and that may not be enough.

There might be new entries into the business; there might be strengthening of competition.

If you are taking one factor—supposing you had taken the Kaiser-Willys, if I may—

[Senator Kefauver]: "Let us stay with Pillsbury, Mr. Howrey.

It was not the intention of Congress where there is obviously a combination which lessens competition in an area to have the Federal Trade Commission supplant the intent of Congress and decide whether Congress really meant to apply the law to this case, or Congress did not mean to apply it. And did not you, as a matter of fact, overrule your counsel and your staff in applying the rule of reason in the Pillsbury case?"

[Mr. Howrey]: "Well, we frequently overrule our counsel and our staff, that is what we are for. We are a quasi-judicial agency. If we were going to agree with our staff on every issue why, we would not, we should not, exist."

[Senator Kefauver]: "I am not arguing about your right to overrule it, but I am just asking if you did overrule them."

[Mr. Howrey]: "Well, I can answer that more specifically. The brief of Counsel in support of the complaint took two positions: It took the position first, that the

Standard Stations doctrine, which is sometimes called the quantitative substantiality doctrine—that means different things to different people; to some people it means the dollar volume involved, and to other people it means the share of the market involved—they said, citing the International Salt case, which was a section 3 case, it was the dollar volume; in Standard Stations they said some people say it is the share of the market.

They said under those two cases 'We feel we have made a *prima facie* case by showing those facts.'

They said, 'In addition we have shown all these other facts so that if that doctrine does not apply, we have shown that there are no new entries; that there is a pattern of acquisitions both by Pillsbury and by the industry as a whole; that there have been decreasing numbers of mills,' and so forth. So they took both positions.

They took the alternative positions in their brief. We agreed with the latter provision. We did say that we did not think section 3—what the courts had said about section 3—applied in section 7 cases for the reason I set forth this morning, and that is the record of Pillsbury, I do not think, would have constituted a violation of the Sherman Act.

[Senator Kefauver]: "You are aware, are you not, Mr. Howrey, that in the Consolidated Steel case, as a result of mergers, Consolidated held about 28 percent of the business in 1 section of the country. The Supreme Court held that was not a violation of the Sherman Act, but by a 4-to-3 decision. So 28 percent was getting mighty close to the point of violating the Sherman Act, in the opinion of the Supreme Court.

Yet you think 48 percent apparently would not?

[Mr. Howrey]: "Senator, I must not answer your characterization because I did not say that at all. I say the Consolidated Steel case was a typical case where it was not a Sherman Act violation but it would have been a section 7 violation and that, I think, is the situation in Pillsbury; that is the difference.

[Senator Kefauver]: "I just want to say, as one who has been very much interested in this, Mr. Howrey—and we are just talking in the sense of being the best of friends here, because I think we all have, I hope we all have, the same interests—that I have been rather shocked and surprised with the turn that has been given to the amendment to the Clayton Act, having lived with it since the early 1940's.

I became interested in this amendment way back when Judge Davis was Chairman of the Federal Trade Commission and Congressman Gwynne was a member of the House Judiciary Committee. It was never the intention of the Judiciary Committee of the House—and I am certain that the new amendment to section 7 of the Clayton Act should be enforced, as you have enforced it, on the basis of Sherman Act tests. It was intended that it was to be enforced on the basis of what the Congress had said about section 3 and the other sections of the Clayton Act.

Here, I cannot be sure, but it seems that you are applying no different treatment to section 7 of the Clayton Act than has always been applied to Sherman Act cases. That was just not the intent of many of us who were interested in this legislation.

[Mr. Howrey]: "I probably cannot convince you, but I would like to respond to your last statement: First I have just said that the Consolidated Steel case and Pillsbury case were two cases where the Sherman Act did not stop

the mergers, but where section 7 will. Now, there is one difference.

Now then, I do not know whether I should speak for Judge Gwynne, but he was on the Judiciary Committee and he wrote the report in the 80th Congress on this section and he joined in the Pillsbury opinion.

[Senator Kefauver]: "Maybe he made a mistake.

[Mr. Howrey]: "Well, maybe he did. I do not think he did. I think he is a very able lawyer.

[Senator Kefauver]: "I agree with you he is an able lawyer, and I was surprised when I saw his approval of the Pillsbury case.

[Mr. Howrey]: "Secondly, the Attorney General's committee approved the Pillsbury approach, with very few dissents. There were just a handful of dissents, and the committee represented, I think, a good cross section of legal and economic thinking of the country.

[Senator Kefauver]: "Well, Mr. Howrey, I disagree with you very strongly. I do not think the Attorney General's committee represented a cross section. Although it had some members who represent the public interest, I think it largely was loaded in favor of big business."

[Mr. Howrey]: "Well, I disagree with that one, Senator.

[Senator Kefauver]: "I also think that you, as chairman of a quasi-judicial body, have done some damage to your judicial position in joining in a report so that everybody can see just exactly how you feel about matters not before your Commission.

[Mr. Howrey]: "I would like to answer that, if I may.

There is a note at page 5 of the report that while I participated in the proceedings, and, as a matter of fact, I have a little written statement on that I would like to insert in the record, if I may.

[Senator Kefauver]: "Without objection it will be inserted.

What I am getting at is—

[Mr. Howrey]: "I know what you are getting at, and I have an answer to it.

[Senator Kefauver]: "Any lawyer can take this report and know exactly how Mr. Howrey's thinking goes about any antitrust problem that is discussed in it, and they are all discussed.

[Mr. Howrey]: "Well, I think the question you are asking about the Pillsbury decision is a much greater challenge to judicial processes, because I am sitting as a quasi-judicial officer in that case. That is a much greater challenge to judicial processes than anything I did by participating in this committee of the Attorney General.

[Senator Kefauver]: "Maybe you should not have answered my questions.

[Mr. Howrey]: "I think I will disqualify myself in the Pillsbury case for the rest of the case because of the inquiry which you have made about my mental processes in it.

But let me answer your other question, and I think I should because I do not think I can sit in a quasi-judicial capacity and—I think you have delved too deeply into the quasi-judicial mind in the Pillsbury matter.

But as a member of the Attorney General's committee, I attended its two general sessions. I was not a member of any task force or work group, and I did not attend any session of any such group.

I did not vote on specific issues nor did I participate in the discussion of any matter in which I had an interest before becoming a member of the Federal Trade Commis-

sion such as, for example, the quantity limit proviso. In fact, I was not in the conference room when the quantity limit proviso was discussed.

In addition, I call your attention to the following statement set forth on page 5 of the report:

While the Chairman of the Federal Trade Commission participated in the proceedings of the committee and signed the report, this should not be construed as a prejudgment of issues which may come before the Commission in individual cases.

Now, that seems to me to be an answer to the criticism that I participated in it.

The administrative agency is, as you know, a conglomerate. We are administrators one day; we are quasi-judicial officers the next.

We decide what complaints should issue; we vote on that, and then we sit and hear the evidence; that is the administrative procedure, that is administrative law, and it has grown up and has become one of the great branches of our Government.

So I do not see how, as an administrator, I could do anything else but participate in a study of the very subject which I was administering.

When the Attorney General invited me to participate, I, of course, accepted."

\* \* \* \* \*

[p. 179]

[Mr. Sheehy]: "Senator, I cannot control what the respondent will do. I can merely tell you we will put our case in in a period of about 6 weeks after we get them into the field. We put our Pillsbury case in in a period of 4 months, and the respondent has now finished approximately 1 year putting its case in, and we cannot control that. We can merely attempt to meet it as it comes in."

[Senator Kefauver]: "You mean the Commission has no control over how long a respondent has to put in his case?"

[Mr. Sheehy]: "No, sir; the Bureau of Litigation has no control. I am speaking solely for it."

[Senator Kefauver]: "Doesn't the Commission have some control over it?"

[Mr. Howrey]: "The hearing examiner has complete charge of the case under the statute."

[Senator Kefauver]: "You mean you have no right as a Commissioner to say speed up this case and give them 3 months to get it completed?"

[Mr. Howrey]: "No; we have no such right. Under the Administrative Procedure Act, the hearing examiner, as I say, has charge of the case, and we can hear it on interlocutory appeals, and we have, of course—"

[Senator Kefauver]: "It certainly seems to me that if monopoly is a bad thing, there ought to be some way of speeding up consideration of these cases so that the public and competitors won't be imposed on all this length of time where, while they are taking all the time they want, and more, probably, getting their defenses in. Then, after the Commission decides, then they have recourse to the courts. In the meantime, they have been maybe enjoying all of the benefits of monopoly. Is that correct?"

The foregoing quotations are not nearly all the references to the Pillsbury case in the course of the Committee hearings. This case or the Pillsbury name was referred to more than 100 times during the several hearings. We have here quoted only from a morning and afternoon session before the Senate subcommittee.<sup>2</sup>

[1] We think it is not necessary to consider the contention of petitioner here that the House hearings, conducted a little earlier, were also damaging to Pillsbury and were of such a nature as to deprive it of procedural due process. We conclude that the proceedings just outlined constituted an improper intrusion into the adjudicatory processes of the Commission and were of such a damaging character as to have required at least some of the members in addition to the chairman to disqualify themselves. We think it illuminating to quote Chairman Howrey's statement relative to his decision to disqualify himself, which he read into the record at the House subcommittee hearing. He said:

"\* \* \* I wrote the opinion [in the Pillsbury case]. It is still a pending adjudication; and because of some of the penetrating questions over on the Senate side, I felt compelled to withdraw from the case because I did not think I could be judicial any more when I had been such an advocate of its views in answering questions."

In view of the inordinate lapse of time in this proceeding, brought to undo what was done by mergers completed in 1951, we are naturally loathe to frustrate the proceedings at this late date. However, common justice to a litigant requires that we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the United States Senate, however innocent they intended their conduct to be, to arrive at the ultimate conclusion which they did reach.

As early as 1776 it was clear that ours was destined to be a government of laws and not of men. In their complaint against the abuses of the British crown, the framers of the Declaration of Independence included the statement that: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Although our Founding Fathers attempted to lay this question to rest on the federal level through Article III, Section 1 of the United States Constitution,<sup>3</sup> the emergence of administrative tribunals as the "fourth branch" of our federal government has revived the problem. Consequently, the federal judicial function, to the extent that it is exercised by administrative bodies, has not been able to make a clean break with the implicit influence inherent in Congressional control over tenure and salary.

But, as we all know, the problem is not as simple as this, since the arsenal of tools with which an administrative agency implements its broad statutory mandates also includes legislative rule-making power. It is the latter

<sup>2</sup> In addition to the pointed references to the Pillsbury litigation which were made at the hearings, the reports which emanated from each of the hearings contained further remarks directed to that case which were in much the same vein as the hearings. The reports were generally highly critical of the Commission's performance in enforcing the Celler-Kefauver Anti-Merger Act. They also were replete with references which dealt directly with the Pillsbury matter. See Interim Report the Antitrust Subcommittee (No. 5), House Judiciary Committee, 84th Cong., 1st sess. (1955); S. Rept. No. 132, 85th Cong., 1st sess. (1957).

<sup>3</sup> The same problem has always existed, of course, with regard to non-Article III courts.

power which sets regulatory agencies apart from courts of law and results in their functions being labelled "quasi-judicial" and "quasi-legislative."

We are sensible of the fact that, pursuant to its quasi-legislative function, it frequently becomes necessary for a commission to set forth policy statements or interpretative rules (to be distinguished from strict "legislative" rules, see generally 1 Davis, *Administrative Law* §§ 5.03-04 (1958) in order to inform interested parties of its official position on various matters. This is as it should be.

At times similar statements of official position are elicited in Congressional hearings. In this context, the agencies are sometimes called to task for failing to adhere to the "intent of Congress" in supplying meaning to the often broad statutory standards from which the agencies derive their authority, e.g., "substantially to lessen competition" or "to tend to create a monopoly." There are those who "take a rather dim view of [such] committee pronouncements as to what agency policy should be, save when this is incident to proposals for amendatory legislation." Friendly, *The Federal Administrative Agencies* 169 (Harvard University Press 1962). Although such investigatory methods raise serious policy questions as to the *de facto* "independence" of the federal regulatory agencies, it seems doubtful that they raise any constitutional issues. However, when such an investigation focuses directly and substantially upon the mental decisional processes of a Commission *in a case which is pending before it*, Congress is no longer intervening in the agency's *legislative* function, but rather, in its *judicial* function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences. See *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-268, 74 S.Ct. 499, 98 L.Ed. 681 (1954). "A first principle of Anglo-American jurisprudence, \* \* \* basic to the conception of due process in the procedural sense" is "that the ends to not justify the means." *Douglas, We The Judges* 354 (Doubleday 1956).<sup>4</sup>

To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case,<sup>5</sup> sacrifices the appearance of impartiality—the *sine qua non* of American *judicial* justice—in favor of some short-run notions regarding the Congressional intent underlying an amendment to a statute, unfettered administration of which was committed by Congress to the Federal Trade Commission (See 15 U.S.C.A. § 21).

<sup>4</sup> An excellent discussion of the dual nature of the administrative agency may be found in the Report on Congressional Oversight of Administrative Law of the Association of the Bar of the City of New York 5 Record ABNYC 11 (1950) which at p. 14 includes the following paragraph:

"We take it to be established principle that the legislature's task is confined to (1) establishing policy standards, (2) prescribing the structure and procedure of the agency, and (3) appropriating the necessary funds. It then becomes the agency's responsibility to administer the statute within the policy standards set forth by the legislature, through the methods of procedure established by the legislature, with such funds as the legislature has allotted. In this administering the act, the agency is to be free of legislative interference. Thus we find that legislative oversight of the agency should be essentially directed to the need for altering standards, structure and procedure, or budget through legislation."

<sup>5</sup> Note Senator Kefauver's statement, *supra*: "I have been rather shocked and surprised with the turn that has been given to the amendment of the Clayton Act, having lived with it since the early 1940's."

It may be argued that such officials as members of the Federal Trade Commission are sufficiently aware of the realities of governmental, not to say "political," life as to be able to withstand such questioning as we have outlined here. However, this court is not so "sohpisticated" that it can shrug off such a procedural due process claim merely because the officials involved should be able to discount what is said and to disregard the force of the intrusion into the adjudicatory process. We conclude that we can preserve the rights of the litigants in a case such as this without having any adverse effect upon the legitimate exercise of the investigative power of Congress. What we do is to preserve the integrity of the judicial aspect of the administrative process. See *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

We are fully aware of the reluctance expressed by the Supreme Court to disqualify the members of the Federal Trade Commission for bias or prejudice (a somewhat different basis than that urged here) in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010. There the Court seems to have placed its decision largely on the grounds of necessity. The Court said, "[T]his complaint could not have been acted upon by the Commission or by any other government agency," since "Congress has provided for no such contingency. [as disqualification] It has not directed that the Commission disqualify itself under any circumstances \* \* \*." The quoted language would be equally applicable here if the alternative to affirming the order were a judgment prohibiting consideration and decision by the Commission for all time. Such is not the case.

Bearing in mind the generally accepted principle enunciated by the Supreme Court in *United States v. Morgan* that the questioning of a judge as to his judicial processes "would be destructive of judicial responsibility," 313 U.S. 409, 422, 61 S.Ct. 999, 1004, we seek to find a solution that guarantees a fair tribunal and that does not frustrate the purposes of the law.

[2] Although we conclude that the course of the questioning before the Senate subcommittee in June 1955 deprived the petitioner of the kind of hearing contemplated by the Supreme Court in its opinion in *Offutt v. United States*, (1956) 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11, we are convinced that the Commission is not permanently disqualified to decide this case. We are convinced that the passage of time, coupled with the changes in personnel on the Commission, sufficiently insulate the present members from any outward effect from what occurred in 1955.

It is extremely unfortunate that this complaint, seeking divestiture by Pillsbury of two other companies acquired by it, has taken this long to reach the present stage of the litigation. It commenced as a pioneer case under the new amendment to the law. However, in the meantime much law has been written as to the quantity and quality of proof needed under a Section 7 complaint while it has been pending. See *Brown Shoe Co. v. United States*, 1962, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510; *United States v. Philadelphia National Bank*, 1963, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915; *United States v. El Paso Natural Gas Co.*, 1964, 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12; *United States v. Aluminum Company of America*, 1964, 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314; and *United States v. Continental Can Co.*, 1964, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953.

We conclude that the order appealed from must be vacated and the case remanded to the Commission. The Commission as now constituted can then determine what steps should then appropriately be taken in view of both

the lapse of time and the present state of the case law applying Section 7.

The Order is vacated and the case is remanded to the Commission.

## **FILE 42**

### **HOUSE COMMITTEE ON THE JUDICIARY**

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(42-A)

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C., March 27, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: I have your letter of March 9, 1973, concerning a survey being conducted by the Senate Subcommittee on Separation of Powers.

Although the minutes of the meetings of this Committee and its Subcommittees do not reflect the type of information requested in your letter, I have asked the staff of the Committee to provide me with whatever information is available that may be relevant to your inquiry. In addition, the present staff has also been in touch with both the former Staff Director and the former General Counsel to ascertain whether either of these former staff members recall any incident which would be relevant.

The information that has been obtained is reflected in Forms II and III which have been completed. There is no information relevant to Form I.

Since the staffs of each of the Subcommittees have been consulted with respect to this matter, this response covers not only the full Committee but the Subcommittees as well.

We are pleased to cooperate with you in this matter.  
With kindest personal regards, I am

Sincerely yours,

PETER W. RODINO, Jr., *Chairman.*

(203)

## (42-B)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
5/4/71	Attorney General John N. Mitchell	Attorney General	Civil Rights Oversight Hearings on Enforcement of Voting Rights Act.			(Although the Chairman requested personal testimony by the Attorney General on three occasions, the Department of Justice sent Acting Assistant Attorney General David Norman
5/28/71						
6/23/71						

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

By: Jerome K. Zefman  
Title: General Counsel 57709  
Extension

[Excerpt from the *Baltimore Sunday Sun*, May 23, 1971]

### MITCHELL SHUNS HOUSE HEARING

Washington, May 22—John N. Mitchell, the Attorney General, has turned down an invitation to testify before a House judiciary subcommittee investigating his enforcement of the Voting Rights Act.

Mr. Mitchell, who was sharply criticized by a federal court in Mississippi last month in connection with a voting rights case, was to have been the lead-off witness at hearings beginning Wednesday.

The committee chairman, Representative Don Edwards (D., Calif.) said today that Mr. Mitchell notified him he would be unable to attend but that David L. Norman, acting head of the civil rights division, would appear.

### LATER MEETING

"We will welcome, Mr. Norman," said Mr. Edwards, "but we will convene the subcommittee at the Attorney General's convenience some other time, because we would like to hear him."

Mr. Edwards said that the Department of Justice's action in the Mississippi case raises a question whether it

is carrying out the intent of Congress in administering the act.

The provision in which the subcommittee is particularly interested requires the seven Southern states covered by the act to get the approval either of a federal court in the District of Columbia or the attorney general before putting into effect any changes in their election laws or procedures.

In the Mississippi case the state submitted to Mr. Mitchell a law passed by its legislature eliminating party primaries in favor of an open general election and a run-off between top two candidates if one is needed. It got back a letter saying that the department was unable to make a determination and neither approved or disapproved.

Noting the lack of approval, the Fifth Circuit Court of Appeals said it was required to suspend the new law and in a biting opinion said that Mississippi's attempt to comply with the Voting Rights Act "has been met with an obtuse, patronizing failure by the federal government official to discharge the duties Congress placed on him."

Mr. Mitchell, who tried unsuccessfully to get Congress to repeal the provision when the act was extended last year, was quoted following a meeting with newsmen May 13 as saying that he viewed the provision as unenforceable.

Mr. Edwards said that he is concerned about the

administration of the provision because the subcommittee has received reports that new registration laws in some of the states covered by the act are wiping out gains made by Negro voters in recent years.

The act, first passed in 1965, is regarded by civil rights

groups as the most effective civil rights law passed by Congress.

Negro registration rose from 29 per cent to 52 per cent of those eligible to register in the five states where federal examiners were sent under the act.

## (42-C)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
11/18/71	Acting Secretary of Agriculture J. Phil Campbell	J. Phil Campbell	Civil Rights Oversight Hearings on Federal Government's Role in the Achievement of Equal Opportunity in Housing	11/30/71	J. Phil Campbell	(Although the Chairman requested personal testimony by the Acting Secretary of Agriculture sent Mr. James V. Smith, Administrator of the Farmers Home Administration (See attached correspondence))

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

By: Jerome H. Zeifman  
TITLED General Counsel 57709  
Extension

FILE 42:  
**DEPARTMENT OF AGRICULTURE,  
OFFICE OF THE SECRETARY,  
Washington, D.C., November 30, 1971.**

Hon. EMANUEL CELLER,  
Chairman, Committee on the Judiciary,  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your invitation to appear before the Civil Rights Oversight Subcommittee of the House Committee on the Judiciary. I am proposing that Mr. James V. Smith, Administrator of the Farmers Home Administration, appear and present the views of the Department of Agriculture before your Subcommittee on Wednesday, December 8, 1971.

Mr. Smith is responsible for the Farmers Home Administration programs and performance of the personnel

executing the programs under his administration. Pending the outcome of the hearing, I believe that the hearing and responsiveness on the part of the Administrator should be sufficient for your purposes. Accordingly, we would appreciate being relieved from having Mr. William T. Shaddick, Florida State Director for the Farmers Home Administration, and John Stewart, a County Supervisor in the State of Florida, appear before your Committee at this time. I believe Mr. Smith in his responsibility can fully represent the Department in the deliberations of your Committee.

I trust this arrangement is satisfactory to you.

Sincerely,

J. PHIL CAMPBELL,  
Acting Secretary.

## (42-D)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
5/15/72	Henry M. Ramirez, Chairman, Cabinet Committee on Opportunities for the Spanish Speaking	Henry M. Ramirez	Hearings by Civil Rights Oversight Subcommittee on Education of the Spanish Speaking	5/31/72 7/31/72	Henry M. Ramirez " " "	(See correspondence attached)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

By: *James L. Zeinman*  
TITLE: General Counsel 57709  
Extension

CABINET COMMITTEE ON OPPORTUNITIES  
FOR SPANISH SPEAKING PEOPLE,  
Washington, D.C., May 31, 1972.

Hon. EMANUEL CELLER,  
House of Representatives,  
Committee of the Judiciary, Washington, D.C.

DEAR CONGRESSMAN CELLER: I am sorry that I will be unable to appear and testify before your Subcommittee on Thursday, June 8, 1972 at 10 A.M. I will be out of town during those hearings.

Sincerely,

HENRY M. RAMIREZ,  
Chairman.

CABINET COMMITTEE ON OPPORTUNITIES  
FOR SPANISH SPEAKING PEOPLE,  
Washington, D.C., July 31, 1972.

CHAIRMAN, House Committee on Judiciary,  
Rayburn House Office Building,  
Washington, D.C.

DEAR MR. CHAIRMAN: I regret that I will be unable to respond to your invitation to appear and give testimony before the Civil Rights Oversight Subcommittee on the

reports of the U.S. Commission on Civil Rights pertaining to the education of Spanish-speaking people.

I was notified by the White House late last evening (Monday, August 4, 1972) that a situation had arisen which would require my immediate and personal attention for some days, to the detriment of an already heavy schedule of commitments.

I was gratified to learn that the three reports issued by the U.S. Civil Rights Commission, outlining the impact of educational practices on Mexican-American students, have occupied the interest and attention of the subcommittee, for, as you know, those studies were undertaken under my direction. I understand that they have already had good effect, as current testimony shows.

Sincerely yours,

HENRY M. RAMIREZ,  
Chairman.

[From Title 42, United States Code, The Public Health and Welfare, ch. 54]

§ 4302. Cabinet Committee on Opportunities for Spanish-Speaking People.

(a) Establishment.

There is hereby established the Cabinet Committee

on Opportunities for Spanish-Speaking People (hereinafter referred to as the "Committee").

**(b) Composition of Committee; requisites for selection of Chairman; appointment of Chairman.**

The Committee shall be composed of—

- (1) the Secretary of Agriculture;
- (2) the Secretary of Commerce;
- (3) the Secretary of Labor;
- (4) the Secretary of Health, Education, and Welfare;
- (5) the Secretary of Housing and Urban Development;
- (6) the Secretary of the Treasury;
- (7) the Attorney General;
- (8) the Director of the Office of Economic Opportunity;
- (9) the Administrator of the Small Business Administration;
- (10) the Commissioner of the Equal Employment Opportunity Commission most concerned with the Spanish-speaking and Spanish-surnamed Americans;
- (11) the Chairman of the Civil Service Commission; and
- (12) the Chairman of the Committee who shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who are recognized for their knowledge of and familiarity with the special problems and needs of the Spanish speaking.

**(c) Participation by other executive departments or agencies.**

The Chairman may invite the participation in the activities of the Committee of any executive department or agency not represented on the Committee, when matters of interest to such executive department or agency are under consideration.

**(d) Restriction on concurrent employment of Chairman; compensation; selection of alternate Chairman.**

(1) The Chairman of the Committee shall not concurrently hold any other office or position of employment with the United States, but shall serve in a full-time capacity as the chief officer of the Committee.

(2) The Chairman of the Committee shall receive compensation at the rate prescribed for level V of the Executive Schedule by section 5316 of Title 5.

(3) The Chairman of the Committee shall designate one of the other Committee members to serve as acting Chairman during the absence or disability of the Chairman.

**(e) Meetings.**

The Committee shall meet at least quarterly during each year. (Pub. L. 91-181, § 2, Dec. 30, 1969, 83 Stat. 838.)

**§ 4303. Functions of Committee; advice to governmental agencies; promulgation of studies and projects.**

(a) The Committee shall have the following functions:

(1) to advise Federal departments and agencies regarding appropriate action to be taken to help assure that Federal programs are providing the assistance needed by Spanish-speaking and Spanish-surnamed Americans; and

(2) to advise Federal departments and agencies on the development and implementation of comprehensive and coordinated policies, plans, and programs focusing on the special problems and needs of Spanish-speaking and Spanish-surnamed Americans, and on priorities, thereunder.

(b) In carrying out the functions, the Committee may foster such surveys, studies, research, and demonstration and technical assistance projects, establish such relationships with State and local governments and the private sector, and promote such participation of State and local governments and the private sector as may be appropriate to identify and assist in solving the special problems of Spanish-speaking and Spanish-surnamed Americans. (Pub. L. 91-161, § 3, Dec. 30, 1969, 83 Stat. 838.)

**§ 4304. Administrative powers of Committee.**

**(a) Rules and regulations.**

The Committee is authorized to prescribe rules and regulations as may be necessary to carry out the provisions of this chapter.

**(b) Coordination of activities with other Federal departments and agencies.**

The Committee shall consult with and coordinate its activities with appropriate Federal departments and agencies and shall utilize the facilities and resources of such departments and agencies to the maximum extent possible in carrying out its functions.

**(c) Agreements with other Federal departments and agencies.**

The Committee is authorized in carrying out its functions to enter into agreements with Federal departments and agencies as appropriate. (Pub. L. 91-181, § 4, Dec. 30, 1969, 83 Stat. 839.)

**§ 4305. Utilization of services and facilities of governmental agencies.**

The Committee is authorized to request directly from any Federal department or agency any information it deems necessary to carry out its functions under this chapter, and to utilize the services and facilities of such department or agency; and each Federal department or agency is authorized to furnish such information, services, and facilities to the Committee upon request of the Chairman to the extent permitted by law and within the limits of available funds. (Pub. L. 91-181, § 5, Dec. 30, 1969, 83 Stat. 839.)

**§ 4306. Compensation of personnel; temporary transfers for duty with the Committee.**

(a) The Chairman shall appoint and fix the compensation of such personnel as may be necessary to carry out the functions of the Committee and may obtain the services of experts and consultants in accordance with section 3109 of Title 5 at rates for individuals not in excess of the daily equivalent paid for positions under GS-18 of the General Schedule under section 5332 of Title 5.

(b) Federal departments and agencies, in their discretion, may detail to temporary duty with the Committee such personnel as the Chairman may request for carrying out the functions of the Committee, each such detail to be without loss of seniority, pay, or other employee status. (Pub. L. 91-181, § 6, Dec. 30, 1969, 83 Stat. 839.)

**§ 4307. Advisory Council on Spanish-Speaking Americans.**

**(a) Establishment; composition; requisites for selection to Council.**

There is established an Advisory Council on Spanish-speaking Americans (hereinafter referred to as the Advisory Council) composed of nine members appointed by the President from among individuals who are representative of the Mexican American, Puerto Rican American, Cuban American, and other elements of the Spanish-speaking and Spanish-surnamed community in the United States. In making such appointments the President shall give due consideration to any recommendations submitted by the Committee.

**(b) Function of Council; designation of Chairman and Vice Chairman; compensation of personnel.**

The Advisory Council shall advise the Committee with respect to such matters as the Chairman of the Committee may request. The President shall designate the Chairman and Vice Chairman of the Advisory Council. The Advisory Council is authorized to—

(1) appoint and fix the compensation of such personnel, and

(2) obtain the services of such experts and consultants in accordance with section 3109 of Title 5, at rates for individuals not in excess of the daily equipment paid for positions under GS-18 of the General Schedule under section 5302<sup>1</sup> of Title 5, as may be necessary to carry out its functions.

**(c) Compensation of Council members; reimbursement of expenses.**

Each member of the Advisory Council who is appointed from private life shall receive \$100 a day for each day during which he is engaged in the actual performance of his duties as a member of the Council. A member of the Council who is an officer or employee of the Federal Government shall serve without additional compensation. All members of the Council shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of such duties. (Pub. L. 91-181, § 7, Dec. 30, 1969, 83 Stat. 839.)

**§ 4308. Impairment of existing powers of other Federal departments and agencies.**

Nothing in this chapter shall be construed to restrict or infringe upon the authority of any Federal department or agency. (Pub. L. 91-181, § 8, Dec. 30, 1969, 83 Stat. 840.)

**§ 4309. Political activities of Committee and Advisory Counsel employees.**

Subchapter III of chapter 73 of Title 5 shall apply to the employees of the Committee and the employees of the Advisory Council. (Pub. L. 91-181, § 9, Dec. 30, 1969, 83 Stat. 840.)

**§ 4310. Authorization of appropriations; availability of funds of Interagency Committee on Mexican-American Affairs.**

There are hereby authorized to be appropriated for fiscal years 1970 and 1971 such sums as may be necessary to carry out the provisions of this chapter, and any funds

made available for expenses of the Interagency Committee on Mexican-American Affairs established by the President's memorandum of June 9, 1967, shall be available for the purposes of this chapter. (Pub. L. 91-181, § 10, Dec. 30, 1969, 83 Stat. 840.)

**§ 4311. Annual report to President and Congress.**

The Committee shall, as soon as practicable, after the end of each fiscal year, submit a report to the President and the Congress of its activities for the preceding year, including in such report any recommendations the Committee deems appropriate to accomplish the purpose of this chapter. (Pub. L. 91-181, § 11, Dec. 30, 1969, 83 Stat. 840.)

**§ 4312. Termination.**

This chapter shall expire five years after it becomes effective. (Pub. L. 91-181, § 12, Dec. 30, 1969, 83 Stat. 840.)

**REFERENCES IN TEXT**

"This chapter" referred to in text, was, in the original "this Act," meaning Pub. L. 91-181, which was approved Dec. 30, 1969.

[Excerpts from the Congressional Record, Jan. 8, 1969, p. 1958 et seq.]

**S. 740—INTRODUCTION OF BILL TO ESTABLISH THE INTERAGENCY COMMITTEE ON MEXICAN-AMERICAN AFFAIRS**

Mr. MONTOYA. Mr. President, today, on behalf of myself and Mr. Brooke, Mr. Cranston, Mr. Fannin, Mr. Goldwater, Mr. Harris, Mr. Hart, Mr. Hartke, Mr. Hughes, Mr. Jackson, Mr. Kennedy, Mr. McCarthy, Mr. McClellan, Mr. McGee, Mr. Metcalf, Mr. Mondale, Mr. Murphy, and Mr. Yarborough, I introduce a measure to establish the Interagency Committee on Mexican-American Affairs as a statutory agency. Since its creation by President Johnson as a Cabinet Committee on June 9, 1967, the presently functioning Interagency Committee on Mexican-American Affairs has sought to identify the needs of the Nation's second largest minority group, provide guidance toward Federal programs that are already in existence, and to recommend new programs to meet the unique requirements of the Spanish-speaking segment of our population.

During the past year and a half, the Interagency Committee has made numerous program contacts at all levels of government as well as with private industry and organizations. Guidance and action have been provided both to community projects and in individual hardship cases. Research has been conducted and materials published to acquaint the population with Spanish-speaking Americans and to guide this community in solving its many problems. The Interagency Committee placement service has referred well over 2,000 job applicants to both Government and private industry.

Areas of action covered by the Inter-agency Committee include education, health, welfare and poverty, housing, migrant labor, civil rights, immigration, military, employment, economic development, and research. While progress has been made in attaining economic independence for this deprived minority group, it becomes evident that a great need exists for a stable organization to assume responsibility for the orderly and successful completion of such transformation. I would like to note at this point

<sup>1</sup> So in original, probably should read 53S2.

that the Presidential order establishing the present Committee is scheduled to expire in June 1969.

The economic plight of the Spanish-speaking American community is the most basic problem and is largely a result of lack of educational opportunity. From this fundamental exclusion have stemmed the chronic problems in health, employment, housing, and related fields. By almost any socioeconomic measure, the Spanish-surnamed Americans, as a group, are very distant from the legendary American dream. In a phrase, one might sum up the Spanish-speaking American as being at the "bottom of the heap." In jobs—nearly 80 percent work in unskilled or semiskilled jobs—porters, laborers, elevator operators, and so forth; in education—most Spanish Americans barely complete the eighth grade and many are functionally illiterate as in Texas where 40 percent of the Spanish-speaking population is illiterate; in income—nearly 50 percent of all Spanish-speaking American families fall below the poverty line of \$3,200; in business—they own less than 1 percent of the U.S. businesses. Thus, the Spanish-speaking American is not only a numerical minority, his level of living and participation in the economy is so minor as to be difficult to measure.

The proposed Committee will expand upon the functions of the present Interagency Committee by involving all Americans of similar ethnic or cultural background.

Today, it is estimated there are 10 million Spanish-speaking Americans in the United States or 5 percent of the total population. Their diversity as a group is striking—ranging from native born Mexican Americans and Puerto Ricans to emigrants from Latin America. Their similarities in language and culture, however, are also striking.

The measure which I am introducing would provide for the alleviation of these conditions through a Central Government agency which can give impetus to an integrated Government-wide effort. I would cite examples of activities in which the Interagency Committee will engage:

The sponsoring of conferences similar to the ones held in the past dealing with problems of education and employment. Cooperation would be extended in conferences sponsored by other groups, involving government officials and private industry professionals as well as barrio residents and migrant workers, to hear complaints and make recommendations. The Committee will be concerned with the establishment of relationships with private groups and organizations who can offer solutions to specific problems.

The analysis of community needs as presented in conferences and to contact officers and development by the Committee staff of answers to these needs. The Committee would be responsible for consulting with and advising the cooperating agencies in policies and priorities, implementation of programs and enforcement of guidelines.

The continuation of research into problem areas. The Committee is envisioned as operating with a small staff of bilingual and bicultural specialists, and, therefore, is not intended to duplicate the massive data collection processes undertaken by Cabinet departments. Rather, the Committee will foster the necessary studies and will synthesize the information obtained from agencies and from hitherto untapped community resources so as to formulate viable policy leading to a more effective and efficient Government-wide approach.

In fulfilling its advisory and educative functions for both Government and community, the Committee will obtain information from departments and agencies on the extent, nature, operation, and provisions of ongoing or proposed programs of special relevance to the Spanish-surnamed community. The Committee, insofar as possible, will rely on the facilities and services of established agencies in such matters as general technical expertise. The Committee will endeavor to promote a better flow of information going from agencies to the community so that only special publications from the Committee itself will be necessary.

The establishment of an employment aid service to direct job applicants to available positions. This activity will involve a service to aid individuals in the preparation of proper application forms both for government and private industry; distribution of these forms to offices with outreach capability; assistance in procedures to lodge complaints of discrimination; and acquainting Government and private employers with methods and resources by which they can reach the talent within the community.

The stimulation of interest among Government agencies and private groups in funding technical assistance projects in localities which have demonstrated the need for and ability to organize such projects. The Committee will seek to conduct such activities through cooperating agencies rather than allocate new funds of its own. A portion of this task must be the total involvement of local groups and organizations.

Publicizing of all of these activities to encourage wider participation by private industry and organizations so that the burden of reform is ultimately lifted from the shoulders of Government and returned to the democracy of the people.

These are but a few of the activities through which the Interagency Committee, as proposed in my legislation, will serve to assist the Spanish-surnamed community. Basically, the Committee will not be a program agency in that it will not, itself, fund programs. Instead, it will act as a community advocate. Its constituency will be nationwide—wherever there are Spanish-speaking Americans—and its scope will be sufficiently broad to cover the problem areas in more than a piecemeal fashion. So often, in our Government, we have found that the right hand does not know what the left hand is doing simply because of the division of efforts necessitated by our size. And so often the very people who are in greatest need of information and attention are the very ones who are bewildered by the vastness of our bureaucracy, our economy, and our society.

We need not, and cannot, await a national crises to prod us into completion of a job barely begun. Within the next few years we should eradicate all traces of the institutionalized discriminatory practices which still work to exclude the Spanish-surnamed American from skilled and white collar positions and which still hamper his advancement. Once the lines of communication are open between the Spanish-surnamed community and American employers, the community will naturally and easily find its way to all levels and manners of employment.

The most basic demand being made of our economy—and perhaps our greatest test—lies in making capitalism really work for all citizens. This is the nuts and bolts of the problem we confront. One southwestern professor of economics, accused of radical thinking, stated that he considered the free enterprise system the best one possible—

so much so that he thought everyone should have a share in it.

We still have opportunity to prove that the free market economy and our whole system of Government can work for everyone, regardless of historical or ethnic origin. By the end of this century, this Nation must bring full economic participation to the Mexican-American community as well as to other underdeveloped groups of American citizens.

The establishment of an advocate Committee to aid in the uplifting of the Spanish-surnamed American is, I firmly believe, one of the tools we must utilize in this grand effort. I sincerely hope the Congress will act quickly upon this measure to insure the continuance of the Interagency Committee and its work which is not yet completed.

I ask unanimous consent to have the text of the bill printed at this point in the Record.

**THE VICE PRESIDENT.** The bill will be received and appropriately referred; and, without objection, the bill will be printed in the Record.

The bill (S. 740) to establish the Interagency Committee on Mexican-American Affairs, and for other purposes, introduced by Mr. Montoya, for himself and other Senators, was received, read twice by its title, referred to the Committee on Government Operations, and ordered to be printed in the Record, as follows:

#### S. 740

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is the purpose of this Act to assure that Federal programs are reaching all Spanish Americans and providing the assistance they need, and to seek out new programs that may be necessary to handle problems that are unique to the Spanish American community.

**SEC. 2.** (a) There is hereby established the Interagency Committee on Mexican-American Affairs (hereinafter referred to as the "Committee").

(b) The Committee shall be composed of—  
 (1) the Secretary of Agriculture;  
 (2) the Secretary of Commerce;  
 (3) the Secretary of Labor;  
 (4) the Secretary of Health, Education, and Welfare;  
 (5) the Secretary of Housing and Urban Development;  
 (6) the Secretary of the Treasury;  
 (7) the Attorney General;  
 (8) the Director of the Office of Economic Opportunity;  
 (9) the Administrator of the Small Business Administration;  
 (10) the Commissioner of the Equal Employment Opportunity Commission most concerned with Mexican-American Affairs; and

(11) such other officers of Federal departments and agencies as may be designated by the President or the chairman of the Committee (hereinafter designated) to serve at the pleasure of the person so designating such officer.

(c) The member referred to in subsection (b)(10) shall serve as chairman of the Committee. The chairman shall designate one of the other Committee members to serve as acting chairman during the absence or disability of the chairman.

**SEC. 3.** (a) The Committee shall have the following functions:

(1) to advise Federal departments and agencies regarding appropriate action to be taken to help assure that Federal programs are providing the assistance needed by Spanish-surnamed Americans; and

(2) to advise Federal departments and agencies on the development and implementation of comprehensive and coordinated policies, plans, and programs focusing on the special problems and needs of Spanish-surnamed Americans, and on priorities thereunder.

(b) In carrying out its functions, the Committee may foster such surveys, studies, research, and demonstration and technical assistance projects, establish such relationships with State and local governments and the private sector, and promote such participation of State and local governments and the private sector as may be appropriate to identify and assist in solving the special problems of Spanish-surnamed Americans.

**SEC. 4.** (a) The Committee is authorized to prescribe rules and regulations as may be necessary to carry out the provisions of this Act.

(b) The Committee shall consult with and coordinate its activities with appropriate Federal departments and agencies and shall utilize the facilities and resources of such departments and agencies to the maximum extent possible in carrying out its functions.

(c) The Committee is authorized in carrying out its functions to enter into agreements with Federal departments and agencies as appropriate.

**SEC. 5.** The Committee is authorized to request directly from any Federal department or agency any information it deems necessary to carry out its functions under this Act, and to utilize the services and facilities of such department or agency; and each Federal department or agency is authorized to furnish such information, services, and facilities to the Committee upon request of the chairman to the extent permitted by law and within the limits of available funds.

**SEC. 6.** (a) The chairman shall appoint and fix the compensation of such personnel as may be necessary to carry out the functions of the Committee and may obtain the services of experts and consultants in accordance with section 3109 of title 5, United States Code, at rates for individuals not in excess of the daily equivalent paid for positions under GS-18 of the General Schedule under section 5332 of such title.

(b) Federal departments and agencies, in their discretion, may detail to temporary duty with the Committee such personnel as the chairman may request for carrying out the functions of the Committee, each such detail to be without loss of seniority, pay, or other employee status.

**SEC. 7.** Nothing in this legislation shall be construed to restrict or infringe upon the authority or any Federal department or agency.

**SEC. 8.** There are hereby authorized to be appropriated such sums as may be necessary to carry out the functions of the Committee under this Act, and any funds heretofore made available for expenses of the Interagency Committee on Mexican-American Affairs established by the President's memorandum of June 9, 1967, shall be available for the purposes of this Act.

**SEC. 9.** The Committee shall, as soon as practicable, after the end of each fiscal year, submit a report to the President and the Congress of its activities for the preceding year, including in such report any recommendations the Committee deems appropriate to accomplish the purposes of this Act.

**MR. MURPHY.** Mr. President, I am pleased to join Senator Montoya in coauthoring this measure which would legislatively establish an Inter-Agency Committee on Mexican-American Affairs. The purposes of the Committee are:

First. To advise Federal departments and agencies regarding appropriate actions to assure that the Federal programs are providing the assistance needed by Spanish-surnamed Americans.

Second. To advise the Federal departments and agencies on the development of comprehensive and coordinated policies, plans and programs focusing on the specific problems of Spanish-surnamed Americans and to establish priorities thereunder.

Third. To mobilize government at all levels and the private sector to identify and attack the specific problems of Spanish-surnamed Americans.

As my colleagues know, the Mexican-American citizens are an important part of my State's population. Their contributions to my State and to the Nation are numerous and significant. In fact, Mexican Americans have contributed to every facet of California's life from Father Serra to the Mexican-American men who today are serving courageously in Vietnam. The last time I had seen statistics on the subject, Mexican-American soldiers had won more medals of honor than any other group. Despite their accomplishments there are problems confronting the Mexican-American community. I have been urging an increased effort to deal with the language problem which often confronts the Mexican-American children

in my State to turn the language barrier from a liability to an asset. I coauthored in 1967 the Bilingual Education Act. On Monday of this week I wrote a letter to President Nixon, Secretary Finch, and Bureau of the Budget Director, Mr. Mayo, urging full funding of this program. I ask unanimous consent that the copy of the letter that I sent to the President be printed in the Record at this point. In addition, the Los Angeles Times, which has been such a strong supporter of this needed program, and in an editorial entitled "Breaking the Language Barrier," urged the full funding of the bilingual program. I ask unanimous consent that this editorial be printed in the Record at this point. I also ask unanimous consent that excerpts of my testimony last year before the Senate Appropriations Committee dealing with bilingual program be printed in the Record.

There being no objection, the matter was ordered to be printed in the Record as follows:

**REMARKS OF SENATOR GEORGE MURPHY, REPUBLICAN, OF CALIFORNIA, BEFORE THE SENATE APPROPRIATIONS COMMITTEE**

**BILINGUAL PROGRAM**

The second program I wish to discuss and urge full funding is the Bilingual Education Act of 1967 which was also incorporated in the 1967 amendments to the Elementary and Secondary Education Act. I was pleased to co-author the bill. As the members of the committee probably know, this program was conceived and initiated in the Congress and was enacted over the opposition of the Administration. The program has now been embraced by the Administration, but the level at which funds have been requested indicates that the Administration's endorsement lacks the enthusiasm which the program needs. For, like the dropout prevention program, the program is of little value unless it is given life by adequate appropriations. The House Appropriations Committee also refused to appropriate any funds for this much-needed program.

The magnitude of the problem is evident by the following appalling statistics:

(1) Of 1.6 million Mexican-American children entering the first grade in the five Southwestern States, one million will drop out before they reach the eighth grade. In my own State of California, I understand that 50 percent of the Mexican-American children drop out by the eighth grade.

(2) Mexican-Americans in the United States have an average grade level of 7.1, compared to a grade level of 9.0 for Negroes and 12.1 for Anglo-Americans. Mr. Chairman, evidence and experience suggest that this need not be. Other countries have confronted the problems of educating bilingual children and some nations such as the United States and certain parts of Africa have insisted that instruction be in the national language only. Many countries have successfully solved the problem by instructing first in the youngsters' mother tongue and as soon as possible, instructing the youngsters in the national language. Last year, Governor Reagan of California signed into law legislation that would permit instruction in Spanish in California's public schools.

It would appear that even Russia has a more enlightened policy than the United States in its approach to the problem. I understand that approximately 50 per cent of the Russian population have a mother tongue other than Russian. In 1938, the Russian Government reversed its insistence that instruction be in Russian and permitted instruction in the mother tongue. As a result I am told there has been a great increase in literacy as well as the use of the Russian language. Similar experiences have occurred in Mexico, the Philippines and in Puerto Rico. In the latter case, the United States at one time insisted that the educational system in Puerto Rico instruct in English, notwithstanding the fact that the mother tongue of the children was Spanish. Mr. Bruce A. Gaarder of the Office of Education in testifying before the Senate Special Subcommittee on Bilingual Education, outlined the experience which was documented in a study by Columbia University that occurred in Puerto Rico as follows:

"The Columbia University researchers, explaining the astonishing fact that these elementary school children in Puerto Rico—poverty-stricken, backward, 'benighted', beautiful Puerto Rico—achieved more through Spanish than continental United States children did

through English, came to the following conclusion, one with extraordinary implications for us here . . .

"The conclusion is, in sum, that if the Spanish-speaking children of our Southwest were given all of their schooling through both Spanish and English, there is a strong likelihood that not only would their so-called handicap of bilingualism disappear, but they would have a decided advantage over their English-speaking schoolmates, at least in elementary school, because of the excellence of the Spanish writing system. There are no reading problems, as we know them, among school children in Spanish-speaking countries."

A Florida effort points not only to substantiation of the Puerto Rico experience, but also to its expansion. In 1963, public schools in Dade County, Florida, embarked on a model bilingual education program. Although final statistical data is not available, preliminary reports are most encouraging. Perhaps even more significant are the results regarding the English-speaking children in the bilingual program. Amazingly, these English-speaking children are doing better in English than their counterparts who were instructed in English. Not only does the bilingual program have the potential and promise of successfully attacking education problems of youngsters whose mother tongue is other than English, but, apparently, the Florida Study is correct, the "implications for education are extraordinary."

Mr. Chairman, I recognize the fiscal limitation under which we are laboring, but I urge you to see that these two important programs which will lay the groundwork for exciting breakthroughs in education be permitted to move ahead. Society can afford to do no less.

**BREAKING THE LANGUAGE BARRIER**

**Issue: Will Congress this year again fail to provide sufficient financial support for bilingual teaching programs in U.S. schools?**

Congress in 1967 finally decided to help break down the language barrier that so limits the educational opportunities for non-English speaking students.

To date, however, appropriations have fallen far short of the \$30 million authorized for bilingual education programs. The \$7.5 million thus far allocated has not made much of a dent in the barrier.

Millions of Mexican-American youngsters have dropped out of school simply because they couldn't understand their teachers. Half of all Mexican-American students in California schools get no farther than the eighth grade according to Sen. George Murphy (R-Calif.), one of the sponsors of the bilingual teaching bill.

The Times urges Congress not only to appropriate the full amount authorized but also to consider voting additional funds to assist these educationally deprived children.

Lack of instruction in their native tongue is a major factor in the average grade level of 7.1 for Mexican-Americans, as compared to 9.0 for Negroes and 12.1 for Anglo-Americans.

Los Angeles schools have been making an increasing effort at bilingual teaching, with almost all the money coming out of local and state funds. Instruction in Spanish is now given to more than 5,000 students in city schools, mostly at the secondary level.

But money is not the only problem.

The number of Spanish-speaking teachers is far less than the demand, a problem that the Ford Foundation will try to solve with a \$325,000 grant for language training program in education schools.

Resistance to bilingual teaching also has been noted among some principals and administrators, although such programs have been officially endorsed by school districts.

The answer is more and better bilingual teaching. Although additional funds will be required, the cost will be minor in comparison to the high price society pays for every dropout.

**LETTER TO PRESIDENT NIXON FROM SENATOR GEORGE MURPHY**

**DEAR MR. PRESIDENT:** I want to call your attention to and urge your support for full funding of the Bilingual Education Act.

"The critical need for this program is evident by the following appalling statistics: (1) Of the 1.6 million Mexican-American children entering the first grade in the five southwestern states, one million will drop out before they reach the eighth grade. (2) Mexican-Americans in the United States have an average grade level of 7.1 compared to a grade level of 9.0 for Negroes and 12.1 for Anglo-Americans.

In my own state of California, I understand that fifty percent of the Mexican-American children drop out by the eighth grade. Yet,

evidence and experience suggest that this need not be. Many countries of the world have successfully solved the problem by instructing first in the youngster's mother tongue and as soon as possible instructing the youngster in the national tongue.

California is moving to attack this serious problem and to reverse the above appalling statistics. In 1967, Governor Reagan signed into law needed and enlightened legislation that permits instruction in Spanish in California's public schools.

Since the enactment of the Bilingual Education Act in 1967, which incidentally was conceived and initiated by the Congress over the opposition of the former Administration, there has been the greatest of interest in California in the promise and potential of the program. Last year, the Johnson Administration gave token endorsement to the program requesting only ten million dollars of the thirty million authorized. The House of Representatives failed to appropriate a single cent. Thereafter, I personally pleaded with the Senate Appropriations Committee to reverse the shortsighted action of the House and to fund the program. As a result, the Senate Appropria-

tions Committee provided ten million dollars and we were able to hold 7.5 million dollars in conference.

Because of the critical nature of the problem, I urge your Administration to enthusiastically get behind the Bilingual Education Program and support its full funding. As a co-author of the Bilingual Education Act, I am confident that such an investment and such an endorsement by the Administration will be wise for the nation and will make a significant difference in the lives of many children.

---

*Note by the Subcommittee on Separation of Powers: See also the testimony of William H. Maramoto before the Select Committee on Presidential Campaign Activities, on Wednesday, November 7, 1973, Hearings, Book 13, pp. 5273-5326, especially pp. 5277, 5278, 5302, 5313, 5316, and 5323, and related exhibits as reproduced in Book 13, especially Exhibit 262-39 at page 5649.*

(42-E)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tording to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In connection with its hearings on H. R. 4249, and other proposals, to extend the Voting Rights Act of 1965, the Chairman invited Attorney General John N. Mitchell to appear and testify on May 14, 1969. The Attorney General declined to appear and subsequently declined four other invitations. Eventually, on June 26, 1969, the Attorney General did appear and testify.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 42

Submitted by: (Comm/Subcomm)

By: Joe M. Zefran  
Title Asst. Counsel 57709  
Extension

(214)

(42-F)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Previous information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

On September 12, 1972, Chairman Emanuel Celler communicated with Attorney General Richard G. Kleindienst requesting information concerning Federal Grand Jury Procedures. (See attached correspondence.) Receipt of this letter was never acknowledged by the Department of Justice and no reply was furnished. Subsequently, on September 21, 1973, Chairman Peter W. Rodino, Jr. renewed the request originally initiated by former Chairman Celler. (See attached correspondence.) By letter dated March 22, 1973, Assistant Attorney General McKevitt replied to the letter of February 21, 1973.

Separation of Powers Subcommittee SURVEY,  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pacore, Asst. Counsel  
225-8421; 8422

FILE 42

Submitted by: (Comm/Subcomm)

By: George M. Zafraas  
Title: General Counsel 57709  
Extension

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
Washington, D.C., September 12, 1972.

Hon. RICHARD G. KLEINDIENST,  
Attorney General of the United States, Department of Justice,  
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: I write to you about a matter of mounting national concern affecting public confidence in the operation of the Federal justice system. The subject is the Federal grand jury process, and more particularly the policies and practices of the Department of Justice governing the institution and conduct of grand jury investigations.

In the course of public hearings in November 1971, I inquired of Associate Deputy Attorney General Harlington Wood, Jr., whether any written guidelines had been promulgated within the Department to govern the nature and scope of grand jury investigations. I also inquired whether or not rules or written standards had been promulgated within the Department of Justice to govern the conduct of an attorney for the Government in the course of a grand jury investigation. ("Federal Jury Service," Hearings before Subcommittee No. 5, House Committee on the Judiciary, 92d Cong., 1st sess., pp. 64-66.)

In a response dated November 30, 1971, you indicated that the only written guidelines that exist apply in the area of granting immunity. You indicated that no other written guidelines exist to govern the conduct of grand jury investigations. Your letter also indicated that in a number of subject areas the decision as to whether or not a grand jury investigation is to be initiated is made at the Department of Justice in Washington rather than by the local United States Attorney.

You also stated that in particularly important or significant cases the decision whether to initiate a grand jury investigation "involves" the Attorney General of the United States.

Thus, there are no written rules or guidelines prescribing the basis upon which a decision whether or not to initiate grand jury proceedings must be based. Nor are there textual instructions governing the choice of the district in which a particular grand jury investigation shall be instituted.

The Rules of Criminal Procedure for the United States Courts which govern, in part, the operation of Federal grand juries have remained largely unchanged since 1948. I have today suggested to the Chief Justice that the Judicial Conference of the United States undertake an

immediate review of these Rules and issue a report and recommendations thereon no later than the Spring of 1973.

The confidence of our citizens in the Federal judicial system demands an effective and fair Federal grand jury process. I, therefore, urge that you direct an immediate review of Departmental policies and practices in furtherance of the adoption of specific written guidelines and rules to govern the initiation and location of Federal grand jury investigations.

With every good wish,  
Sincerely yours,

EMANUEL CELLER,  
*Chairman.*

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C., February 21, 1973.*

Hon. RICHARD G. KLEINDIENST,  
*Attorney General of the United States,*  
*Department of Justice, Washington, D.C.*

DEAR MR. ATTORNEY GENERAL: I would like to express

to you my deep concern with the matter of public confidence in the operation of the Federal grand jury process.

In reviewing the past activities of this Committee, I note that the former Chairman, Representative Emanuel Celler, wrote to you on September 12, 1972, urging that you direct immediate review of departmental policies and practices in furtherance of the adoption of specific guidelines and rules to govern the initiation and location of Federal grand jury investigations.

I note that to date the Committee has received no reply to the letter of September 12, 1972. As a result, I would like respectfully to request that this matter be given prompt attention by the Department of Justice.

With every good wish, I am  
Sincerely,

PETER W. RODINO, Jr.,  
*Chairman.*

*Note by the Subcommittee on Separation of Powers: Assistant Attorney General McKeown's letter of March 22, 1973, mentioned in Survey Report Form 42-F, was not received for publication herein.*

## **FILE 45**

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### **JOINT ECONOMIC COMMITTEE SUBCOMMITTEE ON PRIORITIES**

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## (45-A)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
November 17, 1972	Department of HUD	Sec. Romney	Housing subsidies and Housing policies	11/27/72 Romney initially agreed, then declined	Ltr. from Sec. Romney followed telephone call from aide.	Romney's letter stated it would be inappropriate for him or any other HUD official to testify at that time because of multiple resignations by HUD officials, including that of Romney's.

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm) Joint Economic

Committee, Subc. on Priorities

By: Jasinowski

Title:

Extension

53171

FILE EE: 45

(219)

## (45-B)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
December 8, 1972	Dept. of Transportation	Sec. John Volpe * Sec. Volpe agreed to send Asst. Sec. Robt. H. Cannon to testify, and this was acceptable to the Committee	Assess fed. govt. support for development of a commercial supersonic transport plane (SST)	12/18	Informed by DOT messenger on day before hearings that Cannon would not be able to appear.	No reason given. Department said to be "in transition".
December 8, 1972	Federal Aviation Administration	Administrator John H. Shaffer * Adm'r. Shaffer agreed to send Director of SST Frampton E. Ellis to testify, and this was acceptable to the Committee	Same as above	12/20	Informed by DOT messenger that Ellis would not be able to appear.	Same as above
December 8, 1972	Civil Aeronautics Board	Chairman Secor D. Browne	Same as above	12/20	Browne originally accepted the Committee's invitation, then declined.	Browne pleaded "long-standing family obligations" when he informed the Committee that he would not be appearing.

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE BB:45

Submitted by: (Comm/SubComm) Joint Economic

Committee, Subc. on Priorities and Econ. in Govt

By: Richard A. Warren

Title: Legis. Asst. to Sen. Provinse, Sub 55, Extension

(220)

## FILE 50

### COMPTROLLER GENERAL OF THE UNITED STATES

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(50-A)

COMPTROLLER GENERAL OF THE UNITED STATES,  
GENERAL ACCOUNTING OFFICE,  
*Washington, D.C., April 6, 1973.*

B-107366.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,  
U.S. Senate.*

DEAR MR. CHAIRMAN: In accordance with your request of March 22, 1973, we are providing you with information concerning problems encountered by the General Accounting Office in gaining access to records maintained by the various departments and agencies of the executive branch. The individual cases are attached.

The number of instances whereby GAO has received absolute denial of access to a document is quite rare. To a much greater extent, our reviews have been hampered and delayed by the time-consuming processes employed by the various organizational elements within the executive agencies. The more common difficulties are protracted delays, screening of files so that we are never sure whether we are being denied pertinent documents, and executive agency regulations or pronouncements which limit our access to certain types of documents. These executive actions, while they fall short of absolute denial, have a crippling effect on our audit and review activities.

If I can be of further assistance, please let me know.

Sincerely yours,

ELMER B. STAATS,  
*Comptroller General of the United States.*  
(223)

**(50-B)**

(GENERAL PROBLEMS IN GAINING ACCESS TO RECORDS)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

The number of instances whereby GAO has received absolute denial of access to a document is quite rare. To a much greater extent, our reviews have been hampered and delayed by the time-consuming processes employed by the various organizational elements within and between the executive agencies. The more common difficulties are protracted delays, screening of files so that GAO staff can never be sure whether they are being denied pertinent documents, and executive agency regulations or pronouncements which limit GAO's access to certain types of documents. These executive actions, while they fall short of absolute denial, have a crippling effect upon GAO's audit and review activities.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 50

Submitted by: (Comm/Subcomm)

By: Comptroller General  
Title:

Extension

(224)

## (50-C)

(FEDERAL DEPOSIT INSURANCE CORPORATION)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
Various requests starting as far back as 1950	Chairman of the Board of Directors	Complete and unrestricted access to all of the Corporation's records deemed necessary to carry out our audit responsibility. For example, the efforts and reports of the Corporation's examination division sometimes contain opinions, conclusions, and recommendations of vital importance to the conduct of the Corporation's affairs. Without full and complete access to these reports and any supporting records there is no assurance that all important factors underlying the decisions and actions of the Corporation have been made available for our examination nor are we in a position to evaluate the effectiveness of the examination division's work or the degree of reliance which may be placed on its efforts.	2/2/65	Chairman of the Board of Directors	Although all Government capital was withdrawn from the Corporation by August 30, 1948, it is authorized to borrow up to \$3 billion from the United States Treasury. Our Office is required by section 17 of the Federal Deposit Insurance Act (12 U.S.C. 1827) to conduct annual audits of the Corporation. However, we have been unable to fully discharge our responsibilities because FDIC has not permitted us unrestricted access to examination reports, files and other records relative to the banks which it insures.
More recent request dated 1/14/65					<p>It is the position of the Corporation that our right of access to its records is limited to those administrative or housekeeping records pertaining to its financial transactions. It is GAO's position that, because the financial condition of the Corporation is inseparably linked with the manner in which it supervised the banks which it insures, we cannot completely carry out our audit responsibility without evaluating the significance of its contingent insurance indemnity obligation for the banks.</p> <p>The access to records problem experienced with FDIC has been reported in our annual reports to the Congress. Both the Corporation and GAO believe the present law supports their respective positions. Repeated efforts to resolve the matter administratively have been unsuccessful.</p>

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 50

Submitted by: (Com/Subcom)

By: *Comptroller General*  
Title:

(225)

## (50-D)

INSPECTOR GENERAL REPORTS - DOD

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
6/5/67	Deputy Secretary of Defense	<p>Reports resulting from internal reviews of administrative practices and activities made by the Inspector General. These reports are needed to fully discharge our statutory responsibilities to determine the adequacy of the agencies internal control over operations.</p> <p>In 1958 extensive congressional hearings were held on the refusal of the Air Force to grant us access to an Inspector General Report. In June 1967 the Comptroller General explored the possibility of having the Department of Defense (DOD) modify its position in this area.</p>	11/16/67	Deputy Secretary of Defense	<p>DOD has taken a long standing position that GAO will be given "complete factual summaries" of Inspector General Reports, but may not have access to the reports themselves, on the ground that the reports include frank statements and the release of the reports would discourage candor. The Deputy Secretary of Defense stated that the files contained such sensitive documents as war plans, future budget data, etc. and that unrestricted access to DOD files would place GAO in a role of participating in the Department's ongoing management processes and decisions.</p> <p>In the Comptroller General's letter of June 1967 it was emphasized that the Inspector General and other review groups engage in reviews of management activities and that it was reports on this type of activity that GAO was primarily interested in obtaining. It was further mentioned that we were not interested in reports dealing with criminal activities or military discipline.</p> <p>Our lack of confidence in the completeness of summaries of inspection general reports generally has led us to avoid requesting them and to attempt to develop information on the subject from other sources. It is possible that the nonavailability to us of full Inspector General reports has resulted in significant unnecessary or duplicate work by our office.</p>

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 50-

Submitted by: (Comm/Subcomm)

By: Comptroller General  
FILE:

(226)

## (50-E)

(INTERNAL REVENUE SERVICE - GENERAL)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
11/16/67	Discussion between Comptroller General and Commissioner of IRS	Records necessary to permit an effective review of IRS operations and activities.	5/20/68 transmitted to us on 6/6/68	Chief Counsel of IRS	IRS took the position that GAO could not be given access to records for the purpose of reviewing administration of the internal revenue laws.
11/01/68	Secretary of the Treasury	Same as above. Letter from the Comptroller General disputed the IRS position that it could not, under the law, grant GAO access to records.	12/5/68	Secretary of the Treasury	The Secretary of the Treasury endorsed the above IRS position.  Although GAO continues to be denied access to records requested for reviews of IRS operations, it has been permitted to look at information on individual taxpayers as part of its reviews of the operations of other Federal Agencies. Also, we have conducted reviews of IRS for the Joint Committee on Internal Revenue Taxation. Under this arrangement we have had complete cooperation of the service.

Separation of Powers Subcommittee SURVEY.  
 U.S. SENATE, March 5, 1973  
 contact: Joe L. Pecore, Asst. Counsel, 225 Bldg, Bldg 21

Submitted by: (Comm/Subcomm)

By: Comptroller General  
 Title:

## (50-F)

(OCCUPATION COSTS IN BERLIN)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
5/25/70 (From the Deputy Director, International Division)	Assistant Secretary of State, Bureau of European Affairs	Records relating to United States occupation costs in Berlin.	3/18/71	Assistant Secretary of State, Bureau of European Affairs	The Assistant Secretary of State refused us access to the records we requested. His refusal and the reasons therefor are contained in a classified letter dated 3/18/71. The matter was reported to appropriate congressional committees in a classified SECRET report dated 4/20/71 (B-169960).

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 50

Submitted by: (Com/Subcom)

By: Comptroller General

## (50-G)

(DEPARTMENTS OF DEFENSE AND STATE REFUSAL TO ALLOW GAO TO VISIT VIETNAM BASES)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/21/70	Verbal request to the Commander, U.S. Military Assistance Command, Vietnam	Permission was requested to visit the Thai and Korean camps in Vietnam. We wanted to observe the amounts of United States equipment and supplies provided to the Thai and Korean troops and to talk with United States military liaison personnel stationed at the camp as to their duties and responsibilities.	See column (6)	See column (2). Also see column (6) for refusals that were received.	We were informed that visits would not be authorized without prior clearance from higher headquarters and that our request should be submitted in writing which we did on 9/25/70. Later, United States military and Embassy officials in Bangkok and Saigon denied us permission on the basis that GAO should have no need to consult host country officials or agencies and that such contacts could have adverse consequences (in our request of 9/25/70 we stated that we did not intend to talk to any Thai personnel during our visit to the Camp).
12/16/70	Letter sent to the Secretary of State from the Comptroller General	The Comptroller General pointed out in his letter of 12/16/70 that such inspections are essential if GAO is to carry out its responsibilities for evaluating the effectiveness and improving the management of United States programs.			Subsequent to the above (in November and December 1970), messages were sent out from the Departments of State and Defense stating that GAO representatives should be discouraged from consulting host country officials or agencies.  On February 5, 1971, our Saigon office requested permission to visit the Korean Base Camp at Qui Nhon, Vietnam. On March 6, 1971, a message from the Secretary of Defense disapproved the request.

Separation of Powers Subcommittee SURVEY.  
 U.S. SENATE, March 5, 1973  
 Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

Submitted by: (Comptroller/Subcomm)

By: Comptroller General  
 Title: Comptroller General

(229)

## (50-H)

("INTELLIGENCE COMMUNITY")

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
April 9, 1971	"Intelligence community". (specific identification is classified)	Studies and other information which had been used by DOD as a basis for testimony by the Director of Defense Research and Engineering regarding the levels of Soviet Union research and development expenditures. This data was needed to respond to a request from a congressional committee for a comparison of United States and Soviet Union expenditures for military research and development.	May 5, 1971 See Column (2)		<p>The May 5 letter contained little information as to the reasons for the "intelligence community's" refusing us access. We were later informed that the records were not being made available as it would establish a precedent.</p> <p>We did, in the end, obtain a copy of one of the reports we were seeking. The report was not too useful but it did cite other "intelligence community" reports which may have been more informative. However, because of the time required to obtain the first report and our report deadline, we did not request additional reports.</p> <p>The above problem was reported to the applicable congressional committee in our report to them dated July 23, 1971 (B172553).</p>

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 50

Submitted by: (Comm/Subcomm)

By: Comptroller, Financial  
Title:

(230)

## (50-I)

COUNTERVAILING DUTIES)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
1/7/72	Secretary of Treasury--Department of the Treasury and Bureau of Customs	Files dealing with complaints or investigations which did not result in the imposition of a counter-vailing duty or were still under consideration and files pertaining to countervailing duties that were imposed. These files were requested to enable us to respond to a request received by the Office from a Congressional member.	5/12/72	Assistant Secretary of the Treasury	In the reply to our request, the Assistant Secretary wrote that "The Treasury regards participation by your Office in the areas of our substantive statutory responsibilities under the Tariff Act of 1970 as inappropriate. It is the Treasury's responsibility to inform the Congress, including the appropriate committees such as the Committee on Ways and Means of the House and the Committee on Finance of the Senate, of our approach to substantive matters and we shall do so as the need arises." The above refusal was reported to the requester in our letter report to him dated 1/5/73 (B-145797).

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 Bldg, Rm 8421

FILE 50

Submitted by: (Comm/Subcomm)

By: *Conradeller* General  
Title:

(231)

## (50-J)

(ECONOMIC STABILIZATION PROGRAM)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
/5/72	Deputy Commissioner, Internal Revenue Service, Department of Treasury	General background and organization information from the Office of the Assistant Commissioner for Stabilization. Also, records relating to all aspects of the program in Los Angeles. Access to records was requested in order to respond to a request received from a member of the Congress.	See comments in col. (6)	See comments in col. (6)	<p>There was no refusal in writing. Rather, negotiations between the Deputy Comptroller General and the General Counsel - Department of Treasury were unsuccessful in gaining GAO access to the record. Although IRS did not formally deny us the right to review Program records, it proposed limitations which would have, in our opinion, precluded us from performing an independent review.</p> <p>The access to records question on this review hinged on section 205 of the Economic Stabilization Act Amendments of 1971 which provided for the confidentiality of information obtained under the act which contains or relates to a truly secret or other matter referred to in section 1905 of title 18, U.S.C. In January 1973 we advised the Department of Treasury that since Phase II of the Economic Stabilization Program was being phased out, there was no practical purpose in pursuing the matter.</p> <p>Failure to obtain access to the records was reported to the congressman who had made the request in our report to him dated March 8, 1973 (B-175807).</p>

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 50

Submitted by: (Com/SubComm)

By: Committee on Small Business  
Title:

(232)

## (50-K)

(PRESIDENTIAL FLIGHTS - EXECUTIVE PRIVILEGE INVOKED)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
10/31/72	H. R. Haldeman Assistant to the President	Requested data concerning all flights made by the Presidential crew during September 1972 and the extent to which the United States Government was reimbursed by the Committee to Re-Elect the President. This data was needed to respond to a request received by GAO from a Member of the Congress.	11/20/72	J. W. Dean III Counsel to the President	<p>Mr. Dean, in his reply to our request stated that " * * * information of this nature has traditionally been considered personal to the President and thus not the proper subject of congressional inquiry. All political flights made during September were billed to the Committee to Re-Elect the President, and that date will, of course, be reflected in the Committee's financial reports."</p> <p>Although we were denied access to flight records of the Presidential crew, we did identify through examination of records maintained by our Office of Federal Elections the flights made by the Presidential crew and paid for by the Committee to Re-Elect the President. However, we will not be able to be completely responsive to the request in that we cannot provide a list of all flights.</p>

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 50

Submitted by: (Comm/Subcomm)

By: Comptroller General  
Title:THE WHITE HOUSE,  
Washington, November 20, 1972.Hon. ELMER B. STAATS,  
Comptroller General of the United States, 441 G Street NW,  
Washington, D.C. 20548.

DEAR MR. STAATS: This is in response to your letters of October 31, 1972 and November 1, 1972 to Mr. H. R. Haldeman requesting permission to examine certain records and documents.

Please be advised that the account records for the Executive Office of the President for the period of fiscal year 1969 to the present are available for review by the General Accounting Office, as authorized by sections 53 and 71, Title 31 of the United States Code. Noble Melencamp, Chief Executive Clerk (456-2594) has been instructed to make these records available at your convenience, and should be contacted to make the necessary arrangements.

With regard to your request to examine manifest data concerning Presidential flights made during the month of September 1972, I must advise you that information of this nature has traditionally been considered personal to the President and thus not the proper subject of Congressional inquiry. All political flights made during September were billed to the Committee to Re-Elect the

President, and that data will, of course, be reflected in the Committee's financial reports.

With kind regards,  
Sincerely,JOHN W. DEAN III,  
Counsel to the President.COMPTROLLER GENERAL OF THE UNITED STATES,  
GENERAL ACCOUNTING OFFICE,  
Washington, D.C., April 13, 1973.

B-130961.

Hon. WILLIAM PROXMIRE,  
U.S. Senate.

DEAR SENATOR PROXMIRE: In accordance with your request of September 27, 1972, and subsequent discussions with your office, GAO has examined trips taken by the President and his family, the Vice President, White House Staff, and Cabinet officers. It was agreed that our examination would be limited to transportation provided by the 89th Military Airlift Wing, Andrews Air Force Base (AFB), Washington, D.C., during September, October, and the first week of November 1972. It was also agreed that the specific information we would furnish

you would be a list of the trips made by those mentioned above and with an indication as to which trips were paid for by the Finance Committee to Reelect the President and the amount the Committee reimbursed the Government.

From flight records of the 89th Military Airlift Wing, we identified 108 trips made by the White House and the Cabinet officers. We found that the Finance Committee to Re-Elect the President had reimbursed the Government for 23 of the trips. Our examination was restricted to trips made by other than the Presidential pilot and crew because the Presidential crew's flight records were not available to us.

However, information obtained by our Office of Federal Elections showed an additional 32 trips made by the Presidential crew and paid for by the Finance Committee to Re-Elect the President. We could not determine the total number of trips made by the crew during the period under examination.

#### SUMMARY OF TRIPS MADE BY OTHER THAN PRESIDENTIAL CREW

We identified from flight logs 103 trips made by the 89th Military Airlift Wing for the White House and for Cabinet officers between September 1 and November 7, 1972.

Twenty-six of the trips were made by Cabinet officers, and the costs were paid by the agency involved except in the case of the Secretary of Defense. Eight trips made by Secretary of Defense Laird were charged to the 89th Military Airlift Wing appropriation.

The remaining 77 trips were made for the White House. The flight logs for these trips showed only itinerary data and not the names of passengers. The Finance Committee to Re-Elect the President has reimbursed the Government \$50,355 for 23 of these trips.

Details of the 103 trips, including an indication as to whether costs were paid by the Finance Committee to Re-Elect the President, are included in enclosure I.

#### TRIPS MADE BY THE PRESIDENTIAL CREW

Our examination of payment documents at the Air Force Finance Office, Bolling AFB, Washington, D.C., and information available at our Office of Federal Elections showed that the Finance Committee to Re-Elect the President had paid \$98,936 for 32 additional White House trips made by the 89th Military Airlift Wing during the period we examined. These trips were not included in the 103 we identified through flight logs on file at Andrews AFB and manifests at Headquarters, Military Airlift Command, Scott AFB, Illinois. We assume that they were made by the Presidential crew and that the pertinent logs and manifests were retained by the Military Assistant to the President. Details of these trips are enclosed as enclosure II.

#### LIMITATIONS ON AVAILABLE FLIGHT DATA

The 89th Military Airlift Wing is responsible for fulfilling the air transportation requirements of the President and other key Government officials. Air Force officials informed us that the Military Assistant to the President maintains flight log information and manifests for trips made by the Presidential pilot and crew. Flight log information for all other trips flown by the 89th Military Airlift Wing are on file at Andrews AFB.

All flight manifests are maintained at Headquarters, Military Airlift Command, except those pertaining to White House flights. The Military Assistant to the President maintains the manifests for all White House flights, even those not flown by the Presidential crew.

In response to our request for the flight and manifest data, the Counsel to the President said that such records have been traditionally considered personal to the President and thus not subject to inquiry by the Congress.

We trust this information is satisfactory. We will be glad to discuss this matter in detail with you or members of your staff.

Sincerely yours,

ELMER B. STAATS,  
Comptroller General of the United States.

#### ENCLOSURE I

*Summary of trips by other than Presidential crew for White House and Cabinet officers between Sept. 1 and Nov. 7, 1972*  
*Cabinet (26 flights)*

Date	Agency	Itinerary	Passenger	Cost paid by—
Sept. 24	State	Andrews AFB to La Guardia International Airport, N.Y., and return	Secretary of State	Department of State
Sept. 29	do	La Guardia International Airport, N.Y., to Andrews AFB	do	Do.
Oct. 2	do	Andrews AFB to La Guardia International Airport, N.Y., and return	do	Do.
Oct. 10	do	Andrews AFB to La Guardia International Airport, N.Y.	do	Do.
Oct. 12	do	La Guardia International Airport, N.Y., to Andrews AFB	do	Do.
Sept. 21	Justice	Andrews AFB to Myrtle Beach AFB, S.C.	Attorney General	Department of Justice
Sept. 23	do	Myrtle Beach AFB, S.C., to Andrews AFB	do	Do.
Sept. 6	Labor	Andrews AFB to Sullivan County International Airport, N.Y., and return	Secretary of Labor	Department of Labor
Sept. 13	Agriculture	Andrews AFB to Des Moines and Burlington, Iowa, to Mankato, Minn., and return to Andrews AFB	Secretary of Agriculture	Department of Agriculture
Oct. 30	do	Andrews AFB to Bloomington, Ill., to Amarillo, Tex., to Albuquerque and Kirkland, N. Mex.	do	Do.
Sept. 1	Treasury	Andrews AFB to Westover AFB, Mass.	Secretary of Treasury	Department of the Treasury
Sept. 4	do	Westover AFB, Mass., to Andrews AFB	do	Do.
Oct. 21	do	Andrews AFB to Ingalls Field, Va., and return	do	Do.
Oct. 25	do	Andrews AFB to Chicago, Ill.	do	Do.
Oct. 26	do	Chicago, Ill., to Andrews AFB	do	Do.
Nov. 2	do	Andrews AFB to Logan International Airport, Mass., and return	do	Do.
Oct. 19	Commerce	Andrews AFB to Tinker AFB, Okla., to Los Angeles, Calif., and return to Andrews AFB	Secretary of Commerce	Department of Commerce
Nov. 6 and 7	do	Andrews AFB to Chicago, Ill., and return	do	Do.

## Cabinet (26 flights)—Continued

Date	Agency	Itinerary	Passenger	Cost paid by—
Sept. 5 and 6.....	Defense.....	Andrews AFB to Alameda Naval Air Station, Calif., to Knoxville, Tenn., and return to Andrews AFB.	Secretary of Defense.....	Air Force appropriation for operating the 89th Military Airlift Wing. Do.
Sept. 18 and 19.....	do.....	Andrews AFB to Mosinee, Madison, and Stevens Point, Wis., and return to Andrews AFB.	do.....	Do.
Sept. 22.....	do.....	Andrews AFB to Hagerstown, Md., and return.....	do.....	Do.
Sept. 26 and 28.....	do.....	Andrews AFB to Tinker AFB, Okla., to Sheppard AFB and Carswell AFB, Tex., to McConnell AFB, Kans., and return to Andrews AFB.	do.....	Do.
Oct. 13 and 14.....	do.....	Andrews AFB to Pensacola, Fla., and return.....	do.....	Do.
Oct. 21 and 23.....	do.....	Andrews AFB to East Hartford, Conn., to Quonset Point, R.I., to East Hartford, Conn., and return to Andrews AFB.	do.....	Do.
Oct. 25 and 31.....	do.....	Andrews AFB to London, England; to Rota, Spain; to Norfolk, Va., and return to Andrews AFB.	do.....	Do.
Nov. 2 and 3.....	do.....	Andrews AFB to Oshkosh, Mosinee, and Madison, Wis., and return to Andrews AFB.	do.....	Do.

## White House (77 flights)

Date	Itinerary	Passenger	Cost paid by—
Sept. 14.....	Andrews AFB to Birmingham, Ala., and return.....	Unknown.....	Air Force appropriation for operating the 89th Military Airlift Wing. Do.
Sept. 19.....	Andrews AFB to Montgomery, Ala., and return.....	do.....	Do.
Sept. 19 and 21.....	Andrews AFB to Los Angeles and San Francisco, Calif., and return to Andrews AFB.....	do.....	Do.
Oct. 30 and 31.....	Andrews AFB to El Toro, Calif., and return.....	do.....	Do.
Nov. 3 to 7.....	Andrews AFB to El Toro and Ontario, Calif., and return to Andrews AFB.....	do.....	Do.
Sept. 12.....	Andrews AFB to Colorado Springs, Colo., and return.....	do.....	Do.
Oct. 22 and 23.....	Andrews AFB to Homestead AFB, Fla., to Ashland, Ky., and return to Andrews AFB.....	do.....	Do.
Oct. 27 and 28.....	Andrews AFB to TriState Airport, W. Va., to Ashland, Ky., to Homestead AFB, Fla., and return to Andrews AFB.	do.....	Do.
Nov. 7.....	Andrews AFB to Homestead AFB, Fla., and return.....	do.....	Do.
Sept. 29.....	Andrews AFB to Atlanta, Ga., and return.....	do.....	Do.
Oct. 4.....	do.....	do.....	Do.
Oct. 23.....	Andrews AFB to Chicago, Ill., and return.....	do.....	Do.
Oct. 24.....	Andrews AFB to Ashland Ky., and return.....	do.....	Do.
Oct. 19.....	Andrews AFB to Detroit, Mich., and return.....	do.....	Do.
Sept. 8.....	Andrews AFB to Selfridge AFB, Mich, and return.....	do.....	Do.
Sept. 19.....	Andrews AFB to Minneapolis, Minn., and return.....	do.....	Do.
Sept. 10 and 11.....	Andrews AFB to Nellis AFB, Nev., and return.....	do.....	Do.
Sept. 18.....	Andrews AFB to Newark, N.J., and return.....	do.....	Do.
Nov. 6 and 7.....	Andrews AFB to Islip, N.Y., and return.....	do.....	Do.
Oct. 22 and 23.....	Andrews AFB to Albuquerque, N. Mex., and return.....	do.....	Do.
Sept. 6.....	Andrews AFB to J.F.K. International Airport, N.Y., to Cleveland, Ohio, and return to Andrews AFB.....	do.....	Do.
Oct. 13 and 14.....	Andrews AFB to J.F.K. International Airport and Westchester County Airport, N.Y., and return to Andrews AFB.	do.....	Do.
Sept. 24.....	Andrews AFB to J.F.K. International Airport, N.Y., and return.....	do.....	Do.
Sept. 8.....	Andrews AFB to LaGuardia International Airport, N.Y., and return.....	do.....	Do.
Sept. 9.....	do.....	do.....	Do.
Sept. 13 and 14.....	Andrews AFB to LaGuardia International Airport, N.Y., and return.....	Vice President.....	Do.
Sept. 17.....	Andrews AFB to Dulles International Airport, Va., to LaGuardia International Airport, N.Y., and return to Andrews AFB.	Unknown.....	Do.
Sept. 19.....	Andrews AFB to LaGuardia International Airport, N.Y., and return.....	do.....	Do.
Sept. 20.....	Andrews AFB to LaGuardia International Airport, N.Y., and return.....	do.....	Do.
Sept. 26.....	do.....	do.....	Do.
Sept. 25.....	do.....	do.....	Do.
Sept. 28.....	do.....	do.....	Do.
Sept. 30.....	do.....	do.....	Do.
Sept. 30.....	do.....	do.....	Do.
Oct. 3.....	Andrews AFB to LaGuardia International Airport, N.Y., and return.....	Dr. Henry Kissinger.....	Do.
Sept. 28 and 29.....	Andrews AFB to LaGuardia International Airport, N.Y., to Johnson City, Tex., and return to Andrews AFB.	Unknown.....	Do.
Oct. 24 and 25.....	Andrews AFB to LaGuardia International Airport, N.Y., and return.....	do.....	Do.
Nov. 3 and 4.....	do.....	do.....	Do.
Oct. 13.....	Andrews AFB to Youngstown and Cleveland, Ohio, and return to Andrews AFB.....	do.....	Do.
Oct. 27.....	Andrews AFB to Cleveland, Ohio, and return.....	do.....	Do.
Oct. 16.....	Andrews AFB to Philadelphia, Pa., and return.....	do.....	Do.
Sept. 13.....	Andrews AFB to Philadelphia and Pittsburgh, Pa., and return to Andrews AFB.....	do.....	Do.
Sept. 15.....	Andrews AFB to Wilkes-Barre, Pa., and return.....	do.....	Do.
Sept. 5 and 6.....	Andrews AFB to Beaufort, S.C., and return.....	do.....	Do.
Oct. 6 and 7.....	Andrews AFB to Ellsworth AFB, S. Dak., to Seattle, Wash., and return to Andrews AFB.....	do.....	Do.
Oct. 9 and 10.....	do.....	do.....	Do.
Sept. 14.....	Andrews AFB to McGhee-Tyson Field, Tenn., and return.....	do.....	Do.
Sept. 22 and 23.....	Andrews AFB to Harlingen AFB and Randolph AFB, Tex., and return to Andrews AFB.....	do.....	Do.
Oct. 26 and 27.....	Andrews AFB to Charleston and Huntington, W. Va., and return to Andrews AFB.....	do.....	Do.
Oct. 19.....	Andrews AFB to Hot Springs, W. Va., and return.....	do.....	Do.
Oct. 21.....	do.....	do.....	Do.
Oct. 26.....	Andrews AFB to Huntington, W. Va., to Ashland, Ky., and return to Andrews AFB.....	do.....	Do.
Oct. 27.....	Andrews AFB to TriState Airport, W. Va., and return.....	do.....	Do.
Oct. 11.....	Andrews AFB to Atlantic City, N.J., and return.....	do.....	Do.

## White House (77 flights)—Continued

Date	Itinerary	Passenger	Cost paid by Finance Committee to Reelect the President
Sept. 13	Andrews AFB to Philadelphia and Pittsburgh, Pa., to Andrews AFB	Mr. Robert Finch	\$1,124.51
Sept. 18 to 20	Andrews AFB to Billings and Yellowstone, Mont., and Idaho Falls, Idaho, to Andrews AFB	Unknown	10,875.08
Sept. 18 to 21	do	do	
Oct. 23	Andrews AFB to Lockbourne, Ohio, and return	President's family	1,025.68
Oct. 27	Andrews AFB to Shreveport, La., to Gulfport, Miss., to Keesler AFB, Miss., to Minneapolis, Minn., and return to Andrews AFB	do	5,333.54
Oct. 28	Andrews AFB to Detroit, Mich., and return	do	1,170.54
Sept. 14	Andrews AFB to Trenton, N.J., and return	do	{ 564.13
Sept. 5	Andrews AFB to Mayport Naval Air Station, Fla., and return	do	769.26
Sept. 9	Andrews AFB to Chicago, Ill., and return	do	72.00
Sept. 10	Andrews AFB to Cleveland, Ohio, and return	do	1,538.52
Sept. 11	Andrews AFB to La Guardia International Airport, N.Y., and return	do	1,025.68
Sept. 12	Andrews AFB to Nashville, Tenn., and return	do	532.84
Sept. 28 and 29	Andrews AFB to Birmingham, Ala., to Craig AFB, Ala., to Little Rock, Ark., to Raleigh-Durham, N.C., and return to Andrews AFB	do	1,384.68
Oct. 1	Andrews AFB to Milwaukee, Wis., and return	do	2,923.18
Oct. 4	Andrews AFB to Indianapolis, Ind., and return	do	1,641.08
Oct. 5	Andrews AFB to Richards-Gebaur AFB, Mo.; to Los Angeles, El Toro, and Ontario, Calif., to Cleveland, Ohio, and return to Andrews AFB	do	1,435.95
Oct. 8	Andrews AFB to Westchester County Airport, N.Y., to Montpelier, Vt., to Berlin, N.H., and return to Andrews AFB	do	6,154.08
Oct. 18	Andrews AFB to Columbia and Myrtle Beach, S.C., and return to Andrews AFB	do	1,791.68
Oct. 23	Andrews AFB to Offutt AFB, Nebr., to Medford, Oreg., to McClellan AFB, Calif., and return to Andrews AFB	do	6,820.77
Oct. 26	Andrews AFB to Huntington, W. Va., to Ashland, Ky., and return to Andrews AFB	do	1,208.34
Nov. 6	Andrews AFB to La Guardia International Airport and MacArthur Airport, N.Y., and return to Andrews AFB	do	666.69
Nov. 7	Andrews AFB to MacArthur Airport, N.Y., and return	do	410.27
Nov. 4	Harrisburg, Pa., to Willow Grove, Pa.	do	512.84
Total			1 50,355.00

<sup>1</sup> 23 flights paid by Finance Committee to Reelect the President.

## ENCLOSURE II

White House trips by the Presidential crew between Sept. 1 and Nov. 7, 1972, for which the cost was paid by the Finance Committee to Re-elect the President

Date	Itinerary	Passenger	Amount of reimbursement
Sept. 22 and 23	Andrews AFB to Laredo, Harlingen, and San Antonio, Tex., and return to Andrews AFB	President Nixon and staff	\$8,283.68
Sept. 18 to 20	Andrews AFB to Chicago, Ill., to Billings, Mont., to Idaho Falls, Idaho, to Moffet Field, Calif., to San Antonio, Tex., to Oklahoma City, Okla., and return to Andrews AFB	President's family	16,794.30
Sept. 23	Andrews AFB to Chicago, Ill., and return	do	1,641.09
Sept. 26	Andrews AFB to Kansas City, Kans., to Stapleton and McCarran, Calif., to Phoenix, Ariz., to Santa Fe and Carlsbad, N. Mex., and return to Andrews AFB	do	5,846.38
Oct. 24	Andrews AFB to Morgantown, W. Va., and return	do	869.69
Oct. 30	Andrews AFB to Syracuse and Buffalo, N.Y., and return to Andrews AFB	do	1,338.83
Do	Andrews AFB to Wausau, Wis., and return	do	1,948.79
Sept. 7	Andrews AFB to La Guardia International Airport, N.Y., and return	do	820.54
Do	Andrews AFB to Willow Grove, Pa., and return	do	512.84
Sept. 10	Andrews AFB to La Guardia International Airport, N.Y., and return	do	461.55
Sept. 12	Andrews AFB to St. Louis, Mo., to Cleveland and Port Columbus, Ohio, and return to Andrews AFB	do	2,410.34
Sept. 16	Andrews AFB to Port Columbus, Ohio, and return	do	1,025.68
Do	Andrews AFB to Philadelphia, Pa., and return	do	615.39
Sept. 21 and 22	Andrews AFB to Bismarck and Fargo, N. Dak., to Sioux Falls, S. Dak., and return to Andrews AFB	do	3,589.88
Sept. 15	Andrews AFB to Morristown, Pa., and return	do	410.27
Sept. 16	Andrews AFB to La Guardia International Airport, N.Y., and return	do	358.99
Sept. 26 to 28	Andrews AFB to Newark, N.J., to Oakland and Los Angeles, Calif., and return to Andrews AFB	President Nixon	11,574.45
Oct. 9	Andrews AFB to La Guardia International Airport, N.Y., and return	President's family	769.26
Oct. 13	Andrews AFB to Quincy, Ill., to Kansas City, Kans., to Wheeling, W. Va., to Hagerstown, Md., and return to Andrews AFB	do	2,666.76
Oct. 4 and 5	Andrews AFB to Harrisburg, Pa., to La Guardia International Airport, N.Y., and return to Andrews AFB	do	1,025.68
Oct. 15	Andrews AFB to Buffalo, N.Y., and return	do	1,025.68
Oct. 19	Andrews AFB to Detroit and Wayne, Mich., and return to Andrews AFB	do	1,179.53
Oct. 31 and Nov. 1	Andrews AFB to Lawrence G. Hanscom Field, Mass., and return	do	1,025.68
Oct. 10	Andrews AFB to J.F.K. International Airport, N.Y., and return	do	36.00
Oct. 12	Andrews AFB to Atlanta, Ga., and return	President Nixon	2,723.40
Oct. 23	Andrews AFB to Westchester County and MacArthur Airports, N.Y., and return to Andrews AFB	do	1,929.08
Oct. 28	Andrews AFB to Cleveland, Ohio, to Saginaw, Mich., and return to Andrews AFB	do	3,971.63
Nov. 3	Andrews AFB to Chicago, Ill., to Tulsa, Okla., to Providence, R.I., and return to Andrews AFB	do	8,510.63
Nov. 2	Andrews AFB to Grand Rapids, Mich., to Chicago, Ill., and return to Andrews AFB	President's family	1,794.94
Nov. 4	Andrews AFB to Greensboro, N.C., to Albuquerque, N. Mex., to Ontario and El Toro, Calif., and return to Andrews AFB	President Nixon	11,687.93
Sept. 1	El Toro, Calif., to Seattle, Wash., and return	President's family	2,256.50
Oct. 21	J.F.K. International Airport, N.Y., to Andrews AFB	do	36.00
Total			1 98,936.44

<sup>1</sup> 32 flights.

## (50-L)

TIONAL CREDIT UNION ADMINISTRATION)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
2/22/72	Administrator, NCUA	Unrestricted access to the Administration's credit union examination reports. We believe that access to these reports is essential to a meaningful audit of the financial operations and condition of the Administration and to the expression of an opinion on its financial statements.	1/9/73	Administrator, NCUA	The Administration believes that the Federal Credit Union Act does not provide for the sharing of credit union examination reports with GAO. In addition, the Administration feels that the confidentiality of the relationship between the credit unions would be compromised if the reports were reviewed by GAO.  We advised the Chairman, House Committee on Banking and Currency, by letter dated March 14, 1973, of the access-to-records issue.

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 50

Submitted by: (Comn/Subcomm)

By: Comptroller General  
Title:

(50-M)

(EMERGENCY LOAN GUARANTEE BOARD)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

Various requests have been made by GAO starting in September 1971 to gain access to the records of the Emergency Loan Guarantee Board. These requests have been addressed to and refused by the Secretary of Treasury as Chairman of the Emergency Loan Guarantee Board beginning in December 1971.

The Secretary of Treasury has taken the position that it was not the intent of the Congress in establishing the Board to grant GAO authority to review Board activities.

GAO believes that it has the responsibility and authority to review the Board's activities including decisions of the Board in approving, executing, and administering any loan guaranteed by the Board. The Board's position, as indicated, is that there is nothing in the Emergency Loan Guarantee Act or its legislative history which would provide for a GAO review of all Board activities and that the Congress might need to pass additional legislation to make it clear that GAO has this authority. The main thrust of the Board's position is that the congressional review of loan guarantee matters is carefully spelled out in the guarantee act; GAO is directed to audit the borrower and to report its findings to the Board and the Congress; and the Board is directed to make a "full report" of its operations to the Congress. It is our position that, as an agency of Government, the Board is clearly subject to audit examination by GAO and that the records of the Board are required to be made available to GAO under its basic authorities. Those authorities are section 312 of the Budget and Accounting Act, 1921 (31 U.S.C. 53); section 206 of the Legislative Reorganization Act of 1946 (31 U.S.C. 60); subsections 117(a) and (b) of the Accounting and Auditing Act of 1950 (31 U.S.C. 67(a), (b)); and section 204 of the Legislative Reorganization Act of 1970 (84 Stat. 1140).

It is our view that under these basic authorities GAO has responsibility for auditing the activities of the Board and thus has attending right of access to such information and documents as the Board uses in reaching its decisions. Further, it is our view that neither the failure to spell out explicitly that GAO has such responsibility and right of access nor the fact that under Pub. L. 92-70 GAO was given explicit authority to audit the borrower diminishes in any way the basic audit authorities that we rely upon.

In our report to the Congress entitled "Implementation of Emergency Loan Guarantee Act," (B-169300, 12/6/72), we stated that

"In compliance with the views expressed by the Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Banking and Currency, the Board made available for our examination certain correspondence and financial analyses prepared by its fiscal agent in connection with its review of documents and reports submitted by Lockheed, thus enabling us to examine the activities of the Board in connection with the Lockheed guarantee. However, the Board stated in its Annual Report dated September 5, 1972, that the legal difficulties between GAO and the Board were unaffected by its release of records to us. Thus, the Board has not conceded that GAO has any legal right to all records of the Board--a position we think is without merit."

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 50-

Submitted by: (Comm/Subcomm)

By: Comptroller General  
Title:

Extension

(238)

(50-N)

(CORPORATION FOR PUBLIC BROADCASTING)

-SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

The Public Broadcasting Act of 1967 provides that the Public Broadcasting Corporation shall be audited by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. In attempting to comply with our responsibility under this Act, we have requested such documents as minutes of the meetings of the Board of Directors and files relating to a long term lease for office space entered into by the Corporation. In both instances we were initially denied access to this data. Subsequently, this information was made available to us and enabled us to more properly evaluate certain operations of the Corporation.

On August 10, 1972, an internal Corporation memorandum advised Corporation officials that if GAO wished "to examine documents setting forth policies or procedures or to pursue a detailed examination of how decision-making takes place or analyzing program expenditures to determine the proportion received by various recipients or any of a variety of tasks they might pursue along this line, I believe you should simply state you feel such requests are beyond the scope of their activity and that you decline to pursue the matter with them." On August 22, 1972, the Comptroller General advised the Acting President of the Corporation that the GAO's responsibility for auditing the Corporation included audits which could lead to an identification of needed management improvements together with suggestions as to courses of action which should be considered to correct management deficiencies or otherwise strengthen the management of the Corporation.

Although we have had no written reply to the August 22 letter, the Acting President of the Corporation advised us orally on September 25, 1972, that the Board of Directors and its Chairman felt that it was not clear as to our right of access to information of other than a financial nature. Since that date we have not been formally refused information necessary to perform our work although we have had some difficulty in obtaining needed data in a timely manner.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/Subcomm)

By: Comptroller, General  
Title:

Extension

FILE 50-

(239)

(50-O)

(EXCHANGE STABILIZATION FUND)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

By Public Law 91-599, approved December 30, 1970, the Congress directed that the administrative expenses of the Exchange Stabilization Fund, established by section 10 of the Gold Reserve Act of 1934, be audited by the General Accounting Office and provided certain access to records authority. The legislative history made it clear that the audit should start with fiscal year 1972, and the GAO started efforts to obtain access in the Spring of 1972. After a long period of refusals and delays, the Treasury Department finally agreed in March 1973 to provide GAO access to all financial records and relevant supporting information on the administrative expenses of the Exchange Stabilization Fund for 1972. The audit has been started.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 50

Submitted by: (Comm/Subcomm)

By: Comptroller General  
Title:

Extension

(240)

## **FILE 55**

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### **SENATE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON FOREIGN OPERATIONS**

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(55-A)

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
*Washington D.C., March 28, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for instances in which the executive branch has denied information or witnesses requested by congressional committees.

Although it was before I assumed chairmanship of the Subcommittee on Foreign Operations, I am advised that in June of last year the Department of Defense refused to furnish a witness in a special hearing called for the specific purpose of inquiring into questionable Department of Defense spending practices under continuing resolution authority. The details of this matter have been furnished directly to your subcommittee's counsel, Mr. Joe Pecore. Any further information desired can be obtained from Senator Proxmire, the former chairman of the subcommittee, or Mr. William H. Jordan of the Appropriations Committee staff.

I hope that this information will prove helpful.

Sincerely,

DANIEL K. INOUYE,  
*Chairman, Subcommittee of Foreign Operations.*

(243)

(55-B)

SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
6/27/72	Casper W. Weinberger Director Office of Management & Business  Hon. Robert C. Mogg Assistant Secretary of Defense (Compt)	Mr. Weinberger  Mr. Mogg	Allocations for Foreign Assistance Appropriations under continuing resolution authority	6/29/72		Mr. Weinberger appeared to testify as requested but Mr. Mogg failed to appear at hearings on June 29, 1972.

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

Foreign Operations

By: Daniel K. Inouye

Title: Chairman

Extension

FILE 55:

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
Washington, D.C., June 27, 1972.

Mr. CASPAR W. WEINBERGER,  
Director, Office of Management and Budget,  
Washington, D.C.

DEAR MR. WEINBERGER: A situation has arisen with respect to Continuing Resolutions which has created problems within the Congress.

For many years, in the absence of an appropriation bill the agencies operated under an authority which allowed them to continue activities at the "current rate", or the rate in the budget estimate, or the rate in the House or Senate bills, whichever happened to be the lower figure. As far as I know, there never has been a precise definition of the term, "current rate".

Apparently, during fiscal year 1972 certain activities financed in the Foreign Assistance Appropriation Act interpreted "current rate" to authorize obligations or reservations at a rate which resulted in obligations or reservations in the first five months of the fiscal year, when there was no appropriation act, totaling the final amount which was agreed to in conference when the appropriation bill was enacted several months later.

The argument was used in connection with the Foreign Assistance Appropriation Bill in March of 1972 during the conference between the House and Senate that the Senate was required to recede from its figure of \$350 million for Military Assistance since obligations and reservations for the program through November totaled in the neighborhood of \$500 million.

In view of these alleged violations of the intent of Congress in Continuing Resolutions to continue existing programs at the lowest possible level, there is great sentiment within this Committee to define "current rate" or, in the absence of such a definition, to place ceilings on obligations of not to exceed one-twelfth per month, or 25% for any given quarter.

Should such ceilings be included in future Continuing Resolutions, it is realized that exceptions would have to be made. Some programs are seasonal. Some programs are financed as summer programs.

In view of the facts contained herein and with respect to the Continuing Resolution to be enacted in August, if it is found necessary, it will be appreciated if you will furnish the Committee with your recommendations on the exceptions which should be made to the requirement that obligations should not exceed one-twelfth per month. It

would be appreciated also if you would draft legislation for a new Continuing Resolution which we will have available which will provide for a one-twelfth per month ceiling on obligations, together with the exceptions referred to.

Sincerely,

**ALLEN J. ELLENDER,**  
*Chairman.*

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
SUBCOMMITTEE ON FOREIGN OPERATIONS,  
*Washington, D.C., June 26, 1972.*

Certain sections of the Continuing Resolution proposed by the House Committee constitute an "end run" of the entire appropriations process, and I urge your support of a proposed modification which I will offer first in the Committee and again on the Floor if necessary.

The proposed Continuing Resolution is virtually identical to the original Continuing Resolution enacted last July 1 continuing some programs, including foreign assistance, at a "rate for operations not in excess of the current rate or the rate provided for in the budget estimate whichever is lower." With nothing but this language in hand the Department of Defense went to the Treasury on July 6, 1971—five days later—applied for and received Treasury warrants for the Military Assistance Program, which were quickly allocated, in the amount of \$374,-000,000—\$24,000,000 more than the appropriation the Senate voted for this program on March 2, 1972. By that time, again under "the current rate" as used in the Continuing Resolution, a total of \$499,400,000 in warrants had been legally drawn and allocated—\$149,400,000 in excess of the final Senate figure. Of course the Senate conferees were then "locked" into the higher appropriation approved by the House. Similar but not quite as notorious "end runs" were made by other agencies.

We may have differences over what the level of military assistance or other programs should be but I do not believe anyone who is aware of the flagrant and high handed action taken this year under the loose interpretation of the ambiguous term "current rate" can again vote to open the "barn door" for a repeat performance.

I urge you to support my modifying amendment which would substitute "not to exceed one-twelfth of the annual rate of new obligatory authority" for the "current rate" as proposed by the House Committee for activities and programs financed by the Foreign Assistance and Related Programs Appropriation Bill.

Best wishes,  
Sincerely,

**WILLIAM PROXMIRE,**  
*Chairman, Subcommittee on Foreign Operations.*

Editor's note: The addressee or addressees of this letter were deleted by Subcommittee on Foreign Operations.

OFFICE OF THE ASSISTANT  
SECRETARY OF DEFENSE,  
INTERNATIONAL SECURITY AFFAIRS,  
*Washington, D.C., July 6, 1971.*

Mrs. JOYCE BARBEE,  
*Deputy Assistant Director,*  
*Central Accounting Operations,*  
*Bureau of Accounts,*  
*Treasury Department,*  
*Washington, D.C.*

DEAR MRS. BARBEE: Request appropriation warrant be issued for account 1121080, Military Assistance, Executive in the amount of \$374,000,000 for implementation under the Continuing Resolution Authority (PL 92-38) signed 3 July 1971. State Department has approved country requirements in the above amount with the exception of Cambodia for which a Presidential Determination is in process.

**WILLIAM J. DENNEHY,**  
*Acting Comptroller, Military Assistance and Sales.*

THE DEPARTMENT OF THE TREASURY APPROPRIATION WARRANT

Warrant No. 102-11-8.  
Accounting date July 1, 1971.

The Congress having, by the Acts hereon stated, made the appropriations hereunder specified, the amounts thereof are directed to be established in the general and detailed appropriation accounts, totaling in all \$374,000-000.00 and for so doing this shall be the warrant.

**D. D. DUKE,**  
*The Secretary of the Treasury.*  
**ROBERT J. BEATTY,**  
*Comptroller General of the United States.*

Funds Appropriated to the President—Executive Office of the President—Office of the Assistant Secretary of Defense (International Security Affairs) Comptroller, Military.

Joint Resolution, making continuing appropriations for the fiscal year 1972, and for other purposes. Public Law 92-38, 92d Congress. Approved July 1, 1971. Military Assistance, Executive, 1972, \$374,000,000.00.<sup>1</sup>

[Western Union Telegram sent June 28, 1972]

Hon. ROBERT C. MOOT,  
*Assistant Secretary of Defense (Comptroller), The Pentagon,*  
*Washington, D.C.*

Request your presence tomorrow, June 29, 1972, at 10 a.m., room 1224 New Senate Office Building, to testify

<sup>1</sup> See letter from the Acting Comptroller, Military Assistance and Sales, International Security Affairs, Office of the Assistant Secretary of Defense, dated July 6, 1971., above.

before Senate Appropriations Subcommittee on Foreign Operations concerning fiscal year 1972 allocations under continuing resolution authority. Also fiscal year 1973 program under authority of pending continuing resolution.

WILLIAM PROXMIRE,  
Chairman, Subcommittee on Appropriations  
for Foreign Operations.

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[Excerpt from hearings, Appendix IV, Supplemental Hearing, Continuing Resolution Authority, Fiscal Year 1973, Foreign Assistance and Related Programs for Fiscal Year 1973, pp. 1089-1090]

APPENDIX IV  
SUPPLEMENTAL HEARING  
CONTINUING RESOLUTION AUTHORITY  
FISCAL YEAR 1973

FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATIONS FOR FISCAL YEAR 1973

THURSDAY, JUNE 29, 1972

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
SUBCOMMITTEE ON FOREIGN OPERATIONS.

The subcommittee met at 10 a.m., in room 1224, New Senate Office Building, Hon. William Proxmire (chairman) presiding.

Present: Senators Proxmire, Fong, Brooke, and Young. Senator PROXMIRE. The subcommittee will come to order.

Mr. Weinberger, we are very grateful for your appearing. I understand, and Senator Fong should be informed, too, Mr. Weinberger has to leave at 11 o'clock. He is most gracious to come on this short notice.

This meeting is called because of a difficulty we had in the Appropriations Committee yesterday. A number of members of the subcommittee were very concerned about the action on continuing resolutions last year, a pattern which would seem to completely frustrate any kind of

control at all by the Appropriations Committee over spending.

The meeting is called this morning to consider the manner and rate of obligation or funding of those programs and activities funded through the foreign assistance and related agencies appropriation bill during the period July 1, 1971, until the date on which the bill was finally enacted, March 2, 1972.

We will also consider the administration's proposed program for obligating fiscal year 1973 funds for foreign assistance activities programs, especially the military assistance program, under the continuing resolution H.J. Res. 1234, which is presently pending before the Senate.

That was reported out by the full committee. It is on the floor. I think it is expected to come up tomorrow. We asked Mr. Caspar W. Weinberger, Director of the Office of Management and Budget, and we also asked Mr. Robert C. Moot, Assistant Secretary of Defense, to appear.

Mr. Weinberger is present, but the Department of Defense has refused to send a witness. It is my understanding this may be the first time, certainly one of the very few times, in the history of the Senate when the administration has refused to send any witness whatsoever, either Mr. Moot; his deputy, Mr. Brazier; the Chief of Military Assistance, Admiral Peek; or even the comptroller of the military assistance program, Mr. John VonMarbod.

In fact we were willing to have the liaison official whose primary duty, as I understand it, is to represent the Department of Defense before the Congress but even he is not here this morning. I would be happy to have a warrant officer or Pfc.—and they have plenty of those—to come in.

I am not surprised by this because I think what was done last year by the Department of Defense was absolutely inexcusable. Within 5 days after we passed the continuing resolution something like 70 percent of the funds were drawn down. This is something that we just could not get an explanation on yesterday and I think Senator Fong and others, although I felt we should go ahead with my restrictions, but they felt we should get an explanation.

## **FILE 56**

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**SENATE COMMITTEE ON APPROPRIATIONS  
SUBCOMMITTEE ON HUD-SPACE-SCIENCE-VETERANS**

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### **C O N T E N T S**

*Subfile*

56-A Form I: Listing of NASA programs in priority order with correspondence and excerpts from hearings records-----	Page
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	(247)



## (56-A)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
March 2, 1973	NASA: Administrator James C. Fletcher	NASA was asked to provide a listing of its programs in priority order in the event spending ceilings were imposed by the Appropriations Committee. The listing was requested for appropriations hearings on the NASA budget held on March 26 & 27, 1973.	3/22	Dr. Fletcher	Two reasons were given: First, that there were areas of uncertainty relating to the timing of the appropriations bill's passage, and the amount of termination costs that might ensue if programs are ended. Second, that providing such a listing "would have policy implications going beyond the scope of NASA's mission responsibilities."

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 56

Submitted by: (Comm/Subcomm) Appropriations Committee

Subc. on H.D.-Space-Science-Veterans.

By: Richard A. Newman

Title: Legis. Asst. to Sen. Proxmire

Extension 55456

U.S. SENATE,  
 COMMITTEE ON APPROPRIATIONS,  
 SUBCOMMITTEE ON HUD-SPACE-SCIENCE-VETERANS,  
 Washington, D.C., March 2, 1973.

Dr. JAMES C. FLETCHER,  
*Administrator, National Aeronautics and Space Administration, Washington, D.C.*

DEAR MR. ADMINISTRATOR: In connection with our upcoming hearings on the NASA budget for fiscal year 1974, the Subcommittee will expect you to be prepared to list the areas where programs may be cut in order to meet budgetary ceilings. As you know, the President has repeatedly cited the need to reduce federal spending, and I intend to do all I can to help him achieve this goal.

Specifically, the NASA budget calls for \$2.197 billion for Research and Development for the coming fiscal year. Suppose the Subcommittee approves only \$1.6 billion for Research and Development. How would NASA prefer to see this money allocated? What programs should be cut out first? What programs should be trimmed or stretched out? What programs should be left completely intact?

If the Subcommittee were to impose a \$1.2 billion ceiling

on Research and Development, what further cuts would the agency make?

What about a ceiling of \$0.8 billion on Research and Development? What could be achieved at this level?

For Construction of Facilities, the budget calls for \$112 million for fiscal year 1974. If this were cut back to \$80 million, what programs would NASA prefer to see cut or stretched out? What if the ceiling on construction were \$60 million?

Finally, the budget request for Research and Program Management is \$707 million. Suppose a ceiling were imposed of \$500 million—where would NASA want the cuts to be made? What about a \$300 million ceiling?

The Subcommittee will expect these questions to be discussed *in detail* when it conducts its hearings on the NASA budget. We must have specific answers on precisely how various NASA programs will be cut back as the NASA budget is reduced.

Sincerely,

WILLIAM PROXMIRE,  
*U.S. Senator.*

NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION,  
Washington, D.C., March 22, 1973.

Hon. WILLIAM PROXMIRE,  
Chairman, Subcommittee on HUD-Space-Science-Veterans,  
Committee on Appropriations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reference to your letter of March 2 on reduced budget levels for NASA. I am responding in advance of the hearings on our FY 1974 budget so that you and the Subcommittee will appreciate the problems posed by your questions and the nature of responses it is practicable for us to make.

Your letter asks us to specify in advance what program reductions NASA would make if reductions ranging from about 30% to about 60% were to be made in the FY 1974 budget estimates for each of NASA's three appropriations.

In summary, reductions of the magnitudes suggested would be, to put it bluntly, disastrous. They would require termination in mid-stream of valuable projects initiated after careful review by NASA and approved by the Congress, with almost total loss of the large amounts already invested and the benefits to the nation that would be achieved. The reductions would cripple or destroy the nation's future in space and aeronautics. They would throw out of work, depending on the size and timing of the cuts, from 55,000 to over 100,000 men and women throughout the country, mostly in areas already hard hit by previous aerospace cutbacks, and many thousands more when the indirect impacts on the communities affected are felt. They would effectively dismantle most of the NASA organization and industry and scientific teams that have given the U.S. a position of world leadership in space. The reductions would have the effect of repudiating the objectives and essential features of the long range program plan in space and aeronautics on which Congress and the Executive Branch have been in virtually 100% agreement for the past several years. Finally, I would be concerned about the loss of confidence in America that would ensue from the dismemberment of the space program, which has been and continues to be a major symbol, at home and abroad, of America's ideals of progress, of "getting things done," and optimism for the future.

The fact is, as I believe your Subcommittee's review will confirm, that the NASA FY 1974 budget as presented to Congress has already been reduced to the minimum level required to achieve and maintain progress toward the objectives in space and aeronautics which have previously been presented and approved, after careful review, by both the Executive Branch and the Congress. The budget as presented has already been reduced about \$400 million below the level we projected for FY 1974 in the Congressional reviews of the FY 1973 budget last year. In the course of preparing the budget now before you, the possibilities of substantial further reductions were, I can assure you, given most careful consideration, and each such possibility was rejected for reasons which we are prepared to discuss with the Subcommittee in justifying the programs included in the budget.

Turning to your questions on what would be done in the event of budget reductions of the magnitudes postulated in your letter, I will try to be as responsive as

possible but cannot provide definitive answers for two reasons, which I would like to explain:

*First.* It is impossible for us to anticipate the actual impact on the NASA FY 1974 budget of reductions of the magnitude postulated in your letter because the amount NASA would have left, after the reductions, for whatever program is continued—and therefore the decisions that would be made on which programs to cancel and which to continue—will depend on two variable factors we cannot pin down in advance: the timing of final Congressional action on the FY 1974 appropriation bill and the amount of termination costs for which the Government would be liable at that time.

To illustrate, the timing of final action on NASA's FY 1974 appropriation bill has varied in recent years, but has occurred as late as November or December. Since virtually our entire FY 1974 budget is for continuation of programs already underway, the impact of every \$100 million reduction would, for example, be \$50 million more if the cut is imposed in December—half way through the fiscal year—than if effective at the beginning of the fiscal year because \$50 million of the funds finally allowed would have been used from July to December for continuing the programs until they were cancelled. Thus this factor throws the uncertainty of an additional cut of as much as 50% into the amount we could plan on for the reduced program in the circumstances postulated in your letter.

This uncertainty would be compounded by the uncertainties regarding the termination costs NASA would have to pay in FY 1974 for the programs terminated, charges which will further reduce the amounts available for continuing useful work. We cannot now state what the termination costs would be, but based on experience they could vary from the equivalent of about two to four months of expenditures at the expenditure rate at the time of termination. This means that on the average for every \$100 million of FY 1974 programs terminated, we would have to spend an additional but indeterminate amount in the range of \$15 to \$35 million in FY 1974 for termination costs. This is another uncertainty factor—and an additional cut—of 15 to 35%.

I have cited these points to explain the very large uncertainties and variables which amplify the effects of the postulated reductions and make it impossible to specify in advance how many and which programs would have to be cut and what programs could still be supported.

*Second.* Reductions of the magnitude suggested in your letter, or in fact any significant reduction, in NASA's FY 1974 budget request would have policy implications going beyond the scope of NASA's responsibilities. For this reason, I will indicate the nature and implications of the choices that would have to be made but cannot make a recommendation or state at this time what actions would be taken in the event reductions like those postulated in your letter were imposed.

The NASA program is a research and development enterprise pointed to the future, both near term and long range. The underlying purposes of course, are to achieve benefits for men on earth in terms of practical applications and of new knowledge derived from science, exploration, and research on advanced technology. To produce these benefits both in the near and long term future the NASA program must include two components:

(1) Current activities directed at realizing relatively near term benefits in applications, science, and exploration, and using *available capabilities* (technology, systems, concepts, etc.) and

(2) developmental activities directed at *major advances in capabilities* so that greater and new types of benefits can be achieved, and can be achieved more economically and effectively, in future years.

Without a strong and viable program of activities in category (2), the nation will deny itself further progress in space. Without a strong continuing program of activities in category (1), the nation will deny itself the actual benefits of which it is the purpose of the investment in aeronautics and space to achieve. With reductions of the magnitudes postulated in your letter, the arithmetic of our budget is such that we could not do both.

Thus, for example, termination of the space shuttle would eliminate our principal program in category (2) and would effectively deny the nation further progress in space. The space shuttle is the key to productive use of space in the future because it is the only way we can increase our capabilities for performing useful work in space and at the same time reduce the costs. The future potential of space in applications of economic, commercial, scientific international or national security significance cannot be realized without the space shuttle. Unless the space shuttle program proceeds we will have to close major facilities at Cape Kennedy, Houston, Huntsville, and elsewhere and thereby dismantle the nation's capability for resuming development of the capabilities for a truly productive space program at a later time. Thus, termination of the space shuttle would mean that the U.S. will be denied the future opportunities only the shuttle offers, will not be able to realize the increased effectiveness and reduced costs of space operations it will permit, and will have no further manned space flights (after Skylab and the U.S.-USSR docking experiment). We believe these implications would not be acceptable to the people of the United States.

On the other hand, the alternative of terminating a sufficient number of programs in category (1) to permit proceeding with the space shuttle program at the reduced levels suggested is, we believe, equally unacceptable. Here one would have to take drastic actions such as halting work in Skylab—which will already be in orbit at the start of FY 1974; terminating with total loss the Viking program to land the first life-seeking instruments on Mars, for which over half of the total cost will already have been spent; and curtailing further (or abandoning, depending on the actual size and impact of the reduction) work in other space science areas, in space applications, and in aeronautics. There would be major reductions and facility closing at our science and research centers (like Goddard, Langley, Ames, and the Jet Propulsion Laboratory) and in unmanned launch activities at Cape Kennedy and Vandenberg Air Force Base. Each of the program terminations and reductions that would be required is individually unacceptable on the merits as a loss of the funds already invested and of important economic, social or scientific benefits. In total, the terminations and reductions that would be required to meet the postulated reductions would deny the nation most of the important near term benefits in space and aeronautics that will be achieved by the programs now underway in accordance with previ-

ous decisions by both the President and the Congress. I believe that these implications would also be unacceptable to the American people.

We will be glad to elaborate on this response at the hearings next week if you or other members of the Subcommittee wish us to do so.

Sincerely,

JAMES C. FLETCHER,  
Administrator.

[Excerpt from hearings entitled "Department of Housing and Urban Development, Space, Science, Veterans, and Certain Other Independent Agencies Appropriations for Fiscal Year 1974," before a subcommittee of the Committee on Appropriations, U.S. Senate, 93d Cong., 1st sess., pp. 622-625, 692-693]

[622]

#### REQUEST FOR INFORMATION ON PRIORITY OF NASA PROGRAMS

[Senator PROXMIRE.] . . . Dr. Fletcher, on March 2, I wrote you indicating that we would expect NASA to be prepared to list areas where programs might be cut in order to meet budgetary ceilings, particularly in the event that the subcommittee approves only \$1.6 billion for R. & D.

I asked NASA to state which programs had been allocated, which programs would be cut, which would be trimmed, which would be left intact, and so on. The agency was asked, also, about Research and Program Management, and my letter indicated we would expect these programs to be listed in detail at the time you appeared before us.

You responded to my letter, and in essence you say that you cannot provide definite answers to my questions for two reasons. Then you list, first, that there are two variables that can't be anticipated—the timing of congressional action on the fiscal year appropriations and the amount of termination cost of programs not being terminated and, secondly, that my letter raises policy implications that go beyond the scope of NASA responsibilities.

I hope you will reconsider that, Dr. Fletcher, and I hope you will be prepared to go into more detail than your letter of the 18th. Your letter, it seems to me, is totally unresponsive to my request and completely frustrates the basic intent of my letter. My purpose in writing to you was to receive from you a list of NASA programs and missions in the order of priority; that is, which are most important, which are second most important, and which are third, on down, and programs that are regarded as the most expendable. The areas of uncertainty that you mentioned in your letter, timing and termination costs, are certainly not relevant to such a listing.

As you say, you came to the Office of Management & Budget with a bigger shopping list than you got, and I can't believe the OMB ignored your own priorities and just established their own. They must have received a list from you one way or the other as to your own notion of what you think you should have. That is what it seems to me this subcommittee has to have, also, if we are going to have a fair and rational basis for holding down spending in a year in which the President has called on us to do so;

this is the year in time he determined that we should try to do this, and we would need such a list.

It may be that this Subcommittee will try to increase your budget—I am only one Member of this Committee—and it may be the Subcommittee will stand with the President in exactly what he wants. But in order to consider the options open to us, it seems to me we should have your priorities, your excellent studies of what your priorities are, so that the people who live with these programs, understand these programs, and work with these programs can comprehend more fully what you feel we can postpone in funding for 1974 or perhaps even scale down or eliminate.

Do you think you can give us something like that? Can you give us some help in this area? Otherwise, we are shooting blind. We can come up here and cut a certain percentage across the board—and maybe not—but if we do that, I think you might agree it might be worse than our having a list of your priorities so that we know how much we can cut fairly.

Dr. FLETCHER. Mr. Chairman, you inquired about some pretty drastic cuts; I think it was something like a 30 percent cut in one case and a 60 percent cut in another case. We have never been faced with this kind of dilemma before. It is a pretty tough business to try to estimate the impact of cuts that large because it would involve eliminating a sizable chunk of NASA's present responsibilities, and—

Senator PROXMIRE. Supposing you cut 10 or 20 or 30, and just forget about the 60 percent cut.

Dr. FLETCHER. I think in due time we could respond to that although this would take some time. You don't just say 10, 20 and 30 percent cuts and then a day later come back with an answer. OMB doesn't do that with us either.

Senator PROXMIRE. You say in "some time," but what do you mean by that? How long?

Dr. FLETCHER. I guess we can do the study on a 10 or 20 or 30 percent cut in what—something like 6 or 8 months, or something like that.

Senator PROXMIRE. We don't want to hold up your budget for that long.

Dr. FLETCHER. Senator, I think you should be reminded again that the budget has already been cut by almost 20 percent by OMB.

#### DECISIONS ON FISCAL YEAR 1974 BUDGET

Senator PROXMIRE. I understand that, but as I said OMB wasn't shooting blind. They must have come in and asked you for your priorities. I can't believe they just said, "We are going to cut it 20 percent," and decided what to cut themselves. You must have decided that QUESTOL would be eliminated from the budget but ERTS would be saved.

Those decisions must have been made on the basis of a consultation and not on the basis of OMB saying, "We know better than you do, and this is what we are going to cut and this is what we won't cut!"

Dr. FLETCHER. That is right. Those decisions were made over a period of 5 months and it took a lot of research and a lot of negotiation to finally come up with those particular programs, and the others—

Senator PROXMIRE. But what you are telling me this morning—is that we are going to make a rational decision

on the basis of your priorities, you know the program best, but we are going to have to wait for 6 or 8 months before we can have your priorities.

When you went through this process with OMB—

Senator CHILES. Mr. Chairman—

Senator PROXMIRE. I will yield in a minute. When you went through this process with OMB, you must have done some studies. Is there any work you did there that you can make available for us to indicate where we might go from here?

Dr. FLETCHER. No; we did not give the order of priorities to the OMB—

Senator PROXMIRE. Then they made the decision?

Dr. FLETCHER. No; this was a negotiated process. We started very early in September and negotiated each program separately. You can't look at one program independently of all of the rest. They are all interrelated and this took a lot of time.

Senator PROXMIRE. I am sorry, Senator Chiles.

Senator CHILES. I just think this really shows why, when we get into the budget at this stage, we can't get the information. If we were present at the time this was going on and had access to the information that OMB had to start with, then we could tell much better if OMB cut in the right places or not, and whether we should add or cut further.

We come in at too late a stage—

Senator PROXMIRE. That is exactly correct.

Similar agencies in Wisconsin have open hearings before the Governor—I don't know about Florida—

Senator CHILES. We have, too.

Senator PROXMIRE. Florida apparently has, too, similar to what I hope you have before the Office of Management and Budget and before the President, and those are open and public hearings, which are reported fully; the legislature is completely informed on it and they have hearings as to the budget as we are having now.

And, again, I can't hold you responsible for a procedure we in Congress might want to improve, but I would hope you can come up with some indication of your priorities on these things so that we at least have a basis of analysis and consideration that is better than just an opinion of Senators who have many other duties and responsibilities and a very limited basis of information.

Will you try?

Dr. FLETCHER. Well, we will take another look at it' Mr. Chairman.

Senator PROXMIRE. Think about this overnight, and come in tomorrow and try to give us some kind of schedule on this.

[692]

#### REQUEST FOR INFORMATION ON PRIORITIES

[Senator PROXMIRE.] . . . Dr. Fletcher, yesterday we discussed correspondence in which I asked you to submit your priorities, and see if you could come in with some kind of an estimate as to what would happen to your agency if we made cuts of 10 percent, 20 percent, or 30 percent.

Today, I would like to tell you this. We expect to mark up this bill early in June, and I want you to give us whatever you can. I know it has to be incomplete. This isn't a perfect world, but give us what you can on the effect of such cuts by June 1. In other words, what a 10-percent,

20-percent, or 30-percent cut would do. Be as precise as you can be, as definite and specific as possible. But, as I say, it would be nice if we could do this every year or every several years, but obviously we can't do that.

You see, one of the great difficulties and one thing I resent—it's not your fault—but I resent the fact that all of that very valuable negotiation that went on between you and the Office of Management and Budget excluded the Congress, excluded the press, excluded the industry, and excluded the public. All private and secret; nobody knows the basis for the discussion.

Now, we have to repeat it in a more superficial way, a less satisfactory way, in public, before this committee and before the House committee. It is just a crying shame that we don't have access to OMB negotiations. We could save a lot of time. I think we could make far wiser decisions.

On the basis of having gone through this very difficult and painful process yourself and having come to the conclusion that only by dropping programs could certain reductions be accomplished—could you tell us what would happen if we cut you down 10 percent. I take it you have certain options; there are some programs that would drop. You may well feel that this would be catastrophic, a terrible mistake. Tell us that, and tell us why. Then what would happen if it were to go further than the 10 percent.

Dr. FLETCHER. Mr. Chairman, I am not sure we can be very helpful in this regard. I think we can do better in responding to you as we did with OMB, if you were to ask the question, what if we were to cut out this program or that program.

Senator PROXMIRE. I am going to do that in a minute, but I want the other one, too.

Dr. FLETCHER. But to give you a priority ranking I think would be irresponsible on my part. I'll think about it some more but—

Senator PROXMIRE. I think it would be very responsible. I think it would be painful and difficult, but I can't think of a more responsible action.

Dr. FLETCHER. I think it's just that we have come to the point where all of our programs have, essentially, the same high priority.

Senator PROXMIRE. What you are doing is deferring that kind of decision to those of us in the Senate who have far less detailed and comprehensive understanding of this than you and your people have. We make this kind of decision. We make it on the basis essentially of shooting blind. If you make it, you know what you are doing, and you can at least give us what your judgment is.

Dr. FLETCHER. Mr. Chairman, cutting by that amount really involves, as I indicated earlier, dropping whole areas of NASA activity.

Senator PROXMIRE. That's right.

Dr. FLETCHER. And these are policy questions, and I think—sure, I might have some judgment on that—

Senator PROXMIRE. Well, this is a policy committee; that is what this committee amounts to. That's what the Congress does; it makes policy decisions; and that is what we are here for.

Dr. FLETCHER. Yes, and I think you should make those decisions, and not I.

Senator PROXMIRE. We want to know when we make those decisions, we have the best information that we can

get from the most expert and competent people, so that we make the decisions with our eyes open.

What you can do is tell us what happens when we make that kind of decision.

Dr. FLETCHER. I think, as I indicated, we could do much better by telling you what happens if you eliminate this program or that program. We can give you the impact of each of those, but as far as rank-ordering our programs—

Senator PROXMIRE. You couldn't tell us whether you would rather have the Mariner mission or the Pioneer mission?

Dr. FLETCHER. I don't think so, sir, Mr. Chairman.

Senator PROXMIRE. Why not? Why couldn't you give us your—

Dr. FLETCHER. By the way, it's not a Mariner mission or a Pioneer mission, it's the whole Planetary program that would have to drop out—Mariner, Pioneer, and Viking, in order to get you what you wanted.

NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION,

*Washington, D.C., May 31, 1973.*

Hon. WILLIAM PROXMIRE,  
*Chairman, Subcommittee on HUD-Space-Science-Veterans,  
Committee on Appropriations, U.S. Senate, Washington,  
D.C.*

DEAR MR. CHAIRMAN: At the hearings on the NASA budget for FY 1974 before your Subcommittee on March 26 and 27, we several times discussed the question of priorities within the President's FY 1974 budget request for NASA, currently under consideration. The basic point at issue, as I see it, was your interest in identifying for the record in priority order those programs that we would recommend be adjusted at cuts of 10%, 20%, and 30%. Such reductions would equate to approximately \$300 million, \$600 million, and \$900 million.

At that time, I pointed out that I could not provide program priorities in this fashion; my reasons were:

—First, the NASA program has been severely cut back over the past seven years to the point that any further large reduction must mean the cancellation or termination of an entire area of activity. There simply is no room left for project stretchouts, level-of-effort reductions, or across-the-board percentage allocations.

—Second, all of the program areas are today of great importance and all hold the same high priority in my mind.

—Third, a decision, and thus any recommendation toward a decision, to take the U.S. permanently out of any area of space or of aeronautics would be one of the highest policy import. Such decisions are not reversible nor adjustable year by year, since the capabilities upon which these programs depend (facilities, trained manpower, academic institutions, and industrial capacity) take on the order of seven to ten years to create before they can be productive, even though an ill-considered decision can destroy them in a matter of months.

Although I cannot place these in priority order, I can identify the major program areas and the budget figures we are dealing with. The figures here reflect, not the

amounts by which the programs can be reduced, but rather a rough allocation of all planned FY 1974 resources to each of the areas:

	Millions
Aeronautics and Advanced Research, a fundamental legislated function of the NACA/NASA since 1915-----	\$450
The Apollo-Soyuz Test Project, the only high-technology cooperative US-USSR engineering effort and a US international commitment-----	150
Space Physics, Astronomy, and Earth-oriented Applications, the core of the space program in the past and the source of its major current and future returns-----	400
Skylab, the mission now underway to accomplish over 200 investigations in astronomy, space physics, medicine, biology, engineering, materials development, and earth and environmental surveys-----	450
Planetary Exploration, the search for understanding of the solar system in which Earth evolved and for the sources of life in the Universe-----	450
Space Shuttle, the only foreseeable sound means of exploiting the full capabilities, practical applications, and values of space systems at a reasonable cost-----	700
Management and support, the elements of tracking, data acquisition, and program management that retention of any single area would require-----	400

This does *not* mean that any one of the individual sums shown above could be recovered in FY 1974 by terminating that particular activity; the costs of stopping work can run as high as 50% of the total required to continue as planned. Therefore, it is clear by inspection that sums of \$300, \$600, or \$900 million can be accommodated only by gutting the nation's aeronautics and space capabilities as they now exist. Our integrated budget, at some \$3 billion, does maintain a national capability and a national program in a number of related areas. Overall budget reductions ranging from \$300 to \$900 million could only be accommodated by essentially *abandoning* one or more major areas of the U.S. aeronautics and space program—and that would include the associated national capabilities to do any work therein in the future. It has taken us every bit of skill and perseverance to retain an integrated national program at the \$3 billion level; in some cases, our hold on the future is quite precarious as it is. I cannot, in good conscience, propose priorities where none exist—I firmly believe that every major program element is necessary and that all have been already subjected to a ruthless compression within the Executive Branch.

The minimum logical and productive NASA budget level for FY 1974 is on the order of \$3 billion. The alternatives are, to my mind, catastrophic and therefore do not reflect viable national options.

The elimination of all planetary exploration, for example, would mean not only terminating the on-going projects—with an enormous waste of the resources already expended—but, also closing down major parts of our field activities, with an irreplaceable loss of industrial and Civil Service capabilities. Of far greater note would be the losses to science in terms of both knowledge never to be gained and scientists diverted from one of the really fruitful areas of activity today. I have repeatedly said that exploration of the planets was really exploration of the Earth—this is particularly true in the biosciences, in understanding atmospheric systems, and in geotectonics. We believe that only by understanding the fundamental

forces that shape and control planetary environments—and that lead to and support life—can we hope really to plumb the understanding of our home planet.

There is the entire area of applied engineering—both in aeronautics and in space. Virtually every NASA center is deeply involved in one or both, and the losses here would also be irreplaceable. In aviation, this would be tantamount to a national decision that today's technologies are adequate—that the levels of noise, safety, and efficiency need not improve; and that our competitive position in the international aircraft and air transportation market will not deteriorate as other nations make advances. In space, this would mean abandoning the rich promises that programs like ERTS, Nimbus, GEOS, and ATS have shown to be at hand for the management of our total environment on a global scale for the net benefit of all.

There is the shuttle, a whole new way of doing what is necessary in space in the future for far less money. Without the shuttle, space activities would remain as costly as they are now and the taxpayer would lose his due return in the total space investment. At a reasonable future level of space activity, it now appears that these returns could reach \$10 to \$15 billion in just the first 12 years of shuttle operations. To forego the shuttle would be asking the country to abandon the single major US initiative to bring all the potential benefits of space to the taxpayer at the lowest possible cost.

There are the space sciences—astronomy and physics—as well as all other basic research. It is difficult to put values on science, except to recognize that it has always been scientific progress that has interacted with technology to provide the basis of modern civilization. The study of the sun, the stars, and the far galaxies may lead to a fundamental breakthrough in the understanding of the nature of matter and energy; from such understanding may come the ability to harness new kinds of power. Research is at the root of progress; its value is always apparent after the fact.

In any significant cutback there would be very serious dislocations of our national capabilities. These capabilities reside in our ten field centers, which are repositories of unique technical skills and competence. At even the lowest levels of reduction you have mentioned, some of these centers might have to be permanently closed and all would be seriously affected.

In summary, the priorities you have asked me to consider do not appear reasonable. I think that those who make decisions have the responsibility for defending them—and their long-term implications. If the Congress chooses to make reductions of the nature you have suggested we consider, then I feel the Congress must also choose which basic national purposes we as a society should abandon—and in so choosing, also accept full responsibility for the future diminished position the US would inevitably hold, be it in science and technology, economic and military strength, or societal and intellectual progress.

Sincerely,

JAMES C. FLETCHER,  
Administrator.

## FILE 92

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

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U.S. SENATE,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
*Washington, D.C., March 27, 1973.*

Mr. JOE PECORE,  
*Assistant Counsel, Subcommittee on Separation of Powers, Committee on the  
Judiciary, Washington, D.C.*

DEAR MR. PECORE: Enclosed is a compilation of the information which was requested by Senator Ervin in his letter of March 9, 1973. This is the extent of the instances which I have been able to obtain from present employees. I am attempting to search back into the files and determine any past instances of this nature but, as I am sure you can understand, this is a bit more difficult than merely obtaining instances from persons who are presently affiliated with the Committee.

If I do obtain any other materials, I will immediately forward them to you.

Sincerely yours,

HOWARD J. FELDMAN,  
*Chief Counsel.*

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(92-B)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
1964	A. Caldwell, Adm., Commodity Exchange Authority Agriculture	C.E.A. Daily Reports on futures trading in soybean oil and cotton-seed oil futures. Information was necessary in investigation of Anthony "Tino" DeAngelis salad oil swindle.	1964	A. Caldwell, C.E.A. Adm. J. Bagwell, Ag. General Counsel	Information was not available to Congress as it was considered proprietary.
1964 thru 1970	Department of Defense	Test Reports on F-111 Test Aircraft Progress Reports on F-111 Project outlining status of technical problems and financial status	1964 thru 1970	Robert S. McNamara Paul Warnecke and others in DOD	Internal Documents of Defense not available for Congressional Review.
1968	Office of Economic Opportunity	Inspection Reports and Evaluation Reports on OEO Projects	1968	Malcolm Mason Asst. General Counsel	Reports were considered internal and perusal by Congress would inhibit free expression of employees opinions.
1970	Dept. of Agriculture	Inspection & Investigation Reports on Florida Self Help Housing Project	1970	E. Schulman General Counsel	Reports were considered internal documents.
1972	Dept. of Commerce	Shippers Export Declarations (Relating to Property Disposal Case)	1972		Documents considered proprietary.

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 92

Submitted by: (Comm/Subcomm) Senate Permanent

Subcommittee on Investigations

By: *J. V. Walsh*

Title: Investigator

Extension 2059

(258)

## (92-C)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of request (1)	To whom addressed, and agency represented (2)	Date of information requested, and nature of hearing; or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation • Material as available, and where consider. (6)
Orally in early 1971 and continuing sporadically since then.	William J. Cotter and Charles Miller, U. S. Postal Service	U. S. Postal Inspection reports and tape recordings relating to past informant of U. S. Postal Service and prospective Subcommittee witness. Such material would save Subcommittee expense for duplicative investigation and corroborate witness information.	Continual still to present for stated purpose of reviewing and consulting with Dept. of Justice	William J. Cotter Chief Postal Inspector	No final refusal as yet. In fact, latest word from Mr. Cotter (as of March 26, 1973--almost two years from date of initial request) is that a response to our request will be in hand on <del>or</del> about March 26, 1973.

Senate Select Committee on Small Business  
U.S. Senate, March 5, 1973  
Committee Office, Room 202, Russell, 225 C.P.O., D.C.  
FILE 92

Directed by: (Signature)

Permanent Subcommittee on Investigations

By: Philip R. Morris (by Alan Sander)  
Investigator 51372  
Extension

## (92-D)

SURVEY, PART I: REQUESTS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of request (1)	Location visited, and agency contacted (2)	Nature of information requested, and nature of hearings or other action for which requested. (3)	Date of refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal if available, and other remarks. (6)
Many requests; period December, 1962, through January, 1969..	Department of Defense; the United States Air Force; the United States Navy.	Cost, technical, contractual, performance information on the TFX aircraft (F-111 in all versions) requested during the 8-year investigation (formally known as "The TFX Contract Investigation.")	Multitudes of dates. See accompanying memorandum.	Secretary of Defense Robert S. McNamara; Deputy Secretary of Defense Roswell Gilpatric; Secretary of the Air Force Eugene Zuckert; Secretary of the Navy Fred Korth; Secretary of Defense Clark Clifford; Assistant Secretary of Defense Paul Warnke; numerous Assistant Secretaries and Deputy Assistant Secretaries, on many occasions. See accompanying memorandum.	A principal reason on many occasions: "These are internal documents." Other reasons: "not in the national interest" or often no reply at all to the request. See accompanying memorandum.
See accompanying memorandum.	See accompanying memorandum.				

Senate Select Committee on Small Business  
U.S. Senate, March 5, 1973  
Committee Room, Dir. Bldg., Post Office, 225 C St. S.E., D.C.

FILE 92

Senate Select Committee on Small Business  
Senate  
Permanent Subcommittee on Investigations  
John Brick, Investigator  
E-6599  
Extension

## MEMORANDUM

MARCH 20, 1973.

To: Howard J. Feldman.  
From: John Brick.  
Subject: Survey by Separation of Powers Subcommittee; Refusals of Requests for Information by the Department of Defense and Its Subordinate Agencies during the TFX Contract Investigation.

The TFX Contract Investigation began in December of 1962 and concluded with the submission to the Senate of the Subcommittee's report on December 18, 1970. There were two series of hearings, the so-called First Series, started on February 26, 1963 and concluded on November 20, 1963, and the Second Series, started on March 24, 1970 and concluded on April 28, 1970.

Initially, in December, January and February of 1963, the Department of Defense and the Departments of the Navy and the Air Force cooperated generally with the Subcommittee's requests for information and technical data about the TFX aircraft (hereinafter called the F-111, as it came to be known during 1963.) Early in March of 1963, when it was discovered that the investigation was not to be cursory or limited, the Pentagon began a series

of refusals to furnish information to the Subcommittee, in addition to a considerable number of complete failures even to respond to written requests for such information signed by the Chairman of the Subcommittee, Senator John L. McClellan. The refusals to furnish information upon direct written request continued intermittently until January of 1969, a period of seven years. The direct requests were addressed to Secretary of Defense Robert S. McNamara and later to Secretary Clark Clifford, to Deputy Secretary Roswell Gilpatric, to Secretaries of the Air Force Eugene Zuckert and Harold Brown, and to Secretaries of the Navy Fred Korth and Paul Ignatius, among other high officials of the Defense Department and the several armed services.

The Subcommittee sought, in the period 1963 through January of 1969, information about F-111 costs and projected costs, technical data, performance characteristics of the several versions of the aircraft, program schedules (and slippages therein), and other information known by us to be in the possession of the Pentagon, the contractors, and the sub-contractors, and considered by the Subcommittee to be vital to its investigation of the aircraft program, both in research and development and in production.

Frequently, of course, after much delay, information sought was furnished in whole or in part. This was particularly true after enterprising reporters of the national press had published stories indicating that they had access to the facts of the matter. On other occasions, we received information or documents *after* we had specifically notified the Pentagon about the date, number and nature of the document we wished to obtain, or after we had furnished information to the Pentagon and asked directly that it be verified.

In January of 1969 and shortly thereafter, the new administration in the Pentagon reversed the previous policy and practices, and provided the Subcommittee with all information we sought about the F-111 aircraft in all its versions. Only by this reversal of policy was the Subcommittee enabled to bring its eight-year investigation to a close, although much of the information furnished to us simply verified the data we already had pieced together.

There were literally scores of formal requests for information that were refused or ignored during the period 1963-January of 1969. Literally hundreds of verbal requests by Subcommittee staff members were refused or ignored by officials of the Department of Defense and the military services. Information disclosed to the Subcommittee in 1969 by the Pentagon showed that (1) there was a deliberate policy upon the part of the highest-ranking officials of the Department of Defense and the military services to prevent the Subcommittee from discovering the costs and technical and performance data of the F-111 aircraft, and (2) that Department of Defense witnesses testified without candor, or inaccurately, or untruthfully before Congressional committees conducting hearings on the F-111 aircraft program. Such instances were documented during the Second Series of F-111 hearings before the Subcommittee in 1970.

At no time during the TFX Contract Investigation was the question of executive privilege an issue. The reasons usually given by the Department of Defense for refusing to cooperate with the Subcommittee related rather to "the national interest," or to "internal operations which should not be disclosed," or to frequent explanations that the information did not exist or was not pertinent to the investigation.

Rather than list each formal refusal to each formal request for information during seven years of investigation, I call attention to Exhibit No. 1, of the transcript of the Second Series of the TFX Contract Investigation. On March 24, 1970, the Chairman placed in the record several volumes containing *all* the correspondence between the Subcommittee and the Pentagon relating to the F-111 between December 5, 1962 and March 19, 1970. The exhibit consisting of 545 items, was compiled by John Brick from the Subcommittee's files, and was indexed by number of item, date, and subject of document. Scores of these documents are concerned with adamant refusals by the Department of Defense to respond favorably to formal requests for information or data. The exhibit was introduced on page 32, and is readily available for inspection in the files of the Subcommittee.

Exhibit No. 2, Second Series, also introduced on page 32, consists of the so-called "guidelines" published by the Pentagon as directions to F-111 contractors and subcontractors, telling them exactly what they were to disclose

and *were not to disclose* to Subcommittee investigators and to GAO personnel. These "guidelines", printed in the record of the hearings, were issued on September 2, 1966.

An extremely important document, contrasting what Department of Defense officials were discussing about the F-111 in weekly and bi-weekly meetings in 1966 and 1967 as opposed to what they were telling the Subcommittee and other committees of the Congress during the same period of time—frequently the private conversations were directly contradictory to the public testimony—can be found in pp. 540-573 of Part 3 of the Second Series of hearings on the TFX Contract Investigation. The section is concerned with the so-called "Icarus Project" in which Secretary McNamara assumed personal management of the F-111 program because of the aircraft's startling cost increases and alarmingly inadequate performance characteristics.

Exhibit 1, Exhibit 2, and the text of the testimony about "Project Icarus" cover the major areas of refusal or failure to cooperate with the Subcommittee on the TFX matter. A review of staff members' memoranda, now in the National Archives but available to us within a day or so, would furnish details on all such refusals.

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#### REFUSALS BY THE DEPARTMENT OF DEFENSE TO CO-OPERATE IN THE TFX INVESTIGATION CONDUCTED BY THE SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS

Attached is the Table of Contents of Exhibit 1, Part one, of the Second Series of Hearings in the TFX Contract Investigation, taken from the transcript of March 24, 1970. The list of 545 items of correspondence between the Subcommittee and the Pentagon dates and briefly explains each item. Major items indicating refusal by the Department of Defense to cooperate with the Subcommittee or to furnish information or documents are marked with an asterisk.<sup>1</sup>

The eight-year investigation of the TFX contract was marked, after an initial period of good cooperation from December of 1962 through early March of 1963, by much acerbity upon the part of the Pentagon in its dealings with the Subcommittee's staff, and by ever growing and more adamant refusal of cooperation, particularly in the period between the Spring of 1966, when it became apparent even in the Pentagon that the F-111 aircraft (TFX) concept had been an astounding blunder and the entrance into office in January of 1969 of Secretary of Defense Melvin Laird, who immediately reversed the standard procedures of Secretary McNamara, Secretary Clifford, and their subordinates, and gave the Subcommittee's staff full access to documents, data and information about the F-111.

<sup>1</sup> The Subcommittee on Separation of Powers, has reproduced, following the Table of Contents (Exhibit 1, TFX Contract Investigation (Second Series), hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, U.S. Senate, 91st Cong., 2d sess., Mar. 24, 1970) only those items of correspondence which are indicated by asterisks as signifying refusal of information and which bear a date within the period embraced by this survey. Accordingly, the first item of correspondence which is reproduced is Letter No. 201, dated February 24, 1964. Following the series of letters so reproduced will be found Exhibit 2 to the TFX Contract Investigation (Second Series), in the form of excerpted pages 32 and 33 from the record of those hearings.

Another very important document in the matter of refusal to cooperate with the Subcommittee were the so-called "guidelines" issued in September of 1966 by the Pentagon for a GAO-conducted study of TFX costs ordered by Senator McClellan. The "guidelines" as interpreted by service personnel, contractors' personnel, and the Subcommittee's staff, were designed simply to

supply certain basic information to the Subcommittee—most of which information the Subcommittee already had—and to deny access to the important matters of total cost per individual aircraft and total costs relating to research and development and to the production program. A copy of the "guidelines" is attached as it was printed in the transcript.

## Exhibit 1, Second Series

(92-D)

## TABLE OF CONTENTS

Compilation of all Correspondence between the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations and the Department of Defense, Relating to the TFX Aircraft, from Dec. 5, 1962 to Aug. 16, 1966

1. Dec. 5, 1962 Adlerman to Zuckert. Initial request for information.
2. Dec. 5, 1962 Adlerman to Korth. Initial request for information.
3. Dec. 10, 1962 Iimirie to Adlerman. Reply promising cooperation.
4. Dec. 13, 1962 Lightfoot to Adlerman. Transmits documents.
5. Dec. 13, 1962 Kear to Chairman. Transmits documents.
6. Dec. 14, 1962 McGiffert to Dunne. Transmits documents.
7. Dec. 14, 1962 Lightfoot to Adlerman. Transmits documents.
8. Dec. 14, 1962 Kear to Chairman. Transmits documents.
9. Dec. 18, 1962 Paffel to Adlerman. Transmits documents.
10. Dec. 20, 1962 Adlerman to Hopkins. Requests documents.
11. Dec. 21, 1962 Chairman to McNamara. Request to withhold action on contract for GD until subcommittee considers matter.
12. Dec. 21, 1962 Robbins to Chairman. Transmits documents.
13. Dec. 26, 1962 Paffel to Adlerman. Transmits documents.
- \*14. Dec. 26, 1962 Gilpatrick to Chairman. Announces decision to proceed with GD contract in spite of request in No. 11 above.
15. Dec. 27, 1962 Roderick to Dunne. Transmits information on contract go-ahead referred to in No. 14 and No. 11 above.
16. Dec. 28, 1962 Adlerman to Hopkins. Requests documents.
17. Dec. 31, 1962 Robbins to Chairman. Transmits documents.
18. Jan. 2, 1963 Korth to Adlerman. Transmits telephone log and copies of TFX correspondence.
19. Jan. 3, 1963 Adlerman to Korth. Requests interview with Captain Shepherd.
20. Jan. 3, 1963 Lightfoot to Adlerman. Transmits documents.
21. Jan. 4, 1963 Paffel to Adlerman. Transmits documents.
22. Jan. 4, 1963 Paffel to Adlerman. Transmits documents.
23. Jan. 7, 1963 McGiffert to Dunne. Transmits documents.
24. Jan. 7, 1963 Badger to Adlerman. States availability of Captain Shepherd for interview.
25. Jan. 8, 1963 Robbins to Chairman. Transmits documents.
26. Jan. 9, 1963 Paffel to Adlerman. Transmits documents.
27. Jan. 9, 1963 Paffel to Adlerman. Transmits documents and information.
28. Jan. 10, 1963 Paffel to Adlerman. Transmits documents.

29. Jan. 11, 1963 Adlerman to Zuckert. Makes joint or dual production suggestion for TFX; requests information.
30. Jan. 11, 1963 Paffel to Adlerman. Transmits documents.
31. Jan. 11, 1963 McGiffert to Dunne. Transmits documents.
32. Jan. 14, 1963 Paffel to Adlerman. Transmits documents.
33. Jan. 14, 1963 Hoisington to Adlerman. States reply to No. 29 above is being prepared.
34. Jan. 16, 1963 McGiffert to Adlerman. Transmits McNamara and Gilpatric logs and correspondence.
35. Jan. 24, 1963 Paffel to Adlerman. Transmits documents.
36. Jan. 31, 1963 Paffel to Adlerman. Transmits documents.
37. Feb. 5, 1963 Paffel to Adlerman. Transmits documents.
38. Feb. 13, 1963 Chairman to McNamara. Announces hearings. Suggests Secretary pick convenient dates for himself, Zuckert and Korth.
- \*39. Feb. 13, 1963 Hoisington to Adlerman. States dual production plan in No. 29 above would bring excessive costs; gives information on engine costs, etc.
40. Feb. 14, 1963 Paffel to Adlerman. Transmits documents.
41. Feb. 14, 1963 Paffel to Adlerman. Transmits documents.
42. Feb. 21, 1963 McGiffert to Chairman. Appreciation for allowing Mr. McNamara to choose time for appearance.
43. Feb. 21, 1963 Paffel to Adlerman. Transmits documents.
44. Feb. 21, 1963 Paffel to Adlerman. Transmits documents.
45. Feb. 25, 1963 Paffel to Adlerman. Transmits documents.
46. Feb. 28, 1963 McGiffert to Adlerman. Reports no Asst. Secretaries made TFX recommendations.
47. Mar. 2, 1963 Zuckert to Chairman. Reports error in performance comparison in Memorandum for Record of November 21, 1962.
48. Mar. 2, 1963 Paffel to Adlerman. Transmits information.
49. Mar. 4, 1963 Paffel to Adlerman. Transmits documents.
50. Mar. 4, 1963 Paffel to Adlerman. Transmits documents.
51. Mar. 5, 1963 McGiffert to Adlerman. Transmits security deletions for record.
- \*52. Mar. 6, 1963 Chairman to McNamara. Requests details on prior contract performances of Boeing and General Dynamics.
53. Mar. 6, 1963 Paffel to Adlerman. Transmits documents.
54. Mar. 6, 1963 Paffel to Adlerman. Clarifies data on loiter time.

- \*55. Mar. 7, 1963 McGiffert to Chairman. Acknowledges receipt of No. 52 above and promises information.
56. Mar. 8, 1963 Paffel to Adlerman. Transmits documents.
57. Mar. 9, 1963 McNamara to Chairman. States testimony does not give fair picture of contract award, expresses concern, asks permission to file a statement to be read for him.
58. Mar. 11, 1963 Sylvester to Chairman. Apology for comments in press conference about unfair hearings.
59. Mar. 12, 1963 McGiffert to Adlerman. Transmits Gilpatrick "Meet the Press" transcript.
60. Mar. 12, 1963 Gilpatrick to Adlerman. Re. arrangements for Secretary McNamara's statement.
61. Mar. 12, 1963 Paffel to Adlerman. Transmits documents.
62. Mar. 12, 1963 Paffel to Adlerman. Transmits documents.
63. Mar. 12, 1963 Paffel to Adlerman. Transmits documents.
64. Mar. 12, 1963 Paffel<sup>3</sup> to Adlerman. Transmits documents.
65. Mar. 15, 1963 Paffel to Adlerman. Transmits documents.
66. Mar. 15, 1963 Paffel to Adlerman. Transmits documents.
- \*67. Mar. 16, 1963 McGiffert to Nunnally. Certain documents in dead storage; assumes not necessary to supply.
68. Mar. 19, 1963 Adlerman to Gilpatrick. Reports on interviews of witnesses which led to "browbeating" charge.
69. Mar. 19, 1963 Gilpatrick to Adlerman. Comments on No. 68 above. States witnesses will arrive March 20.
70. Mar. 19, 1963 Gilpatrick to Chairman. Explains about press conferences in Pentagon, and his own statements.
- \*71. Mar. 19, 1963 Charyk to Adlerman. Asks that subcommittee ask Zuckert for Zuckert "chronology."
72. Mar. 19, 1963 McNamara to Chairman. Sends a book as example of basis for accuracy of cost estimates.
73. Mar. 19, 1963 Kear to Chairman. Transmits documents.
74. Mar. 19, 1963 Paffel to Adlerman. Transmits documents.
75. Mar. 19, 1963 Paffel to Adlerman. Transmits documents.
76. Mar. 20, 1963 McGiffert to Dunne. Transmits documents.
77. Mar. 20, 1963 Spangenberg to Chairman. Transmits correction in testimony.
- 77-A. Mar. 23, 1963 McNamara to Chairman. Personal letter re press treatment.
78. Mar. 23, 1963 Gilpatrick to Chairman. States wisdom of channeling requests, etc., through Dave McGiffert, who will forward them.
79. Mar. 23, 1963 Dunne to McGiffert. Confirms appearances of witnesses.
- \*80. Mar. 25, 1963 McGiffert to Dunne. Says process continues on compilation of material requested in No. 52 above.
81. Mar. 26, 1963 Dunne to Gilpatrick. Requests Zuckert "chronology" and Rand study.
- \*82. Mar. 26, 1963 Adlerman to McGiffert. Requests expedition of material referred to in No. 52 and No. 80 above.
83. Mar. 26, 1963 McGiffert to Adlerman. Transmits classified copy of *Fortune* magazine article.
84. Mar. 26, 1963 McGiffert to Adlerman. Transmits document.
85. Mar. 26, 1963 McGiffert to Adlerman. Re availability of Crawford for interview.
86. Mar. 26, 1963 Gilpatrick to Chairman. States that he would not have spoken like Sylvester; says Sylvester meant well.
87. Mar. 27, 1963 McGiffert to Adlerman. Transmits documents.
88. Mar. 27, 1963 McGiffert to Dunne. Transmits document.
- \*89. Mar. 28, 1963 McGiffert to Dunne. Refuses Zuckert "chronology" and promises word on Rand study.
90. Mar. 28, 1963 Gilpatrick to Chairman. Reports transmittal of Navy TFX briefing and availability of Capt. Shepherd.
91. Mar. 29, 1963 McGiffert to Adlerman. Transmits document.
- \*91-A. Apr. 1, 1963 McGiffert to Dunne. Refuses Rubel paper.
- \*92. Apr. 2, 1963 Chairman to McNamara. Repeats request for Zuckert "chronology" referred to in Nos. 71, 81, and 89 above.
- \*93. Apr. 2, 1963 Chairman to McNamara. Repeats request for Rubel paper.
- 93-A. Apr. 2, 1963 Chairman to Comptroller General. Requests GAO to study cost standards for TFX.
- 93-A-1. Apr. 2, 1963 Chairman to McNamara. Informs original request to GAO to study cost estimate.
- 93-B. Apr. 3, 1963 McGiffert to Chairman. Transmits information.
94. Apr. 3, 1963 Gilpatrick to Chairman. Requests word on briefing desires of Subcommittee.
95. Apr. 3, 1963 Chairman to Comptroller General. Details information wanted by the Subcommittee from GAO study.
96. Apr. 3, 1963 Gilpatrick to Chairman. Suggests scheduling of witnesses.
- \*97. Apr. 4, 1963 Gilpatrick to Chairman. Refuses Rubel paper.
98. Apr. 4, 1963 McGiffert to Gilleas. Transmits jet engine injury data.
99. Apr. 4, 1963 McGiffert to Adlerman. Transmits documents.
- \*100. Apr. 4, 1963 Adlerman to McGiffert. Requests contractors' management operating ratios.
101. Apr. 4, 1963 General LeMay to Chairman. Corrects impression of his testimony.
102. Apr. 5, 1963 McGiffert to Chairman. Clarification of Dr. Brown's testimony on ceiling figures.
- \*103. Apr. 5, 1963 McNamara to Chairman. Letter stating cost estimates used by Air Force were "so unreliable" they could not be used as a foundation for source selection.
104. Apr. 8, 1963 McGiffert to Adlerman. Transmits pricing standards on Century series of aircraft.
105. Apr. 8, 1963 Dunne to McGiffert. Requests information on F4.
106. Apr. 9, 1963 McGiffert to Adlerman. Transmits information.
107. Apr. 10, 1963 Dunne to McGiffert. Requests information.
108. Apr. 10, 1963 Chairman to McNamara. States Comptroller General's review will be modified in view of No. 103 above.
109. Apr. 10, 1963 Chairman to Comptroller General. Requests modification of review in view of No. 103 above.
- \*110. Apr. 11, 1963 Chairman to McNamara. Repeats request for prior performance data made on March 6 in No. 52 above, which is referred to in Nos. 55, 80, 82.
111. Apr. 12, 1963 McGiffert to Adlerman. Transmits information.

112. Apr. 15, 1963 Gilpatrick to Chairman. Requests information about scheduling of Secretarial witnesses.
- \*113. Apr. 16, 1963 Chairman to Gilpatrick. States no dates set for secretarial witnesses. Requests information first asked for on March 6 in No. 52 above. Requests material first asked for in No. 81 above. Requests material first asked for in No. 93 above. Asks for material previously verbally requested. Requests material asked for in No. 100 above.
- \*114. Apr. 17, 1963 McGiffert to Adlerman. Transmits certain information and documents on Blackburn, previously verbally requested.
115. Apr. 18, 1963 Adlerman to Gilpatrick. Requests Rand study on prototypes.
116. Apr. 18, 1963 McGiffert to Adlerman. Transmits Blackburn white paper on TFX.
117. Apr. 18, 1963 McNamara to Chairman. States nuclear submarine material may be had by requesting of McGiffert. All requests should go through McGiffert.
- \*118. Apr. 19, 1963 Chairman to Gilpatrick. Requests again Blackburn memorandum referred to in No. 114 above. Requests again materials in No. 113 above.
119. Apr. 19, 1963 McGiffert to Adlerman. Transmits management operating ratios referred to in Nos. 100, 113, and 118 above. Also Rand study.
- \*120. Apr. 19, 1963 Gilpatrick to Chairman. Reply to No. 118 above. States 200-plus documents furnished, 75 interviews allowed at cost of thousands of hours. States material requested in No. 52 above is being compiled; refuses Zuckert "chronology." Refuses Rubel paper. Refuses Blackburn memorandum. Asks for scheduling of Secretarial witnesses.
121. Apr. 25, 1963 McGiffert to Dunne. Transmits material on F4 referred to in No. 105 above.
- \*122. Apr. 26, 1963 Chairman to McNamara. Requests information on design changes, progress, commonality status, etc.
123. Apr. 26, 1963 Dunne to McGiffert. Asks further information in F4.
124. Apr. 27, 1963 Adlerman to McGiffert. Requests documents.
125. Apr. 30, 1963 McGiffert to Adlerman. Transmits Rand study on prototypes.
- 125-A. May 2, 1963 Gilpatrick to Chairman. Asking Secretarial witness schedule.
- \*126. May 2, 1963 Chairman to Gilpatrick. Chairman notes he made available Comptroller General's letter. Then states that many items requested have been refused or not provided. Cites press stories about Secretarial unhappiness about not being called to testify, and notes original offers to have Secretaries first, and subsequent testimony in the record to that effect. Cites permission for McNamara statement. Attaches list of six items refused, not acknowledged, or not provided.
127. May 7, 1963 McGiffert to Adlerman. Transmits documents requested in No. 124 above.
- 127-A. May 7, 1963 McGiffert to Chairman. Transmits Blackburn memo.
128. May 7, 1963 McGiffert to Chairman. Transmits documents.
- \*129. May 7, 1963 Dunne Memorandum. Reports that information requested in No. 122 above is said by McGiffert to open new avenues and must be considered at the highest level.
130. May 8, 1963 McGiffert to Dunne. Transmits F4 data asked in No. 123.
131. May 9, 1963 McGiffert to Adlerman. Transmits new copy of McGiffert letter to Chairman (attached) on Air Force source selections. Requests for this information originally made by Senators Jackson and Javits.
132. May 15, 1963 McGiffert to Adlerman. Transmits second copy of Rand prototype study. Robbins to Adlerman Transmits photograph.
134. May 21, 1963 Adlerman to McGiffert. Request access to Rubel file. Request 2 added copies of 4th Eval. Report, one sanitized.
135. May 22, 1963 Gilpatrick to Chairman. Transmits Rubel information.
136. May 23, 1963 McGiffert to Chairman. Informal note re transmission of Rubel material.
137. May 27, 1963 McGiffert to Adlerman. Transmits one copy 4th Evaluation Report. Another being "sanitized."
138. May 28, 1963 Adlerman to McGiffert. Requests 7 files on which Admiral Anderaon based his testimony.
- \*139. May 29, 1963 Chairman to McNamara. Requests status and progress data initially asked for in No. 122. States no acknowledgement of request received.
140. June 3, 1963 Adlerman to McGiffert. Asks for telephone logs of Gilpatrick, Zuckert, and Korth.
- \*141. June 3, 1963 Gilpatrick to Chairman. Replies to No. 122 above, (see No. 139 above). States that some answers must await contract finalization, gives general summary answers to other questions.
142. June 5, 1963 McGiffert to Adlerman. Transmits files requested in No. 138 above.
143. June 11, 1963 Adlerman to McGiffert. Again requests "sanitized" 4th Evaluation Report. See Nos. 134 and 137 above.
144. June 13, 1963 McGiffert to Adlerman. Hopes to have 4th Evaluation Report ready "next week."
- \*145. June 14, 1963 McGiffert to Adlerman. States request for Spangenberg interviews should be taken up with McNamara or Gilpatrick.
- 145-A. June 18, 1963 Zuckert to Chairman. Re trip to Europe and hearings.
146. June 19, 1963 Adlerman to McGiffert. Requests documents.
147. June 20, 1963 Adlerman to McGiffert. Requests data on GD contracts.
148. June 21, 1963 Chairman to McNamara. Requests presence of Lt. Gen. Alness, Mr. McGiffert, and unnamed person on June 25.
149. June 21, 1963 McGiffert to Adlerman. States General Alness' answer (see No. 148 above) would be Alex Tachmindji.
150. June 21, 1963 McGiffert to Adlerman. Transmits document in No. 146 above.
- 150-A. June 21, 1963 Zuckert to Chairman. Transmits advance copies of statement.
151. June 24, 1963 Adlerman to McGiffert. Relating to Korth and Zuckert appearances and need for Korth's statement early.
152. June 25, 1963 McGiffert to Adlerman. Reviews scheduling of Secretarial witnesses, complains about scheduling Korth before Zuckert.
- \*153. June 27, 1963 Chairman to McNamara. Asks for Spangenberg now and at all future hearings.
154. June 27, 1963 Adlerman to McGiffert. Asks for Dr. Asher and other witnesses for interviews on July 1.

- \*155. June 27, 1963 Adlerman to McGiffert. Repeats request for "sanitized" 4th Evaluation Report. See Nos. 134, 137, 143. Also asks for expense data for TFX outside consultants.
156. June 27, 1963 Kear to Chairman. Transmits 40 copies of Korth's statement.
- \*157. June 27, 1963 Korth to Chairman. Refuses to make Spangenberg available.
158. July 1, 1963 Jacobsen to Adlerman. Encloses Air Force pamphlet.
- \*159. July 2, 1963 Adlerman to McGiffert. Repeats request for "sanitized" 4th Evaluation Report. See Nos. 134, 137, 143, 155 above.
160. July 8, 1963 McGiffert to Nunnally. Transmits cost data on other aircraft.
- 160-A. July 8, 1963 McGiffert to Adlerman enclosing Planning Research Corp. data.
161. July 11, 1963 Adlerman to McGiffert. Requests Navy Sea Based Strike Force Study.
162. July 12, 1963 McGiffert to Maisch. Transmits Korth and Zuckert data.
163. July 24, 1963 Josephs to Dunne. Transmits added copies Zuckert's statement.
164. July 24, 1963 McGiffert to Nunnally. Transmits Bomarc study.
165. July 26, 1963 McGiffert to Chairman. Transmits thrust reverser studies.
166. July 30, 1963 McGiffert to Chairman. Transmits deficiency lists.
- \*167. July 30, 1963 McGiffert to Chairman. States Earl Crawford sick; cannot testify.
168. July 31, 1963 Korth to Chairman. Transmits details of bank transactions with General Dynamics.
169. Aug. 4, 1963 Brick Memorandum. Reports details of phone conversations Dunne-Zuckert and Dunne-Horwitz.
170. Aug. 8, 1963 Zuckert to Chairman. Comments unfavorably on subcommittee staff excerpting of 4th Evaluation Report.
- \*171. Aug. 9, 1963 McGiffert to Nunnally. Comments on material already supplied in connection with No. 52 above. Deems it sufficient; ready to discuss need for more information.
172. Aug. 16, 1963 McGiffert to Chairman. Transmits information on F4 and F8U-3 as requested in hearings.
173. Aug. 28, 1963 Zuckert to Chairman. Clarifies and confirms his testimony relating to TFX source selection. Letter placed in record.
174. Aug. 29, 1963 Brick to Spangenberg. Requests "sanitizing" of Jordan statement.
- \*175. Sept. 6, 1963 Nunnally Memorandum. States that McGiffert letter (No. 171 above) is not responsive to No. 52 request. States need for exact information.
- \*176. Sept. 6, 1963 Chairman to McNamara. Repeats March 6, 1963 request (No. 52) and gives detailed information on what is needed. Asks early delivery.
- \*177. Sept. 6, 1963 Chairman to McNamara. Repeats request for Navy Sea-Based Strike Study (No. 161) and asks for latest cost and budget figures on TFX.
178. Sept. 6, 1963 McGiffert to Dunne. Requests Korth's letter of July 31 (No. 168 above) be placed in the record.
179. Sept. 9, 1963 McGiffert to Chairman. Transmits three items requested for the record.
- \*180. Sept. 18, 1963 McNamara to Chairman. Refuses to furnish Navy Sea-Based Strike Study (Nos. 161 and 177 above.)
181. Sept. 27, 1963 Korth to Chairman. Transmits information on Boeing's changes to September 10, 1962, proposal.
- \*182. Oct. 21, 1963 Chairman to McNamara. States Nunnally en route to WPAFB and requests cooperation on giving him cost figures and budget projections.
183. Oct. 21, 1963 Korth to Chairman. States he gave press copies of letters related to his resignation.
- \*184. Oct. 25, 1963 Chairman to McNamara. States Nunnally denied access to files (No. 182 above) at WPAFB. States refusal hampers and delays investigation; asks Secretary's personal attention.
185. Oct. 25, 1963 Chairman to Korth. Acknowledges No. 183 and states Korth will be recalled. Will advise.
186. Oct. 25, 1963 Adlerman to McGiffert. Asks briefing on Sequoia.
187. Oct. 26, 1963 Korth to Chairman. Relating to likelihood of recall.
- \*188. Oct. 29, 1963 McNamara to Chairman. States Nunnally's trip objectives not specified (Nos. 182 and 184). States belief Subcommittee intends to "monitor and supervise." States contract will be furnished when completed. No preliminary budget figures. Cannot permit investigation to hinder and delay.
189. Oct. 30, 1963 Adlerman to Comptroller General. Advises on Sequoia inquiry; asks GAO representation.
- \*190. Nov. 8, 1963 McNamara to Chairman. Refuses Gen. Dynamics cost proposal. Says "final contract will be best evidence for evaluation \* \* \* of judgments we made \* \* \*."
191. Nov. 12, 1963 McGiffert to Chairman. Refers to No. 196 above and No. 52 and transmits information, explaining why some material is not pertinent.
- \*192. Nov. 12, 1963 McGiffert to Adlerman. Refuses material on Sequoia as not pertinent.
193. Nov. 13, 1963 McGiffert to Chairman. Transmits Pert charts.
- \*194. Nov. 13, 1963 Chairman to McNamara. Requests Sequoia material (Nos. 186, 189, 192) in relation to recall of Korth.
- \*195. Nov. 13, 1963 Adlerman to McGiffert. Notes No. 194 above, and suggests McGiffert not try to determine pertinancy.
196. Nov. 16, 1963 McGiffert to Chairman. Reports compliance on Sequoia material.
197. Nov. 19, 1963 McGiffert to Chairman. Reports TFX funds released under contract.
198. Nov. 26, 1963 McKee to Adlerman. General McKee reports best recollection on events related to F-102.
199. Jan. 21, 1964 McGiffert to Nunnally. Transmits letter appointing to Grumman as subcontractor.
200. Feb. 11, 1964 Chairman to McNamara. Requests personnel be made available to keep our staff up on status of program.
- Editor's note: Commencing with letter No. 201, letters marked with an asterisk are reproduced below.
- \*201. Feb. 24, 1964 McNamara to Chairman. States contracts will be available when ready and personnel will be furnished. (See p. 272.)
202. Feb. 29, 1964 McMillan to Chairman. Transmits copy of press release of President on A-11 "spook" plane.
- \*203. Mar. 7, 1964 Chairman to McNamara. Asks if interpretation is correct (Nos. 200, 201) that personnel are being denied. If so, will hamper and delay inquiry. Advise. (See p. 272.)
204. Mar. 11, 1964 McGiffert to Chairman. Acknowledges No. 203 above and will advise.

- \*205. Mar. 25, 1964 McNamara to Chairman. States (re. Nos. 203, 204) that inquiry will be expedited best if he gives information after contract completion, at end of April, 1964. (See p. 273.)
206. Apr. 18, 1964 Broderick to Adlerman. Transmits TFX public affairs plan, not otherwise identified.
- \*207. May 15, 1964 Chairman to McNamara. Refers to previous letters (Nos. 182, 184, 200, 203) and states history of refusals and failures to furnish information. Now past contract time. Hopes Secretary will comply. (See p. 273.)
208. May 25, 1964 McGiffert to Chairman. Transmits contract.
209. May 26, 1964 Chairman to McNamara. Requests lengthy list of documents referred to in contract.
210. May 28, 1964 McGiffert to Chairman. Acknowledges No. 209 above.
- \*211. June 8, 1964 Chairman to McNamara. Notes No. 210 above, and asks Secretary's personal attention and assurance that documents will be available forthwith. (See p. 273.)
- 211-A. June 12, 1964 McGiffert to Chairman. Transmits documents No. 209.
- \*212. June 12, 1964 Adlerman to Zoeckler. Requests documents on current status of TFX re. costs and performance, etc. (See No. 216). (See p. 274.)
- \*213. June 12, 1964 Zoeckler to Adlerman. States he requested permission for access to McGiffert. States Subcommittee will have to go through Office of Secretary of Defense and Secretary of Air Force. (See p. 274.)
214. June 26, 1964 McGiffert to Chairman. Transmits certain documents listed in No. 209.
215. July 2, 1964 McGiffert to Chairman. Transmits GD's make-or-buy program requested in No. 209.
216. July 10, 1964 Chairman to McNamara. Requests expediting of documents requested in No. 212 above. List attached.
217. July 17, 1964 Roderick to Chairman. Acknowledges No. 216 above.
218. Aug. 4, 1964 Chairman's Memorandum. Notes conference with Zuckert and Horwitz relating to assembling of documents, etc.
- \*219. Aug. 25, 1964 Zuckert to Chairman. Details documents requested in connection with contract, states delivery impractical, thousands of man hours, etc. (See p. 274.)
220. Sept. 30, 1964 Corbin to Chairman. Notes showing of A-11 (YF-12A) "spook plane" and encloses secret fact sheet.
221. Oct. 2, 1964 Chairman to Zuckert. Attaches copy of letter to McNamara to serve as a reply to No. 219 above.
- \*221-A. Oct. 2, 1964 Chairman to McNamara. Relates events connected with promises to furnish contract, etc., and related documents, and discusses Mr. Zuckert's plea in No. 219 above. States such laborious delivery is not necessary. Requests that documents be made available where located for on-the-spot inspection. (See p. 277.)
222. Oct. 8, 1964 McGiffert to Chairman. Acknowledges No. 221-A above.
- \*223. Oct. 29, 1964 Zuckert to Chairman. States that some 600 documents will be available for on-the-spot inspection as requested in No. 221-A above. (See p. 278.)
- \*224. Nov. 24, 1964 Adlerman to Garcia. States that staff members will arrive at WPAFB to inspect documents, and asks personnel be available for discussion on Nov. 30. (See. p. 278.)
- \*225. Dec. 4, 1964 Adlerman to Zuckert. Attaches list of documents to be delivered to Subcommittee. (See p. 279.)
- \*226. Dec. 4, 1964 Adlerman to Zoeckler. Asks written response why certain documents listed were not made available to staff at WPAFB on December 2. (See p. 279.)
227. Dec. 10, 1964 Adlerman to Nitze. Requests copies of contracts for engine modifications for Navy version.
228. Dec. 11, 1964 Zoeckler to Adlerman. In reply to No. 226, says he has forwarded letter to HQ AF, for action.
- \*229. Jan. 15, 1965 McGiffert to Adlerman. Reply to No. 226 above. Says make all request to him in future. Transmits some documents, says others are not available, others not pertinent. (See p. 280.)
230. Feb. 9, 1965 McGiffert to Chairman. Notes No. 229 above and No. 226, and transmits more documents, including Contractor's Cost Proposal.
231. Mar. 20, 1965 McGiffert to Adlerman. Notes Nos. 229, 230, and 226 above, and transmits more documents. Others will be forwarded when available.
232. Apr. 12, 1965 Hoisington to Chairman. States award of procurement contract to General Dynamics and gives data. Provides copy of letter contract.
233. Feb. 22, 1966 Chairman to McNamara. Requests declassification of record in view of public press publication of almost all of classified material on TFX.
234. Feb. 25, 1966 Stempler to Chairman. Acknowledges No. 233 above.
- \*235. Mar. 22, 1966 Stempler to Chairman. States declassification would not serve well. Suggests a fact sheet on TFX be prepared and forwarded. (See p. 281.)
236. Apr. 5, 1966 Stempler to Chairman. Forwards fact sheet on TFX.
237. Aug. 15, 1966 Chairman to McNamara. Informs Secretary of inquiry requested of the Comptroller General. Attached is copy of letter to Comptroller General.
- 237-A. Aug. 15, 1966 Chairman to Comptroller General. Requests study of TFX costs and performance status.
238. Aug. 16, 1966 Stempler to Chairman. Acknowledges receipt of No. 237 above.
239. Aug. 29, 1966 Stempler to Chairman. Announces GAO and Department of Defense meeting on August 31, 1966.
240. Aug. 23, 1966 Weitzel to Chairman. Response to No. 237-A. GAO will start study immediately.
- \*241. Sept. 6, 1966 Chairman to McNamara requesting cooperation and acknowledgement of GAO study. (See p. 281.)
- \*242. Sept. 9, 1966 McNamara notes that Mr. Stempler replied; repeats information that GAO-Pentagon liaison is under way; does not offer personal and official cooperation. (See p. 281.)
- \*243. Sept. 21, 1966 Chairman to McNamara. Announces resumption of investigation, asks cooperation. (See p. 282.)
- \*243-A. Sept. 9, 1966 Memorandum of TFX—Study of Correspondence, 1962-1966. (See p. 282.)
- \*244. Sept. 30, 1966 McNamara to Chairman. Acknowledges letter of September 21, 1966. Designates Mr. Warnke, General Coun-

- sel of Department of Defense to work with committee staff in responding to requests. (See p. 284.)
- \*245. Oct. 7, 1966 Chairman to McNamara. Requests access to material. (See p. 284.)
246. Oct. 13, 1966 Paul Warnke to Chairman. Forwards current organizational chart indicating offices, committees, and personnel involved in direction of R.D.T. & E. and procurement programs of F-111 and promises cooperation with committee's requests.
- \*247. Oct. 18, 1966 McNamara to Chairman. Information should be obtained from Warnke. (See p. 284.)
- \*248. Oct. 20, 1966 Chairman to McNamara. Requesting again personal assurance of access to documents. (See p. 284.)
- \*249. Oct. 31, 1966 McNamara to Chairman. Personal assurance of DOD cooperation. (See p. 284.)
250. Nov. 21, 1966 Warnke to Adlerman enclosing Anti-Air Warfare Study Reports prepared by Grumman.
251. Nov. 25, 1966 Warnke to Adlerman. Briefing to be held Dec. 12, 1966 and requesting list of staff who will be present.
252. Nov. 26, 1966 Adlerman to Warnke. List of staff to be at briefing.
253. Dec. 2, 1966 Warnke to Adlerman. Re briefing Dec. 12, 1966.
254. Dec. 9, 1966 Warnke to Adlerman. Enclosing documents re F-111 R.D.T. & E. and production letter contracts.
255. Dec. 28, 1966 Warnke to Adlerman. Enclosing transcript of briefing of Dec. 12, 1966 with charts.
256. Jan. 1, 1967 Warnke to Cromwell with Demonstration Planning and Progress Report and Demonstration Data Report for F-111B.
257. Jan. 11, 1967 Warnke to Walsh with delivery and acceptance documents.
258. Jan. 12, 1967 Walsh to Warnke requesting documents.
259. Jan. 12, 1967 Warnke to Walsh enclosing documents.
260. Jan. 9, 1967 Capt' Kelly (Navy) to Adlerman with documents requested Dec. 20, 21, 1966.
261. Jan. 16, 1967 Walsh to Warnke listing documents requested.
262. Jan. 20, 1967 Walsh to Warnke requesting Standard Aircraft Chart and Pratt & Whitney proposal.
263. Jan. 20, 1967 Warnke to Walsh enclosing documents requested Jan. 3, 1967 and identified Jan. 12, 1967.
264. Jan. 23, 1967 Walsh to Warnke requesting ASD exhibit 62 ASZB X-20 and DD-250.
265. Jan. 26, 1967 Warnke to Cromwell enclosing documents FZM 12-2419.
266. Jan. 28, 1967 Cromwell to Warnke requesting documents on corrected list.
267. Feb. 6, 1967 Warnke to Walsh enclosing DD-250 inspection and receiving reports.
268. Feb. 6, 1967 Cromwell to Warnke requesting four items.
269. Feb. 8, 1967 Warnke to Cromwell enclosing Laidlaw reports.
270. Jan. 27, 1967 Warnke to Walsh forwarding copy of Standard Aircraft Characteristics for the F-111B.
271. Feb. 15, 1967 Warnke to Walsh forwarding weight and balance status reports 1 through 28.
272. Feb. 16, 1967 Letter to Warnke requesting Shuttle chart etc from D. O'Donnell.
273. Feb. 15, 1967 Letter from Warnke to Walsh enclosing ASNST-4 and 62ASZB-X-20.
274. Feb. 17, 1967 Warnke to Walsh forwarding documents.
275. Feb. 17, 1967 Warnke to Walsh forwarding copies of revisions.
276. Feb. 24, 1967 Warnke to Walsh forwarding copy of Pratt & Whitney letter dated Sept. 7, 1965 to BUWEPS entitled "Development of the JTF 10A-27 Engine for the F-111B Plane."
277. Feb. 28, 1967 Letter to Warnke requesting material removed from F111 systems status report.
278. Feb. 28, 1967 Letter from Warnke enclosed NATC flight test instrumentation report and NATC message 122148Z—January 1967.
279. Mar. 3, 1967 Letter from Warnke forwarding original issue of FZM-12-182.
280. Mar. 3, 1967 Letter to Warnke Mar. 3, 1967 requesting documents.
281. Mar. 3, 1967 Letter to Warnke Mar. 3, 1967 requesting documents.
282. Mar. 14, 1967 Letter from Warnke enclosing 3 documents requested Mar. 3, 1967.
283. Mar. 14, 1967 Letter from Warnke requesting report re crash of F11-A No. 9.
284. Mar. 14, 1967 Letter to Warnke requesting 2 reports and summary.
285. Mar. 14, 1967 Letter to Warnke requesting minutes and reports from Executive Management reviews held during 1964, 1965, 1966.
286. Mar. 15, 1967 Letter to Warnke requesting Apr. 30, 1964 and Apr. 6, 1964 minutes, May 7, 1964 minutes, 13-15, 1964 and minutes Sept. 29, Oct. 1, 1964.
287. Mar. 15, 1967 Letter to Warnke request. Grumman proposal re falling back and minutes.
288. Mar. 15, 1967 Letter to Warnke Mar. 15, 1967 requesting Cal Hargis report and F-111 weight review report Feb. 15, 1964.
289. Mar. 7, 1967 Letter from Warnke refusing summary report. (See p. 285.)
- \*290. Mar. 15, 1967 Letter to McNamara re Warnke letter of Mar. 7, 1967 of refusal. (See p. 285.)
291. Mar. 16, 1967 Letter to Warnke requesting documents.
292. Mar. 16, 1967 Letter to Warnke requesting documents.
- \*293. Mar. 15, 1967 Letter from Warnke re FZM-12-988 not available. (See p. 285.)
294. Mar. 16, 1967 Letter to Warnke requesting 3 BuWeps letters.
295. Mar. 20, 1967 Letter to Warnke requesting 2 ferry range reports.
296. Mar. 23, 1967 Letter to Warnke requesting 5 growth studies.
297. Mar. 23, 1967 Letter to Warnke requesting directive and development plan.
298. Mar. 23, 1967 Letter to Warnke requesting current flight test schedule, minutes of January 1967 meeting, file on wind tunnel testing.
299. Mar. 23, 1967 Letter to Warnke requesting 2 SPO letters to General Dynamics, current static and fatigue test schedule, minutes of August 11 to 13, 1965 S-111SPO meeting.
300. Mar. 23, 1967 Letter to Warnke in answer to Mar. 15, 1967 letter re progress reports.
301. Mar. 23, 1967 Letter to Warnke requesting F-111B weight growth chart June 3, 1964 and F-111B weight growth chart config "C", 1967.
- \*302. Mar. 21, 1967 Letter from Warnke re our requests of March 14, March 15, and March 16, 1967. (See p. 285.)
- \*303. Mar. 22, 1967 Letter from Warnke re 2 items requested on Mar. 15, 1967. (See p. 286.)
304. Mar. 24, 1967 Letter to Warnke requesting 3 documents.
305. Mar. 24, 1967 Letter to Warnke requesting 8 docs.
306. Mar. 27, 1967 Letter to Warnke requesting Project Icarus Reports 1-14.

307. Mar. 22, 1967 Letter to McNamara Mar. 22, 1967, re 3 reports.
308. Mar. 27, 1967 Letter to Warnke re F-111B flight readiness review.
309. Mar. 29, 1967 Letter from Warnke forwarding copy of report of Board of Inquiry re crash of F-111A at Edwards Air Force Base.
310. Mar. 28, 1967 Letter from Warnke Mar. 28, 1967 forwarding report on the Status of Individual Letter Contract AF33(657)-13403.
311. Mar. 29, 1967 Letter from Warnke re arrangements for Navy interviews.
312. Mar. 29, 1967 Letter from Warnke re making available a set of all issues of FZM-12-988 Category I flight test progress reports on a 1-month loan period.
- \*313. Mar. 29, 1967 Letter from Warnke Mar. 29, 1967 declining to furnish 2 AMSA documents. (See p. 286.)
314. Mar. 29, 1967 Letter from Warnke with 2 documents on cost effectiveness.
315. Mar. 29, 1967 Letter from Warnke forwarding copy of BUWEPS LTR. of Dec. 16, 1963 re F-111B performance.
316. Mar. 31, 1967 Letter from Warnke. Enclosed flight test progress report.
- \*317. Mar. 31, 1967 Letter to McNamara re cooperation. (See p. 286.)
318. Apr. 3, 1967 Letter from Warnke attaching current F-111 flight test schedule.
319. Apr. 3, 1967 Letter from Warnke forwarding 2 documents.
320. Apr. 11, 1967 Letter from Warnke April 11, 1967 forwarding report.
321. Apr. 11, 1967 Letter from Warnke April 11, 1967 forwarding U.S. Air Force Bomber Penetration Study.
- \*322. Apr. 11, 1967 Letter from Warnke April 11, 1967 enclosing 4 of 5 requests. (See p. 287.)
323. Apr. 10, 1967 Letter from McNamara to Senator McClellan in answer to letter of March 31, 1967.
324. Apr. 11, 1967 Letter from Warnke re reviewing documents in Goodwin's office.
325. Apr. 12, 1967 Letter from Warnke re reviewing documents in Goodwin's office.
326. Apr. 13, 1967 Letter from Warnke enclosing vols I & II of F-111B Requirements Study.
327. Apr. 12, 1967 Letter from Warnke enclosing SPO letters etc.
328. Apr. 13, 1967 Letter from Warnke enclosing files from Systems Program Office.
329. Apr. 14, 1967 Letter from Warnke enclosing F-111 reports of ferry range test flights.
330. Apr. 18, 1967 Letter to Warnke requesting 4 documents.
331. Apr. 20, 1967 Letter to Warnke requesting RAD & PTDP.
332. Apr. 21, 1967 Letter to Warnke requesting minutes.
- \*333. Apr. 21, 1967 Letter from Warnke declining documents. (See p. 287.)
- \*334. Apr. 21, 1967 Letter from Warnke. Unable to locate requested report. (See. p. 288.)
335. Apr. 24, 1967 Letter from Warnke April 24, 1967 forwarding documents.
- \*336. Apr. 18, 1967 Letter from Warnke declining reports. (See p. 288.)
337. Apr. 25, 1967 Letter to Warnke requesting documents.
338. Apr. 24, 1967 Letter from Warnke forwarding document.
339. Apr. 26, 1967 Letter from Warnke enclosing minutes and reports.
340. Apr. 26, 1967 Letter from Warnke enclosing 2 BuWeps letters.
341. Apr. 26, 1967 Letter from Warnke enclosing Requirement Action Directive.
342. Apr. 27, 1967 Letter from Warnke enclosing documents re F-111B Phoenix program.
343. Apr. 28, 1967 Letter from Warnke enclosing TF-30 Weight Review.
- \*344. May 1, 1967 Letter to Warnke requesting 1 missing page from F-111B Flight Readiness Review. (See p. 288.)
345. May 1, 1967 Letter to Warnke requesting History of the F-111B Tip Back Problem Area.
346. May 1, 1967 Letter to Warnke requesting Secretary Navy Control C-4986, CNM Memo and Secretary Navy meeting on F-111B, December 16, 1965.
347. May 1, 1967 Letter to Warnke requesting BuWeps F-111B status report January 22, 1964.
348. May 1, 1967 Letter to Warnke requesting Memo, SecDef to SecNav, SecAf Control #X-5596.
349. Apr. 28, 1967 Letter to Warnke requesting enclosure to BuWeps letter of January 17, 1964.
350. May 2, 1967 Letter to Warnke requesting Letter Contract AF-33(657)13403 & FZM 12-1070.
351. May 2, 1967 Letter from Warnke enclosing FZM 12-9185 & FZM 12-9149 revisions.
352. May 2, 1967 Letter from Warnke enclosing 64 ASL-271.
353. Mar. 29, 1967 Letter from Secretary McNamara re current performance estimates for F-111.
354. May 3, 1967 Letter to Warnke requesting F-111B Weight & Performance summary report.
355. May 3, 1967 Letter to Warnke identifying document requested previously.
356. May 4, 1967 Letter from Warnke enclosing Letter Contract AF 33(657) 13403.
357. May 4, 1967 Letter from Warnke enclosing Performance Estimate Summary.
358. May 4, 1967 Letter from Warnke re F-111B Weight & Performance Summary Report.
359. May 5, 1967 Letter to Warnke May 5, 1967 re F-111B Weight & Performance Summary Report.
360. May 5, 1967 Letter to Warnke requesting documents.
361. May 9, 1967 Letter to Warnke requesting F-111 Review Committee Report.
362. May 10, 1967 Letter to Warnke requesting "Report of F-111 Independent Review Group Study" chaired by Col. Kirsch.
363. May 12, 1967 Letter from Warnke forwarding documents.
364. May 12, 1967 Letter from Warnke forwarding briefing chart.
365. May 12, 1967 Letter from Warnke giving names of TAC personnel associated with Categories I and III of the F-111A.
366. May 12, 1967 Letter from Warnke re details of NASC studies.
367. May 12, 1967 Letter to Warnke requesting 2 copies of production contract for F-111.
368. May 15, 1967 Letter to Warnke requesting copy of FZM 12-2474.
369. May 15, 1967 Letter from Warnke forwarding Contractor's Document 12-0-47.
370. May 17, 1967 Letter from Warnke enclosing 2 copies of production contact.
371. May 17, 1967 Letter from Warnke enclosing weight and performance status report and planned schedule and enclosure and Phoenix Development and procurement costs.
372. May 17, 1967 Letter from Warnke enclosing F-111 Review Committee (summary).
373. May 17, 1967 Letter from Warnke enclosing review item No. A-1.
374. May 17, 1967 Letter to Warnke requesting 3 documents.

375. May 18, 1967 Letter from Warnke enclosing F-111 Independent Review Group Report.
376. May 18, 1967 Letter from Warnke enclosing FZM-12-2474, FZM-12-2462 and FZM-12-2469.
377. May 19, 1967 Letter from Warnke forwarding BUWEPS confidential memo.
378. May 20, 1967 Letter from Warnke forwarding F-111 A.F.P.E. Schedule.
379. May 19, 1967 Letter from Warnke forwarding F-111B program status report for F-111 Policy Board.
380. May 18, 1967 Letter from Warnke forwarding memo from Deputy F-111B program manager to F-111B/Phoenix program manager.
381. May 19, 1967 Letter from Warnke forwarding History of F-111B Tip Back Problem Area.
382. May 22, 1967 Letter to requesting copy of DOD Directive 3200.9 and loan of 1 copy of summary report of the Concept Formulation Studies for the Advanced Manned Strategic Aircraft.
383. May 22, 1967 Letter to Warnke requesting copy of General Dynamics' specification FZM-12-1173a dated February 8, 1965.
384. May 19, 1967 Letter from Warnke forwarding copy of McNamara memo September 3, 1966 to Secretary of Navy and Secretary of Air Force.
385. } Letters to and from General Dynamics.
386. } Letters to and from General Dynamics.
387. May 23, 1967 Letter from Warnke forwarding copy of FZM-12-1173A.
388. May 24, 1967 Letter to Warnke requesting F-111B weight and performance summary.
389. May 24, 1967 Letter to Warnke requesting FZM-12-988 January and February 1967 flight test summary reports.
390. May 26, 1967 Letter from Warnke forwarding DOD Directive 3200.9 and loan of summary Report of the concept formulation studies for AMSA.
391. June 1, 1967 Letter from Warnke forwarding documents.
- \*392. May 29, 1967 Letter to Warnke May 29, 1967 requesting the 24 pages removed from cf report FZM 12-2474. (See p. 288.)
393. } Letters to and from Grumman.
394. } Letters to and from Grumman.
395. June 2, 1967 Letter to Warnke requesting insert provided by General Gerrity for House Defense Appropriation Subcommittee hearings.
396. June 2, 1967 Letter from Warnke forwarding 24 pages deleted from FZM-12-2474 previously sent.
397. June 1, 1967 Letter from Warnke re material requested already sent.
398. June 5, 1967 Letter from Warnke enclosing January-February 1967 issues of FZM-12-988 and F-111 category I flight test progress reports.
- Editor's note: Numbers 399, 404 and 407 were evidently not assigned in the case files.
400. June 9, 1967 Letter to Warnke requesting documents.
401. June 12, 1967 Letter to Dr. Laidlaw requesting information on the relative position of neutral stability point and the landing center of gravity for the AF plane.
402. June 13, 1967 Letter from Charles W. Havens forwarding NATC report "Carrier Suitability Demonstration Tests of the F-111B airplane; Investigation of Airplane Tip-Back Tendency."
403. June 14, 1967 Letter to Warnke requesting copy of recent NATC report of the phase I B Navy preliminary evaluation of the F-111B aircraft.
405. June 19, 1967 Letter from Warnke forwarding documents.
406. June 20, 1967 Letter from Dr. Laidlaw re static stability of F-111A.
408. June 24, 1967 Letter from Warnke forwarding 2 Grumman reports.
409. July 8, 1967 Letter from Charles Havens with information requested verbally.
410. July 11, 1967 Letter from Havens enclosing 2 DAG reports.
411. July 13, 1967 Letter to Havens requesting Ad Hoc Group report October 27, 1965.
412. July 20, 1967 Letter to Nitze requesting interim Navy preliminary evaluation report and copy of NASC letter to AF F-111 Systems Project Office.
413. July 17, 1967 Letter from Warnke with breakout of funding for F-111 program for years 1965 thru 1967.
414. July 24, 1967 Letter to William Woodruff enclosing interim Navy Preliminary Evaluation Report on F-111B and letter of comment from Warnke.
415. June 7, 1967 Letter from Warnke forwarding classified insert for record of House Defense Appropriations Subcommittee hearings of Apr. 1967.
416. Aug. 7, 1967 Letter to Warnke re Air Force Flight Test Report.
417. Aug. 15, 1967 Letter to Appropriations Committee forwarding April, May, and June 1967 Air Force reports F-111 Systems Status Summaries.
418. Aug. 18, 1967 Warnke letter forwarding Air Force Preliminary Evaluation of F-111A with External Stores.
419. Aug. 29, 1967 Letter from Warnke with report of F-111/TF30 Propulsion System Special Review Working Group.
420. Aug. 31, 1967 Letter to Charles requesting documents.
421. Sept. 7, 1967 Letter to Warnke requesting revised F-111A performance estimates.
422. Sept. 22, 1967 Letter to Warnke re request of March 24, 1967.
423. Sept. 26, 1967 Letter to Warnke requesting section 4 VFAX technical development plan.
424. Oct. 2, 1967 Letter from Warnke re material requested being prepared by Air Force.
425. Oct. 9, 1967 Letter from Warnke re F-111 System Status Summary.
426. Oct. 10, 1967 Letter to Warnke requesting standard aircraft characteristics charts on A-6A, F-4B and A-7A.
427. Oct. 13, 1967 Letter from Warnke forwarding F-111 operating envelopes, loads diagrams and mission profiles.
428. Oct. 18, 1967 Letter to Warnke requesting documents.
429. Oct. 19, 1967 Letter from Warnke forwarding document.
430. Oct. 19, 1967 Letter from Warnke forwarding standard aircraft characteristics charts for A-6A, F-4B & A-7A.
431. Oct. 20, 1967 Letter to Warnke requesting F-111B performance characteristics.
- \*432. Oct. 27, 1967 Letter from Warnke declining documents for 6 weeks. (See p. 289.)
433. Nov. 2, 1967 Letter from Warnke forwarding 3 items and explaining other requests.
434. Dec. 1, 1967 Letter from Warnke forwarding 5 documents.
435. Dec. 4, 1967 Letter to McNamara requesting briefing for Cromwell.
436. Dec. 5, 1967 Letter to Warnke requesting copies of charts.
437. Dec. 9, 1967 Letter from Warnke forwarding information on B-52, B-58, and FB-111.
438. Dec. 11, 1967 Letter to Sec. Harold Brown requesting views on FB-111 bomber.
439. Dec. 18, 1967 Letter to Warnke requesting copy of F-111A Flight Handbook.

440. Dec. 18, 1967 Letter from Warnke forwarding 8 charts.
441. Dec. 15, 1967 Letter from Warnke Dec. 15, 1967 with performance characteristics of F-111B.
442. Dec. 28, 1967 Letter from J. Clark, Department of Air Force asking letter to.
443. Jan. 13, 1968 Letter from Warnke giving F-111A data.
444. Jan. 16, 1968 Letter from Warnke forwarding F-111A flight manual.
445. Jan. 26, 1968 Letter to Warnke requesting annual aircraft operating costs.
446. Jan. 26, 1968 Letter from Warnke forwarding B-58 operational capability.
447. Jan. 31, 1968 Letter to Warnke requesting latest performance estimates for F-111B at time of fleet introduction.
448. Feb. 1, 1968 Letter from Secretary Brown forwarding FB-111A range estimates.
449. Feb. 8, 1968 Letter to Secretary Brown requesting information on FB-111.
450. Feb. 9, 1968 Letter from Warnke giving performance estimates for F-111B.
451. Feb. 16, 1968 Letter from Warnke giving standard annual operating costs for B-52 and B-58.
452. Feb. 23, 1968 Letter from Captain Ball, Navy, giving statement of NPE deficiencies.
453. Feb. 17, 1968 Letter from Secretary Brown, Air Force re FB-111 range.
454. Feb. 26, 1968 Letter to Warnke requesting report "B-52 Life Expectancy Study."
455. Mar. 6, 1968 Letter from Warnke forwarding B-52 Life Expectancy Study.
456. Mar. 11, 1968 Letter from Air Force attaching detailed information on tankers, airplane configurations, payload composition and refueling distances.
457. Mar. 13, 1968 Letter to Secretary Brown re Cromwell's visit to SAC.
458. Mar. 15, 1968 Letter from Air Force re arrangements for Cromwell's visit to SAC.
459. Mar. 27, 1968 Letter to Secretary Brown requesting information on Mark 53 weapons.
460. Mar. 29, 1968 Letter to Warnke requesting range capabilities of F-111B.
461. Apr. 5, 1968 Letter to Warnke requesting briefing on F-111A flight test and ground test programs and information on F-111E.
462. Apr. 10, 1968 Letter from Warnke re briefing.
463. Apr. 10, 1968 Letter to Secretary Brown re our letter of Mar. 27, 1968 satisfactorily answered.
464. Apr. 16, 1968 Letter from Warnke re range capabilities of F-111B.
465. Apr. 19, 1968 Letter to Warnke re range capabilities.
466. May 1, 1968 Letter from Warnke re range capabilities.
467. May 7, 1968 Letter to Warnke requesting current F-111 production schedule be included in briefing of May 10, 1968.
468. May 17, 1968 Letter to Secretary Brown re FB-111 range capability and F-111B differences.
469. May 20, 1968 Letter from Warnke with 2 charts of current production schedule of F-111.
470. May 27, 1968 Letter from Dr. Brown re FB-111 range estimates.
471. May 24, 1968 Letter from Warnke forwarding ECP's.
472. June 3, 1968 Letter from Warnke forwarding ECP's.
473. June 8, 1968 Letter from Warnke forwarding ECP's.
474. June 12, 1968 Letter from Warnke forwarding briefing charts on Terrain Following Radar System review.
475. June 21, 1968 Letter to Warnke requesting copy of memo.
476. June 20, 1968 Letter from Warnke forwarding memo.
477. June 27, 1968 Letter to Warnke requesting letter March 19, 1968 to Chief of Naval Ops from Naval Air Systems Command.
478. June 28, 1968 Letter from Warnke forwarding copy of memo.
479. July 2, 1968 Letter to Warnke requesting D.D.R. & E. memo for Sec. Def. February 15, 1964 status report on F-111A, F-111B and Phoenix.
480. July 5, 1968 Letter to Secretary Clifford requesting cooperation of Subcommittee.
- \*481. July 9, 1968 Letter from Warnke declining to furnish documents requested June 27, 1968. (See p. 289.)
482. Aug. 5, 1968 Letter to Warnke requesting copy of Navy Fighter Study 19.
483. Sept. 14, 1968 Letter to Secretary Clifford requesting documents.
484. Sept. 25, 1968 Letter from Secretary Clifford re giving documents.
485. Oct. 12, 1968 Letter to Secretary Clifford re giving documents.
486. Oct. 18, 1968 Letter from Warnke forwarding documents.
487. Oct. 18, 1968 Letter from Warnke forwarding documents.
488. Oct. 24, 1968 Letter to Rear Admiral R. L. Townsend requesting documents.
489. Oct. 30, 1968 Letter from Warnke re our request of Rear Admiral Townsend.
490. Nov. 4, 1968 Letter to Warnke November 4, 1968 requesting copy of document canceling F-111.
491. Nov. 23, 1968 Letter from Warnke forwarding stop work order on F-111 and copy of memo of July 5, 1968 from Under Secretary of Navy to Secretary of Air Force re termination of F-111.
492. Oct. 17, 1968 Letter from Clifford re furnishing documents.
493. Dec. 19, 1968 Letter from Warnke forwarding does requested from General Dynamics after review of files.
494. Dec. 27, 1968 Letter to Warnke requesting 2 documents.
495. Dec. 30, 1968 Letter from Warnke forwarding documents from General Dynamics after review of files.
496. Jan. 13, 1969 Letter from Warnke transmitting documents requested by Cromwell on visit to Edwards Air Force Base on Dec. 12, 17, 1968.
497. Jan. 22, 1969 Letter from Warnke forwarding General Dynamics releases.
498. Jan. 22, 1969 Letter from Warnke forwarding documents.
499. Jan. 31, 1969 Letter from Warnke forwarding documents.
500. Feb. 4, 1969 Letter from Warnke forwarding documents.
501. Feb. 7, 1969 Letter from Warnke forwarding documents.
502. Feb. 17, 1969 Letter to Jack Stempler requesting documents.
503. Feb. 20, 1969 Letter to Air Force requesting documents.
504. Feb. 12, 1969 Letter to Air Force with request.
505. Mar. 17, 1969 Letter to Air Force re request of Jan. 20, 1969.
506. Mar. 19, 1969 Letter from Colonel Wm. P. Reed forwarding documents.
507. Apr. 2, 1969 Letter from Niederlehner forwarding documents.
508. Apr. 7, 1969 Letter from Colonel Reed forwarding documents.
509. Apr. 7, 1969 Letter from Colonel Reed forwarding documents.

510. Apr. 7, 1969 Letter from Colonel Reed forwarding documents.
511. Apr. 11, 1969 Letter from Colonel Reed forwarding information.
512. Apr. 15, 1969 Letter from Colonel Reed forwarding documents.
513. Apr. 15, 1969 Letter from Colonel Reed forwarding documents.
514. Apr. 18, 1969 Letter from Colonel Reed forwarding documents.
515. Apr. 21, 1969 Letter from Eric Collins, Dept. of Navy, forwarding documents.
516. May 5, 1969 Letter to Eric Collins, Naval Air Systems Command, requesting access to correspondence or written documentation on 4 items.
517. May 9, 1969 Letter from Colonel Reed forwarding documents.
518. May 9, 1969 Letter to Niederlehner requesting documents.
519. May 9, 1969 Letter from Colonel Reed forwarding documents.
520. May 8, 1969 Letter from Colonel Reed forwarding documents.
521. May 8, 1969 Letter from Colonel Reed forwarding documents.
522. Apr. 18, 1969 Letter from Colonel Reed forwarding documents.
523. May 15, 1969 Letter from Colonel Reed forwarding information.
524. May 28, 1969 Letter from Navy forwarding documents.
525. June 30, 1969 Letter from Air Force forwarding documents.
526. July 1, 1969 Letter from Navy forwarding documents.
527. June 5, 1969 Letter from Air Force forwarding documents.
528. June 12, 1969 Letter from Air Force forwarding documents.
529. June 30, 1969 Letter from Air Force forwarding documents.
530. June 30, 1969 Letter from Air Force forwarding documents.
531. July 2, 1969 Letter from Niederlehner giving list of legal personnel who worked on the original F-111 program.
532. July 7, 1969 Letter from Air Force forwarding documents requested by Prichett from GD, Fort Worth.
533. Aug. 1, 1969 Letter from Colonel Reed with performance speed of F-111D.
534. May 13, 1969 Letter from Niederlehner re deletion of F-111B and legal analysis.
535. Aug. 26, 1969 Letter from Colonel Hopper, Air Force with 5 documents requested of General Dynamics.
536. Sept. 9, 1969 Letter from Colonel Arnold, Air Force with General Dynamics quality control report re 1831 Longerons.
537. Sept. 16, 1969 Letter from Colonel Arnold with addendum to report on 1831 Longerons.
538. Jan. 28, 1970 Letter to Secretary John H. Chafee requesting information.
539. Feb. 27, 1970 Letter from John W. Warner, Under Secretary of Navy, forwarding documents.
540. Mar. 6, 1970 Letter from Eric Collins (Navy) declassifying some documents and forwarding 1 document.
541. Mar. 9, 1970 Letter to Assistant General Counsel of Air Force, Wm. Munves, requesting documents.
542. Mar. 16, 1970 Letter from Air Force forwarding documents.
543. Mar. 16, 1970 Letter from Air Force forwarding documents.
544. Mar. 19, 1970 Letter from Navy forwarding 1 document.
545. Mar. 19, 1970 Letter from Navy forwarding 1 document.

(Letter No. 201)

THE SECRETARY OF DEFENSE,  
Washington, February 24, 1964.HON. JOHN L. McCLELLAN,  
Chairman, Senate Permanent Subcommittee on Investigations,  
Committee on Government Operations, U.S. Senate,  
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of February 11, 1964, requesting that qualified personnel familiar with the TFX program be made available to your Subcommittee and its staff for interview, discussion and identification of such documents and other material which the Subcommittee will need to acquaint it with the current status and progress of this program.

The Secretary of the Air Force advises me that the negotiation of the contract with the General Dynamics Corporation and the determination of the final specifications of the airplane are proceeding satisfactorily. He has been instructed by me that as soon as the definitive contract and the definitive specifications are completed to furnish copies thereof to the Subcommittee and to make available to the Subcommittee such personnel and all the materials as may shed light on these determinations.

It is my desire to expedite the inquiry of the Subcommittee in every way possible so that it can be brought to an early conclusion.

Sincerely,

(Signed) ROBERT S. McNAMARA.

(Letter No. 203)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
March 7, 1964.Hon. ROBERT S. McNAMARA,  
Secretary of Defense,  
Washington, D.C.

MY DEAR MR. SECRETARY: I interpret your letter of February 24th, which is in response to my letter of February 11th, to mean that you are declining to comply with our request "that qualified personnel familiar with this program (TFX) be made available to the Chairman and other members of the Subcommittee and its staff for interview, discussion, and identification of such documents and other material which the Subcommittee will need to acquaint it with the current status and progress of this program" until "the definitive contract and the definitive specifications are completed." Is that interpretation and my understanding correct?

If so, then you can appreciate that your declination will result in the Subcommittee being hampered and further delayed in its inquiry respecting this procurement program and in its efforts and duty to determine "the efficiency and economy of operations" of your Department in connection therewith as I informed you in my letter of February 11th.

Kindly advise whether you still insist on forcing such delay. If you do, then I would like to know how soon we

may expect the definitive contract and specifications to be completed.

Sincerely yours,

JOHN L. McCLELLAN,  
Chairman.

(Letter No. 265)

MARCH 25, 1964.

Hon. JOHN L. McCLELLAN,  
Chairman, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of March 7, 1964, I wish to state that I fully share your desire to expedite the TFX inquiry. It has been and still is my considered judgment that the inquiry will be best expedited if we follow the course of making all information available to the Subcommittee promptly upon the completion of the contract and the specifications.

The Secretary of the Air Force advises me that he expects these actions to be completed by the end of April.

Sincerely,

ROBERT S. McNAMARA.

(Letter No. 207)

U.S. SENATE,

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
May 15, 1964.

Hon. ROBERT S. McNAMARA,  
Secretary of Defense, Washington, D.C.

MY DEAR MR. SECRETARY: Reference is made to my earlier letters to you of October 21, 1963; October 25, 1963; February 11, 1964; and March 7, 1964; and your answers thereto wherein you deferred compliance with this Subcommittee's requests for information regarding the TFX airplane until "the definitive contract and the definitive specifications are completed."

In brief, the following has transpired since you approved this program on September 1, 1961:

*September 1, 1961.*—In your approval memorandum to the Secretary of the Air Force and the Secretary of the Navy, you directed that the TFX plans should include the "signing of weapons system contract by February 1, 1962" as a "major milestone." (Hearings, Exhibit 42, p. 333, Part 2) (You will recall that the second round of competition and then the third round of competition and then the fourth round of competition, ordered at the Secretarial level, made it impossible for the Armed Services to achieve this major milestone.)

*November 1962.*—You decided to award the contract to the General Dynamics Corporation. (Exhibit 2, p. 350, Part 2).

*December 17, 1962.*—Your Assistant, Dr. Harold Brown, sent a memorandum to the Assistant Secretaries of the Navy and Air Force for Research and Development, advising that ". . . the target date for completion of the initial complete weapon system contract negotiations should be April 1, 1963 . . ." (Hearings, p. 1201, Part 5)

*July 26, 1963.*—Secretary Zuckert testified before our Subcommittee that "we expect to have a contract by late

fall. That is our present expectation . . . we will have a definitized contract on which we agree by late fall." (Hearings, p. 1960, Part 8)

*July 30, 1963.*—Colonel Charles Gayle, the TFX System Project Officer, testified that "the administrative actions and all the rest of the review, the 10th of April [1964] is the final date when everything is done, distribution of the contract and everything else." He agreed that this was one year and nine days later than the date recommended by Harold Brown. (Hearings, p. 2065, Part 8)

*November 20, 1963.*—Your Deputy, Mr. Gilpatrick, testified before this Subcommittee that "the Air Force reports that we will not have the definitized contract until April of 1964." (Hearings, p. 2733, Part 10)

*March 25, 1964.*—In a letter from you to me, you advised that these contractual actions should "be completed by the end of April."

*May 4, 1964.*—The Subcommittee's General Counsel made inquiry of your Assistant for Legislative Affairs, Mr. McGiffert, and was advised that the contract should be signed in a week or ten days.

More than two years and three months have elapsed from the initial date directed by you in your memorandum of September 1, 1961, for achieving the major milestone of signing the final contract. I am aware that all of this time has not been lost and that some work may have proceeded in the absence of a firm contract between the parties as to what will be built and how much it will cost.

I am becoming concerned about this unduly long and what appears to be unnecessary delay in providing the Subcommittee with the information and assistance it has requested and which it requires in order to proceed expeditiously with this inquiry. It has been some 17 months (December 21, 1962) since you made the award to your selected contractor, General Dynamics, and over a year (April 1, 1963), since the contract was to have been originally signed with them. On March 25, 1964, you advised that these contractual negotiations and specifications would "be completed by the end of April" (1964) and that at that time you would make "all information available to the Subcommittee promptly . . ." It is now 15 days past that time, and although I have not heard from you, I trust you are now prepared and willing to comply with the Subcommittee's request. Please advise.

Sincerely yours,

JOHN L. McCLELLAN,  
Chairman.

(Letter No. 211)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
June 8, 1964.

Hon. ROBERT S. McNAMARA  
Secretary of Defense,  
Washington, D.C.

MY DEAR MR. SECRETARY: With further reference to the TFX R & D contract, you advised me in your letter of February 24th that the Secretary of the Air Force had been instructed by you "that as soon as the definitive contract and the definitive specifications are completed to furnish copies thereof to the Subcommittee and to make

available to the Subcommittee such personnel and all the materials as may shed light on these determinations."

On May 26th an incomplete copy of that contract was delivered to my office. Upon examination of it, I found missing a large number of "attachments" which are incorporated in it by reference. Accordingly, I advised you by letter on that date that in order for the Subcommittee to make a proper evaluation it would be necessary to have copies of all documents that had been referenced in the contract, including many which I specifically enumerated.

In view of the assurances contained in your letter of February 24th—above quoted—I anticipated that you would promptly comply with my request. I was much surprised when I received on June 2nd a letter from one of your subordinates which states:

"From looking at the list of documents, I am unable to determine how difficult or lengthy a process it will be for us to assemble them. As soon as the documents have been assembled. I will be in further touch with you or members of the Subcommittee staff."

I would assume that Major General G. F. Keeling and the Legal Division of the Defense Department had all of these documents before and at the time they approved the contract. I am, therefore, at a loss to understand why the process of assembling them would be either difficult or lengthy.

Your personal attention and assurance that these documents will be made available to the Subcommittee without further delay will be greatly appreciated.

Sincerely yours,

JOHN L. McCLELLAN,  
Chairman.

(Letter No. 212)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
June 12, 1964.

To: General J. Zoeckler (ASL).

MY DEAR GENERAL: Under instructions of Senator John L. McClellan, Chairman of the Senate Permanent Investigation Subcommittee, you are most respectfully requested to furnish for examination by the Subcommittee Staff now at Wright-Patterson AFB, the materials and documents pertaining to the current status of the TFX Program which are listed in the attachment hereto.

This request is made pursuant to the authority duly invested in the Subcommittee and in accordance with the agreement of Secretary McNamara contained in his letter to the Chairman on February 24, 1964 in which he advised that the Secretary of the Air Force had been instructed by him—"that as soon as the definitive contract and the definitive specifications are completed, to furnish copies thereof to the Committee and to make available to the Subcommittee such personnel and all the materials that may shed light on those determinations".

Senator McClellan has instructed me to suggest that if you have not already been authorized to make these materials available, that you undertake to obtain immediate permission by wire or telephone from the Secretary of Defense or Air Force to supply them.

In the event any or some of those documents cannot be made available, then we would appreciate your advising the Subcommittee the reasons they cannot be furnished.

Your cooperation will be deeply appreciated.

JEROME S. ADLERMAN,  
General Counsel.

(Letter No. 213)

AIR FORCE SYSTEMS COMMAND,  
UNITED STATES AIR FORCE,  
Wright-Patterson Air Force Base, Ohio, June 12, 1964.  
Mr. JEROME S. ADLERMAN.

DEAR MR. ADLERMAN: In reply to your request contained in the letter dated 12 June 1964, United States Senate Committee on Government Operations, Senate Permanent Subcommittee on Investigations, signed by yourself as General Counsel, be advised that authorization to furnish the materials and documents (listed in the attachment to referenced letter) has not been granted.

As suggested, the undersigned immediately attempted to obtain such permission by telephone from Mr. McGiffert, Assistant to the Secretary of Defense for Legislative Affairs in the temporary absence of the Secretary of the Air Force. Authority has been granted to begin immediately the identification, collection and reproduction of the requested documents for transmission, through HQ USAF, to the Office of the Secretary of Defense.

In view of the fact that you refer to a letter from the Secretary of Defense to the Chairman dated 24 February 1964, it is entirely appropriate that the question of access to these documents be dealt with by his office and the Office of the Secretary of the Air Force.

Sincerely,

J. L. ZOECKLER,  
Brigadier General, USAF, Deputy for F-111.

(Letter No. 219)

DEPARTMENT OF THE AIR FORCE,  
OFFICE OF THE SECRETARY,  
Washington, August 25, 1964.

Hon. JOHN L. McCLELLAN,  
Chairman, Permanent Subcommittee on Investigations,  
Senate Committee on Government Operations, U.S.  
Senate.

DEAR MR. CHAIRMAN: In accordance with the discussion which I recently had with you when Mr. Horwitz and I visited with you in your office, I am writing to inform you about the problems which exist with respect to the documentation which was requested in the attachment to your letter of July 10, 1964.

The documentation requested falls into the following four major groups:

#### A. GENERAL DYNAMICS ORIGINATED DOCUMENTS

The bulk of the requested documentation falls within the Contractor-originated area which corresponds to Item 1(h) of the request. This item is worded broadly enough to encompass every document ever submitted by

General Dynamics ("G/D"). At the least, this item would include all reports required under the Contractual Data Requirements Document FZM-12-083C dated January 21, 1964. This document calls for the delivery of a total of 537 different reports, 49 of which are required on a recurring basis as follows:

Daily	1
Semi-monthly	8
Monthly	24
Bi-monthly	3
Quarterly	11
Annually	2

thus resulting in 909 periodic reports per year. The remaining 488 reports fall into the following categories:

As required	95
Based on an event	311
Continuing effort	8
Upon request	67
PCO authorized	7

While the reports called for by this document vary in bulk, detail and material covered, G/D has estimated that to the date of the request, it had delivered approximately 327 cubic feet (single set figure) of these reports to the Systems Program Office ("SPO"). Inasmuch as some of these reports supersede earlier periodic reports, only the latest versions of such reports would in most cases be available at the SPO, the earlier versions having been retired or destroyed.

#### B. DOCUMENTS RELATED TO AN IDENTIFIED GROUP

The second largest area of documentation would be that relating to the reports, memoranda, minutes, surveys and evaluations of, and correspondence and materials considered by, an identified group (corresponding to Items 1(a)-(e) of the request).

1. The first group identified in the request is the Configuration Control Board ("CCB").

a. The CCB exercises full control over SPO actions involving specifications, configuration change proposals, contract task changes and other related activities as determined by the CCB Chairman. It is an official joint command/agency group with representation determined by the System Program Director ("SPD"). It is not a voting board. Subject to final review and concurrence by the SPD, the CCB Chairman (the SPD or his designee) is personally responsible for determinations with respect to configuration changes.

b. Input to the CCB is as follows:

*SCP*—Specification Change Proposal. This is a proposal to make a change to a contractual performance specification. It may be originated by G/D, or any one of the pertinent commands or agencies on the CCB (TAC, ATC, Navy, SPO engineering, SPO management, etc.).

*CDP*—Contractor Development Proposal. This serves the same purpose as the ECP (Engineering Change Proposal) serves in the post-first article testing phase. It may be originated only by the SPO and/or G/D.

*CTC*—Contractor Task Change Proposal. This is similar to the CDP/ECP except that it is used for "soft ware" such as studies and reports to accompany "hardware".

c. No verbatim minutes are kept of CCB proceedings, but there are summary minutes of important business. Individual members have the opportunity of filing individual views. These reports and the CCB directive ("CCBD"), issued as a result of the Chairman's determination, are subject to review by the SPD, as in any other CCB business which is presented to the SPD for disposition.

d. The end result of the CCB proceedings is the CCBD, which is signed by the Chairman. This is directive on the applicable procuring organization, which must then issue a Contract Change Notification ("CCN") in accordance with the CCBD.

2. The second group identified in the request is the Senior Inter-Service Configuration Board ("SICB").

a. The SICB reviews on a quarterly basis configuration status and CCB actions. In addition, individual members are provided summaries of significant CCB actions and may meet to review such actions.

b. Input to the SICB consists of Viewgraph/Oral presentations by members of the SPO on current status of various phases of the project.

c. Summary minutes are kept. To date there have been three quarterly meetings.

d. Distribution of these minutes is not normally made outside the group. The group, as such, does not have any directive capabilities, but the SPD and the ASD Commander are members.

3. The third group identified in the request is the Weight Advisory Group ("WAG").

a. The WAG was established by the SPO to review, evaluate, validate and maintain weight records.

b. G/D provides monthly Weight and Balance Status Reports to WAG in accordance with a contractual reporting requirement. Other information relating to weight and balance is provided by G/D in depth and detail upon request of the group. In addition, the CCB may transmit G/D proposals relating to weight and balance to WAG for evaluation and recommendations.

c. No minutes are kept.

d. WAG submits reports to CCB on input received. These reports contain G/D developed information and WAG recommendations.

4. The fourth group identified in the request is the F-111 Aerodynamics Consulting Group ("ACG").

a. The ACG was established at the request of the Systems Engineering Director of the SPO to provide him with an evaluation of proposals which have an aerodynamic effect on the F-111 aircraft.

b. Input is furnished by G/D in the form of Viewgraph/Oral presentations to the group. (Subsequently, G/D usually furnishes written summaries of such presentations in the form of Technical Reports.) On occasion, BuWeps and NASA members of the group have furnished data for discussion. Such data is usually included in subsequent G/D Technical Reports.

c. The group keeps summary minutes, expressing the views of each individual member.

d. No formal reports are made.

e. The minutes are made available to the Systems Engineering Director for use in his deliberations as a member of the CCB.

## C. DOCUMENTS RELATED TO A PROGRAM

The next largest area of documentation would be that relating to the Weight Improvement Program ("WIP"), the Super Weight Improvement Program ("SWIP"), and the Weight Control Program.

1. *WIP*—This program was initiated by G/D about the time of the December 19, 1963, Executive Management Review ("EMR"). G/D presented to the SPO a series of proposals for reducing weight in the form of CDP's. These were reviewed in the SPO, and as a result, the Director of Systems Engineering went to G/D to discuss the evaluation of these proposals. Summary minutes of these discussions were kept. On the basis of these discussions, the Director of Systems Engineering prepared technical recommendations to the CCB on these CDP's. These were presented orally and G/D was represented at these CCB meetings. The results, if any, of this program would take the form of CCBD's.

2. *SWIP*—Subsequent to the WIP, the Deputy for Development, SAF-RD, visited G/D. In connection with this visit, G/D prepared for presentation to him a January 27, 1964, Status Report, which included detailed proposals for what it considered a Super Weight Improvement Program. These proposals and subsequent unrefined proposals in the format of a weekly letter were sent by G/D to the SPO Deputy for Engineering for preliminary review. This review was performed by a SWIP SPO Ad Hoc Committee, a creation of the SPO Deputy for Engineering. Results of this review were incorporated in a weekly letter from this Ad Hoc Group to G/D, advising it that certain proposals were either (a) worthy of further consideration and should be pursued by G/D, or (b) completely unfeasible in the context of the F-111 System, and should be dropped without further efforts by G/D. In short, this SWIP SPO Ad Hoc Group was a sounding board for G/D weight reduction ideas. SWIP proposals that were not eliminated in this manner would be refined by G/D and presented to the SPO for formal action as CDP's.

3. There are no Weight Control Program reporting procedures, as such. The contractual data requirements document calls for the delivery of monthly status reports on weight and balance. These reports are reviewed by WAG and supplemental information is supplied by G/D on request of WAG.

## D. IDENTIFIED DOCUMENTS AND SUPPORTING DATA

The last area of documentation is that of identified documents and supporting data thereto, including:

- (1) Status Reports 4, 5, 6, 7, & 8. (Item 1(c))
- (2) Weekly letters from G/D. (Item 1(d))
- (3) Status reviews. (Item 1(d))
- (4) Monthly letter from G/D. (Item 1(d))
- (5) Evaluation of weight control and external reports made to Navy and the Army by SPO. (Item 1(d))
- (6) ACG recalled report of July 1963. (Item 1(e))
- (7) Negotiating memorandum and Contractor's proposal of October 31, 1963. (Item 1(g))
- (8) Thrust Reverser Study. (Item (2))
- (9) Evaluations of SWIP proposals. (Item (3))
- (10) Crash program report on weight problem in January 1964, and evaluation by Captain Davis. (Item (4))
- (11) All amendments, changes to and documents referenced in the letter contract and amendments thereto. (Item (6))
- (12) All amendments to the definitized contract, plus all documents referenced in definitized contract or amendments thereto. (Item (7))

- (13) Any advance authorizations for deviations to the contract. (Item (8))

1. Status Reports 4, 5, 6, 7, & 8 are periodic reports submitted by G/D in accordance with a specific contractual data requirement. They are not connected with WIP or SWIP, although later status reports may ultimately reflect actions taken on the basis of these programs.

2. The Weekly letters from G/D would be those presenting preliminary proposals to the SWIP SPO Ad Hoc Committee in connection with SWIP.

3. The status reviews are a compilation of the monthly status reports on weight and balance prepared by G/D, together with the WAG's recommendations to the CCB on each of them.

4. The monthly letters from G/D are assumed to be the status reports on weight and balance delivered to the SPO for WAG review as a requirement of the contract.

5. There is no separate documented evaluation of weight control, as such, beyond that made in connection with the documentation discussed above.

6. The ACG does not issue any reports and, therefore, none have been recalled. The only work product of the ACG is a summary recording of their sessions. This summary is prepared by the group at the close of its meeting, and is signed by the members present. This procedure was not in effect at the end of its first meeting in July 1963 and, therefore, an individual member of the group subsequently prepared a draft of the minutes of the first meeting and circulated it to the other members for concurrences. Inasmuch as the group decided to prepare summary minutes at its meetings, the draft was destroyed, and minutes of the first and second meeting were prepared at the end of the second meeting.

7. Program target cost and incentives are set forth in the definitive contract previously furnished the Subcommittee. The Negotiation Memorandum consists of 63 typewritten pages and an additional 60 pages of exhibits and addendum. The G/D proposal of October 31, 1963, designated EST 006, consists of 12 Sections comprising 333 double pages. The definitive contract is based on this proposal and any subsequent proposals, revisions or changes would have to be in the form of a CCN.

8. The Thrust Reverser study is a 129 page document titled, "F-111 Reverser Incorporation Plan", prepared by the F-111 Thrust Reverser Team for the SPD.

9. It is not clear what evaluations of the SWIP proposals are referred to. These may be the CCBD's on SWIP proposals presented to the CCB or, in the alternative, the weekly letters of the SWIP SPO Ad Hoc Group presenting its preliminary review of SWIP proposals in their early stages.

10. This appears to be the G/D status report and proposals dated January 27, 1964. Captain Davis has stated that he has never made an evaluation of this report.

11. Of the documents referenced in the letter contract, a complete set of the original specifications dated September 1962 is available. This set consists of 68 numbered specifications containing a total of 2,582 pages of material. In addition, there is a separate proposal relating to each of these specifications, which provides written detail of material contained in the specification, and is on the average four times as long as the specification itself. Amendments to the letter contract have already been delivered to the Subcommittee.

12. The definitive contract, and documents referenced therein and amendments thereto, have been sent to the Subcommittee, as specified in your previous request.

13. No advance authorizations for deviations to G/D have been made by the Contracting Officer. All approved changes to the definitive contract are processed as CCN's and no directive is issued to G/D prior to that notice.

Absent any other consideration, the sheer bulk of the material requested in the attachment to your letter of July 10, 1964, would make its delivery to the Subcommittee impractical and would involve the expenditures of thousands of man hours and many thousands of dollars. Documents estimated to exceed in bulk 350 cubic feet of space, would have to be assembled, copied and delivered to the Subcommittee. To accomplish this, many of the persons now working on the F-111 program would have to be diverted from their regular duties to the detriment of the accomplishment of the objectives of the program within the scheduled time frame.

However, over and above the problem of the huge bulk of the requested documents is that most of the requested documents deal with matters upon which no final decisions have as yet been made. For example, many of the documents deal with questions of configuration and weight. In a research and development contract, final decisions on such matters cannot be made until the research and development has been completed or is nearing completion. The delivery of such documents before final determinations have been made on such issues would not only seriously interfere with the management of the program, but would be contrary to the instructions of the Secretary of Defense, who has directed me to make available to the Subcommittee final determinations and all materials as may shed light on those determinations at the time such determinations are made.

To sort out of the blanket request those documents which I am authorized to deliver only at a later time would require me to divert personnel now working on the program for a considerable period of time from their primary task of developing the F-111. This could seriously prejudice the development of the plane, which could have a most harmful effect upon the combatant capability of our armed forces.

I have sought at all times to comply with the requests of the Subcommittee as promptly as possible. As soon as the definitive contract was executed, a copy was made available to the Subcommittee and, subsequently, such supporting documents as have been requested have also been furnished. When final determinations are made with respect to other matters, I shall promptly furnish such determinations and supporting data as the Subcommittee may desire to examine.

Sincerely,

EUGENE M. ZUCKERT.

(Letter No. 221-A)

U.S. SENATE, COMMITTEE ON  
GOVERNMENT OPERATIONS, SENATE  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
*Washington, D.C., October 2, 1964.*

Hon. SECRETARY OF DEFENSE.

My DEAR MR. SECRETARY: My failure to make a more prompt response to Secretary Zuckert's letter of August

25th was occasioned by the pressure of legislative duties and other responsibilities during the closing days of the Congress. As you can well appreciate, I am surprised and disappointed in the contents of his letter.

During the course of this investigation, the Subcommittee has repeatedly asked for access to documents and for information which have not been supplied. On February 24, 1964, you wrote me advising that the Secretary of the Air Force:

. . . has been instructed by me that as soon as the definitive contract and the definitive specifications are completed to furnish copies thereof to the Subcommittee and to make available to the Subcommittee such personnel and all the materials as may shed light on these determinations.

I relied upon that assurance and believed the Subcommittee would encounter no further difficulties in securing from your Department the documents and information that were essential to it in the conduct of the TFX investigation.

I was encouraged when, on May 25, 1964, pursuant to the above commitment, a copy of the basic contractual instrument was delivered to the Subcommittee. However, examination of this basic document revealed that it was incomplete.

On June 12 and 26, 1964, you complied with the Subcommittee's request and supplied it with some 40 additional documents which are incorporated by reference in the basic agreement. These 40 additional documents, in turn, refer to some 611 other documents. The contents and provisions of many, if not all, of these documents appear to be essential to a proper analysis and understanding of all of the terms and provisions of the General Dynamics TFX contract.

A list of these documents to which I refer is attached hereto, and it is expressly requested that you make these available to the Subcommittee—to its staff—for inspection and examination at such installation or place in the Department where these documents may now be located. This will obviate the necessity of their physical delivery to the Subcommittee here in Washington and also the necessity for copying or duplicating those, if any, that it may be determined are not significant or essential to the inquiry. This is certainly the practical and economical way to implement the commitment in your letter of February 24, 1964.

It will, therefore, be most helpful and appreciated if you will immediately make these documents available for inspection and examination by members of the Subcommittee staff so that they may utilize the necessary time during the recess period of the Congress for that purpose. If you will thus cooperate, please let me know promptly so that I may instruct the staff accordingly.

In addition to the attached list of documents which relates specifically to the contractual agreement, there are other materials and documents which the Subcommittee has requested, access to which it has been denied. Involved in this inquiry are questions concerning commonality, cost realism, use of titanium, desirability of thrust reversers, and certain performance characteristics of the aircraft such as weight, ferry range, loiter time on station, ordnance carrying capability, and other factors that entered into your decision in the selection of the General Dynamics proposal in preference to that submitted by The Boeing Company.

On June 12, 1964, at my direction, members of the Subcommittee staff proceeded to Wright-Patterson Air Force Base in an effort to ascertain the current status of the TFX program and to examine pertinent documents relating thereto. At that time a request was made of General Zoekler to obtain clearance from your office to make said material available for examination by members of the Subcommittee staff. On the same date, General Zoekler advised that he had contacted your assistant, Mr. David E. McGiffert, by telephone in an effort to obtain such permission but "authorization to furnish the materials and documents (listed in the attachment to referenced letter) has not been granted." He advised, however, that authority had been granted "to begin immediately the identification, collection and reproduction of the requested documents for transmission, through Hq. USAF, to the Office of the Secretary of Defense," and further suggested that the question of access to these documents should be dealt with by your office and the Office of the Secretary of the Air Force.

Simultaneously, on June 12, 1964, Mr. McGiffert wrote to me and reiterated his "ground rule" by stating:

\* \* \* it seems to me both necessary and appropriate that requests for documents continue to be made in writing addressed to the Secretary of the Air Force, the Secretary of Defense, or my office \* \* \*

Although this suggested procedure may be an attempt to limit and restrict the right of Congress and this Subcommittee to procure the information it requires and to which it is entitled and also to impose a burdensome condition upon your previous commitment "to make available \* \* \* all the materials as may shed light on these determinations," nonetheless, in an effort to cooperate, a request for these documents was made by letter of June 12, 1964, from Mr. Adelman to General Zoekler and later by my letter to you of July 10, 1964.

These written requests have not been met. Instead, on August 4, 1964, Secretary Zuckert and your assistant, Mr. Solis Horwitz, visited me and endeavored to persuade me to not insist on compliance. After some discussion, I suggested that they submit to me in writing their position and reasons for their objection. Three weeks thereafter, I received Secretary Zuckert's letter of August 25, 1964, in which he, in essence, complains that to assemble, review, copy, and forward to this Subcommittee the documents it has requested "could seriously prejudice the development of the plane, which could have a most harmful effect upon the combatant capability of our armed forces." There is no basis whatsoever for such a grossly exaggerated interpretation of or conclusion respecting the Subcommittee's request.

I can readily agree that the self-imposed and complicated screening and duplicating process, including physical delivery to the Subcommittee here in Washington, as apparently envisioned and proposed by Secretary Zuckert, of all materials and documents that the Subcommittee may desire to examine would be burdensome, costly and unnecessary. That is not the request of the Subcommittee. The request simply is that you make this material and these documents available for inspection and

examination by the Subcommittee staff at the place where the documents are now located. Will you agree to do that—to make available for on-the-spot inspection the documents and materials which have been requested? If you agree, then this can be done. It will thereafter only be necessary to deliver copies of those documents as it may be determined are essential to this investigation.

Sincerely yours,

JOHN L. McCLELLAN,  
Chairman.

(Letter No. 223)

DEPARTMENT OF THE AIR FORCE,  
OFFICE OF THE SECRETARY,  
Washington, October 29, 1964.

Hon. JOHN L. McCLELLAN,  
Chairman, Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate.

DEAR MR. CHAIRMAN: Secretary McNamara has asked me to respond to your letter of October 2, 1964. I wish to assure you that the documents identified in the list attached to your letter, some 600 in number, will be made available to your Subcommittee Staff for on-the-spot inspection and examination, as you requested. I had the list checked to verify the identification of the items so as to insure their availability and I am told that only a very few items may require further identification.

Will you please have your Subcommittee's Staff contact our Liaison Officer to make whatever arrangements may be necessary to accommodate their inspection requirements for these documents.

Sincerely,

EUGENE M. ZUCKERT.

(Letter No. 224)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
November 24, 1964.

Lt. Col. LABRE H. GARCIA,  
*Office of Legislative Liaison,  
Department of the Air Force,  
Washington, D.C.*

DEAR COLONEL GARCIA: Pursuant to Secretary Zuckert's letter of October 29, 1964, to the Chairman, Messrs. Dunne, Walsh, and Nunnally of the Subcommittee staff will arrive at Wright-Patterson Air Force Base on November 30 in connection with our continuing inquiry into the TFX aircraft procurement.

In addition to the documents which have been asked for, it is requested that you have available Colonel Nyblade and Mr. Warner Wilson, the contracting officer, for discussion on the contract.

Sincerely yours,

JEROME S. ADLERMAN,  
General Counsel.

(Letter No. 225)

U.S. SENATE,  
 PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
 COMMITTEE ON GOVERNMENT OPERATIONS,  
*December 4, 1964.*

Hon. EUGENE M. ZUCKERT,  
*Secretary of the Air Force,*  
*Washington, D.C.*

MY DEAR MR. SECRETARY: As you know, staff members of this Subcommittee examined a large number of documents at Wright-Patterson Air Force Base earlier this week, which documents are a part of the Air Force contract with the General Dynamics Corporation for the F-111 airplane.

There is attached a list of the documents selected for reproduction and it is requested that a copy of these documents be made and delivered to this Subcommittee at the earliest date possible.

Very truly yours,

JEROME S. ADLERMAN  
*General Counsel.*

## ATTACHMENT A.—APPROVAL LETTERS

ASL/SEB 1-----	Feb.	6, 1964
ASLK/PRO 3-3-----	Jan.	10, 1964
ASLM 7-1-68-----	Jan.	7, 1964
ASLMC-----	Nov.	14, 1964
ASLMC-----	Dec.	18, 1963
ASLMC-----	Jan.	3, 1964
ASLMC-----	Jan.	9, 1964
ASLMC-----	Jan.	13, 1964
ASLMC-----	Jan.	14, 1964
ASLMC-----	Jan.	28, 1964
ASLMC-----	Jan.	29, 1964
ASLMC-----	Feb.	12, 1964
ASLMC-----	Feb.	18, 1964
ASLMC-----	Feb.	25, 1964
ASLMC 27-12-159-----	Dec.	27, 1963
ASLMS 31-10-176-----	Oct.	31, 1963
ASLMS 3-12-65-----	Dec.	3, 1965
ASLMS 26-12-99-----	Dec.	27, 1963
ASLMS 17-1-89-----	Jan.	16, 1964
ASLMS 30-11-99-----	Nov.	30, 1963
ASLPE-----	Dec.	30, 1963
ASZB-----	Mar.	28, 1963
ASZB 1-----	July	16, 1963
ASZB-1-----	Aug.	19, 1963
ASZB-51-----	May	14, 1963
ASZB-19-9-48-----	Sept.	19, 1963
ASZB 27-9-54-----	Sept.	27, 1963
ASZB 27-9-126-----	Sept.	27, 1963
ASZB 1-52-----	May	14, 1963
ASZB 12-7-36-----	July	2, 1963
ASZBK 13-5-56-----	May	13, 1963
ASZBM-1-----	Aug.	15, 1963
ASZBM-1-----	Aug.	19, 1963
ASZBM-1-----	Aug.	27, 1963
ASZBM-2-----	Sept.	18, 1963
ASZBM-18-10-113-----	Oct.	18, 1963
ASZBM 22-8-112-----	Sept.	22, 1963
ASZBP-3-----	Sept. 19-10-Aug.	1963
ASZBT-----	Oct.	11, 1963

## ATTACHMENT B.—GENERAL DYNAMICS SPECIFICATIONS

FZM 12-071C	FZM 12-262-16A
FZM 12-085B	FZM 12-262-19
FZM 12-094A	FZM 12-262-20A
FZM 12-140B	FZM 12-263-11A
FZM 12-106C	FZM 12-265-2A
FZM 12-131G	FZM 12-265-3A
FZM 12-141	FZM 12-266-2A
FZM 12-146B	FZM 12-266-27A
FZM 12-154	FZM 12-267-5A
FZM 12-155B	FZM 12-268-4A
FZM 12-156B	FZM 12-301
FZM 12-157B	FZM 12-309B
FZM 12-161	FZM 12-316
FZM 12-166B	FZM 12-318
FZM 12-167C	FZM 12-321
FZM 12-170	FZM 12-323B
FZM 12-255	

## ATTACHMENT C.—MISCELLANEOUS

Contract change notifications 25 through 138  
 Contract task changes (CTC's), specification change proposals (SCP's), and configuration development proposals (CDP's) incorporated into the contract by contract change notifications 3 through 138

Exhibit 62-ASZB-X-19  
 BuWeps sketch—RSSH-1338K steam catapult capacity

(Letter No. 226)

U.S. SENATE,  
 PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
 COMMITTEE ON GOVERNMENT OPERATIONS,  
*December 4, 1964.*

Brig. Gen. J. L. ZOECKLER  
*Deputy for F-111, Aeronautical Systems Division, Air Force  
 Systems Command, Wright-Patterson Air Force Base,  
 Ohio.*

DEAR GENERAL ZOECKLER: I have been directed to request from you a written response as to your reasons for not making available certain documents requested of you by the staff in the presence of Colonel Garcia on December 2, 1964.

At that time, Mr. Dunne and other staff members requested access to the documents set forth in a list prepared under the direction of the Chairman and previously delivered to you by me. This list included, among other things:

1. The cost proposal submitted by General Dynamics on October 31, 1963;
2. The memorandum of negotiation prepared by the Government's contracting officer immediately after definitizing the contract in May of this year;
3. The preliminary and final version of the documentation presented by the contractor at the Executive Management Review of June 9, 1964, concerning the weight problem, etc.; and

4. The five year Force Structure and Financial Plan under which the TFX program is being operated.

It is my understanding that you are under orders from higher authority to not make the aforementioned documents available.

All of the above documents have been included in a previous request contained in the memorandum that I submitted to you the last time I met with you at Wright-Patterson and the documents were further requested by Senator McClellan in his letter of July 10, 1964, to Secretary McNamara..

In addition to the foregoing, as you may know, Secretary McNamara advised the Chairman that Secretary Zuckert would deliver a complete copy of the contract when it was definitized between the Air Force and General Dynamics. Our examination of this contract by the staff, the major portions of which have been made available to us, fails to reveal any documentation which indicates that General Dynamics is legally bound to prove or demonstrate the performance characteristics of the TFX, such as dash distance, Navy weight, loiter time, and the like, by a day certain. If a day certain has been set, we would like to examine the contractual document that fixes such date.

As aforementioned, it is requested that we receive a reply stating whether or not you are authorized to comply with these requests to furnish the aforementioned documents or to confirm your inability to make these documents available and the reasons therefore.

Sincerely yours,

JEROME S. ADLERMAN,  
*General Council.*

(Letter No. 229)

OFFICE OF THE SECRETARY OF DEFENSE  
*Washington, D.C., January 15, 1965.*

Mr. JEROME S. ADLERMAN,  
*General Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR MR. ADLERMAN: I am replying to your letters of December 4, 1964, to Secretary Zuckert and General Zoeckler requesting certain documents and information relative to the TFX investigation. It is suggested that for the orderly handling of such requests they be directed to me.

Transmitted herewith are:

1. A copy of the Contracting Officer's memorandum of negotiations of the definitive research and development contract (Price Negotiation Memorandum, Contract AF 33(657)-8260, dated 25 March 1964) requested in your letter to General Zoeckler. Because of its sensitive nature, it is requested that this document be appropriately safeguarded from public release. Disclosure of its contents to General Dynamics or any other contractor would be highly prejudicial to the best interests of the Government. It reveals both the Government's method of analyzing and comparing costs and the cost element breakdown of the Government final offer. The Air Force is presently entering upon the F-111 negotiation for production quantities. The information in the memorandum reflecting the contracting officer's pricing evaluations and decisions in the research and development contract negotiation are related in many

significant respects to the follow-on production cost data and pricing. As indicated above, any disclosure of such information outside the Government, especially to General Dynamics, could seriously jeopardize the Government's negotiating position on the production contract.

2. Certain of the documents requested in the list attached to your letter to Mr. Zuckert. Some of the Contract Task Changes, Specification Change Proposals, and Configuration Development Proposals listed in the letter to Mr. Zuckert, and the Contractor's Cost Proposal of October 31, 1963, mentioned in the letter of General Zoeckler, are not being transmitted herewith since they have not yet been received.

With respect to the request in your letter to General Zoeckler for the documentation presented by the contractor at the Executive Management Review (EMR) of June 9, 1964, I wish to call to your attention Mr. McNamara's letters of October 29, 1963, and February 24, 1964. EMR's are informal meetings attended by high level representatives of the Departments and executives of General Dynamics and Grumman to keep them informed as to status of the program. An EMR briefing does not serve as a basis for decision or contractual action. It is not a contractual requirement. Decisions are made on the basis of official contractor submissions, specification changes and other changes in work and accomplished by the issuance of CCN's and other contractual documents. For these reasons, the EMR does not fall within the scope of the guidelines contained in the letters mentioned above.

You also requested contractual document which fixes the date on which General Dynamics is legally bound to prove or demonstrate certain performance characteristics of the TFX, such as dash distance, Navy weight, loiter time and the like. The Air Force advises that no fixed contractual dates have been established to prove final aircraft performance. To do so would tend to eliminate the flexibility essential to a dynamic and successful flight test program. This policy is standard and was adopted for this weapon system prior to the selection of a contractor. Government regulations and specifications adequately allow for proof of system capability under Air Force and/or Navy control. The airworthiness and performance of the air vehicle and the performance of subsystems are further developed and proved during the flight test program prior to proving the complete weapon system.

Air Force Regulation 80-14 establishes categories of flight testing as follows:

a. Category I—responsibility of the contractor to conduct with the close cooperation and surveillance of the Air Force.

b. Category II—the responsibility of the Air Force (Air Force Systems Command) and conducted by the Systems Command with the cooperation of the Using Command, and supported to some extent by the contractor.

c. Category III—the responsibility of the Air Force (Using Command), conducted by the Using Command with the cooperation of the Systems Command, and with little or no support by the contractor.

It is planned that proof of the F-111 weapon system will be a part of the Category II flight test program. It is therefore not appropriate to contract with the contractor for a schedule which is the responsibility of the Air Force to develop. This schedule is built around the delivery of

the test aircraft and the capability of the Air Force to conduct the Category II flight test program.

Proof testing of the Navy aircraft performance is planned to be conducted during the contractor's flight test program with the very close participation and surveillance of the Navy, during carrier suitability testing at Patuxent River, and during the Board of Inspection and Survey (BIS) trials conducted by the Navy. Again, the Navy will schedule this testing to provide valid test data at the earliest practicable date. It is not appropriate to contract with the contractor for a demonstration over which the Government has a large measure of control.

It is significant to note in this connection that the aircraft delivery requirements are fixed in the contract; that the contractor's obligations to meet contract performance requirements applicable to delivered aircraft are also established by the contract; and that the "Correction of Deficiencies" clause requires correction of deficiencies within a specified time period after such delivery (i.e., 1 year after completion of Category II flight test program or 18 months after acceptance of the 23d aircraft, whichever is earlier). The Government, therefore, will have ample opportunity to test the aircraft within the warranty period at such times as it determines to be in its best interests and, where appropriate, to require correction of deficiencies found as a result of such tests.

Sincerely,

DAVID E. MCGIFFERT,  
*Assistant to the Secretary.*

(Letter No. 235)

OFFICE OF THE SECRETARY OF DEFENSE,  
*Washington, D.C., March 22, 1966.*

Hon. JOHN L. McCLELLAN,  
*Chairman, Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in further response to your letter to the Secretary of Defense requesting another review of the 1963 TFX testimony to declassify certain information that was previously deleted for reasons of national security.

As you know the security review of the testimony before your Subcommittee was approached on the basis of the maximum disclosure possible. We have continued this policy. As a result, some information about the TFX which required classification in 1963 no longer needs to be protected and has been officially released. In addition, considerable speculation concerning the TFX has appeared in trade journals and newspapers which in the interest of national security we believe unwise to confirm or deny. A review of the ten volume 1963 hearings would therefore only affect the classification of the testimony which has been the subject of subsequent official releases.

After careful consideration, it is our best judgment that the most economical and direct way to provide you the information you desire is for the Department of Defense to prepare a current fact sheet containing all available unclassified characteristics of the F-111 aircraft and its various modifications.

This fact sheet is now being prepared and will be forwarded to you shortly.

Sincerely,

JACK L. STEMPLER,  
*Assistant to the Secretary (Legislative Affairs).*

(Letter No. 241)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*September 6, 1966.*

Hon. ROBERT S. McNAMARA,  
*Secretary of Defense,  
Department of Defense,  
Washington, D.C.*

MY DEAR MR. SECRETARY: In our letter to you of August 15, 1966, we advised that the Subcommittee is concerned about reported excessive costs and deficiencies of the TFX aircraft in meeting design specifications and required performance capabilities. In that letter, a copy of which is attached, we also informed you that the Subcommittee had sought the assistance of the General Accounting Office in obtaining a correct cost analysis of the entire TFX project.

In order that the Comptroller General and the General Accounting Office might expeditiously perform this service for the Subcommittee, we respectfully requested your personal and official cooperation and asked that you direct the Secretaries of the Air Force and of the Navy and all appropriate officials and personnel under your jurisdiction to make available to the Comptroller General and representatives of the General Accounting Office all records, documents, and other pertinent information which the Comptroller General deems necessary to carry out this mission.

On August 16 and 29, 1966, we received acknowledgments of that letter from one of your subordinates, but we have received no response from you to the foregoing request for your personal and official cooperation. The courtesy of your early attention and reply to this request will be deeply appreciated.

Sincerely yours,

JOHN L. McCLELLAN,  
*Chairman.*

(Letter No. 242)

THE SECRETARY OF DEFENSE,  
*September 9, 1966.*

Hon. JOHN L. McCLELLAN,  
*Chairman, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: As Mr. Stempler advised you on August 29, a meeting of Defense Department and General Accounting Office officials was scheduled for August 31 to discuss collection of data relating to the F-111 and to expedite our cooperation in this matter. The meeting was held as scheduled, and, at my direction, the Secretary of the Air Force, the Under Secretary of the Navy (the

Secretary being out of town), and the Director of Defense Research and Engineering represented the Defense Department. Pursuant to the arrangements made at this meeting, I understand the representatives of the General Accounting Office have started gathering data.

Sincerely,

ROBERT S. McNAMARA.

(Letter No. 243)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*September 21, 1966.*

Hon. ROBERT S. McNAMARA,  
*Secretary of Defense,*  
*Department of Defense,*  
*Washington, D.C.*

MY DEAR MR. SECRETARY: The Subcommittee has directed its staff to resume the TFX inquiry and to obtain further information about the progress of the program. It is therefore requested that you instruct all personnel within the Department of Defense who have responsibility for the RDT&E and production programs to cooperate fully with our staff in the investigation.

As you can appreciate, in order to make a thorough inquiry, the Subcommittee will need free and unlimited access promptly to all documents, data, records, correspondence and other material relating to the RDT&E and procurement programs for all existing or contemplated versions of the TFX. Our staff also should have access to similar data in the possession of the General Dynamics Corporation, Grumman Aircraft and Engineering Corporation, Hughes Aircraft Company, and their subcontractors.

We also request that you furnish a current organizational chart showing each office and responsible official exercising supervision or direction over both the RDT&E and procurement programs. This chart should include all supervisory committees or boards which are concerned with the TFX, such as the various weight improvement committees with their full membership, including contractor personnel.

The Subcommittee will greatly appreciate your personal assurance that you will issue promptly the necessary directives to insure the full compliance of your Department with the foregoing requests.

Sincerely yours,

JOHN L. McCLELLAN,  
*Chairman.*

(Letter No. 243-A)

MEMORANDUM

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*September 8, 1966.*

To: Jerome S. Adleran.  
From: John Brick.  
Subject: TFX—Study of Correspondence between the Chairman and the Secretary of Defense, 1962-1966.

I have reviewed the correspondence between the Chairman and Secretary McNamara for the purpose of summarizing it and making a chart of replies and/or acknowledgments. The summary follows; the chart is attached.

#### SUMMARY OF CORRESPONDENCE

##### *The Chairman's Letters to Secretary McNamara*

The Chairman has written 26 letters addressed to Secretary McNamara during the course of the TFX investigation. Replies, acknowledgments, and references to the Chairman's letters, by the Secretary and by other persons in the Department of Defense, are summarized below:

1. Secretary McNamara replied personally to 5 of the 26 letters addressed to him by the Chairman.
2. Deputy Secretary Gilpatrick replied to 4 of the 26 letters addressed to Mr. McNamara by the Chairman.
3. Secretary Korth replied to 1 letter addressed to Mr. McNamara by the Chairman.
4. Secretary Zuckert visited the Chairman and eventually replied to 1 letter addressed to Mr. McNamara by the Chairman.
5. Jack Stempler replied to 2 letters addressed to Mr. McNamara by the Chairman.
6. David McGiffert replied to 4 letters addressed to Mr. McNamara by the Chairman.
7. Acknowledgments of 7 letters addressed to Mr. McNamara by the Chairman were made as follows: 5 by Mr. McGiffert, 1 by Mr. Stempler, 1 by General Broderick.
8. No acknowledgment or reply was made to 2 letters addressed by the Chairman to Secretary McNamara.

The above 8 items representing replies and acknowledgments account for 26 letters. However, in many instances, there were frequent references subsequently to some of the Chairman's letters, as documents or information requested in them were forwarded to the Subcommittee.

##### *Secretary McNamara's Letters to the Chairman*

Secretary McNamara wrote on his initiative to the Chairman on 5 occasions. One letter required no reply; immediate inter-staff contacts filled the Secretary's request. One letter transmitted a book; there is no record that the Chairman replied. One letter summed up the Secretary's concern about press treatment; the letter refers to a phone conversation between the Chairman and the Secretary. The Chairman replied (#108) to the Secretary's letter (#103) relating to "unreliable" figures. One letter refused to furnish G.D. cost proposal; there is no record that the Chairman replied. Total: 5 letters; 1 reply, 1 phone conversation.

##### *Judgment on Necessity of Reply*

Of the Chairman's 26 letters, a staff judgment is that personal replies from the Secretary were necessary for 20 of them. Acknowledgment and inter-staff liaison and consultation were probably sufficient for 6 of them.

NOTE.—After this memorandum was written, a reply to the Chairman's letter of September 6, 1966, was received on September 10, 1966, and is recorded on the attached chart.

[Numbers used refer to file of all correspondence between Subcommittee and Defense Department]

Chairman to Secretary McNamara	Secretary McNamara to Chairman	Acknowledgments or replies by others	Need for personal reply
11. Dec. 21, 1962. Chairman requests Secretary to hold action on GD contract.	No reply to No. 11.....	14. Dec. 26, 1962. Deputy Secretary Gilpatrick replies to Chairman. Announces go-ahead on contract.	Yes.
38. Feb. 13, 1963. Chairman announces hearings and suggests Secretary pick dates for himself, Zuckert, and Korth.	No reply to No. 38.....	42. Feb. 21, 1963. McGiffert to Chairman. Yes. Acknowledges No. 38, thanks for opportunity to set dates.	
52. Mar. 6, 1963. Chairman requests details on prior contract performance of GD and Boeing. Chairman did not reply; interstaff contacts sufficed. Chairman did not reply.	No reply to No. 52.....	55. Mar. 7, 1963. McGiffert acknowledges No. 52, Perhaps not necessary. promises information.	
Chairman did not reply; Secretary's letter refers to phone conversations on previous evening.	57. Mar. 9, 1963. Secretary states his concern about hearings; asks permission to file statement.		
92. Apr. 2, 1963. Chairman repeats request for important documents requested twice previously.	72. Mar. 19, 1963. Secretary transmits book to help explain his cost estimate philosophy.		
93. Apr. 2, 1963. Chairman requests "Rubel paper".	77-A. Mar. 23, 1963. Secretary writes personal letter on press treatment.		
108. Apr. 10, 1963. Reply by Chairman to No. 103. States GAO's task will be changed in response to No. 103.	103. Apr. 5, 1963. Secretary states figures were "so unreliable" they could not be used.	See No. 120 below. The Chairman repeated the request in letter of Apr. 16, 1963, to Deputy Secretary Gilpatrick, whereupon the documents were submitted.	Yes.
110. Apr. 11, 1963. Chairman repeats requests made in No. 52 above.	117. Apr. 18, 1963. Secretary states nuclear sub material will be furnished; other material requests should be channeled.	120. Apr. 19, 1963. An added reply by Deputy Secretary Gilpatrick to No. 110, also incorporating references to No. 92 and No. 93.	Yes.
122. Apr. 26, 1963. Chairman requests information on status of TFX program.	No reply to No. 122.....	141. June 3, 1963. Deputy Secretary Gilpatrick replies to No. 122, refers to No. 139.	Yes.
148. June 21, 1963. Chairman requests General Alness for interview.	No reply to No. 148.....	149. McGiffert to Adelman. Transmits information wanted from General Alness.	Probably not necessary; interstaff liaison sufficed.
153. June 27, 1963. Chairman requests Spangenberg's presence at all hearings.	No reply to No. 153.....	157. Secretary Korth refuses to make Spangenberg available.	Probably; although delegated to Korth.
176. Sept. 6, 1963. Repeats request of Mar. 6, 1963, in No. 52 above. Asks early delivery.	No reply to No. 176.....	191. Nov. 12, 1963. Reply by David McGiffert, Yes. furnishing partial information.	Yes.
177. Sept. 6, 1963. Repeats staff request for Navy Sea-Based Strike Study; asks costs and budget figures.	180. Sept. 18, 1963. Secretary refuses Navy Sea-Based Strike Study; no comment on costs and budget.		
182. Oct. 21, 1963. Chairman states Nunnally is enroute to WPAFB; requests cooperation.	No reply to No. 182.....	188. Oct. 29, 1963. Secretary says Nunnally's objectives not specified. Says Subcommittee seeks to "monitor and supervise."	Probably not; staff liaison would suffice.
184. Oct. 25, 1963. Chairman states Nunnally was denied access. Asks for personal cooperation.	No reply to No. 184.....	190. Nov. 8, 1963. Secretary refused GD cost proposal sought by Subcommittee's staff.	Yes.
Chairman made no reply to No. 190.....	No reply to No. 194.....	196. Nov. 11, 1963. McGiffert replies to report compliance on Sequoia data.	Yes.
194. Nov. 13, 1963. Chairman requests Sequoia material previously sought by staff.	201. Feb. 24, 1964. Secretary states contract will be furnished when ready and personnel will be available.	204. Mar. 11, 1964. McGiffert acknowledges No. 203. Yes.	
200. Feb. 11, 1964. Chairman requests personnel to be made available on status of TFX.	205. Mar. 25, 1964. Secretary says information will be sent when contract is completed.	Without acknowledgment, or reference McGiffert replies in No. 208, forwards contract.	Yes.
203. Mar. 7, 1964. Chairman asks if personnel in No. 200 are being denied. Requests reply.	No reply to No. 207.....	210. May 28, 1964. McGiffert acknowledges No. 209. Yes.	
207. May 15, 1964. Chairman sums up history of requests and refusals. Asks compliance and personal reply.	No reply to No. 209.....	211-A. June 12, 1964. Reply by McGiffert, for- warding documents.	Yes.
209. May 26, 1964. Chairman asks for documents referred to in contract.	No reply to No. 211.....	217. July 17, 1964. Acknowledgment of No. 216 by Yes. General Broderick. Visit by Secretary Zuckert, and reply by Zuckert letter of August 25, 1964, No. 219.	
211. June 8, 1964. Chairman notes acknowledgment only of No. 209. Asks for Secretary's personal attention and assurance.	No reply to No. 216.....	222. October 8, 1964. McGiffert acknowledges No. 203. Yes.	
216. July 10, 1964. Chairman asks expedition of documents on costs and performance.	No reply to No. 216.....	221-A. Reply by Secretary Zuckert, October 29, 1964, No. 223.	
211-A. October 2, 1964. Chairman recalls promises; asks contract documents be made available for inspection.	No reply to No. 221-A.....	224. February 25, 1966. Stempler acknowledges No. 235, March 22, 1966, regarding "fact sheet." Stempler forwards "fact sheet," No. 236, April 5, 1966.	
233. Feb. 22, 1966. Chairman requests declassification of TFX material in record.	No reply to No. 233.....	238. Aug. 16, 1966. Stempler acknowledges No. 239, August 29, 1966.	Yes.
237. Aug. 15, 1966. Chairman informs Secretary of GAO inquiry. Requests cooperation. "Please advise."	No reply to No. 237.....	No Acknowledgment yet received.....	Yes.
241. Sept. 6, 1966. Chairman requests courtesy of a reply to No. 237.	No reply yet received.....		
242. Sept. 9, 1966. Secretary notes that Mr. Stempler replied; repeats information that GAO Pentagon liaison is under way; does not offer personal and official cooperation.			
243. Sept. 21, 1966. Chairman announces resumption of investigation, asks cooperation.			Yes.

## (Letter No. 244)

THE SECRETARY OF DEFENSE,  
Washington, September 30, 1966.

Hon. JOHN L. McCLELLAN,  
Chairman, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of September 21, 1966 asks that I issue the necessary directives to permit your Committee staff to obtain information about the progress of the RDT&E and production programs for the F-111 aircraft.

In order to expedite cooperation with the Committee in the performance of its duties, I have directed the General Counsel of the Department of Defense, Mr. Warnke, to undertake the responsibility on behalf of the Department of Defense of working with the Committee staff in responding to its requests for data.

The current organizational charts requested in your letter are being prepared, and will be forwarded to you in the near future.

Sincerely,

ROBERT S. McNAMARA.

## (Letter No. 245)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
October 7, 1966.

Hon. ROBERT S. McNAMARA,  
The Secretary of Defense,  
Washington, D.C.

MY DEAR MR. SECRETARY: Your letter of September 30, 1966, has been received.

In order that the Subcommittee's staff may proceed promptly with the inquiry into the progress of the RDT&E and production programs for the TFX aircraft, it will be necessary initially that the staff have access to the following material:

(1) all reports, minutes of meetings, recommendations, directives, and other documents prepared by all weight reduction committees which have been organized and operated by the Department of Defense or by the contractors in connection with the entire TFX program;

(2) all weight and balance reports, including the most recent, which the contractor is required to forward monthly to the Systems Project Officer at Wright-Patterson Air Force Base; and

(3) all cost effectiveness studies which have been prepared for all existing or contemplated versions of the TFX aircraft, and all studies of comparative performance between any version of the TFX and other existing or contemplated aircraft.

The Subcommittee will greatly appreciate a prompt reply indicating the locations of the material requested. We again request your personal assurance that our staff will be granted, without unnecessary delay, full access to the documents and materials in the three categories listed above at the offices or places where they may be located.

Sincerely yours,

JOHN L. McCLELLAN,  
Chairman,

## (Letter No. 247)

THE SECRETARY OF DEFENSE,  
Washington, October 18, 1966.

Hon. JOHN L. McCLELLAN,  
Chairman, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of October 7, 1966. As I previously informed you, I have directed the General Counsel of the Department of Defense, Mr. Warnke, to undertake the responsibility of working with your staff in responding to its requests for data. Information as to what material can be made available and at what location may, therefore, be obtained by your staff through Mr. Warnke.

Sincerely,

ROBERT S. McNAMARA.

## (Letter No. 248)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
October 20, 1966.

Hon. ROBERT S. McNAMARA,  
Secretary of Defense, Department of Defense,  
Washington, D.C.

MY DEAR MR. SECRETARY: This is in reply to your letter of October 18, 1966, in which you again indicated that you had directed the General Counsel of the Department of Defense, Mr. Warnke, to undertake the responsibility of working with the Subcommittee's staff in responding to its requests for data. Your letter of September 30, 1966, and Mr. Warnke's letter of October 13, 1966, previously had informed the Subcommittee of that directive.

The Subcommittee, however, is still awaiting, and again requests, your personal assurance that our staff will be granted, without unnecessary delay, full access to the documents and materials described in the Subcommittee's letters to you of September 21, 1966, and October 7, 1966.

Sincerely yours,

JOHN L. McCLELLAN,  
Chairman.

## (Letter No. 249)

THE SECRETARY OF DEFENSE,  
Washington, October 31, 1966.

Hon. JOHN L. McCLELLAN,  
Chairman, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of October 20, 1966 appears to indicate some concern about our intention to cooperate with your Subcommittee in its review of the F-111 program. I had believed that the arrangements already made, both for your staff and with General Accounting Office representatives, were ample evidence of our cooperation. In any event, you have my personal

assurance that the Department of Defense will continue to cooperate throughout this review.

My designation of Mr. Warnke to work with your staff and with the General Accounting Office representatives was intended to facilitate our response to requests for data. I am hopeful that these arrangements will minimize, if not fully avoid, the difficulties that tend to be associated with review of on-going programs, particularly when they are of this complexity.

Sincerely,

ROBERT S. McNAMARA.

(Letter No. 289)

GENERAL COUNSEL OF THE DEPARTMENT  
OF DEFENSE,  
Washington, D.C., March 7, 1967.

Mr. DONALD F. O'DONNELL,  
Chief Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. O'DONNELL: Since receipt of your letter of February 28, 1967, I have again reviewed the "F-111 Systems Status Report Summary", for January 1967. I have concluded that, as previously stated, it is not appropriate to grant access to this document at this time.

This report is an internal program management document. It contains tentative conclusions which are subject to review and is prepared on a continuing basis to indicate the day to day progress of an on-going program. In addition, it contains preliminary budget estimates not as yet submitted by the President to the Congress.

To the extent that this document contains information pertinent to your review of the F-111 Program, such as current performance estimates, the information can of course be made available from other and more appropriate sources.

Sincerely yours,

PAUL C. WARNKE.

(Letter No. 290)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
March 15, 1967.

Hon. ROBERT S. McNAMARA,  
Secretary of Defense,  
Washington, D.C.

MY DEAR MR. SECRETARY: Paul C. Warnke, your General Counsel, in a letter of March 7, 1967, addressed to Donald F. O'Donnell, Chief Counsel of the Senate Permanent Subcommittee on Investigations, has declined to make the January 1967 F-111 Systems Status Report Summary available to the Subcommittee's staff for review.

He based his objection in part on the ground that the report contains certain preliminary budget estimates not

yet submitted by the President to the Congress. I have no objection to having these budget estimates deleted from copies to be made available to the staff.

I am informed that this Summary Report is prepared by the Program Project Officer and is based upon information supplied by the Government's own technical experts who are the best informed and most qualified sources on the F-111 aircraft performance and testing program. I believe that this report is pertinent and important to the inquiry being conducted by the Subcommittee and I would therefore greatly appreciate having the complete report, except for the budget estimates, made available to the staff for examination at an early date.

Sincerely yours,

JOHN L. McCLELLAN,  
*Chairman.*

(Letter No. 293)

GENERAL COUNSEL OF THE DEPARTMENT  
OF DEFENSE,  
Washington, D.C., March 15, 1967.

MR. CHARLES H. CROMWELL,  
Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CROMWELL: This is in response to your request for all issues to date of FZM-12-988, Category I Flight Test Progress Report.

I am informed there is not an extra set available of the entire series, which involves upwards of two dozen separate reports totaling more than 3,500 pages. If there are any particular reports in this series of which you require copies, we will, of course, be happy to supply them.

Sincerely yours,

PAUL C. WARNKE.

(Letter No. 302)

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
Washington, D.C., March 21, 1967.

MR. JEROME S. ADLERMAN,  
General Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. ADLERMAN: This will acknowledge your several letters dated March 14, 15 and 16, 1967. We are presently processing these requests to determine the extent to which the documents can be made available. As I am sure you recognize, however, many of these documents relate to early stages of the F-111 development program. There may therefore be some unavoidable delays in locating the various documents which are no longer in our current files. We will be in touch with you further in the near future.

Sincerely yours,

PAUL C. WARNKE.

## (Letter No. 303)

GENERAL COUNSEL OF  
THE DEPARTMENT OF DEFENSE,  
Washington, D.C., March 22, 1967.

MR. JEROME S. ADLERMAN,  
*General Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR MR. ADLERMAN: Your letter of March 15, 1967 asked that I inform you whether and where the following documents could be made available for review:

1. Grumman "Fall Back" Options Proposal dated May 28, 1964, and General Dynamics' report on same subject FZM-12-775 dated June 4, 1965.

2. Minutes of Meeting where decision was made to reject "Fall Back" options.

With respect to your Item 2, no minutes have been found of any meeting where a decision was reached on a Grumman "Fall Back" Options Proposal. We have been able to locate a copy of a Grumman report dated May 28, 1964, together with a General Dynamics report FZM-12-755, dated June 4, 1964. This would appear to be the material to which you refer in your Item 1.

Access to these reports can be obtained through Captain E. W. Cole, who can be reached on OX 7-0892.

Sincerely yours,

PAUL C. WARNKE.

## (Letter No. 313)

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
Washington, D.C., March 29, 1967.

MR. JEROME S. ADLERMAN.

*General Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR MR. ADLERMAN: Your letter of March 23, 1967 reported the request of Mr. Cromwell and Mr. Nunnally for two documents relating to the AMSA program. It would appear that this request is outside the scope of the Subcommittee's inquiry into the F-111 Program, as described in Senator McClellan's letter of September 21, 1966. The documents relate neither to the RDT&E nor the procurement program for the F-111 aircraft.

Accordingly, I would appreciate your considering whether in fact these documents are pertinent to the inquiry announced by Senator McClellan.

Sincerely yours,

PAUL C. WARNKE.

## (Letter No. 317)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
March 31, 1967.

Hon. ROBERT S. McNAMARA,  
*Secretary of Defense,*  
*Washington, D.C.*

MY DEAR MR. SECRETARY: In your letter of October 31, 1966, you gave me your personal assurance that personnel of the Department of Defense would cooperate with the

staff of the Subcommittee during the inquiry into the TFX program. I am informed that very good cooperation was achieved during the first several months of our renewed inquiry.

During that period, our staff met with Defense Department personnel through arrangements made directly with the Congressional liaison offices of the armed services, and with contractors' employees through arrangements made directly with the contractors. These procedures brought good results in an atmosphere free of inhibitions and antagonisms. The procedure of obtaining documents through the office of your General Counsel, Paul C. Warnke, resulted in occasional delay but has been generally satisfactory.

Our staff members now find, however, a complete change in the atmosphere within which interviews are conducted. I have information that when our representatives visited Wright-Patterson Air Force Base during the week of March 13, employees and officers of the Department of Defense received instructions prior to interviews that severely limited access of our staff to information and documents. As many as three officials were assigned as observers for all interviews. Freedom of discussion disappeared, and the persons interviewed were obviously inhibited and guarded in their responses.

Later that week, Mr. Warnke prohibited further interviews unless they were arranged through his office, with advance notice of 24 hours. The Subcommittee's General Counsel, Jerome S. Adelman, agreed under protest to this procedure as a temporary expedient to complete interviews which had been planned that week.

However, the procedure for scheduling interviews was formalized, without further consultation, on March 21 by official instructions issued within the armed services. Meetings and interviews now require 24 hours notice and prior approval from Mr. Warnke's office. The same procedure was established for interviews by General Accounting Office representatives, who have been engaged since August of 1966 in an inquiry into F-111 costs and other contractual matters.

Enclosed is a copy of a letter from Comptroller General Elmer B. Staats, dated March 27, 1967, which states that the new procedure could delay the work of his staff and may tend to hinder the full expression of views by personnel of the Department of Defense and the contractors.

These directives were extended to include F-111 contractors, forbidding meetings and conferences of their personnel with the Subcommittee and General Accounting Office representatives unless prior clearance was granted by Mr. Warnke. After protest by the Subcommittee's General Counsel, Mr. Warnke recalled these instructions to the contractors. I am pleased that he has done so, because I do not believe that the Congress should countenance any attempt to limit Congressional responsibility for legislative oversight on government contracts.

However, I am seriously concerned, as is the Comptroller General, about the effects of the newly established procedure for interviews and meetings. I hope you will agree that all personnel of the Defense Department should speak with freedom and candor to representatives of the Congress of the United States, and that such conversations and interviews must be free of inhibiting and restricting conditions.

I believe that interviews can be arranged and our inquiry properly facilitated by a prompt return to the procedures which previously prevailed, using normal legislative liaison channels. Therefore, I most respectfully request that you rescind the recent directive and reinstate the former practices in their entirety, thereby permitting the resumption of a good working relationship between our representatives.

I also regret the necessity for calling to your attention two letters we recently received which deny to the Subcommittee access to certain pertinent material relating to the F-111 aircraft program.

The first of these, dated March 29, 1967, from Mr. Warnke, refuses access to documents relating to AMSA because they are outside the scope of the Subcommittee's inquiry into the F-111 program. I believe that the documents are most pertinent to the Subcommittee's inquiry. In your testimony before the Senate Appropriations Committee in 1966 (page 209), you said: ". . . I think that the term 'Advanced Manned Strategic Aircraft,' which is the meaning of AMSA, is quite appropriately applied to the FB-111." I am sure that you will agree that the AMSA documents are both pertinent and appropriate, and I again request that they be supplied.

The other letter to which I refer is your reply of March 29, 1967, to my letter of March 15, 1967, requesting that the January 1967 F-111 Systems Status Report Summary, prepared by Major General Zockler, System Program Director, be made available to the Subcommittee. You said that access to this report was not granted because it was meant for internal distribution, and that it is against established policy to disclose advisory comments, because such disclosure would impede communications within the Executive branch.

This document had been examined previously by our staff in the office of the General Counsel of the Air Force. However, the material relating to performance and flight testing had been deleted. The report contained facts and figures, not advisory comments. Therefore, your reason for not complying with this request appears to be totally invalid.

If such reasoning as you offer for failing to provide this material had prevailed throughout this investigation, the Subcommittee would have been denied access to the original Systems Source Selection Board's reports on the TFX and all background documents. Your offer to substitute "current performance estimates in all respects of equivalent detail" will not satisfy the Subcommittee's needs. We request that you furnish the original document, about which there can be no question.

I would appreciate having your full cooperation in these matters—your furnishing all materials and documents requested—so that the Subcommittee's inquiry may proceed expeditiously. Please advise.

Sincerely yours,

JOHN L. McCLELLAN,  
Chairman.

(Letter No. 322)

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
Washington, D.C., April 11, 1967.

Mr. JEROME S. ADLERMAN,  
General Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

Dear Mr. ADLERMAN: Your letter of March 23, 1967 requested copies of the following:

1. Final Evaluation Report, "Growth" F-111 SAC Study 65 SES 448, dated March 1965.
2. General Dynamics report FZM12-425A "Growth" F-111 SAC Study, 12 November 1964.
3. General Dynamics report RZM12-4254-1 "Growth" F-111/SAC Study Planning and Cost Data, 13 November 1964.
4. Letter from AMSA SPO or SES to F-111 SPO requesting support in evaluating General Dynamics "Growth" SAC study and F-111 letter in return answering that request.
5. AMSA SPO letter to SES requesting evaluation of General Dynamics "Growth" SAC study.

Enclosed are documents responsive to items 1, 2, 3 and 5. As you will note, the correct number for item 2 is FZM-4254A, while that for item 3 is FZM-4254-1. Item 5 is the portion of the AMSA SPO to SES requesting evaluation of General Dynamics' "Growth" SAC Study.

No letters fitting the description in item 4 have been located, and it is assumed that any such arrangements must have been made orally.

Sincerely yours,

PAUL C. WARNKE.

(Letter No. 333)

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
Washington, D.C. April 21, 1967.

Mr. JEROME S. ADLERMAN,  
General Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. ADLERMAN: In a letter of March 14, 1967, you requested copies of "Minutes and Reports presented at all Executive Management Reviews held during 1964, 1965 and 1966." The nature of Executive Management Reviews was explained in a letter from Mr. McGiffert, then Assistant to the Secretary of Defense (Legislative Affairs), in a letter sent to you on January 15, 1965 in response to a similar request:

"EMR's are informal meetings attended by high level representatives of the Departments and executives of General Dynamics and Grumman to keep them informed as to status of the program. An EMR briefing does not

serve as a basis for decision or contractual action. It is not a contractual requirement. Decisions are made on the basis of official contractor submissions, specification changes and other changes in work and accomplished by the issuance of CCN's and other contractual documents."

Because of their purpose and composition, it has not been the practice either to prepare formal minutes or to transcribe the reports presented at these meetings.

Such fragmentary papers as do exist with respect to these EMR's would not be meaningful apart from the context of oral presentation. They would, moreover, obviously come within the category of internal management documents.

Sincerely yours,

PAUL C. WARNKE.

(Letter No. 334)

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
Washington, D.C., April 21, 1967.

MR. JEROME S. ADLERMAN,  
General Counsel, Senate Permanent Subcommittee on  
Investigations, Committee on Government Operations,  
U.S. Senate, Washington, D.C.

DEAR MR. ADLERMAN: In one of your letters of March 14, 1967, you requested, as Item 1, "F-111 Report presented by General Zoekler, SPO, at briefing for Secretary of Navy and Secretary of Air Force, April 21, 1965."

An intensive review of the files has not disclosed any report on that date which fits this identification.

We are continuing our efforts to locate the other documents described in your letter.

Sincerely yours,

PAUL C. WARNKE.

(Letter No. 336)

GENERAL COUNSEL OF THE,  
DEPARTMENT OF DEFENSE,  
Washington, D.C., April 18, 1967.

MR. JEROME S. ADLERMAN,  
General Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. ADLERMAN: Your letter of March 27, 1967 requests for review certain material described as the "Project Icarus Reports Nos. 1 through 14 submitted by the F-111 Systems Project Office for the period September 1, 1966 to date, including the Problem List, the Action Items and the Performance Sheets." I find that there are no reports that bear this identification. I am informed however that the designation "Project Icarus" is an informal reporting symbol which has been used by the Systems Project Office in connection with preliminary informational materials of an advisory nature prepared for the Department of Defense's on-going review of the progress and status of the F-111 program.

Materials of this kind, as you will recognize, do not constitute reports of final actions taken or decisions made with respect to the program. Their relationship to the

internal management of the program is such as to preclude their release outside the Department.

We will, of course, be happy to provide the Subcommittee with any specific factual information to which this request is addressed.

Sincerely yours,

PAUL C. WARNKE.

(Letter No. 344)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
May 1, 1967.

Mr. PAUL C. WARNKE,  
*General Counsel, Department of Defense,  
Washington, D.C.*

DEAR MR. WARNKE: Your letter of 24 April 1967 forwarded to us one copy of FZM12-9188, "F-111B Flight Readiness Review" dated 28 April 1965. Unfortunately one page was missing from the document. Under Item No. A-1, there should have been an extra page of "attached comments by team members."

Would you see if you can locate and forward to us a copy of the page in question. Your cooperation in this matter will be appreciated.

Sincerely yours,

JEROME S. ADLERMAN,  
*General Counsel.*

(Letter No. 392)

U.S. SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
May 29, 1967.

Mr. PAUL C. WARNKE,  
*General Counsel, Department of Defense, Washington, D.C.*

DEAR MR. WARNKE: Your letter of May 18, 1967 transmitting a General Dynamics report, FZM 12-2474; of a pre-Icarus meeting states that the first sections, some 24 pages in all, were removed from the report because they "relate to the contractor's position on contractual matters which have not as yet been resolved, and does not constitute a factual report on the status of the program."

Aside from the propriety of the Department of Defense instructing a private contractor not to turn a report over to the Congress, as was done in this instance, we feel that it is improper for the Department to censor and remove sections of such a report. It is our understanding that the sections which you had deleted were concerned with F-111B problems and schedules, engine specification changes and their effect on airplane guarantees, F-3 engine modifications and changes, and items of that nature. There is no valid reason for withholding that type of information from a congressional committee.

I would appreciate it if you would reconsider your action and provide the Subcommittee with the missing pages. Your cooperation in this matter will be appreciated.

Sincerely yours,

JEROME S. ADLERMAN,  
*General Counsel.*

(Letter No. 432)

ASSISTANT SECRETARY OF DEFENSE,  
INTERNATIONAL SECURITY AFFAIRS,  
Washington, D.C., October 27, 1967.

Mr. JEROME S. ADLERMAN,  
General Counsel, U.S. Senate, Committee on Government  
Operations, Washington, D.C.

DEAR MR. ADLERMAN: In response to your letter of 18 October 1967, I am informed that the additional calculations you have requested are not readily available and cannot be scheduled for approximately 6 weeks without delaying work presently underway and planned in support of the operational deployment of the F-111A. Upon receiving this information, I will forward it immediately to you.

Sincerely,

PAUL C. WARNKE.

(Letter No. 481)

ASSISTANT SECRETARY OF DEFENSE,  
INTERNATIONAL SECURITY AFFAIRS,  
Washington, D.C., July 6, 1968.

Mr. JEROME S. ADLERMAN,  
General Counsel, Senate Permanent Subcommittee on Investigations, Committee on Government Operations,  
U.S. Senate, Washington, D.C.

DEAR MR. ADLERMAN: Your letter of June 27, 1968 requested a copy of a Naval Air Systems Command letter to the Chief of Naval Operations (OP-05) dated March 19, 1968, serial 02374 in connection with the current inquiry of the Subcommittee into the F-111 program.

It would be inappropriate at this time to provide this document prepared for internal use because it contains information and recommendations relating to a matter currently under consideration within the Navy and Department of Defense. To make such material available would inevitably impair effective and efficient administration and tend to impede the free flow of information from subordinate officials and invite serious interference with effective program information and reporting.

If, however, there is any factual information pertaining to the F-111B program and the proposed VFX that you require, we will endeavor to provide it as expeditiously as possible.

Sincerely,

PAUL C. WARNKE.

*Subcommittee Note: The following excerpts from the record of hearings, TFX Contract Investigations (Second Series), Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate, 91st Congress, 2nd Session, March 24, 1970, pp. 32 and 33, are included to provide further identification to the foregoing excerpts from Exhibit 1, 2nd Series, and to present Exhibit 2, 2nd Series. Exhibit 2, 2nd Series, provides some interesting insights on the question of availability of information to the Legislative branch of the government.*

Mr. CROMWELL. To my knowledge, it (Exhibit I) is complete. I have discussed this with the people who keep the files and it is a complete record.

The CHAIRMAN (Senator McClellan). Being on the committee staff, you have had custody of these letters

as they were written and as they were received; is that correct?

Mr. CROMWELL. That is correct, sir.

The CHAIRMAN. Very well. Without objection, I will let this file be made exhibit 1, in the second series of hearings. This will be exhibit 1, second series.

These will be made a part of the record for reference. They will not be printed in the record. I think that is unnecessary. They will be kept on file by the committee staff as a part of the record of this series of hearings. They will be available, or copies of them may be made available, to the press or to anyone else who has an interest and wishes to inquire or examine them.

(The documents referred to were marked "Exhibit No. 1, 2d Series," for reference and may be found in the files of the subcommittee.)

The CHAIRMAN. Proceed.

Mr. CROMWELL. The chairman announced the resumption of the active investigation in a speech on the floor of the Senate on August 16, 1966.

On August 31, 1966, representatives of the General Accounting Office met with high officials of the Defense Department to discuss the GAO's part in collecting data and information for the subcommittee.

As a result of this meeting, the Defense Department issued instructions on September 2, 1966, giving "Interim Guidance on the F-111 Investigation."

At this point, we would like to make this document an exhibit for the record.

The CHAIRMAN. It may be received as exhibit No. 2, 2d Series.

(The document referred to was marked "Exhibit No. 2, 2d Series," for reference and follows:)

#### EXHIBIT NO. 2, 2D SERIES

2 Sep 66 22 13Z.

HQ. USAF.

From: OSAF.

To: AFLC; AFSC; ASD; AF; AFOMD, Los Angeles, Calif.; AFPRO GEN DYNAMICS/Fort Worth, Tex.; SMAMA McCLELLAN AFB, Calif.  
UNCL FROM AFSPPC 91708 2 Sep 1966.

Subject: Interim Guidance on F-111 Investigation. Part 1. At the request of the Senate Permanent Investigations Subcommittee, GAO has initiated a review of selected aspects of the F-111 program. This message provides interim guidance with respect to the applicable ground rules as worked out in preliminary discussions with GAO officials. Part 2. GAO representatives may be given access to executed contractual documents, supporting documentation and actual costs incurred with respect to the following items of inquiry. a. Current total costs of F-111 development contract. b. Timeliness and adequacy of the negotiations of prime contracts, major subcontracts, and contract changes. c. Propriety and consistency with contract terms of profits paid or accrued and payments made and penalties imposed under contract incentive provisions. d. Prime contractor's accounting controls and procedures to assure that each contract bears only the cost of the work included in that contract. e. Contract arrangements and work entailed for development of the FB-111. f. History and status of contracts for TF-30 engine models and types. g. Contract costs for development of the Phoenix missile system. h. Nature, type, frequency and costs incurred by General Dynamics in meeting Government reporting requirements. i. Changes in work under contract to Grumman and McDonnell. Access is also authorized to information on the number of Government personnel assigned at the F-111 project office and other locations involved in managing the program, special committees established, and total yearly administrative costs to DOD since inception of the program. Part 3. The Air Staff focal point is Major General H. E. Goldsworthy. Any questions of

interpretation of the above guidelines will be referred by the fastest means to Hq USAF (AFSP) for resolution. Part 4. Additional instructions will be issued later with respect to other items of GAO inquiry. This includes requests with respect to such matters as contractual documents as yet not executed and approved, cost estimates not related to definitive contracts, performance characteristic and test results, program delays, and agreements with the United Kingdom and Australian Governments. Part 5. GAO will be given access to documents as outlined above. Until further notice, however, requests for copies of documents and any material prepared in response to GAO questions will continue to require transmittal through the Office of the Secretary of Defense, in accordance with the ground rules previously established for this investigation by the Senate Permanent Investigations Subcommittee. Part 6. AFSC and AFLC will designate focal points for all addresses of this message and advise AFSPD of same not later than 9 September 1966.

Mr. CROMWELL. These "Guidelines," as they came to be called by everyone connected with the investigation, were worded in a very positive way to emphasize material that could be made available to the GAO and to the subcommittee.

For example, the guidelines stated:

GAO representatives may be given access to executed contractual documents, supporting documentation, and actual costs incurred with respect to the following items of inquiry.

- a. Current total costs of F-111 development contract.
- b. Timeliness and adequacy of the negotiations of prime contracts, major subcontracts, and contract changes.
- c. Property and consistency with contract terms of profits paid or accrued and payments made and penalties imposed under contract incentive provisions.

d. Prime contractor's accounting controls and procedures to assure that each contract bears only the cost of the work included in that contract.

e. Contract arrangements and work entailed for development of the FB-111.

f. History and status of contracts for TF-30 engine models and types.

g. Contract costs for development of the Phoenix missile system.

h. Nature, type, frequency and costs incurred by General Dynamics in meeting government reporting requirements.

i. Changes in work under contract to Grumman and McDonnell.

Although a formidable sounding list of materials to be made available for review, the important part in the preceding paragraph is the terminology "GAO may be given access to executed contractual documents."

The investigators also found that the true limitations of the "Guidelines" were contained in this paragraph:

Additional instructions will be issued later with respect to other items of GAO inquiry. This includes requests with respect to such matters as contractual documents as yet not executed and approved cost estimates not related to definitive contracts, performance characteristic and test results, program delays, and agreements with the United Kingdom and Australian Governments.

The CHAIRMAN. Do I understand those were to be excluded from the information for access by the General Accounting Office?

Mr. CROMWELL. At that time. They said they would later issue instructions to cover those.

The CHAIRMAN. They were excluded at that time?

Mr. CROMWELL. At that time.

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## **FILE 93**

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**SENATE COMMITTEE ON GOVERNMENT OPERATIONS  
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS**

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## (93-A)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
11/24/70	Charles W. Stewart, Chairman, Advisory Council on Federal Reports	Charles W. Stewart	Mr. Stewart's refusal to testify came during hearings chaired by Senator Metcalf on S.3067 (91st Cong.), a bill to provide for consumer, labor and small business representation on Advisory Committees under the coordination of Federal recording services, and for other purposes. Mr. Stewart had corresponded with the Subcommittee on October 22, 1970, concerning the subject of the hearings. Subsequently, his name came up in the testimony of other witnesses, and Senator Metcalf requested that he testify in a formal letter Nov. 24, 1970. Mr. Stewart refused in a letter dated Dec. 1, 1970. At a subsequent hearing on Dec. 10, 1970, Senator Metcalf again made his request orally.	Dec. 1, 1970	Refusal came in a letter from Mr. Stewart	Mr. Stewart cited the following reason for not testifying:  "You recognize, I am sure, that with respect to these hearings, however, I cannot disassociate myself from my current responsibility as Chairman of the Business Advisory Council on Federal Reports. As its chairman I must abide by established policies and procedures governing the focus of the Council operation. In the presentation of October 22, 1970, on behalf of the Council, you may recall, I explained:  ". . . the Council sits at the request of OMB. It was organized and continues to operate at the request of OMB. OMB is a part of the executive branch of the government and, in view of that fact, coupled with the advisory function to which activities of the Advisory Council are limited, at the minimum we hold strong reservations as to the propriety of our participating formally in Congressional public hearings!"

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

Subcommittee on Intergovernmental Relations

By: Al From

Title: Staff Director

Extension

FILF 93 :

[Excerpt from hearings entitled "Advisory Committees," before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, U.S. Senate, 91st Con., 2d Sess., Dec. 8, 10, and 17, 1970, pt. 3, pp. 605-607]

Senator METCALF. It was Senator Muskie's and my intention to close the hearings with this witness. However, as I stated on Monday, at the opening of the hearing, the appointment of the advisory committee on the railroads did not contain a single public member as was required by statute. Therefore, I proposed to continue the hearings and try to get Mr. Volpe up here to tell us which of those corporation lawyers, stockbrokers, and so forth, is intended to represent the public. Maybe one of the corporation lawyers is a commuter or something. At least, we would like to know which of the members the public members are. So the hearing will be continued and the subcommittee will recess at this time.

Now, in the course of these hearings, I have had some communication with Mr. Charles W. Stewart, whose name was mentioned in the previous witness' testimony. Mr. Stewart is Chairman of the Advisory Council on Federal Reports. I have suggested that representatives of the Ad-

visory Council appear and testify. I have asked him to testify. After the previous hearings closed, he sent all members of the committee—of the subcommittee—an analysis of the witnesses' testimony.

Now, it is a well-known fact that it is one thing to sit down and make false and misleading statements and another thing to appear before a committee and subject yourself to cross-examination and interrogation. So I again asked Mr. Stewart if he or a representative of the Advisory Council on Reports would like to appear and personally testify and subject himself to the ordinary and customary interrogation. He again had declined.

I give him a third opportunity and renew my invitation. However, the exchange of correspondence between Mr. Stewart and the chairman of the subcommittee and this Senator presiding over the committee will be, without objection, inserted and made a part of the record. Mr. Stewart's statement will be incorporated in the record for what it is worth, with the admonition that he has declined to appear and testify in person.

(The material referred to follows:)

U.S. SENATE,  
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*November 24, 1970.*

Mr. CHARLES W. STEWART,  
*Chairman, Advisory Council on Federal Reports, Washington, D.C.*

DEAR MR. STEWART: I have carefully reviewed the contents of your 20 page letter of October 22 regarding S. 3067 and advisory committees.<sup>1</sup>

You object generally to the idea of changing the existing advisory arrangements. You specifically—and urgently oppose S. 3067. You object specifically to most of the testimony presented. You object to "the character of the record which has been developed so far."

You and your associates within the Advisory Council on Federal Reports, more than any other person or group, could provide the balance, among witnesses, which the Subcommittee sought. Yet, in your letter you again object to participating in the legislative hearing process.

The Subcommittee plans additional hearings on advisory committees on Dec. 8, 9, and 10. I hereby invite you again, to testify on any of those three days which suits your convenience. You may bring along as many fellow members of the Advisory Council as you wish.

I hope you will reconsider and accept the renewed invitation. If you choose not to testify, I shall include the above letter in the Committee Record with my comments about your refusal to appear for interrogation and your inability to respond to charges made against you.

Very truly yours,

LEE METCALF.

ADVISORY COUNCIL ON FEDERAL REPORTS,  
*Washington, D.C., December 1, 1970.*

Hon. LEE METCALF,  
*Subcommittee on Intergovernmental Relations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR SENATOR METCALF: We appreciate, most sincerely, the spirit prompting the further invitation to the Business Advisory Council on Federal Reports in your letter of November 24, 1970, to participate in the additional hearings of the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations planned for December 8, 9, and 10. Let me assure you that I personally, or as President of the Machinery and Allied Products Institute, have no hesitancy, or reluctance, concerning appearing at Congressional hearings, as my many such appearances over the years amply demonstrate.

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<sup>1</sup> See pt. 1, p. 36, these hearings.

You recognize, I am sure, that with respect to these hearings, however, I cannot disassociate myself from my current responsibility as Chairman of the Business Advisory Council on Federal Reports. As its Chairman I must abide by established policies and procedures governing the scope of the Council operation. In the presentation of October 22, 1970, on behalf of the Council, you may recall, I explained:

"... the Council sits at the pleasure of OMB. It was organized and continues to operate at the request of OMB. OMB is a part of the Executive Branch of the government and, in view of that fact, coupled with the advisory function to which activities of the Advisory Council are limited, at the minimum we hold strong reservations as to the propriety of our participating formally in congressional public hearings."

In this letter, you will notice, I have referred to the Council as the Business Advisory Council on Federal Reports. You may be interested in knowing that the name of the Council has been formally and officially changed from the Advisory Council on Federal Reports to the Business Advisory Council on Federal Reports. It was recognized by our governing body that the present designation allowed ambiguous interpretation of the function of the Council in terms of the area of its operation. The concept behind its organization was to provide advice and counsel to the Bureau of the Budget (now Office of Management and Budget) from the *business sector* on federal reporting by business and the Council has, over the years, operated entirely in this area. Accordingly, this action was taken by our governing body to specify more precisely our function and areas of operation, and our letterhead is currently being reprinted to reflect this new designation.

The October 22, 1970, written presentation of the Council was based on careful study of the transcript of the hearings of your Subcommittee on October 5, 6, 7, and 8, 1970, and the daily reports from our observer who attended these hearings. Contrary to the conclusion which you draw in the last paragraph of your letter of November 24, we believe our presentation of October 22 sets forth clearly and comprehensively, our comments on S. 3067 and a point by point refutation of any "charges" made against the Council and the function which it performs. We stand, therefore, on the statements and conclusions set forth in our presentation of October 22, 1970, welcome your decision to include it in the Committee Record, and are confident that this presentation on behalf of the Council will be considered on its merits by the members of the Subcommittee.

In light of your statement that such inclusion will be accompanied by your comments about our "refusal to appear", we respectfully request that this letter also be made a part of the Committee Record.

Respectfully,

CHARLES W. STEWART, *Chairman.*

Senator METCALF. Unless there is something else to come before the subcommittee, we will be in recess subject to the call of the Chair.

(Whereupon, at 11 a.m., the subcommittee was adjourned subject to the call of the Chair.)

## **FILE 94**

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**SENATE COMMITTEE ON GOVERNMENT OPERATIONS  
SUBCOMMITTEE ON REORGANIZATION RESEARCH, AND  
INTERNATIONAL ORGANIZATIONS**

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(94-A)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

1970

In connection with our hearings on legislation to establish a Consumer Protection Agency we learned that the Department of Agriculture was not enforcing the 30% fat limit in hot dogs. We requested the Department to provide us a list of the manufacturers of hot dogs and the departmental reports concerning their compliance with the 30% regulation. Initially this was denied to us, however, after further negotiation and discussions, the Department did supply us a copy of a computer printout listing the manufacturers and the fat content of the hot dogs they produced.

Preparation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 94

Submitted by: (Comm/Subcomm) on Request of  
Research and International Organizations  
By: Robert Wager  
Title: Mag. Division + from General Extension

(L57)



## **FILE 119**

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### **SENATE COMMITTEE ON POST OFFICE AND CIVIL SERVICE SUBCOMMITTEE ON CIVIL SERVICE POLICIES AND PRACTICES**

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#### **C O N T E N T S**

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(119-A)

U.S. SENATE,  
SUBCOMMITTEE ON CIVIL SERVICE POLICIES AND PRACTICES,  
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,  
*Washington, D.C. March 23, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Senate Subcommittee on Separation of Powers,*  
*Dirksen Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your letter of March 13, 1973, the enclosed completed form is submitted.

There is only one instance where information requested from an agency of the Federal Government was denied; however, it was readily and easily available from computerized data.

With best wishes, I am  
Truly,

JENNINGS RANDOLPH,  
*Chairman.*

(301)

## (119-B)

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
SEPT. 1972	U. S. POSTAL SERVICE	LISTS OF POSTMASTERS LISTING SALARY, DATE OF BIRTH, CAREER STATUS AND DATE OF APPOINTMENT.	SEPT. 1972	HENRY ALBERT, EXECUTIVE ASS'T. FOR GOV'T. RELATIONS	SAID REQUEST WAS IN VIOLATION OF SECTION 412 TITLE 39, U.S. CODE. THIS SECTION READS AS BELOW:  ALL REQUESTS AND DENIALS WERE BY PHONE

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 119

Submitted by: 40835/Subcomm Civil Service

Policies and Practices

By: Jennings Randolph

Title: U.S. Senator

Extension

(302)

[Excerpt from the *United States Code*, Title 39]

**§ 412. Nondisclosure of lists of names and addresses.**

Except as specifically provided by law, no officer or employee of the Postal Service shall make available to the public by any means or for any purpose any mailing or other list of names or addresses (past or present) of postal patrons or other persons. (Pub. L. 91-375, Aug. 12, 1970, 84 Stat. 727.)

**EFFECTIVE DATE**

Section effective July 1, 1971, pursuant to Resolution No. 71-9 of the Board of Governors. See section 15(a) of Pub. L. 91-375, set out as a note preceding section 101 of this title.



## **FILE 144**

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### **SENATE BANKING COMMITTEE SUBCOMMITTEE ON CONSUMER AFFAIRS**

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## (144-A)

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
Aug. 3, 1971	John B. Connally	Date on Lockheed Loan Guarantee (Requested by individual Senator)	8-10-71	Samuel R. Price Jr.	See attached cover of prevalence

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 144Submitted by: (Comm/Subcomm) Senate Banking CommitteeSubcommittee on Consumer CreditBy: Ivan McCallTitle: Assistant Staff Member - 2341  
Extension

U.S. SENATE,  
COMMITTEE ON BANKING,  
HOUSING AND URBAN AFFAIRS,  
Washington, D.C., August 3, 1971.

Hon. JOHN B. CONNALLY,  
*Secretary of the Treasury, Washington, D.C.*

DEAR MR. SECRETARY: Now that Congress has reduced the amount of emergency loan guarantee assistance from \$2 billion to \$250 million, it is likely that the only applicant for such assistance will be the Lockheed Aircraft Corporation. The Act requires the Board to make a number of determinations and authorizes the Board to prescribe the terms and conditions of a loan guarantee including the interest payable to the lending institutions, the amount of the guarantee fee, the amount of collateral taken by the government, the position of the Federal government's claims with respect to other creditors, as well as other affirmative and negative covenants contained in the underlying loan agreement.

In order to keep informed on the administration of this new program, I would appreciate receiving the following information as it becomes available.

1. A copy of any written procedures or policies prepared by the Emergency Loan Guarantee Board;
2. A copy of any application for a loan guarantee submitted by Lockheed or its lenders;

3. A copy of the audited financial statement required under Section 6(c)(1) of the Act;
4. A copy of the information provided by Lockheed under Section 6(c)(2);
5. A copy of the underlying loan agreement between Lockheed and its lenders;
6. A copy of Lockheed's expenditure plan required under Section 6(e)(2)(C);
7. A copy of the lender certification required under Section 4(a)(2);
8. A copy of the proposed loan guarantee agreement;
9. A copy of the Board's findings required under Section 4(a)(1);
10. A copy of the Board's determinations under Section 6(b) concerning Lockheed's management;
11. A copy of the Board's determinations should it waive the requirements set forth under Section 6(a)(1) and 6(a)(2); and
12. A copy of the new agreements between Lockheed and its present airline customers.

With best wishes, I am

Sincerely,

WILLIAM PROXMIRE,  
*U.S. Senator.*

DEPARTMENT OF THE TREASURY,  
*Washington, D.C., September 10, 1971.*

Hon. WILLIAM PROXMIRE,  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR PROXMIRE: This is in further reference to your letter of August 3, 1971, in which you request that the Emergency Loan Guarantee Board furnish you with certain information. The Loan Agreement between Lockheed and its banks, the Security and Pledge Agreement and the Guarantee Agreement will be made public shortly after the documents are executed. We will furnish you with copies of these agreements as soon as they are available.

As to other information, the Board has decided it would prefer that requests concerning Board action and supporting data originate with the Chairman of the Committees which considered the guarantee legislation. The Board believes that this procedure will serve to inform the Congress of any action taken by the Board and at the same time meet the concern of any borrower regarding proprietary information.

Sincerely,

SAMUEL R. PIERCE, Jr.,  
*General Counsel.*

## (144-B)

3

## SURVEY FORM 11: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
4-19-72	John B. Connally Emergency Loan Guarantee Board	John B. Connally (Before Full Banking Committee)	Withholding data On Lueckhead Letter Guarantees from GAO	4/27/72 5/31/72	Samuel R. Pierce, Jr.	See attached correspondence

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 144:

Submitted by: (Comm/SubComm) Senate Banking Committee  
Sub Committee on Consumer Credit  
By: Ken McLean  
TITLE: Professor Staff Member 7351  
Extension

U.S. SENATE,  
COMMITTEE ON BANKING,  
HOUSING AND URBAN AFFAIRS,  
Washington, D.C., April 19, 1972.

Hon. JOHN B. CONNALLY,  
Chairman, Emergency Loan Guarantee Board,  
Washington, D.C.

DEAR CHAIRMAN CONNALLY: During hearings before the Subcommittee on Production and Stabilization of the Senate Committee on Banking, Housing and Urban Affairs on April 12, the Comptroller General charged that in his opinion you were in clear violation of Federal law in denying the General Accounting Office access to the books and records of the Emergency Loan Guarantee Board. In view of the serious charges raised by the Comptroller General, I feel that it is imperative that the issue be fully discussed before an open hearing of the Senate Banking Committee which has jurisdiction over the Emergency Loan Guarantee Act. Chairman Sparkman will be out of town during the next few weeks, but he has authorized me to conduct such a hearing.

Accordingly, the purpose of this letter is to formally invite you to testify before the Committee regarding the charges raised by the Comptroller General. I would like to hold these hearings either on April 28 or on May 2; however, if these dates are not feasible, I hope that we can work out a mutually convenient schedule.

While I do not wish to prejudge the issues involved in the Comptroller General's allegations, he has made a most persuasive case on the public record that the decision denying the General Accounting Office access to the books and records of the Emergency Loan Guarantee Board is in violation of the Budget and Accounting Act of 1921 as well as several other statutes giving the General Accounting Office authority to examine the records of Federal agencies. On the basis of the Comptroller General's testimony, it would seem to me that the Emergency Loan Guarantee Board has not followed the intent of the Senate Banking Committee when we approved the Emergency Loan Guarantee Act. However, before the Committee takes any formal action on the Comptroller General's allegations, I believe it would be most useful to have your views on the public record.

I realize of course that there are technical legal questions involved in interpreting the Budget and Accounting Act of 1921. Nonetheless, the Emergency Loan Guarantee Board at a meeting on November 17, 1971, apparently voted to deny the General Accounting Office access to its records, presumably on the advice of the general counsel of the Treasury. Since you are the Chairman of that Board, I believe you must take full responsibility for explaining and justifying the Board's decision to the Congress. Therefore, while I would have no objection if you were to be accompanied by the Treasury's general counsel or other legal personnel of the Department, I feel it is of the utmost necessity for you to appear in person before our Committee to justify the position taken by the Emergency Loan Guarantee Board.

I hope to hear from you regarding your availability as a witness in the very near future.

With best wishes, I am

Sincerely,

WILLIAM PROXMIRE,  
U.S. Senator.

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THE GENERAL COUNSEL OF THE TREASURY,  
Washington, D.C., April 27, 1972.

Hon. WILLIAM PROXMIRE,  
U.S. Senate,  
Washington, D.C.

DEAR SENATOR PROXMIRE: This is in response to your request that Secretary Connally, as Chairman of the Emergency Loan Guarantee Board, appear before the Senate Committee on Banking, Housing and Urban Affairs to discuss the question which has been raised concerning the authority of the General Accounting Office to review the decisions of the Board.

Contrary to Mr. Staats' statement of April 12, 1972 that the Board has denied the General Accounting Office access to its books and records, the Board has cooperated with the GAO in permitting it to review all of the Board's financial records involving its receipts and expenditures. Thus, the statement that the Board has denied the GAO access to any of its records is simply inaccurate,

and we are anxious that the record that has been developed to date in this matter be clarified. I should also add that the GAO has complete and total access to all of Lockheed's records, including all documents furnished to the Guarantee Board and to the participating banks. The GAO has a copy of the Credit Agreement, the Security and Pledge Agreement, and the Guarantee Agreement, which cover every aspect of the loan guarantee. These documents are also publicly available from the SEC.

The only thing that has been denied to the GAO is access to the Board's records pertaining to its decision making process. These include the Board's minutes, containing expressions of judgments of the three-man Board and related internal memoranda and correspondence. In November 1971, the Emergency Loan Guarantee Board requested and received my advice on whether the GAO has authority to review the Board's records pertaining to its decision making process. I advised the Board at that time—and continue to believe—that the GAO has no such authority.

This advice was based on legal research, including a review of the pertinent legislation and its legislative history. In my opinion, Congress did not intend for the Board's decision making process to be reviewed by the GAO when it enacted the Emergency Loan Guarantee Act. It vested this authority solely in a highly responsible three-man board consisting of Secretary Connally, Chairman Burns of the Federal Reserve Board, and Chairman Casey of the Securities and Exchange Commission. As required by the Guarantee Act, the Board will fully disclose its operations and the bases for its decisions when it reports to Congress in August of this year.

Since the Board's action in this matter was based on my legal advice, the Chairman of the Board has asked me, in my capacities as Executive Director of the Board and as its General Counsel, to appear and explain the legal basis for the Board's position. I shall be happy to do so on May 4, 1972, or on a later mutually convenient date.

Very sincerely yours,

SAMUEL R. PIERCE, Jr.

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[From Newsletter of May 1, 1972]

## OFFICE OF SENATOR WILLIAM PROXMIRE OF WISCONSIN

Senator William Proxmire (D-Wis.) said he was deeply concerned by Treasury Secretary Connally's failure to come before the Senate Banking Committee to justify his actions on the Lockheed loan guarantee.

Proxmire had invited Connally to testify on why he would not release certain information to the General Accounting Office on the \$250 million Lockheed loan guarantee. Proxmire's invitation followed testimony by the Comptroller General that Connally had clearly violated the law in refusing to make such information available to the GAO. A Connally subordinate replied to the invitation by offering to appear in Connally's place.

In a further letter to Connally, Proxmire said that Connally's failure to testify "will cast a dark cloud of suspicion on the safety of the Lockheed loan. It implies that the government is trying to conceal the true facts about Lockheed's precarious financial future. Only you can set these suspicions to rest by assuring Congress and the American people that their tax dollars are not being squandered in a hopeless venture to rescue an insolvent company."

The text of Sen. Proxmire's letter to Secretary Connally follows:

I have a letter dated April 27, 1972 from the General Counsel of the Treasury in response to my letter to you of April 19 inviting you to testify before the Senate Banking Committee regarding your refusal to provide certain information to the General Accounting Office. This invitation was in response to charges by the Comptroller General that you were in clear violation of the Budget and Accounting Act of 1921 as well as other statutes in denying GAO access to certain records of the Emergency Loan Guarantee Board.

I am deeply concerned by your failure to personally appear before the Committee to justify your actions on the Lockheed loan. Your failure to testify will cast a dark cloud of suspicion on the safety of the Lockheed loan. It strongly implies that the government is trying to conceal the true facts about Lockheed's precarious financial future.

Only you can set these suspicions to rest by assuring Congress and the American people that their tax dollars are not being squandered in a hopeless venture to rescue an insolvent company.

The Emergency Loan Guarantee Act creates a three-man Emergency Loan Guarantee Board with you as Chairman to administer the Lockheed loan guarantee. The law requires the Board to make a specific finding that Lockheed's prospective earning power and collateral "furnish reasonable assurance that it will be able to repay the loan within the time fixed, and afford reasonable protection to the United States." In reaching its finding, I understand the Board has relied heavily upon several credit analyses of Lockheed prepared by the New York Federal Reserve Bank which is paid \$5,000 a month for its work on the Lockheed loan guarantee.

The GAO has sought to obtain a copy of these credit analyses as well as other records in order to determine whether the Board complied with the law's statutory requirements. Since the credit analyses were prepared at taxpayer expense and are specifically related to a statutory requirement imposed by Congress, I am at a loss to understand why you will not make them available to the GAO.

What do you have to hide? What do these credit analyses reveal about the company? Do they show that the earning power of the company is so weak that there is no reasonable assurance that the loan will be repaid? If so, Congress and the American people certainly have a right to know.

You say in your letter of March 30, 1972 to the Comptroller General that Congress did not intend that the decisions of the Board be reviewed by the GAO. This conclusion does not agree with my interpretation of the Congressional intent. The Board does have the final authority to approve a loan guarantee pursuant to the Act. However, Congress did not give the Board a blank check to approve any loan guarantee. It imposed specific requirements on the Board as a condition for approving a loan guarantee.

For example, Section 4 (a) of the Emergency Loan Guarantee Act states that a loan guarantee may be made only if the Board finds that:

"(1) the loan is needed to enable the borrower to continue to furnish goods or services and failure to meet this need would adversely and seriously affect the economy or employment in the Nation or any region thereof,

"(2) credit is not otherwise available to the borrower under reasonable terms or conditions, and

"(3) the prospective earning power of the borrower, together with the character and value of the security pledged, furnish reasonable assurance that it will be able to repay the loan within the time fixed, and afford reasonable protection to the United States."

Congress certainly has a right to know, through its investigative agency, the GAO, whether the Board is complying with these statutory requirements. If Congress intended for the Board to be the sole judge of its actions, then why did it go through the sham of setting up these detailed statutory requirements? Are these requirements merely a facade to mask an unlimited grant of legislative power? I think not.

Whatever the legalities concerning the right of GAO access, I believe there are overriding public policy considerations involved in removing the cloak of secrecy which you have imposed on the Lockheed Loan Guarantee. Even conceding your argument that you are not *legally* required to make this information available to the GAO (and I do not so concede), what do you gain by concealing the information on the Lockheed loan? The taxpayers of America have a \$250 million investment in the Lockheed Aircraft Company. Why, therefore, should the investigative arm of Congress be denied any information which you have about the company? What public policy objective is furthered by denying this information to the General Accounting Office.

Only you can answer these policy questions. You are the Chairman of the Emergency Loan Guarantee Board and are responsible to the Congress for all of its decisions, both of a legal and a policy nature. Only you can assure the Congress in an open hearing that the Board is not attempting to cover up Lockheed's financial difficulties. Accordingly, I hope you will reconsider your apparent decision not to testify and respond favorably to my invitation of April 19.

THE GENERAL COUNSEL OF THE TREASURY,  
*Washington, D.C., May 31, 1972.*

Hon. WILLIAM PROXMIRE,  
U.S. Senate,  
*Washington, D.C.*

DEAR SENATOR PROXMIRE: This is in reply to your letter of May 1, 1972, concerning my letter to you of April 27, 1972, in which I offered to testify on the legal question which has been raised concerning the authority of the General Accounting Office. Your letter requests that Secretary Connally appear to testify on this subject. Secretary Connally has submitted his resignation to the President and shall remain as Secretary only until Mr. Schultz is confirmed by the Senate. When Mr. Schultz is confirmed, he will then become Chairman of the Emergency Loan Guarantee Board. As I stated in my earlier letter to you, if the Committee wishes, I will be happy to testify on the legal bases for the Board's decision to deny GAO access to certain internal documents.

Contrary to earlier statements of the Comptroller General, the Board has cooperated with the GAO in making available to it all of the Board's records relating to its receipts and expenditures. The GAO also has the pertinent agreements including the Guarantee Agreement which govern every aspect of the loan guarantee matter. It also is significant, as I indicated in my earlier letter to you, that the GAO has unlimited access to all of Lockheed's records and files including all information furnished to the Guarantee Board and to Lockheed's 24 lending banks. This access is granted by virtue of (1)

an express provision included by the Board in the Guarantee Agreement to which Lockheed is a party, and (2) the Guarantee Act which directs the GAO to make a detailed audit of Lockheed. The Board can get no more financial or economic data from Lockheed than can GAO. In fact, the GAO has a team of auditors at Lockheed and the Board does not. The only material not available to the GAO is the Board's internal documents relating to its decision making process.

In a letter to Secretary Connally as Chairman of the Board, the Comptroller General, relying on the Budget and Accounting Act of 1921 and subsequent acts, asserted "authority and responsibility for review of Board decisions." It is the Board's position the GAO has no such authority. The statutes relied upon confer no authority on the GAO to review the decision making committed by the Emergency Loan Guarantee Act to the discretion and judgment of the Board. This position is supported by Opinions of the Attorney General and decisions of the Supreme Court. Moreover, it is the Board's contention that GAO review of its decision making process would be contrary to the intent of Congress as reflected in the Guarantee Act and would violate the separation of powers doctrine of the Constitution.

Regardless of its legal differences with the GAO, the Board is sincerely interested in keeping Congress apprised of any significant developments in the Lockheed matter. Consequently, in September, 1971—in response to an inquiry from you—the Board informed you that if the Congress wanted any information about Lockheed or the actions of the Board, the Board would be glad to supply such information to the Congress upon the request of the Chairman of either the House or Senate committee having the responsibility for this legislation.

In closing, I might also indicate again that the Board will make a *full* report to the Congress on its activities in August—only about 90 days from now. That report will fully discuss the Board's operations and the bases for the Board's decisions. Naturally, if after reviewing this report, the Congress has any questions, I am sure the Board will be glad to answer them.

Sincerely,

SAMUEL R. PIERCE, Jr.

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COMPTROLLER GENERAL OF THE UNITED STATES,  
Washington, D.C., September 21, 1971.  
B-16930.

Hon. JOHN B. CONNALLY, Jr.,  
*Chairman, Emergency Loan Guarantee Board.*

DEAR MR. CHAIRMAN: As you are aware, the Emergency Loan Guarantee Act, Public Law 92-70, requires the General Accounting Office to make a detailed audit of any borrower with respect to which a loan guarantee is made.

In this connection, a meeting to initiate our review was held on September 16, 1971, between representatives of our Office and Mr. Tim Greene, Secretary of the Emergency Loan Guarantee Board.

The discussion centered on three areas; decisions of the Board in approving, executing, and administering any guaranteed loans; the provisions of the guaranteed loan agreements established between the Board and the borrower; and the audit of the borrower. Mr. Greene had some question concerning our authority and responsibility for review of Board decisions.

As you know the authority and responsibility of the GAO for making audits and investigations of Government agencies are stated in a number of laws including the Budget and Accounting Act, 1921; the Legislative Reorganization Act, 1946; and the Accounting and Auditing Act of 1950. For example, Section 312 of the Budget and Accounting Act requires the Comptroller General to examine all matters relating to the receipt, disbursement or application of public funds and report to the Congress the results of such examinations. Section 313 of the same Act states that all departments and establishments shall furnish information as may be required of them by the Comptroller General. It further provides that the Comptroller General shall have access to any books, documents, papers or records of such departments or establishments. Section 2 of the Act defines department or establishment to include boards such as the Emergency Loan Guarantee Board.

In view of the fact that Lockheed has already received a substantial amount of the guaranteed loan and is likely to receive additional amounts in the near future, we are anxious to begin our work as soon as possible. We would appreciate advice as to when the records of the Board can be made available for review.

Sincerely yours,

ELMER B. STAATS,  
*Comptroller General of the United States.*

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GENERAL ACCOUNTING OFFICE,  
Washington, D.C. (undated)

MEMORANDUM ON RIGHT OF THE COMPTROLLER GENERAL  
AND THE GENERAL ACCOUNTING OFFICE TO HAVE  
ACCESS TO THE RECORDS OF THE EMERGENCY LOAN  
GUARANTEE BOARD

The Emergency Loan Guarantee Board (Board) through its Chairman, the Secretary of the Treasury, has taken the position that it was not the intent of the Congress in establishing the Board to grant the General Accounting Office (GAO) authority to review Board activities. The Board was established by the Emergency Loan Guarantee Act, Pub. L. 92-70, to make guarantees or to make commitments to guarantee lenders against loss of principal or interest on loans to major business enterprises whose failures would seriously and adversely affect the economy or employment of the nation or region thereof.

The GAO seeks to review the Board's activities including decisions of the Board in approving, executing, and administering any guarantee loans; the provisions of the guarantee loan agreements established between the Board and the borrower; and the audit of the borrower. It is the position of the Board that there is nothing in the Emergency Loan Guarantee Act, or its legislative history, which would provide for a GAO review of Board activities and that Congress might need to pass additional legislation to make it clear that GAO has this authority. The main thrust of the Board's position is that congressional review of loan guarantee matters is carefully spelled out in the guarantee act; the GAO is directed to audit the borrower and report its findings to the Board and to the Congress and the Board is directed to make a "full report" of its operations to the Congress. It is the position of GAO that as an agency of Government the Board is clearly subject

to audit and examination by GAO, and that the records of the Board are required to be made available to GAO under section 313 of the Budget and Accounting Act, 1921, and other basic GAO authorities. With regard to these GAO authorities Congress has never felt it necessary to repeat them in every new statute.

**SPECIFIC INFORMATION SOUGHT BY GAO AND HOW THAT INFORMATION RELATES TO THE BOARD'S STATUTORY REQUIREMENTS**

With regard to the specific information which GAO is seeking from the Board and how that information relates to the various statutory requirements imposed on the Board by the Act, the primary objective in seeking to examine the records of the Board is to report to the Congress on the manner in which the Board is discharging its responsibilities under the Act.

In its review of the Board GAO would examine into the data and analysis that support the three basic findings that the Board was required to make prior to committing the Government to guarantee a loan for a prospective borrower, Sec. 4(a)(1). GAO would also examine into the Board's basis for establishing the guarantee fee and the application of the criteria stated in Sec. 4(c)(2) of the Act.

In addition, GAO would consider how the Board placed a valuation on the pledged security in order to determine whether it had "fully collateralized" the loan guarantee as provided in section 5. Other matters for consideration in reviewing the Board's records concern:

(1) the basis for the Board's waiver of the prohibition against the borrower making any payments on its other indebtedness to a lender whose loan is guaranteed under the Act, as long as any portion of the guaranteed loan is outstanding (Sec. 6(a)(2)),

(2) how the Board decided that the inability of the borrower to obtain credit did not result from the failure of management to exercise reasonable business prudence (Sec. 6(b)),

(3) whether the Board received the audited financial statements from the borrower as required (Sec. 6(c)(1)), and

(4) whether the Board received the appropriate notices and certification from the lender (Sec. 6(c)(2)(A) and (B)) and a plan from the borrower (Sec. 6(c)(2)(C)) prior to approving each increment to the guaranteed loan.

It is GAO's understanding that almost all of the research and credit analysis is being performed by the Board's fiscal agent, the Federal Reserve Bank of New York, and many of the records GAO would need to examine would likely be with the fiscal agent. In this connection, GAO would be particularly interested in the rationale for Board actions that were not consistent with the fiscal agent's recommendations.

GAO also believes the Congress should be informed of those instances where the Board's actions may have been solely on the information contained in the records of the hearings of the House and Senate Banking Committees prior to enactment of Public Law 92-70.

In addition, with respect to the Emergency Loan Guarantee Fund, Sec. 9, GAO has an interest in the disposition of any remainder after all appropriate expenses and obligations incurred by the Board have been paid. This could ultimately amount to several million dollars.

**BASIC GAO AUDIT AUTHORITY**

The General Accounting Office unquestionably has the right and duty to inquire into the efficiency and the economy of the use of public funds in Government departments and establishments and to make reports thereon to the Congress and its committees. Such authority is spelled out in section 312 of the Budget and Accounting Act, 1921, 31 U.S.C. 53; section 206 of the Legislative Reorganization Act of 1946, 31 U.S.C. 60; sections 117(a) and (b) of the Accounting and Auditing Act of 1950, 31 U.S.C. 67(a), (b); and section 204 of the Legislative Reorganization Act of 1970, Pub. L. 91-510, 84 Stat. 1140.

Section 312(a) of the Budget and Accounting Act, 1921, provides:

The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

Supportive of the basic authority of section 312 is section 313 of the Budget and Accounting Act, 1921, 31 U.S.C. 54 which grants the Comptroller General statutory authority for access to records of departments and agencies. Section 2 of that act, 31 U.S.C. 2, defines departments or establishments to include Boards such as the Emergency Loan Guarantee Board. Section 313 provides:

All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes.

It will be noted that the only exception in section 313 relates to expenditures made under section 291, Revised Statutes (31 U.S.C. 107), which authorizes the Secretary of State to account for certain confidential expenditures in connection with intercourse or treaties with foreign nations by certificate where, in his judgment, he may think it advisable not to specify the details of such expenditure. Since that is the only exception stated and following the legal maxim that the specific setting forth of one type of exception precludes others from arising, it seems clear that the Comptroller General may require, and the departments are required to furnish, documents, etc., as to any other transaction or activity. Also, the language of section 313 itself [except as to the expenditures under 291 R.S.] in requiring the departments to furnish such information as the Comptroller General "may require of them" and its requirement that he be given access to any documents of the departments, clearly gives him access to all such documentation. If he has access to any document, he has access to all. The legislative background of the Budget

and Accounting Act, 1921, makes no qualification as to what records can be required; the provision itself apparently being considered sufficiently specific. The legislative reports do bring out that one of the principal functions of the Comptroller General is to enable the Congress to be kept advised as to expenditures of the Government, and that the Comptroller General is expected to criticize extravagance, duplication, and inefficiency in executive departments. There is no doubt, in passing the Act, the Congress did not intend that the executive agencies could, or would, withhold any books, documents, papers, or records needed by the Comptroller General. Otherwise, the very purpose of the Act would be nullified.

The authority and duty of the Comptroller General was amplified by section 206 of the Legislative Reorganization Act of 1946, 31 U.S.C. 60, which authorized and directed him to make expenditure analyses of each agency in the executive branch of the Government which "will enable Congress to determine whether public funds have been economically and efficiently administered and expended" and to make reports thereon from time to time to the Committees on Government Operations, and Appropriations and other committees having jurisdiction over legislation relating to the operation of the agencies involved. The work of the Comptroller General, together with the activities of the Committees on Government Operations, were to serve as a check on the economy and efficiency of administrative management. See pages 6 and 7, S. Rept. No. 1400, 79th Congress on the Legislative Reorganization Act of 1946.

The Budget and Accounting Procedures Act of 1950 requires each executive agency to maintain systems of accounting and internal control and provides, in section 117(a), 31 U.S.C. 67(a), that the Comptroller General in determining auditing procedures and the extent of examination to be given accounts and vouchers give consideration to "the effectiveness of accounting organizations and systems, internal audit and control and related administrative practices of the respective agencies."

The latest basic audit authority granted the Comptroller General and the General Accounting Office is section 204 of the Legislative Reorganization Act of 1970, Pub. L. 91-510, 84 Stat. 1140, which provides as follows:

#### ASSISTANCE TO CONGRESS BY GENERAL ACCOUNTING OFFICE

SEC. 204. (a) The Comptroller General shall review and analyze the results of Government programs and activities carried on under existing law, including the making of cost benefit studies, when ordered by either House of Congress, or upon his own initiative, or when requested by any committee of the House of Representatives or the Senate, or any joint committees of the two Houses, having jurisdiction over such programs and activities.

(b) The Comptroller General shall have available in the General Accounting Office employees who are expert in analyzing and conducting cost benefit studies of Government programs. Upon request of any committee of either House or any joint committee of the two Houses, the Comptroller General shall assist such committee or joint committee, or the staff of such committee or joint committee—

- (1) in analyzing cost benefit studies furnished by any Federal agency to such committee or joint committee; or
- (2) in conducting cost benefit studies or programs under the jurisdiction of such committee or joint committee.

Thus, by statutory mandate, the Comptroller General is required to (1) audit the activities of the executive departments and agencies including Boards such as the Emergency Loan Guarantee Board; (2) make expenditure analysis to determine whether funds have economically

been expended; (3) give consideration to departments' internal audit and control and related administrative practice, and (4) review and analyze the results of Government programs and activities carried on under existing law. To perform these duties the Comptroller General and the General Accounting Office is given the clear statutory authority to require the information of the departments and agencies regarding their organization, activities, and methods of business, coupled with the right of access to any books, documents, papers, or records in any such establishment.

#### ARGUMENTS THAT GAO IS NOT AUTHORIZED TO REVIEW BOARD DECISIONS

With regard to arguments that GAO is not authorized to review the decisions of the Board, those arguments need to be put into proper perspective. It is not GAO's intention in reviewing the Board's activities to attempt to set aside or to reverse any decisions of the Board. GAO does feel however that the actions which are required of the Board prior to approving a loan guarantee and the actions of the Board related to the loan guarantee are of legitimate concern to GAO in its review and it is GAO's purpose to review such activities.

With regard to the actions of the Board prior to the approval of the loan guarantee, GAO would examine into (1) the basis or rationale for the Board's various determinations (2) the documents the Board should have received from the borrower and lender, and (3) whether the Board's actions comply with the spirit and intent of Pub. L. 92-70. With regard to the actions of the Board relating to the loan guarantee agreement the Board must satisfy itself that the underlying loan agreement on which the guarantee is sought contains all appropriate affirmative and negative covenants and provides for the Board's approval of any amendments. In addition, the Board must establish the interest rate, establish and collect a guarantee, have the guaranteed loan fully collateralized, and obtain priority over the lender and any other person with respect to the collateral.

In examining the loan agreement GAO should consider whether (1) all mandatory provisions have been included in the loan agreement and the reasons for any omissions (this has been done) (2) all parties whose rights and responsibilities are affected have acquiesced and (3) the interest rates and guarantee fee established by the Board are consistent with the intent of the Act. GAO would also examine into the receipts and accountability of the guarantee fee. It is GAO's belief that the review of the activities of the Board is a vital part of GAO's overall examinations of all of the activities authorized by the Act.

GAO examinations of governmental activities normally include a variety of internal agency documents that provide the basis or support for major decisions programs or courses of action. For example: (1) in its examinations of the Department of Defense GAO has had access to and has reviewed Development Concept Papers and supporting decisions to acquire Major Weapons systems involving billions of dollars of Government funds. Development concept papers cover the pros and cons of various weapons systems and alternative strategies ultimately leading to a recommendation to the decision maker. GAO has also reviewed the records of DOD's

source Selection Boards who are responsible for selecting contractors that will develop and produce the weapons systems; (2) in its review of the Model Cities Program administered by the Department of Housing and Urban Development (HUD) GAO has had access to and examined correspondence, justifications and support for high level policy decisions on the method of allocating Model Cities Supplemental Grant Funds to about 150 cities in the United States; (3) in its continuing reviews of the activities of the Atomic Energy Commission GAO normally examines the records supporting various management decisions of the agency. In its review of problems in developing the Atomic Energy Commission's past flux facility GAO examined internal cost-benefit studies and other pertinent records and documents relating to the civilian nuclear reactor program. In another examination GAO considered the procurement of certain products from private industry by AEC. GAO reviewed the factors considered by AEC in deciding to procure products from outside sources in lieu of production at AEC's contractor operated facilities.

#### **PROTECTION OF INFORMATION SOUGHT BY EXECUTIVE PRIVILEGE**

The basis for the executive branch denial of information to the Congress is the constitutional doctrine of separation of powers which is interpreted by the executive branch as granting it a privilege to withhold information where such action is deemed necessary in the best interest of the country. While no court has addressed the precise issue it has been the subject of many articles, studies, and commentaries. It would serve no useful purpose to present here any summarization of discussions and studies that have been made about the doctrine for they are detailed in individual statements by Members of Congress and in publications by committees of both the House and the Senate. See for example the study by the staff of the House Committee on Government Operations presented as a Committee Print of May 3, 1956, entitled "The Right of Congress to Obtain Information From the Executive Branch and From Other Agencies in the Federal Government"; H. Rept. No. 1461, 85th Cong., 2d sess.; the remarks of Senator Morse during consideration of the Mutual Security Appropriation, 1960 on September 12, 1959, 105 Cong. Rec. 19269-19298; and, the more recent hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 92d Cong., entitled "Executive Privilege: The Withholding of Information by the Executive" on S. 1125, 92d Cong.

Assuming, without conceding, that there is a legitimate basis for the doctrine, it is the position of GAO that it cannot be invoked by the head of an executive department to withhold information from GAO because of GAO's clear statutory right of access to such information in the Budget and Accounting Act of 1921, and other statutes. If it can properly be invoked, it is GAO's view that it must be done by the President himself. For this reason, despite initial reservations about the Congress giving statutory recognition to the doctrine, GAO testified in support of S. 1125, 92d Cong., which would have amended title 5 of the United States Code so as to provide that no employee of the executive branch summoned or requested to testify or produce documents before the Congress or its committees could refuse to do so on the grounds that he

intends to assert executive privilege and that no such employee shall assert the privilege unless at the time it is asserted he presents a statement signed personally by the President requiring that the privilege be asserted as to the testimony or document sought. It was GAO's observation that S. 1125 was the first measure to specifically recognize the doctrine of executive privilege in so many words as a basis for refusing information to the Congress. In this regard it was unlike the Foreign Assistance and Related Programs Appropriation Act, 1971, and kindred appropriation acts going back as far as the Mutual Security Appropriation Act, 1960, as well as section 634(c) of the Foreign Assistance Act of 1961. The measures just cited, in effect, excused production of certain documents to committees of Congress and to the GAO upon certification by the President that he had forbidden the furnishing of such documents and his reasons for so doing.

#### **GAO AUDIT AUTHORITY OVER CERTAIN NEW PROGRAMS**

With regard to the Chairman of the Board's position that Congress might need to pass additional legislation to make it clear that GAO has audit authority over the activities of the Board, it is true that where a special need is envisioned the Congress has provided by express language in new program authority for GAO audit notwithstanding the broad authority vested by the general GAO legislation discussed above. It should be noted however that when this has been done the specific language has usually been provided in one of the following contexts:

(1) Provisions for annual GAO audits where audits would not otherwise be on an annual basis. Examples would include the Alaska Housing Act, the District of Columbia Redevelopment Act of 1945, the Higher Education Act of 1965, the General Supply Fund, and the audit of the Federal Home Loan Banks and Federal Home Loan Bank Boards.

(2) Provisions for GAO audit of programs where financial transactions or decisions by the persons charged with administration of the program are final and conclusive. Examples include the audit under the National Defense Education Act of 1949 where certain of the Commissioner of Education decisions on financial transaction are final and conclusive on all officers of the Government, certain audit of the Farm Credit Administration, and audits of the programs under the Veterans' Readjustment Assistance Act of 1952 and the War Orphans Educational Act of 1946.

(4) Provision for audits of the activities of the governing bodies of the various territories of the United States.

Editor's note: Subparagraphs appear as numbered by General Accounting Office.

One notable exception to this general practice was the requirement in the Economic Opportunity Amendments of 1967 which provided for an investigation and evaluation by the Comptroller General of the poverty program, but this was for an entirely new type of evaluation work which GAO had not theretofore normally performed.

It is apparent that the functions of the Emergency Loan Guarantee Board do not fit into any of the four categories detailed above and in view of the broad statutory authorities—and mandates—set out in the basic authorities quoted above the Congress saw no need to provide specific legislative authority for audit of the Board by the GAO. Accordingly, it is not felt that the

failure of the Congress in this instance to provide specific statutory authority for GAO can be properly construed as an indication on the part of Congress that the General Accounting Office should not have audit authority over the Board's activities.

#### EXEMPTIONS FROM GAO AUDIT AUTHORITY

With certain exceptions, the audit authority and responsibility of GAO extends to all activities, financial transactions, and accounts of the Federal Government. However, certain agencies and activities are not subject to audit by reason of specific statutory prohibitions and the type of funds involved. Where expenditures are of a privileged or confidential or emergency nature accounted for solely on a certificate of a designated Government official, the GAO audit is statutorily restricted. Certain laws impose restrictions on the disclosure of information and prescribe penalties for the officer or employees who violate the restrictions. Nonappropriated fund activities such as operations of exchanges, restaurants, concessions, canteens, vending machine operations, and other revenue-producing activities are often subject to limited audits. It would serve no useful purpose to detail here the numerous activities of the Government which the Congress has in effect seen fit to hold exempt from the usual GAO audit. Suffice it to say that at present there are in excess of sixty such governmental activities and in enacting Pub. L. 92-70 Congress did not see fit to exempt in any way the Board's activities from GAO audit.

An interesting example of final authority in an administrator which was modified to allow some GAO access involves the Treasury Department. Section 10 of the Gold Reserve Act of 1934, 8 Stat. 341, ch. 6, 31 U.S.C. 822a, authorized the establishment in the U.S. Treasury of a stabilization fund, for the purpose of stabilizing the exchange value of the dollar, to be operated under the exclusive control of the Secretary of the Treasury, with the approval of the President, whose decisions shall be final and not subject to review by any other officer of the United States. An audit by the General Accounting Office of the Exchange Stabilization Fund was thus precluded.

However, section 10 of the act was amended by Public Law 91-599, approved December 30, 1970, 84 Stat. 1659, so as to allow GAO audit of administrative expenses of the fund. As amended, section 10 now provides in pertinent part as follows:

\* \* \* the administrative expenses of the fund shall be audited by the General Accounting Office at such times and in such manner as the Comptroller General of the United States may by regulation prescribe for the purpose of ascertaining that administrative funds are properly accounted for and that fully adequate accounting procedures and systems for control of such funds have been established. Except for information determined by the Secretary to be of an internationally significant nature, there shall be furnished to the Comptroller General such information on the administrative expenses of the fund as is necessary to conduct the audit, and the Comptroller General or any of his representatives shall, for the purpose of securing this information, have access to all books, accounts, records, reports, files, and all other papers, things, or property belonging to or in use by the United States Government (other than records, reports, files, or other papers or things containing or revealing information determined by the Secretary of the Treasury to be of an internationally significant nature).

In view of the numerous governmental activities for which the Congress has effectively precluded the usual

GAO audit, failure to include such a preclusion in Pub. L. 92-70 leaves GAO with its audit authority over the Board under its general statutory authorities in the same manner as most other Federal agents.

It can be inferred from the Board's position that by providing in Pub. L. 92-70 for a GAO audit of the borrower's records, the Congress intended that such audit be the total of GAO's audit over the program administered under the act. Such an inference overlooks the fact that without specific authority for the General Accounting Office to audit the records of the borrower GAO would not have authority to audit this private recipient. Demonstrative of this fact is that in many acts the Congress has provided for specific GAO authority over Government contractors and Government grantees under various programs. If the GAO was precluded from auditing the activities of the Board because Pub. L. 92-70 contains provisions providing for GAO audit of the borrower, the same rationale would preclude the GAO from auditing non-grant activities of the executive departments because GAO usually is given express audit authority over the recipients of grantees and certain contractors. The fallacy of this reasoning need only be demonstrated by recognizing that the consequence of such a construction would be that GAO would be precluded from auditing any HEW program that does not involve the making of grants where GAO has access to grantee records.

With regard to specific legislative authority for GAO audit of recipients of Federal funds, the general audit authority of GAO has not been regarded as extending to monies transferred to States, instrumentalities, local organizations, and individuals because such funds lose their identity as Federal funds when transferred. Consequently numerous laws authorizing Federal grant-in-aid and cost-sharing programs which have been enacted in recent years specifically provide for GAO audit and access to records of recipients. Many such audit authorities are contained in laws because of legislative recommendations made by the Comptroller General which usually follow the line of stating that the Secretary involved and the Comptroller General or their duly authorized representatives shall have access to any books, documents, papers, and records of recipients that are pertinent to amounts received under the act. See section 202 of the Intergovernmental Cooperation Act of 1968, Pub. L. 90-577.

Such a recommendation was contained in the Assistant Comptroller General's report of August 10, 1970, on S. 4011, 91st Congress which was the administration's version of what eventually was enacted as the Emergency Rail Services Act of 1970, Pub. L. 91-663. In his recommendations to the Chairman of the Senate Committee on Commerce the Assistant Comptroller General pointed out that the bill did not grant the Secretary of Transportation or the Comptroller General the specific authority to examine the financial records and documents of the railroads. It was suggested that the bill should provide such authority to both the Comptroller General and the Secretary of Transportation during periods of any outstanding loan guarantees. When finally enacted, Pub. L. 91-663, contained provisions providing:

(1) Access by the Secretary of Transportation to and authority to make copies of all accounts, books, records, memorandums, correspondence, and other documents of

any railroad which receives assistance under the act; (Section 4)

(2) in addition to other duties prescribed by section 77 of the Bankruptcy Act, the court should maintain supervision of the expenditure of the funds obtained pursuant to the act for the purpose of assuring that such funds were used solely for the purpose set forth in the act, (Section 7)

(3) the Comptroller General was given access to "such information, books, records, and documents" as he deems necessary to effectively audit financial transactions and operations carried out by the Secretary in the administration of the act. (Section 8).

There is no explanation in the legislative history of the act for this particular approach in providing for access to the records of the recipient railroad. It could be assumed that it was felt that the provisions requiring the Bankruptcy court to supervise the expenditure of funds obtained under the act coupled with the access authority granted to the Secretary of Transportation to the accounts, books, and records was sufficient *direct* access to the railroads' records by Government agencies. The provision granting the Comptroller General to have access to such of the Secretary's "information, books, records, and documents" as he, the Comptroller General, determined necessary to effectively audit the financial transactions and operations of the Secretary is not needed as far as the Secretary's records are concerned but the language apparently was intended to give the Comptroller General access to the copies of the railroads' records which the Secretary was authorized to make, in accordance with GAO's recommendation for such authority. GAO considers this case to be an exception to the general rule and is the only one of which GAO is aware.

#### ENFORCEMENT REMEDIES AVAILABLE TO GAO

With regard to enforcement remedies that are available to GAO to compel disclosure by Federal agencies where such agencies have refused to cooperate, except to report such refusals to the Congress GAO does not have any enforcement remedies available. During the 91st Congress Senator Ribicoff introduced S. 4432 which had as its purpose to strengthen and broaden the duties and operations of the General Accounting Office in order that it could provide more effective service to the Congress. That bill contained provisions which included (1) the intervention of appropriate committee chairmen in disputes between the Comptroller General and the executive departments over access to records (2) authority for the Comptroller General to subpoena negotiated contract and subcontract records and records of other non-Federal persons or organizations to which he has a right of access by law or agreement and (3) provision to permit court review of differences of opinion on legal matters between the Comptroller General and the Attorney General. Although S. 4432 passed the Senate on October 9, 1970, no action was taken on the bill in the House of Representatives and it was reintroduced in the 92d Congress as S. 1022. In addition, S. 2702, 92d Congress, has been introduced which would provide for judicial resolution of disputes between the Attorney General and the Comptroller General of the United States. While these bills for

the most part do not bear directly on the problem of access to records of the executive branch, they are examples of efforts being made for GAO to strengthen its role with some enforcement authority as agent of the Congress.

In considering recommendations that might be made on the subject, it is GAO's view that a measure now pending would serve as well as any other to meet the problem. That measure is Senator Fulbright's bill, S. 1125, 92d Congress, as amended, which was previously discussed. That bill, as amended, would help to avoid the delays that GAO has encountered in obtaining records of the executive branch. The amendment to the bill (No. 343 of July 29, 1971), would impose a sanction along the lines now providing for a cut-off of Foreign Assistance funds under section 634(c) of the Foreign Assistance Act of 1961, 22 U.S.C. 2394(c). Specifically, the Fulbright bill as amended would provide that upon a determination by GAO that information requested of the executive branch by a committee or subcommittee of the Congress or GAO has not been made available within sixty days after the request has been received and if during such period the President has not signed a statement invoking executive privilege, no funds made available to the agency involved shall be obligated or expended commencing on the seventieth day after such request is received by such agency unless and until such information has been made available or the President himself invokes executive privilege with respect to such information. It is felt that the approach of the Fulbright amendment is the most salutary that has been presented in the Congress and should be considered in any effort to devise a legislative remedy to the problem.

#### SUMMARY

It is the position of GAO that under basic audit authorities GAO has responsibility to audit the activities of the Emergency Loan Guarantee Board and thus has attending right of access to such information and documents as the Board uses in reaching its decisions. Further, it is GAO's view that neither the failure to spell out explicitly that GAO has such responsibility and right of access nor the fact that under Public Law 92-70 GAO is given explicit authority to audit the borrower diminishes in any way the basic audit authorities that GAO relies upon. If GAO is not granted access to such information and records as it feels is needed to audit the activities of the Board, it will be necessary to qualify any report it may make with respect to the Board or any borrowers pursuant to Public Law 92-70.

Finally, the closest parallel in the law that has been found to the Emergency Loan Guarantee Act is the Disaster Relief Act of 1969, Public Law 91-79. Under Public Law 91-79 various agencies of the Government are given authority to provide additional assistance to the inhabitants of and for the reconstruction of areas which have been damaged by major disasters. This law contains no specific GAO authority over the activities of the agencies affording such additional assistance and it has yet to be suggested by anyone that the absence of such specific authority precludes GAO audit of activities conducted under Public Law 91-79.

THE SECRETARY OF THE TREASURY,  
Washington, December 9, 1971.

Hon. ELMER B. STAATS,  
*Comptroller General of the United States,*  
*General Accounting Office Building, Washington, D.C.*

DEAR MR. STAATS: This is in further response to your September 21, 1971 letter to me as Chairman of the Emergency Loan Guarantee Board requesting that records of the Board be made available to the General Accounting Office for its review. In your letter you indicate your authority to review decisions of the Board and its records is found in the Budget and Accounting Act of 1921, the Legislative Reorganization Act of 1946 and the Accounting and Auditing Act of 1950.

The Board wishes to cooperate as fully as possible with the General Accounting Office. After carefully considering your request, however, the Board concluded at its meeting on November 17 that it was not the intent of Congress that the General Accounting Office review its decisions. The Board's belief is based on its understanding of what was intended to be accomplished by the Emergency Loan Guarantee Act. If Congress intends for the General Accounting Office to review the decisions of the Emergency Loan Guarantee Board, we believe amendatory legislation should be enacted making it clear that the GAO has this authority.

Congressional review of loan guarantee matters is carefully spelled out in the Guarantee Act: the GAO is directed to audit the borrower and report its findings to the Board and to the Congress; and the Board is directed to make a "full report" of its operations to the Congress. We find nothing in the Guarantee Act or its legislative history which suggests an intent that competing reports of the Board's operations were to be made to the Congress or that the Board's decisions were to be reviewed by the General Accounting Office.

The Board as constituted by the Congress is uniquely well qualified to make the determinations called for by the Guarantee Act, including the critical finding of whether failure to guarantee a loan would have an adverse effect on the economy.

We would be happy to discuss this matter further with you if you wish. Questions concerning the basis for the Board's decision also may be directed to Samuel R. Pierce, Jr., General Counsel of the Treasury, and Executive Director to the Board.

Finally, I have taken the liberty of furnishing a copy of your September 21, 1971 letter to me together with a copy of this response to the Honorable John Sparkman, Chairman of the Senate Committee on Banking, Housing and Urban Affairs and the Honorable Wright Patman, Chairman of the House Banking and Currency Committee.

Sincerely,

JOHN B. CONNALLY.

COMPTROLLER GENERAL OF THE UNITED STATES,  
Washington, D.C., February 10, 1972.

Hon. JOHN B. CONNALLY,  
*Secretary of the Treasury.*

DEAR JOHN: On December 9 you wrote me that records of the Emergency Loan Guarantee Board, which has guaranteed a loan to the Lockheed Corporation, would not be available to the General Accounting Office in carrying out its audit and review responsibilities. Your letter indicates that there is nothing in the Emergency Loan Guarantee Act, or its legislative history, which provides for a GAO review of the Board's activities and suggest that Congress might need to pass additional legislation to make it clear that GAO has this authority.

I am afraid that your staff has overlooked the basic authority of GAO as set forth in the Budget and Accounting Act of 1921 to audit the activities of the Government agencies. Also included in the Act is the right of access to the records of the agencies. In short, there would have been no reason for the Congress to repeat this authority in connection with the Emergency Loan Guarantee Act. I wonder if you would not want to take a personal look at the situation.

Best wishes.

Sincerely,

ELMER B. STAATS.

THE SECRETARY OF THE TREASURY,  
Washington, March 30, 1972.

Hon. ELMER B. STAATS,  
*Comptroller General of the United States,*  
*General Accounting Office Building, Washington, D.C.*

DEAR ELMER: Since receipt of your letter of February 10, 1972, regarding the authority of the General Accounting Office to review the activities of the Emergency Loan Guarantee Board, I have reviewed the entire matter again.

As you know, representatives of your Office have examined and verified the accounts of the Emergency Loan Guarantee Board. On the basis of my review of the matter, however, I continue to believe that the conclusion reached by the Board at its November 1971 meeting, as set forth in my letter to you of December 9, 1971, was correct and that it was not the intent of Congress that the decisions of the Board be reviewed by the General Accounting Office. In reaching that conclusion, the Board and its staff gave careful attention to the provisions of the Budget and Accounting Act of 1921, the Legislative Reorganization Act of 1946, and the Accounting and Auditing Act of 1950.

Sincerely,

JOHN.

## (144-C)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
5/4/71 5/24/71	John B. Connally Marvin Laird	Lockheed Loan Guarantee	Various		See attached memo (correspondence, etc.)
5/21/71					
5/14/71					
5/27/71					

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 144

Submitted by: (Comm/Subcomm) Senate Banking Committee

Subcommittee on Consumer Credit

By: Ken McLean

Title: Vice Staff Member :: 735/

Extension

U.S. SENATE,  
 COMMITTEE ON BANKING, HOUSING,  
 AND URBAN AFFAIRS,  
 Washington, D.C., June 2, 1971.

To: Senator William Proxmire.  
 From: Kenneth A. McLean.  
 Subject: Committee executive session on Lockheed hearings.

As you know, Senator Sparkman has scheduled an Executive Session of the Senate Banking Committee on Thursday, June 3 to discuss the procedures for handling the Lockheed hearings which begin on Monday, June 7. I expect that the following items will come up for discussion:

#### 1. LACK OF INFORMATION ON LOCKHEED

Despite repeated attempts, we have been unable to obtain any detailed financial information on the Lockheed Aircraft Corporation or the current status of the L-1011 project. You wrote Lockheed on May 3 and May 25 requesting information. Thus far, the only information

made available is a so-called "Fact Sheet" and an un-audited copy of the Company's 1970 financial statement.

In addition, your wrote Treasury on May 4 and May 24 requesting detailed financial information including a copy of Treasury's reply to inquiries directed by the Chairman of the House Banking and Currency Committee on May 12, 1971. Senator Sparkman also requested financial information from Treasury on May 21. No responses to these requests have yet been received.

You also requested information from the Department of Defense on May 14 and May 27. The Defense Department has responded to your May 14 letter indicating that the information requested was submitted to them on a confidential and proprietary basis and would require the concurrence of Lockheed for disclosure.

In addition you wrote the 2 lead banks in the 24 bank consortium on May 18 and May 19 requesting information on the Lockheed loan guarantee. A reply was received on May 25 from Bankers Trust indicating that the bank would make a statement and discuss the subject at the time of the hearings. No direct replies to your questions were received.

The Senate Banking Committee cannot adequately review the proposed legislation without studying the financial information on Lockheed in advance of the hearing. I would therefore suggest that you request Sparkman to delay the hearings until one week following the receipt of complete and detailed answers to Chairman Sparkman's letter of May 21 and Congressman Patman's letter of May 12. Congressman Patman has indicated his Committee will not proceed until it has received a complete

reply to its inquiries. Certainly the Senate Banking Committee should be no less insistent upon its prerogatives.

\* \* \* \*

The Committee has a legitimate right to inquire into the competence of Lockheed's management before approving a \$250 million loan guarantee. Lockheed's performance on its defense contracts is certainly indicative of the quality of its management. It would be financially irresponsible for the Committee to ignore Lockheed's management or mismanagement of its defense contracts.

## (144-D)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested; nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
7/21/72	L. Patrick Gray F.B.I.	L. Patrick Gray	F.B.I. access to Bank records BANK	7/26/72	L. Patrick Gray	See attached documentation

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm) Senator [unclear] Chairman.

Subcommittee on Consumer Credit

By: [unclear]

TITLE: P.R.F. Staff Member 7351

Extension

FILE 144:

U.S. SENATE,  
COMMITTEE ON BANKING, HOUSING,  
AND URBAN AFFAIRS,  
July 21, 1972.

Hon. L. PATRICK GRAY,  
Acting Director, Federal Bureau of Investigation, Department of Justice, Washington, D.C.

DEAR MR. GRAY: The Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs will hold hearings on regulations issued by the Department of the Treasury to implement the Currency and Foreign Transactions Reporting Act (Public Law 91-508). In addition, the Subcommittee will also consider legislation introduced to limit access to bank records required to be kept under the Act and the implementing regulations.

When the Senate Banking Committee passed the legislation, it indicated in its report that access to bank records by law enforcement officials would be only pursuant to a subpoena or other lawful process. The Committee went on to say that "the legislation in no way authorizes unlimited fishing expeditions into a bank's records on the part of law enforcement officials". As you know, the Treasury regulations have been challenged by civil liberty groups and others on the grounds that they do not adequately protect the privacy of bank records. There have been various re-

ports in the press and elsewhere to the effect that FBI agents, in particular, have been able to obtain copies of checks and other records without resorting to a subpoena. Moreover, a report by Jack Anderson in his column dated May 12, 1972, indicates the FBI had monitored the checking account of a well known movie actress without a subpoena or court order.

I am concerned that nothing in the regulations issued by the Department of the Treasury prohibits banks or other financial institutions from releasing their financial records to law enforcement officials unless pursuant to a subpoena or other lawful process. It may be that the regulations or the legislation need to be changed to preserve the confidentiality of these records. In that connection, I would most appreciate your testimony before my Subcommittee's hearings on August 11 and 14. I believe the viewpoints of all law enforcement officials, including the FBI, should be reflected in the hearing record before the Subcommittee takes any action to amend the legislation. I look forward to hearing from you in the near future concerning your availability as a witness at these hearings.

With best wishes, I am

Sincerely,

WILLIAM PROXMIRE,  
Chairman, Subcommittee on Financial Institutions.

UNITED STATES DEPARTMENT OF JUSTICE,  
FEDERAL BUREAU OF INVESTIGATION,  
*Washington, D.C., July 28, 1972.*

Hon. WILLIAM PROXMIRE,  
*U.S. Senate.*  
*Washington, D.C.*

DEAR SENATOR PROXMIRE: I have received your letter dated July 21, 1972, inviting me to testify in August before your Subcommittee on Financial Institutions. I can certainly understand the interest of your Subcommittee in the privacy of bank records.

Since all matters pertaining to legislation are under the overall supervision of the Attorney General, I have referred your invitation to the Deputy Attorney General and you may expect a further reply from him.

Sincerely yours,

L. PATRICK GRAY, III,  
*Acting Director.*

---

OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
*Washington, D.C. August 2, 1972.*

Hon. WILLIAM PROXMIRE,  
*U.S. Senate,*  
*Washington, D.C.*

DEAR SENATOR: This is in further reference to your letter of July 21, 1972 concerning the scheduled hearing of your Subcommittee on Financial Institutions on regulations issued by the Department of the Treasury to implement the Currency and Foreign Transactions Reporting Act (Public Law 91-508).

It is understood that you desire our representative to appear on August 11. In confirmation of information previously passed to your staff, William S. Lynch, Chief, Organized Crime and Racketeering Section will represent the Department.

Sincerely,

RALPH E. ERICKSON,  
*Deputy Attorney General.*

## FILE 151

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### SENATE COMMITTEE ON THE JUDICIARY

#### SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

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(151-A)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE,  
*Washington, D.C., April 3, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*Committee on the Judiciary,*  
*U.S. Senate,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your letter of March 9, 1973, surveying the instances in which federal officers or employees have refused to provide information requested by congressional committees. As my chairmanship of the Subcommittee on Administrative Practice and Procedure started with the 91st Congress, this response is confined to the period since January 1969.

The instances requested are documented on the enclosed survey forms provided by your subcommittee. I would, in addition, like to call your attention to the series of related problems arising out of the full Judiciary Committee hearing on the nomination of Mr. Kleindienst to be Attorney General. Efforts of members of the Committee to obtain information from the nominee, who was at the time Acting Attorney General, and the nominee's response to those efforts are described in the Individual Views of three members of the Committee on the Nomination (Exec. Rept. 92-19, part 4, pages 117-119), a copy of which is enclosed for your convenience. You also remember, of course, the Flanigan invocation of executive privilege that arose during the course of the Kleindienst nomination hearings.

I fully support this project which you have undertaken to uncover the depth and range of refusal of government officials to provide information to Congress, and I look forward to our joint participation in hearings later this month on the subject of Executive privilege and government secrecy.

Sincerely,

EDWARD M. KENNEDY, *Chairman.*

(325)

[Excerpt from an executive report of the Committee on the Judiciary, U.S. Senate, 92d Cong., 2d sess., "Nomination of Richard G. Kleindienst," pp. 117-119, May 31, 1972]

## VII. BARRIERS TO OBTAINING THE FACTS

Throughout the hearings the Committee was confronted with an unsolvable dilemma. When John Mitchell's resignation became effective on the day following the publication of the first Anderson column, Kleindienst became Acting Attorney General. In that capacity, the nominee himself assumed control of all decisions concerning what information should be made available to the Committee by the Department of Justice. That power was exercised time and again to deny information requested by the Committee (pp. 3002-3005), and if the Senate does not persist in seeking that information, it cannot act with any assurance that it knows the truth.

Kleindienst himself admitted that the decisions to withhold information were not based on a Presidentially authorized claim of executive privilege—which this President has indicated in the only legitimate basis for withholding congressionally requested materials (p. 280)—but upon the nominee's own personal authority, notwithstanding his direct personal interest in the outcome of these hearings. (pp. 3002-3005.) The following exchange is rather typical:

**Q.** Well, the reports Justice sent to the White House on antitrust policy; we understand there was at least one. Why wouldn't that be made available?

**Mr. Kleindienst:** It might be on that same basis, Senator.

**Q:** Well, can we get the basis once more just so we have got that in the record and so we can tell the members of the Senate what the basis is?

**Mr. Kleindienst:** As of right now, Senator Kennedy, it is my refusal.

**Q:** Just your refusal based on what?

**Mr. Kleindienst:** As the Acting Attorney General of the United States.

**Q:** Based on what?

**Mr. Kleindienst:** In my opinion it is not a proper document to give to this committee. (pp. 3005-3006.)

In like manner, when the Committee asked for documents which might have reflected the extent and nature of the nominee's participation in the ITT settlement, it was the nominee who made the decision that those materials would not be produced (pp. 251, 279). And when the Committee asked for the reports which would reflect whether there was any factual justification for the nominee's conclusion that U.S. Attorney Harry Steward had done nothing wrong, it was the nominee who decided that the reports should not be examined by the Committee.

On certain occasions when it was in the best interests of the nominee, some self-serving documents have been voluntarily tendered, as for example the conclusory memorandum to Mr. Kleindienst which recommended

that the ITT case be settled (p. 111). But when the Committee asked to see the materials which would have reflected the background and foundation for Mr. McLaren's conclusions, those items were refused (p. 1263).

On other occasions, the Committee has simply been told, without any explanation whatsoever, that certain potentially relevant materials simply could not be located, even though the Department had earlier admitted their existence.

Listed below are some of the materials which the Committee has been unable to obtain.

The Committee had been completely frustrated in its efforts to obtain:

1. The Justice Department settlement file on the ITT case. The Department has refused to produce this file, and we are therefore completely uninformed of the contents of the Department's "paper record" justifying this settlement. The Department has even refused to provide an itemization and description of what the settlement file contains.

2. The reports and memoranda which the Justice Department sent to the White House about anti-conglomerate policies, problems, and cases. The Department has refused to provide these materials to the Committee, and has even refused to provide an itemization of what these materials are.

3. Any information relating to the Administration's interagency committee on antitrust policy. Such a committee would presumably already have accumulated the information which Mr. Lawrence Walsh suggested should be accumulated, and would presumably have considered the issues of "balance of payments" and "ripple effect" on the stock market which were ostensibly raised as new issues in Rohatyn's presentation.

4. The Justice Department document which would reflect the first step the Department took in the ITT cases, including the identities of the authorizing officials. The Department has claimed that they "cannot locate" this document.

5. The Justice Department document which would reflect who was aware of, and authorized the response to, Reuben Robertson's inquiry in September 1971 about whether there was a connection between the ITT's San Diego pledge and the ITT settlement. This information of course bears upon the state of knowledge of Mr. Kleindienst about the ITT pledge in September 1971, in view of his testimony that he did not know about it until December 1971. The Department has claimed that there is no such document.

6. A chronological record of the events which transpired in the ITT cases. At the hearings, Senator Burdick described this requested record as a "day to day diary." The Department has not provided this record.

7. The materials which would show the basis upon which Mr. Kleindienst based his findings of "no wrongdoing," after a staff finding of "highly improper" conduct by U.S. Attorney Harry Steward. The Department has refused to provide these materials to the Committee.

Other Federal agencies were similarly uncooperative. Early in the hearings the Securities and Exchange Commission was asked to provide for the Committee any relevant information obtained during their investigation into alleged unlawful "insider trading" by ITT officials prior to the settlement. When that request was refused, the Committee asked merely for the ITT documents which the Company had turned over to the SEC prior to the massive "shredding" operation discussed below. While acknowledging that they had custody of such materials, the Chairman of the Commission rejected even this limited request.

Perhaps the classic examples of withheld information were two instances in which the Committee was not informed in advance by the Justice Department that certain witnesses who offered evidence helpful to the nominee had been under Federal investigation for criminal fraud. Indeed in one case the witness himself, and in the other case the witness's wife, had been targeted for criminal prosecution just before those witnesses testified (see pp. 1089-94). In both situations the Department had been aware of the facts prior to the time the witnesses appeared before the Committee.

## (151-B)

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
March 1969	Special Assistant to Secy of Transportation John Volpe	Subcommittee staff requested documents or memoranda reflecting development of new DOT regulations relating to equal employment opportunity enforcement in highway program (in conjunction with Subcommittee hearing on Equal Employment Opportunity Procedures, held March 27 & 28, 1969)	March 1969	Spec. Asst. to Secy of Transp. Volpe	Request initially refused; documents then made available for inspection by staff but not copying; finally, documents provided but names of authors and participants at meetings were physically cut out of memoranda (see brief discussion in Hearings at p. 220*)  *Full title of hearings: "The Practices and Procedures Involved in the Implementation of E.O. 11246 and Related Laws, Regulations, and Constitutional Provisions Concerning Equal Employment Opportunity in Federal and Federally Assisted Contracts" before the Subcommittee on Administrative Practice and Procedure, March 27 and 28, 1969 (91st Congr., 1st Sess.).

Separation of Powers Subcommittee SURVEY.  
 U.S. SENATE, March 5, 1973  
 Contact: Tom J. Pacore, Asst. Counsel, 225 8422, 8421  
131

FILE \_\_\_\_\_

Submitted by: (Comm/Subcomm)

Senate Subcom. on Administrative Practice &amp; Procedure

By: Thomas M. Susman

Title: Assistant Counsel

Extension 55617

(328)

## (151-C)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
8/26/71	Atty Gen John Mitchell	Justice Dept investigative reports regarding Kent State killings (ltr)	10/22/71	Atty Genrl Mitchell	"general policy of Dept of Just" that "investigat: reports of the FBI are not subject to disclosure"
10/28/71	Atty Gen John Mitchell	Request repeated; query whether Executive privilege invoked (ltr)	1/12/72	Atty Genrl Mitchell	to determine whether repts or portions shd be made available or Exec. priv. invoked, query which segments of repts desired
2/1/72	Asst Atty Gen. (nominee) Ralph Erickson	Request repeated (hearing)*			
2/21/72	Atty Gen John Mitchell	Request repeated (ltr)*			
2/23/72	Atty Gen (nominee) Richard Kleindienst	Request repeated (hearing)  *Subcommittee Chairman took position that without access to reports, there can be no reasonable determination of which portions are desired			

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 151

Submitted by: (Comm/Subcomm)

Senate Subcommittee on Administrative Practice & Proce

By: Thomas M. Susman

Title: Assistant Counsel

Extension 55617

(329)

## (151-D)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
2/22/72	Atty Gen (nominee) Richard Kleindienst	FBI Manual of Instructions, especially Section 87D (hearing)		Kleindienst responde	as at hearing: "I will come back and give you an opinion as to A, whether it is a guideline, and B, whether it is, that document is one we feel that we should give to the Senate" (page 64, Hearings before the Committee on the Judiciary, U.S. Senate, 92d, 2d, on Nomination of Richard G. Kleindienst to be Attorney General, etc., Feb. 22 & 23, 1972)  NB: No response was forthcoming, nor has one been received as of this date

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 151

Submitted by: (Comm/Subcomm)

Senate Subcom. on Administrative Practice &amp; Procedure

By: Thomas M. Susman

Title: Assistant Counsel

Extension 55617

(330)

## (151-E)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
3/6/72	Chm. Wm. Casey, SEC	SEC files relating to investigation of ITT insider trading (Note: request was made by members of Judiciary Comm. through Chm. Eastland; letter of request appears at p. 1664, Hearings on Nomination of Richard Kleindienst to Be Attorney General, US Senate, Comm. on the Judiciary, part 3, April 10, et seq., 1972)	4/26/72	SEC Chm Casey	Policy against disclosure of investigative files (see letter from Casey to Chm. Eastland, Kleindienst Nomination Hearings page 1664)
8/15/72	Chm. Wm. Casey, SEC	Same, especially documents obtained from ITT by subpoena (request by letter from Sen. Kennedy as Chm. of Admin. Prac. Subcom)*	8/31/72	SEC Chm Casey	Policy against disclosure of investigative files; investigation still ongoing (letter to Sen. Kennedy)*
10/6/72	Chm. Wm. Casey, SEC, thru his Admin. Asst. Charles Whitman	Same, indicating that SEC should at least keep copies of documents requested, since original documents were being transmitted to Justice Dept.*	10/6/72	Chas. Whitman, Admin. Asst to Chm Casey	Files actually sent from SEC to Justice Dept., with no transmittal of request to Chm. Casey*

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 151

Submitted By: (Comm/Subcomm)

Sen. Subcom. on Administrative Practice &amp; Procedure

By: Thomas M. Susman

Title: Asst Counsel

Extension 55617

(331)

(151-F)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

Shortly after 1971 Mayday demonstrations, Subcommittee staff made an oral request of the Department of Justice for the Department's "analysis and report" on its handling of those demonstrations in the District of Columbia.

On November 16, 1971, this request was reiterated by letter from Senator Kennedy to Atty Gen Mitchell. This request was made in conjunction with the Subcommittee's continuing investigation into the Federal Handling of Mass Demonstrations (hearings had previously been held on the subject)

Staff followed up on this request, informally, on a number of occasions thereafter. The response from departmental officials was that the report was still in progress and had not been completed.  
*with attachments*

On March 5, 1973, a three-page report was transmitted by the Deputy Attorney General to the Subcommittee

Séparation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 151

Submitted by: (Comm/Subcomm)

Senate Subcom. on Administrative Practice & Procedure

By: Thomas M. Susman

Title: Assistant Counsel

Extension 5561#

(332)

## FILE 154

### SENATE COMMITTEE ON THE JUDICIARY

#### SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

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*Editor's Note: The reader, in proceeding through the materials presented, will observe a few instances of repetition of supporting documents. Some of the refusals reported in the survey involve more than one category as catalogued in this report, and, consequently, they have been included in each. In considering the several options that would permit elimination of these duplications, it became apparent that a change of the format of the report might generate more confusion than would result from the duplications. Accordingly, the indulgence of the reader who has approached the materials ad serialim is solicited.*

## (154-A)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/26/72	L. M. Pellerzi Assistant Attorney General Department of Justice	Procedures for access to records in the department which may contain derogatory information about an individual which may be incorrect.	Not yet refused. interim replies 11/7/72 12/15/72 1/4/73 2/2/73	Responses received from L. M. Pellerzi and A. William Olson	"Please be advised the answers to these inquiries are being determined and a reply to your letter will be submitted as soon as possible."
1/18/73 (renewed request)	A. William Olson Assistant Attorney General Department of Justice	Request was made in response to a complaint and in connection with the continuing Subcommittee study of privacy, constitutional rights and computers and other data banks.			*Copies of the correspondence is not attached because all identifying references to the individual who complained could not be deleted.

Separation of Powers Subcommittee SURVEY.  
 U.S. SENATE, March 5, 1973  
 Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

Submitted by: (Comm/Subcomm)

Constitutional Rights Subcommittee

By: Irene R. Margolis  
 Title: Professional Staff Member 5A191  
 Extension

(355)

## (154-B)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
2/25/71	J. Fred Buzhardt General Counsel Department of Defense	Transcript of the Board of Inquiry investigating the 113th Military Intelligence Unit for use during the Subcommittee's hearings on Federal Data Banks, Computers, and the Bill of Rights and its study of domestic surveillance activities by the military.	3/2/71	J. Fred Buzhardt during his testimony before the Subcommittee	"Policy of executive branch not to divulge the contents of investigations while an investigation is still open and prior to final action being taken."
3/30/71	Melvin R. Laird Secretary of Defense		4/19/72	letter from Melvin R. Laird	*See hearings held by the Subcommittee, "Federal Data Banks, Computers and The Bill of Rights" Part II, Correspondence with the Department of Defense; also Part I, testimony of J. Fred Buzhardt.

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 154

Submitted by: (Comm/Subcomm)

Subcommittee on Constitutional Rights

By: Irene R. Margolis

Title: Professional Staff Member 58191

Extension

[Excerpts from hearings entitled "Federal Data Banks, Computers, and the Bill of Rights," hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st sess., Part II, "Relating to Departments of Army, Defense, and Justice," February and March 1971, pp. 1216-1217 and 1223-1227]

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
February 25, 1971.

Mr. J. FRED BUZHARDT,  
*General Counsel, Department of Defense, Washington, D.C.*

DEAR MR. BUZHARDT: Some time ago Mr. Baskir requested that you make available to the Subcommittee the transcript of the board of inquiry appointed by Secretary Resor to investigate the allegations made against the 113th Military Intelligence Unit. It is my understanding that you agreed to do so but that subsequently you informed him "certain difficulties" had arisen which you were trying to resolve.

I would like to request that you have this material delivered to the Subcommittee staff by Friday for their use in preparing the Subcommittee members for the testimony to be presented by the Department on Tuesday.

I would also like to renew my request that you have available that day the witnesses that I requested in my letter of February 17, 1971.

With kindest wishes,

Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Constitutional Rights.*

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
March 30, 1971.

Hon. MELVIN R. LAIRD,  
*Secretary of Defense,  
Washington, D.C.*

DEAR MR. SECRETARY: In the short time since the recess of the Subcommittee's hearings, I have had an opportunity to review the testimony and other information relating to data gathering by the Defense Department. Although my review is by no means complete, a number of questions occur at this time, and I would appreciate your assistance

in having them answered. In addition, there are still a number of unresolved requests which I have made in the past. These are:

Permission for Major General Joseph A. McChristian, General William H. Blakefield and Major General William P. Yarborough to testify at the hearings.

Access to the "Plant" Board transcript and reports, if any.

A copy of the list of investigations made into Army intelligence operations. (March 2 hearings, transcript p. 657-658)

A complete report on the courts-martial investigation referred to by Mr. Buzhardt in his letter to me of March 9. Mr. Buzhardt's letter of March 26 does not elaborate on the information he previously furnished nor does it explain why this investigation relates in any way to the desired testimony from the Generals.

I hope that these requests of mine can be granted without any additional delay.

I have reviewed the materials which the Department of Army transferred to the Department of Justice for possible use in the *Tatum* case. I appreciate the cooperation of Mr. Buzhardt in enabling me to have temporary custody of these materials.

I believe that the record of the hearings would be seriously incomplete if a description of them were omitted. For that reason, I would like to request that the materials be declassified. Since they are being held for possible use in the lawsuit, obviously this may have to be done eventually in any case. The Subcommittee, of course, will, as it has throughout the hearings, respect the privacy of persons whose names appear in these materials.

With respect to the computer print-out from the Fort Monroe computer, I should appreciate answers to the following:

1. Following the name and address of each entry, there is a designation "PLINK," and a 9-digit number, apparently consecutive throughout most, but not all of the six-volume print-out. What is this reference, and what is the significance of the "PLINK," numbers which are not consecutive?

2. After "Data Source," most of the designations are "FBI." How was this information obtained from the FBI; pursuant to what authority; was it done on a case-by-case basis, or by general authority; from what level of the FBI did the approval and the information come? Please submit copies of all regulations, and agreements pertinent to your answers.

3. Some of the "Data Source" designations are 10-digit letter-number combinations—for example "9015004 USC." What do these designations mean? What is the source of data where there is no entry after "Data Source"?

4. Following each entry is a 17-category list, including "Ethnic Group," "Race," "Religion," etc. What are the possible entries for "Character," "Leader of," "Effectiveness," and "Picture," and what is the meaning or definition of each possible entry? How and by whom were these categorizations made?

5. Following these categories, there appears "Entry #, Organizational Membership, Influence Therein" and below this certain numbers. Under "Entry #" there appears most often "001" followed by a 7-digit letter-number designation, apparently identifying organizations and perhaps also membership. Please explain these designa-

tions and list all the organizations which have such designations. Are these references to other files or data banks, either maintained now or in the past by your Department, or any other Federal or State agency?

6. Following each entry at the right margin is a 5-digit number, in most cases "69221." What is the significance of these designations?

To aid in the understanding of this print-out, I would appreciate copies of manuals, instructions, and other materials used to train or guide personnel in the operation and use of the system.

The Subcommittee has previously been informed that the Fort Monroe data bank was destroyed. On what date were the "master tapes" destroyed?

How many master tapes were there, and have all been destroyed? Were there any other tapes containing some or all of the information existing as of this destruction date? If so, have they all now been destroyed? When were these other tapes destroyed?

The brief discussion of the Fort Monroe data system in Mr. Froehlke's statement does not give many details. I would appreciate a detailed report of the origins, purposes, sources of data, and uses made or planned for this system. What specific programs was the system designed to support? Who authorized this system, and when? Who had access to the information in the system? How many print-outs were made? To whom were they distributed? Who is the highest ranking civilian in authority who approved or had actual knowledge of the data bank? When was the system discovered? What justification was made for maintaining the system and for seeking an exception to the discontinuance order of Secretary Resor? Were periodic teletype messages, estimates or summaries produced and, if so, to whom were they distributed? Please also answer the questions above relating to the master and other tapes for this computer system as well.

Reference has been made to a third data bank system at Fort Hood. The Subcommittee has even less information about this system. I would appreciate a full report on this, including information on the matters raised with respect to the other two computers. A print-out of this data system was not included in the materials transferred from the Department of Justice. Does a print-out or any other similar document exist which contains the information on that computer? If so, I would appreciate access to it as well.

During the hearings, references were made to a set of records called the "Van Deman" files. Have these files ever existed, and were they compiled by Army personnel in whole or part? Please describe the history, content and nature of the files. Were they ever in the custody or possession of the Army? If so, please give the dates, and the particulars of how they came into Army control. Are they still in Army control? If not, on what date did they leave Army control? Please give the particulars of how they left Army control. Did the Army have possession or control of them on the date Mr. Froehlke testified, or could they have regained control at that time? Why was no mention made of these files at the time of his testimony?

The Subcommittee is informed that reviews of files in the possession of the Department during the period of the Subcommittee's inquiries revealed a number which were specially segregated and destroyed because of their content or because the existence of files on these persons would

have been particularly embarrassing to the Department. Were any special reviews made of files, indexes, or the like to determine whether files on persons of prominence existed? If so, when was this review made? Were any such files discovered? Were the files destroyed? If so, when, by whom, and on whose authority or direction? Please describe the nature and contents of the files and list the names of the persons involved. Why was no mention made of this to the Subcommittee?

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Constitutional Rights.*

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*April 19, 1971.*

Hon. MELVIN R. LAIRD,  
*Secretary of Defense,*  
*Washington, D.C.*

DEAR MR. SECRETARY: For many months, as you know, the Subcommittee has been endeavoring to secure various kinds of information relating to Army surveillance and data bank programs which infringe on the privacy and First Amendment rights of citizens. My requests have included the appearance of certain officials of the Department, the delivery to the Subcommittee of various documents, and the declassification of others which have been made available. While certain of our requests have been granted, the most important information has thus far been denied the Subcommittee.

I now find to my surprise that information of the very sort we have sought for many months has been leaked to the press. This gives the appearance, if not the reality, of a contempt for the right of Congress and the American people to full information about the operations of their government. In the case of the Army's surveillance the people and their elected representatives are entitled to know precisely what the Department has been doing, and they are entitled to be given this information in a forthright manner.

While I had hoped throughout the course of this inquiry that the Subcommittee would receive the full cooperation of the Department, I have been disappointed. I am constrained to say that the cooperation we have received—and I have expressed my appreciation for it on many occasions—has not been complete. Despite outward appearances, we have received little information from the Department which we had not already secured elsewhere from sources outside the government. The information we have received from the Department has served merely to corroborate testimony presented by the witnesses which in any case could not have been successfully ignored or denied.

My correspondence with you and other members of the Department, as well as innumerable oral requests, has thus far produced unsatisfactory responses. I have requested the appearances of certain general officers in the Army who were charged with immediate supervision and implementation of this program. I have asked for documents of the same nature as that leaked to the press in the accompanying article. I have asked for other materials, as well, and for the declassification of a number

of them so that the Congress and the country could be informed of the nature and scope of this program. My reasons are set forth at length many times in my correspondence and I will not repeat them yet again.

I have no wish for a confrontation with the Department over the power of Congress and the American people to learn of the past activities of the Executive Branch. We have been told this Army program has now been ended. It is all history, and I see no reason why the country cannot be fully informed of its origins, extent, authority, purpose and usefulness. Certainly such a full public disclosure will impede no legitimate programs. It will serve the essential purpose of insuring that such illegitimate activities will not again occur. Public accountability is a cardinal principle of this nation. It is one of the few powerful weapons the people have to control their government.

Therefore, I call upon the Department once again to provide us with the witnesses, the documents, and the information we have requested. If the Subcommittee continues to be frustrated in its inquiry, and must rely upon leaks to the papers for its answers, I feel the Subcommittee has no recourse but to compel their production. I hesitate to take this step, but fully intend to do it if I have no other recourse.

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Constitutional Rights.*

THE SECRETARY OF DEFENSE,  
*Washington, D.C., April 19, 1971.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Upon receipt of your letter of March 30, 1971 requesting the appearance of further witnesses and the submission of additional information, I requested my General Counsel, Mr. J. Fred Buzhardt, to conduct an over-all review of the actions taken by the Department of Defense to furnish the Subcommittee with a full account of the information gathering activities of the Military Departments.

It may be worthwhile to summarize the events which led up to the Committee's hearings, and the Department's testimony in March of this year. As early as January 22, 1970, the Subcommittee requested the Department of the Army to survey the development and maintenance of its data banks, which survey was immediately begun. In March 1970, these inquiries were expanded to include the investigations conducted by the U.S. Army Intelligence Command. During the period, the Army was busily engaged in preparing and providing you data in response to your several inquiries. In July 1970, you directed a letter to me in which you addressed some nineteen questions regarding data banks containing personal information about individuals. At this point, the scope of the inquiries was further enlarged to include the other Military Departments as well as other Department of Defense components concerned with the collection of information about individuals.

The resulting compilation and submission of data by the Department over the next several months included memoranda, directives, military regulations, manuals, field

instructions, guidance letters, computer print-outs, and correspondence concerned with the general subject. To facilitate the Subcommittee's inquiries, interviews and briefings were also arranged both in Washington offices and in various field activities. Measured in terms of volume, the submission by the Military Departments included hundreds of documents. Measured in terms of effort, many thousands of manhours were willingly expended by Department of Defense personnel to accommodate to your requests.

At all times during this period leading up to February and March 1971 hearings, the Military Departments and the Office of the Secretary of Defense strove to respond to your requests, and to leave no stone unturned in an effort to get an accurate and complete picture of Departmental operations. At the same time the Department took steps to declassify its records whenever possible in order that your Subcommittee could include them in the public record. That this spirit of cooperation was recognized by your Subcommittee is reflected in your comments to the Departmental representatives during the hearings, and in your correspondence to me.

It was against this background that the Department of Defense decided that the proper spokesmen for the Department in these hearings should be the senior civilian officials directly responsible for the programs under review by your Subcommittee. As our General Counsel advised you, I designated the Assistant Secretary of Defense (Administration), Mr. Robert Froehlke, to represent me at the hearings and to provide you with an in-depth report of the events surrounding the counterintelligence role in the Military Departments. He was also directed to report to you the actions which have been taken to ensure that civilian control is maintained, and that adequate safeguards are instituted to ensure against violations of individual privacy. The Assistant Secretary and the General Counsel were completely candid in their evaluation of what transpired, and sought to give you a full and complete account of the organizational and policy changes which I had directed. The eighty-six page prepared statement by the Assistant Secretary attests to the thoroughness of his presentation, and to the willingness of the Department to make full and frank disclosures. The testimony of the Assistant Secretary was supplemented by that of the General Counsel of the Department of Defense, and in the closing part of the hearings by the General Counsel of the Department of the Army. Following the hearings, additional documents and information were collected and transmitted to your staff, and additional submissions will be forthcoming as a result of still further requests set forth in your March 30 letter.

Against this background of events, the request for the appearance of Major Generals McChristian, Blakefield and Yarborough before the Subcommittee is frankly disquieting. These individuals, while highly qualified in their area, cannot speak for the Department of Defense on the broader issues to which the Subcommittee has addressed its attention. These individuals do not occupy high level policy positions as they relate to central issues under discussion, but are instead under the direct supervision and control of senior civilian officials. Even though your invitation to these witnesses be based on a desire to review past events during the period 1967-1969, I believe this has been fully covered in the testimony and in the rec-

ords submitted by the Department of Defense before, during and subsequent to the hearings. Consequently, I do not believe it appropriate that the general officers in question appear before your Subcommittee, but that any "desired testimony" as referred to in your March 30 letter, should be furnished by my designated representative, Mr. Robert Froehlke.

As to the request that the Subcommittee have access to the Army's investigation of the 113th Intelligence Group, referred to in your letter as the "Plant" Board transcript and report, I fully concur in the position taken by my General Counsel during the hearings on March 2. As he noted, it is the policy of the Executive Branch not to divulge the contents of investigations while an investigation is still open and prior to final action being taken. As the testimony taken by the "Plant" Board may possibly provide the basis for disciplinary action, it would be inappropriate to authorize the release of these documents. To do so might jeopardize the rights of the people involved and prevent them from being afforded a fair hearing. In the General Counsel's letter to you on March 9, Mr. Buzhardt explained that in the course of an investigation and possible subsequent disciplinary actions the Army generals named above might be called upon to testify as to the nature of the instructions issued the military investigators assigned to the field activities.

With respect to the list of investigations made into Army intelligence operations, a print-out of the subordinate units inspected by the Army Intelligence Command was compiled in order to ensure compliance with the Department of the Army's policy letter of June 9, 1970. This print-out was given to your staff by Secretary Froehlke on March 2 immediately following the conclusion of his appearance before your Subcommittee.

As to the detailed questions regarding the computer print-out from the Fort Monroe computer, referred to on page 2 of your letter, the Department of the Army has been requested to compile the necessary information. As for the remaining questions which concern the Fort Monroe and Fort Hood data banks, and the additional files referred to on page 3 of your letter, these also have been referred to the appropriate offices for the preparation of a detailed response. Answers to these questions will be submitted by separate letter at an early date.

Following the dispatch of your March 30 letter to me, an oral request was made by your Chief Counsel to permit the Subcommittee to include in its report excerpts from the print-outs from the Army's Civil Disturbance Intelligence Data Banks. As you recall, the Department of Defense and the Department of Justice worked out arrangements whereby your staff was permitted to examine the print-outs in order that they might ascertain their general character and in order to get a general understanding of their intended purpose. The General Counsel's letter of March 19, 1971 expressly stated that none of the specific information contained in these print-outs should be made public. As was noted in that letter, "The kinds of characterizations and unsubstantiated information contained in these print-outs, like other information contained in intelligence files, could be misleading if taken out of context and could be detrimental to the individuals and organizations which are mentioned." Accordingly, I find that declassification of these documents cannot be accomplished.

In the past year, substantial changes have been made in the policy, organization and management procedures relating to our mutual areas of concern with military investigative activities. You noted in your letter to me of March 12 that "It is apparent that you and the other members of the Department have made a commendable effort to rectify the abuses of the past and to prevent their recurrence." It is my hope that our work, of which much remains to be done, can be concentrated on the positive

side of current and future management of military investigative activities, rather than in a continuing iteration of details of past activities which have already been thoroughly aired to the public. Our cooperation with your Subcommittee toward this objective, which I am sure you share with me, will continue.

Sincerely,

MELVIN R. LAIRD.

(154-C)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/25/72	Arthur F. Sampson Administrator General Services Administration	Clarification of GSA directives regarding the citizenship certification required of GSA contractors. The certification forms appear to conflict with the 1964 Civil Rights Act and violate individual rights.	Preliminary information submitted 10/26/72, no reply to follow up letter	Interim information supplied by Larry F. Roush	Reply did not address all the questions raised. No reply received to second request.
11/21/72	Larry F. Roush Acting Administrator General Services Administration				

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 154.

Submitted by: (Comm/Subcomm)  
Subcommittee on Constitutional Rights  
By: Irene R. Margolis  
Title: Professional Staff Member 58191  
Extension

(341)

## (154-D)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
2/18/71	Robert F. Froehlke Assistant Secretary of Defense	Col. John Downie Col. Thomas Mann William L. Parkinson Bland West Stanley R. Resor	Invited as witnesses at the Subcommittee's hearings on Army surveillance scheduled for March 2, 1971.	never answered in writing		Assistant Secretary Froehlke instructed J. Fred Buzhardt, General Counsel, to inform Senator Ervin that the Department was reluctant to make the witnesses available. The request for witnesses then focused on three other individuals.
2/25/71 (renewed request)						
3/4/71 (renewed request)						*See Subcommittee Hearings, Federal Data Banks, Computers and the Bill of Rights", Part II, pp. 1216-1217.

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 154

Submitted by: (Comm/SubComm)

Constitutional Rights Subcommittee

By: Irene R. Margolis

FILE: Professional Staff Member 58191

Extension

[Excerpt from hearings entitled "Federal Data Banks, Computers and the Bill of Rights," before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 92d Cong., 1st sess., pp. 1216-1217.]

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
February 18, 1971.

Hon. ROBERT F. FROEHLKE,  
Assistant Secretary of Defense,  
The Pentagon, Washington, D.C.

DEAR MR. FROEHLKE: Although you and Mr. Buzzhardt will be the main witnesses from the Department of Defense at the Subcommittee hearings on Tuesday, March 2, I should like to request that the following persons also be present that day for possible testimony before the Subcommittee:

Colonel John W. Downie, Director of Counterintelligence, OACSI.

Major General Joseph A. McChristian, ASCI.  
William L. Parkinson, Deputy Chief, CIAD.  
Stanley R. Resor, Secretary of Army.

Robert E. Jordan, III, General Counsel, Department of Army.

General William H. Blakefield, Former CG, USAINTC.  
Bland West, Deputy General Counsel, Department of Army.

Major General William P. Yarborough, former ACSI.  
Lt. Col. William Mann, Jr., Chief, Civil Disturbance Branch, OACSI.

I would like to reiterate my request that the classified materials you have sent the Subcommittee be declassified. This is particularly important with respect to the material I received on February 10. Because so many of these materials are now obsolete and have been superseded by subsequent Department of Defense guidelines, I see no purpose in maintaining the security classification of them.

Thank you very much for your cooperation and I look forward to hearing your testimony.

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Constitutional Rights.

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*March 4, 1971.*

Hon. MELVIN R. LAIRD,  
*Secretary of Defense, Washington, D.C.*

DEAR MR. SECRETARY: On February 18, 1971, I addressed a letter to Assistant Secretary Froehlke requesting that he make available certain persons in the Department for possible questioning at the Subcommittee hearing on March 2. To date he has not answered my letter directly, but he did instruct Mr. J. Fred Buzhardt, the General Counsel, to inform me that the Department was reluctant to make them available.

It has become obvious that the Subcommittee's inquiry into recent activity by military intelligence organizations—activity which you ended in your directive of March 1—cannot be concluded satisfactorily unless certain of the persons called for in my previous letter appear before the Subcommittee. While the testimony presented by Mr. Froehlke answers many of the Subcommittee's questions, it opened other important lines of inquiry which the Subcommittee must pursue, and left others unsatisfactorily unanswered.

For these reasons, I would like to request formally, on behalf of the Subcommittee, that the following persons appear before the Subcommittee:

Major General Joseph A. McChristian, Assistant Chief of Staff for Intelligence.

Major General William H. Blakefield, former Commander General, U.S. Army Intelligence Command.

Major General William P. Yarborough, former Assistant Chief of Staff for Intelligence.

In addition, I would like to ask that Mr. Jordan, General Counsel of the Army, also return at that time.

Since I understand that General Blakefield has returned from Korea in anticipation of his appearance, it would be best that the witnesses appear in the near future. Accordingly, their testimony has been scheduled for Wednesday, March 17, 1971, at 10:00 a.m.

With kindest wishes,

Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Constitutional Rights.*

## (154-E)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
2/18/71	Melvin R. Laird Secretary of Defense	Maj. Gen. Joseph A. McChristian Gen. William H. Blakefield Maj. Gen. William P. Yarborough	First hand testimony of surveillance activities of the military intelligence organizations during the Subcommittee's hearings on Federal Data Banks, Computers and the Bill of Rights.	3/9/71	J. Fred Buzhardt	"...it would be inappropriate for Generals McChristian, Blakefield and Yarborough to testify before your Subcommittee on this subject at this time."
3/4/71	Robert F. Froehlke Assistant Secretary of Defense			3/26/71	J. Fred Buzhardt	
3/12/71	J. Fred Buzhardt General Counsel Department of Defense			4/19/71 (rec'd 4/20/71)	Melvin R. Laird	"I do not believe it appropriate that the general officers in question appear before your Subcommittee, but that any 'desired testimony' as referred to in your March 30 letter, should be furnished by my designated representative..."
3/30/71						
4/19/71						

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 154:

Submitted by: (Comm/SubComm)  
Subcommittee on Constitutional Rights  
By: Irene R. Margolis  
Title: Professional Staff Member 58191  
Extension

[Excerpt from hearings entitled "Federal Data Banks Computers and the Bill of Rights," Part II, before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 92d Cong., 1st sess., February and March 1971, pp. 1216-1227]

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
February 18, 1971.

Hon. ROBERT F. FROEHLKE,  
Assistant Secretary of Defense,  
The Pentagon, Washington, D.C.

DEAR MR. FROEHLKE: Although you and Mr. Buzhardt will be the main witnesses from the Department of Defense at the Subcommittee hearings on Tuesday, March 2, I should like to request that the following persons also be present that day for possible testimony before the Subcommittee:

Colonel John W. Downie, Director of Counterintelligence, OACSI.

Major General Joseph A. McChristian, ASCI.  
William L. Parkinson, Deputy Chief, CIAD.  
Stanley R. Resor, Secretary of Army.

Robert E. Jordan, III, General Counsel, Department of Army,  
General William H. Blakefield, Former CG, USAINTC.  
Bland West, Deputy General Counsel, Department of Army.

Major General William P. Yarborough, former ACSI.  
Lt. Col. William Mann, Jr., Chief, Civil Disturbance Branch, OACSI.

I would like to reiterate my request that the classified materials you have sent the Subcommittee be declassified. This is particularly important with respect to the material I received on February 10. Because so many of these materials are now obsolete and have been superseded by subsequent Department of Defense guidelines, I see no purpose in maintaining the security classification on them.

Thank you very much for your cooperation and I look forward to hearing your testimony.

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Constitutional Rights.

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*March 4, 1971.*

Hon. MELVIN R. LAIRD,  
*Secretary of Defense, Washington, D.C.*

DEAR MR. SECRETARY: On February 18, 1971, I addressed a letter to Assistant Secretary Froehlke requesting that he make available certain persons in the Department for possible questioning at the Subcommittee hearing on March 2. To date he has not answered my letter directly, but he did instruct Mr. J. Fred Buzhardt, the General Counsel, to inform me that the Department was reluctant to make them available.

It has become obvious that the Subcommittee's inquiry into recent activity by military intelligence organizations—activity which you ended in your directive of March 1—cannot be concluded satisfactorily unless certain of the persons called for in my previous letter appear before the Subcommittee. While the testimony presented by Mr. Froehlke answers many of the Subcommittee's questions, it opened other important lines of inquiry which the Subcommittee must pursue, and left others unsatisfactorily unanswered.

For these reasons, I would like to request formally, on behalf of the Subcommittee, that the following persons appear before the Subcommittee:

Major General Joseph A. McChristian, Assistant Chief of Staff for Intelligence.

Major General William H. Blakefield, former Commander General, U.S. Army Intelligence Command.

Major General William P. Yarborough, former Assistant Chief of Staff for Intelligence.

In addition, I would like to ask that Mr. Jordan, General Counsel of the Army, also return at that time.

Since I understand that General Blakefield has returned from Korea in anticipation of his appearance, it would be best that the witnesses appear in the near future. Accordingly, their testimony has been scheduled for Wednesday, March 17, 1971, at 10:00 a.m.

With kindest wishes,

Sincerely yours,

SAM J. ERVIN, JR.,

*Chairman, Subcommittee on Constitutional Rights.*

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GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
*Washington, D.C., March 9, 1971.*

Hon. SAM J. ERVIN, JR.,  
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: The Secretary asked that I reply to your letter of March 4th with reference to additional witnesses from the Army for your Subcommittee on Constitutional Rights.

It comes as a surprise that you feel that Secretary Froehlke left some of your questions unanswered in his appearance on March 2nd before your Subcommittee. A review of the transcript revealed but one request by your Subcommittee for information to be submitted for the record. The material requested was for the organization and manning of the Army Intelligence Command and this material is being compiled for submission.

Assistant Secretary Froehlke remains available as a witness to provide any additional information your Subcommittee requires. Mr. Jordan, General Counsel of the Army, will be available to accompany him.

As Mr. Froehlke advised the Subcommittee during his testimony, formal investigations are in progress in connection with the activities of two organizational units of the Army. It is quite possible that any one or perhaps all three of the general officers, whom you requested to appear before your Subcommittee on March 17th, could be material witnesses in formal proceedings which might grow out of the current investigations. I am sure you will agree, that in order to protect the due process rights of any persons who might be the subject of criminal or administrative charges as a result of the current investigations, it would be inappropriate for Generals McChristian, Blakefield and Yarborough to testify before your Subcommittee on this subject at this time.

As I am sure you are aware, both General Blakefield and General Yarborough are presently assigned to command positions of heavy responsibility outside the continental limits of the United States.

Please be assured that the Department continues to stand ready to provide to the fullest extent possible such additional information as you and your Subcommittee need for the completion of these legislative hearings.

Sincerely yours,

J. FRED BUZHARDT.

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U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*March 12, 1971.*

Hon. MELVIN R. LAIRD,  
*Secretary of Defense,  
Washington, D.C.*

DEAR MR. SECRETARY: Thank you for your response, through General Counsel Buzhardt, in reply to my letter of March 4 repeating my request that Generals McChristian, Yarborough and Blakefield appear before the Subcommittee to testify.

As I have often expressed both publicly and privately, the Subcommittee appreciates the fine spirit of cooperation which the Department has demonstrated during the course of our inquiry. There is no question but that you and the Department have rendered a fine public service by the way in which this matter has been approached. Mr. Froehlke's statement was extremely helpful and served to clear up many questions the Subcommittee and the public had with respect to the events of the past few years. Although I have not yet had an opportunity to study in detail the new rules promulgated by the Department for future domestic intelligence, it is apparent that you and the other members of the Department have made a commendable effort to rectify the abuses of the past and to prevent their reoccurrence.

Despite the great progress which has been made thus far, there still remain some important matters which must be cleared up. Chief among the issues is the question of the extent to which the intelligence-gathering was ordered or approved by higher civilian authority. It is also necessary to determine the extent and level of civilian

knowledge of these activities during various times throughout the period in question.

Mr. Froehlke's testimony was very helpful in these matters. However, the Subcommittee has had no direct, positive evidence from those in a position to know the facts. As Mr. Froehlke pointed out so well, the evidence on this difficult point must be reconstructed from the memories of those who participated. He, of course, like yourself, was not in office at the time and he was given formal and direct responsibility for these matters only recently.

The Subcommittee has not thus far been given access to the memoranda, notes, chronologies and other documents upon which Mr. Froehlke's statements were based or to which he referred. These are matters which can only be clarified by the appearance of those in the military service who were direct participants in these operations or who were immediately responsible for the implementation of the programs.

One very serious question, which only such individuals can assist in answering, concerns the effectiveness of the intelligence operations and their usefulness in helping the Army, the Department of Justice, and state and local officers in meeting their responsibilities when they were called upon to put down civil disorders. We have not as yet received an assessment of this activity from the experts who are in position to inform the Subcommittee and the American people. Only direct, positive testimony from officers whose business it is to provide useful intelligence can give us this evaluation.

There are other points upon which their testimony will be helpful. We wish to learn, for instance, how many agents were employed in domestic intelligence work, what their geographic areas of responsibility were, how many meetings, speeches, campuses, and other activities were covered, and other such information.

I am very mindful of the sensitivity of testimony which might conceivably be presented by these generals. As a former judge and as one who has long been striving for the finest possible systems of military and civilian justice, I am most cautious lest any public testimony prejudice prosecutions which may develop out of this inquiry. However, it is difficult to determine from the current state of Subcommittee knowledge how any testimony we might desire from these gentlemen could in any way be involved in a future trial. For this reason, I believe it would be helpful if you would inform me, in detail, of the nature of the possible prosecutions, the persons involved, the substance of the allegations, and the particulars of the statutes and regulations that may have been violated. I realize that you are in an early stage of determining whether there occurred any violations subject to court-martial proceedings. However, as is evident from the testimony and Mr. Buzhardt's letter, this is more than a hypothetical possibility.

The Subcommittee wishes to avoid any possibility of prejudicing in any way the future rights of any person who may be subject to court-martial. I will certainly inform other members of the Subcommittee of the possible difficulty and encourage each of them to exercise great care during the conduct of the hearing. Since each member of this Subcommittee is a lawyer and each has been involved in the Subcommittee's prior efforts to ensure that every soldier is protected by the finest system of justice

possible, I have every confidence that the fears expressed in Mr. Buzhardt's letter can easily be avoided.

I believe that if these gentlemen are permitted to testify, we can demonstrate to the American citizen beyond question that any lingering doubts he might have about the issues under investigation are without foundation. I am certain you agree with me that it is important that the Congress and the Defense Department not give any citizen any reason to believe that the full story about surveillance of civilians has not yet been told. I firmly believe that the appearance of these gentlemen at a full public hearing will go far towards achieving this important goal.

Once again, I want you to know of my appreciation for the fine cooperation which you have shown thus far in our inquiry.

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Constitutional Rights.*

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
*Washington, D.C., March 26, 1971.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Committee on the Judiciary, Subcommittee on Constitutional Rights, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The Secretary of Defense has requested me to respond to your letter of March 12th and to thank you for your complimentary remarks on the cooperation of the Department of Defense, and on Mr. Froehlke's testimony in connection with the recent hearings of your Subcommittee on Constitutional Rights.

I recall that you told me in one of our earlier meetings that the purpose of your investigation was to assist in bringing about a correction of whatever excesses or inappropriate activities existed or had existed in connection with gathering by military organizations of information on individuals and organizations not affiliated with the Department of Defense. The Secretary of Defense and the Department concurred wholeheartedly in that objective and is intent on continuing cooperation with you toward that end.

In this connection, the transcript of the hearing at which Mr. Froehlke testified has been carefully reviewed to insure that all information requested by you and the other Senators who participated has been supplied in full. In addition, supplemental material has been provided in a number of areas which appear to be useful to your Committee in fully evaluating the subjects of your interest.

Among the materials requested by you during the hearings was data on the organization and manning of the Army's investigative and counterintelligence units within the United States. This material is being provided with respect both to the United States Army Intelligence Command and the military intelligence detachments and units which are assigned to combatant forces. Appropriate maps are also being provided to show the location of these units and, where applicable, their geographic areas of responsibility.

Also in response to a request by Senator Kennedy, we are furnishing the number of agents involved in direct observation and the types of utilization made of them in connection with major disturbances.

To the best of our knowledge, these are the only two questions asked during the full day's testimony by Mr. Froehlke in which answers to the Committee's inquiries could not be fully provided at that time.

In your letter, you noted that you had not yet received an assessment of the effectiveness of the intelligence operations and their usefulness in helping the Army, the Department of Justice, and state and local offices in meeting their responsibilities when they were called upon to put down civil disorders. We cannot, of course, respond for the Department of Justice, but we have noted that officials of that Department have appeared before your Committee on two occasions.

Neither could we presume to evaluate any assistance which might have incidentally been provided to state and local officials from the civil disturbance information collection activities. The Department of the Army and the Department of Defense, however, have assessed the effectiveness and usefulness of the types of civil disturbance information collected in past years. This evaluation has been made by senior civilian officials of the Department of the Army and the Department of Defense. As I am sure you know, those charged with the responsibility of collecting information are not in the best position to evaluate its usefulness to the decision makers, and respond to requirements for information, which, when collected, is considered, together with information from other sources, by those they support.

The civil disturbance information collection by the military (primarily the Army) was broadly expanded in 1967 in the hope and expectation that on the basis of a wide range of information collected it might be possible to predict with a creditable degree of accuracy the occurrence of civil disturbances which might be sufficiently severe to require the assistance to state and local law enforcement agencies by military forces. However, as Secretary of the Army Resor stated in his letter to Congressman Ogden Reid on 13 February 1971, "we also concluded from our experience in collecting civil disturbance information for over two years that we could not predict, with any degree of assurance, which disturbances would be sufficiently severe to require the Army to assist state and local law enforcement agencies." This conclusion contributed to the decision by the Department of the Army on June 9, 1970, and to that of the Secretary of Defense in March of this year, to severely constrain the collection of civil disturbance information by military organizations and personnel. As you know, the Department of Defense now relies on the Department of Justice to provide adequate alert to the Department of Defense on situations which might require prepositioning or deployment of military units to assist state and local law enforcement agencies in civil disturbance situations.

As you noted, Mr. Froehlke did testify on the extent to which civil disturbance information collection by the military was ordered or approved by higher civilian authorities. Please be assured that Mr. Froehlke was in a position to know the facts since he had at his disposal all of the records of the Department. His familiarity, as I am sure you will agree, is indicated by his extensive recital on the types of civilian knowledge and involvement indicated by the records. As Mr. Froehlke testified, internal memoranda of interagency group meetings at the White House and elsewhere demonstrated that senior civilian

officials fully participated in the civil disturbances planning. Further, the Civil Disturbance Information Collection Plan of May 1968 was, as you know, widely distributed to the appropriate civilian levels of authority in the Government. Additionally, Congressional committees were notified of the military's participation in the collection of civil disturbance information.

This ability to provide a broad overview of events is contrasted with the more restricted knowledge of subordinate commanders or staff officers. Such officers receive their direction through formal channels, and in the normal course of business, do not have direct knowledge of the acts of civilian officials either at the Department level, at higher echelons of Government, or in other departments of Government.

The formal investigations to which I referred in my letter to you of March 9th were initiated with respect to allegations that military personnel from Fort Carson units and from undetermined units in Texas had engaged in information collection activities on individuals not affiliated with the Department of Defense. The allegations were directed at personnel of other than the United States Army Intelligence Command. The initial purposes of the investigation are to determine which, if any, of the allegations are factually based, who participated and who directed the activities, if any, to be performed. Once these questions are answered, it will be necessary to determine, if such occurred, under what authority they were conducted, and whether any of the activities exceeded the authority vested in the commander who initiated them. These activities are being subjected to formal investigation because there is no present evidence that civilian authorities specifically authorized such activities or were aware of them. At this stage of the investigation, it is not possible to anticipate what might be the nature of the judicial or administrative actions, if any, that result.

It is hoped that this additional information will be of assistance to your Committee.

Sincerely yours,

J. FRED BUZHARDT.

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U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*March 30, 1971.*

Hon. MELVIN R. LAIRD,  
*Secretary of Defense,*  
*Washington, D.C.*

DEAR MR. SECRETARY: In the short time since the recess of the Subcommittee's hearings, I have had an opportunity to review the testimony and other information relating to data gathering by the Defense Department. Although my review is by no means complete, a number of questions occur at this time, and I would appreciate your assistance in having them answered. In addition, there are still a number of unresolved requests which I have made in the past. These are:

Permission for Major General Joseph A. McChristian, General William H. Blakefield and Major General William P. Yarborough to testify at the hearings.

Access to the "Plant" Board transcript and reports, if any.

A copy of the list of investigations made into Army intelligence operations. (March 2 hearings, transcript p. 657-658)

A complete report on the courts-martial investigation referred to by Mr. Buzhardt in his letter to me of March 9. Mr. Buzhardt's letter of March 26 does not elaborate on the information he previously furnished nor does it explain why this investigation relates in any way to the desired testimony from the Generals.

I hope that these requests of mine can be granted without any additional delay.

I have reviewed the materials which the Department of Army transferred to the Department of Justice for possible use in the *Tatum* case. I appreciate the cooperation of Mr. Buzhardt in enabling me to have temporary custody of these materials.

I believe that the record of the hearings would be seriously incomplete if a description of them were omitted. For that reason, I would like to request that the materials be declassified. Since they are being held for possible use in the lawsuit, obviously this may have to be done eventually in any case. The Subcommittee, of course, will, as it has throughout the hearings, respect the privacy of persons whose names appear in these materials.

With respect to the computer print-out from the Fort Monroe computer, I should appreciate answers to the following:

1. Following the name and address of each entry, there is a designation "PLINK," and a 9-digit number, apparently consecutive throughout most, but not all of the six-volume print-out. What is this reference, and what is the significance of the "PLINK" numbers which are not consecutive?

2. After "Data Source," most of the designations are "FBI." How was this information obtained from the FBI; pursuant to what authority; was it done on a case-by-case basis, or by general authority; from what level of the FBI did the approval and the information come? Please submit copies of all regulations, and agreements pertinent to your answers.

3. Some of the "Data Source" designations are 10-digit letter-number combinations—for example "9015004 USC." What do these designations mean? What is the source of data where there is no entry after "Data Source"?

4. Following each entry is a 17-category list, including "Ethnic Group," "Race," "Religion," etc. What are the possible entries for "Character," "Leader Of," "Effectiveness," and "Picture," and what is the meaning or definition of each possible entry? How and by whom were these categorizations made?

5. Following these categories, there appears "Entry #. Organizational Membership. Influence Therein" and below this certain numbers. Under "Entry #" there appears most often "001" followed by a 7-digit letter-number designation, apparently identifying organizations and perhaps also membership. Please explain these designations and list all the organizations which have such designations. Are these references to other files or data banks, either maintained now or in the past by your Department, or any other federal or State agency?

6. Following each entry at the right margin in a 5-digit number, in most cases "69221," What is the significance of these designations?

To aid in the understanding of this print-out, I would appreciate copies of manuals, instructions, and other materials used to train or guide personnel in the operation and use of the system.

The Subcommittee has previously been informed that the Fort Monroe data bank was destroyed. On what date were the "master tapes" destroyed?

How many master tapes were there, and have all been destroyed? Were there any other tapes containing some or all of the information existing as of this destruction date? If so, have they all now been destroyed? When were these other tapes destroyed?

The brief discussion of the Fort Monroe data system in Mr. Froehlke's statement does not give many details. I would appreciate a detailed report of the origins, purposes, sources of data, and uses made or planned for this system. What specific programs was the system designed to support? Who authorized this system, and when? Who had access to the information in the system? How many print-outs were made? To whom were they distributed? Who is the highest ranking civilian in authority who approved or had actual knowledge of the data bank? When was the system discovered? What justification was made for maintaining the system and for seeking an exception to the discontinuance order of Secretary Resor? Were periodic teletype messages, estimates or summaries produced and, if so, to whom were they distributed? Please also answer the questions above relating to the master and other tapes for this computer system as well.

Reference has been made to a third data bank system at Fort Hood. The Subcommittee has even less information about this system. I would appreciate a full report on this, including information on the matters raised with respect to the other two computers. A print-out of this data system was not included in the materials transferred from the Department of Justice. Does a print-out or any other similar document exist which contains the information on that computer? If so, I would appreciate access to it as well.

During the hearings, references were made to a set of records called the "Van Deman" files. Have these files ever existed, and were they compiled by Army personnel in whole or part? Please describe the history, content and nature of the files. Were they ever in the custody or possession of the Army? If so, please give the dates, and the particulars of how they came into Army control. Are they still in Army control? If not, on what date did they leave Army control? Please give the particulars of how they left Army control. Did the Army have possession or control of them on the date Mr. Froehlke testified or, could they have regained control at that time? Why was no mention made of these files at the time of his testimony?

The Subcommittee is informed that reviews of files in the possession of the Department during the period of the Subcommittee's inquiries revealed a number which were specially segregated and destroyed because of their content or because the existence of files on these persons would have been particularly embarrassing to the Department. Were any special reviews made of files, indexes, or the like to determine whether files on persons of prominence existed? If so, when was this review made? Were any such files discovered? Were the files destroyed? If so, when, by whom, and on whose authority or direction? Please

describe the nature and contents of the files and list the names of the persons involved. Why was no mention made of this to the subcommittee?

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.  
*Chairman, Subcommittee on Constitutional Rights.*

APRIL 19, 1971.

Hon. MELVIN R. LAIRD,  
*Secretary of Defense,*  
*Washington, D.C.*

DEAR MR. SECRETARY: For many months, as you know, the Subcommittee has been endeavoring to secure various kinds of information relating to Army surveillance and data bank programs which infringe on the privacy and First Amendment rights of citizens. My requests have included the appearance of certain officials of the Department, the delivery to the Subcommittee of various documents and the declassification of others which have been made available. While certain of our requests have been granted, the most important information has thus far been denied the Subcommittee.

I now find to my surprise that information of the very sort we have sought for many months has been leaked to the press. This gives the appearance, if not the reality, of a contempt of the right of Congress and the American people to full information about the operations of their government. In the case of the Army's surveillance the people and their elected representatives are entitled to know precisely what the Department has been doing, and they are entitled to be given this information in a forthright manner.

While I had hoped throughout the course of this inquiry that the Subcommittee would receive the full cooperation of the Department, I have been disappointed. I am constrained to say that the cooperation we have received—and I have expressed my appreciation for it on many occasions—has not been complete. Despite outward appearances, we have received little information from the Department which we had not already secured elsewhere from sources outside the government. The information we have received from the Department has served merely to corroborate testimony presented by the witnesses which have been successfully ignored or denied.

My correspondence with you and other members of the Department, as well as innumerable oral requests, has thus far produced unsatisfactory responses. I have requested the appearances of certain general officers in the Army who were charged with immediate supervision and implementation of this program. I have asked for documents, of the same nature as that leaked to the press in the accompanying article. I have asked for other materials, as well, and for the declassification of a number of them so that the Congress and the country could be informed of the nature and scope of this program. My reasons are set forth at length many times in my correspondence and I will not repeat them yet again.

I have no wish for a confrontation with the Department over the power of Congress and the American people to learn of the past activities of the Executive Branch. We have been told this Army program has now been ended.

It is all history, and I see no reason why the country cannot be fully informed of its origins, extent, authority, purpose and usefulness. Certainly such a full public disclosure will impede no legitimate programs. It will serve the essential purpose of insuring that such illegitimate activities will not again occur. Public accountability is a cardinal principle of this nation. It is one of the few powerful weapons the people have to control their government.

Therefore, I call upon the Department once again to provide us with the witnesses, the documents, and the information we have requested. If the Subcommittee continues to be frustrated in its inquiry, and must rely upon leaks to the papers for its answers, I feel the Subcommittee has no recourse but to compel their production. I hesitate to take this step, but fully intend to do it if I have no other recourse.

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.  
*Chairman, Subcommittee on Constitutional Rights.*

THE SECRETARY OF DEFENSE,  
*Washington, D.C., April 19, 1971.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Constitutional Rights, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Upon receipt of your letter of March 30, 1971, requesting the appearance of further witnesses and the submission of additional information, I requested my General Counsel, Mr. J. Fred Buzhardt, to conduct an over-all review of the actions taken by the Department of Defense to furnish the Subcommittee with a full account of the information gathering activities of the Military Departments.

It may be worthwhile to summarize the events which led up to the Committee's hearings, and the Department's testimony in March of this year. As early as January 22, 1970, the Subcommittee requested the Department of the Army to survey the development and maintenance of its data banks, which survey was immediately begun. In March 1970, these inquiries were expanded to include the investigations conducted by the U.S. Army Intelligence Command. During this period the Army was busily engaged in preparing and providing you data in response to your several inquiries. In July 1970, you directed a letter to me in which you addressed some nineteen questions regarding data banks containing personal information about individuals. At this point, the scope of the inquiries was further enlarged to include the other Military Departments as well as other Department of Defense components concerned with the collection of information about individuals.

The resulting compilation and submission of data by the Department over the next several months included memoranda, directives, military regulations, manuals, field instructions, guidance letters, computer print-outs, and correspondence concerned with the general subject. To facilitate the Subcommittee's inquiries, interviews and briefings were also arranged both in Washington offices and in various field activities. Measured in terms of volume, the submission by the Military Departments in-

cluded hundreds of documents. Measured in terms of effort, many thousands of manhours were willingly expended by Department of Defense personnel to accommodate to your requests.

At all times during this period leading up to February and March 1971 hearings, the Military Departments and the Office of the Secretary of Defense strove to respond to your requests, and to leave no stone unturned in an effort to get an accurate and complete picture of Departmental operations. At the same time the Department took steps to declassify its records whenever possible in order that your Subcommittee could include them in the public record. That this spirit of cooperation was recognized by your Subcommittee is reflected in your comments to the Departmental representatives during the hearings, and in your correspondence to me.

It was against this background that the Department of Defense decided that the proper spokesmen for the Department in these hearings should be the senior civilian officials directly responsible for the programs under review by your Subcommittee. As our General Counsel advised you. I designated the Assistant Secretary of Defense (Administration), Mr. Robert Froehlke, to represent me at the hearings and to provide you with an in-depth report of the events surrounding the counterintelligence role in the Military Departments. He was also directed to report to you the actions which have been taken to ensure that civilian control is maintained, and that adequate safeguards are instituted to ensure against violations of individual privacy. The Assistant Secretary and the General Counsel were completely candid in their evaluation of what transpired, and sought to give you a full and complete account of the organizational and policy changes which I had directed. The eighty-six page prepared statement by the Assistant Secretary attests to the thoroughness of his presentation, and to the willingness of the Department to make full and frank disclosures. The testimony of the Assistant Secretary was supplemented by that of the General Counsel of the Department of Defense, and in the closing part of the hearings by the General Counsel of the Department of the Army. Following the hearings, additional documents and information were collected and transmitted to your staff, and additional submissions will be forthcoming as a result of still further requests set forth in your March 30 letter.

Against this background of events, the request for the appearance of Major Generals McChristian, Blakefield and Yarborough before the Subcommittee is frankly disquieting. These individuals, while highly qualified in their area, cannot speak for the Department of Defense on the broader issues to which the Subcommittee has addressed its attention. These individuals do not occupy high level policy positions as they relate to central issues under discussion, but are instead under the direct supervision and control of senior civilian officials. Even though your invitation to these witnesses be based on a desire to review past events during the period 1967-1969, I believe this has been fully covered in the testimony and in the records submitted by the Department of Defense before, during and subsequent to the hearings. Consequently, I do not believe it appropriate that the general officers in question appear before your Subcommittee, but that any "desired testimony" as referred to in your March 30 letter, should

be furnished by my designated representative, Mr. Robert Froehlke.

As to the request that the Subcommittee have access to the Army's investigation of the 113th Intelligence Group, referred to in your letter as the "Plant" Board transcript and report, I fully concur in the position taken by my General Counsel during the hearings on March 2. As he noted, it is the policy of the Executive Branch not to divulge the contents of investigations when an investigation is still open and prior to final action being taken. As the testimony taken by the "Plant" Board may possibly provide the basis for disciplinary action, it would be inappropriate to authorize the release of these documents. To do so might jeopardize the rights of the people involved and prevent them from being afforded a fair hearing. In the General Counsel's letter to you on March 9, Mr. Buzhardt explained that in the course of an investigation and possible subsequent disciplinary actions the Army generals named above might be called upon to testify as to the nature of the instructions issued the military investigators assigned to the field activities.

With respect to the list of investigations made into Army intelligence operations, a print-out of the subordinate units inspected by the Army Intelligence Command was compiled in order to ensure compliance with the Department of the Army's policy letter of June 9, 1970. This print-out was given to your staff by Secretary Froehlke on March 2 immediately following the conclusion of his appearance before your Subcommittee.

As to the detailed questions regarding the computer print-out from the Fort Monroe computer, referred to on page 2 of your letter, the Department of the Army has been requested to compile the necessary information. As for the remaining questions which concern the Fort Monroe and Fort Hood data banks, and the additional files referred to on page 3 of your letter, these also have been referred to the appropriate officers for the preparation of a detailed response. Answers to these questions will be submitted by separate letter at an early date.

Following the dispatch of your March 30 letter to me, an oral request was made by your Chief Counsel to permit the Subcommittee to include in its report excerpts from the print-outs from the Army Civil Disturbance Intelligence Data Banks. As you recall, the Department of Defense and the Department of Justice worked out arrangements whereby your staff was permitted to examine the print-outs in order that they might ascertain their general character and in order to get a general understanding of their intended purpose. The General Counsel's letter of March 19, 1971 expressly stated that none of the specific information contained in these print-outs should be made public. As was noted in that letter, "The kinds of characterization and unsubstantiated information contained in these print-outs, like other information contained in intelligence files, could be misleading if taken out of context and could be detrimental to the individuals and organizations which are mentioned." Accordingly, I find that declassification of these documents cannot be accomplished.

In the past year, substantial changes have been made in the policy, organization and management procedures relating to our mutual areas of concern with military investigative activities. You noted in your letter to me of

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Citation:

351 (1974) <br> <span class="cite\_title"> Refusals by the Executive Branch to provide information to the Congress, 1964-1973 : a survey conducted by the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, of instances in which executive agencies of the government have withheld information from members and Committees of the Congress and from the Comptroller General of the United States. </span>

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March 12 that "It is apparent that you and the other members of the Department have made a commendable effort to rectify the abuses of the past and to prevent their recurrence." It is my hope that our work, of which much remains to be done, can be concentrated on the positive side of current and future management of military investigative activities, rather than in a continuing

iteration of details of past activities which have already been thoroughly aired to the public. Our cooperation with your Subcommittee toward this objective, which I am sure you share with me, will continue.

Sincerely,

MELVIN R. LAIRD.

(154-F)

## SURVEY FORM 11: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
9/16/71	Herbert Klein Director of Communications White House	Herbert Klein	In connection with the Subcommittee's study and hearings on Freedom of the Press, Mr. Klein was invited to present the Administration's policies and working arrangements respecting the press,	9/21/71	Herbert Klein	"In response to your letter of September 16, 1971 requesting me to appear before your Subcommittee on September 29, 1971, I wish to advise you that, as a member of the immediate staff of the President, I must respectfully decline the invitation to testify."

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)Constitutional Rights Subcommittee

By: Irene R. McGoli

TITLE: Professional Staff Member 8191  
ExtensionFILE 154

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
September 16, 1971.

Mr. HERBERT G. KLEIN,  
*Director of Communications for the Executive Branch,  
Executive Offices of the President, Washington, D.C.*

DEAR MR. KLEIN: As part of its study on the state of freedom of the press in America, the Senate Subcommittee on Constitutional Rights has scheduled hearings this fall to explore the constitutional issues and practical problems surrounding the First Amendment's guarantee of freedom of the press.

I am writing to invite you to appear before the Subcommittee and present testimony concerning this subject. The hearings will begin on September 28, 1971, and will continue through the next few weeks. If possible, I would like for you to appear on the morning of Wednesday, September 29, 1971.

The scope of the Subcommittee's study is broad. Among other matters, we are concerned about the increased subpoenaing of newsmen by government, the recent effort to secure injunctions against certain newspapers, the use

of false press credentials for investigative "covers," and new fears about government control and regulation of the broadcast media.

We intend to examine the application of First Amendment principles to both the printed and broadcast press and to analyze the relationship between the press and all branches of the government. We will be seeking to create a better appreciation of the First Amendment's purpose and its crucial importance to a free society.

In view of your responsibilities as the President's chief officer for communications policy, the Subcommittee would be particularly interested in your presentation of the White House's position on the problems surrounding the relationship between the office of the Presidency and the press. A description of this Administration's policies and working arrangements respecting the press would be most helpful. As you are aware, there has been much controversy recently about this relationship. An examination of this problem and other matters connected with the state of freedom of the press will hopefully lead to increased understanding and better cooperation between the Administration and the press.

In my judgment, it is necessary at this time in our nation's history to re-examine the purposes and the principles embodied in the constitutional guarantee of freedom of the press. I am confident that your participation in the Subcommittee's hearings will be of great assistance in this endeavor.

Subcommittee rules require 10 copies of a witness's statement one week in advance of the scheduled appearance and 50 additional copies to be made available when testimony is presented.

I look forward to hearing from you in the near future. If you have any questions about your appearance before the Subcommittee or about the hearings in general, please feel free to contact me or the staff of the Subcommittee at 202-225-8191.

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Constitutional Rights.*

[Excerpt from hearings entitled "Freedom of the Press," before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st and 2d sess., September and October 1971, and February 1972.]

THE WHITE HOUSE,

Washington, D.C., September 21, 1971.

Hon. SAM J. ERVIN, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your letter of September 16, 1971 requesting me to appear before your Subcommittee on September 29, 1971, I wish to advise you that, as a member of the immediate staff of the President, I must respectfully decline the invitation to testify.

Sincerely,

HERBERT G. KLEIN,  
*Director of Communications for the Executive Branch.*

## (154-G)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY.

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
11/12/71	Richard M. Nixon President	Fredric V. Malek Charles W. Colson	Testify at hearings on Freedom of the Press regarding reports of an alleged investigation of Mr. Daniel Schorr.	undated letter delivered just prior to hearings which resumed 2/1/72.	John W. Dean III	"With respect to your request for the appearance of Mr. Malek and Mr. Colson before your Subcommittee, it has been a matter of long-established principle and precedent that members of the President's immediate staff do not appear before Congressional committees to testify in regard to the performance of their duties as members of the President's staff.... Therefore, I wish to advise you that Mr. Malek and Mr. Colson respectfully decline the invitation to testify."

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973.  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

Constitutional Rights Subcommittee

By: Irene R. Margolis

TITLE: Professional Staff Member 58191

Extension

FILE 154:

U.S. SENATE,  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,  
COMMITTEE ON THE JUDICIARY,  
November 12, 1971.

Hon. RICHARD M. NIXON,  
*The President,*  
*The White House*

DEAR MR. PRESIDENT: As you know, the Senate Subcommittee on Constitutional Rights has been conducting hearings on the state of freedom of the press in our country. We are giving special attention to the relationship between government and the press and the impact of this relationship upon First Amendment freedoms.

In personal letters inviting several high-level officials of your Administration to present testimony to the Subcommittee, I have expressed my concern over the increasing suspicion of many Americans that government appears anxious to use its power to control the press for its own purposes. Recent newspaper reports of an alleged investigation of Mr. Daniel Schorr, correspondent for Columbia Broadcasting System, by the Federal Bureau of Investigation, have clearly exacerbated this suspicion. One report suggests that this investigation was undertaken under the guise of considering Mr. Schorr for a top position in the

Federal government. Apparently neither Mr. Schorr nor various White House officials with general responsibility in the area of recruiting were aware of any such appointment under consideration.

I am deeply concerned over the fears, even unwarranted fears, which may arise from the public reports concerning the alleged investigation of Mr. Schorr. First Amendment freedoms can be stilled by intimidation and suggestion from those who have official power just as surely as they can by direct curtailment.

I should like to urge that you make inquiry into this matter and that you provide me with any information developed therefrom. I also intend to invite Mr. Schorr, Mr. Malek, Mr. Colson and other persons involved in this incident to appear before the Subcommittee when it resumes hearings on freedom of the press early in January. In addition, may I express again the desire of the Subcommittee on Constitutional Rights to have Mr. Klein or some other official of comparable responsibility from the White House also testify.

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman.*

THE WHITE HOUSE,  
Washington, November 22, 1971.

Hon. SAM J. ERVIN, JR.,  
Chairman, Subcommittee on Constitutional Rights, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The President has asked me to respond to your letter of November 12, 1971, in which you expressed concern over the recent incident involving Mr. Daniel Schorr of the Columbia Broadcasting System and the possible appearance of harassment of the news media by the government.

This matter has been fully and carefully reviewed. There are no indications of any intent on the part of anyone on the White House staff to harass or intimidate Mr. Schorr by initiating an investigation into his background.

Upon reviewing the incident, the President has ordered that no routine background investigation will be initiated on an individual without prior notification to the person that the investigation is to be conducted. I am sure that this policy change will help to eliminate any possible misinterpretation of personnel investigations in the future.

Your interest in this matter is greatly appreciated and understood, as it has always been the policy and concern of this Administration to take all steps necessary to insure and guarantee the preservation of every citizen's First Amendment rights and freedoms.

Sincerely,

JOHN W. DEAN, III,  
*Counsel to the President.*

U.S. SENATE,  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,  
COMMITTEE ON THE JUDICAIY,  
December 3, 1971.

Hon. RICHARD M. NIXON,  
*The President,*  
*The White House,*  
*Washington, D.C.*

DEAR MR. PRESIDENT: I have received a letter from Mr. John W. Dean III, of the White House staff, in response to my earlier letter to you of November 12, 1971, concerning the recent FBI investigation of Mr. Daniel Schorr. I was encouraged to learn that you have ordered that no routine background investigation shall be initiated on an individual without prior notification to the person involved.

While I welcome Mr. Dean's assurances that no member of the White House staff intended to intimidate Mr. Schorr, or the news media in general, I believe this incident has raised serious questions and lingering suspicions in the minds of many Americans. In my judgment, these questions and suspicions cannot be laid to rest, nor should they be, with the simple assurances from those involved that no intimidation was intended. This is why, in my first letter to you, I requested an inquiry on your part and a report of the information developed therefrom.

Specifically, the Subcommittee would like to know when the investigation of Mr. Schorr was begun, how long it was continued, its nature and scope, and the specific authority under which it was conducted. We should also

like to know for which position or positions in the government Mr. Schorr was being considered. We would like to find out what has happened to the information which was collected on Mr. Schorr. Was any official investigative file on him established in connection with this background check, and, if so, is it still in existence? This and similar information is absolutely necessary to clarify what actually occurred in the course of the investigation of Mr. Schorr and to put to rest the considerable anxiety over the reasons for this investigation.

It is obvious that only public testimony by those involved can erase the serious questions and suspicions which this unfortunate affair has produced.

In this instance, our Subcommittee's hearings will serve to reinforce the assurances that nothing untoward was involved. Because of the importance of this incident to our study of the relationship between government and the press, I have invited Mr. Charles W. Colson and Mr. Frederic V. Malek to present to the Subcommittee their understanding of what actually occurred with respect to the investigation of Mr. Schorr. I am enclosing copies of my letters of invitation. In my opinion, not only the Congress but the public has a right and a need to have a complete explanation of a development which has raised understandable fears and suspicions on the part of many Americans.

With kindest wishes,  
Sincerely yours,

SAM J. ERVIN, Jr.,  
*Chairman.*

[Excerpt from hearings entitled "Freedom of the Press," before the Subcommittee on Constitutional Rights, of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st and 2d sess.]

THE WHITE HOUSE,  
Washington, D.C.  
(Undated)

Hon. SAM J. ERVIN, Jr.,  
U.S. Senate,  
Washington, D.C.

DEAR SENATOR ERVIN: This is in response to your letters of December 3, 1971 to the President, Mr. Frederick V. Malek and Mr. Charles W. Colson concerning the investigation of Mr. Daniel Schorr.

You have indicated in your letter to the President that your inquiry is prompted by concerns and suspicions which have arisen in connection with this matter and the need to put them to rest. We fully agree that any concerns and suspicions which have arisen must be eliminated and we have moved to do just that by publicly stating the precise reason the investigation of Mr. Schorr was conducted. Also, upon reviewing this matter, the President has made it the policy of this Administration that such preliminary job clearance investigations will not be initiated without prior notification to the person being investigated.

Despite some inaccurate conjecture to the contrary, the facts in this situation are quite simple. Mr. Schorr was being considered for a post that is presently filled and a routine job investigation was commenced without notifying Mr. Schorr. Mr. Malek's office was performing in its general area of talent searching in this matter.

Mr. Colson's office was not involved in the matter at all. Given these facts, there is nothing more we believe can be added to clarify the situation.

With respect to your request for the appearance of Mr. Malek and Mr. Colson before your Subcommittee, it has been a matter of long-established principle and precedent that members of the President's immediate staff do not appear before Congressional committees to testify in

regard to the performance of their duties as members of the President's staff. This practice is, indeed, fundamental to the operation of our system of government.

Therefore, I wish to advise you that Mr. Malek and Mr. Colson respectfully decline the invitation to testify.

Sincerely,

JOHN W. DEAN III,  
*Counsel to the President.*

(154-H)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

During the Subcommittee's study of Army surveillance and its extensive hearings on Federal Data Banks, Computers and the Bill of Rights, the Army was requested to produce certain materials. Included in the numerous requests for information and documents were requests for the computer print-outs from Fort Holabird and Fort Monroe, the Mug books, and the Compendium. These specific materials were delivered to the Subcommittee but the Army and Department of Defense refused to declassify the documents so that they could not be used in the study effectively. After a year and a half of negotiations between the Subcommittee and the Department, the material was declassified only to the extent that the "sanitized" information taken from these sources which was used in the Staff analysis of the documents and in the Subcommittee report on the hearings was declassified. The remainder of the information remains classified.

\*See Subcommittee hearings, "Federal Data Banks, Computers, and the Bill of Rights", Parts I and II, 1971. Also, "Army Surveillance of Civilians: A Documentary Analysis", prepared by the Staff of the Subcommittee on Constitutional Rights, (1972).

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 154-4

Submitted by: (Comm/Subcomm)  
Constitutional Rights Subcommittee  
By: Irene R. Margolis  
TITLE: Professional Staff Member 58191  
Extension

ARMY SURVEILLANCE OF CIVILIANS: A DOCUMENTARY ANALYSIS

(Prepared by the Subcommittee on Constitutional Rights, 1971)

INTRODUCTION

*Mr. Chairman and Members of the Subcommittee:*

The core of any intelligence operation is its files. The Army's files on civilian political activity were voluminous and far-reaching. Scores of local, regional, and national records centers kept track of individuals and organizations of all kinds, from Unitarian Church congregations to the Weathermen. Computers were used to store information and to index voluminous libraries of dossiers. Where

computers were not used, card indexes opened the way to the information.

Since the Subcommittee began its investigation of these files in January 1970, many of these records have been destroyed. Before the destruction of records began, however, a lawsuit was filed, *Tatum v. Laird*, which sought to enjoin the military's monitoring of civilian political activity. Part of the relief sought by the plaintiffs was supervised destruction of the records. Although the District Court denied the plaintiff's request for an order requiring delivery of the records to the court, the defendants, represented by the Department of Justice, promised to preserve one copy of each computer print-out and publication destroyed for purposes of litigation. These files were turned over to Internal Security Division of the Department of Justice at various times in 1970 and 1971.

In February and March 1971, the Subcommittee conducted hearings on the Army data collection programs as well as on other representative Government data programs. Witnesses at these hearings presented some documentary evidence together with their testimony on Army surveillance operations and their subjects. Statements of correspondents who know of and who participated in Army surveillance activities are included in the appendix to the hearings.

To facilitate the Subcommittee's analysis of the Army's domestic intelligence operations, the Chairman asked the Department of Justice on March 9, 1971,<sup>1</sup> for permission to examine the files. The Justice Department, after consultation with the Departments of Defense and Army, granted the request and the following documents were delivered to the Subcommittee offices:

1. Five volumes of a six-volume set of "mugbooks" published by the Army Intelligence Command, and generally known as the Fort Holabird "black list," and containing information on more than 1000 individuals. (Confidential)

2. A two-volume "Compendium" published by the Office of the Assistant Chief of Staff for Intelligence containing data on more than 100 organizations and approximately 350 individuals. (overall classification of Secret)

3. A print-out from the "Biographic Data File" of the Ft. Holabird computer, consisting of 379 pages of a 408-page document with information on almost 4000 individuals. (Confidential)

4. Volumes 2 through 6 of a six-volume computer print-out on Personalities from Ft. Monroe data bank of the Continental Army Command. (Confidential)

5. Briefing Reports from CONARC'S Counterintelligence Records Information System dated from December 15, 1969, to January 11, 1970, and from June 30 to July 1969. (Unclassified)

Following examination of these materials, the Chairman addressed inquiries to the Department of Defense seeking additional information about these materials. This letter of March 30, 1971, and the two replies, one to the Subcommittee Chief Counsel on June 9, and one to the Chairman on June 10, are reprinted in the Hearings.<sup>2</sup> On April 10, 1971, a computer specialist from the Department of the Army met with the Staff Counsel, but was unable to explain the coding of the Fort Holabird computer. At that time the Subcommittee was informed that the computer instruction books no longer existed.

The inability of the Chairman and staff to obtain neither clear and detailed explanations for the data collection and storage operations of the Army's domestic intelligence program nor the delivery to the Subcommittee of documents known to be in the Department's possession ultimately caused the Chairman to inform the Defense Department that he was considering introducing a Resolution in the Senate which would have had the effect of authorizing the Subcommittee, on behalf of the Senate, to subpoena the necessary witnesses and documents to make preparation of this, and the Subcommittee Report possible.

In January, 1972, the Department of Defense delivered a second set of materials to the Subcommittee. These materials included:

1. The computer instruction books for the Fort Holabird biographic data file and incident data file with over 750 organizational code listings. (Unclassified)

2. A nine-page print-out on five prominent personalities in the civil rights and antiwar movements extracted from the Fort Holabird Incident Data File. (Confidential)

3. A set of microfilm aperture cards containing all print-outs from the Fort Monroe Incident Data file from January 1, 1969, through February 28, 1970. (Unclassified) These print-outs substantially added to the CRIS briefing Reports received in the Spring of 1971. There are reports on well over 4,000 incidents during this period.

4. "An Alphabetical Roster by Initials" representing the organizational data file from the Fort Hood computer of III Corps. The file contains information on approximately 250 organizations and 300 individuals. (Unclassified)

5. One page from the U.S. Strike Command's computer printout entitled "Counterintelligence Personality File." (Secret)

6. A print-out published by the Directorate for Civil Disturbance Planning and Operation entitled "Civil Disturbance Anticipated Activities or Events," dated 15 October 1969 with coverage of 177 events. (Unclassified)

7. A copy of USAINTC Regulation 380-100 establishing standard operating procedures for the CONUS intelligence program. (Confidential)

8. An inventory of noncomputerized files maintained by the continental armies, the Military District of Washington, and the U.S. Army in Hawaii. (Parts Confidential; parts unclassified)

These documents have expanded our knowledge of the Army's data keeping operations considerably. However, they are far from complete. For example, the Departments of Army and Defense have been unable to supply us with:

1. Computer code books for the Fort Monroe, Fort Hood, DCDPO, and Strike Command data banks;

2. Fort Holabird's incident data files, (All we have received is a nine-page excerpt of spot reports relating to five persons);

3. Strike Command's full Counterintelligence Personality File, and its incident and organization files, if any;

4. DCDPO's full computer files on individuals, organization's, and incidents;

5. The computerized index to the domestic intelligence sections of the microfilm archives of the Counterintelligence Analysis Branch, (now Detachment); and

6. Documents (or persons) to describe this nature, scope, content, purposes, uses and capabilities of these data banks.

The subcommittee also had a considerable amount of difficulty in obtaining the declassification of much of the materials delivered by the Departments of the Army and Defense. For over a year, we were unable to obtain the declassification of this report<sup>3</sup> despite the fact that none of the information it contains affects national security, and despite the fact that it pertains to an illegal program now disavowed by the Pentagon. Yet even with the public admission that none of the information was of any value to any legitimate military function, the report was not cleared until late June 1972, following another letter from the Chairman concerning his proposed Senate Resolution. At this point, the declassification proved surprisingly easy. A representative of the Department of Defense

<sup>1</sup> See Federal Data Banks, Computers, and the Bill of Rights. Hearings before the Constitutional Rights Subcommittee on the Judiciary, U.S. Senate, 92d Cong., 1st Sess. (1971) pt. I, p. 622. (Hereafter cited as Hearings).

<sup>2</sup> Hearings, part II, pp. 1223, 1228, and 1232.

<sup>3</sup> Hearings, part II, pp. 1227, 1228.

General Counsel read the report for 1½ hours and pronounced it declassified when he finished.

What follows, then, is the picture of the Army's surveillance of civilians unaffiliated with the armed forces as disclosed by the files and printouts made available to the subcommittee.

LAWRENCE M. BASKIR,  
Chief Counsel and Staff Director.

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
Washington, D.C., June 9, 1971.

Mr. LAWRENCE M. BASKIR,  
Chief Counsel and Staff Director, Subcommittee on Constitutional Rights, U.S. Senate, Washington, D.C.

DEAR MR. BASKIR: Please accept my apologies for not responding earlier to your draft analysis of the various Army documents delivered to the Subcommittee by the Justice Department. In order to give you a responsible reaction, it was necessary to establish a coordinated review of the documents from all appropriate elements of the Department.

Our comments are as follows:

1. The publication of the statement would be prejudicial to the Government's interests in the *Tatum v. Laird* litigation, particularly since the case has been remanded for trial. Certain of the information in the staff report, and the exhibits accompanying it, would not be available in discovery proceedings. As the documents are needed by the Government in preparation for pending litigation, the documents temporarily in the possession of the Subcommittee Staff should be returned to the Justice Department.

2. The publication of the statement with references to certain public figures could certainly run counter to the Subcommittee's announced intention to safeguard the privacy of individuals. With the report itself there are descriptions of individuals and their activities of a personal nature. It is one thing to put it in an investigative file, but quite another thing to publish it in a committee report available to the public-at-large.

3. The publication of the statement would be in contradiction to the conditions under which the Subcommittee staff was permitted to review these documents. As was noted in the Department's letter to you of March 19, 1971, defense agreed to this review "with the expressed understanding that none of the specific information contained in these print-outs will be made public."

4. The draft statement is overtaken by events. Since the preparation of the staff report, the Defense Department has furnished additional materials to the Committee. These explain certain of the code designations reflected in the computer print-outs. They also refute the contention expressed in the report that the Army has failed to provide an adequate explanation of the computer printouts.

5. No useful purpose would be served by a public report on the materials examined, particularly where these materials relate to long-rescinded intelligence collection programs. Many hundreds of manhours have already been devoted to explaining these computer operations in considerable detail. Since these computer operations were disbanded, and since Defense policies now specifically restrict such collections of information, further efforts in this area would serve no valid legislative purpose.

6. The report contains a number of statements which are factually incorrect, which omit pertinent facts or which draw erroneous conclusions as indicated below.

The report states that there is an absence of "any definite assessment" as to the "value of this intelligence." On November 27, 1970, the Army notified the Committee that it did not substantially aid the Army in predicting civil disturbances. On March 2, 1971, Secretary Froehlke testified that the Army's Under Secretary had questioned the worth of the intelligence collection effort as early as December 1968.

The report strongly implies that the Army has failed to cooperate by providing a complete accounting. Contrary to these assertions, the Army has provided both documents and personnel to explain the computer system in a series of exchanges with the Subcommittee staff. On April 12, 1971, a computer expert familiar with the computer operations at Fort Monroe and Fort Hood, together with an Army General Counsel representative, met with the Chief Counsel to discuss these computer systems. Instead, the major attention of this meeting was directed to the Fort Holabird computer system with which the computer expert was not immediately familiar. As this computer system was dismantled sometime ago, it is difficult to reconstruct computer decisions of three years ago.

The report is deficient in that it omits any reference as to the date these documents were compiled and any reference to the date these documents were destroyed. At the very least it should note that so-called "Mug" books were published in May and October 1968. It should further note that the two volumes of the Compendium were compiled in 1968 with the last change dated October 1969. The report should also indicate that these documents were ordered destroyed in June 1970, and that the only known copies are those retained for litigation purposes.

Finally, the report states that despite the analysis of these documents the Subcommittee staff still does not have a complete picture of civil disturbance intelligence activities. It further asserts that it is impossible to determine whether civilian authorities had ordered or had knowledge of the intelligence program. These assertions are difficult to accept because the extent of the surveillance program has been covered in great depth, both by the

Subcommittee's own witnesses and through the testimony and documents supplied by the Defense Department. As to civilian participation and knowledge of such activities, the record is replete with testimony as to involvement of the White House, the Justice Department and senior civilian officials in the Department of Defense.

Sincerely yours,

J. FRED BUZHARDT.

(154-I)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

- The Subcommittee requested the Department of Defense to declassify Air Force Regulation 205-57, "Reporting and Investigating Espionage, Sabotage and Subversion" (October 14, 1968), for use in its study of domestic surveillance by the military. The Department of Defense refused to change the "For Official Use Only" classification because "public disclosure of the described procedures for reporting and investigating sabotage, espionage and subversion could generate interest and inquiries by persons and organizations whose interests are inimical to those of the Air Force and the United States."

\*See Subcommittee hearings, "Federal Data Banks, Computers, and the Bill of Rights, Part II, p. 1215.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 154

Submitted by: (Comm/Subcomm)  
Constitutional Rights Subcommittee  
By: Irene R. Margolis  
Title: Professional Staff Member 8191  
Extension

*Editor's note: The two following documents (Senator Ervin's telegram dated October 5, 1970, and Mr. Robert C. Moot's responsive letter of October 27, 1970) provide the entire documentation for the five instances of refusal to provide documents which are reported in files 154-I, 154-J, 154-K, 154-L, and 154-M. They are reproduced only once, in File 154-I.*

Excerpt from hearings entitled "Federal Data Banks, Computers and the Bill of Rights," before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st sess., Part II, pp. 1215-1216.]

[Western Union Telegram]

OCTOBER 5, 1970.

Hon. MELVIN J. LAIRD,  
Secretary of Defense,  
Washington, D.C.

In connection with forthcoming hearings on federal data banks computers and the bill of rights, this is to request that you review the restrictions on disclosure and declassify the following documents which have been submitted to the Subcommittee with a letter of September 9, 1970, in response to my inquiry of July 20, 1970.

1. Letter, July 11, 1969, "Countersubversion", by Adjutant General, Army
2. Naval Intelligence—Naval Investigative Service, with attachments, August 27, 1970
3. Extracts—Article 3—1602. Naval Investigative Service Manual for Investigations
4. Air Force letter Nr. 18, Dec. 16, 1968, OSI Special Counter-Intelligence Requirements
5. Air Force OSI Manual 124-3, Section 5/23, Investigation of US Air Force Military Personnel who participate in anti-Vietnam War Activities, January 15, 1970
6. Extracts from Commandant, Marine Corps, message 171500, November 1969
7. Air Force regulation 205-57 "Reporting and Investigating Espionage, Sabotage and Subversion", October 14, 1968.

SAM J. ERVIN Jr.,  
Chairman, Senate Constitutional Rights Subcommittee.

ASSISTANT SECRETARY OF DEFENSE,  
Washington, D.C., October 27, 1970.

Hon. SAM J. ERVIN,  
Subcommittee on Constitutional Rights, Committee on the  
Judiciary, U.S. Senate.

DEAR MR. CHAIRMAN: In accordance with my October 12 letter, this is a complete report concerning declassification and removal of disclosure restrictions on those documents pertinent to data banks and individual privacy identified in your October 5 telegram to the Secretary of Defense. Specifically, review by the Deputy Assistant Secretary (Security Policy) in the Office of the Assistant Secretary of Defense (Administration) and respective originating Services has resulted in the following:

1. Army Adjutant General multiaddressee memorandum dated July 11, 1969 "Countersubversion." This document remains SECRET because it contains counterintelligence essential elements of information and counterintelligence administrative and operational procedures. Disclosure of this material would inform individuals who might be engaged in subversive activities directed against the U.S. Army concerning:
  - a. Details of U.S. Army interest in their activities.
  - b. Methodology and procedures of U.S. Army countersubversion operations.
2. Naval Investigative Service attachments, August 27, 1970 (sic). Presidential multiaddressee memorandum dated June 26, 1939, no subject (sic). President Roosevelt's memorandum is beyond Department of Defense jurisdiction.
3. Naval Investigative Service. *Manual For Investigations*, article 1602. FOR OFFICIAL USE ONLY (FOUO)

designation has been removed, thereby permitting unrestricted disclosure.

4. Air Force Inspector General Special Counterintelligence Requirements Letter Nr. 18 dated December 16, 1968. This document remains CONFIDENTIAL because the Air Force considers that disclosure of the contained counterintelligence operational and technical doctrine to unauthorized persons would prejudice counterintelligence efforts.

5. Air Force Office of Special Investigations Manual 124-3, section 5/23, January 15, 1970, Investigation of Air Force Military Personnel who Participate in Anti-Vietnam War Activities. FOUO designation has been removed, thereby permitting unrestricted disclosure.

6. Commandant Marine Corps message 171500Z, November 1969. This document remains SECRET because it indicates the nature and degree of Marine Corps concern regarding certain problems which relate to the good order, discipline and morale of the Corps.

7. Air Force Regulation 205-57, October 14, 1968, Reporting and Investigating Espionage, Sabotage and Subversion. This document remains FOUO, because public disclosure of the described procedures for reporting and investigating sabotage, espionage and subversion could generate interest and inquiries by persons and organizations whose interests are inimical to those of the Air Force and the United States.

In closing, I hope this information is helpful in your inquiry. I assure you that efforts will continue throughout the Department of Defense to provide assistance in all matters relating to the data banks and individual privacy.

Sincerely,

ROBERT C. Moot,  
Assistant Secretary of Defense.

(154-J)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In connection with the Subcommittee's hearings on Federal data banks, computers and the Bill of Rights, a copy of the Commandant Marine Corps message 171500Z, dated November 1969, was provided the Subcommittee. However, the document was classified "secret". The Department of Defense refused to declassify this document stating that the document indicated "the nature and degree of Marine Corps concern regarding certain problems which related to the good order, discipline and morale of the Corps."

\*See Subcommittee hearings, "Federal Data Banks, Computers, and the Bill of Rights", Part II, p. 1215.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 154

Submitted by: (Comm/Subcomm)  
Constitutional Rights Subcommittee  
By: Irene R. Margolis  
Title: Professional Staff Member 8191  
Extension

(For documentation, see editor's note, page 361.)

(363)

(154-K)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

Responding to a Subcommittee request for information on July 20, 1970 in connection with hearings on Federal data banks, computers and the Bill of Rights, the Department of Defense supplied the Air Force Inspector General Special Counterintelligence Requirements Letter Nr. 18, dated December 16, 1969. The letter was marked "confidential". The Department of Defense refused to declassify the document contending that the "Air Force considered that disclosure of the contained counterintelligence operational and technical doctrine to unauthorized persons would prejudice counterintelligence efforts." The Subcommittee could not release the information contained therein.

\*See Subcommittee hearings, "Federal Data Banks, Computers, and the Bill of Rights", Part II, p. 1215.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 154.1

Submitted by: (Comm/Subcomm)  
Constitutional Rights Subcommittee  
By: Irene R. Margolis  
Title: Professional Staff Member 58191  
Extension

(For documentation, see editor's note, page 361.)

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(154-L)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In response to a Subcommittee request for information on July 20, 1970 in connection with hearings on Federal data banks, computers and the Bill of Rights, the Department of Defense supplied a document, Naval Intelligence--Naval Investigative Service, with attachments. However, the document was classified. On October 5, 1970 Senator Ervin requested that the restrictions on disclosure be lifted. The Department of Defense refused stating that the attachment, President Roosevelt's multiaddressee memorandum dated June 26, 1939 was beyond their jurisdiction to declassify.

\*See Subcommittee hearings, "Federal Data Banks, Computers, and the Bill of Rights", Part II, p. 1215.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 154-1

Submitted by: (Comm/Subcomm)  
Constitutional Rights Subcommittee  
By: Irene R. Margolis  
Title: Professional Staff Member 58191  
Extension

(For documentation, see editor's note, page 361.)

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(154-M)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available.. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In connection with the Subcommittee's hearings in 1971 on Federal Data Banks, Computers and the Bill of Rights, the Subcommittee requested a copy of the Army Adjutant General's letter of July 11, 1969 regarding "Countersubversion". The document, a multiaddressee memorandum, was forwarded the Subcommittee. However the document was classified "secret" and the Department of Defense refused to declassify it pursuant to a specific request by Senator Ervin on October 5, 1970.

\*See Subcommittee hearings, "Federal Data Banks, Computers, and the Bill of Rights", Part II, p. 1215.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 154-1

Submitted by: (Comm/Subcomm)  
Constitutional RightsSubcommittee  
By: Irene R. Margolis  
Title: Professional Staff Member 8191  
Extension

(For documentation, see editor's note, page 361.)

(366)

(154-N)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In connection with the Subcommittee's hearings on federal data banks, computers and the Bill of Rights, Senator Ervin wrote Secretary of Defense Melvin R. Laird on March 30, 1971, requesting the so-called "Van Deman" files. In addition Senator Ervin wanted to know the history of the files, who had possession or custody of the material, and the role of Army personnel in compiling the files. On June 10, 1971 J. Fred Buzhardt, General Counsel of the Defense Department, responded by briefly and generally describing the nature and content of the files and where they were held. This information was not what Senator Ervin sought.

\*See Subcommittee hearings, "Federal Data Banks, Computers, and the Bill of Rights", Part II, *pp. 1223, 1224, 1232-1235*.  
*See also, ibid., pp. 1722.*

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 154

Submitted by: (Comm/Subcomm)  
Constitutional Rights Subcommittee  
By: Irene R. Margolis  
Title: Professional Staff Member 58191  
Extension

[Excerpt from hearings entitled "Federal Data Banks, Computers and the Bill of Rights," before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st sess., Part II, pp. 1223-1224 and 1232-1235]

[1223]

MARCH 30, 1971.

Hon. MELVIN R. LAIRD,  
Secretary of Defense,  
Washington, D.C.

DEAR MR. SECRETARY: In the short time since the recess of the Subcommittee's hearings, I have had an opportunity to review the testimony and other information relating to data gathering by the Defense Department. Although my review is by no means complete, a number of questions occur at this time, and I would appreciate your assistance in having them answered. In addition, there are still a number of unresolved requests which I have made in the past. These are:

Permission for Major General Joseph A. McChristian, General William H. Blakefield and Major General William P. Yarborough to testify at the hearings.

Access to the "Plant" Board transcript and reports, if any.

A copy of the list of investigations made into Army intelligence operations. (March 2 hearings, transcript p. 657-658)

A complete report on the courts-martial investigation referred to by Mr. Buzhardt in his letter to me of March 9. Mr. Buzhardt's letter of March 26 does not elaborate on the information he previously furnished nor does it explain why this investigation relates in any way to the desired testimony from the Generals.

I hope that these requests of mine can be granted without any additional delay.

I have reviewed the materials which the Department of Army transferred to the Department of Justice for possible use in the *Tatum* case. I appreciate the cooperation of Mr. Buzhardt in enabling me to have temporary custody of these materials.

I believe that the record of the hearings would be seriously incomplete if a description of them were omitted. For that reason, I would like to request that the materials be declassified. Since they are being held for possible use in the lawsuit, obviously this may have to be done eventually in any case. The Subcommittee, of course, will, as

it has throughout the hearings, respect the privacy of persons whose names appear in these materials.

With respect to the computer print-out from the Fort Monroe computer, I should appreciate answers to the following:

1. Following the name and address of each entry, there is a designation "PLINK", and a 9-digit number, apparently consecutive throughout most, but not all of the six-volume print-out. What is this reference, and what is the significance of the "PLINK" numbers which are not consecutive?

2. After "Data Source," most of the designations are "FBI." How was this information obtained from the FBI; pursuant to what authority; was it done on a case-by-case basis, or by general authority; from what level of the FBI did the approval and the information come? Please submit copies of all regulations, and agreements pertinent to your answers.

3. Some of the "Data Source" designations are 10-digit letter-number combinations—for example "9015004 USC." What do these designations mean? What is the source of data where there is no entry after "Data Source"?

4. Following each entry is a 17-category list, including "Ethnic Group," "Race," "Religion," etc. What are the possible entries for "Character," "Leader Of," "Effectiveness," and "Picture," and what is the meaning or definition of each possible entry? How and by whom were these categorizations made?

5. Following these categories, there appears "Entry #. Organizational Membership, Influence Therein" and below this certain numbers. Under "Entry #" there appears most often "001" followed by a 7-digit letter-number designation, apparently identifying organizations and perhaps also membership. Please explain these designations and list all the organizations which have such designations. Are these references to other files or data banks, either maintained now or in the past by your Department, or any other federal or State agency?

6. Following each entry at the right margin is a 5-digit number, in most cases "69221." What is the significance of these designations?

To aid in the understanding of this print-out, I would appreciate copies of manuals, instructions, and other materials used to train or guide personnel in the operation and use of the system.

The Subcommittee has previously been informed that the Fort Monroe data bank was destroyed. On what date were the "master tapes" destroyed?

How many master tapes were there, and have all been destroyed? Were there any other tapes containing some or all of the information existing as of this destruction date? If so, have they all now been destroyed? When were these other tapes destroyed?

The brief discussion of the Fort Monroe data system in Mr. Froehlke's statement does not give many details. I would appreciate a detailed report of the origins, purposes, sources of data, and uses made or planned for this system. What specific programs was the system designed to support? Who authorized this system, and when? Who had access to the information in the system? How many print-outs were made? To whom were they distributed? Who is the highest ranking civilian in authority who approved or had actual knowledge of the data bank? When was the system discovered? What justification was made for maintaining the system and for

seeking an exception to the discontinuance order of Secretary Resor? Were periodic teletype messages, estimates or summaries produced and, if so, to whom were they distributed? Please also answer the questions above relating to the master and other tapes for this computer system as well.

Reference has been made to a third data bank system at Fort Hood. The Subcommittee has even less information about this system. I would appreciate a full report on this, including information on the matters raised with respect to the other two computers. A print-out of this data system was not included in the materials transferred from the Department of Justice. Does a print-out or any other similar document exist which contains the information on that computer? If so, I would appreciate access to it as well.

During the hearings, references were made to a set of records called the "Van Deman" files. Have these files ever existed, and were they compiled by Army personnel in whole or part? Please describe the history, content and nature of the files. Were they ever in the custody or possession of the Army? If so, please give the dates, and the particulars of how they came into Army control. Are they still in Army control? If not, on what date did they leave Army control? Please give the particulars of how they left Army control. Did the Army have possession or control of them on the date Mr. Froehlke testified, or could they have regained control at that time? Why was no mention made of these files at the time of his testimony?

The Subcommittee is informed that reviews of files in the possession of the Department during the period of the Subcommittee's inquiries revealed a number which were specially segregated and destroyed because of their content or because the existence of files on these persons would have been particularly embarrassing to the Department. Were any special reviews made of files, indexes, or the like to determine whether files on persons of prominence existed? If so, when was this review made? Were any such files discovered? Were the files destroyed? If so, when, by whom, and on whose authority or direction? Please describe the nature and contents of the files and list the names of the persons involved. Why was no mention made of this to the Subcommittee?

With kindest wishes,

Sincerely yours,

SAM J. ERVIN, Jr., Chairman,  
Subcommittee on Constitutional Rights.

[1232]

GENERAL COUNSEL OF THE  
DEPARTMENT OF DEFENSE,  
Washington, D.C., June 10, 1971..

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Constitutional Rights, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your questions concerning the Fort Monroe and Fort Hood data banks and the additional files referred to on page 3 of your March 30, 1971 letter to Secretary Laird have been referred to me for reply.

As you know, representatives from the Army met with the Subcommittee's Chief Counsel for several hours on April 15 to respond to the six questions set forth on page 2

of your letter. During these discussions, he raised additional questions about the Fort Monroe and the Fort Holabird computer systems. Answers to these questions are enclosed at Tab A.

It is believed that the submissions included with this letter, plus certain follow-up actions by the Department of the Army, will provide the Committee with as complete a report of the computer operations as possible under the circumstances. In this respect, it is noted that the draft report of the Constitutional Rights Subcommittee Staff, dated April 26, 1971, suggests a certain unresponsiveness on the part of the Department of the Army. The record is to the contrary. The Department has endeavored at all times to furnish a full and complete account despite the fact that the computer operations in question have long since been disbanded, and the computer print-outs at Fort Holabird and Fort Monroe destroyed except for those which are now in the temporary custody of the Subcommittee. To secure a technical explanation, the Department of the Army contacted the originators of the computer system and obtained their recollections as to the meaning of the computer code symbols.

With reference to your request for further information on the Fort Monroe and Fort Hood computer data banks, answers to your various questions have been prepared from the information presently available and from the recollection of those who worked on these programs. The destruction of these computer data banks and related files last year makes it quite difficult to answer many of your questions. In this regard, the Army is unable to provide you copies of any documents, manuals, or other publications relating to the establishment of these systems because they are no longer available and in some cases existed only in a fragmentary and informal form. However, two pamphlets on coding instructions for the Fort Holabird computer are being held by the Department of Justice for purposes of the *Tatum v. Laird* litigation. These may be of interest to you in your inquiry.

The Fort Monroe computer data bank, known as the Counterintelligence Records Information System (CRIS), was established in January 1968 but was not computerized until May 1968. CONARC sought and obtained approval for the computerization of this system in April–May 1968 in accordance with the provisions of paragraph 2-1, Army Regulation 18-2 (attached). This regulation does not establish the criteria for reviewing the propriety of a particular system; it only outlines the procedures for reviewing the feasibility of a particular program in light of available and prospective computer resources and requirements. On April 1, 1970, the Secretary of the Army issued a policy letter which required his personal approval of any computerized data bank on civilians not affiliated with the Department of Defense and only after consultation with Congress. DOD Directive 5200.27 now imposes the requirement that the Chairman of the Defense Investigative Review Council approve such computer operations.

CRIS, the Fort Monroe system, was designed to retrieve civil disturbance information rapidly and generate data and statistics to assist CONARC in the prediction of civil disturbances which might result in the deployment or commitment of federal troops. The attempt to predict possible civil disturbances or incidents related directly to the requirements placed on CONARC to provide Task Forces for deployment and for actual use in civil disturb-

ances in accordance with the Army Civil Disturbance Plan (Garden Plot). The statistics and other data produced by this program were considered to be a necessary adjunct to the requirements and responsibilities imposed by the Army Civil Disturbance Plan, and it was hoped that this data would assist the CONARC staff in planning for and reacting to situations calling for the possible use of federal troops.

The CRIS contained three basic categories of information with a cross-reference retrieval capability among them: personalities, organizations, and incidents. The information itself was stored on magnetic discs, with a backup file on magnetic tape. Information for CRIS was received from USAINTC, CONUSAMDW, and the FBI. There was not, however, a direct interconnection between other computers nor was the information fed directly into CRIS over teletype or other electrical means. Recipients of the information produced by CRIS included: Office Deputy Chief of Staff for Intelligence, CONARC; the Deputy Chiefs of Staff for Intelligence, CONUS Armies and Military District of Washington; HQ, USAINTC; Assistant Chief of Staff for Intelligence, DA; and the Commander, Military Traffic Management and Terminal Service. There is no way of determining how many printouts or other information derived from CRIS were produced and forwarded to the recipients listed above. However, the June 9, 1970 Army policy letter required the destruction of all civil disturbance information on civilians.

It should be pointed out that only 2.5% of available computer time was used on CRIS. The remaining computer time was consumed by 8 major programs, all of which dealt directly with CONARC's command and control functions. These programs were: Force Status, Unit Identification, Automated Army Unit Readiness Reporting System, Contingency Planning Troop List, CONARC Movement Planning and Status, Computerized Airlift Planning, and Contingency Plan Map System.

The civil disturbance information in CRIS was stored on four magnetic tapes and discs. They were all destroyed on April 12, 1970, by degaussing, i.e., the information was removed from the discs and tapes by passing them through a magnetic field. No other discs or tapes contained the information which was in the Fort Monroe program. Supporting files consisted of boxes of IBM cards, existing printouts, and the user manuals. These related files were destroyed on April 22, 1970.

You have asked whether a civilian approved the initiation of the Fort Monroe program. The requirement for the approval of such computer data banks was not imposed until April 1, 1970, and, hence, there was no requirement for such approval at the time the system was initiated. The Office of the Army General Counsel did become aware of the system on or about March 1, 1970. I would stress that there was no effort to hide the system in question; it was discussed and explained at various briefings to high military officials and was viewed as a normal adjunct to the Army's civil disturbance program.

The Fort Hood system, the second system referred to in your letter, did not reach the same stage of development as CRIS. In fact, it did not become fully operational before its destruction on August 15, 1970. By way of background, a feasibility study was begun in July 1969 at Fort Hood on a computer program which could provide III Corps with the ability to retrieve civil disturb-

ance information rapidly and assist it in predicting disturbances within its geographical area of responsibility. Under the Army Civil Disturbance Plan (Garden Plot), Fort Hood was required to provide three civil disturbance task force headquarters and six civil disturbance brigades for possible deployment in a civil disturbance situation. The computerization of the data contained at Fort Hood was intended to supply the intelligence required to respond efficiently and rapidly to a civil disturbance situation.

The program was run on a computer which was used primarily in the areas of supply, finance, accounting, and maintenance with the secondary purpose of providing support for various systems development such as the Division Logistic Systems Tests and currently the Combat Service Support System. In fact, only 0.008 of 1 percent of computer time was used in the formulation of the civil disturbance program. A request for program approval was not submitted under the provisions of paragraph 2-1, AR 18-2, described above. However, since AR 18-2 relates only to the feasibility of the system, the question of the propriety of implementing such a system would not have been reviewed under AR 18-2. Of course, new policy letters and directives now impose a requirement that such a computer data bank be approved by civilian officials.

The information for the data banks was received from the FBI, USAINTC, and from liaison contacts with local authorities. The data bank itself listed in alphabetical order various civilian organizations which were deemed to have some relation to the III Corps responsibility under Garden Plot. Under the listed organizations, the names of certain members of the organization were also included. Since this system did not reach full operational status, only two copies of a printout were produced for distribution outside of Fort Hood. The Deputy Chief of Staff Intelligence, 4th U.S. Army, received one copy which was subsequently destroyed in August 1970. One was also forwarded to the Assistant Chief of Staff for Intelligence, DA.

The computer program at Fort Hood was not known at DA, Headquarters until the latter part of April 1970 when an exception was sought from the provisions of the April 1, 1970 letter requiring the destruction of computerized data banks on civilians not affiliated with the Department of Defense. To review the propriety of the exception, ACSI, DA, requested a copy of the printout from the Fort Hood computer. This copy (referred to above) was forwarded, and after review of the document, the exception was denied and the data bank was ordered destroyed on August 5, 1970. The data bank and computer program on magnetic tape (there were no discs) were then destroyed on August 15, 1970.

As indicated above, the printout, from the Fort Hood system sent to the 4th U.S. Army was previously destroyed. It was thought that the printout provided to ACSI, DA, the only other printout, had also been destroyed. Although there had never been any written record of destruction to confirm this, several prior searches had failed to discover the document in question. However, on May 11, 1971, the last remaining printout from Fort Hood was discovered by accident among some files in the Office of the Assistant Chief of Staff for Intelligence, Department of the Army. On May 21, 1971, the Acting General Counsel of the Army wrote to the Department of Justice requesting

its advice on the proper disposition of this item in view of the *Tatum v. Laird* litigation. The Justice Department has advised the Department that it should be retained for litigation purposes.

You asked about the existence of a set of records called the "Van Deman" files. Major General Ralph Van Deman, who formerly headed Army Intelligence, compiled intelligence files during the period of 1920-1952. There is no indication, however, that he collected these files prior to his retirement in 1929.

The files, for the most part, consisted of four general categories: (1) collection of various newspapers from the West Coast alleged to be communist or communist affiliated; (2) literature and reference material on or produced by alleged communists; (3) a photo album of assorted individuals; and (4) files on individuals and organizations based upon information acquired from various agencies and private sources. The information in the latter category largely dealt with communist activities.

The Assistant Chief of Staff for Intelligence, Sixth Army, assumed custody of at least some of General Van Deman's files on January 22, 1952. It is believed that certain portions of the files were removed by associates of General Van Deman before the Sixth Army acquired these files, but this cannot be verified. The reasons for assuming custody is not entirely clear. It is quite possible that there was some informal arrangement between the Assistant Chief of Staff for Intelligence, Sixth Army, and General Van Deman for the transfer of these items at General Van Deman's death.

The files in the possession of the Sixth Army were shipped in 1958 to what is now designated as the United States Army Investigative Records Repository (USAIRR). Following this transfer, the index cards prepared by General Van Deman for use with his material were replaced by punch cards and integrated into the USAIRR index. His own index cards were then destroyed. In 1968, the punch cards prepared from the earlier index cards were also destroyed, and all reference to these materials in the Defense Central Index of Investigations was thereby deleted. The Van Deman files were then segregated within the USAIRR. After 1968, these files were not referenced by the DCII.

These files remained in the USAIRR, although segregated, until March 2, 1971 when they were transferred to the Internal Security Subcommittee of the Senate Judiciary Committee pursuant to a written request by the Chairman of the Judiciary Committee. We have found no record of an inquiry to Mr. Froehlke or to the Department of Defense related directly or indirectly to the Van Deman files prior to your letter of March 30.

In regard to your last series of questions on page 3 of your letter, the Army implemented a policy in February 1971 of reviewing each file at the USAIRR prior to its release to an authorized official for the purpose of removing material which cannot be retained under our present directives. Mr. Froehlke explicitly informed you of this policy in his appearance.

"There are dossiers within the Army Investigative Records Repository which contain FBI reports and other material which do not meet current Army criteria for retention. A mass screening of the 8 million dossiers would be a long and very expensive undertaking. To comply with the spirit of the new DA policy, however,

all dossiers are reviewed for unauthorized material—which is removed and destroyed—before being released to the requester. (Report of Proceedings held before the Subcommittee on Constitutional Rights of the Committee on the Judiciary Mar. 2, 1971, Vol. 4, p. 600.)"

Files have been and will continue to be screened in accordance with this policy for the purpose of removing and destroying material not authorized for retention under current policy. Generally speaking, there has been

no special effort to segregate files to be screened. However, upon discovering that files on certain prominent individuals contained information which is no longer authorized to be retained, the Army has specifically screened out this material.

I trust that this information will assist you in your inquiry.

Sincerely,

J. FRED BUZHARDT.

(154-0)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

During the Subcommittee's hearings on Federal Data Banks, Computers, and the Bill of Rights, Assistant Attorney General Robert C. Mardian was requested to provide a copy of the "Interdepartmental Action Plan for Civil Disturbances" he referred to during his testimony. He furnished the Subcommittee with a copy of the document but stated that "although the document is not classified, it is an internal working memorandum". . .furnished in confidence. Senator Ervin, Chairman of the Subcommittee, responded that it was "an important piece of information pertaining to our data bank and surveillance study and report. As such it should be included in our formal record. Since the document does not appear to include any sensitive material, I see no reason for not including it."

See Subcommittee hearings, "Federal Data Banks, Computers, and the Bill of Rights", pp. 1370 and 1410, Part II.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 154

Submitted by: (Comm/Subcomm)  
Constitutional Rights Subcommittee  
By: Irene R. Margolis  
Title: Professional Staff Member 8191  
Extension

[Excerpt from hearings entitled "Federal Data Banks, Computers and the Bill of Rights," before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st sess., Part II, p. 1370 and p. 1410.

DEPARTMENT OF JUSTICE,  
Washington, March 22, 1971.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Constitutional Rights, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In accordance with the request you made at the time I testified before the Subcommittee on Constitutional Rights on Wednesday, March 17, 1971, I am enclosing herewith the Interdepartmental Action Plan for Civil Disturbances which I alluded to in that testimony.

Although the document is not classified, it is an internal working memorandum and is furnished to your Committee as confidential.

Very truly yours,

ROBERT C. MARDIAN,  
Assistant Attorney General.

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
December 16, 1971.

Hon. JOHN N. MITCHELL,  
The Attorney General,  
Department of Justice,  
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: On November 12, I wrote you with respect to the production of certain materials and information pertinent to the Subcommittee's study of data collection by the Justice Department. That letter was the latest in a series of requests which began in June, 1970. In view of the longstanding nature of these inquiries, I should like to have the materials produced within the next few weeks. The Subcommittee's hearings of February and March are now going to the printer and the information the Subcommittee desires must be produced shortly so that they can be included in the hearing record.

In this connection, the Department submitted a copy of the Inter-departmental Action Plan for Civil Disturbances, Mr. Mardian's letter of March 22 noted that the plan is not classified, but asked that it be kept "confidential." Upon reviewing the document, I can readily understand that it cannot be properly classified for reasons of security. It is, however, an important piece of information pertaining to our data bank and surveillance study and report. As such it should be included in our formal record. Since the document does not appear to include any sensitive material. I see no reason for not including it. I

think a useful purpose would be served by disclosing to the American people how the federal government approaches these complex and controversial situations. I am confident that publication of the plan would do much to prevent misunderstanding and uninformed criticism of the government's actions in the future.

With kindest wishes.

Sincerely yours,

SAM J. ERVIN, JR.,  
*Chairman, Constitutional Rights Subcommittee.*



## **FILE 160**

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### **SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY**

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(160-A)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY,  
*Washington, D.C., April 9, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*United States Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I understand from Ms. Mathea Falco, Staff Director and Chief Counsel of the Subcommittee on Juvenile Delinquency, that Mr. Pecore has assured her that a brief account of our experience in obtaining information from federal officers would be sufficient for the survey being conducted by your Subcommittee. As you know, I have been Chairman of the Juvenile Delinquency Subcommittee since December 1970. The records of Subcommittee requests to Federal agencies before that time are not available as far as I have been able to determine.

In the two years that I have been Chairman, I have never encountered a direct refusal on the part of Federal employees to testify or to supply information. However, we have experienced consistent difficulty in obtaining prompt and adequate responses to our requests for information. The Federal agencies we deal with most frequently are the Department of Health, Education and Welfare (juvenile delinquency programs); the Department of Treasury (firearms control); and the Department of Justice (dangerous drugs control; firearms control; and juvenile delinquency programs). We have encountered delays in responses from all three agencies, requiring follow-up requests and telephone communications. A particularly glaring example is provided in the Subcommittee hearings on "Saturday Night Special" handguns. At the September 14, 1971 hearings, Senator Hruska asked Mr. Dickey, Deputy Assistant Secretary of Enforcement and Operations of the Department of Treasury, to assemble information regarding the cost of proofing weapons as far as the manufacture is concerned. Six months later, this information had still not been supplied, despite repeated requests for this information so that the record would be complete. The hearings were subsequently printed without this information. The Alcohol, Firearms, and Tobacco Division of the Department of Treasury, while usually cooperative at the lowest staff levels, have generally not been responsive to our requests for detailed information relating to the production of firearms and to other issues in the firearms area. Rather than encountering direct refusals, we are often confronted with an informational barrier which is virtually impossible to penetrate.

In dealing with the Food and Drug Administration of the Department of Health, Education and Welfare and the Bureau of Narcotics and Dangerous Drugs of the Department of Justice, we have always received hearing testimony minutes before the beginning of the hearing, despite the fact that invitations are sent out several weeks before a hearing and copies of testimony are requested 72 hours before appearing to testify. (We have not experienced similar difficulty with non-Federal witnesses.) Most recently, for example, the Subcommittee invited the BNDD and the FDA by letters of February 27, 1973 to appear on March 21, 1973 regarding the abuse and diversion of methadone. The hearings were postponed (due to the Gray nomination hearings) until April 5, 1973; however, in spite of the more than 5 weeks between our invitation and the actual appearance of BNDD and FDA, neither the BNDD nor the FDA testimony arrived at the Subcommittee until less than 5 minutes before the start of the hearing. This is typical of our experience with all Federal agencies whose representatives have been invited to testify before the Subcommittee.

In addition, we have had serious difficulty obtaining prompt, full responsive answers to questions submitted to both BNDD and FDA in order to develop background material for our investigations and hearings. For example, on February 17, 1972, I wrote to the Commissioner of the FDA requesting certain information on barbiturate abuse and diversion no later than March 6, 1972. However, I did not receive responses to my questions until March 28 and April 25, 1972. A similar request was made to the Director of the BNDD on February 16, 1972. The response to my request was not made until May 8, 1972, almost three months later.

Nor has the Law Enforcement Assistance Administration, which is responsible for administering juvenile delinquency programs within the Department of Justice, been prompt in responding to specific questions submitted by the Subcommittee. On January 14, 1972, I requested from LEAA information concerning the number and type of grants, as well as funds appropriated, directed at juvenile crime and delinquency. This inquiry was made 10 days prior to hearings held by the Subcommittee on S. 1428, a bill to establish an Institute for Continuing Studies of Juvenile Justice. I did not receive a response to my questions until April 4, 1972, nearly four months after my initial request.

I hope this information will be helpful to your survey. If you have any questions or need other details, please do not hesitate to have Mr. Pecore call Ms. Mathea Falco, Staff Director and Chief Counsel of the Subcommittee.

With warm regards,  
Sincerely,

BIRCH BAYH, *Chairman.*

## **FILE 165**

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### **SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON SEPARATION OF POWERS**

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(165-A)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

A letter of invitation was sent on January 16, 1973, by Senator Ervin, Chairman of the Subcommittee on Separation of Powers, to Mr. Earl L. Butz, Secretary of Agriculture, asking him to testify on February 1, 1973, and also to Mr. William D. Ruckelshaus, Administrator, Environmental Protection Agency, on January 12, 1973, asking him to testify on February 6, 1973, on the Impoundment control bill, S. 373, at hearings held jointly by the Subcommittee on Separation of Powers and an ad hoc subcommittee of the Committee on Government Operations. Mr. Butz's staff accepted by telephone the invitation to Mr. Butz. The day before Mr. Butz was to testify, we had been in touch with his staff and it was decided he would appear before the two Subcommittees at 1 p.m. on Thursday, February 1, 1973. The morning Mr. Butz was to testify, the Subcommittee learned through a conversation with Mr. Ruckelshaus's staff that neither Mr. Butz nor Mr. Ruckelshaus would testify because President Nixon had directed that only two administration witnesses would testify, although several had been requested. Senator Ervin, the chairman, pointed out that the hearing process is fundamental to the legislative process, and it is not the President's prerogative to determine who would or would not be helpful as a witness in the Subcommittees' investigation.

Meanwhile, Mr. Butz's office claimed it had sent a letter several days before stating that Mr. Butz would not appear before the subcommittees. No such letter had been received by either subcommittee; in fact, on January 31, 1973, the day before Mr. Butz was to appear on February 1, 1973, a member of his staff was trying to establish a time suitable for Mr. Butz to appear and testify.

Mr. Ruckelshaus had previously accepted, and then declined.

Senator Ervin offered to hold another day of hearings in order that Mr. Butz and Mr. Ruckelshaus might testify at their convenience. If they refused, the Chairman suggested that a subpoena would be issued.

Mr. William Timmons of the White House staff soon contacted the Chairman and stated that there was a misunderstanding and that Messrs. Butz and Ruckelshaus would appear. Mr. Ruckelshaus testified on February 6, and Mr. Butz on February 7, 1973.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 165

Submitted by: (X) Comm/Subcomm

Subcommittee on Separation of Powers

By: Walker F. Nolan, Jr.

Title: Counsel

Extension

(381)



## **FILE 172**

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### **SENATE COMMITTEE ON PUBLIC WORKS SUBCOMMITTEE ON BUILDINGS AND GROUNDS**

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#### **C O N T E N T S**

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## (172-A)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
1-29-73	Secretary, Department of Housing, and Urban Development	Ass't. Secretary for Research and Technology	2-5-73 hearings were for the purpose of determining relative merits of new Building - Systems concept, for application to public buildings, to improve quality and reduce construction time. Because H.U.D.'s "Break-thru" Program for residential buildings was similar, Committee wanted benefit of their experience.	Verbal 1-30-73 Written 2-6-73	Secretary, H.U.D.	New Secretary in process of being confirmed, and the fact that former Assistant Secretary responsible for "Break-thru" Program had resigned.

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)Senate Public Works  
Committee, Subcommittee on Buildings and Grounds  
By: John Purinton  
Title: Professional Staff Member X712-C  
Extension

FILE 172:

(385)

(172-B)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

As defined in subparagraph (5), Page 2 of Instructions  
(Failure to comply fully and within a reasonable time).

The Postal Reorganization Act of 1970 (P.L. 91-375) authorized transfer of construction and financial responsibility for Post Office buildings from General Services Administration to the Postal Service. Postal Service affairs and facilities are not under the jurisdiction of the Public Works Committee. Projects relating to 21 Post Offices had been authorized by resolutions of the Committee at that time, for construction or repair by General Services, who subsequently requested that the authorizations be rescinded, requiring further resolutions. At a Committee Executive Session on September 28, 1972 the Members declined to rescind them until future plans for the individual projects were made known, and also the details of each transfer.

On that date both Postal Service and General Services Administration Staff representatives were requested, by telephone, to furnish the desired information at the earliest practicable time. The Postal Service responded promptly, transmitting a resume of proposed plans for each building, with a cover letter dated October 10. General Services Administration did not, and had not at the time of adjournment later that month. During the following three months additional requests were made by telephone, and various reasons were given for the delay. On February 15, 1973 an undated partial list of the buildings, outlining original proposals, was hand-carried to Committee staff without a cover letter or identifying heading. A spot check against the Postal Service list and explanatory remarks revealed discrepancies with regard to General Services' continued involvement in some of the projects, as prime or sub contractor agent. Clarification and a corrected tabulation were requested verbally, which have not to date (3-15-73) been furnished.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 172

Submitted by: (Comm/Subcomm) Senate Public Works  
Committee. Subcommittee on Buildings and Grounds  
By: John Purinton  
Title: Professional Staff Member x57846  
Extension

(380)

## **FILE 180**

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### **HOUSE COMMITTEE ON FOREIGN AFFAIRS**

#### **SUBCOMMITTEE ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENTS**

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(180-A)

CONGRESS OF THE UNITED STATES,  
COMMITTEE ON FOREIGN AFFAIRS,  
HOUSE OF REPRESENTATIVES,  
*Washington, D.C., March 29, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: This is in reply to your letter of March 9 in which you requested information concerning all instances in which federal officials have refused to provide information requested by a subcommittee. I appreciate hearing from you and I am happy to cooperate. Since I became Chairman of the Subcommittee in 1969 there have been no refusals to provide documents or written material, or refusals to appear and testify on the part of Executive branch officials.

There was a single instance in which a request for information was refused but was subsequently honored. The details are provided on the enclosed Survey Form III.

With best wishes, I am  
Sincerely,

CLEMENT J. ZABLOCKI,  
*Chairman, Subcommittee on National Security*  
*Policy and Scientific Developments.*

(389)

(180-B)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY ANSWERED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

During hearings of the National Security Policy and Scientific Developments Subcommittee on chemical-biological warfare during the fall of 1969, a request was made to the Department of Health, Education, and Welfare for a copy of a report on adverse effects of a chemical 2,4,5-T. The report had been prepared under contract by a private laboratory, the Biometrics Research Laboratory of Washington, D. C. 2,4,5-T was at that time a component part of Agent Orange, an herbicide being used in great quantities in South Vietnam.

An initial request for the study was made to HEW by the Subcommittee staff consultant on December 1, 1969. An official there refused to provide the report on the grounds that it was "under review."

Subsequently on December 8, 1969, Chairman Zablocki wrote to the Hon. Robert H. Finch, then Secretary of the Department of Health, Education, and Welfare, formally requesting the report. The letter inquired whether Executive privilege was being invoked to prevent the release of the study and suggested that an HEW official might be called before the Subcommittee in a hearing to explain why the report could not be released. Shortly after the initial refusal, the Acting Surgeon General, Jesse L. Steinfeld, wrote to Chairman Zablocki stating that "Secretary Finch has asked me to provide you with a copy of the Biometrics Research Laboratory's Report on Herbicides."

The report was received in sufficient time to be of assistance to the Subcommittee in its deliberations on chemical-biological warfare.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 180

Submitted by: (Com/Subcomm) Subcommittee on  
National Security Policy & Scientific Developments  
By: John H. Sullivan *J.H. Sullivan*  
Title: Staff Consultant *T5001*  
Extension

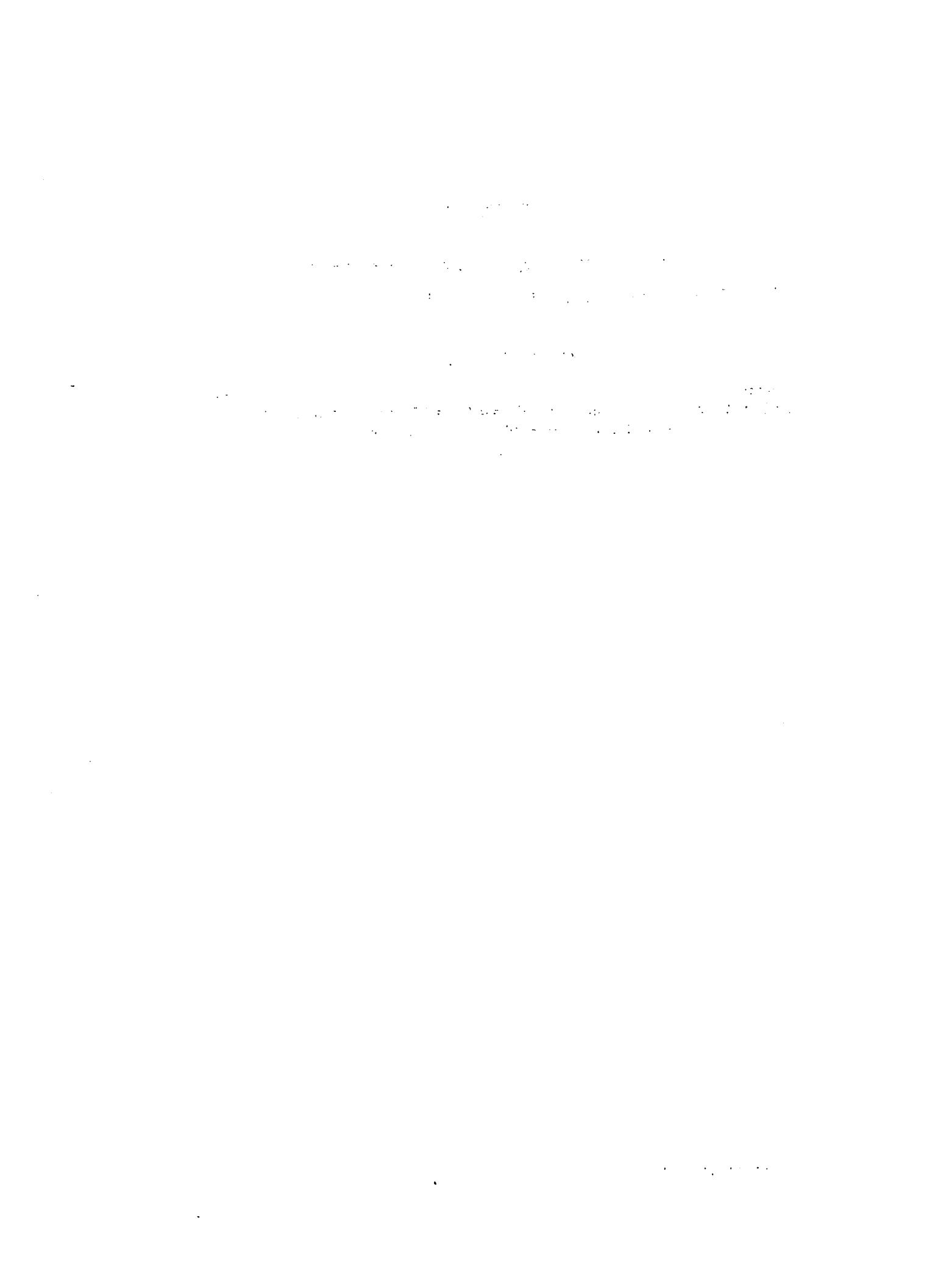
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**FILE 186/188**

**HOUSE COMMITTEE ON FOREIGN AFFAIRS  
SUBCOMMITTEES ON EUROPE AND NEAR EAST**

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## (186/188-A)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
March 27, 1972	John H. Chaffee Secretary of the Navy	Unspecified	See attached correspondence	4/4/72	E.K. Snyder Rear Admiral U.S. Navy, Chief of Legislative Affairs	See attached letter

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILER 186 + File 188

Submitted by: *Comm/Subcomm on Europe & Subcomm on NEAR EAST*  
*C.P. Rackett & Michael Van Dusen*  
 By: C.P. Rackett & Michael Van Dusen  
 TITLE: Staff Consultant Staff Consultant  
 Subcommittee on Europe Subcommittee on NEAR EAST  
 x 58096  
 x 58971

[Excerpt from hearings entitled "Political and Strategic Implications of Homeporting in Greece," before the Subcommittee on Europe and the Subcommittee on the Near East of the Committee on Foreign Relations, House of Representatives, 92d Cong., 2d sess., pp. 168 and 169]

CONGRESS OF THE UNITED STATES,  
COMMITTEE ON FOREIGN AFFAIRS,  
Washington, D.C., March 27, 1972.

Hon. JOHN H. CHAFFEE,  
Secretary of the Navy, Department of the Navy,  
Washington, D.C.

DEAR MR. SECRETARY: In continuing our consideration of the Navy's proposal for homeporting in Greece, our subcommittee will hold additional hearings on April 12 and 13. We would like to have testimony from the Navy at the first session which begins at 2 p.m., on Wednesday, April 12.

We are especially interested in having someone thoroughly familiar with the relative advantages of Greece over the alternative ports which the Navy considered in the homeporting plan.

There are at least three additional important reasons for our request for additional testimony on homeporting by the Department of Defense at that time. First, we will hear from an independent expert on the concept of homeporting whose testimony will raise points the Department will want to comment on. Second, we feel that the additional material submitted to us in your letter of March 21,

in response to our letter of February 28, and the material to be submitted for the record of the March 7 hearing, raise new areas of inquiry. Third, we would like to be able to discuss with the Department of the Navy's witness(es) the systems analysis background of the concept of homeporting and analyses of manpower and force levels relevant to that concept.

Your assistance in this matter is greatly appreciated.  
Sincerely yours,

LEE H. HAMILTON,  
Chairman, Subcommittee on the Near East.  
BENJAMIN S. ROSENTHAL,  
Chairman, Subcommittee on Europe.

DEPARTMENT OF THE NAVY,  
OFFICE OF LEGISLATIVE AFFAIRS,  
Washington, D.C., April 4, 1972.

Hon. LEE H. HAMILTON,  
Chairman, Subcommittee on the Near East, Committee on Foreign Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of March 27, 1972, which offers the Navy additional opportunity to discuss the proposal of homeporting in Greece in the forthcoming sessions of your subcommittee beginning

on April 12. I have been requested by Secretary Chafee to respond to your invitation.

The Navy is desirous of assisting the subcommittee in its consideration of overseas homeporting and will be pleased to provide such information as the subcommittee desires. In this connection, Admiral Zumwalt and executives of the Defense and State Departments appeared before a joint session of the European and Near East Subcommittees on March 7 and 8, 1972. During these hearings, the witnesses provided comprehensive background information regarding the administration policy on homeporting together with details of the considerations which attended the selection of Greece as a site. In addition, the Senate Foreign Relations Committee and other key members of both the House and Senate have been thoroughly briefed by Admiral Zumwalt on this subject.

In light of this previous information and of the level of representation at which it was provided, it would appear that the Navy can now best serve the subcommittee's interests by providing specific answers to further questions rather than by additional testimony on a unilateral basis and at a level of representation below that of the original witnesses. This belief is strengthened by the contents of your letter of March 27, 1972. These refer to specifics generated by expert testimony, by further inquiry into details previously provided by the Navy and by analytical estimates, all of which will require detailed analysis and a reply that are not practical or appropriate in oral testimony.

It is for the above reasons that the Navy respectfully declines your invitation. I do wish to assure your subcommittee that the Navy desires to cooperate in every possible way. We will be pleased to respond, for the record, to any question that may develop during the hearings on April 12 and 13.

Sincerely yours,

E. K. SNYDER,  
Rear Admiral, U.S. Navy,  
Chief of Legislative Affairs.

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CONGRESS OF THE UNITED STATES,  
COMMITTEE ON FOREIGN AFFAIRS,  
Washington, D.C., April 6, 1972.

Hon. MARTIN J. HILLENBRAND,  
Assistant Secretary of State for European Affairs,  
Department of State, Washington, D.C.

DEAR MARTY: The Subcommittee on Europe and the Near East have been holding joint hearings on the U.S.

Navy's plan to homeport a carrier task force in Greece. The sessions so far have indicated that a number of other Mediterranean ports were considered by the Navy but were rejected in favor of Greece.

Because of the considerable attention our subcommittees, and the full Committee on Foreign Affairs, have given recently to Greece, and because the Congress recently approved a foreign aid bill forbidding any aid to that country, we have naturally followed the homeporting matter very closely. In our earlier hearings in March on this subject we heard from Adm. Elmo Zumwalt and Assistant Secretary of Defense G. Warren Nutter, who testified in favor of homeporting as an administrative device to improve morale and reenlistment rates and thereby to improve the capability of the 6th Fleet in the Mediterranean. Two former members of the Greek Parliament testified against the homeporting plan which would, in their view, increase the apparent American support for the military junta which seized power nearly 5 years ago.

Our inquiry now turns to the alternatives which the Navy considered before deciding on Greece. All of those alternate ports were in the European area, the Navy has said. The only State Department testimony so far has been from the Near East Bureau, which lacks the detailed knowledge needed to explain the assets and deficiencies of alternative ports. Since the homeporting proposal was made by the Navy after consulting with the State Department, we would like to have an explanation of all the factors concerning which the Department and the Navy conferred in reaching the decision on homeporting.

Although several of the alternate ports were in Spain and France, it is our understanding that Italy offered the most realistic alternatives to Greece. We would be happy to have testimony from George Springsteen or Russ Fessenden, or both, to get a broad view of the alternatives considered, supplemented by whatever country director(s) or desk officer(s) you think appropriate.

The Navy has declined to testify on its consideration of the alternate ports in a session we have already scheduled for 2 p.m., on Wednesday, April 12. We would be happy to have the State Department witness(es) testify then although we realize that this is quite short notice. We have another session scheduled on Tuesday, April 18, also at 2 p.m. which might be more suitable.

I look forward to hearing from you.

Sincerely yours,

BENJAMIN S. ROSENTHAL,  
Chairman, Subcommittee on Europe.

## **FILE 207**

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### **HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE**

#### **SUBCOMMITTEE ON COMMERCE AND FINANCE**

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#### **C O N T E N T S**

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(207-A)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
*Washington, D.C., July 12, 1973.*

Hon. SAM J. ERVIN, Jr.;  
*Chairman, Subcommittee on Separation of Powers,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I refer to your letter of March 9, 1973, seeking information on instances in which Federal officers refused to provide information to congressional committees.

I am returning to you herewith copies of Survey Form I indicating refusals to submit information by the Price Commission, the Securities and Exchange Commission, the Department of Transportation, and the Consumer Product Safety Commission.

I trust this will assist your committee in its investigation.  
Sincerely,

JOHN E. MOSS,  
*Chairman, Subcommittee on Commerce and Finance.*

(397)

## (207-B)

## SURVEY FORM L: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
1-27-72	Hon. C. Jackson Grayson Jr.	Price increase requests filed by American Motors, Ford Motor Co., and General Motor Corp.	2-11-72	Mr. Grayson	Confidential material of the type referred to § 1905 of Title 18, U.S.C.. Only released to carry out P.L. 92-210 when relevant in proceedings thereunder.
5-73	Exec. Dir., Consumer Product Safety Com.	Budget documentation submitted to House Appropriations Committee	5-73	Unknown	Material was furnished only after permission was obtained from the House Appropriations Com.
5-72	Legislative Liaison Ofc Nat'l. Highway Safety Administration	Budget documentation submitted to House Appropriations Committee	5-72	Unknown	Material was furnished only after permission was obtained from the House Appropriations Com.
1973	Securities and Exchange Commission	Budget documentation submitted to Office of Management & Budget.	1973	Unknown	Office of Management & Budget Circular A-10, which prohibits agencies from making available to the Congress budget requests submitted to OMB by the agency; except that such agency may make the material available to the Appropriations Committee upon request.

Separation of Powers Subcommittee SURVEY,  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 207

Submitted by: (Comm/Subcomm)  
Committee on Interstate and Foreign Commerce  
Subcommittee on Commerce and Finance

By:

Title: John E. Moss, Chairman

Extension

(398)

## **FILE 245**

### **HOUSE COMMITTEE ON GOVERNMENT OPERATIONS SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS**

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(245-A)

HOUSE OF REPRESENTATIVES,  
INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., March 26, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: I am enclosing responses prepared by the staff of the Intergovernmental Relations Subcommittee to questions in your Subcommittee's survey on refusals by Federal officers or employees to provide information requested by congressional committees and subcommittees.

I hope this information will be useful in the very important work you have undertaken. If additional information is desired, we will be glad to provide it.

Sincerely,

L. H. FOUNTAIN, *Chairman.*

(401)

## (245-B)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/5/69	Hon. Robert H. Finch, Secretary of HEW	Files used by HEW as basis for excluding scientists from serving on non-sensitive advisory committees on grounds of loyalty or suitability. On October 13, 1969, HEW Secretary Finch informed the Subcommittee that 12 persons had been so excluded since January 1968 and that 8 of these individuals have been identified as active members of the Communist Party, USA, several of whom served in leadership roles. The Subcommittee subsequently learned that 9 of the 12 persons in question had been awarded HEW grants since January 1968 totalling more than \$3 million.  In view of this situation, and the fact that the scientists in question had not been informed of or given an opportunity to challenge the derogatory information used by HEW, Chairman Fountain requested that the Subcommittee be given access to the appropriate files so that the Subcommittee might ascertain for itself the reliability of the information transmitted by the Secretary.	6/29/70. (NOTE: Secretary Finch advised Subcommittee on June 1, 1970, that Executive Order 10450 prevented HEW from making the files available without first obtaining authorization from the Justice Department, which was the investigative agency for the files in question.)	Attorney General John Mitchell, with specific approval of the President.	Investigative reports of the FBI are of a confidential nature and that "congressional or public access to them would not be in the public interest." The Opinion of Attorney General Jackson of April 30, 1941, 40 Op. A.G. 45, 46.

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 245

Submitted by: (Comm/Subcomm)

House Intergovernmental Relations Subcommittee

By: Dr. D. C. Goldberg

Title: Professional Staff Member

5-2548 Extension

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
April 2, 1974.

Hon. L. H. FOUNTAIN,  
Chairman, Subcommittee on Intergovernmental Operations,  
House of Representatives, Washington, D.C.

DEAR L. H.: I have been informed that your files contain correspondence between you, President Richard Nixon, former Attorney General John Mitchell, Mr. John Ehrlichman, and possibly Mr. Robert N. Finch, which document an invocation of Executive privilege by Mr. Mitchell. As I understand the circumstances, Mr. Mitchell refused to supply your committee, in June 1970, with documents which you sought relating to the exclusion of certain scientists from appointment to nonsensitive advisory committees under the sponsorship of the Department of Health, Education, and Welfare, during Mr. Finch's secretaryship. I understand also that Mr. Mitchell, evidently having possession of these documents, refused to pass them to your committee, claiming Executive privi-

lege, and asserting the President's personal and specific approval of this invocation of Executive privilege.

The Senate Subcommittee on Separation of Powers will print in the immediate future a detailed report of its survey of Congress. This report will document the difficulties encountered by the Legislative branch in obtaining information from officials of the Executive branch during the period from 1964 to early 1973.

I would be most grateful to you if you would provide to the Subcommittee on Separation of Powers copies of the correspondence referred to above for inclusion in that report. We have documented fully three of the four known instances in which President Nixon was involved personally in the invocation of Executive privilege, and we seek to explain fully this fourth instance which occurred during the period of the survey. The correspondence which I request from you now will permit us to complete this part of the survey.

With all kind wishes, I am  
Sincerely yours,

SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers.

HOUSE OF REPRESENTATIVES,  
INTERGOVERNMENTAL RELATIONS  
SUBCOMMITTEE OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., April 3, 1974.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, U.S.  
Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of April 2, 1974, I am transmitting herewith the pertinent correspondence relating to Attorney General Mitchell's invocation of Executive privilege on June 29, 1970. My letter of October 24, 1970 to President Nixon fully summarizes this Subcommittee's earlier extensive correspondence with HEW Secretary Finch on this subject.

I appreciate the important work of the Subcommittee on Separation of Powers in documenting the several instances in which the President has invoked or has authorized the invocation of Executive privilege, and I am pleased to be of assistance.

With kindest personal regards.

Sincerely,

L. H. FOUNTAIN, Chairman.

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U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., June 4, 1970.*

Hon. JOHN N. MITCHELL,  
Attorney General of the United States, U.S. Department of  
Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: I am informed that on June 1, 1970, the Secretary of Health, Education, and Welfare requested your authorization to make available to the Subcommittee certain investigative reports which your Department furnished HEW for the purpose of evaluating scientists nominated to serve on nonsensitive advisory bodies.

I want you to know that the Subcommittee is very anxious to complete its investigation of HEW clearance procedures and standards which has been delayed since October 1969 by the Department's failure to provide the necessary information.

In view of this background, I will appreciate it if you would give immediate attention to Secretary Finch's request so that the Subcommittee may complete its study of this matter.

Sincerely,

L. H. FOUNTAIN,

*Chairman, Intergovernmental Relations Subcommittee.*

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OFFICE OF THE ATTORNEY GENERAL,  
*Washington, D.C., June 29, 1970.*

Hon. L. H. FOUNTAIN,  
Chairman, Intergovernmental Relations Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. FOUNTAIN: This is in reply to your letter of June 4, 1970. In that letter you referred to a request by the Secretary of Health, Education, and Welfare, addressed to me, for authority to make available to the Intergovernmental Relations Subcommittee of the House

Committee on Government Operations certain investigative reports prepared by the Federal Bureau of Investigation which had been furnished to the Department of Health, Education, and Welfare for the purpose of evaluating scientists nominated to serve on advisory bodies.

The Opinion of Attorney General Jackson of April 30, 1941, 40 Op. A.G. 45, 46, issued with the approval and at the direction of the President, confirmed that the investigative reports of the Federal Bureau of Investigation are of a confidential nature and that "congressional or public access to them would not be in the public interest." There has been no change since then in the confidential status of those reports. This is particularly true with respect to FBI reports compiled in connection with security investigations instituted for the purpose of government employment. We are not aware of any instance of disclosure outside the Executive branch in such a case.

I have therefore concluded that it would not be in the public interest to comply with the request of the Secretary of Health, Education, and Welfare to release any investigative reports of the Federal Bureau of Investigation to your subcommittee. This invocation of privilege is being made with the specific approval of the President.

I am transmitting a copy of this letter to the Secretary of Health, Education, and Welfare.

Sincerely,

JOHN MITCHELL,  
*Attorney General.*

---

HOUSE OF REPRESENTATIVES,  
INTERNATIONAL RELATIONS SUBCOMMITTEE, OF THE COMMITTEE ON  
GOVERNMENT OPERATIONS,  
*Washington, D.C., October 24, 1970.*

Hon. RICHARD M. NIXON,  
President of the United States,  
The White House,  
Washington, D.C.

DEAR MR. PRESIDENT: On September 8, 1969, I directed certain questions to the Secretary of Health, Education, and Welfare concerning press reports that his Department had arbitrarily excluded distinguished scientists from service on non-sensitive advisory bodies on political or other grounds unrelated to their professional qualifications.

In replying to my letter on October 13, 1969, the Secretary stated that since January 1968 twelve persons have been excluded from serving on non-sensitive scientific advisory panels, committees, or councils because of the following factors disclosed by investigations:

"Eight of these individuals, who were not selected for invitation to serve, have been identified as active members of the Communist Party, USA, several of whom served in leadership roles (one a national officer) in the Communist Party. Five of the eight have refused to discuss their Communist Party activities before Congressional Committees or with Government investigative agencies.

"Another individual, who is married to a Communist Party member, has attended Communist Party sponsored functions and associated with Communist Party leaders. His wife has refused to answer questions before a Congressional Committee. One individual is a non-resident

alien whose father has been an active member of the Communist Party of a foreign country since 1920.

"One individual had been arrested for committing an indecent act and pleaded guilty. Information on the remaining individual is classified intelligence data and cannot be disclosed. However, you are assured that this information was given careful and serious consideration and it was determined that he was not suitable for selection."

On October 16, 1969, I again wrote the Secretary in regard to certain requested information that had not been provided. I also raised a number of specific questions concerning the twelve excluded persons and the nature of the investigations relied upon by HEW as the basis for excluding them. Despite numerous follow-up letters and telephone calls from the Subcommittee, most of the basic information requested was not provided until May 4, 1970. This was immediately after I had asked the Department to make available to the Subcommittee for direct inspection the investigative files for the twelve individuals in question.

Although the Secretary's letter of May 4, 1970, was not fully responsive to my questions of October 16, 1969, it did disclose for the first time that since January 1968 nine of the twelve persons excluded from advisory bodies have been awarded HEW grants totaling more than \$3,000,000.

It should be kept in mind that the Secretary has identified eight of the twelve persons as "active members of the Communist Party, USA, several of whom served in leadership roles (one a national officer) in the Communist Party." Of the remaining four persons, one was said to be married to a Communist Party member, and another was identified as a non-resident alien whose father has been an active member of the Communist Party of a foreign country. The other two cases involved a morals charge and classified intelligence data respectively.

Needless to say, I was shocked to learn that HEW had awarded large amounts of public funds to the very same persons whom the Department was unwilling to appoint to non-sensitive scientific advisory bodies because of alleged Communist Party membership or associations.

Either the persons who are alleged to be Communists have been unfairly accused, or HEW is knowingly making grants to persons it considers disloyal. This obviously is an untenable situation, and the public interest demands that it be resolved. However, I am unaware of any action being taken by HEW to resolve it.

To make matters even worse, the Under Secretary of Health, Education, and Welfare informed me on October 1, 1970, of newly adopted Department procedures which will permit the appointment to advisory bodies of persons whom HEW considers to be disloyal. This is now possible because pre-appointment name checks of FBI and CSC files have been discontinued, and these checks are to be made for advisory body members only after their terms of service have commenced.

In the light of these circumstances, I believe it is imperative that the Subcommittee ascertain for itself from the investigative files used by HEW the accuracy of the Secretary's characterization of the scientists in question.

After repeated requests and protracted discussion of this matter, we were finally advised on June 1, 1970, that the Department has no further objection to making those files available to the Subcommittee, but that Executive

Order 10450 requires HEW first to obtain authorization from the Justice Department, which was the investigative agency for these cases.

In response to my letter of June 4, 1970, Attorney General Mitchell wrote me on June 29, 1970, that the request of the Secretary of Health, Education, and Welfare to release the investigative reports to the Subcommittee was denied. The Attorney General suggested that investigative reports of the FBI have not previously been made available to the Congress.

I can state from my personal knowledge that such reports have been made available at the President's direction to appropriate committees of the Congress. Moreover, I am confident that your authorization to the Attorney General to invoke Executive Privilege in your behalf was not given, and indeed I do not believe it would have been given, with full knowledge of the facts I am bringing to your attention.

I hope, Mr. President, you will agree with me that the Subcommittee not only has a special need to examine these files but it also has the duty to do so. Only then can the Congress ascertain through this Subcommittee whether or not the Department of Health, Education, and Welfare has acted responsibly in excluding scientists from non-sensitive advisory bodies, and in simultaneously making research and training grants to those same scientists.

I hope also that in view of the urgency of this matter you will give immediate attention to my request for access to these files.

Sincerely,

L. H. FOUNTAIN,  
*Chairman, Intergovernmental Relations Subcommittee.*

THE WHITE HOUSE,  
Washington, November 21, 1970.

Hon. L. H. FOUNTAIN,  
*Chairman, Intergovernmental Relations Subcommittee,  
Committee on Government Relations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your letter of October 24, 1970, in which you requested the President to reconsider his decision approving the invocation by the Attorney General of Executive privilege with respect to certain personnel security files which the Federal Bureau of Investigation had compiled and made available to the Department of Health, Education, and Welfare.

The documents here involved are not ordinary investigative reports, but reports relating to personnel security investigations which are subject to especially strict standards of confidentiality. To our knowledge, no President has ever authorized the release of such reports except in connection with proceedings involving the confirmation or the impeachment of officers of the United States. See 40 Op. A.G. 45, 54 (1941).

Since neither of those categories is applicable here, the President has decided to adhere to his earlier decision approving the invocation of privilege in this case.

I'm reviewing in some detail the procedures governing the appointment of individuals to advisory bodies. I will have more information forwarded to you on this particular subject at a later date.

Yours sincerely,

JOHN D. EHRlichman,  
*Assistant to the President for Domestic Affairs.*

(245-C)

SURVEY FORM ~~III~~: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
			NOTE: There have been no instances in which Federal officers or employees have refused to appear as witnesses. In June 1969, Jack Woolley, then Assistant for Congressional Relations to the Secretary of Housing and Urban Development took the position that scheduled testimony of representatives of the Federal Housing Administration concerning accidents due to unsafe glass doors would not be permitted because it had not been arranged through his office. However, Mr. Woolley's position did not prevail and the hearings were held as scheduled.			

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

House Intergovernmental Relations Subcomm.

By: James R. Naughton

Title: Counsel

5-2548

Extension

FILE 245:

(405)

(245-D)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

The Subcommittee held hearings in 1971 on the Food and Drug Administration's regulation of diethylstilbestrol (DES) as a drug for humans and in animal feeds. The hearing commenced in March 1971, followed by further hearings on November 11 and December 13, 1971.

While preparing for the December 13 hearing, the Subcommittee staff learned of the existence of a December 5, 1971 memorandum by Dr. Adrian Gross, an FDA scientist, which questioned the adequacy of the testing methods used for detecting residues of DES in edible animal tissue. The memorandum concluded that the testing methods were not sufficiently sensitive to provide adequate public protection.

On December 8 the Subcommittee staff requested the Food and Drug Administration to furnish a copy of this memorandum. FDA refused to comply on the grounds that the document was a preliminary report which was being considered by the agency and, as such, was not available under the Freedom of Information Act.

FDA persisted in this refusal for two days despite numerous telephone conversations with agency officials. However, at 5 p.m. on December 10, one business day before the hearing scheduled for 10 a.m. December 13 (a Monday), the Food and Drug Administration did deliver the memorandum. It was accompanied by a letter from the FDA Commissioner requesting that the Chairman regard the memorandum as confidential and avoid its public disclosure until it could be further studied by FDA. The memorandum was provided only after the Subcommittee staff had insisted upon a written statement citing the legal authority upon which FDA was relying in its refusal to provide the document. This document was very useful in the Subcommittee's investigation of the regulation of DES.

See NOTE attached.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FIL# 245

Submitted by: (Comm/Subcomm)  
House Intergovernmental Relations Subcommittee  
By: Dr. D. C. Goldberg  
Title: Professional Staff Member  
5-2539 Extension

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

NOTE: This represents only one of a long series of instances in which the FDA has attempted to withhold information from the Subcommittee. In previous instances of withholding, FDA contended that it had an obligation to protect the confidentiality of information obtained from drug manufacturers, from practicing physicians or from agency consultants.

The initial refusal to provide information occurred in May 1962 when the Subcommittee requested access to FDA files containing the New Drug Applications for two drugs which had been withdrawn from the market because they were found to be unsafe. The FDA Commissioner held that Section 301j of the Federal Food, Drug and Cosmetic Act (which protects "trade secrets") prohibited the agency from disclosing any information submitted in connection with a New Drug Application that is entitled to protection as a trade secret. The requested information was not made available until after Chairman Fountain had testified before the House Committee on Interstate and Foreign Commerce, on June 20, 1962, proposing that Section 301j be amended to include the language "Provided that nothing in this Act shall authorize the withholding of information from the duly authorized committees of the Congress."

In addition to the cited instances involving FDA, there have been a number of instances in which officials of other agencies have been unwilling to provide information when initially requested but have subsequently reversed their position. Information concerning these reversals is not readily available from the Subcommittee files since the matters usually were handled on an informal basis and reversals were obtained without the necessity of formal action.

Submitted by Intergovernmental Relations Subcommittee  
House of Representatives

## FILE 246

### HOUSE COMMITTEE ON GOVERNMENT OPERATIONS SUBCOMMITTEE ON CONSERVATION AND NATURAL RESOURCES

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(246-A)

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL RESOURCES SUBCOMMITTEE,  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., March 19, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman,*  
*Subcommittee on Separation of Powers,*  
*Committee on the Judiciary,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: I am pleased to respond to your March 9, 1973, letter concerning your Subcommittee's survey of instances when Federal officers or employees refused to provide information requested by congressional committees and subcommittees during the period January 1, 1964 through February 28, 1973.

Executive branch officers and employees have refused to provide information to the House Conservation and Natural Resources Subcommittee in the following instances, which are described in detail on the enclosed forms furnished by you (your File 246):

*Form I—*

A. My letter of November 15, 1972, to Mr. Kent Frizzell, Assistant Attorney General, U.S. Department of Justice, requesting memorandum written by Martin Green and other data relating to White House intervention in *United States of America v. Armco Steel Corporation*.

B. Oral request of Rep. William S. Moorhead to Mr. Martin Green, for copy of Mr. Green's memorandum mentioned above, at Subcommittee's December 21, 1972, hearing on "Mercury Pollution and Enforcement of the Refuse Act of 1899"—part 3, p. 1301.

C. My oral request at above hearing (p. 1336) to Assistant Attorney General Kent Frizzell, for a list of the people at one of the negotiating sessions on the Armco Steel matter mentioned above.

D. My letter of January 29, 1973, to EPA Administrator William D. Ruckelshaus, requesting data concerning Justice Department's settlement of *United States v. Houston Lighting and Power Co.*

E. My letters of February 6 and March 12, 1973, to Environmental Protection Agency Administrator William D. Ruckelshaus, requesting copy of Dr. Oscar Liu's report entitled "Virus Study on Water Supplies from Three New England Communities."

*Form II—*

A. My letter of October 21, 1971, to Mr. Peter M. Flanigan, Assistant to the President, requesting that he testify at the Subcommittee's October 21, 1971, hearing.

B. My letter of October 19, 1971, to Mr. Shiro Kashiwa, then Assistant Attorney General, requesting that he testify at the Subcommittee's October 21, 1971, hearing.

C. My letter of December 13, 1972, to Presidential Assistant Peter M. Flanigan, requesting that he testify at our Subcommittee's December 21, 1972, hearing.

D. My letter of December 13, 1972, to Mr. W. John Glancy, former White House staff aide, requesting him to testify at the Subcommittee's December 21, 1972, hearing.

E. My letter of December 13, 1972, to Mr. George Crawford, former White House staff aide, requesting him to testify at the Subcommittee's December 21, 1971, hearing.

*Form III* describes instances in which our requests for information were initially refused but subsequently complied with.

If you desire any further information, please contact our Subcommittee Chief Council, Phineas Indritz, extension 5-6427.

Sincerely,

HENRY S. REUSS,  
*Chairman, Conservation and Natural Resources Subcommittee.*

## (246-B)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
November 15, 1972 (Subcommittee letter attached.)	Mr. Kent Frizzell, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice.	Subcommittee requested copy of (a) September 30, 1971, memorandum for departmental files written by Martin Green, Chief of the Department's Pollution Control Section; and (b) all other documents, including memoranda, correspondence, notes, telephone reports, and other materials in Justice Department files in Washington and in the U.S. Attorney's office in Houston since September 16, 1971, relating to White House intervention to secure modification of September 17, 1971, Federal District Court Order barring Armco Steel Corp.'s toxic waste discharges into Houston, Tex., Ship Channel. <u>Reason:</u> For use in hearings, "Mercury Pollution and Enforcement of the Refuse Act of 1899", Part 3, Dec. 21, 1972, to examine into discrepancy between testimony before the Subcommittee on November 5, 1971 (Part 2) by Shiro Kashiwa, then Mr. Frizzell's predecessor at the Justice Department, and Mr. Green's Memorandum, which was published in the Jack Anderson column on November 15, 1972. These discrepancies are listed on pp. 1277, 1278 of the Hearings, <u>supra</u> , Part 3. Enclosed are copies of Part 2, and the uncorrected page proofs of Part 3, of the Subcommittee's hearings, "Mercury Pollution and Enforcement of the Refuse Act of 1899", relating to the <u>Armco</u> matter. The Staff Memorandum on pages 1276-1280 of the page proofs outlines the details of the Government's negotiation of the Consent Order in the <u>Armco Steel Corporation</u> case.	11/21/72 (Justice Department response attached.)	Ralph E. Erickson, Deputy Attorney General, U.S. Department of Justice.	"...long standing Department policy against making available files in open cases."

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 246

Submitted by: (Comm/Subcomm) Conservation and Natural Resources Subcommittee of House Committee on Government Operations  
By: Phineas Ingritz  
Title: Chief Counsel, Conservation and Natural Resources Subcommittee Extension 56427

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND  
NATURAL RESOURCES SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS  
Washington, D.C., November 15, 1972.

MR. KENT FRIZZELL,  
Assistant Attorney General for Land and Natural Resources,  
Department of Justice, Washington, D.C.

DEAR MR. FRIZZELL: Please provide to us a copy of Mr. Martin Green's memorandum of September 30, 1971, to your predecessor, Mr. Shiro Kashiwa, concerning Mr. Green's contacts with the White House in regard to the September 17, 1971, decision by a Federal District Court Judge in Houston, Texas, against the Armco Steel Company. It is our understanding that you will provide this memorandum to us quite promptly.

We also request that you provide to us by November 20, 1972, a copy of all other documents, including memoranda, correspondence, notes, telephone reports, and other materials made a part of the Justice Department files in Washington and in the U.S. Attorney's office in Houston since September 16, 1971, in the above case.

Sincerely,

HENRY S. REUSS,  
Chairman, Conservation and Natural Resources  
Subcommittee.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, D.C., November 21, 1972.

HON. HENRY S. REUSS,  
Chairman, Conservation and Natural Resources Subcommittee of the Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of November 15, 1972, to Assistant Attorney General Kent Frizzell, concerning the Armco Steel Company case.

Your request for copies of all documents made a part of the Department's file in the case subsequent to September 16, 1971, must be respectfully declined in accordance with the long standing Department policy against making available files in open cases. I understand that you have previously been furnished the various documents filed with the court in this case.

Sincerely,

RALPH E. ERICKSON,  
Deputy Attorney General.

## (246-C)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
December 21, 1972 (hearing, page 1301, attached)	Mr. Martin Green, Chief, Pollution Control Section, U.S. Department of Justice.	Mr. Green's departmental memorandum of September 29, 1971 re: White House contacts on the <u>Armco Steel Corp.</u> decision (see Form I-dated Nov. 15, 1972), requested by Rep. William S. Moorhead at Hearings "Mercury Pollution and Enforcement of the Refuse Act of 1899", Part 3, December 21, 1972.	Dec. 21, 1972 (Hearing, page 1301 attached)	Mr. Ralph Erickson, Deputy Attorney General (See form I dated November 15, 1972)	"It is a matter in the files of the Department of Justice in an open case, ..."

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 246

Submitted by: (Comm/Subcomm) Conservation and Natural Resources Subcommittee of House Committee on Government Operations

By: Phineas Indritz  
Title: Chief Counsel, Conservation and Natural Resources Subcommittee Extension 56427

[Excerpt from hearings entitled "Mercury Pollution and Enforcement of the Refuse Act of 1899," Part 3, before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d sess., p. 1301]

Mr. MOORHEAD. Thank you, Mr. Chairman. I want to congratulate you for holding these hearings. You have been very diligent in the enforcement of our conservation laws, and this hearing is certainly along that line.

The hearing, however, does bring up other matters which are clearly related to the jurisdiction of the Foreign Operations and Government Information Subcommittee. We have had testimony on actions of the Justice Department in dealing with representatives of the White House, who have declined to appear before this subcommittee. I am speaking of Mr. Flanigan, Mr. Glancey, and Mr. Crawford. When decisions are made in the White House or in the Executive Office Building and participants in those decisions decline to appear before Congress, it makes it difficult for us to carry out our constitutional duty.

Mr. Green, from time to time you referred to notes in your testimony. Are there any memorandums to which you are referring, other than the memorandum of September 30, 1971, that you described?

Mr. GREEN. I have here a number of items: Newspaper clippings, court pleadings, and some handwritten notes. The answer is, I am not referring directly to the memorandum that I wrote, and I am referring to matters other than that.

Mr. MOORHEAD. Will you furnish a copy of your memorandum of September 30, 1971, to this subcommittee?

Mr. GREEN. No.

Mr. MOORHEAD. Why?

Mr. GREEN. It is a matter in the files of the Department of Justice in an open case, and so in the course—

Mr. MOORHEAD. Are you under instructions not to submit that memorandum of September 30 to the subcommittee?

Mr. GREEN. Yes, I am.

Mr. MOORHEAD. Will you supply to the subcommittee other notes and memorandums that you referred to in your testimony?

Mr. GREEN. Yes. You may have the whole folder right now.

Mr. REUSS. If the gentleman will suspend for a minute, the material just furnished by Mr. Green encased in a folder will be marked "Exhibit 1" and, without objection, will be received into the record.

(SUBCOMMITTEE NOTE.—The materials submitted by Mr. Green are in the subcommittee files.)

Mr. MOORHEAD. This folder does not contain the memorandum of September 30; is that correct?

Mr. GREEN. That is correct. It does contain a clipping from a newspaper, but it does not contain the memorandum.

Mr. CONYERS. On whose instruction, Mr. Green, are you acting in withholding the memorandum?

Mr. GREEN. Most immediately on the instructions of the Assistant Attorney General in charge of the Land and Natural Resources Division, Kent Frizzell.

Mr. CONYERS. Thank you.

## (246-D)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
December 21, 1972 (hearing, page 1336 attached.)	Mr. Kent Frizzell, Assistant Attorney General, U.S. Department of Justice D	A list of the people attending one of the numerous negotiation sessions, representing Armco and the Government, requested by Chairman Reuss at Hearings, "Mercury Pollution and Enforcement of the Refuse Act of 1899," Part 3, December 21, 1972.	Dec. 21, 1972 (hearing, page 1336 attached.)	Mr. Kent Frizzell	"Under the statements that I have just furnished this Committee and under the Departmental Order 116-56, I am sorry I am unable to provide you with a copy of that because it is part of the departmental file whose integrity must be protected."

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 246

Submitted by: (Comm/Subcomm) Conservation and Natural Resources Subcommittee of the House Committee on Government Operations

By: Phineas Ingritz, Chief Counsel, Conservation and Natural Resources Subcommittee  
Extension 56427

[Excerpt from hearings entitled "Mercury Pollution and Enforcement of the Refuse Act of 1899," Part 3, before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d sess., December 21, 1971, p. 1336]

Mr. REUSS. Thank you very much.

On page 3 of your testimony which you have just read, you refer to a document containing "a list of the people attending one of the numerous negotiation sessions, representing Armco and the Government." What was the date of that meeting?

Mr. FRIZZELL. October 8, 1971.

Mr. REUSS. May I have that list?

Mr. FRIZZELL. Under the statements that I have just furnished this committee and under the Departmental Order 116-56, I am sorry I am unable to provide you with a copy of that because it is part of the departmental file whose integrity must be protected.

Mr. REUSS. If you cannot give me the papers, then just tell me who was there.

Mr. FRIZZELL. I am now recalling as best I can. Mr. Chairman, because I have reviewed the file, obviously, in preparation for this hearing and when it received publicity prior hereto.

I will say that the earlier testimony that this committee has heard this morning from both Judge Kashiwa and Martin Green as to their recollection of those persons attending that same meeting was accurate, as best I recall. There were three representatives of Armco Steel, all lawyers. There were two or three representatives from EPA. There were three or four representatives from the Department of Justice. There was one representative from the Corps of Engineers. I do not recall their specific names.

Mr. REUSS. Are those the only people whose presence you can recall at that meeting?

Mr. FRIZZELL. I can recall that there were no other agencies or departments of Government other than those I have enumerated.

## (246-E)

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
January 29, 1973 (letter from Subcommittee Chairman Reuss attached)	Mr. William D. Ruckelshaus, Administrator, Environmental Protection Agency	The Subcommittee requested that EPA advise whether or not it concurred in a Justice Department-Houston Lighting and Power Co. settlement of a lawsuit filed against the Company's fossil fuel electricity plant near Cedar Bayou in Chambers County, Texas. (EPA had earlier proposed a different settlement of the case.)	Feb. 23, 1973	Mr. Gary Baise, Director, Office of Legislation, Environmental Protection Agency (letter attached)	Mr. Baise wrote in part: "...I am of the opinion that it would be quite inappropriate and unproductive to explain the reasons behind each draft change. The final product sets forth a settlement regarded as being in the best interests of the government."

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 246

Submitted by: (Comm/Subcomm) Conservation and Natural Resources Subcommittee of the House Committee on Government Operations

By: Phineas Idritz  
Title: Chief Counsel, Conservation and Natural Resource Subcommittee Extension 56427

### III DISCHARGE

Generating Units 1 and 2 of the Cedar Bayou plant have been completed and are now in operation. Defendant has begun construction of a third generating unit at the plant.

To obtain necessary cooling water for the electricity generating facilities at the Cedar Bayou plant, Defendant has constructed an intake channel extending from Cedar Bayou into Galveston Bay at a location east of Atkinson Island in upper Galveston Bay, near the Houston Ship Channel. The cooling water drawn from Galveston Bay and Cedar Bayou through the intake channel passes through the condensers of the Defendant's generating facilities. The Defendant has constructed a canal approximately six miles long, through which effluent water from the Cedar Bayou plant is discharged into the waters of Trinity Bay at a point approximately six and one-half miles north of Umbrella Point. *The discharged water contains toxicants, nutrients, coliform bacteria and other pollutants and is higher in salinity than the water of Trinity Bay. The temperature of the discharged water is higher than the temperature of the receiving water.*

*The Defendant does not hold a permit from the Chief of Engineers, United States Army Corps of Engineers for the discharge of such refuse matter into said navigable waters, although a permit has been applied for by Defendant.*

### IV

#### PROHIBITION AGAINST DISCHARGE

*On or before September 1, 1974, Defendant shall cease all discharges from its Cedar Bayou Plant into Trinity Bay or other navigable waters of the United States, except for discharges into navigable waters of the United States other than Trinity Bay which are in accordance with applicable Federal and State discharge permits. (Italic supplied.)*

The above prohibition is consistent with EPA's recommendation to the Justice Department of last March concerning the Company's discharge into Trinity Bay.

However, we understand that the sentences underlined above were not included in the final agreement.

In addition to replying to our January 24 letter, please advise us:

(a) whether or not EPA concurred in the settlement approved by the court; and

(b) if EPA did concur, please explain why EPA concurred in the omission of those sentences, particularly the prohibitory sentence in Article IV.

Sincerely,

HENRY S. REUSS,  
*Chairman,*  
*Conservation and Natural Resources Subcommittee.*

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,  
*Washington, D.C., February 23, 1973.*

Hon. HENRY S. REUSS,  
*Chairman, Subcommittee on Conservation and Natural  
Resources, Committee on Government Operations, House  
of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: I have in hand for reply your letter of January 29, 1973, concerning the settlement of the Houston Light and Power Company case. In any intensive negotiations, there are necessarily many drafts and many revisions, and I am of the opinion that it would be quite inappropriate and unproductive to explain the reasons behind each draft change. The final product sets forth a settlement regarded as being in the best interests of the government.

Sincerely yours,

GARY H. BAISE,  
*Director, Office of Legislation.*

## (246-F)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal. (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
February 6 & March 12, 1973 (letters from Subcommittee Chairman Reuss attached)	Mr. William D. Ruckelshaus, Administrator, Environmental Protection Agency	Dr. Oscar Liu's report, "Virus Study on Water Supplies from Three New England Communities," together with whatever reservations or criticism EPA has concerning the report.	March 1, 1973, and March 19, 1973.	Dr. Stanley M. Greenfield, Assistant Administrator, EPA; and Bryan F. LaPlante, EPA Office of Legislation	In telephone conversations with the Subcommittee's Chief Counsel, Dr. Greenfield initially agreed to provide the requested report, but later refused, saying (a) EPA objects to releasing the report because it may cause public concern about the presence of disease-producing viruses in New England water supplies; (b) if a copy is sent to the Subcommittee, EPA would feel obliged to release the report to the public; and (c) although a written reply had been prepared, it would not be sent to the Subcommittee and Chairman Reuss should telephone Mr. Ruckelshaus to discuss the matter. After Chairman Reuss, on March 12, requested a written response, Mr. LaPlante wrote attached letter of March 19 refusing to provide the requested report, citing reasons (a) and (b) above.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILF 246

Submitted by: (Lonn/Subcomm) Conservation and Natural Resources Subcommittee of the House Committee on Government Operations.

By: Thineas Indritz,  
Title: Chief Counsel, Conservation and Natural Resources  
Subcommittee Extension 56427

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL  
RESOURCES SUBCOMMITTEE OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., February 6, 1973.

Mr. WILLIAM D. RUCKELSHAUS,  
Administrator, Environmental Protection Agency,  
Washington, D.C.

DEAR MR. RUCKELSHAUS: Dr. Oscar Liu of the Water Quality Research Laboratory in Narragansett, Mass., has prepared a report for distribution by the Environmental Protection Agency entitled "Virus Study on Water Supplies from Three New England Communities."

We understand that EPA has not released this report because your agency questions whether the controls were adequate to confirm that viruses exist in the water supplies of those communities.

We request that you send to this Subcommittee a copy of the report, together with whatever reservations, or criticisms your agency has concerning the report. We would appreciate receiving the report by February 16, 1973.

Sincerely,  
HENRY S. REUSS,  
Chairman, Conservation and Natural  
Resources Subcommittee.

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL RESOURCES  
SUBCOMMITTEE OF THE COMMITTEE ON  
GOVERNMENT OPERATIONS,  
Washington, D.C., March 12, 1973.

Mr. WILLIAM D. RUCKELSHAUS,  
Administrator, Environmental Protection Agency,  
Washington, D.C.

DEAR MR. RUCKELSHAUS: On February 6, I requested that you send to our Subcommittee a copy of Dr. Oscar Liu's report concerning a study at EPA's laboratory at Narragansett, Massachusetts, entitled "Virus Study on Water Supplies from Three New England Communities," together with whatever reservations or criticisms your agency has concerning the report.

Our Subcommittee Staff subsequently received a telephone call from your Assistant Administrator, Dr. Stanley Greenfield, in which he said: (a) that if a copy of the report is sent to this Subcommittee, EPA would feel obliged to release the report to the public; (b) that EPA does not desire to release the report because it may cause public concern about the presence of disease-producing viruses in New England water supplies; (c) that a reply along the foregoing lines had been prepared but will not be sent to me, and that I should telephone you to discuss this matter.

I am always glad to talk with you. However, I do think that if EPA is going to take the position of refusing to provide to this Subcommittee a report prepared by its laboratory (or any other document requested by us), EPA's reasons should be sent to me in writing, rather than through a telephone conversation with our staff, and such response should state the legal basis relied on for refusing to provide information and documents requested by us. I would appreciate either the report or your written refusal.

I call to your attention that the work of EPA's Narragansett laboratory in finding viruses in the drinking water supplies of the Cities of Billerica and Lawrence, Massachusetts was discussed last year in the Senate Commerce Committee hearings on S. 1476 ("Potable Waters"). EPA's representative testified (p. 34):

Senator SONG. Are these the systems in Massachusetts that there has been some report about in the press?

Mr. McDermott. Yes, sir. We have looked at two systems in Massachusetts, and one in Connecticut.

In the case of the Connecticut system, we found virus neither in the 10 raw water samples nor in the 10 finished water samples after treatment. In large measure, we suspect this has to do with the excellent raw water quality of the source.

On the other hand, in two communities in Massachusetts, we found five positive samples out of 32 in the distribution system of one community and two positive virus samples out of 32 in a second community or roughly 9 percent of the overall distribution system analysis that we performed.

Senator SONG. Were these the first discoveries of viruses in treated drinking water in the United States?

Mr. McDermott. This was the first in the United States, to the best of our knowledge, sir. . . .

This study was also discussed in the press. See enclosed copy of Washington Post article of March 21, 1972.

Sincerely,

HENRY S. REUSS,  
Chairman, Conservation and  
Natural Resources Subcommittee.

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ENVIRONMENTAL PROTECTION AGENCY,  
Washington, D.C., March 19, 1973.

Hon. HENRY S. REUSS,  
Chairman, Subcommittee on Conservation and Natural  
Resources Committee on Government Operations, House  
of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letters of February 6 and March 12 to the Administrator, in

which you request a copy of a report by [Dr. Liu on the presence of viruses in the water supply of several New England communities.]

The report by Dr. Liu to which you refer is merely a preliminary draft. The data upon which that draft was based are being reexamined for accuracy in light of new data which have been gathered. Under these circumstances, the requested report is not yet available for release.

In your letter of March 12 you state that Dr. Stanley Greenfield, our Assistant Administrator for Research and Monitoring, called Subcommittee staff members in response to your letter of February 6. You further state in that letter that Dr. Greenfield indicated that if the report is released to the Subcommittee, it would have to be released to the public; that EPA does not desire to release the report because it may cause public concern about viruses in drinking water, and that a written response to your February 6 letter would not be forthcoming.

I understand from Dr. Greenfield that he did not phone members of the Subcommittee staff, but rather that a member of the staff phoned him. I further understand that Dr. Greenfield indicated to the Subcommittee staff member that the report is a preliminary draft which is being reviewed and revised in light of new data, which has cast considerable doubt on the accuracy of the information in the preliminary draft.

Dr. Greenfield indicated that the reexamination of the report was the basis for withholding it at this time and that if the draft report were released to the Subcommittee, we would be obliged to release it to many others who had requested copies. There was no indication that you would not receive a written response to your request.

We sincerely regret any misunderstanding that may have been occasioned by your request.

Sincerely yours,

GARY H. BAISE,  
Director, Office of Legislation.

## (246-G)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
October 20, 1971 (letter from Chairman Reuss attached)	Peter M. Flanigan Assistant to the President	Peter M. Flanigan Assistant to the President	To testify at Subcommittee's October 21, 1971, hearing about White House actions concerning the dumping of toxic wastes by the Armco Steel Corp. into the Houston Ship Channel, in light of the September 17, 1971, Federal District Court order prohibiting such dumping.	Oct. 20, 1971.	John W. Dean, III, Counsel to the President (letter attached)	"As a long established principle and precedent, members of the President's immediate staff do not appear before Congressional committees to testify in regard to the performance of their duties on behalf of the President."

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973.  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm) Conservation and Natural Resources Subcommittee of House Committee on Government Operations

By: Phineas Indritz  
TITLE: Chief Counsel, Conservation and Natural Resources Subcommittee  
Extension 56427

FILF 246

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL RESOURCES  
SUBCOMMITTEE OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., October 20, 1971.

Mr. PETER M. FLANIGAN,  
Assistant to the President  
The White House, Washington, D.C.

DEAR MR. FLANIGAN: The Subcommittee on Conservation and Natural Resources will hold a hearing on Thursday, October 21, 1971, on the current status of the new 1899 Refuse Act permit program and enforcement of the 1899 Act.

We are particularly interested in your briefing the Subcommittee on the actions taken or being considered by the White House concerning the dumping of waste by the Armco Steel Co. in the Houston channel, in light of the recent court order prohibiting such dumping.

The hearing will take place in Room 2003, Rayburn House Office Building, beginning at 2 P.M. We request that you testify then.

Sincerely,

HENRY S. REUSS,

Chairman, Conservation and Natural Resources  
Subcommittee.

THE WHITE HOUSE,  
Washington, October 20, 1971.

Hon. HENRY S. REUSS,  
Chairman, Conservation and Natural Resources Subcommittee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge receipt and thank you for your letter of October 20, 1971 to Mr. Peter M. Flanigan, Assistant to the President, requesting that he appear before your Subcommittee to present testimony on October 21, 1971.

As a matter of long established principle and precedent, members of the President's immediate staff do not appear before Congressional committees to testify in regard to the performance of their duties on behalf of the President. This practice is, indeed, fundamental to the operation of our system of government.

Therefore, I wish to advise you that Mr. Flanigan respectfully declines the invitation to testify. However, we would be pleased to assist your Subcommittee in its work and to supply you with such information as you may request that will be appropriate to your Subcommittee's instant inquiry.

With kind regards,

Sincerely,

JOHN W. DEAN, III,  
Counsel to the President.

[Excerpt from Part 2 of hearings entitled "Mercury Pollution and Enforcement of the Refuse Act of 1899," before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 1st sess., pp. 1093-96]

**Mr. REUSS.** But apparently Attorney General Mitchell did not want the court to take him at his word. According to an article in the Washington Star of October 19, 1971, Armco is seeking and apparently getting White House help to undo the judge's order.

The Star article states that officials of the Justice Department and the Environmental Protection Agency are negotiating an agreement to permit Armco to discharge its wastes into the channel. The article also states that a company attorney said Armco could appeal but "prefers" to work out an agreement with EPA.

(Note.—The article referred to, "Nixon Helps Armco, Cited for Polluting," by Roberta Hornig, follows:)

[From the Evening Star, Oct. 19, 1971]

#### NIXON HELPS ARMCO, CITED FOR POLLUTING

(By Roberta Hornig, Star Staff Writer)

The White House has intervened on behalf of a company that is under a Federal judge's order to stop dumping toxic wastes into a waterway.

As a result, apparently, officials of two Federal agencies are now negotiating with the firm, Armco Steel Co., which wants to continue some dumping.

The case against Armco initially was brought by the Environmental Protection Agency.

EPA won its case last month when a Federal judge ordered Armco to stop dumping into the Houston, Tex., ship channel. But the company president, William Verity, wrote to President Nixon protesting the ruling and claiming more than 300 jobs could be at stake.

#### SUMMONED BY FLANIGAN

As a result, White House aide Peter Flanigan summoned EPA officials to his office to discuss the matter.

Now, presumably because of the White House intervention, EPA and Justice Department attorneys are negotiating with the firm. Several meetings already have taken place and another is scheduled for tomorrow.

In the meantime, Armco is obeying the order and not dumping.

Armco attorney William Bailey said yesterday that the judge's ruling, which orders a halt to all dumping of the wastes, including cyanide, phenol, ammonia, and sulfides, "went too far."

He said the company is trying to reach a two-part agreement with EPA.

It would like to continue dumping some wastes into the channel and dispose of others by digging a well and injecting them 7,000 feet underground.

#### EPA FAVORS BURNING

EPA's position, up to now, has been that the judge's order should be followed and all wastes should be burned. The agency would not comment yesterday.

Bailey said that this is the proper point in a court case at which to seek a settlement with the contesting party, in this case the EPA.

Armco went to the White House, Bailey said, "only when jobs were involved."

Bailey estimated that 352 employees were directly affected by the court ruling, but other sources say that figure is too high.

The suit against Armco was one of the first brought by the EPA when it was established last November. The ship channel is regarded by water pollution experts as one of the 10 most polluted waterways in the Nation.

#### CONCERN FOR GROUND WATER

Bailey said the Texas Water Quality Board has approved Armco's plans to inject wastes into the ground. EPA, however, reportedly is concerned about ground water supplies.

Bailey argued that the amount of toxic material the company wants to flush into the ship channel is no more than is contained in some drinking water,

Bailey also said the company has the right to appeal, but that it prefers to work out an agreement with EPA.

A court presumably would accept a working agreement between two conflicting parties, he said.

During the 1968 political campaign, Armco's officers and directors contributed a total of at least \$12,000 to committees supporting President Nixon's candidacy, according to a tabulation of donations compiled by the Citizen's Research Foundation of Princeton, N.J. They did not contribute to the Democrats' campaign, according to the tabulation.

**Mr. REUSS.** I wonder if Mr. Berthelsen is as proud of his Government today as he was last August.

We want EPA and Justice Department officials to explain to us why such negotiations initiated by the White House are being undertaken in light of the court order. If Armco disagrees with the judge's order, Armco has adequate recourse to the courts to seek a reversal of that order. As a matter of fact, on October 1, Armco asked for a new trial. In the meantime, administration officials should see to it that the court order is obeyed by Armco, rather than seek ways to subvert it.

On September 20, Assistant Attorney General Shiro Kashiwa told a conference of the National Association of Attorneys General that the Armco decision is a "landmark" case and a fine example of cooperation between Federal and State officials.

For today's hearing we invited the Corps of Engineers, the Administrator of the Environmental Protection Agency, Mr. William D. Ruckelshaus, Assistant Attorney General Shiro Kashiwa, and Mr. Peter M. Flanigan, special assistant to the President.

According to Mr. Ruckelshaus, the Administrator of EPA, Mr. Flanigan had instructed him to "negotiate" with Armco, "like any other" case.

We have received a letter from Assistant Attorney General Kashiwa refusing to appear before this subcommittee. His letter states:

Since this case and the mercury cases to which you also refer are pending in litigation, for the reasons I have heretofore indicated to you, I must respectfully decline your invitation to testify with respect to them.

A representative of EPA has informed us, by letter, that no representative of EPA will appear at this hearing, for the same reason as that given by Mr. Kashiwa. We have also received a letter from Mr. John W. Dean III, counsel to the President, saying that because "of long established principle and precedent \* \* \* Mr. Flanigan respectfully declines the invitation to testify."

(Note.—The correspondence referred to follows:)

CONSERVATION AND NATURAL RESOURCES SUBCOMMITTEE,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., October 19, 1971

Hon. SHIRO KASHIWA,  
Assistant Attorney General, Department of Justice,  
Washington, D.C.

DEAR MR. KASHIWA: The Subcommittee on Conservation and Natural Resources will hold a hearing on Thursday, October 21, 1971, on the current status of the enforcement of the 1899 Refuse Act by your agency.

We are particularly interested in your briefing the subcommittee on the actions taken or being considered by your Department concerning the dumping of waste by the Armco Steel Co. in the Houston channel, in light of the recent court order prohibiting such dumping. We also want to know what actions have been taken by your Department to carry out the recommendations made by the Environmental Protection Agency in Mr. Quarles' letter and enclosures of April 18, 1971, to your Department "concerning the mercury pollution suits and future mercury pollution actions."

The hearing will take place in room 2203, Rayburn House Office Building, beginning at 2 p.m. We request that you testify then. If your commitments make it impossible for you to testify in person, please telephone the subcommittee office (code 180, ext. 6427) by the close of business on October 20 to provide to us the name of the person who will testify for your Department.

Sincerely,

HENRY S. REUSS, Chairman.

DEPARTMENT OF JUSTICE,  
Washington, D.C., October 20, 1971.

Hon. HENRY REUSS,  
Chairman, Subcommittee on Conservation and Natural Resources,  
Government Operations Committee, Rayburn House Office  
Building, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of October 19, 1971, for information concerning the case *United States of America v. Armco Steel Corporation, et al.*, Civil Action No. 70-H-1335, in the U.S. District Court for the Southern District of Texas, Houston Division, I am herewith forwarding the following documents filed in the case:

1. Complaint.
2. Defendant's answer.
3. Defendant's first amended answer.
4. Counterclaim and third-party claim.
5. Complaint.
6. Memorandum and opinion.
7. Final decree.
8. Defendant's motion for amendment of findings and for a new trial.

Since this case and the mercury cases to which you also refer are pending in litigation, for the reasons I have heretofore indicated to you, I must respectfully decline your invitation to testify with respect to them.

Sincerely,

SHIRO KASHIWA,

Assistant Attorney General, Land and Natural Resources Division.

CONSERVATION AND NATURAL RESOURCES  
SUBCOMMITTEE,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., October 19, 1971.

Mr. WILLIAM D. RUCKELSHAUS,  
Administrator, Environmental Protection Agency,  
Washington, D.C.

DEAR MR. RUCKELSHAUS: The Subcommittee on Conservation and Natural Resources will hold a hearing on Thursday, October 21, 1971, on the current status of the new 1899 Refuse Act permit program and enforcement of the 1899 Act by your Agency.

We are particularly interested in your briefing the subcommittee on the actions taken or being considered by your Agency and the Justice Department concerning the dumping of waste by the Armco Steel Co. in the Houston channel, in light of the recent court order prohibiting such dumping. We also want to know what actions have been taken by the Justice Department to carry out the recommendations made by EPA in Mr. Quarles' letter and enclosures of April 18, 1971, to Justice "concerning the mercury pollution suits and future mercury pollution actions."

The hearing will take place in room 2203, Rayburn House Office Building, beginning at 2 p.m. We request that you testify then. If your commitments make it impossible for you to testify in person, please telephone the subcommittee office (code 180, ext. 6427) by the close of business on October 20 to provide us the name of the person who will testify for your Agency.

Sincerely,

HENRY S. REUSS, Chairman.

ENVIRONMENTAL PROTECTION AGENCY,  
Washington, D.C., October 21, 1971.

Mr. DAVID FINNEGAN,  
Assistant Counsel, Subcommittee on Conservation and Natural Resources, House Government Operations Committee, Washington, D.C.

DEAR DAVE: This will confirm our telephone conversation earlier this morning concerning the letter from Congressman Reuss to the Administrator dated October 19 which we received yesterday requesting that EPA testify at a hearing this afternoon at 2 p.m. I explained to you that the Agency would be pleased to testify on all matters referred to in Congressman Reuss' letter other than those cases currently in litigation which are being handled by the Department of Justice. While it is not possible for a witness to appear this afternoon due to lack of sufficient notice, we will hope to schedule a time at the convenience of the committee in the near future in order to satisfy the committee's request.

Sincerely yours,

GRANT SHOTWELL,  
Acting Director,  
Congressional Affairs.

CONSERVATION AND NATURAL  
RESOURCES SUBCOMMITTEE,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., October 20, 1971.

Mr. PETER M. FLANIGAN,  
Assistant to the President,  
The White House, Washington, D.C.

DEAR MR. FLANIGAN: The Subcommittee on Conservation and Natural Resources will hold a hearing on Thursday, October 21, 1971, on the current status of the new 1899 Refuse Act permit program and enforcement of the 1899 act.

We are particularly interested in your briefing the subcommittee on the actions taken or being considered by the White House concerning the dumping of waste by the Armco Steel Co. in the Houston channel, in light of the recent court order prohibiting such dumping.

The hearing will take place in room 2203, Rayburn House Office Building, beginning at 2 p.m. We request that you testify then.

Sincerely,

HENRY S. REUSS, Chairman.

THE WHITE HOUSE,  
Washington, D.C., October 20, 1971.

Hon. HENRY S. REUSS,  
Chairman, Conservation and Natural Resources Subcommittee, House  
of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge receipt and thank you for your letter of October 20, 1971 to Mr. Peter M. Flanigan, Assistant to the President, requesting that he appear before your subcommittee to present testimony on October 21, 1971.

As a matter of long established principle and precedent, members of the President's immediate staff do not appear before congressional committees to testify in regard to the performance of their duties on behalf of the President. This practice is, indeed, fundamental to the operation of our system of Government.

Therefore, I wish to advise you that Mr. Flanigan respectfully declines the invitation to testify. However, we would be pleased to assist your subcommittee in its work and to supply you with such information as you may request that will be appropriate to your subcommittee's instant inquiry.

With kind regards,

Sincerely,

JOHN W. DEAN III,  
Counsel to the President.

## (246-H)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
October 19, 1971 (letter from Chairman Reuss attached)	Shiro Kashiwa, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice	Shiro Kashiwa	To testify at October 21, 1971 Subcommittee hearing about Justice Department's actions (a) concerning dumping of toxic wastes by Armco Steel Corp. into Houston Ship Channel, in light of September 17, 1971 Federal District Court order prohibiting such dumping; and (b) to carry out EPA's recommendations to Justice concerning the mercury pollution suits and future mercury pollution actions. (Hearings, "Mercury Pollution and Enforcement of the Refuse Act of 1899," part 2, October 21, 1971.)	Oct. 20, 1971	Shiro Kashiwa (letter attached)	"... this case and the mercury cases...are pending in litigation..."

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FIL# 246:

Submitted by: (Comm/SubComm) Conservation and Natural Resources Subcommittee of House Committee on Government Operations

By: Phineas Indritz  
Title: Chief Counsel, Conservation and Natural Resources Subcommittee Extension 56427

DEPARTMENT OF JUSTICE,  
Washington, D.C., October 20, 1971.

Hon. HENRY REUSS,  
Chairman, Subcommittee on Conservation and Natural Resources, Government Operations Committee, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of October 19, 1971 for information concerning the case *United States of America v. Armco Steel Corporation, et al.*, Civil Action No. 70-H-1335, in the United States District Court for the Southern District of Texas, Houston Division, I am herewith forwarding the following documents filed in the case:

1. Complaint
2. Defendant's Answer
3. Defendant's First Amended Answer
4. Counterclaim and Third-Party Claim
5. Complaint
6. Memorandum and Opinion
7. Final Decree
8. Defendant's Motion for amendment of findings and for a new trial

Since this case and the mercury cases to which you also refer are pending in litigation, for the reasons I have heretofore indicated to you, I must respectfully decline your invitation to testify with respect to them.

Sincerely,

SHIRO KASHIWA,  
Assistant Attorney General, Land and Natural Resources Division.

Sincerely,

HENRY S. REUSS, Chairman.

## (246-I)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
December 13, 1972 (letter from Chairman Reuss attached)	Mr. Peter M. Flanigan, Assistant to the President	Mr. Peter M. Flanigan	Request to testify about conflict in testimony of Justice Department representative at Subcommittee hearings of November 5, 1971, and subsequently disclosed departmental memorandum of September 30, 1971, concerning Administration's role in modification of Federal District Court order of September 17, 1971, that Armco Steel Corp., Sheffield, Texas, plant had discharges of toxic wastes into Houston Ship Channel. Hearings, "Mercury Pollution and Enforcement of the Refuse Act of 1899", Dec. 21, 1972, Part 3, (See Form 1 dated Nov. 15, 1972.)	12/18/72 (letter attached)	John W. Dean, III, Counsel to the President	"...as a matter of long established principle and precedent, members of the President's immediate staff do not appear before congressional committees to testify regarding the performance of their duties on behalf of the President."

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 246

Submitted by: (Comm/SubComm) Conservation and Natural Resources Subcommittee of House Committee on Government Operations

By: Phineas Indritz  
Title: Chief Counsel, Conservation and Natural Resources Subcommittee

56427

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL RESOURCES  
SUBCOMMITTEE OF THE COMMITTEE ON  
GOVERNMENT OPERATIONS,  
Washington, D.C., December 13, 1972.

Mr. PETER M. FLANIGAN,  
Assistant to the President, Executive Office of the President,  
Washington, D.C.

DEAR MR. FLANIGAN: The Conservation and Natural Resources Subcommittee of the House Committee on Government Operations will hold hearings on December 21, 1972, at 10:00 A.M., in Room 2247, Rayburn House Office Building, concerning the renegotiation in the fall of 1971 by the Justice Department of a court order issued on September 17, 1971, in the Government's action against the ARMCO Steel Company of Houston, Texas.

During our hearings on November 5, 1971, Justice Department officials indicated that there had been no direct communication between the White House and the Justice Department concerning the court order. On Nov. 15, 1972, it was revealed that a memorandum prepared by Mr. Martin Green—a section chief in the Justice Department's Lands and Natural Resources Division—disclosed that White House employees working under you had close contact with Justice Department officials concerning the court order.

In order that you may have an opportunity to comment on this matter, we invite you to testify at these hearings.

We would appreciate receiving, by December 18, confirmation that you will testify on December 21.

We shall welcome your views.  
Sincerely,

HENRY S. REUSS,  
Chairman, Conservation and Natural Resources Subcommittee.

THE WHITE HOUSE,  
Washington, December 18, 1972.

HON. HENRY S. REUSS  
Chairman, Conservation and Natural Resources Subcommittee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge receipt and thank you for your letter of December 13, 1972 inviting Mr. Peter Flanigan to appear before your Committee on December 21 and testify at its hearings regarding the Government's action against ARMCO Steel Company.

As noted in my letter to you of October 20, 1971 in response to a similar invitation to Mr. Flanigan to testify on this subject, as a matter of long established principle and precedent members of the President's immediate staff do not appear before Congressional committees to testify regarding the performance of their duties on behalf of the President.

Therefore, Mr. Flanigan must respectfully decline your invitation to appear before the Conservation and Natural Resources Subcommittee.

With kind regards,  
Sincerely,

JOHN W. DEAN, III,  
Counsel to the President.

(246-J)

SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
December 13, 1972 (Letter from Chairman Reuss attached)	Mr. W. John Glancy, c/o Walker, Winstead, Cantwell & Miller, Attorneys and Counselors, Dallas, Texas	Mr. W. John Glancy	Request to testify on his contacts with the Justice Department, while he was a White House employee, re: modification of Federal District Court order in <u>Armco Steel Corp.</u> case. (See Form II dated October 20, 1971.) Hearings: "Mercury Pollution and Enforcement of the Refuse Act of 1899", December 21, 1972, Part 3, (See Form I dated November 15, 1972.)	Dec. 19, 1972	Mr. W. John Glancy (letter attached)	"...As a matter of longstanding precedent, members of the President's staff do not appear before Congressional Committees to testify in regard to their work while on the President's staff. ..."

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 266:

Submitted by: (Comm/SubComm) Conservation and Natural Resources Subcommittee of House Committee on Government Operations

By: Phineas Indritz  
FILE: Chief Counsel, Conservation and Natural Resources Subcommittee Extension  
56427

HOUSE OF REPRESENTATIVES  
CONSERVATION AND NATURAL  
RESOURCES SUBCOMMITTEE OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS  
Washington, D.C., December 13, 1972.

Mr. JOHN W. GLANCY,  
Dallas, Texas

DEAR MR. GLANCY: The Conservation and Natural Resources Subcommittee of the House Committee on Government Operations will hold hearings on December 21, 1972, at 10:00 A.M., in Room 2247, Rayburn House Office Building, concerning the renegotiation in the fall of 1971 by the Justice Department of a court order issued on September 17, 1971, in the Government's action against the ARMCO Steel Company of Houston, Texas.

During our hearings on November 5, 1971, Justice Department officials indicated that there had been no direct communication between the White House and the Justice Department concerning the court order. On Nov. 15, 1972, it was revealed that a memorandum prepared by Mr. Martin Green—a section chief in the Justice Department's Lands and Natural Resources Division—disclosed that you, while a White House employee, had close contact with Justice Department officials concerning the court order.

In order that you may have an opportunity to comment on this matter, we invite you to testify at these hearings.

We would appreciate receiving, by December 18, confirmation that you will testify on December 21.

We shall welcome your views.  
Sincerely,

HENRY S. REUSS,  
*Chairman.*

JACKSON, WALKER, WINSTEAD,  
CANTWELL & MILLER,  
ATTORNEYS AND COUNSELORS,  
Dallas, Tex., December 19, 1972.

Hon. HENRY S. REUSS,  
Chairman, Conservation and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN REUSS: Thank you for your letter of December 13, 1972, inviting me to testify at hearings to be held on December 21, 1972 by the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations.

To confirm what I stated earlier today in a telephone conversation with Mr. David Finnegan of your Subcommittee's staff, I must respectfully decline the invitation to appear before your Subcommittee. As a matter of long-standing precedent, members of the President's staff do not appear before Congressional committees to testify with regard to their work while on the President's staff. This policy would preclude my testifying with respect to the matters outlined in your letter.

With best regards,

Yours respectfully,

W. JOHN GLANCY.

## (246-K)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
December 13, 1972 (letter from Chairman Reuss attached)	Mr. George Crawford, Archon Pure Products Corp., Beverly Hills, California	Mr. George Crawford	Request to testify on his contacts with the Justice Department, while he was a White House employee, re: modification of Federal District Court order in <u>Armco Steel Corp.</u> case. (See Form II dated October 20, 1971.) Hearings: "Mercury Pollution and Enforcement of the Refuse Act of 1899", December 21, 1972, Part 3, (see Form I dated November 15, 1972.)	Dec. 19, 1972	Mr. George Crawford (letter attached)	"...Since long standing custom would prevent my testifying, I do not believe my presence would be useful to your committee in any event. ..."

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm) Conservation and Natural Resources Subcommittee of House Committee on Government Operations

By: Phineas Indritz  
Title: Chief Counsel, Conservation and Natural Resources Subcommittee Extension  
56427

FILE 246:

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL  
RESOURCES SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., December 13, 1972.

Mr. GEORGE CRAWFORD, Esq.,  
Vice President and Secretary, the Archon Corp.,  
Los Angeles, Calif.

DEAR Mr. CRAWFORD: The Conservation and Natural Resources Subcommittee of the House Committee on Government Operations will hold hearings on December 21, 1972, at 10:00 A.M., in Room 2247, Rayburn House Office Building, concerning the renegotiation in the fall of 1971 by the Justice Department of a court order issued on September 17, 1971, in the Government's action against the ARMCO Steel Company of Houston, Texas.

During our hearings on November 5, 1971, Justice Department officials indicated that there had been no direct communication between the White House and the Justice Department concerning the court order. On Nov. 15, 1972, it was revealed that a memorandum prepared by Mr. Martin Green—a section chief in the Justice Department's Lands and Natural Resources Division—disclosed that you, while a White House employee, had close contact with Justice Department officials concerning the court order.

In order that you may have an opportunity to comment on this matter, we invite you to testify at these hearings.

We would appreciate receiving, by December 18, confirmation that you will testify on December 21.

We shall welcome your views.  
Sincerely,

HENRY S. REUSS,  
Chairman, Conservation and Natural Resources Subcommittee.

ARCHON PURE PRODUCTS CORP.,  
Beverly Hills, Calif., December 19, 1972.

Hon. HENRY S. REUSS,  
Chairman, Conservation and Natural Resources Subcommittee, Rayburn House Office Building, Washington, D.C.

DEAR Mr. CHAIRMAN: Confirming my telephone call of this morning to your office, I will not be present at the hearings of December 21. Receipt of your letter of December 13 was unfortunately delayed due to a change of address of our corporate offices; it did not arrive until yesterday. Preparation to come to Washington for the hearings day after tomorrow would be most difficult.

As I understand it, the hearings will bear on activity which occurred while I was on the White House staff. Since long standing custom would prevent my testifying in this respect, I do not believe my presence would be useful to your Committee in any event. I therefore respectfully decline the invitation to testify.

I do regret the delay in my response, and my inability to contribute to the work of your Committee.

Sincerely,

GEORGE CRAWFORD,  
Vice President, Administration.

(246-L)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In 1970, the Justice Department entered into stipulations with nine of ten industrial plants charged with violations of the 1899 Refuse Act for discharging mercury into the Nation's navigable waterways. The stipulations required each defendant to submit (a) weekly reports on daily measurements of the mercury content of its effluent, and (b) a proposed schedule of future reductions of its mercury discharges.

On December 18, 1970, February 26, and May 21, 1971, Subcommittee Chairman Reuss asked the Justice Department for these reports and schedules, and also for a description of methods and devices used by the defendants to take these readings. Shiro Kashiba, then Assistant Attorney General, refused each time to provide the data, saying, at different times, that (a) Canon 20 of the ABA's Canons of Professional Ethics made disclosure "unethical", (b) Department of Justice Order No. 116-56 of May 15, 1956, prevents the Department from making available to a congressional committee information concerning an open case, and (c) since *Delaney v. United States*, 199 F.2d 107 (C.A. 1, 1952) held that disclosure of data concerning a pending criminal case was prejudicial to the defendants, and therefore warranted postponement of the trial, disclosure in this case might cause injury to the Government's case.

On May 21, 1971, the Subcommittee wrote to the Environmental Protection Agency Administrator asking for the data. The Administrator refused, saying that since the Justice Department regarded the dischargers' plans as "confidential", the Administrator was "constrained" to abide by that Department's rulings.

At the Subcommittee's hearing on July 1, 1971, the Subcommittee asked Mr. Kashiba to review the matter and make the data available to the Subcommittee (Hearings, "Mercury Pollution and Enforcement of the Refuse Act of 1899", part 1, p. 71). On July 22, August 6, and September 15, 1971, the

Justice Department transmitted to the Subcommittee the reports and mercury discharge data on 9 plants of those companies that consented to such disclosure. However, the Department refused to provide the reports and plans concerning mercury discharges of the Diamond Shamrock Corporation because that company refused to consent to such disclosure to the Subcommittee (H. Rept. 92-1333, Aug. 14, 1972, "Enforcement of the Refuse Act of 1899", pp. 30-42). (Copies of H. Rept. 92-1333, *supra*, and pp. 1-4 and 71 of the Hearings, *supra*, are attached.)

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 246

Submitted by: (Comm/Subcomm) Conservation and Natural Resources Subcommittee of House Committee on Government Operations  
By: Phineas Indritz  
Title: Chief Counsel, Conservation and Natural Resources Subcommittee Extension  
56427

[Excerpt from hearings entitled "Mercury Pollution and Enforcement of the Refuse Act of 1899" (pt. 1), before a subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 1st sess., July 1, 1974, pp. 1-4, 71]

THURSDAY, JULY 1, 1971

The subcommittee met, at 10 a.m., in room 2247, Rayburn House Office Building, Hon. Henry S. Reuss (chairman of the subcommittee) presiding.

Present: Representatives Henry S. Reuss, Floyd V. Hicks, Bella S. Abzug, Guy Vander Jagt, Gilbert Gude, and Paul N. McCloskey, Jr.

Staff members present: Phineas Indritz, chief counsel; David B. Finnegan, assistant counsel; Josephine Scheiber, research analyst; and J. P. Carlson, minority counsel, Committee on Government Operations.

Mr. REUSS. Good morning. The Subcommittee on Conservation and Natural Resources will be in order for a hearing on the refusal by the Environmental Protection Agency and the Justice Department to disclose to the subcommittee pertinent data concerning water pollution discharges of mercury and other hazardous materials such as lead and arsenic.

The hearing is also called to find out why the Justice Department has failed to maintain records of complaints of violations of the 1899 Refuse Act. These have been filed by citizen informers, many of whom will be entitled under the 1899 law to half of the fine levied by a court against the violators if their information leads to a conviction.

We asked the Attorney General last February for a list of those complaints. The Justice Department told us 3 months later, on May 11, 1971, that no such lists exist. The Department admits that it has received many such complaints, but merely refers them to EPA and the Corps of Engineers and then, apparently, washes its hands of them. Meanwhile, the citizen, thinking that the No. 1 law and order agency in the Nation is doing its duty to vigorously prosecute 1899 Act violators, has been patiently waiting for word either that more data are needed or that the Justice Department has filed charges against the polluter. But under this "no recordkeeping policy," this patient citizen has not heard from the Justice Department or anyone else for that matter.

In his environmental message of February 8, 1971 ["Program for a Better Environment," H. Doc. 92-46], President Nixon said that the "building of a better environment will require \* \* \* a citizenry that is both deeply concerned and fully informed," and he urged "citizen participation."

The Justice Department has had so little concern for the citizen that it has failed to maintain records of citizen complaints referred to EPA and the Corps, and to have a followup system to insure that the complaints receive effective attention. How can the citizen, who has a right under the 1899 law to one-half the penalty, receive his award if the Justice Department conveniently misplaces the data he provided?

I am glad to say that 2 weeks ago, when the Department learned that this hearing was imminent, it started a system to maintain records of these complaints, to follow up on its referrals, and to help citizens provide effective pollution information. But with regard to the information received before this new system, Justice apparently is still simply content to forget them.

On July 24, 1970, the Justice Department filed civil actions under the 1899 Refuse Act against 10 industrial plants discharging without a permit "sufficient quantities of mercury into the Nation's waterways to constitute a serious hazard to public health." These were among 13 mercury discharge cases referred to it by the Interior Department 2 days earlier. The Justice Department has never acted on the other three. We want to know why it hasn't.

In September 1970 the Interior Department released to the subcommittee and the public the names of 37 other known mercury polluters, but did not recommend either civil or criminal action against them. We want to know what the Environmental Protection Agency is doing about them.

Our subcommittee requested that the Corps of Engineers require all 50 mercury polluters to file applications for 1899 Refuse Act permits. On November 13, 1970, the Corps said it would do so. We want to know what progress has been made.

We now find that there were at least 51, not 50, known mercury polluters last September, and that the Environmental Protection Agency since then has discovered at least 18 more. The identity of these dischargers has not yet been made known to the subcommittee or the public. We want to know why. We have asked that this be identified today, together with the details of their discharge and the actions taken to halt the discharge.

Also, we want to know why only 10 mercury polluters have been prosecuted for violating the 1899 act. Should not all known violators of the law be treated equally?

Now, what has the Justice Department done in the cases of the 10 mercury defendants who were sued?

Justice entered into stipulations with nine of them, permitting them an "average daily discharge of half pound per day of mercury" into our waterways. When Interior announced these suits last July, the Secretary said, "These discharges must be stopped. They represent an intolerable threat to the health and safety of Americans." Quite obviously, the discharges have not been stopped. We want to know why not?

The stipulations require the nine defendants to file weekly or monthly reports of their discharges and to file plans, by December 1970, to reduce further their mercury discharges.

Thus, the stipulations in the public court files, already approved by the courts, specified the criteria and conditions which are to be complied with by the companies.

On December 18, 1970, we asked the Justice Department for copies of the reports and plans and for a description of the methods used by the companies to measure the discharges.

On four occasions since then—January 25, February 26, May 11, and June 11, 1971—the Justice Department refused to send the reports to us, stating only that the cases are still pending and that it is the "longstanding policy" of Justice not to reveal information as to litigation which is pending. When we also asked the Administrator

of EPA for the same information, he refused (on June 14) saying that he was "constrained to abide by the rulings of the Department of Justice."

Neither agency cited any statute, or claimed "executive privilege," as a basis for their refusals. They cite only some vague Justice Department policy.

We believe that if the basic court approved stipulations are public, any document filed pursuant to them should be public also, absent a prohibition by the court.

Under the EPA-Justice doctrine, these agencies can review the documents, conduct closed-door negotiations with the nine polluters, and enter into final agreements, without any prior disclosure to the subcommittee or the public.

Each stipulation provides that the Government may renew its request for an injunction at any time in the future if the stipulation is violated. Thus, each case will still be "technically pending" for throughout all eternity. Under the EPA-Justice doctrine, public disclosure of the documents is not permitted while the cases are "pending," thus barring disclosure for an indefinite period.

This new doctrine of withholding discharge data simply because they are provided under a stipulation in a civil suit will undermine the public disclosure provisions of both the corps' Refuse Act permit program and EPA's national industrial waste inventory. Both specifically declare that waste discharge data will not be withheld from the subcommittee or the public. Under the Justice Department doctrine, all a company need do to avoid disclosure of its discharges is to let Justice sue and then enter into a stipulation to furnish its discharge data on a confidential basis. The net result is to weaken the Government's pollution control program and to undermine public confidence in the Government.

The information sought by the subcommittee related merely to whether and how the polluters are complying with the stipulations entered into in civil, not criminal, cases.

The refusal by EPA and Justice cannot be justified under any of the exemptions from disclosure set forth in the Freedom of Information Act (5 U.S.C. 552). Even as to those exemptions, the act specifies that an agency cannot withhold the data from a congressional committee.

The claim of "confidentiality" is no excuse for refusing to provide to this subcommittee the information we need to evaluate the effectiveness, or lack of it, of Government agencies in protecting our waterways from pollution by industrial wastes. Disclosure after closed-door negotiations and settlement does not satisfy, because at that point, if the settlement is a bad one, the Government and the public will be saddled with it.

It is time that Justice and EPA stop giving the Nation's polluters preferred treatment.

We again request that these data be immediately made available to the subcommittee, and the public.

Among other matters we will cover today: What actions the Justice Department has taken to "vigorously prosecute" all offenders of the 1899 law when "requested to do so by the Secretary of the Army" or by other officials.

We understand that 516 such cases were referred by the Corps to Justice in fiscal 1970. Section 17 of the 1899 law provides that it is the duty of U.S. attorneys "to report to the Attorney General \* \* \* the action taken by him" against each reported offender. According to our information, although a year has gone by since the end of fiscal

year 1970, this section of the statute has not been complied with by the Nation's chief law enforcement officer. We want the Justice Department to provide to us a copy of those reports for fiscal years 1970 and 1971.

We understand that the Corps intends to ask the Justice Department "to reactivate a dormant provision of the 1899 act" (33 U.S.C. 418) which requires the Attorney General to transmit to the Secretary of the Army reports on the actions taken on cases referred to Justice. We commend the Corps for this.

At this point, I insert in the record the pertinent correspondence and documents.

(Note.—The pertinent correspondence and documents referred to by Chairman Reuss are included in the appendixes of this hearing record.)

[71]

Mr. QUARLES.<sup>1</sup> The campaign to reduce mercury pollution was opened with the 10 lawsuits. That attracted attention, and the top officials of companies involved very rapidly recognized that they would be immediately required to face up to perhaps expensive changes in their operations to reduce mercury discharges.

Following that opening gun, we have conducted the mercury campaign without resorting to further litigation. We stand ready to resort to litigation at any time we may conclude that any company is not being responsive to our requests for information or not being cooperative in working out agreements to reduce their discharges. There is no comparison between the discharges of the companies against whom suit was brought and those companies against whom suit was not brought.

<sup>1</sup> Mr. John R. Quarles, Jr., appeared as General Counsel, Environmental Protection Agency.

The rationale, as I understood it, is that the companies that had the bad luck to be sued were those which had been clearly identified with Federal evidence on hand at the time that the suits were filed.

Mr. REUSS. Thank you. I have one last question of Mr. Kashiwa: Am I right in my understanding, Mr. Kashiwa, that in view of yesterday's Supreme Court decision on the Pentagon papers, and in view also of the passage by the Congress of the Freedom of Information Act (5 U.S.C. 552)—both many years after the adoption in 1956 of this Department of Justice internal rule to which you have referred—you will review, and let this subcommittee know, whether you can make available to us the information and papers we requested, irrespective of the wishes of the defendants?

Mr. KASHIWA. We will review that.

Mr. REUSS. You will review that?

Mr. KASHIWA. Yes.

Mr. REUSS. Can you do that by next week?

Mr. KASHIWA. We will try to.

Mr. REUSS. Thank you very much.

(Note.—By letters of July 22, August 6, and September 15, 1971, Mr. Kashiwa transmitted to the subcommittee the reports and mercury discharge data requested by Chairman Reuss. These materials are reprinted as appendix 3, p. 126 of this hearing record. One of the 10 mercury dischargers—Georgia-Pacific Corp.—informed the subcommittee on July 2, 1971, that it did "not regard" its discharge data as confidential. See appendix 3, p. 126).

*Editor's note: The following addendum report was received without survey report form and is entered here in the files.*

(246-M)

ADDENDUM REPORT

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL  
RESOURCES SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., March 27, 1973.*

Mr. JOE L. PECORE,  
Assistant Counsel, Subcommittee on Separation of Powers,  
New Senate Office Building, Washington, D.C.

DEAR Mr. PECORE: Enclosed is a copy of a letter dated March 22, 1973, from Mr. Charles R. Ford, Chief, Office of Civil Functions, Office of the Secretary of the Army, to Chairman Reuss, refusing to provide to this Subcommittee certain comments on a draft regulation because "... these comments were solicited by the Office of Management and Budget and were forwarded to the Department of the Army for its internal use only." A copy of Chairman Reuss' letter of January 29, 1973, to the Secretary of the Army is also enclosed.

Sincerely,

PHINEAS INDRITZ,  
Chief Counsel, Conservation and  
Natural Resources Subcommittee.

—  
HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL  
RESOURCES SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., January 29, 1973.*

Hon. ROBERT F. FROEHLKE,  
Secretary of the Army, The Pentagon,  
Washington, D.C.

DEAR SECRETARY FROEHLKE: On January 19, 1973, Mr. Charles R. Ford of the Office of the Under Secretary of the Army replied to our letter of January 5 concerning several long-delayed Corps of Engineers proposed regulations which have not yet been published.

Mr. Ford noted:

As you point out, the Department of the Army had expected to publish the regulation in the Federal Register for comment by autumn of last year. However, these expectations were overtaken by the enactment of the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500; the Marine Protection, Research and Sanctuaries Act of 1972, P.L. 92-532; and the Coastal Zone Management Act, P.L. 92-583.

The Chief of Engineers advises me that his analysis of these recent enactments has been completed insofar as they impact on the proposed revision of his regulation, and extensive revision of the preliminary draft is necessary. For example, Section 404 of Title IV, Section 2 of P.L. 92-500 has new procedural requirements that affect all parts of the regulation. The Chief of Engineers has his staff preparing a new revision of the regulation and has given the matter high priority.

We recognize that the law is constantly changing and that the Corps' regulations should reflect those changes. But the statutes referred to by Mr. Ford were all enacted in October 1972, more than 3 months ago; yet, their various regulations are still not published.

One consequence of the delay relates directly to a recommendation by our Committee in its report of August 10, 1972 (H. Rept. 92-1323), entitled "Increasing Protection for Our Waters, Wetlands and Shorelines: The Corps of Engineers". That report noted that the Corps' present "cumbersome" method of indirect referrals of violations of section 10 of the River and Harbor Act of 1899 has resulted in "irreparable harm" to valuable wetlands resources. The Committee's report therefore recommended that the referral procedure be revised to allow District Engineers to contact U.S. Attorneys directly. In response to this recommendation, the Chief of Engineers, General Clarke, wrote to us on September 16, 1972, as follows:

When the Section 10 regulation is finally published, Corps Districts will have sufficient guidance to assure uniform enforcement of Corps statutes and maximum protection of the nation's resources. This, in furtherance of the position taken in my letter to you dated 18 July 1972, *will permit consummation of an agreement with the Department of Justice for direct referral of cases by Division and District Engineers to United States Attorneys.* (Italic supplied.)

We continue to receive complaints from the Interior Department, from citizens, and even from field personnel of the Corps of Engineers, that the Corps' referral procedure is not working effectively and efficiently. But as General Clarke noted, this procedure will not be revised until the regulations, now being held up by the Corps and OMB, are "finally published". This is certainly a frustrating situation that is detrimental to the public interest.

II.

Enclosed with Mr. Ford's letter was a copy of two pages, entitled "Preliminary Draft Revised Wetlands Policy", dated "30 Aug 1972", and containing paragraph 6.c(1) through (5) of Regulation 1145-2-303. The copy sent to us is obviously incomplete since it refers to provisions in subparagraphs 5d-e and 5f which were not attached thereto.

We are distressed that the proposed draft regulations appear to have been largely emasculated and rendered an empty shell of the draft sent to the Office of Management and Budget in January 1972, and published in the Hearings of December 10 & 11, 1972 entitled "Protecting America's Estuaries: Puget Sound and the Straits of Georgia and Juan de Fuca", pp. 702-705.

The January 1972 draft established a presumption that "wetlands constitute a valuable and productive resource the preservation of which is in the public interest," unless it is "clearly shown otherwise". That draft stated:

(b) The purpose of a proposed structure or work will be examined with a view towards avoiding siting in wetland areas. If that purpose is not dependent on waterfront access, or can be satisfied by the use of an

*alternate site or by use of existing public facilities, the application will ordinarily not be granted.* The applicant will be required to demonstrate that a feasible alternate site does not exist; the inability to finance or acquire an alternate site is not a factor in the determination of feasibility. (Underlining supplied.)

This key provision in the January 1972 draft is consistent with Section 2.B. (2)a. of the Fish and Wildlife Service's recently developed and circulated "Navigable Waters Handbook" which states (p. 5):

- Where the proposed work is non-water dependent and alternative upland sites are available, the Service will insist on the use of such upland sites irrespective of costs or other burdens on the sponsor of the proposed work.
- For water dependent works, the Service will insist on minimizing the loss of or damage to productive wetlands and shallows, their fish and wildlife, and human uses.
- The Service will insist on guarantees that the work is actually carried out as promised and/or as required by conditions of the permit, provisions of law, or agreements formalized in writing. (Underlining in original.)

But this important provision was mysteriously omitted from the August 1972 draft.

The latest version quite properly finds that wetlands "constitute a productive and valuable public resource", rather than just stating this fact in terms of a rebuttable presumption. It also finds that their "alteration or destruction . . . or use for purposes not dependent on wetland resources, is detrimental to the public interest". But, as we noted above, the August 1972 draft fails to tell the Corps' District Engineers, the permit applicant, and the public that, as a result of these findings, permit applications for work in wetland areas "will ordinarily not be granted" where the purpose is (a) "not dependent on waterfront access", or (b) "can be satisfied by the use of an alternative site or by use of existing facilities".

It is clear that the long delay in issuing the draft wetland regulations has been detrimental to the public interest. However, the August 1972 draft wetlands regulation must be substantially revised (i) to include the above quoted paragraph (b), and (ii) to require, even in the case of water-dependent works, the applicant to show that the work is in the public interest, that there is no prudent and feasible alternative to utilizing the particular wetlands site, and that the applicant will minimize loss and damage to the wetlands area. If the regulation is not so revised, we believe that it would be largely rhetoric without substance, and therefore would mislead the public into believing that it will result in some added protection for the Nation's valuable and irreplaceable wetlands.

### III.

Our letter of January 5, 1973, requested that you promptly provide to us a copy of all Federal agency

comments received thus far by your Department and/or the Corps on the various draft versions of the wetland and other regulations mentioned in your January 19 letter to us. Mr. Ford's letter overlooked this request. We repeat the request.

Sincerely,

HENRY S. REUSS,  
Chairman, Conservation and Natural Resources  
Subcommittee.

GUY VANDER JAGT,  
Ranking Minority Member, Conservation and Natural  
Resources Subcommittee.

DEPARTMENT OF THE ARMY,  
OFFICE OF THE UNDER SECRETARY,  
Washington, D.C., March 22, 1973.

Hon. HENRY S. REUSS,  
Chairman, Subcommittee on Conservation and Natural  
Resources, House of Representatives, Washington, D.C.

DEAR MR. REUSS. In the absence of Secretary Froehlke I am taking the liberty of responding to your letter of January 29, 1973. This letter will also further clarify my letter of January 19th concerning the status of regulations being revised by the Corps of Engineer to include, among other changes, a policy statement relative to permits for work in wetland areas.

A final draft of the regulation will be published shortly in the *Federal Register*. I will provide you with a copy of this draft as soon as it is ready for publication and will provide you with all comments received thereafter as a result of publication of the proposed regulation.

With regard to your request for comments received by the Department of the Army or by the Corps of Engineers last year on earlier draft versions of the regulation, Mr. Weinberger in his letter to you of July 25, 1972, noted that these comments were solicited by the Office of Management and Budget and were forwarded to the Department of the Army for its internal use only. Accordingly, I do not have authority, under standard interagency procedures, to release these comments.

A copy of the regulation has been furnished to the Department of Justice, requesting initiation of discussion on delegation of authority to United States Attorneys and Corps District Engineers for direct referral of cases at field level. In the interim, direct referral on an ad hoc basis is being authorized, and this procedure is avoiding needless administrative delays.

Sincerely,

CHARLES R. FORD,  
Chief, Office of Civil Functions.

*Editor's note: The following addendum report was received without survey report form and is entered here in the files.*

(246-N)

ADDENDUM REPORT

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL  
RESOURCES SUBCOMMITTEE OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., April 20, 1973.

Mr. JOE L. PECORE,  
Assistant Counsel, Subcommittee on Separation of Powers,  
New Senate Office Building, Washington, D.C.

DEAR MR. PECORE: Enclosed is a copy of a letter dated April 17, 1973, from Mr. Charles R. Ford, Chief, Office of Civil Functions, Office of the Secretary of the Army, in response to a letter written by Chairman Reuss on March 27, 1973, (copy also enclosed) concerning refusal by the Department of the Army to supply to the Subcommittee comments by various agencies on Corps of Engineers' draft regulations concerning wetlands and other matters.

Sincerely,

PHINEAS INDRITZ,  
Chief Counsel,  
Conservation and Natural Resources Subcommittee.

HOUSE OF REPRESENTATIVES,  
CONSERVATION AND NATURAL  
RESOURCES SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., March 27, 1973.

HON. ROBERT F. FROEHLKE,  
Secretary of the Army,  
Washington, D.C.

DEAR SECRETARY FROEHLKE: Our Subcommittee's letter to you dated January 29 requested copies of the comments which various Federal agencies made on the Corps of Engineers' draft of regulations concerning wetlands and other matters, and sent to the Office of Management and Budget in January 1972. Mr. Charles R. Ford, Chief, Office of Civil Functions, of your Department responded on March 22 that he lacks "authority, under standard agency procedures" to release those comments to us.

Please advise us, by April 6, 1973, the statutory basis for your Department's refusing to supply these interagency

comments to this Subcommittee. Also, please provide to us by that date a copy of the documents which set forth the "standard interagency procedures" cited by Mr. Ford.

Sincerely,

HENRY S. REUSS,  
Chairman, Conservation and Natural  
Resources Subcommittee.

DEPARTMENT OF THE ARMY,  
OFFICE OF THE UNDER SECRETARY,  
Washington, D.C., April 17, 1973.

Hon. HENRY S. REUSS,  
Chairman, Subcommittee on Conservation and Natural  
Resources, House of Representatives, Washington, D.C.

DEAR MR. REUSS: The Secretary of the Army has asked me to reply to your letter of March 27, 1973, regarding your earlier correspondence. In that letter, you ask to be advised of the basis for the statement in my letter of March 22, that the Army lacks "authority, under standard inter-agency procedures" to release the requested comments.

As I noted in my earlier letter, the only comments received by the Army on earlier draft versions of the regulations currently under preparation were those to which Mr. Caspar Weinberger, then Director of the Office of Management and Budget (OMB), referred in his letter to you of July 25, 1972. In his letter, Mr. Weinberger stated:

The agency comments and policy recommendations on certain possible revisions of the regulations, which OMB solicited as part of its interagency coordination functions, were forwarded to the Department of the Army for its internal use during this review

In that same letter, Mr. Weinberger responded to your request for these comments by stating:

[I]nternal exchanges of opinion within the Executive Branch have traditionally never been released in order to protect and maintain the free and frank expressions of views essential to the development of policy positions. \* \* \* Since your request for agency comments relates to the preliminary exchanges of opinion prior to adoption of a final agency position, it would, in accordance with both theory and practice, be inappropriate for us to make them available.

The requested comments are not records originated by the Army. The Office of Management and Budget furnished them to the Army for its internal use only, and has not authorized the Army to release them.

I hope that this letter will clarify for you the basis for our Department's action on this matter. If you wish to pursue the matter of these comments further, you should again contact the Office of Management and Budget.

Sincerely,

CHARLES R. FORD,  
Chief, Office of Civil Functions.



## FILE 247

### HOUSE COMMITTEE ON GOVERNMENT OPERATIONS SUBCOMMITTEE ON FOREIGN OPERATIONS AND GOVERNMENT INFORMATION

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(247-A)

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND GOVERNMENT  
INFORMATION SUBCOMMITTEE OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., March 30, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,*  
*U.S. Senate.*

DEAR MR. CHAIRMAN: Enclosed is our response to your survey on the use of the claim of Executive privilege by the President, Federal officers, and employees in denying information to the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations.

If you or your staff have any questions or need further information on these incidents, we will be most happy to provide you the additional details.

With kind regards,  
Sincerely,

WILLIAM S. MOORHEAD, *Chairman.*

(433)

## (247-B)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
Feb. 9, 1972	Secretary of State William P. Rogers	AID Country Field Submission for Cambodia for Fiscal Years 1972 and 1973	March 15 1972	President Nixon	Executive privilege (see attached)

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 Bldg., 8421

FILF 247

Submitted by: fcomm/Subcomm

Division of Govt Info.

By: William S. Moorhead

Title: Chairman

Extension

[Excerpt from hearings entitled "Economy and Efficiency of U.S. Aid Programs in the Khmer Republic (Cambodia)," before a subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d sess., February 1972, pp. 51-52]

Mr. REID.<sup>1</sup> Well, I just want the record to state that the final decision has not been made, and it has been made at a lower level, a level where the final decision does not lie.

Mr. MOORHEAD. Well, without these documents, it is very difficult to meet the mandate under which this committee is constituted. We do have the Laos documents. They were a help to us. As of this moment, there is no contention of executive privilege, I believe. This is why I am making this statement, that the administration should be as open on the question of Cambodia as it has been in the past on other countries, and I hope that, as Mr. Reid has suggested, there will be a decision at a higher level to cooperate with the Congress, because it leaves suspicion in people's minds when there is not the kind of openness that has existed in the past.

(The material referred to above follows:)

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., February 9, 1972.

Hon. WILLIAM P. ROGERS,  
Secretary of State, Department of State,  
Washington, D.C.

DEAR MR. SECRETARY: This letter constitutes an official request by the Foreign Operations and Government Information Subcom-

mittee of the House Committee on Government Operations for the Country Field Submission for Cambodia for the fiscal years 1972 and 1973.

This information is needed in connection with the subcommittee's continuing study of economic assistance programs in Southeast Asia. The Department of State and the Agency for International Development has been cooperating in this study for a number of years.

During that time, the subcommittee always has been provided every country field submission it has ever requested and their contents have in each of the numerous instances been completely safeguarded according to classification.

We would greatly appreciate your prompt and favorable response to this request in view of the fact that subcommittee hearings on Cambodia will resume Thursday, February 17.

With kind regards,

Sincerely yours,

WILLIAM S. MOORHEAD,  
Chairman.

DEPARTMENT OF STATE,  
Washington, D.C., February 21, 1972.

Hon. WILLIAM S. MOORHEAD,  
Chairman, Subcommittee on Foreign Operations and Government Information, Committee on Government Operations, House of Representatives.

DEAR MR. CHAIRMAN: The Secretary has asked me to reply to your letter of February 9 requesting the country field submission for Cambodia for the fiscal years 1972 and 1973.

Since response to your request requires coordination within the Department of State and with the Agency for International Development, I am writing you to advise that we are giving your request careful consideration and will write you again as soon as we are in a position to give a substantial response.

Sincerely yours,

DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations.

<sup>1</sup> Hon. Ogden R. Reid, M.C., of New York.

DEPARTMENT OF STATE,  
February 23, 1972.

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Subcommittee on Foreign Operations and Government Information, Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: The appropriate officers within the Department as well as the Agency for International Development have now had an opportunity to study your request by letter of February 9, 1972, for a copy of the Country Field Submission for fiscal years 1972 and 1973 with respect to Cambodia and I am therefore now able to follow up my letter of February 22, 1972, with a substantive response to your letter.

The annual country field submission (CFS) is prepared by the concerned officers working in the particular country, and sets forth their collective assessment of current programs and their recommendations regarding plans and appropriations for the next fiscal year. This document is an internal working document which discloses tentative planning data on future years which are not approved executive branch decisions. Because of this important role played by such internal documents it is important that their authors' candor and independence of judgment be assured. It has traditionally, and, I believe, properly, been felt that this candor and independence, the very integrity of the executive branch processes, are best preserved if the confidentiality of such documents is adequately protected. Similar considerations have underlain the traditional confidentiality of certain committee sessions, staff memoranda and other aspects of the internal processes of Congress, as well as analogous processes of the judicial branch.

On the other hand it is beyond dispute that the proper discharge by Congress of its constitutional functions is dependent on its being adequately informed, and to this end the Secretary of State and the entire Department have striven to be responsive to congressional requests for information to the maximum extent consistent with the principles outlined above. This is done in many ways, through testimony in public and in the executive session, briefings and written presentations.

Certainly the planning material and factors relating to this program are important information which your subcommittee should have at its disposal, and I therefore propose that they be made available in a form which will provide you with complete information necessary to proper performance of the subcommittee's functions, while preserving the integrity of the formulative process of which the CFS is an indispensable part. AID is prepared to give your subcommittee a full oral briefing, and, in addition, is undertaking to prepare especially for the subcommittee, on an expedited basis, a detailed written presentation, both in classified form. In this manner your committee can receive promptly the full substance of the information it seeks.

The coordinator of the Supporting Assistance Bureau of AID, Roderic O'Connor, will be communicating with you directly to make the appropriate arrangements.

If I can be of any further assistance in this or any other matter, please do not hesitate to let me know.

Sincerely yours,

DAVID M. ABSHIRE.  
*Assistant Secretary for Congressional Relations.*

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U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., March 3, 1972.*

Hon. WILLIAM P. ROGERS,  
*Secretary of State,*  
*Department of State, Washington, D.C.*

DEAR MR. SECRETARY: This is in response to Assistant Secretary Abshire's February 23 letter relating to this committee's February 9 request for the Country Field Submissions for Cambodia for the Fiscal Years 1972 and 1973, which the Department of State subsequently declined to provide. Such action, of course, automatically invoked the provisions of Section 634(c) of the Foreign Assistance Act of 1961, as amended.

As pointed out in our original request, these documents have never been denied to the House Committee on Government Operations under the past three administrations until now, nor should they be. We reiterate that these documents are absolutely essential to comply with our mandate from the House of Representatives to study the economy and efficiency of Government activities *at all levels*. The underlined phrase is quoted directly from House Rule XI, Clause 8, setting forth the Committee's jurisdiction.

Your alternative suggestion for an oral briefing and a sanitized written presentation simply is not acceptable.

I respectfully urge that the Department of State reconsider its decision. Adherence to this position can only raise questions in the minds of Members of Congress and the public that the Executive branch is trying to hide something it is either ashamed of or unable to defend.

With kind regards,  
Sincerely yours,

WILLIAM S. MOORHEAD, *Chairman.*

DEPARTMENT OF STATE,  
*Washington, D.C., March 15, 1972.*

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Subcommittee on Foreign Operations and Government Information, Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: The Secretary has asked me to respond to your letter of March 3, 1972, which referred to my letter to you of February 23, 1972.

As you have indicated, on February 9, 1972 you requested the Country Field Submissions (CFS) for Cambodia for the fiscal years 1972 and 1973. You were subsequently advised by Roderic L. O'Connor, Coordinator for Supporting Assistance at the Agency for International Development, that there is no Cambodia CFS for 1972.

Your reiterated request of March 3 for the actual Cambodia Country Field Submission documents for fiscal year 1973 has been given the most careful consideration. After reviewing your request in all its aspects, and after consulting the Attorney General, through the Office of Legal Counsel of the Department of Justice, the Department of State has submitted the matter to the President for his consideration. We have today been advised that the President has invoked executive privilege, and I enclose a copy of the President's directive, which conforms to the requirements of Section 634(c) of the Foreign Assistance Act of 1961, as amended.

I wish to reiterate that the Cambodia CFS for fiscal year 1973 is an internal working document which discloses tentative planning data for the future which are not approved Executive Branch decisions. It is prepared by the concerned officers working in the particular country, and sets forth their collective assessment of current programs and their recommendation regarding plans and appropriations for the next fiscal year. It is important that the candor and independence of judgment of the authors of such documents be ensured because of the important role played by such internal documents. It has traditionally, and, I believe, properly, been felt that this candor and independence, the very integrity of Executive Branch processes, are best preserved if the confidentiality

of such documents is adequately protected. Similar considerations have underlain the traditional confidentiality of certain committee sessions, staff memoranda and other aspects of the internal processes of Congress, as well as analogous processes of the Judicial Branch.

I wish to stress that it is beyond dispute that the proper discharge by Congress of its constitutional functions is dependent on its being adequately informed, and to this end the Secretary of State and the entire Department have striven to be responsive to congressional requests for information to the maximum extent consistent with the principles outlined above. As you know, this is done in many ways, through testimony in public and in executive session, in briefings and written presentations. In fulfillment of the needs of your Subcommittee, I previously proposed that it be given a full oral briefing, and in addition, be expeditiously furnished with a detailed written presentation of the substance of the Cambodia CFS for fiscal year 1973. In the meantime, this written presentation has been provided, and Mr. O'Connor awaits your pleasure with respect to an oral briefing. In accordance with the President's directive of today we remain ready, as before, to furnish the Subcommittee with the substantive information contained in the document, and to provide the Subcommittee with all information appropriate in light of the President's directive.

Please rest assured of our appreciation of the very thoughtful approach of your Subcommittee to the matter of information policy, of the very significant contributions that the Subcommittee has made and of your need for information. Be assured of our desire to cooperate in every way possible.

Sincerely yours,

DAVID M. ABSHIRE,  
Assistant Secretary for Congressional Relations.

THE WHITE HOUSE,  
Washington, March 15, 1972.

**MEMORANDUM FOR THE SECRETARY OF STATE, THE DIRECTOR, U.S. INFORMATION AGENCY**

As you know, by a memorandum of August 30, 1971 to the Secretary of State and the Secretary of Defense, I directed "not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions." In that memorandum, I fully explained why I considered that the disclosure of such internal working papers to the Congress would not be in the public interest.

I have now been informed that the Senate Foreign Relations Committee and the House Foreign Operations and Government Information Subcommittee have requested basic planning documents submitted by the country field teams to the United States Information Agency and the Agency for International Development, and other similar papers. These documents include all USIA Country Program Memoranda and the AID fiscal year 1973 Country Field Submission for Cambodia, which are prepared in the field for the benefit of the agencies and the Department of State and contain recommendations for the future.

Due to these new requests for documents of a similar nature to those covered by my August 30, 1971 directive, I hereby reiterate the position of this Administration so that there can be no misunderstanding on this point.

My memorandum for the Heads of Executive Departments and Agencies, dated March 24, 1969, set forth our basic policy which is to comply to the fullest extent possible with Congressional requests for information. In pursuance of this policy, the Executive Departments and Agencies have provided to the Congress an unprecedented volume of information. In addition, Administration witnesses have appeared almost continuously before appropriate Committees of the Congress to present pertinent facts and information to satisfy Congressional needs in its oversight function and to present the views of the Administration on proposed legislation.

The precedents on separation of powers established by my predecessors from first to last clearly demonstrate, however, that the President has the responsibility not to make available any information and material which would impair the orderly function of the Executive Branch of Government, since to do so would not be in the public interest. As indicated in my memorandum of March 24, 1969, this Administration will invoke Executive Privilege to withhold information only in the most compelling circumstances and only after a rigorous inquiry into the actual need for its exercise.

In accordance with the procedures established in my memorandum of March 24, 1969, I have conducted an inquiry with regard to the Congressional requests brought to my attention in this instance. The basic planning data and the various internal staff papers requested by the Senate Foreign Relations Committee and the House Foreign Operations and Government Information Subcommittee do not, insofar as they deal with future years, reflect any approved program of this Administration, but only proposals that are under consideration. Furthermore, the basic planning data requested reflect only tentative intermediate staff level thinking, which is but one step in the process of preparing recommendations to the Department Heads, and thereafter to me.

I repeat my deep concern, shared by my predecessors, that unless privacy of preliminary exchange of views between personnel of the Executive Branch can be maintained, the full frank and healthy expression of opinion which is essential for the successful administration of Government would be muted.

Due to these facts and considerations, it is my determination that these documents fall within the conceptual scope of my directive of August 30, 1971 and that their disclosure to the Congress would also, as in that instance, not be in the public interest.

I, therefore, direct you not to make available to the Congress any internal working documents concerning the foreign assistance program or international information activities, which would disclose tentative planning data, such as is found in the Country Program Memoranda and the Country Field Submissions, and which are not approved positions.

I have again noted that you and your respective Department and Agency have already provided much information and have offered to provide additional information including planning material and factors relating to our foreign assistance programs and international information

activities. In implementing my general policy to provide the fullest possible information to the Congress, I will expect you and the other Heads of Departments and Agencies to continue to make available to the Congress all information relating to the foreign assistance program and international information activities not inconsistent with this directive.

RICHARD M. NIXON.

[Excerpt from House Rept. No. 92-1146, "U.S. Economic Assistance for the Khmer Republic (Cambodia)," 13th report by the Committee on Government Operations, June 1972, p. 58]

DEPARTMENT OF STATE,  
AGENCY FOR INTERNATIONAL DEVELOPMENT,  
BUREAU FOR SUPPORTING ASSISTANCE,  
*Washington, D.C., March 3, 1972.*

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Subcommittee on Foreign Operations and Government Information, Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: In Mr. David Abshire's letter of February 23, regarding your committee's request for the country field submission (CFS) for Cambodia, he proposed that AID make available to the subcommittee a detailed account of the planning material and other factors relating to the economic assistance program contained in the fiscal year 1973 CFS. He stated that the material could be made available in a form which would provide you the complete information necessary to the proper performance of the subcommittee's functions while, at the same time, preserving the integrity of the formulative process of which the CFS is an indispensable part, and that this could be accomplished by a full oral briefing by AID along with a detailed written presentation—both in classified form. Finally, Mr. Abshire advised you that I would be communicating with you directly to make the appropriate arrangements.

You will recall that in our February 24 meeting, I repeated that offer, advised the subcommittee that I would be sending forward shortly the written material, and volunteered to meet with the subcommittee, at its convenience, to provide an oral briefing on the CFS.

In your letter, you requested copies of the CFS for both fiscal year 1972 and fiscal year 1973. There was no Cambodian CFS for 1972 because our economic aid program had not yet been resumed in the summer of 1970, the period when the fiscal year 1972 CFS would have been prepared. We therefore had no field staff in Phnom Penh. I am attaching a résumé of the fiscal year 1973 CFS.

It should be pointed out that the CFS is essentially a budget document designed to recommend and justify a certain level and composition of economic aid. The sections of the CFS that deal with the political and military situations represent a backdrop for that purpose. But it should be understood the CFS is not a planning document dealing in those areas; it accepts as datum the policies and programs formulated by others and fits the economic rationale into that matrix. I feel certain the subcommittee understands, therefore, that although the CFS has chapters entitled "Military Situation" and "Political Situation" it does not imply that the CFS is plowing new ground or making new projections in these substantive fields. By far the largest part of the document is devoted to discussion of economic conditions, projections, and aid requirements.

The subcommittee should also have in mind the time frame of the CFS. It was prepared in July of 1971 and purports to describe a program covering the period July 1972 to July 1973, almost 2 full years later. The program in Cambodia is beset with uncertainties greater than those experienced in other programs. The newness of the program combined with the dislocations of the war have served to compound the normal set of variables and uncertainties. Some of our mission's projections of how the economy will develop have already proved amiss and this factor will, of course, influence our decision on the funding level request for fiscal year 1973.

I stand ready to supplement this material with an oral briefing. I have planned a brief vacation between March 3 and March 13 during which time I will be out of town. I await word from you as to the most convenient time for the subcommittee.

Sincerely yours,

RODERIC L. O'CONNOR.

## (247-C)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
April 15 and April 16, 1971	Secretary of Labor James D. Hodgson	Secretary or designee who is intimately familiar with policy decision	Testimony regarding decision by Labor Department to discontinue monthly press briefings on Consumer Price Index and unemployment figures.	April 20, 1971	James D. Hodgson	Sent witness who played no role in decision and had no first-hand knowledge about it. (see attached)
June 21, 1971	Dr. Henry Kissinger Herbert Klein John W. Dean III The White House	Mr. Kissinger Mr. Klein Mr. Dean	Hearings on "U.S. Government Information Policies and Practices --The Pentagon Papers"	June 28, 1971	John W. Dean (for all three)	None, simply declined. (see attached)
Feb. 11, 1972	Herbert G. Klein Director of Communications The White House	Mr. Klein	Testimony regarding administration and effectiveness of Freedom of Information Act	Feb. 18, 1972	Herbert Klein	Said President's immediate staff do not testify in regard to performance of their duties on behalf of the President. (see attached)
Feb. 23 and March 13, 1972	Donald Rumsfeld Director Cost of Living Council	Mr. Rumsfeld	Testimony regarding administration and effectiveness of Freedom of Information Act	April 12, 1972	Joseph E. Mulaney General Counsel Cost of Living Council	Declined by suggesting that other witnesses were more appropriate. (see attached)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

Frank S. Horton

Bv: Frank S. Horton

TITLE: Extension

FILE 247:

## (247-C(a))

[Excerpt from hearings entitled "Discontinuance of Monthly Press Briefings by the Bureau of Labor Statistics on the Consumer Price Index and Unemployment Figures," before a subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 1st sess., April 1971, pp. 23-24]

Mr. HORTON.<sup>1</sup> I too agree that the gentleman has made a good point. But I also believe that we are discussing whether or not this information should be disclosed at a briefing by technical people.

It apparently is a policy decision and I would hope that the Secretary would be here, or someone, that could speak from the policy standpoint. I would suggest that if you do have those letters, that you put them in the record, because I think it is important to know that the Secretary was asked and couldn't attend or didn't want to attend. If it is a case of his being busy and can't attend tomorrow, I assume we can set another date. But he ought to be given every reasonable opportunity to appear. And I do think that any correspondence that you had with the Secretary would be meaningful with regard to the hearing.

I agree we have a problem.

Mr. MOORHEAD. Without objection, we will include my two letters to the Secretary, and the Secretary's reply to me, as part of the record.

[The letters follow:]

U. S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., April 18, 1971.

Hon. JAMES D. HODGSON,  
Secretary of Labor,  
Department of Labor,  
Washington, D.C.

DEAR MR. SECRETARY: The Foreign Operations and Government Information Subcommittee of the House Government Operations Committee will begin public hearings April 21 on the decision to discontinue monthly press briefings on the Consumer Price Index and unemployment figures. As you know, this subcommittee has both legislative and oversight jurisdiction in the House of Representatives on Government information matters. We are currently making an inquiry into the reasons for and wisdom of this action.

Our subcommittee would be most grateful if you could accept an invitation to shed some further light on this matter at a hearing scheduled for 2 p.m., Thursday, April 22, in hearing room 2247 of the Rayburn House Office Building. We would be pleased to receive a statement from you at that time, or if you are unavailable, from a designee who is intimately familiar with the decision, such as your special assistant, Mr. Joseph Loftus.

We also request the accompanying witnesses from the Department: Mr. John W. Leslie, Director of the Office of Information, and Mr. Harold Goldstein and Mr. Joel Popkin, Assistant Commissioners of the Bureau of Labor Statistics, to make themselves available to respond to questions.

<sup>1</sup> Hon. Frank Horton, M.C., of New York.

It would be greatly appreciated if you would make 50 copies of your prepared statement available at the time of the hearing. Under our committee rules, 15 advance copies should be provided to Mr. William Phillips, subcommittee staff administrator, by 2 p.m. the day prior to the hearing, Wednesday, April 21.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD, Chairman.

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., April 16, 1971.*

Hon. JAMES D. HODGSON,  
*Secretary of Labor,*  
*Department of Labor,*  
*Washington, D.C.*

DEAR MR. SECRETARY: I have been advised informally that you are not going to accept our invitation to testify before the Foreign Operations and Government Information Subcommittee on the discontinuance of the monthly press briefings on the Consumer Price Index and unemployment figures. As you may recall, this hearing is scheduled for 2 p.m., Thursday, April 22.

I regret that you will not be present for this session, and also that you are declining to send any high-ranking official of the Department of Labor, who is intimately familiar with the decision to discontinue the briefings, as we requested.

With all due respect to Commissioner Moore, a review of his testimony before the Joint Economic Committee, April 2, and a subsequent conversation with him this morning by our staff, shows clearly that he has no firsthand knowledge of some of the key points in which the subcommittee is vitally interested. These questions relate to the decision itself and events leading up to it.

Also in all fairness, Mr. Secretary, it is conceivable that some of the testimony to be received Wednesday may be critical of the briefing cutoff, and the Department should be prepared to give the best reply possible in justification of its action.

With all of the above points in mind, I do hope you will reconsider your decision and send a high-ranking representative who can provide all of the detailed answers which the subcommittee needs. I would appreciate greatly your immediate advice on this matter.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD, Chairman.

U.S. DEPARTMENT OF LABOR,  
OFFICE OF THE SECRETARY,  
*Washington, April 20, 1971.*

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Foreign Operations and Government Information Sub-*  
*committee, Committee on Government Operations, House of*  
*Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: I am responding to your letters of April 13 and 16 with reference to testimony by an official of the Department of Labor before the Foreign Operations and Government Information Subcommittee on discontinuance of monthly press briefings on the Consumer Price Index and employment situation.

In your letter of April 13, a request was made that either I or a designee intimately familiar with the suspension decision appear to discuss the matters before the subcommittee. Subsequently, Mr. Norman Cornish of your staff was advised by telephone that I had designated as Department of Labor witness, Dr. Geoffrey Moore, Commissioner of Labor Statistics; accompanied by Mr. Harold Goldstein, Assistant Commissioner for Manpower and Employment Statistics; Mr. Joel Popkin, Assistant Commissioner for Prices and Living Conditions; and Mr. Herbert Morton, Director, Office of Publications, Bureau of Labor Statistics.

Your letter of April 16 expressed the opinion that Commissioner Moore lacked firsthand knowledge of some of the key points in which the subcommittee is interested. I am constrained to reply that Commissioner Moore possesses complete familiarity with both the technical subject matter under subcommittee consideration and with the reasons which led to the decision to suspend.

I am sure you will find that Commissioner Moore and his associates are fully capable of responding to all inquiries directed by the subcommittee.

Sincerely,

J. D. HODGSON,  
*Secretary of Labor.*

(247-C(b))

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., June 21, 1971.*

Hon. HENRY A. KISSINGER,  
*Assistant to the President for National Security Affairs,*  
*Washington, D.C.*

DEAR MR. KISSINGER: The Foreign Operations and Government Information Subcommittee of the House Government Operations Committee has scheduled a series of hearings to begin Wednesday, June 23, 1971, on U.S. Government information policies and practices.

Pursuant to the Subcommittee's legislative and investigative authority over Government information subjects, we will explore the Constitutional principles and operational practices involved in the public's "right to know" and the right of the Legislative Branch to information and documents from the Executive Branch that are deemed essential in the discharge of our duties as elected representatives of the American people.

You are hereby requested to appear before the Subcommittee as a witness at 10:00 a.m., Wednesday, June 30, 1971, in Room 2247, Rayburn House Office Building.

In addition to your general views and comments on the subjects included within the scope of our inquiry, please be prepared to discuss procedures and practices concerning the coordination of Executive implementation of the provisions of Executive Order 10501 (18 F.R. 7049) and Executive Order 10964 (26 F.R. 8932), relating to "Safeguarding Official Information in the Interests of the Defense of the United States," and the automatic downgrading and declassification procedures for documents, information, and other security material presently in effect.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., June 21, 1971.*

Hon. HERBERT G. KLEIN,  
*Director of Communications for the Executive Branch,*  
*Washington, D.C.*

DEAR MR. KLEIN: The Foreign Operations and Government Information Subcommittee of the House Government Operations Committee has scheduled a series of hearings to begin Wednesday, June 23, 1971, on U.S. Government information policies and practices.

Pursuant to the Subcommittee's legislative and investigative authority over Government information subjects, we will explore the Constitutional principles and operational practices involved in the public "right to know" and the right of the Legislative Branch to information and documents from the Executive Branch that are deemed essential in the discharge of our duties as elected representatives of the American people.

You are hereby requested to appear before the Subcommittee as a witness at 10:00 a.m., Wednesday, June 30, 1971 in Room 2247, Rayburn House Office Building. Your vast experience in the news field and the unique position you now hold in the present Administration will make your testimony particularly valuable to the Subcommittee.

In addition to your general views and comments on the broad scope of our inquiry, please be prepared to discuss the ways in which your office functions in its coordinating role in the dissemination of information to the public generally and what role your office plays in coordinating request for both routine and classified material by Congress.

Please be prepared to discuss also the extent of Executive compliance with the instructions issued by President Nixon on April 7, 1969 establishing procedures in the handling of Congressional demands for information. Please explain also what role your office has in enforcing the procedures set forth in that April 7, 1969 Memorandum.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

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U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., June 21, 1971.*

Hon. JOHN WESLEY DEAN III,  
*Counsel to the President,*  
*Washington, D.C.*

DEAR MR. DEAN: The Foreign Operations and Government Information Subcommittee of the House Government Operations Committee has scheduled a series of hearings to begin Wednesday, June 23, 1971, on U.S. Government information policies and practices.

Pursuant to the Subcommittee's legislative and investigative authority over Government information subjects, we will explore the Constitutional principles and operational practices involved in the public's "right to know" and the right of the Legislative Branch to information and documents from the Executive Branch that are deemed essential in the discharge of our duties as elected representatives of the American people.

You are hereby requested to appear before the Subcommittee as a witness at 10:00 a.m., Wednesday, June 30, 1971, in Room 2247, Rayburn House Office Building.

In addition to your general views and comments on the subjects included within the scope of our inquiry, please be prepared to discuss procedures and practices concerning the coordination of Executive implementation of the provisions of Executive Order 10501 (18 F.R. 7049) and Executive Order 10964 (26 F.R. 8932), relating to "Safe-guarding Official Information in the Interests of the Defense of the United States," and the automatic downgrading and declassification procedures for documents, information, and other security material presently in effect.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

[Excerpt from hearings entitled "U.S. Government Information Policies and Practices—The Pentagon Papers" (pt. 3), before a subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 1st sess., p. 896]

Mr. MOORHEAD. I would also like to submit for the record, following the letters of invitation to the witnesses, the letter to me from Mr. John W. Dean III, Counsel for the President, declining our invitation to testify, on behalf of himself, Dr. Kissinger, and Mr. Herbert Klein.

[The letter follows:]

THE WHITE HOUSE,  
*Washington, June 28, 1971.*

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your letters of June 21, 1971, to Dr. Henry Kissinger, Mr. Herbert Klein and myself requesting that we appear before your subcommittee on June 30, 1971. I wish to advise you that, as members of the immediate staff of the President, we must respectfully decline the invitation to testify.

Sincerely,

JOHN W. DEAN III,  
*Counsel to the President.*

Mr. MOORHEAD. I also have been asked to keep the record open for insertion of relevant articles, statements, and studies to be inserted in the hearing record. Without objection, that will be so ordered.

These hearings will not close at this time. We expect to have testimony from the State Department now that the Supreme Court has handed down its decision, so the subcommittee will stand in recess subject to the call of the Chair.

(Whereupon, at 1:20 p.m., the hearing was adjourned to reconvene at 2 p.m., Thursday, July 7, 1971.)

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(247-C(c))

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., February 11, 1972.*

Hon. HERBERT G. KLEIN,  
*Director of Communications,*  
*The White House, Washington, D.C.*

DEAR MR. KLEIN: Early next month the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee will begin a comprehensive series of hearings into the administration and effectiveness of the Freedom of Information Act (5 U.S.C. 552). A copy of the Committee's press release announcing these hearings is enclosed.

The hearings will begin with panel discussions by leading experts in the fields of Government information policies and practices, in the legal ramifications of subject areas covered by the Act, and in the importance of the free flow of information about the activities of the Federal government to help inform our citizens.

On behalf of the Members of the Subcommittee, we would like to extend this invitation to you to participate in our panel discussion of experts in the field of Government information policies, practices, and problem areas in dealing with the public, the media, the internal agency bureaucracy, and the Congress.

This panel will be heard on Monday, March 6, at 10:00 a.m. in Room 2154, Rayburn House Office Building. We hope that initial statements by each panelist could be limited to ten minutes, to be followed by general discussion among the panel members and questioning by Subcommittee Members.

Because of the vital importance of these hearings and your own valuable experience in the field, we earnestly hope that it will be possible for you to arrange your schedule to appear. Please let us know at the earliest date if you can participate in our hearings. If there are questions, please contact the Subcommittee Staff Director, William G. Phillips—(202) 225-3741.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

THE WHITE HOUSE,  
*Washington, February 18, 1972.*

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for your letter of February 11, 1972 inviting me to appear before the Foreign Operations and Government Information Subcommittee and to participate in its hearings on the administration and effectiveness of the Freedom of Information Act.

As a matter of long established principle and precedent, members of the President's immediate staff do not appear before Congressional committees to testify or to participate in discussions in regard to the performance of their duties on behalf of the President. This practice is, indeed, fundamental to the operation of our system of government. Therefore, I must respectfully decline your invitation.

With best regards,  
Sincerely,

HERBERT G. KLEIN,  
*Director of Communications  
for the Executive Branch.*

(247-C(d))

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., February 4, 1972.*

Hon. DONALD RUMSFELD,  
*Director, Cost of Living Council,  
Washington, D.C.*

DEAR DON: I have read with interest the regulations promulgated by the Cost of Living Council regarding information access under the Freedom of Information Act, as published in the FEDERAL REGISTER on February 1, 1972.

As a former member of this subcommittee, you are of course aware of the necessity for the most complete access

by the public to Government information. For this reason and because this subcommittee is preparing for hearings on Government information policies, I thought I might comment on some of the provisions contained in the Cost of Living Council regulations.

Section 102.3(b) is confusing as it apparently limits access to information on investigations where no violations have occurred to the complainant or persons who have specific knowledge of a complaint. This appears to be in conflict with the Act, which provides access to information to all persons regardless of position, and appears to be in conflict with Section 102.10 of your regulations which states that "Any person may file a request for records."

Section 102.4(c) is of special interest as it exempts trade secrets and other matters under the authority of the Criminal Code. Perhaps this regulatory language could be explained.

Section 102.13 requires that a request for information shall be filed on a specified form. This subcommittee has always felt that administrative burdens on the public should be avoided. The requirement of a specified form is considered especially onerous. You will also note that the Administrative Conference of the United States has specifically recommended in Recommendation 24 (copy enclosed) that the use of a form not be required by agencies under the Freedom of Information Act. Many agencies have found that any request in writing or by telephone which clearly identifies the records sought is sufficient to initiate information access processing.

Section 102.40 (d) appears to fly in the face of the specific language and intent of the Freedom of Information Act. First, it implies that there is a "need to know" obligation on the part of the person requesting the record on appeal. The "cause" rule, as you know, was specifically removed on passage of the Freedom of Information Act. Second, the requirement in this subsection that the person filing an appeal may be required to present additional evidence or information in support of the request seems to shift the burden of proof from the agency to the individual. As you are aware, the Act specifically requires the agency to substantiate its refusal. There is no burden on the public to prove the negative.

Finally, the press release issued by the Cost of Living Council on January 10, 1972, again implies in paragraph one that there is a "need to know" which must be established prior to receipt of information. This again flies in the face of the spirit of the Act.

The hearings planned by the Subcommittee will begin about March 6th. We plan an in-depth review of Government information policies centering on the administration of the Freedom of Information Act. Since you have had the unique opportunity to serve on this subcommittee during your tenure in Congress and to administer this act as a member of the Executive Branch, your insights and recommendations will be of special interest to the Congress and the public.

I will look forward to an exploration of these matters at a mutually convenient date.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

**U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., February 23, 1972.**

Hon. DONALD RUMSFELD,  
*Director, Cost of Living Council,  
Washington, D.C.*

DEAR DON: This is in further regard to my letter of February 4th concerning certain regulations promulgated by the Cost of Living Council affecting access to information as provided for in the Freedom of Information Act (5 U.S.C. 552).

As I indicated earlier, this subcommittee will begin a comprehensive series of hearings on March 6th into the administration of the Act. A copy of the Committee's press release announcing these hearings is enclosed for your information.

On behalf of the Members of the Subcommittee, we would like to extend this formal invitation to you to testify on Friday, March 10, at 2:00 p.m. in Room 2154, Rayburn House Office Building.

Major topics of concern for discussion in your testimony are outlined in my letter of February 4th.

As provided for in the Rules, we would appreciate receiving from you 50 copies of your statement to the Subcommittee 24 hours in advance for distribution to our Members and for press use at the hearing.

We look forward to welcoming you back to your old subcommittee and to the opportunity to resolve the information problems connected with your agency.

With best regards,  
Sincerely,

**WILLIAM S. MOORHEAD,  
Chairman.**

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**EXECUTIVE OFFICE OF THE PRESIDENT,  
COST OF LIVING COUNCIL,  
Washington, D.C., March 8, 1972.**

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Foreign Operations and Government Information  
Subcommittee, Committee on Government Operations,  
House of Representatives, Washington, D.C.*

DEAR BILL: I was pleased to receive your comments with respect to the Council's Regulations under the Freedom of Information Act. You are right that, as a former subcommittee member, I am fully aware of the importance of this matter. I will attempt to respond to each of the points you raise in your letter.

The Freedom of Information Act specifically provides that the provisions of the Act shall not be applicable to matters regarding "investigatory files compiled for law enforcement purposes except to the extent available by law to private parties." The purpose of section 102.3(b) of the Regulations is to authorize the release of certain information from investigative files even though the Act does not require disclosure.

The Council, because of its desire to provide maximum information to the public, determined that certain information from investigative files should be made available. However, the Council decided that this type of information should be made available only to a complainant or a

person with specific knowledge of a complaint. A description of the policy with regard to disclosure in these circumstances is explained in the attached Press Release.

Section 102.4(c) of the Regulations is designed to reference a section of the Act covering matters "specifically exempted from disclosure by statute." Similar provisions appear in regulations published by many Federal agencies.

You point out quite correctly that section 102.13 provides that a request for information shall be filed on a specified form. The reason for this is that requests for information can oftentimes be misunderstood by one or more of the parties, and letters requesting access to information do not always permit proper identification of documents. The Council does not believe that use of a "specific form" will create an undue burden and it is the Council's intent to interpret this provision in a manner which will not inhibit disclosure of information.

Section 104.40(d) of the Regulations will not be construed as an impediment to obtaining information under the Act. The purpose of the provision is to permit us to gain additional information from an applicant where an initial request was denied because it was deemed to be covered by a specific exemption in the Freedom of Information Act. In those circumstances the Council should be in a position to request additional information from the applicant which may, in fact, lead to a favorable ruling on appeal. Under no circumstances was this section designed to establish a "need to know" obligation on the part of a person requesting a particular record.

In addition, I would like to stress that fact that "any person" may request access to information under these Regulations. A person does not have to show why he requested the information or that he "needs to know" the information before he receives it. The Press Release of January 10, 1972, to which you refer was not intended to convey a contrary intent.

I assure you that it is the Council's policy to comply fully with the Freedom of Information Act and to provide any interested citizen with information concerning the conduct of the Council's business, consistent with statutory requirements affording protection of confidential information, and information which may not be released because of an individual's rights.

With warm regards, I am,  
Sincerely,

**DONALD RUMSFELD,  
Director.**

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**U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., March 13, 1972.**

Hon. DONALD RUMSFELD,  
*Director, Cost of Living Council,  
Washington, D.C.*

DEAR DON: I have your letter of March 8, responding to my letter of February 4th and subsequent correspondence and telephone discussion concerning the public information policies of the Cost of Living Council and your appearance before our Subcommittee to testify at our current hearings on the administration of the Freedom of Information Act.

Frankly, we are not at all satisfied with the explanation of the regulations contained in your letter. It is, therefore, even more important that you honor our request and make yourself available to testify before the Subcommittee on these and other questions related to the ways in which your agency is carrying out its information policies.

We appreciate the fact that you are busy, as all of us are. For this reason, we could give you several alternative dates following the Easter recess of Congress so that you may make your plans to testify well in advance. We suggest either the morning or afternoon sessions of our hearings on Tuesday, April 11th, Friday, April 14th, Monday, April 17th, or Tuesday, April 18th.

Please let me hear from you as to which date will be best for you so that other witnesses also scheduled for these four days of hearings may be notified of the necessary changes.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

EXECUTIVE OFFICE OF THE PRESIDENT,  
COST OF LIVING COUNCIL,  
*Washington, D.C., April 12, 1972.*

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR CONGRESSMAN MOORHEAD: Mr. Rumsfeld asked me to reply to your letter relating to the Cost of Living Council's regulations under the Freedom of Information Act and to his requested appearance before your Subcommittee.

Obviously, we are sorry to find that you are not satisfied with the explanation contained in our earlier letter. We attempted to respond to each of the points you raised, as well as to assure you that the regulations would be interpreted and applied in a manner consistent with the letter and spirit of the Act.

I have again reviewed your original letter and our response, I believe we fairly answered the questions you raised. If you would indicate the specific areas where you believe additional explanation would be helpful, we would be pleased to respond to your specific comment.

With respect to your invitation to have Mr. Rumsfeld appear before your Subcommittee, I regret that he must decline your invitation. The officers of the Cost of Living Council, Chairman Connally and Vice Chairman Stein, have in the past and are continuing to represent the Council in appearances before Committees of the Congress. In addition, we would be pleased to assist your Subcommittee in its work and to furnish you with such information as you may request with respect to the administration of the Freedom of Information Act.

Sincerely,

JOSEPH E. MULLANEY,  
*General Counsel.*

COST OF LIVING COUNCIL,  
*Washington, D.C., June 23, 1972.*

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.*

DEAR BILL: I noted in the Congressional Record your Extension of Remarks<sup>1</sup> on Page E5501 of May 18, 1972.

It struck me that possibly you were not aware of the fact that the Executive Branch offered to have appear either the Chairman of the Cost of Living Council, John Connally, Secretary of the Treasury, or the Vice Chairman of the Cost of Living Council, Dr. Herb Stein, the Chairman of the Council of Economic Advisers. These are the two officers of the Cost of Living Council. They are the individuals who have handled all testimony before Congressional Committees for the Cost of Living Council. It was our view that they would be the appropriate ones to testify. Your remarks in the Record could have erroneously led readers to believe that the Council would not agree, which of course was not the case.

Sincerely,

DONALD RUMSFELD,  
*Director.*

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON FOREIGN OPERATIONS  
AND GOVERNMENT INFORMATION,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., July 18, 1972.*

Hon. DONALD RUMSFELD,  
*Director, Cost of Living Council,  
Washington, D.C.*

DEAR DON: This is in reference to your letter of several weeks ago in which you took note of my remarks in the May 18 Record concerning your reluctance to honor our invitation to testify before our subcommittee concerning information policies of the Council.

Of course, I was fully aware of the contents of the April 12 letter from Mr. Joseph E. Mullaney, General Counsel of the Cost of Living Council, in which he declined our invitation to you to testify and suggested Chairman Connally and Vice Chairman Stein as possible alternative witnesses. The Subcommittee staff had been apprised of this fact earlier by phone by members of your staff, who had also indicated that your duties as Counselor to the President precluded your testifying. It was also indicated by your staff that a formal letter citing "Executive Privilege" in your behalf by the President would be forthcoming from Mr. John W. Dean, III, Counsel to the President. No such letter was delivered, however.

Obviously, Chairman Connally or Vice Chairman Stein could not testify in sufficient detail as to information policies of the Council as affected by the Freedom of Information Act, since their duties do not involve the types

<sup>1</sup> See p. 446 for excerpts of this extension of remarks.

of sophisticated dealings with the Act which our subcommittee has been investigating since March.

Your prior service on this subcommittee, in which you participated in the drafting of the Act, places you in a unique position to deal with the level of inquiry that would be useful to the Subcommittee in reviewing the successes and failures of the administration of the act. This is why the Subcommittee gave you so many alternative dates to appear, making certain that your testimony would not conflict with the many other important matters on your busy schedule. In this connection, I have noted with interest your reference to your previous service on this subcommittee in remarks before The Headline Club of Chicago on June 5.

We are therefore reissuing our invitation to you to testify on the information policies of the Council during the week of July 31, on a date that is convenient to you, or a date the following week, if additional time is necessary to adjust to your calendar.

We will look forward to hearing from you as soon as possible so that a firm date may be arranged for your testimony to complete our hearing record.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

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EXECUTIVE OFFICE OF THE PRESIDENT,  
COST OF LIVING COUNCIL,  
Washington, D.C., August 14, 1972.

Hon. WILLIAM S. MOORHEAD,  
*Chairman, Foreign Operations and Government Information  
Subcommittee, Committee on Government Operations,  
House of Representatives, Washington, D.C.*

DEAR CONGRESSMAN MOORHEAD: This will confirm conversations between members of your staff and our

Congressional Affairs office relating to your letter of July 18 in which you request Mr. Rumsfeld's appearance before your Subcommittee.

As we indicated in our earlier letter, the Chairman and the Vice Chairman of the Cost of Living Council have been representing the Council in appearances before various committees of the Congress. Chairman Shultz and Vice Chairman Stein are generally familiar with Council policies relating to disclosure of information and, in any appearance before your Subcommittee, they would be accompanied by staff personnel with detailed information. Accordingly, we believe that either Chairman Shultz or Vice Chairman Stein could provide you with testimony of the type you are seeking. If you would like one of them to testify, we will attempt to work out appropriate scheduling.

In addition, as we indicated in our earlier letter, we would be pleased to assist your Subcommittee in its work and to furnish you with whatever information you might request with respect to the Council's Freedom of Information Act regulations and our administration of those regulations.

For your information, we have had only two requests for information under our disclosure regulations both of which were promptly granted. You might also be interested to learn that we are making a change in our regulations to provide, in effect, that the Chairman be authorized to release certain information, otherwise exempt, if it is in the public interest to do so and not otherwise prohibited by law. This change is intended to make explicit in the regulations what has been implicit policy of the Council.

We welcome your suggestions and comments and we look forward to working with you.

Sincerely,

JOSEPH E. MULLANEY,  
*General Counsel.*

## (247-D)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
April 24, 1972	David Young, Special Assistant to National Security Adviser The White House	Mr. Young	Testimony regarding security classification problems involving subsection (b)(1) of the Freedom of Information Act	April 29, 1972	John W. Dean Counsel to the President	Said officials of Executive Office do not appear before Congressional committees to present testimony regarding advice and assistance they render the President. (see attached)

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, Rm 22

Submitted by: (Comm/SubComm)

*Frank J. Giarratano*

By: *William S. Moorhead*

TITLE: *Chairman*

Extension

FILE 247:  
**U.S. HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND GOVERNMENT  
INFORMATION SUBCOMMITTEE,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., April 24, 1972.**

Mr. DAVID YOUNG,  
Special Assistant to the National Security Council,  
The White House, Washington, D.C.

DEAR MR. YOUNG: Early next month, the Foreign Operations and Government Information Subcommittee will begin our review of security classification problems affecting exemption (b)(1) of the Freedom of Information Act (5 U.S.C. 552).

As part of these hearings, we will examine the way in which the President's new Executive Order 11652 will affect the economic and efficient operation of our security classification system, the rationale behind its various provisions, and alternatives to the present approach.

We would very much like to have you as a witness from the executive branch because of your key role in developing the new system. Of course, we are aware of the usual reluctance of Executive Office officials to testify before congressional committees and would therefore agree in advance not to pose questions that might tend to impinge on your personal discussions with the President in this area.

In view of the vital importance of your testimony to the subject of our hearings, we would hope that a waiver along the lines of that recently granted in the case of Mr. Peter Flanigan could be obtained to make it possible for you to appear before our subcommittee on Tuesday, May 2, at 10 a.m. in room 2154, Rayburn House Office Building.

We look forward to a favorable response because we know that you could make a positive and significant contribution to the subcommittee's inquiry into this most important subject.

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman*.

THE WHITE HOUSE,  
Washington, April 29, 1972.

Hon. WILLIAM S. MOORHEAD,  
Chairman, Foreign Operations and Government Information Subcommittee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Mr. David Young has requested that I thank you and reply to your letter of April 24, inviting him to testify before your subcommittee regarding his role in the development of the new security classification system and Executive Order 11652.

As you know, it is a well-established principle that officials of the Executive Office do not appear before congressional committees to present testimony regarding advice and assistance they render the President. I am sure you appreciate that this practice is indeed fundamental to the preservation of the constitutional doctrine of separation of powers. Your offer to limit the questioning of Mr. Young in order to preserve the doctrine is greatly appreciated. However, since his work related solely to rendering advice and assistance to the President, any testimony he could give would be inconsistent with that principle. Therefore, Mr. Young must respectfully decline your invitation.

I should also note that Mr. Young's situation differs significantly from the recent instance to which your letter makes reference, when Mr. Peter Flanigan appeared before the Senate Judiciary Committee to present testimony regarding his limited involvement in certain aspects of the ITT merger cases. Mr. Flanigan's testimony dealt with contacts he had with individuals outside the executive branch and was unrelated to any advice or assistance he rendered the President. As noted above, such were not the circumstances in the case of Mr. Young's role in developing the new classification system.

While Mr. Young will not be in a position to accept your invitation, we are confident that the Departments concerned with the operation of the security classification system will be able to provide your subcommittee with the information it seeks.

With best regards,  
Sincerely,

JOHN W. DEAN III,  
*Counsel to the President.*

*Editor's Note: Mr. Moorhead's requests for the appearance of Mr. Klein (File 247-D (c)); Mr. Rumsfeld (File 247-D (d)); and Mr. Young (File 247-E); were made in conjunction with hearings before the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee held during February, March, and April of 1972. In view of the close relationship of the subject matter of those hearings and that of the present Subcommittee on Separation of Powers report concerning the problems faced by the Congress in obtaining information from the Executive branch, the material inserted in the Congressional Record of May 18, 1972, by Mr. Moorhead are provided here as an excerpt.*

[Excerpt from the *Congressional Record*, May 18, 1972, E5501-E5509]

#### PROBLEMS OF CONGRESS IN OBTAINING INFORMATION FROM THE EXECUTIVE BRANCH

Mr. MOORHEAD. Mr. Speaker, the Foreign Operations and Government Information Subcommittee's continuing hearings on the operation of the Freedom of Information Act is now focusing on the problems of Congress in obtaining information from the executive branch, a problem that has grown to crisis proportions in the past few years.

The President's assertion of so-called executive privilege to withhold information needed by Congress in fulfilling our constitutional duties and responsibilities will be examined during these hearings. We will also explore the instances where stalling, subterfuge, and similar tactics by executive agencies have succeeded in denying information to Congress short of the invocation of "executive

privilege" by the President himself, as pledged by the past three Presidents in correspondence with the former distinguished chairman of this subcommittee, the gentleman from California (Mr. Moss).

Mr. Speaker, so that all Members may be fully informed of the importance of these hearings that affect the rights and duties of every one of us, I insert at this point the text of my opening statement on these hearings; the text of the correspondence regarding "executive privilege" between Presidents Kennedy, Johnson, and Nixon with Mr. Moss; the testimony of our colleagues, the gentleman from New York (Mr. Reid), the gentleman from New York (Mr. Wolff), and the gentlewoman from Hawaii (Mrs. Mink); also the testimony of Deputy Comptroller General of the United States, Mr. Robert F. Keller, who details the shocking extent of executive denial of information to the General Accounting Office.

[The material follows:]

#### OPENING STATEMENT BY REPRESENTATIVE WILLIAM S. MOORHEAD

Today we begin the third segment of our hearings on government information policies. The first two segments, the Executive Branch's administration of the Freedom of Information Act and security classification policies, dealt primarily with the relationship of the Executive to the people of the United States and the Congress.

Our hearings have thus far shown that while the Executive grants lip service to Freedom of Information, its performance has not lived up to its promise. In the murky arena of classified information, the President has at long last confessed error. But he has offered a solution in the form of Executive Order 11652, which I am convinced is unworkable and lacks real commitment to solving the difficult problem of overclassification.

While the past 20 days of hearings have elicited expressions of good intentions by the various departments and agencies, we are today entering the realm of so-called "Executive privilege" and the Congress' right to know. This non-Constitutional doctrine is founded on the remarkable assertion of the President that he may withhold whatever information he wishes at any time from the Congress of the United States. This unique theory is in part justified by a memorandum of dubious legal scholarship which was presented to a Senate committee in 1958.

"Executive privilege", by which the President arrogates to himself the decision as to what the elected representatives of our government will be told about the areas of their undisputed responsibility, is further justified by the argument that "free Congressional inspection of executive documents would cause the Executive Branch to disappear from our policy, leaving in its place another unfortunate example of government by legislature."

We see quite the reverse occurring, as day by day the prerogatives, duties and responsibilities of the Congress are being sublimated by unfettered expansion of the White House staff.

It is most interesting to note that the first example of the imposition of Executive privilege as cited by the Attorney General was the purported refusal of President Washington to provide Congress with information relative to the failure of a military expedition carried out in 1792. Congress was of course interested in how we became involved in this expedition and why it failed. It seems that in 183 years we have come the full circle.

I must note, however, that—despite claims by the proponents of executive privilege—President Washington did release the requested papers to the Senate. So much for the "Father of Executive Privilege."

Since 1961 executive privilege has technically been invoked solely by the President. Letters stating this policy were sent to Congressman John Moss, former Chairman of this subcommittee, by Presidents Kennedy, Johnson and Nixon. However, this new policy has been more honored in the breach, as the various executive departments continue to withhold information from Congress on their own motion. While never invoking the magic words "Executive Privilege" the departments simply decline to provide the information, stall, provide only partial information, or otherwise attempt to thwart the will of Congress.

While Congress can call Cabinet Department witnesses before its various committees, it has not, with few notable exceptions

been able to call persons on the White House staff. When the Department of State truly administered our foreign policy, and the Department of Defense truly administered our military policy, witnesses from these departments were able to provide Congress with the information it needed to legislate. However, we are now witnessing a geometric expansion of the White House staff—with policy-makers from the agencies and departments drawn in under the spurious White House umbrella of executive privilege. I will insert a Congressional Research Service study of this expansion at the conclusion of this statement. George Reedy, Press Secretary to President Johnson, testified before this subcommittee in March that this shift to the White House is critically unbalancing the equality of the legislature and the executive.

Since 1969 the White House staff has expanded by almost 100 per cent. Amazingly enough, many of these persons are considered personal advisors to the President and will not appear before Congress.

Earlier this year, this subcommittee invited Mr. Herbert Klein, the Presidential Director of Communications, to appear with a panel of former press aides. He refused to appear.

This subcommittee also invited Mr. David Young, primary drafter of the new Executive Order on classification. He refused to appear. Even Donald Rumsfeld, head of the Cost of Living Council, refused to appear before this subcommittee, inappropriately donning his hat as an advisor to the President.

I ask the White House—what is the Congress supposed to do? Are we to accept White House assertions that all is well and be content with the benign claptrap oozing from the basement of the White House as prepared by a former advertising flack for Disneyland? I think not.

In the next several days of hearings, this subcommittee will hear from Members of Congress who were impeded in their legislative responsibilities by departmental refusals to supply needed information. We will also take testimony from the General Accounting Office, the arm of Congress which by law has the absolute right to all financial data necessary to the performance of its auditing functions. We will hear how even the GAO has difficulty in fulfilling its statutory obligations because of Executive intransigence.

We will also hear from Professor Raoul Berger, probably the leading academic authority on Executive Privilege whose prior articles have clearly demonstrated the extra-legal basis for executive privilege.

Also appearing before this subcommittee will be representatives from the offices of legislative affairs of the Departments of State and Defense as well as the Director of the United States Information Agency, and the Internal Revenue Service—all of whom will attempt to explain and justify departmental policies toward Congressional requests for information.

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THE WHITE HOUSE,  
Washington, D.C., April 7, 1969.

Hon. JOHN E. MOSS,  
Chairman, Foreign Operations and Government Information Sub-  
committee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Knowing of your interest, I am sending you a copy of a memorandum I have issued to the heads of executive departments and agencies spelling out the procedural steps to govern the invocation of "executive privilege" under this Administration.

As you well know, the claim of executive privilege has been the subject of much debate since George Washington first declared that a Chief Executive must "exercise a discretion."

I believe, and I have stated earlier, that the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific Presidential approval.

I want to take this opportunity to assure you and your committee that this Administration is dedicated to insuring a free flow of information to the Congress and the news media—and, thus, to the citizens. You are, I am sure, familiar with the statement I made on this subject during the campaign. Now that I have the responsibility to implement this pledge, I wish to reaffirm my intent to do so. I want open government to be a reality in every way possible.

The Administration has already given a positive emphasis to freedom of information. I am committed to ensuring that both the letter and spirit of the Public Records Law will be implemented throughout the Executive Branch of the government.

With my best wishes,

Sincerely,

RICHARD NIXON.

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS  
AND AGENCIES

(Establishing a Procedure to Govern Compliance with Congressional Demands for Information)

The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest. This Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval. The following procedural steps will govern the invocation of Executive privilege:

1. If the head of an Executive department or agency (hereafter referred to as "department head") believes that compliance with a request for information from a Congressional agency addressed to his department or agency raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.

2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that Executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring Congressional agency.

3. If the department head and the Attorney General agree that the circumstances justify the invocation of Executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

4. In the event of a Presidential decision to invoke Executive privilege, the department head should advise the Congressional agency that the claim of Executive privilege is being made with the specific approval of the President.

5. Pending a final determination of the matter, the department head should request the Congressional agency to hold its demand for the information in abeyance until such determination can be made. Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request does not constitute a claim of privilege.

RICHARD NIXON.

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HOUSE OF REPRESENTATIVES,  
Washington, D.C., January 28, 1969.

Hon. RICHARD M. NIXON,  
The President of the United States,  
The White House, Washington, D.C.

DEAR MR. PRESIDENT: The claim of "executive privilege" as authority to withhold government information has long been of concern to those of us who support the principle that the survival of representative government depends on an electorate and a Congress that are well informed.

As you know, some administrations in the past made it a practice to pass along to executive branch subordinates a discretionary authority to claim "executive privilege" as a basis to refuse information to the Congress. The practice of delegating this grave Presidential responsibility was ended by President John F. Kennedy when he restored a policy similar to that which existed under previous strong administrations, including those of Presidents George Washington, Thomas Jefferson, and Theodore Roosevelt. In a letter to the Foreign Operations and Government Information Subcommittee, dated March 7, 1962, he enunciated the policy as follows:

"... this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence, and information. That is the basic policy of this Administration, and it will continue to be so. *Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.*"

President Lyndon B. Johnson informed the Subcommittee by letter, dated April 2, 1965, he would continue the policy enunciated by President Kennedy. He stated:

"Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of 'executive privilege' will continue to be made only by the President."

In view of the urgent need to safeguard and maintain a free flow of information to the Congress, I hope you will favorably consider a reaffirmation of the policy which provides, in essence, that the claim of "executive privilege" will be invoked only by the President.

Sincerely,

JOHN E. MOSS, Chairman.

THE WHITE HOUSE,  
Washington, D.C., March 7, 1962.  
Hon. JOHN E. MOSS,  
Chairman, Special Government Information Subcommittee of the Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of last month inquiring generally about the practice this Administration will follow in invoking the doctrine of executive privilege in withholding certain information from the Congress.

As your letter indicated, my letter of February 8 to Secretary McNamara made it perfectly clear that the directive to refuse to make certain specific information available to a special subcommittee of the Senate Armed Services Committee was limited to that specific request and that "each case must be judged on its merits".

As you know, this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. [Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.] Your own interest in assuring the widest public accessibility to governmental information is, of course, well known, and I can assure you this Administration will continue to cooperate with your subcommittee and the entire Congress in achieving this objective.

Sincerely,

JOHN F. KENNEDY.

Hon. JOHN E. MOSS,  
Chairman, Foreign Operations and Government Information Subcommittee of the Committee on Government Operations, House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I have your recent letter discussing the use of the claim of "executive privilege" in connection with Congressional requests for documents and other information.

Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of "executive privilege" will continue to be made only by the President.

This administration has attempted to cooperate completely with the Congress in making available to it all information possible, and that will continue to be our policy.

I appreciate the time and energy that you and your Subcommittee have devoted to this subject and welcome the opportunity to state formally my policy on the important subject.

Sincerely,

LYNDON B. JOHNSON.

MARCH 31, 1965.

Hon. LYNDON B. JOHNSON,  
President of the United States, the White House, Washington, D.C.

DEAR MR. PRESIDENT: The use of the claim of "executive privilege" to withhold government information from the Congress and the public is an issue of importance to those who recognize the need for a fully informed electorate and for a Congress operating as a co-equal branch of the Federal Government.

In a letter dated May 17, 1954, President Eisenhower used the "executive privilege" claim to refuse certain information to a Senate Subcommittee. In a letter dated February 8, 1962, President Kennedy also refused information to a Senate Subcommittee. There the similarity ends, for the solutions of "executive privilege" problems varied greatly in the two Administrations.

Time after time during his Administration, the May 17, 1954 letter from President Eisenhower was used as a claim of authority to withhold information about government activities. Some of the cases during the Eisenhower Administration involved important matters of government but in the great majority of cases Executive Branch employees far down the administrative line from the President claimed the May 17, 1954 letter as authority for withholding information about routine developments. A report by the House Committee on Government Operations lists 44 cases of Executive Branch officials refusing information on the basis of the principles set forth in President Eisenhower's letter.

President Kennedy carefully qualified use of the claim of "executive privilege". In a letter of February 8, 1962 refusing information to a Senate Subcommittee, he stated that the "principle which is at stake here cannot be automatically applied to every request for information." Later, President Kennedy clarified his position on the claim of "executive privilege", stating that—

"... this Administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. Executive privilege can be invoked only by the President and will not be used without specific Presidential approval."

As a result of President Kennedy's clear statement, there was no longer a rash of "executive privilege" claims to withhold information from the Congress and the public. I am confident you share my views on the importance to our form of government of a free flow of information, and I hope you will reaffirm the principle that "executive privilege" can be invoked by you alone and will not be used without your specific approval.

Sincerely,

JOHN E. MOSS, Chairman.

HOUSE OF REPRESENTATIVES,  
Washington, D.C., February 15, 1962.

The Honorable JOHN F. KENNEDY,  
The President of the United States,  
The White House, Washington, D.C.

DEAR MR. PRESIDENT: In your letter of February 8, 1962 to Secretary McNamara you directed him to refuse certain information to a Senate Subcommittee. The concluding paragraph of your letter stated:

"The principle which is at stake here cannot be automatically applied to every request for information. Each case must be judged on its merits."

A similar letter from President Eisenhower on May 17, 1954 also refused information to a Senate Subcommittee, setting forth the same arguments covered in your letter, President Eisenhower did not, however, state that future questions of availability of information to the Congress would have to be answered as they came up.

I know you are aware of the result of President Eisenhower's letter. Time after time Executive Branch employees far down the administrative line from the President fell back on his letter of May 17, 1954 as authority to withhold information from the Congress and the public.

Some of the cases are well known—the Dixon-Yates matter and the investigation of East-West trade controls, for instance—but many of the refusals based on President Eisenhower's letter of May 17, 1954 received no public notice. A report of the House Committee on Government Operations covering the five years from June, 1955 through June, 1960 lists 44 cases of Executive Branch officials refusing information on the basis of the principles set forth in the May 17, 1954 letter.

I am confident that you share my belief that your letter of February 8, 1962 to Secretary McNamara should not be seized upon by Executive Branch employees—many of them holding the same policy-making positions of responsibility they did under the Eisenhower Administration—as a new claim of authority to withhold information from the Congress and the public. A Subcommittee staff study indicates that during the year between the time you took office and February 8, 1962, the claim of an "executive privilege" to withhold government information was not used successfully once, compared to the dozens of times in previous years administrative employees held up "executive privilege" as a shield against public and Congressional access to information.

Although your letter of February 8, 1962 stated clearly that the principle involved could not be applied automatically to restrict information, this warning received little public notice. Clarification of this point would, I believe, serve to prevent the rash of restrictions on government information which followed the May 17, 1954 letter from President Eisenhower.

Sincerely,

JOHN E. MOSS, Chairman.

### TESTIMONY OF CONGRESSMAN OGDEN R. REID

Mr. Chairman: Needless to say, I deeply appreciate the opportunity to appear before this distinguished subcommittee from the other side of the table and discuss what I and many others believe to be the most vital "freedom of information" question facing our country today—the furnishing of information by the Executive Branch of Congress.

During the course of these hearings, you will hear from Members of Congress who have experienced difficulty obtaining information on relevant matters from the Executive Branch. I am sure you also know of the many instances of obstruction, delay, and outright refusal by the Executive Branch to furnish information to the General Accounting Office when that agency has requested information in furtherance of its responsibilities under law.

Within the past year alone, members of this subcommittee have been rebuffed in their efforts to obtain important information in their official capacity. On June 28, 1971, pursuant to statutory authority contained in 5 U.S.C. 2954, seven members of the committee sought to be furnished the so-called Pentagon Papers study, only to be refused summarily. Congressman Moss and I were subsequently unsuccessful in securing the release of that study by the courts in a suit brought under the Freedom of Information Act. More recently, the President has formally invoked the doctrine of executive privilege to deny this subcommittee the Country Field Submission Report for Cambodia, thereby reversing a longstanding policy of availability of such documents to Congress.

I am certain that the record of these hearings will establish beyond dispute that the Executive Branch makes a common practice of withholding information from Congress when it deems such withholding desirable. What I would principally like to discuss here are the basic Constitutional implications of this problem and a legislative remedy which I shall introduce tomorrow in the House.

### CONSTITUTIONAL IMPLICATIONS

The bedrock principle upon which our system is founded is accountability to the people. But accountability is a hollow word unless the American people, and in their behalf the Congress, have the information necessary to judge the performance of their government. Moreover, without relevant information it is impossible for either the Congress or the people to participate meaningfully in the making of fundamental decisions which, from time to time, truly alter the course of our nation's history.

There is now a fundamental and growing imbalance between the Congress and the Executive Branch, with a major accretion of power on the side of the Presidency. This has occurred in part because the Executive Branch has actively expanded its power, and in part because the Congress has failed to assert itself.

The power to legislate, expressly granted to Congress by the Constitution, carries with it the further right of Congress to oversee the administration of the laws by the Executive Branch. Yet the Information Congress needs, both to legislate in the first instance and to oversee the administration of laws it has previously enacted, is frequently in the exclusive possession of the Executive Branch.

In my judgment there is no information possessed by the Executive Branch to which Congress does not have a right of access when that information is legitimately needed to fulfill the responsibilities of Congress for legislation or oversight. If Congress must legislate out of ignorance, it will make bad laws. If it is impeded in studying the activities of the Executive Branch, there is no way it can identify and resist the arbitrary or unwise exercise of executive power. Full access by Congress to relevant information, therefore, is essential to preserve the Constitutional balance of our government.

While these principles seem self-evident, they have never been accepted by any Presidential administration. To the contrary, the doctrine of executive privilege, which dates back to the days of President George Washington, has been repeatedly invoked over the years, both expressly and silently, to deny the Congress information which it sought in furtherance of its Constitutional duties. The Constitution nowhere states that the President may withhold information from Congress, but proponents of executive privilege claim an inherent right on his part to do so.

Speaking for the present administration last June before this subcommittee, then Assistant Attorney General William H. Rehnquist strongly affirmed such a right as "implicit in the separation of powers established by the Constitution." Yet even some of the Supreme Court cases cited in support of this proposition seem to circumscribe its application. Specifically, in *Reynolds v. United States* (345 U.S. 1) the Court held that the Executive Branch does not have

unlimited discretion to withhold information, stating, "the court itself must determine whether the circumstances are appropriate for the claim of privilege."

Because the question has never been settled by the courts, Congress cannot rely on firm judicial authority to support its claim for information.

In the absence of an accommodation between the two branches of government, Congress must employ other means to make effective its right to know.

### PROPOSED LEGISLATIVE REMEDY

Twelve years ago the House Committee on Government Operations made to Congress a recommendation of considerable importance. In concluding a report on this fundamental problem, the committee said:

"What can the Congress do to combat abuses by executive officials in withholding from the Congress information which the Congress believes it needs?

"Two existing powers of the Congress are available to oppose this abuse—the power of subpena and the power of the purse. The power of subpena, however, should be used only as a last resort.

"Utilizing the power of the purse, the Congress can and should provide, in authorizing and appropriating legislation, that the continued availability of appropriated funds is contingent upon the furnishing of complete and accurate information relating to the expenditure of such funds to the General Accounting Office and to the appropriate committees of Congress at their request. ("Executive Branch Practices in Withholding Information from Congressional Committees." Report by the House Committee on Government Operations, August 30, 1960, p. 14)

Since the date of this recommendation, and indeed within memory, the Congress has taken no action to exercise its power of the purse following a refusal by the Executive Branch to furnish requested information. This is largely due, I think, to a lack of institutional procedures which would facilitate such action. The organization of Congress and the requirement of concurrent action by the Houses in order to legislate a denial of appropriations simply do not lend themselves to prompt and decisive application of financial sanctions in response to specific instances of withholding by the Executive.

The bill I shall introduce, as an amendment to the Freedom of Information Act, establishes a procedure designed to overcome this impediment. Essentially it provides that:

(1) when any committee of Congress requests information from the Executive Branch, the head of the agency concerned shall immediately furnish all the information requested;

(2) the agency head shall certify to the requesting committee whether or not full and complete disclosure of the requested information has been made;

(3) upon resolution of the requesting committee, funds for the program or activity in question shall automatically be suspended without further action being required by Congress if—

(a) an agency head fails to make a requested certification;

(b) an agency head certifies that full and complete disclosure of the requested information has not been made; or

(c) an agency head falsely certifies that full and complete disclosure of the requested information has been made;

(4) the GAO shall take all steps available to it under law, including refusal to countersign relevant warrants drawn upon the U.S. Treasury, to effectuate a suspension of funds.

In effect, the withholding of information by the Executive would trigger a fund cutoff previously built into law by this legislation of general applicability. Because no new legislation would be needed at the time to deny funds, effective response to the part of the Congress would be greatly facilitated.

It is important to note that this legislation does not vest in Congress any power it does not already possess under the Constitution. It merely streamlines the procedure by which this power can be exercised and, as a practical matter, makes its exercise more possible.

Nor does this legislation, in my view, risk irresponsible action by a committee of Congress. Every Member of Congress is sensitive to the gravity of a fund cutoff under the conditions contemplated in this legislation. It is inconceivable that a majority of the members of a full committee would vote to initiate the fund cutoff process without first giving the most careful and sober consideration to the circumstances and ramifications of their action. For this

reason, the procedure would not be invoked lightly or with great frequency, but only when fundamental disagreements between the two branches could not be resolved in any other way.

The trustworthiness of the Congress or one of its committees to preserve the secrecy of such information when necessary and appropriate should not be doubted. Committees of Congress regularly receive secret information from the Executive Branch, as they have both a right and a need to do. The national security has never suffered as a result, for committees of Congress are no less responsible than their counterparts in the Executive Branch.

#### CERTIFICATION PROCEDURE

Under the terms of this legislation the Executive Branch would retain at all times the ability to avert a threatened fund cutoff. It need simply furnish the requested information and certify to the committee that it has made full and complete disclosure of the information sought. If such a certification were made, funds could not be cut off (unless the certification were subsequently found by the Comptroller General of the United States to have been false). Funds could be cut off upon resolution of the requesting committee if the Executive Branch either (1) failed within the required time to make any certification of whether or not full disclosure had been made or (2) certified that full disclosure of the requested information had not been made.

By making the certification procedure the focal point on which a fund cutoff would depend, all subjectivity and ambiguity are removed from the process. The committee would not be in the position of having to judge for itself whether all the requested information had been furnished before resolving to cut off funds. In many cases, if a committee had to make such a judgment, it could not be certain whether it would be justified in cutting off funds, because it would not know whether full disclosure had been made.

The certification procedure establishes an objective identifiable event from which a fund cutoff would result, and the occurrence or non-occurrence of that event would be totally within the control of the Executive Branch. Whether or not funds were cut off would depend entirely on whether the Executive Branch permitted them to be cut off by failing to certify that full disclosure of the requested information had been made. I wish to make clear that this means disclosure of all information requested, not merely all information which the Executive Branch deems it appropriate to disclose.

This procedure is fair to both the Congress and the Executive Branch. To Congress it would ensure requested information were fully provided or financial sanctions were triggered. On the other hand, the Executive Branch would at all times control the "trigger," which could be pulled only if the Executive Branch deliberately and consciously refused to certify that it had furnished all the requested information. Thus in no way could funds be cut off if the Executive Branch did not affirmatively choose to allow them to be cut off.

#### EXECUTIVE PRIVILEGE

Under this legislation the invocation of executive privilege by the President would not avert a fund cutoff. Should the President choose not to provide Congress the requested information, for whatever reason, funds would be cut off. The President might prefer to lose funds than to disclose the information to Congress, but that is the hard—and the only—choice he would have.

#### OFFICERS AND AGENCIES COVERED

I should make clear, too, that this legislation exempts no office or agency within the Executive Branch from its provisions. Specifically, the President and establishments within the Executive Office of the President are included, so that no official, office, or agency may claim some undefined "privilege" flowing from his or its relationship with the President. Since the President is included, a *fortiori* so are all agencies and offices in the Executive Branch which are subordinate to the President.

However, the bill also provides that the President or head of any agency shall not be required to disclose the nature of any advice, recommendation, or suggestion made to him by a member of his staff or of an agency of the United States in connection with matters solely within the scope of his official duties, except to the extent that such information may be required to be made public or made available to Congress by some other provision of law. Any form of information included within or forming the basis of such advice, recommendation, or suggestion is not protected from disclosure.

The obvious purpose of this provision is to protect the confidentiality of staff relationships and to encourage free debate among

agency heads and their advisers. At the same time, it is intended to ensure that factual information—such as a finding by the President's science advisers that the SST would deplete the earth's ozone supply—be made available to Congress when relevant to its responsibilities.

#### JOINT RESOLUTION

Supplementary to the bill I have just described, I am also introducing a joint resolution expressing the sense of Congress that an office or agency of the executive branch should immediately make available all information requested by either House or any committee of Congress. The resolution is based on the same premises as the bill, and in my judgment would be a most useful reassertion by Congress of its constitutional prerogatives.

#### CONCLUSION

It has become common for administrations to apply a double standard to the release of information. Favorable classified information is frequently "leaked" to the press, while Congress and the public are denied information which could prove embarrassing to the government.

This legislation is born of the premise that Congress, as a co-equal branch of our Federal government, has both a right and a need to know information about all matters over which the Constitution gives it the power to legislate and the right of oversight. I can conceive in theory no justification for withholding from Congress information legitimately related to one of these functions. To keep Congress in the dark about the activities of the government is to consign it to a subordinate and subservient role in derogation of the intent of the Constitution.

Observers have frequently criticized Congress for allowing itself to become a second-class citizen in our constitutional system. There is altogether too much truth in this assertion. In failing time and again over the years to exercise the prerogatives it unquestionably possesses, Congress has materially contributed to the relative decline of its influence over our nation's course in the world. This need not have been the case, and the imbalance can be corrected if we in the Congress so desire.

#### STATEMENT OF THE HONORABLE LESTER L. WOLFF

Mr. Chairman and Members of the Committee, I would like to thank you for giving me this opportunity to testify on the question of access to information, a subject which is of vital concern to every Member of Congress.

As you may be aware, I have the privilege of serving on the House Foreign Affairs Committee. In fulfilling my duties on this Committee, I have had to deal with the Department of State on numerous occasions. Unfortunately, I have not always received the kind of cooperation which is essential to the proper discharge of my duties as a Member of this body.

Although I could cite many examples of this lack of cooperation which, I might add, sometimes approach outright obstruction, I would like to describe in detail three recent problems which I have had with the State Department.

The most recent instance occurred this February after I had returned from a study mission to Europe and the Far East involving international narcotics traffic. During the early part of January, I attended, along with the Subcommittee on Europe, a briefing by the U.S. Ambassador to Turkey and other Embassy personnel on the subject of opium cultivation and traffic in Turkey. Mr. Rosenthal of New York, Chairman of the mission, requested me to record the meeting. Prior to the briefing in Istanbul, I requested clearance from the Embassy staff to take notes on a tape recorder. I placed my personal tape recorder on a table during the meeting where it was highly visible.

Since I felt that some of the material which was discussed at this meeting could possibly be of a sensitive nature, I requested the Embassy to return the tape by diplomatic pouch to me at my office in Washington. All other material which I sent back in this way arrived; the drug tape did not.

I launched an inquiry with Secretary Abshire, Director of Congressional Relations for the State Department, and was informed that the Department would withhold the tape and classify it. Imagine the Department of State intercepting either a Congressman's personal property or the property of the U.S. Congress, keeping it, and then classifying its contents.

For two months I had to attempt to reclaim my tape, particularly since I wished to review certain information before holding a

drug-related meeting in March. I was told that the Department of State was preparing a transcript of the tape and was going to mark those sections which it considered secret. On March 21st, I finally received the transcript of my own tape. The tape itself, as this "I.O.U." indicates, is still being held by the State Department which is apparently afraid that I might give out not only the Ambassador's words, but also his voice. My very own questions have been classified "Secret" and the Department even censored a four-letter word uttered by the Ambassador. Such cavalier treatment of the personal property of a Member of Congress is nothing short of intolerable and represents a direct challenge by the Executive to Congressional autonomy.

Another illustration of this type of treatment took place last October when I introduced a resolution of inquiry directing the Secretary of State to furnish the Committee on Foreign Affairs all communications regarding the Vietnamese election, including all documents relative to the conduct and use of U.S. financed public opinion surveys. I introduced this resolution precisely because I felt that the lack of cooperation on the part of the Department of State necessitated firm action by the Congress itself concerning the availability of information necessary to the proper discharge of our responsibilities in the area of this nation's foreign policy.

One has only to read the Congressional Record of October 20th to know that the distinguished Chairman of the Foreign Affairs Committee received a letter dated October 8th from Secretary Abshire which stated, "The United States Information Agency has informed us that the Joint United States Public Affairs Office (JUSPAO) in Vietnam has NOT conducted any polls or surveys, formal or informal, concerning or involving the Vietnamese election."

Only after I had announced that I had in my possession sworn statements from persons who had participated in the conduct of these polls did Secretary Abshire write further that, "I regret that there was this inaccuracy in my last letter." Abshire explained, in a letter dated October 16th that, "We have now been informed that between October 1970 and February 1971 four regular opinion surveys were conducted by JUSPAO containing questions explicitly directed to the Vietnamese elections." The surveys were then released to the Committee classified "Limited Official Use."

On October 19th, Secretary Abshire again wrote to Chairman Morgan about these surveys in a letter that was classified "Confidential." At my insistence, this letter has been declassified. Abshire stated that, "The Embassy informed us that the results of this particular poll were discussed with President Thieu, but were neither discussed with other Vietnamese, nor given any distribution within the Vietnamese Government."

Thus what the State Department was hoping to keep quiet was the fact that American personnel were conducting surveys of public opinion not for our own information, but for the information of President Thieu's reelection campaign. Much of the raw data of these surveys, which it should be pointed out bears directly on the attitudes of the Vietnamese people towards the war, is still classified.

The final example of "liaison" work between the State Department and myself occurred in connection with a remark I made during an Executive Session of the New East Subcommittee to the effect that I felt that our Ambassador to Israel might not be adequate to the demands of his job. Several other Members of the Subcommittee echoed my sentiments. The State Department, through the Committee staff, requested me to delete this from the transcript of the hearing. My refusal to do so resulted in the almost one-year delay in publishing the hearings.

In summary, Mr. Chairman, it has been my experience that I have had to fight to get information and even to keep information. Access to the kind of information described is, I feel, vital to my duties as a Member of Congress. We cannot allow any agency or department to withhold information from a Member of Congress. Intrusions of the Executive branch are such that we must take effective action to prevent any further erosion of the constitutionally mandated separation of powers. I hope that these hearings will lead to some changes in the current intolerable situation. Thank you.

#### STATEMENT BY REPRESENTATIVE PATSY T. MINK

Mr. Chairman and Colleagues, I welcome this opportunity to appear before the committee and to testify on certain problems in the administration of the Freedom of Information Act. In particular I want to discuss with you certain concerns about access to information needed to carry out Congressional functions. As many of you

know, my concern over this problem led to a Freedom of Information Act suit filed last year to obtain certain information on the Amchitka, Alaska, underground nuclear test. That case is now pending before the United States Supreme Court and arguments will be heard this fall. It is the first Freedom of Information Act case to be heard by the Supreme Court.

Because of my concern over possible adverse environmental effects of the nuclear test, I attempted last year to block its funding by Congress. On July 15, 1971, I offered an amendment to H.R. 9388, the Atomic Energy Commission authorization bill for fiscal 1972, which would have eliminated funds authorized for the test—code named "Cannikin." Unfortunately, that amendment failed in the House and a similar amendment failed in the Senate on July 20, 1971. I offered another amendment when H.R. 10090, the appropriation bill for Public Works and the Atomic Energy Commission, was taken up by the House on July 29. This also failed. A major factor in our inability to secure passage of my amendment was the lack of information on the environmental and physical dangers involved.

On July 26, 1971 an article was published in the Washington Evening Star which indicated that certain federal agencies had recommended to the White House that Cannikin be cancelled. The article indicated that the federal agencies charged with protecting the environment—EPA and CEQ—both recommended against conducting the test, as did the President's Office of Science and Technology. I ask that a copy of this article be included in the committee record at this point.

On July 28, 1971, I telegraphed the President requesting release of the documents upon which that newspaper article was based. I stressed that the information was needed so that Congress could properly legislate on Cannikin. On August 2, 1971, John W. Dean, III, Counsel to the President, replied to my telegram and informed me that the reports described in the *Star* article were not available to members of Congress. I request that a copy of that letter also be included in the committee record at this point.

Thereafter, on August 11, 1971, thirty-two other Members of Congress and I instituted a suit under the Freedom of Information Act to obtain the Cannikin reports. We contended that as Members of Congress we were entitled to disclosure of the information without regard to the restrictions on disclosure in the Act that apply to members of the public. The government responded by contending that Members of Congress could not sue Executive officials because of the "separation of powers provisions" of the Constitution. In essence, the government seemed to argue that if the Executive branch disobeyed a lawful duty owed to the Legislative branch, the Executive branch could not be held accountable by the Judiciary.

The government further contended that in any event the documents were immune from disclosure under the Freedom of Information Act because they were classified "secret" or higher and consisted of internal documents prepared for the advice of the President.

The District Court held that as Members of Congress we could not seek judicial relief against the Executive branch. It further held that as members of the public, we were not entitled to the documents because they were classified and consisted of internal agency memoranda. An emergency appeal was taken to the Court of Appeals for the District of Columbia Circuit. Several reasons were urged in support of reversal of the trial court's judgment. First, we contended that Members of Congress were entitled to sue as such and that such suits were not barred by any "separation of powers" principles. Second, we argued that Members of Congress were not subject to the restrictions on disclosure contained in the Act. Third, we contended that the government had not sustained the burden placed on it by the Act to justify nondisclosure and that the trial court had not conducted the *de novo* hearing required by the Act. Fourth, we contended that the "classification" and "internal memoranda" exemptions of the Act did not apply to the documents in question. And we basically urged that the District Court failed fully to explore the facts behind the withholding in order to determine the legality of the agency action.

The Court of Appeals did not pass on all these contentions. Rather, it simply held that the validity of the secrecy classification was cast in dispute by the government's own allegations and that an *in camera* inspection of the withheld documents was necessary to determine whether they should be disclosed under the Act. I ask that a copy of the Court of Appeals opinion be included at this point in the hearing record.

The government then sought certiorari from the Supreme Court, contending that the *in camera* hearing was unauthorized by the Act

and constituted an invasion of Executive functions. As indicated, the case is now pending before the Supreme Court.

This brief description indicates that numerous important legal issues in the administration of the Act are presented by this case and are now pending before the court. My comments today by no means are intended to minimize the importance of all those legal issues; rather I rely on the knowledge and experience of this committee and its staff to evaluate the litigation and any decision the Supreme Court may deliver next year.

Thus I will not elaborate on the various issues such as scope of the "classification" and "internal memoranda" exemptions, the proper procedure for a reviewing court, and the other questions of statutory interpretation. I will instead direct my remarks to the important policy issue involved in this case which in my judgment is indicative of a current crisis of constitutional dimensions in our democratic society.

Specifically I refer to the present inability of the Congress to obtain information from the Executive branch that is needed to perform the Constitutional powers of legislation prescribed in Article I. How many times have members of this committee been frustrated in their efforts to obtain information needed for a legislative purpose? How many times have we been met by a wall of "Executive privilege" surrounding the facts needed for democratic governance? How many times has this withholding of information precluded intelligent legislation and effectively placed far too much power in the Executive branch? How many times has the Executive parceled bits and pieces of information to the press to further its own goals while denying that same information to the Congress?

It is my firm belief that a democratic society cannot survive the suppression of information revealed by the Cannikin episode. These highly expert Executive agencies apparently concluded that an underground nuclear test posed substantial dangers to the health and safety of American citizens. And yet, when Congress itself sought the information in order to determine the propriety of the test, the Executive branch hid behind legal privileges and principles and effectively frustrated meaningful Congressional participation.

Were this incident simply an isolated one, my alarm would not be as great. But we have seen far too many instances of such "Executive privilege." Witness the continuing inability of the Congress to participate in the vital decisions affecting the Vietnam war. Witness the refusal of the Executive to supply documents needed by the Senate in carrying out its Constitutional duty to advise and consent to Presidential nominations.

All of these things are indicative of a major crisis confronting the Congress. That crisis is an inability to obtain the information needed to govern today's complex and technological society.

My suit was filed in part to secure a judicial construction of the Freedom of Information Act that would guarantee Members of Congress the unlimited right to seek and obtain information in the hands of the Executive. I believe that that Act in its present form sets forth certain exemptions from disclosure that apply to members of the public, but that these exemptions do not apply to Members of Congress. I base this conclusion on the language in 5, U.S.C./552(c) which states that the Act "is not authority to withhold information from Congress". I also base my beliefs on the debates and proceedings that led to passage of the Act. Whether I am right in this contention, of course, is one of the issues now before the Supreme Court.

If this committee—as a result of the pending Supreme Court decision, or its own study—concludes that the Act in its present form does not provide such a right of access to Members of Congress, I suggest appropriate language to insure this right be included in any bill the committee may report and recommend for passage.

Suggestions have been made which would recognize a right in the Executive to withhold certain information from Congress. I believe such proposals concede far too much power to the Executive and authorize the withholding of far too much information. In my opinion the amount of information which the Executive branch can validly withhold from Congress is very limited indeed. Although the Executive consistently asserts a so-called "Executive privilege" supposedly based on Constitutional principles, I believe that no such Constitutional privilege prevents Congress from obtaining any information it needs for legislative purposes from the Executive branch. Of course this is conditioned upon the Fourth Amendment with its protection of the right of privacy. Congress cannot constitutionally obtain information the disclosure of which would constitute an unreasonable invasion of privacy. My point here is that Congress, in order to fulfill its Article I powers of legislation, has the Constitutional power to completely regulate Congressional access to Executive branch information.

Although I would concede as a matter of policy that there is a very limited category of documents which Congress should not

seek from the Executive branch. As in other areas of legislation, definition of this category and precise line-drawing is quite difficult. I frankly think it would be impossible to draft statutory language defining with any acceptable precision the category of documents I would permit the Executive to withhold from Congress. I sense only that in some cases there may be some documents whose disclosure I would not compel.

Rather than focusing excessively on the nature of documents which the Executive might withhold from Congress, I suggest the committee should properly focus on the procedures to be followed when a Congressional request for information is made to the Executive branch. Here I would suggest the broadest possible right of access to individual Members of Congress. This right should be secured by an appropriately drawn statute and enforceable by individual members in the courts. First, I would require that any refusal to supply any information to a Member of Congress should be made by the President himself, and then only to permit a decision to be made by a court. There should be a requirement of promptness in the release of information to a Member, and a fixed deadline for the President to seek court action. I would not attempt in such a statute to define with precision the categories of any documents immune from disclosure. I would instead state in the strongest possible terms the priority of Congress' right to obtain information. I would then refer to countervailing factors which *might* in certain exceptional circumstances justify nondisclosure. I would suggest the court decide on a case-by-case basis whether disclosure of the particular information sought is required. If possible, I would also make clear that decisions made by courts would form a body of precedents that must be followed by Federal officials subsequently, so that there will be no repeated delays in granting the data requested. And most importantly, I would authorize the court to require a Member of Congress to treat the information with confidentiality, perhaps even requiring closed sessions of Congressional committees of the House and Senate. But there should also be restrictions on this kind of requirement. Confidentiality should be authorized only in exceptional circumstances.

This process would not constitute "Executive privilege" but instead would in effect state that no such doctrine exists. The President would not be empowered to withhold any information from Congress. This could be done only by a court at the President's request. Penalties would be prescribed for Federal officials who violated the statute or court decisions.

I recognize these thoughts are somewhat general and imprecise. But the important themes are simple. First, the emphasis should be on a broad general right of Congress to obtain information, not any right of the Executive to withhold such information. Second, the narrow category of documents which might be withheld should not be defined in advance, but should be determined on a case-by-case basis. Third, determination of what documents the Executive branch might properly withhold from Congress should be made by the federal courts not a special agency established to administer Freedom of Information Act functions.

This third suggestion is in my mind especially important. I fear that an expert agency established solely to administer the Freedom of Information Act would become far too accustomed to secrecy, classification, and withholding. Inevitably it would tend to favor withholding rather than disclosure. On the other hand, federal courts whose traditions are deeply rooted in openness and public disclosure, would perhaps be more likely to limit severely the Executive's attempted withholding from Congress. Additionally, placing the responsibility on the federal courts would enable the decision-maker to rely on a broad spectrum of experience rather than an excessively narrow familiarity with governmental documents alone.

I would also suggest that any such procedure place an extremely high burden of proof on the agency which seeks to withhold information from Congress. As my own case demonstrates, the attempts to place such a burden on the Executive in the present Act may not be sufficient.

In conclusion, I commend this committee for its attention to a most important problem in our society. We have all become aware of the crucial need for facts and intelligent information as a necessary condition for responsible government. Unfortunately, the fact-finding abilities of Congress are far more limited than those of the Executive branch. Rather than compete through wasteful duplication and overlap of expert agencies, I seek to employ the Executive branch capability in the assistance of Congressional function. In my view the primary responsibility for governing this country rests with Congress, not the Executive branch. I thus see little justification for withholding of information from Congress. The question

is basically one of trust. Who do we trust? The thousands of nameless, faceless, Executive officials whose responsibility to the people is limited? Or the 535 elected Members of Congress and United States Senators and their staffs who are directly accountable to the people? In my mind the answer is a simple one. Congress must have access to Executive information.

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**STATEMENT OF ROBERT F. KELLER, DEPUTY COMPTROLLER  
GENERAL OF THE UNITED STATES**

Mr. Chairman and members of the Committee:

We are appearing in response to your request for our views on the difficulty of the General Accounting Office in obtaining information from the executive departments and agencies.

One of the most important duties of GAO is to make independent reviews of agency operations and programs and to report to the Congress on the manner in which Federal departments and agencies carry out their responsibilities. The Congress, in establishing GAO, recognized that the Office would need to have complete access to the records of the Federal agencies and provided that basic authority in section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 53, 54), as follows:

"All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment."

The more important factors underlying the law, intent of the Congress, and GAO's policy of insisting on generally unrestricted access to pertinent records of agencies and contractors in making GAO audits and reviews are:

1. An adequate, independent, and objective examination contemplates obtaining a comprehensive understanding of all important factors underlying the decisions and actions of the agency or contractor management relating to the subject of GAO examinations.

2. Enlightened management direction and execution of a program must necessarily consider the opinions, conclusions, and recommendations of persons directly engaged in programs that are an essential and integral part of operations. Likewise, knowledge of this type is just as important and essential to us in making an independent review and evaluation as it is to management in making basic decisions.

3. Agency internal audits and other evaluative studies are absolutely necessary. They are important tools by which management can keep informed of how large and complex activities are being carried out. Knowledge of the effectiveness with which internal review activities are carried out and the effectiveness with which corrective action where needed is taken is absolutely necessary to GAO in the performance of its responsibilities.

4. Availability of internal audit and other evaluation documents to GAO enables us to concentrate a greater part of our efforts in determining whether action has been promptly and properly taken by agency officials to correct identified weaknesses, and helps eliminate duplication and overlapping in audit effort.

We generally have had good cooperation in obtaining access to records of the executive departments except for the Department of State and the Department of Defense in those areas which involve our relations with foreign countries, and with the exception of certain activities of the Treasury Department and of the Federal Deposit Insurance Corporation. Also, quite recently an impasse has developed with the Emergency Loan Guarantee Board.

#### INTERNATIONAL ACTIVITIES

We have been experiencing increasing difficulties in obtaining access to information needed in our reviews and evaluations of programs involving our relations with foreign countries. Specific examples of our problems in this area were included in our testimony on June 24, 1971, before the Senate Appropriations Committee, Subcommittee on Foreign Operations, and again on July 28, 1971, before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate. I have with me a compilation of access-to-records problems encountered by GAO in making audits of foreign operations and assistance programs, which we prepared in September 1971 at the request of the Chairman, Senate Committee

on Foreign Relations. With your concurrence, Mr. Chairman, I will submit this compilation for the record at this point.

On August 30, 1971, the President invoked executive privilege to withhold information which had been requested by the Senate Foreign Relations Committee relating to the Military Assistance Program. The President determined that it would not be in the public interest to provide to the Congress the basic planning data on military assistance that was requested by the Chairman of the Senate Foreign Relations Committee, and he directed the Secretary of State and the Secretary of Defense not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the Military Assistance Program which are not approved executive branch positions.

Subsequent to this action we noted a general increase in the volume of documents that operating officials were referring to higher authority for approval for release to our auditors. This practice added to the delays in obtaining access to documents that had hampered our audits in the past. Although absolute denial of access to a document is quite rare, our views have been hampered and delayed by the time-consuming processes employed by the various organizational elements within and between the executive agencies. These delays occur in screening records and in making decisions as to whether such records are releasable to GAO. It is not unusual for our staff people to request access to a document at an overseas location and to be required to wait several weeks while such documents are screened through channels from the overseas posts and through the hierarchy of the departments involved.

The increasing concern of the Comptroller General, especially with actions within the Department of Defense that were having the effect of denying GAO access to information and documents needed to carry out our responsibilities for review of international activities of the Department of Defense, in particular military assistance activities, prompted him to write to the Secretary of Defense on October 13, 1971. He cited examples of our access problems and pointed out specific DOD instructions and directives which, we believed, had created an atmosphere that was discouraging overseas agency officials from cooperating with GAO personnel. In reaching for a solution to this complex problem, the Comptroller General summarized his position to the Secretary of Defense as follows:

"I am most interested, as I am sure you are, in establishing a mutual accommodation within which we can carry out our respective responsibilities, with due regard to the sensitivities of the matters under review.

"I believe you can appreciate the depth of my concern at what appears to be an increasing effort within the Department of Defense to restrict the General Accounting Office's capability to carry out its responsibilities to the Congress in the field of international matters.

"To clear the air and set the stage for joint efforts to establish better working relationships I believe that a personal expression of your views communicated to your representatives in Washington and overseas would be extremely helpful. We would then be glad to work with the Assistant Secretary of Defense (Comptroller), or others that you designate, in the interest of accomplishing mutually acceptable working arrangements."

On January 27, 1972, the Secretary of Defense replied, stating:

"At the outset, let me assure you that neither the Assistant Secretary of Defense (ISA) nor myself condone any actions which could be interpreted as restricting your auditors from carrying out their responsibilities in the field of international matters or discouraging overseas officials from cooperating with your auditors in the performance of their statutory responsibilities."

He also indicated a need and intent to continue to screen the files of the Department before making them available for our review and stated:

"Papers in these files originate within as well as outside the Department, including The White House, and Department of State. I am sure that you appreciate that merely because such papers are in our files we cannot release them to GAO without the express approval of the originator. Fortunately, however, it is only on rare occasions that GAO auditors actually need access to such papers to complete their audits or reviews. The matter of access to such papers must, I believe, continue to be handled on a case-by-case basis. In the future, when the question of access to sensitive documents in the international affairs area arises, I have asked the Assistant Secretary of Defense (ISA), when he believes that access to a particular document should be denied, that he consult with the Assistant Secretary of Defense (Comptroller) and the General Counsel prior to refusing access."

The Secretary suggested that to clear the air and set the stage to establish better working relationships that DOD and GAO send

representatives to some overseas locations with a view to creating an atmosphere of mutual cooperation and understanding.

Mr. Chairman, I have copies of this correspondence with me, and, with your concurrence, I will submit them for the record at this point.

Since the exchange of letters we have been meeting with Defense officials in an attempt to establish mutual working arrangements within which we can carry out our responsibilities. In addition, representatives of our office and of the Department of Defense will jointly visit overseas commands very shortly as an additional step toward this goal.

As your Subcommittee is well aware, on March 15, 1972, the President again invoked executive privilege and in his memorandum to the Secretary of State and the Director, United States Information Agency, he directed them not to make available to the Congress any internal working documents concerning the foreign assistance program or international information activities, which would disclose tentative planning data—such as is found in the Country Program Memoranda and the Country Field Submissions—and which are not approved positions.

Since then we have experienced some tightening up on our access to documents. For example, the Agency for International Development on March 23, 1972, instructed its operating personnel as follows:

"2. In order to carry out the President's directive, A.I.D. Country Field Submissions should not be disclosed to representatives of the Congress or the General Accounting Office. Likewise, disclosure should not be made of any other document from an A.I.D. Assistant Administrator, A.I.D. Office Head or A.I.D. Mission Director to higher authority containing recommendations or planning data not approved by the Executive Branch concerning overall future budget levels for any fiscal year for any category of assistance (e.g., Development Loans, Technical Assistance, Supporting Assistance or PL-480) for any country.

"3. In lieu of the disclosure of such documents, the President has directed that Congress be provided with 'all information relating to the foreign assistance program and international information activities' not inconsistent with his directive. Ordinarily, the substantive factual information contained in these documents should be disclosed through means of oral briefings, testimony, special written presentations and such other methods of furnishing information as may be appropriate in the circumstance.

"4. The General Counsel should be advised of any Congressional or GAO requests for any document described in paragraph 2 above or for files or records containing such a document. The General Counsel should also be advised of requests for other documents which raise Executive Privilege questions, whether under the rationale of the President's March 15 directive or otherwise, and a decision should be obtained from the General Counsel concerning the availability of the document for disclosure before the document is disclosed."

On May 8, 1972, the Under Secretary of State issued a memorandum to all Agency Heads, Assistant Secretaries, and Office Heads on the subject of executive privilege. This memorandum cites the Presidential Directive of March 15, 1972, and contains instructions similar to those put out by AID; however, it goes a bit further in broadening the field of applicability by stating:

"It will be noted that the President's directive is not strictly limited to Country Program Memoranda and Country Field Submissions, but applies also to other, similar internal working documents in the foreign assistance and international information fields which would disclose tentative planning data and which are not approved positions. Undoubtedly, specific questions will arise in the future as to whether or not the President's directive applies to particular congressional requests for disclosure. Such questions should be resolved in consultation with the Office of the Legal Adviser."

There is evidence that the executive agencies may try to satisfy GAO's need for access to records by providing the required information by means other than direct access to the basic documents, especially in cases where such documents are considered to be internal working documents. This would not be acceptable unless we are able to satisfy ourselves that the data provided to us is an accurate presentation of the substantive information contained in the basic documents.

In summary, our access to the records and documents or other materials we need to carry out our responsibilities for reviewing programs relating to international activities has been increasingly difficult. It is a matter of degree, but it has seriously interfered with the performance of our responsibilities. The most serious interfer-

ence is in the restraints which have been placed upon agency officials overseas and which require them more and more to refer to Washington for clearance before making documents available to our staffs. Although these are not termed refusals, they come close because of the interminable delays that result from having to refer routine matters through channels to Washington.

In addition to the unnecessary cost and waste of time this involves, there is the increased risk of our making reports without being aware of significant information and the increased risk of our drawing conclusions based on only partial information.

We are seriously concerned with the increasing restrictions that have been imposed on overseas officials in particular, that take away a large measure of their discretion for dealing with GAO personnel, and we have conveyed this to the agencies.

#### INTERNATIONAL LENDING INSTITUTIONS

Beginning in the fall of 1970, we undertook to study U.S. participation in international lending institutions—the World Bank, International Development Association, Inter-American Development Bank, and Asian Development Bank. During our initial survey and in our later reviews relating to specific institutions, we encountered difficulties in obtaining information from the Treasury Department.

We experienced long delays in obtaining certain information. For example, access to monthly operations reports and to loan status reports for one of the institutions that we requested in December 1970 was not granted until August 1971 and then only after repeated requests.

We were refused access to several categories of documents by Treasury Department officials. These included the recorded minutes of the meetings of the institutions' board of directors, periodic progress reports on the status of projects being financed by the institutions, and a consultant's report on management practices of one of the institutions. Also, although Treasury officials advised us that they had refused access to internal documents which they received in confidence from the institutions, we were refused access to certain documents which, as far as we could determine, were not documents furnished by the institutions but rather were documents prepared by U.S. officials for use by other U.S. officials.

Inasmuch as we have not examined the documents discussed above, it is difficult to say with any confidence what effect our not having examined them may have had on our review. However, it seems that the documents in question form a significant part of the record on which U.S. management decisions regarding the institutions' operations were based. It is our view, therefore, that the documents should have been made available for our examination.

#### INTERNAL REVENUE SERVICE

GAO's review efforts at the Internal Revenue Service have been materially hampered, and in some cases terminated, because of the continued refusal by IRS to grant GAO access to records necessary to permit it to make an effective review of IRS operations and activities.

Without access to necessary records, GAO cannot effectively evaluate the IRS administration of operations involving billions of dollars of annual gross revenue collections (about \$192 billion in fiscal year 1971) and millions of dollars in appropriated funds (about \$978 million in fiscal year 1971). Such an evaluation, we feel, would greatly assist the Congress in its review of IRS budget requests and in its appraisal of IRS operations and activities. Without such access, the management of this very important and very large agency will not be subject to any meaningful independent audit.

GAO has taken every opportunity to impress upon IRS officials that it is not interested in the identity of individual taxpayers and does not seek to superimpose its judgment upon that of IRS in individual tax cases; rather, GAO is interested in examining into individual tax transactions only for the purpose of, and in the number necessary to serve as a reasonable basis for, evaluating the effectiveness, efficiency, and economy of selected IRS operations and activities. GAO has, in general, directed its efforts toward those areas where it believed that improvements in current operations would bring about better IRS administration of programs, activities, and resources.

It is the position of IRS that no matter involving the *administration* of the internal revenue laws can be officially before GAO and therefore we have no audit responsibility. The Commissioner of IRS, in a letter to the Comptroller General dated June 6, 1968, stated:

"\* \* \* I must note that the [Chief Counsel, IRS] opinion holds that the Commissioner of Internal Revenue is barred by Sections 6406 and 8022 of the Internal Revenue Code from allowing any of your representatives to review any documents that pertain to the administration of the Internal Revenue Laws. Thus, federal tax returns and related records can be made available to you only where the matter officially before GAO does not involve administration of those laws."

Under the provisions of 26 U.S.C. 6103, tax returns are open to inspection only on order of the President and under rules and regulations prescribed by the Secretary of the Treasury or his delegate and approved by the President. Regulations appearing in 26 CFR 301.6103(a)-100-107 grant several Government agencies specific right of access to certain tax returns. Our Office is not included among those agencies. The regulation applicable to our Office, 26 CFR 301.6103(a)-1(b)(f), provides that the inspection of a return in connection with some matter officially before the head of an establishment of the Federal Government may be permitted at the discretion of the Secretary or Commissioner upon written application of the head of the establishment.

IRS has permitted Federal agencies, States, individuals, contractors, and others to have access to tax returns and records. GAO has been given access to individual tax returns only when the return is needed in connection with another matter in which GAO is involved or when we have made reviews at the request of the Joint Committee on Internal Revenue Taxation. Otherwise we have been denied records requested for reviews of IRS operations. The reviews of IRS conducted at the request of the Joint Committee have been made pursuant to an arrangement whereby GAO and the Joint Committee agreed on certain priority matters involving the administration of the internal revenue laws. Under this arrangement we, in effect, make reviews for the Joint Committee, and we have had the complete cooperation of the Service.

#### FEDERAL DEPOSIT INSURANCE CORPORATION

The long and involved history of controversy between GAO and the Federal Deposit Insurance Corporation over GAO's right of access to certain of the Corporation's records appears in the published hearings of the House Committee on Banking and Currency of May 6 and 7, 1968. Those hearings resulted in the introduction of H.R. 16064, 90th Congress, a bill to amend the Federal Deposit Insurance Act with respect to the scope of audit of FDIC by GAO.

Essentially what is involved in this dispute is that although our Office is required by section 17 of the Federal Deposit Insurance Act (12 U.S.C. 1827) to conduct annual audits of the Corporation, we have been unable to fully discharge our responsibilities because FDIC has not permitted us unrestricted access to examination reports, files and other records relative to the banks which it insures.

It is the position of the Corporation that our right of access to its records is limited to those administrative or housekeeping records pertaining to its financial transactions. It is GAO's position that, because the financial condition of the Corporation is inseparably linked with the manner in which it supervised the banks which it insures, we cannot report to the Congress on the financial condition of the Corporation without evaluating the significance of its contingent insurance indemnity obligation for the banks.

At the time section 17 was being considered by the Congress, it developed that, although GAO and FDIC had agreed on the language included therein, divergent views were held by GAO and FDIC as to its meaning. Each made its position known to the House Committee on Banking and Currency, but the matter was not resolved. This difference of opinion still exists with both the Corporation and GAO feeling that the present law supports their respective positions. Repeated efforts to resolve the matter administratively have failed, and, for this reason, the Comptroller General in his testimony of March 6, 1968, before the House Banking and Currency Committee, recommended that the Federal Deposit Insurance Act be amended to specifically provide for an unrestricted access to the examination reports and related records pertaining to all insured banks.

#### EMERGENCY LOAN GUARANTEE BOARD

The Emergency Loan Guarantee Board, established by the emergency Loan Guarantee Act (Pub. L. 92-70), through its Chairman—the Secretary of the Treasury—has taken the position that it was not the intent of the Congress in establishing the Board to grant GAO authority to review Board activities. The Board was established to make guarantees or to make commitments to guarantee lenders against loss of principal or interest on loans to major business enterprises whose failures would seriously and adversely affect the economy or employment of the Nation or a region thereof.

GAO believes that it has the responsibility and authority to review the Board's activities including decisions of the Board in approving, executing, and administering any loan guaranteed by the Board. The Board's position, as indicated, is that there is nothing in the Emergency Loan Guarantee Act or its legislative history which would provide for a GAO review of all Board activities and that the Congress might need to pass additional legislation to make it clear that GAO has this authority. The main thrust of the Board's position is that the congressional review of loan guarantee matters is carefully spelled out in the guarantee act; GAO is directed to audit the borrower and to report its findings to the Board and to the Congress; and the Board is directed to make a "full report" of its operations to the Congress.

It is our position that, as an agency of Government, the Board is clearly subject to audit examination by GAO and that the records of the Board are required to be made available to GAO under its basic authorities. Those authorities are section 312 of the Budget and Accounting Act, 1921 (31 U.S.C. 53); section 206 of the Legislative Reorganization Act of 1946 (31 U.S.C. 60); subsections 117 (a) and (b) of the Accounting and Auditing Act of 1950 (31 U.S.C. 67(a), (b)); and section 204 of the Legislative Reorganization Act of 1970 (84 Stat. 1140).

It is our view that under these basic authorities GAO has responsibility for auditing the activities of the Board and thus has attending right of access to such information and documents as the Board uses in reaching its decisions. Further, it is our view that neither the failure to spell out explicitly that GAO has such responsibility and right of access nor the fact that under Pub. L. 92-70 GAO was given explicit authority to audit the borrower diminishes in any way the basic audit authorities that we rely upon.

#### SUMMARY

The position of GAO is that full access to records, information, and documents pertaining to the subject matter of an audit or review is necessary in order that GAO can fully carry out its duties and responsibilities. The intent of the various laws assigning authority and responsibility to the GAO is clear on this point. The right of generally unrestricted access to needed records is based not only on laws enacted by the Congress, but is inherent in the nature of the duties and responsibilities of the Comptroller General.

The withholding of information and documents from GAO on the basis that such information and documents are internal working documents, or that they disclose tentative planning data, has seriously impaired our capability to effectively review and evaluate those programs or activities described in this statement.

The greatest disruptive element, however, is from the delaying tactics at the various levels—both in Washington and overseas—and in particular the restraints placed by the Department of Defense and the Department of State, which have restricted the exercise of normal judgment by operating officials of those departments in requiring what should be routine individual requests to go through channels for consideration on a document-by-document basis.

We expect to continue a firm effort to obtain working arrangements at the various levels which will permit us to fully carry out our responsibilities without yielding to unreasonable delays or outright refusals.

This concludes our statement, Mr. Chairman. We will be glad to answer any questions.



## **FILE 248**

### **HOUSE COMMITTEE ON GOVERNMENT OPERATIONS SUBCOMMITTEE ON LEGAL AND MONETARY AFFAIRS**

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(248-A)

HOUSE OF REPRESENTATIVES,  
LEGAL AND MONETARY AFFAIRS SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., March 26, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: Pursuant to your request of March 9, 1973, I am enclosing lists of instances in which Federal officers or employees have refused to provide information requested by or refused to testify before the Subcommittee on Legal and Monetary Affairs during the period from January 1, 1964 through February 28, 1973. I hope that these materials will be of assistance to you in the important work being undertaken by your Subcommittee. If this Subcommittee can provide any further assistance to you in that work, we will be pleased to do so.

Very truly yours,

W.M. J. RANDALL, *Chairman.*

(459)

## (248-B)

SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
1/14/65	Written request by Comptroller General Campbell to Joseph Barr, Chairman of Board of FDIC. Request made to permit audit and report to Congress required by 12 USC 1827.	Request to give GAO auditors unrestricted access to all examinations, reports, files, and other records maintained by the FDIC relative to the banks it insures.	2/2/65	Joseph Barr, Chairman of Board of FDIC	<p>Reason: 12 USC 1827 limits GAO access to records pertaining to financial transactions. Congress did not give access to records pertaining to individual banks. FDIC will inform Congress on such matters. Every year since 1965 access has been denied.</p> <p>Documentation: Letter.</p> <p style="text-align: right;">Original version 1/14/65</p>

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 248

Submitted by: (Comm/Subcomm)

Legal and Monetary Affairs Subcommittee

By: Wm. J. Randall

Title: Chairman

Extension

(460)

## (248-C)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
6/28/71	Oral request by GAO for Subcommittee Chairman made to Frank Geibel, Director, Internal Credit Division, IRS.	Requested to review records of collection of Highway Use Tax by Internal Revenue Service as part of oversight of IRS operations by Committee on Government Operations.	7/ /71	Frank Geibel, Director, Internal Audit Division, IRS	<p>Reason:</p> <p>Geibel cited opinion of Chief Counsel of IRS dated May 20, 1968 that IRS was barred by §6406 and §8022 of the Internal Revenue Code. Opinion stated that review of IRS's administration of tax laws was restricted to Joint Committee on Internal Revenue Taxation.</p> <p>Documentation: Notes of GAO auditor.</p>

Separation of Powers Subcommittee SURVEY,

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE -270-

Submitted by: (GPO/Subcomm)

Legal and Monetary Affairs

By: Wm. J. Randall

Title: Chairman

Extension

(461)

## (248-D)

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/11/72	Verbal request for information by GAO auditors to Harold D. Snyder, Director of Collections Division, IRS. GAO was pursuing a request for information by the Subcommittee Chairman.	<p>Request for:</p> <p>(1) IRS unofficial plan to pursue only aliens admitted on work visas.</p> <p>(2) IRS procedures concerning tax clearance of aliens being formally deported by IRS and any other such national procedures relative to aliens.</p> <p>(3) Results of IRS field office projects concerning tax clearance of illegal aliens in various cities, e.g. New York City and Los Angeles.</p> <p>(4) To discuss these projects with local IRS officials and to discuss other IRS activities relating to aliens in Boston, Los Angeles, Miami, Kansas City and New York City.</p>	9/18/72	Mr. William Rankin Acting Director Internal Audit	<p>(1) Only verbal explanation was applied to GAO.</p> <p>(2) Denied } GAO has no right</p> <p>(3) Denied } to audit tax</p> <p>(4) Denied } administration matters.</p> <p>All denials were verbal to GAO auditors conducting investigation at request of Subcommittee Chairman.</p>

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 248

Submitted by: (WJRS/Subcomm)

Legal and Monetary Affairs

By: Wm. J. Randall  
Title: Chairman

Extension

(462)

## (248-E)

SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
2/12/73	Commissioner, Internal Revenue Service	Request for a list of questionable tax return preparers to prepare for hearings on a bill requiring regulation of tax preparers by the IRS.	3/ 8/73	Commissioner, Internal Revenue Service	<p>Reason:</p> <p>(1) Put questionable preparers on notice and diminish IRS ability to deal with problems.</p> <p>(2) Subject the suspected preparer to unwarranted adverse publicity.</p> <p>Documentation: Letter.</p>

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 248

Submitted by: (Board/Subcomm)

Legal and Monetary AffairsBy: Wm. J. Randall  
Title: Chairman

Extension

(463)

## (248-F)

## SURVEY FORM 11: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
7/1/71	Mr. Ira DeMent, US Attorney, Middle District of Alabama	Mr. Ira DeMent	Information on the Administration of Law Enforcement Planning Agency in the State of Alabama which is funded by the Law Enforcement Assistance Administration.	7/13/71	Richard Klein-dienst, Deputy Attorney General	<p><b>Reason:</b> Allegations of improper expenditures of LEAP funds in Alabama and of other irregularities in the administration of the program in that State were being investigated by the FBI to determine whether violations of criminal statutes have occurred. Mr. DeMent was participating in these investigations and it would be contrary to Congress' standing departmental policy to allow him to testify.</p> <p><b>Documentation:</b> Letter (copy attached).</p>

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm)

Legal and Monetary Affairs Subcommittee

By: Wm. J. Randall

Title: Chairman

Extension

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON LEGAL AND  
MONETARY AFFAIRS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., July 1, 1971.

Mr. IRA DE MENT,  
U.S. Attorney, Middle District of Alabama, U.S. Post  
Office Building, Montgomery, Ala.

DEAR MR. DE MENT: On Tuesday, July 20, 1971, at 10 a.m., the Subcommittee on Legal and Monetary Affairs of the House Committee on Government Operations will commence hearings on the operations of the Law Enforcement Assistance Administration of the Department of Justice. As part of that inquiry, the subcommittee will receive testimony from appropriate State officials on the administration of the law-enforcement assistance programs in a number of States, of which Alabama will be one.

In that regard, the subcommittee invites you to appear and give testimony at 10 a.m., Tuesday, July 20, 1971, on the administration of the Law-Enforcement Planning Agency in the State of Alabama, and specifically on the

actions you have taken to assure the proper expenditure and accountability of funds derived under the Federal Grant-in-Aid program administered by LEAA.

The subcommittee is quite interested in determining the progress that has been made toward the goals that Congress set out in the Omnibus Crime Control and Safe Streets Act which established this program and which received broad bipartisan support. The subcommittee inquiry, of course, as with all of its work, is grounded in an objective and nonpartisan foundation. Its principal mandate is to review the efficiency, economy, and effectiveness of Federal programs.

I would appreciate your following those procedures of the Department of Justice which pertain to appearances before congressional committees and that you notify the subcommittee concerning your appearance at your earliest convenience. We request that you submit 40 copies of a prepared statement to the subcommittee office no later than Friday, July 16, 1971.

Sincerely yours,

JOHN S. MONAGAN,  
Chairman.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
*Washington, D.C., July 13, 1971.*

Hon. JOHN S. MONAGAN,  
*Chairman, Legal and Monetary Affairs Subcommittee,  
Committee on Government Operations, U.S. House of  
Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Mr. Ira De Ment, the U.S. attorney for the Middle District of Alabama, has consulted my office concerning your invitation to him to testify before the Legal and Monetary Affairs Subcommittee on the administration of the Law Enforcement Assistance Administration program in Alabama. I am writing to advise you that the Department is of the view that it would be inappropriate for Mr. De Ment to appear.

Your letter of invitation indicates that you wish him to give testimony specifically on the actions his office has taken to assure the proper expenditure and accountability of funds granted to Alabama by LEAA. As you know,

there have been allegations of improper expenditures of LEAA funds in Alabama and of other irregularities in the administration of the LEAA program in that State. Those allegations are now being investigated by the Federal Bureau of Investigation to determine whether violations of Federal criminal statutes have occurred. In addition, LEAA auditors are conducting a thorough examination of the Alabama program. Mr. De Ment is participating in these investigations and would probably participate in any criminal prosecution that may be instituted. Under these circumstances, the Department feels that it would be inappropriate and contrary to a long standing departmental policy for Mr. De Ment to testify on this subject.

Please be assured that the Department of Justice remains willing to assist you and the subcommittee in any appropriate way in connection with the hearings.

Sincerely,

RICHARD G. KLEINDIENST,  
*Deputy Attorney General.*

(248-G)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

On October 28, 1971 Subcommittee staff was refused copies of the FHA files relating to an FHA insured housing project in Boston, Mass. The refusal was orally made by Mr. M. Daniel Richardson, Area Director of the HUD area Office. Subsequently, after November 16, 1971 the Subcommittee staff was permitted to examine these files at the main office of DHUD in Washington. The reason given for not supplying the files was that they would not be available under the Freedom of Information Act (\$552 (b) of Title V U.S. Code).

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 248

Submitted by: Wm. J. Randall/Subcomm

Legal and Monetary Affairs

By: Wm. J. Randall

Title: Chairman

Extension

(466)

(248-H)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

The Justice Department refused to supply a witness regarding prosecution of persons who have defrauded the Federal Housing Administration (sequence of events set out in attached comments of Subcommittee Chairman at hearings).

On May 2, 1972 Assistant Attorney General Henry Petersen did testify on the subject.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422  
FILE 248

Submitted by: (Comm/Subcomm)  
Legal and Monetary Affairs Subcommittee  
By: Mr. T. Randall  
Title: Chairman  
Extension

[Excerpts from hearings entitled "Defaults on FHA Insured Mortgages," pt. 2, Feb. 24, May 2, 3, and 4, 1972, before the Subcommittee on Legal and Monetary Affairs of the Committee on Government Operations, House of Representatives, 92d Cong., 2d sess., pp. 200-204]

Mr. MONAGAN. I will call the hearing to order.

In connection with Mr. Whitbeck's testimony here about the office of the U.S. attorney in Detroit, while we were in that city the U.S. attorney, Mr. Ralph Guy, did come up and suggest that he would like to testify regarding his office's role in prosecuting those who have defrauded FHA.

Once again we were in difficulty because of the time frame, and were not able to have him testify at that time. However, we did subsequently invite Mr. Guy to testify at this hearing today. That was by letter dated February 3. And he subsequently informed us that he would be out of the country, and, therefore, would not be able to come.

We then got in touch with the Justice Department. I wrote to the Attorney General and set out the history of the developments in Detroit, and some of the statements that had been made and questions raised about the operations of the office of the U.S. attorney there. I asked that another witness be made available to go into these matters before the subcommittee.

We did not receive a response until this morning. And I haven't been able to go over it very carefully, but it does

indicate that the Justice Department is assigning one attorney to work full time coordinating FHA matters under the direct supervision of the senior attorney, who was in charge of the unit, which handles FHA matters.

The Department declined to provide a witness on the ground that it would prejudice pending cases. There certainly was no intent on the part of the subcommittee to go into any matters in any way that would prejudice any accused. We, of course, have jurisdiction over the Department of Justice and whether or not it is operating efficiently and economically. The question of the operations of the U.S. attorney's office in Detroit is what we are interested in and that is what we intend to find out about.

We are going to pursue this matter. And it may very well be that it will be necessary to issue subpoenas in order to secure the attendance of witnesses who will be able to testify and give us the information that we want to have. We have no final decision or conclusion as to what the activity of the U.S. attorney's office has been, whether there has been any laxity or failure to process these cases as expeditiously as possible. But we certainly are entitled to find that out, and we are going to do it. This will be taken up with the committee after we have had an opportunity to study it. All of this correspondence will be inserted in the record at this point.

[The material follows:]

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON LEGAL AND MONETARY AFFAIRS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., February 8, 1972.

Mr. RALPH B. GUY,  
U.S. Attorney, Eastern District,  
Detroit, Mich.

DEAR MR. GUY: The Legal and Monetary Affairs Subcommittee of the House Committee on Government Operations, as a part of its continuing investigation of the acquired properties situation in Detroit, will hold hearings on Thursday, February 17, 1972,<sup>1</sup> at 10:00 a.m. in Room 2247 of the Rayburn House Office Building.

The subcommittee invites you to appear and give testimony on the responses of your office to a number of matters brought to your attention and commented upon by Mr. Whitbeck in his testimony before the subcommittee on December 3, 1971. In addition, we would appreciate being advised of any coordination of activity by your office and the prosecuting attorney for Wayne County in dealing with inner-city speculators.

We appreciate your having volunteered to appear before the subcommittee while we were in Detroit and do regret that our schedule was such that we simply could not accommodate you at that time. The subcommittee is, of course, mindful of the sensitivity of matters within your jurisdiction and does not anticipate a need for you to discuss the specific details of any case. We are concerned with the adequacy of the initial referral to your office by HUD and the apparent lack of administrative action on the part of the Department either in lieu of initiating a criminal investigation or in response to a decision by your office to decline to prosecute. We would appreciate your comments on this aspect of the problem.

The subcommittee requests that you submit sixty (60) copies of a prepared statement to the subcommittee office by Monday, February 14, 1972. The staff will be glad to assist you with any questions that you have regarding your testimony.

I would appreciate your following those procedures of the Department of Justice which pertain to appearances before congressional committees and that you notify the subcommittee concerning your appearance at your earliest convenience.

Sincerely yours,

JOHN S. MONAGAN, Chairman.

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U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON LEGAL AND MONETARY AFFAIRS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., February 14, 1972.

Mr. JOSEPH Ross,  
Office of Congressional Liaison,  
Department of Justice, Washington, D.C.

DEAR JOE: Enclosed please find a copy of our letter to U.S. Attorney Ralph Guy and a copy of the Detroit hearings.

As I indicated on the phone, considerable activity has taken place in Detroit subsequent to the committee's hearings. I have talked to Mr. Hood, chief assistant to Mr. Guy, and believe that he would be in a position to bring the committee up to date on some of the matters referred to in the chairman's letter.

Since we planned to hold similar hearings in other cities, it would be entirely appropriate for the Chief of the Fraud Division to furnish the subcommittee a briefing on the foreclosure situation from the point of view of the Department of Justice nationwide at this time.

Sincerely yours,

RICHARD L. STILL,  
Subcommittee Staff Director.

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HOUSE OF REPRESENTATIVES,  
LEGAL AND MONETARY AFFAIRS SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., February 22, 1972.

Hon. JOHN N. MITCHELL,  
Attorney General, Department of Justice,  
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: The Subcommittee on Legal and Monetary Affairs commenced an indepth review of the operations of the Department of Housing and Urban Development on May 24,

1971, by receiving testimony from Secretary George Romney. On October 13 and 14, 1971, testimony was received from Assistant Secretary Eugene A. Gulledge in connection with the subcommittee's investigation of the operations of the Federal Housing Administration.

In September 1971, the subcommittee initiated communication with Mr. Thomas J. McTiernan and Mr. Frederick W. Becker of your Department's fraud section of the Criminal Division since allegations of fraudulent conduct, possibly involving employees of the Federal Government as well as fee inspectors and appraisers, appeared to be widespread in a number of major cities. The subcommittee was assured that it would be furnished a summary of Justice Department action with regard to inner city foreclosures and would be notified of grand jury activity to insure that subcommittee investigations did not in any way interfere with such activity. To date, the subcommittee has been given no information from the Justice Department, notwithstanding considerable activity by the Department in Philadelphia, Detroit, and Chicago which has come to the subcommittee's attention from other sources.

During hearings by the subcommittee in Detroit on December 3 and 4, 1971, Mr. Ralph B. Guy, U.S. attorney for the Eastern District of Michigan, introduced himself to me and offered to testify so that the public would be fully informed as to the position of his office on the referral of cases by the Department of Housing and Urban Development about which that Department's Area Director, William C. Whitbeck, testified. Because of the extremely crowded schedule, Mr. Guy was informed that his testimony would be welcome at a later hearing in Washington when the matter could be reviewed a little more dispassionately than was possible at that time in Detroit.

On January 11, 1972, subcommittee staff members met with Mr. Guy in Detroit after having advised Mr. Joseph Ross, Deputy Chief, Legislative and Legal Section of the Justice Department, of the subcommittee's growing concern over the criminal aspects involved. Mr. Ross set up a meeting with representatives of the Fraud Division and arranged meetings with the U.S. attorneys in Detroit, Chicago, and Los Angeles. These meetings, which did not involve discussion of either specific cases pending or investigations in progress, revealed apparent shortcomings in HUD referral procedures and possible defects in administrative followup by HUD when, for a variety of reasons, rarely ever stated, the respective U.S. attorneys declined to prosecute. The question of the availability of adequate manpower, both prosecutorial and investigative, in our judgment must be resolved during the course of hearings on Detroit and other major cities.

On February 3, 1972, following the procedures recommended by Mr. Ross, an invitation was extended to U.S. Attorney Guy to appear before the subcommittee on February 24, 1972. Copies of correspondence with Justice Department personnel are enclosed for your information. I wish to emphasize that my letter of February 3 clearly stated that there does not exist a need to discuss the specific details of any case.

Let me emphasize, however, the subcommittee is well aware of the need to take all steps possible to insure any defendant the right to a fair trial. Moreover, the subcommittee is determined to avoid confusing any investigation now underway either by premature public testimony or by staff field investigation. It was for these reasons that steps were taken to establish liaison with the Fraud Division and with U.S. attorneys in those cities currently the subject of staff evaluation and investigation.

To assist you in evaluating what may well be a loss of confidence in the Department of Justice to react promptly to allegations of criminal activity, I have enclosed a representative sampling of press accounts in Detroit and Philadelphia. The enclosures, in my judgment, speak for themselves. If, as has been indicated, Justice Department resources are inadequate, then it is the responsibility of this subcommittee, with its oversight jurisdiction of the Department of Justice, to examine the operations of the Fraud Division with a view toward making recommendations to insure adequate protection for the victims of fraudulent conduct.

I trust that you will agree that the description of the type of case referred by DHUD Area Directors as "low priority" is objectionable when one realizes that the victims of such fraudulent conduct in order to qualify for their "first home" have low income, and, in fact, many are mothers receiving aid for dependent children.

If, on the other hand, however, the inferences drawn are in fact erroneous as to the Department's attitude, then the subcommittee is determined to use its resources to restore public confidence in the Department. Accordingly, I consider it a matter of utmost importance that U.S. Attorney Ralph B. Guy or a representative of his

<sup>1</sup> Hearings date changed to Feb. 24, 1972.

office be prepared to testify on Thursday, February 24, 1972, as I originally requested in my letter of February 3, 1972. Alternatively, you may wish to designate a representative of the Fraud Division in order that the subcommittee may be advised of the Department's actions.

Your prompt response would be appreciated.

Sincerely yours,

JOHN S. MONAGAN, Chairman.

DEPARTMENT OF JUSTICE,  
Washington, D.C., February 24, 1972.

Hon. JOHN S. MONAGAN,  
Chairman, House of Representatives, Legal and Monetary Affairs  
Subcommittee, Committee on Government Operations, Washington,  
D.C.

DEAR MR. CHAIRMAN: Attorney General Mitchell has asked me to reply to your letter of February 22, 1972, concerning your subcommittee's review of the operation of the Department of Housing and Urban Development, and its desire to have a representative of the Department testify at your forthcoming hearings.

The previous correspondence with the subcommittee indicated that you were interested in hearing from U.S. Attorney Ralph B. Guy of the eastern district of Michigan concerning certain matters brought to his attention and commented upon by William C. Whitbeck of HUD in his testimony before the subcommittee in Detroit on December 3, 1971. As we read Mr. Whitbeck's testimony in this regard, he said that 24 "alleged violations" were reported to the U.S. attorney's office, that some of them were under investigation by the Federal Bureau of Investigation and the U.S. attorney, that in others prosecution was declined and they were returned to HUD, where they are now pending, and that there had not been any prosecutions.

As Mr. Guy advised you in his letter of February 9, he is unable to appear on the scheduled hearing date, February 24, because he is out of the country. As we advised your staff director, in response to his letter of February 14 asking for an alternative witness, after giving careful consideration to the latter request, it was decided that we could not comply without violating the Department's longstanding policy against public dissemination of information about criminal matters under investigation or awaiting trial. We told him further that we would of course provide factual information on the number, nature, and status of the matters in question. Such information is being prepared with respect to the six indictments that have been returned to date and with respect to the numerous other matters that are under consideration, a number of which we anticipate will result in prosecution.

It now appears from your letter to the Attorney General that, based on newspaper stories in Detroit, the subcommittee is concerned about the availability of adequate manpower, both prosecutorial and investigative, in the Department. For this reason, the subcommittee wishes to examine the operations of the "Fraud Division," with a view toward making recommendations to insure adequate protection for the victims of fraudulent conduct.

The Criminal Division's knowledge with respect to Federal Housing Administration violations comes primarily from referrals of HUD, which go simultaneously to the appropriate U.S. attorney. A great deal of information with respect to particular violations is developed in the course of ensuing FBI investigations. However, it should be kept in mind that the role of the Criminal Division in these matters is not an operational one, the actual investigations being conducted under the direction of the various U.S. attorneys'

offices. Nonetheless, you may be interested to know that we have assigned one attorney to work full time, coordinating FHA matters under the direct supervision of the senior attorney, who is in charge of the unit which handles FHA matters. If a need for additional attorney manpower is indicated, we will use additional personnel from within this Division. With respect to staffing in the U.S. attorney's office in Detroit, we have discussed the matter of violations relating to public housing programs with the U.S. attorney, and should additional manpower be required in that office, we will attempt to supply such additional manpower, either through the hiring of new assistant U.S. attorneys or by the temporary transfer of personnel from the Department. We are also undertaking to assure, as was done in other jurisdictions, that adequate investigative resources are available in Detroit, to attack the overall problem connected with the HUD programs, as well as to handle any specific violations that are developed.

Please be assured, Mr. Chairman, we wish to cooperate with the subcommittee. Nevertheless, we do not see how we can provide a witness to give meaningful testimony at this time without jeopardizing pending cases and matters.

Sincerely,

HENRY E. PETERSEN,  
Assistant Attorney General.

DEPARTMENT OF JUSTICE,  
Washington, D.C., March 6, 1972.

Hon. JOHN S. MONAGAN,  
Chairman, House of Representatives, Legal and Monetary Affairs  
Subcommittee, Committee on Government Operations, Washington,  
D.C.

DEAR MR. CHAIRMAN: Reference is made to your letter of February 22, 1972, and our response dated February 24, 1972, in which we agreed to provide additional information relative to the Federal Housing Administration matters pending in Detroit, Mich.

In our previous correspondence you were advised that there were six indictments outstanding in Detroit. Of these six, four are two-count indictments alleging false statements in violation of title 18, United States Code, section 1010, and aiding, abetting, and counseling in violation of sections 2(a) and 1010 of title 18, United States Code. The defendants in these four cases were all real estate brokers or agents. A fifth indictment, which consisted of 10 counts alleging false statements, aiding, abetting, and counseling, and one conspiracy count, was returned against a large landlord and the two agents who handled his FHA transactions. The sixth indictment was in one count alleging false statements by an individual home buyer. This case has already been tried, and resulted in the acquittal of the defendant.

The investigations which were reported in our last correspondence with you have resulted in five additional indictments. Named in these indictments are three brokers, one attorney-broker, the secretary-treasurer of a real estate firm and four real estate agents. All but one are multi-count indictments charging false statements and aiding, abetting, and counseling. Other investigations as to FHA matters are continuing.

Should you be interested in obtaining similar information with respect to investigations and prosecutions of FHA related matters in other metropolitan areas, we would be pleased to furnish it to you.

Sincerely,

HENRY E. PETERSEN,  
Assistant Attorney General,  
Criminal Division.



**FILE 249**

**HOUSE COMMITTEE ON GOVERNMENT OPERATIONS**  
**SUBCOMMITTEE ON SPECIAL STUDIES**

**C O N T E N T S**

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(471)



(249-A)

HOUSE OF REPRESENTATIVES,  
SPECIAL STUDIES SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., March 23, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Committee on the Judiciary, Subcommittee on Separation of Powers,  
Washington, D.C.*

DEAR MR. CHAIRMAN: In accordance with your request of March 9, 1973, I am enclosing a completed survey form dealing with one incident of refusal to testify. I was not the subcommittee chairman at the time this refusal occurred and the incident was related by a former staff director of the subcommittee.

I do not know whether the refusal being reported here, given the circumstances in which it occurred, is of the type sought by your subcommittee. It is submitted for such use as you may wish to make of it.

Sincerely yours,

FLOYD V. HICKS, *Chairman.*

(473)

## (249-B)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
April 18, 1972	Mr. Jimmy Minyard, Department of Agriculture by telephone	Secretary of Agriculture, Earl Butz	Discussion of market for American agricultural products in USSR in connection with subcommittee investigation of Market Promotion Activities of the Foreign Agricultural Service	April 18 1972	Refusal conveyed by Mr. Minyard	<p>Request was made for Secretary Butz' appearance the following week. Subcommittee staff director at the time (Erskine Stewart) was informed that the Secretary would not be available during that period. Staff director asked when Secretary Butz could appear; could Mr. Minyard propose a date? Mr. Minyard stated that Secretary Butz would not be appearing before the subcommittee under any circumstances.</p> <p>No written request was made for Secretary Butz to appear.</p>

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422 249

FILE #:

Submitted by: (Comm/SubComm) Special Studies

Subcommittee of the House Committee on  
Government Operations  
By: Mr. Joseph C. Luman  
TITLE: Staff Director X56751  
Extension

(474)

## FILE 273

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### HOUSE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON PUBLIC WORKS AND AEC.

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<sup>1</sup> No survey form was received in this instance.

(475)



(273-A)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
*Washington, D.C., March 17, 1973.*

Hon. SAM J. ERVIN, Jr.,

*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.*

DEAR CHAIRMAN ERVIN: In response to your recent letter requesting information concerning the refusal of the Executive officers or employees to testify before Congressional Committees and Subcommittees, I want to provide you with the following information.

On one occasion Patrick Moynihan, a Presidential assistant, declined, after an invitation by the Chairman, to testify at a formal hearing of the Subcommittee on Independent Offices Appropriations, although he later agreed to participate in an informal session if his testimony were not recorded and not given under oath.

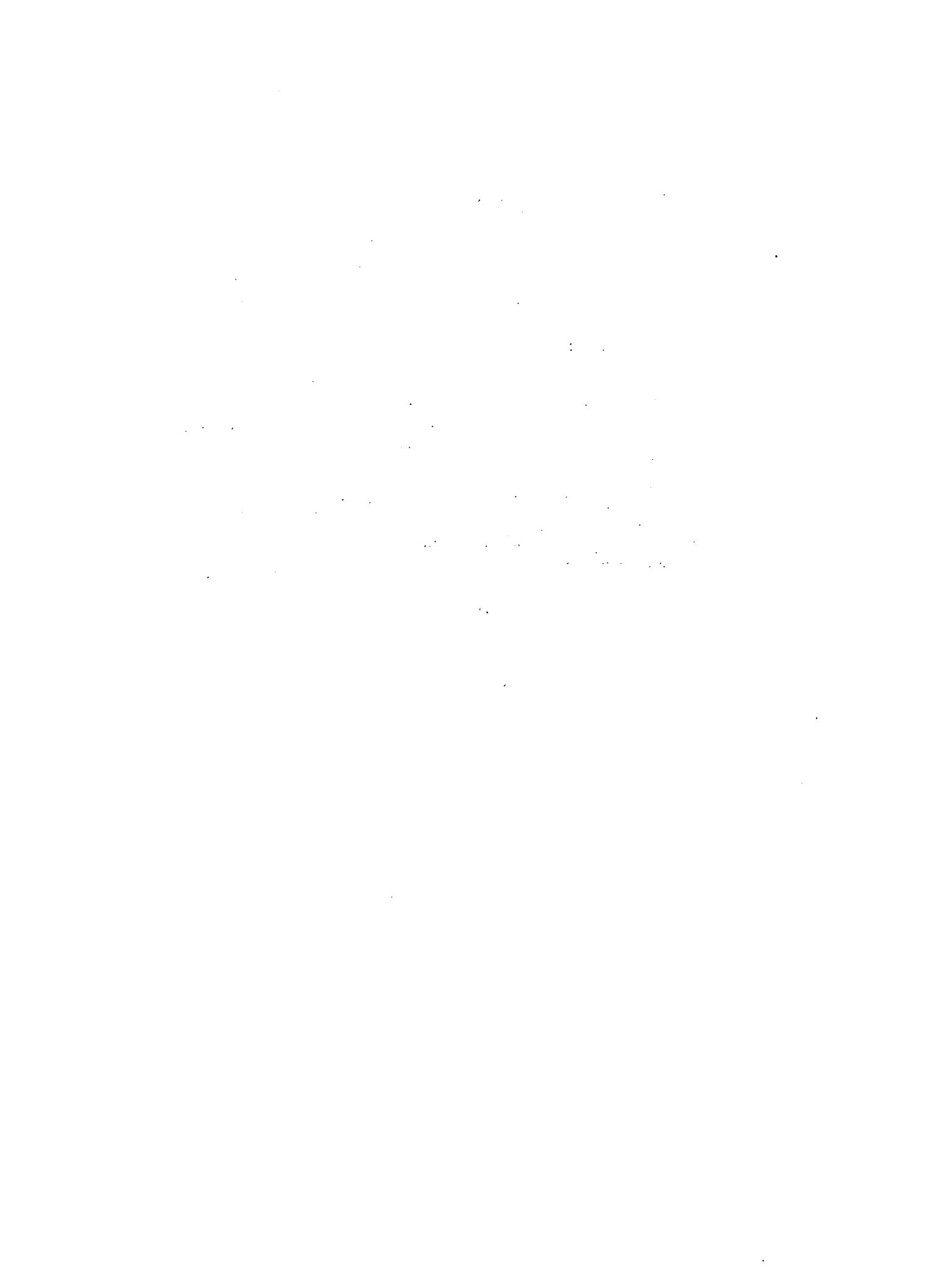
I trust this information will be of some helpfulness to you, and I want to again commend you for your great work in endeavoring to strengthen and restore the powers and prerogatives of Congress.

With kindest regards and best wishes, I am,

Sincerely your friend,

JOE L. EVINS,  
*Member of Congress.*

(477)



## FILE 287

### HOUSE COMMITTEE ON EDUCATION AND LABOR GENERAL SUBCOMMITTEE ON LABOR

#### C O N T E N T S

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## (287-A)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
March 2, 1970	Walter J. Hickel, Secretary of the Interior	Recommendations by the Director, Bureau of Mines for the implementation of the Federal Coal Mine Health and Safety Act of 1969.			Instead of an outright refusal to provide the documentation, the Departmental officials sent inane interim replies (copies attached). Mr. O'Leary's recommendations were never received.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 287

Submitted by: (Comm/Subcomm)

House General Subcommittee on Labor

By: Miss Adrienne Fields

Title: Executive Assistant

Extension

U.S. HOUSE OF REPRESENTATIVES,  
GENERAL SUBCOMMITTEE ON LABOR,  
COMMITTEE ON EDUCATION AND LABOR,  
Washington, D.C., March 2, 1970.

Hon. WALTER J. HICKEL,  
Secretary of the Interior, U.S. Department of the Interior,  
Washington, D.C.

DEAR MR. SECRETARY: I am aware that the former Director of the Bureau of Mines, Mr. John F. O'Leary, made a comprehensive set of recommendations regarding the implementation of the Federal Coal Mine Health and Safety Act prior to his recent departure.

I believe the committee would find these recommendations very useful and I would appreciate having a complete copy as soon as possible.

With kindest regards, I am,  
Sincerely yours,

JOHN H. DENT, Chairman.

DEPARTMENT OF HEALTH,  
EDUCATION, AND WELFARE,  
Washington, D.C., March 5, 1970.

Hon. JOHN DENT,  
Chairman, General Subcommittee on Labor, Committee on Education and Labor, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Secretary has received your March 3 letter concerning the regulations for the Federal Coal Mine Health and Safety Act.

A reply will be forwarded to you as soon as possible.  
Sincerely,

JERRY W. POOLE,  
Deputy Assistant Secretary for  
Congressional Liaison.

U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D.C., March 9, 1970.*

Hon. JOHN H. DENT,  
Chairman, Committee on Education and Labor, General  
Subcommittee on Labor, House of Representatives,  
*Washington, D.C.*

DEAR MR. CHAIRMAN: On behalf of Secretary Hickel I wish to thank you for your inquiry of March 2 concerning recommendations by the former Director of the Bureau of Mines regarding implementation of various standards to the Federal Coal Mine Health and Safety Act.

Assistant Secretary Hollis M. Dole will be in touch with you as soon as possible to discuss these recommendations with you.

Sincerely yours,

GENE P. MORRELL,  
*Deputy Assistant Secretary.*

U.S. HOUSE OF REPRESENTATIVES,  
GENERAL SUBCOMMITTEE ON LABOR,  
COMMITTEE ON EDUCATION AND LABOR,  
*Washington, D.C., March 11, 1970.*

Mr. GENE P. MORRELL,  
Deputy Assistant Secretary, Department of the Interior,  
*Washington, D.C.*

DEAR MR. MORRELL: This is in response to your letter of March 9, regarding our request for the recommendations by the former Director of the Bureau of Mines for implementing the Federal Coal Mine Health and Safety Act.

I do not think it would be useful for me to discuss the recommendations with anyone without first reviewing them and having the benefit of studying them. I would, therefore, reiterate our request for copies of the recommendations.

With kindest regards, I am,  
Sincerely yours,

JOHN H. DENT, Chairman,

## (287-B)

SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
March 5, 1970	Walter J. Hickel, Secretary of the Interior	Reasons for actions by Department officials in filling personnel vacancies with persons with questionable interests; reasons for certain enforcement and non-enforcement of the Federal Coal Mine Health & Safety Act which reflected obvious disregard for Congressional intent and lack of proper interpretation of the Act.			<p>Departmental officials did not refuse to respond or defend their actions. Rather, they responded to specific charges in an unsatisfactory manner, or chose to defend their actions many of which place them in an untenable position. No acceptable response was ever received, despite the numerous letters of request (see attached).</p> <p>Note: The initial request of March 5 was drafted in the office of Congressman Ken Hechler and a copy may be available from that office.</p>

Separation of Powers Subcommittee SURVEY.

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE 207

Submitted by: (Comm/Subcomm)

House General Subcommittee on Labor

By: Miss Adrienne Fields

Title: Administrative Assistant

Extension

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON EDUCATION AND LABOR,  
GENERAL SUBCOMMITTEE ON LABOR,  
Washington, D.C., April 22, 1970.

Hon. WALTER J. HICKEL,  
Secretary of the Interior, Department of the Interior,  
Washington, D.C.

DEAR SECRETARY HICKEL: Thank you for your letter of April 3, 1970, in response to a letter of March 5, 1970, concerning the administration of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173; 83 Stat. 742), to Congressman Hechler.

## SUMMARY

After reviewing the actions taken by the Department since the new law was approved on December 1, 1970, we are seriously concerned (1) that with 31 top positions of the Bureau of Mines filled with officials who serve in an acting capacity only, it cannot function effectively; (2) that the new reorganization divides the Bureau's health functions into separate divisions for coal mines and for metal mines which will duplicate each other, and fosters too close a confidential relationship with industry in its research function which could be harmful to workers and to protecting the total environment; (3) that the schedule

of fees set forth in the regulations for violations of the Act is contrary to law; (4) that it failed to provide an opportunity for rule-making as directed by the new law; (5) that the Department, in apparently publishing new "mandatory safety standards" in its regulations of March 28, 1970, did so without following the procedures of Title I of the Act; (6) that its announced policy of conducting "partial, but representative" inspections is not in accord with the law; and (7) that the Department saw fit to be critical of some provisions of the new law after being silent on them during its consideration.

## DISCUSSION

## I. Personnel of the Bureau of Mines

Your letter of April 3, provides assurance that the Bureau of Mines' "entire Health and Safety organization is intact with minor exceptions." While the organization may be intact, it is clear that the personnel are still in a state of flux. It has not had a permanent director since March 1, 1970. In your letter you state as follows:

*Mr. Henry P. Wheeler, Jr.*, who was recommended by John O'Leary to the position of Associate Director—Health and Safety, Bureau of Mines, has been formally appointed to the position. *Mr. Henry Doyle* has been offered a choice of positions in a new organizational set up which we plan to put into effect shortly, but has so far declined the opportunities. *Mr. Carl Rampacek*'s detail as the

Acting Assistant Director for Minerals Research has been terminated. He has returned to his permanent assignment and is under consideration for a key position in the new organization. *Earl T. Hayes*, as Deputy Director under John O'Leary, followed the health and safety activities of the Bureau closely, and, since he himself has suffered from silicosis when he worked in the mines, can naturally be expected to favor strict application of the law in his present capacity. He is being assisted by *Harry Perry* of my staff, who worked closely with John O'Leary during Congressional consideration of the law, and has now been detailed as Acting Deputy Director of the Bureau. (emphasis supplied).

*Mr. Henry P. Wheeler*, according to the Bureau's Personnel Bulletin No. 70-73 of April 1, 1970, is again listed in an *acting* capacity and in two positions.

*Mr. Henry N. Doyle* was appointed to his position in acting capacity on February 13, 1969. His appointment terminates on April 30, 1970. We understand that Mr. Doyle declined an offered position in the Bureau's new reorganization because he disagreed with it and expressed his views in writing. We would appreciate your providing us with a copy.

*Mr. Carl Rampacek* was in an acting capacity from July 27, 1969, through March 24, 1970, and now the position is vacant. In the above bulletin, he is listed as Acting Assistant Director of Metallurgy. What, in fact, is his status?

*Dr. Hayes*, as Deputy Director of the Bureau is familiar with its health and safety functions prior to enactment of the new law. In the past year, he had little direct contact with the development of the new law. He did not participate with the committees or the staff during its consideration. As a matter of fact, he was traveling for the Department during a large portion of the period the legislation was being considered. The above bulletin which was signed by Dr. Hayes as Deputy Director lists him also as acting in two other positions. How can the acting head of the Bureau effectively carry out his heavy responsibilities of leadership if he is also required to act in two other capacities?

The choice of *Mr. Harry Perry*, who is familiar with the new law and its background and participated in its development in the Congress, as Acting Deputy Director is a good one. The fact still remains that you have only "detailed" him to the position.

Thus, the Bureau continues to have no one in its top staff on a permanent basis of *Mr. Perry's* or *Mr. O'Leary's* caliber and experience. Further, 31 of the Bureau's most important posts are not permanently filled, including the four heads of the health and safety division. (See Bulletin No. 70-73.)

## II. Reorganization of the Bureau of Mines

The Bureau was reorganized in January, 1969, for the primary purpose of upgrading the health function of the Bureau. The overwhelming evidence that occupationally caused health problems in the coal and metals industry which are at least as serious, and possibly even more serious, than safety problems helped to bring about this change. (See attached Press Release.)

Yet, on April 1, 1970, at a time when all of the Bureau's energies and attention should have been directed at implementing the new law, a new reorganization was devised. This time, the Department has reversed its earlier decision of January, 1969, and moved once again to submerge the Bureau's health function from its once prominent, but shortlived, position to a division level subordinate to an

assistant director for both health and safety. Further, it no longer treats coal mine health and metal mine health as one unit with its common problems. Instead, it divides the function into two separate entities subordinate to a health and safety assistant director for coal mines and one for metal mines, Mr. Westfield and Mr. Jarrett, who have no health background.

Safety too is downgraded from a position headed by an assistant director solely for coal mine safety and one for metal mine safety to two divisions headed by a division chief who is subject to an assistant director for both health and safety.

In addition, the reorganization appears to divorce completely the Bureau's health and safety functions and the Bureau's research functions. This, despite the fact that Congress, in the new law greatly expanded the Bureau's health and safety research function and, in sections 301(b) and 501(a), set forth specific priorities in this area. We fail to see how the health and safety program can be effectively carried out unless there is, as the enclosed press release emphasizes, a close relationship between those who investigate and enforce and those who research and test. A Bureau divided under two deputy directors, in our opinion, will not foster such a relationship.

Further, we believe that the reorganization will encourage an even closer, confidential relationship with industry in the research area than that now cherished by it. Such a relationship could well be detrimental to the miner concerned with health and safety and to the public concerned that the mineral industry meet its responsibilities to prevent the degradation of the environment. In this reorganization, what efforts have been made by your Department to require greater public participation and disclosure in the Bureau's research programs as required by section 501(c) of the new Act and section 102 of the National Environmental Policy Act?

We strongly recommend that the new reorganization be rescinded for these reasons:

First, it is ill-conceived and designed to foster an unhealthy confidential relationship between parts of the Bureau and Industry, while dismantling the Office of Mineral Industry Health which was seeking ways to curb and eliminate occupationally caused diseases, such as pneumoconiosis, in the case of coal miners, and lung cancer, in the case of uranium miners. As a matter of fact, Mr. Doyle was an outspoken advocate of tough health standards for uranium miners along the lines adopted by former Secretary of Labor Wirtz. The uranium industry, including Mr. J. Rigg of Assistant Secretary Dole's staff, has a long-history of opposing the Wirtz standard.

Second, the President's Advisory Council on Executive Reorganization is now in the process of preparing a report on the organization of the executive branch, including the Interior Department and the Bureau of Mines. In view of this, the Bureau's new reorganization should be shelved, at least, until that report is available and its recommendations fully evaluated.

We would appreciate your comments on this recommendation.

## III. Regulations Publication

Thank you for providing copies of the proposed Coal Mine Health and Safety regulations recommended to you

by Mr. O'Leary on February 27 and 28, 1970. We will compare them with the published regulations and comment thereon, where appropriate, at a later time.

In addition to the regulation which was referred to in the February 20, 1970 letter, the Interior Department has now published under the Federal Coal Mine Health and Safety Act of 1970 the following regulations and notices:

- (A) Coal Mine Dust Personal Sampler Units—(35 F.R. 4326-4329)—Published March 11, 1970;
- (B) Mandatory Safety Standards, Underground Coal Mines—(35 F.R. 5221-5258)—Published March 28, 1970;
- (C) Notice of Regulations Continued in Effect—(35 F.R. 5335-5345)—Published March 31, 1970; and
- (D) Mandatory Health Standards—Underground Coal Mines—(35 F.R. 5544-5550)—Published April 3, 1970.

In the case of the mandatory safety standards, Congress specifically provided in section 301(d) of the Act that "where the provisions of sections 302 to 318, inclusive, of this title (Title III of the Act) provide that certain actions, conditions, or requirements shall be carried out as prescribed by the Secretary, or the Secretary of Health, Education and Welfare, as appropriate, the provisions of section 553 of Title 5 of the United States Code shall apply unless either Secretary otherwise provides." In publishing these final regulations, the Department did not refer to this exception to the rulemaking requirement, but found that it is "impracticable" under section 553 to have proposed rulemaking. We are distressed at this finding.

Congress, in enacting this statute, clearly recognized that the Department probably could not properly issue regulations of the magnitude found in the March 28, 1970, publication and, at the same time, provide the operators, the miners, and the public sufficient time to review and comment on them by April 1, 1970. That is the reason section 101(j) was added to the Act. That section provides that "interpretations, regulations, and instructions" existing under the 1952 Act which are consistent with the new Act could, upon republication, continue to exist until superseded by more comprehensive regulations. In the letter of March 5, 1970, to you, it was pointed out that the Conferencees expressly urged that this republication be made "as soon as possible after enactment." Despite this congressional admonition to act quickly, the Department did not republish these until March 31, 1970. Many of the mandatory safety standards in Title III could be enforced on April 1, 1970, without the need for additional regulations immediately. In such cases, proposed rulemaking of these comprehensive regulations would have been quite proper. We would appreciate your Department advising us (a) why it was impracticable to publish such extensive regulations on March 28 without proposed rulemaking as required by section 301(d) of the Act; (b) what standards in Title III could not be enforced without implementing regulations on April 1, 1970; and (c) why it took your Department so long to develop regulations that were begun, as your April 2, 1970, press release states, in December, 1969.

#### *IV. Scope of Safety Regulations*

The preamble to the March 28 regulations (35 F.R. 5221) states that the regulation:

\* \* \* includes mandatory safety standards for underground coal mines which are set forth in Title III \* \* \*, other mandatory safety standards issued pursuant to that title and section 101(j) of the Act, and interpretations and supplementary regulations.

The publication identifies each statutory standard. It does not, however, identify these other items. Please identify each item in the publication that your Department considers to be "interpretations and supplementary regulations" and each item that it considers to be "other mandatory standards." Since neither Title III nor section 101(j) of the Act authorize the issuance of such standards, we would appreciate (a) your requesting the Department's Solicitor to provide us with a legal opinion concerning the authority for such other standards, and (b) advising us why such other standards were not issued in accordance with the procedures set forth in Title I.

#### *V. Fee Schedule*

Section 301.50 of the regulations (35 F.R. 5257) establishes proceedings for the assessment of civil penalties to be initiated by a hearing examiner or the Appeals Board if an operator or miner fails to pay a fine to the Bureau "within 30 days after receipt of the notice of violation by the mine operator or miner" in accordance with a fee schedule in the regulation.

Under section 109(a) of the Act, an operator who violates any provision of the Act, except Title IV, shall be assessed a civil penalty of up to \$10,000 for each violation, after an opportunity for a hearing. It also provides that, in determining the amount of the penalty, the Secretary (whether a hearing is held or not) "shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

The schedule sets a fine for first violations committed by an operator in a 12 month period (a) for imminent danger violations at \$500.00; (b) for unwarrantable failures (which the conferees describe as a "failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of lack of due diligence, or because of indifference or lack of reasonable care on the operator's part") at \$100.00, and (c) for all other violations at \$25.00. Miners who willfully smoke or carry smoking materials underground are charged \$5.00 out of a possible \$250.00. We understand that, by first violations, the Department means—violations cited in a first inspection. Violations cited in second and later inspections in such period incur a progressively greater fine.

We are strongly opposed to this illegal fee schedule or "justice of the peace" type of approach to civil penalties because:

(a) It is contrary to law. The statute requires that the above cited factors be considered when a penalty is assessed. The fee schedule is an assessment of a penalty

in advance of the violation and does not consider these factors at all. Thus, a negligent operator whose violation resulted in death or injury could pay his \$25.00 and avoid a higher penalty when the factors are considered.

(b) It establishes the same penalty for a 500 man mine operator and for a ten man mine operator. A \$25.00 penalty against a Bethlehem Steel mine is a mere slap on the wrist. Even in the case of a ten man mine, \$25.00 fine may not be appropriate.

(c) In the case of a miner, a \$5.00 fine for "willfully" smoking underground in a mine endangers the lives of his fellow miners. It amounts to a mere license to smoke. We are sure that the workers themselves would support a more realistic fine where, as the law provides, there are proper proceedings instituted before the fine is assessed.

We call upon the Department (1) to rescind this fee schedule in the regulations immediately; (2) to reassess civil penalties according to law for violations arising since April 1; and (3) to establish a policy that provides meaningful penalties for all violations consistent with the above factors.

On April 20, 1970, a House staff member talked by telephone to Assistant Solicitor Gershuny of the Department who apparently will handle litigation under the new law. Mr. Gershuny stated that he knew when he drafted the fee schedule for the Department that it was "illegal," but it was needed to "wash-out" some of the proceedings before the Board, since the Bureau anticipated about 25,000 violations per year. He also contended that the Act impliedly authorized the Secretary to "compromise" civil penalties once assessed.

We request a detailed explanation as to why the Department, knowing the fee schedule was illegal, published it. We understood from staff discussions with Department officials, during consideration of the civil penalty provisions proposed by it, that Bureau officials (other than inspectors) would assess the penalty subject to the right of the alleged violator to request a public hearing. We, therefore, would like to know why it is necessary or desirable for the Board or a hearing examiner, who are not administrators, to assess civil penalties when a hearing is not requested.

Finally, since Congress failed to adopt the Department's civil penalty provisions which provided for administrative compromise, and did not specifically authorize such compromise, as it did in the case of other recent statutes, we fail to see how the Department now believes from the statute and its legislative history that administrative compromises are authorized after considering the above cited factors. We would appreciate your providing us with the Department's rationale for administrative compromises.

#### *VI. Burden of Proof*

Section 301.68 of the regulations (35 F.R. 5258) states:

In proceedings under Subparts B, C, and F of this part, the burden of proof shall be on the Bureau of Mines. In all other proceedings, the burden of proof shall be on the moving party.

Under the second sentence of the regulation, the moving party, who is the miner or his representative, has the "burden of proof" on applications for compensation or for review of discharge actions or acts of discrimination under section 110 of the Act.

We believe that this requirement is totally inconsistent with section 110(a) of the Act. It is an outrageous attempt by your Department to bail out the coal operators from enforcement of section 110 of the Act which protects the worker's salary and job status. Under section 110(a), compensation to the miners is guaranteed for specified periods where a closure order is issued under section 104 of the Act, where a final unwarrantable failure closure order is issued, and when an operator violates or fails or refuses to comply with a section 104 closing order. Only in the case of an unwarrantable failure order is there any requirement that the order be a final one or that there be an opportunity for a hearing. In the other cases, the miners must be compensated once an order is issued, even if, on appeal, it is vacated. There is no proceeding in such cases in which the miner or his representative must prove a violation.

Further, under section 110(b) of the Act, the operator is prohibited from discharging or discriminating against a miner under the circumstances prescribed. If he violates the prohibition, he is subject to the penalty section of the Act. The Secretary must enforce this prohibition too on his own motion or on application by the miner or his representative. He does so by investigation which may or may not include a public hearing. We fail to see why the miner or his representative should bear this burden.

We believe that the last sentence of section 301.68 should either be abandoned or substantially clarified consistent with the requirements of section 110 of the Act. Please advise us when you do so.

Subpart B relates to applications for review of orders and notices, subpart C to review of notices under section 104(h) of the Act, and subpart F to assessment of penalties. Thus, in these three proceedings the "burden of proof" is on the Bureau. Please provide us with a legal opinion from the Department's Solicitor (a) establishing the statutory authority for placing this burden on the Bureau and not on the appellant in each case; and (b) setting forth what the Solicitor considers sufficient proof in each proceeding for the Bureau to sustain this burden.

#### *VII. Inspections*

Your Department's news release of April 3, 1970, announcing the adoption of an "Interim Coal Mine Inspection Plan" quotes your statement that the Bureau has "only about 220 fully qualified coal mine inspectors now," and that 50 more have been hired and are being trained. Yet, in testimony before the House Subcommittee on Department of the Interior and related agencies, the Department's witness, Mr. Wheeler, testified that you "have about 300 coal mine inspectors at the present time." (Hearings, p. 806). Why this discrepancy?

We are concerned about the slowness of the Department's efforts to hire and train inspectors. We, therefore, would appreciate promptly receiving your response to the following questions:

1. How many inspectors will be needed to make four complete inspections a year under the Act?
2. How many inspectors will be needed to carry out inspections under section 103(i) of the Act?
3. What is your authorized personnel ceiling on inspectors?

4. (a) Has the Department sought new increased funds and personnel authorizations in this fiscal year for inspectors? (b) If so, how much money, and how many positions? (c) If not, why not?

5. (a) Is the Department seeking increased funds and personnel in the fiscal year 1971 budget now before Congress for inspectors? (b) If so, how much money, and how many positions?

6. What salaries are being offered to attract qualified people as inspectors?

7. (a) How long is the training period for inspectors?  
(b) When did you begin hiring new inspectors?

In his statement before the House Subcommittee on Appropriations, Dr. Hayes stated (*supra*, p. 783):

In the past the Bureau has inspected every underground coal mine twice a year and we have managed to inspect most of the large coal mines three times a year.

While we recognize that the new law has many more mandatory provisions to be enforced during an inspection than existed under the 1952 Act, many of these provisions are similar to the old voluntary Code provisions which were also enforced during those inspections. Thus, if the Bureau inspected every mine completely twice last year, as the above statement indicates, and most of the larger mines three times last year, how long will it be before the Department makes all of the inspections required by the Act for its first full year in operation?

In testimony before the House Subcommittee on Appropriations, the Department's witnesses testified that the Administration cut \$8.3 million from the Department's budget for Fiscal Year 1971 for the enforcement of the new Federal Coal Mine Health and Safety Act of 1969. (See hearings, *supra*, p. 805.) With the mandates expressed by Congress to the Department to increase its enforcement activity *now*, how is it possible that the Administration would apparently disregard that mandate and reduce substantially the Department's budget request in this area? What was the use intended for this sum? Did the Department appeal the cut by the Budget Bureau? If so, what was the Budget Bureau's justification for this cut?

We are also disturbed about your program of representative inspections with the stated objective of inspecting *all* underground coal mines by the end of June, 1970. While it is, of course, desirable to inspect all mines as soon as possible, the Congress in enacting the new law was not concerned with the volume of inspections, but with the adequacy of each inspection. The law contemplates four complete inspections, plus spot inspections. The "partial, but representative inspection" is a new concept altogether which was never previously mentioned during consideration of the new law. The Associate Director for Health and Safety describes, in his March 26, 1970 memorandum to Dr. Hayes, each of these as follows:

1. A *spot inspection*, which would enable us to get into all of the mines as quickly as possible but which would not be extensive enough to be informative to the operator as to what is required throughout the entire mine;

2. A *regular inspection*, which would extend throughout each mine inspected, but which would, because of the time required for each such inspection, leave some mines for a rather long time before an inspection could be made under the new law; and

3. A partial, but representative inspection (*PBR inspection*), in which we would inspect enough, but only enough, of a mine to be representative of the entire mine insofar as health and safety are concerned. A PBR inspection would take longer than a spot inspection but not nearly as long, in most instances, as a regular inspection.

The law now requires four complete inspections per year. The Administration proposed three per year in its legislative proposal of March, 1969. Did the Administration contemplate PBR inspections then? If not, how did the Administration intend to comply with its own recommendation in one year?

#### VIII. Accidents

We would appreciate your providing us with the complete details concerning the two mine accidents of a few days ago which killed two men—one a roof fall and one an ignition—and the actions taken by the Bureau to prevent them in the future. Also, we would appreciate your providing us with the details concerning the accident at the Helen Mining Company in Homer City in Pennsylvania, including the area of the mine inspected just prior thereto, a copy of the inspection report, and an identification of the area of the mine where the accident occurred.

#### IX. Interior's Criticism of Statutory Safety Standards

It is inconceivable to us that a Federal agency, such as the Department of the Interior, would appear before the Appropriation Committee of the House of Representatives after Congress enacted the 1969 law and criticize various provisions of it after remaining silent on the provisions during its consideration by the legislative committee of the House. Yet, the Department's witness did just that on March 2, 1970, when he said (hearings, *supra*, p. 815-816) as follows:

Mr. WHEELER. Madam Chairman, overall, I do not think anyone would have any question with the objectives and law itself. But there are a few provisions and I would like to cite one of them to you—there is a provision in the law that all mine cars after a year must be provided with automatic brakes and there are no automatic brakes that can be put on mine cars.

Mrs. HANSEN. Are they nonexistent?

Mr. WHEELER. There are none in existence.

Mrs. HANSEN. What are you going to do about that provision?

Mr. WHEELER. Maybe we have some consternation in our own organization. I think what we will have to do is to cite them as being in violation of the law, because they will be.

Mrs. HANSEN. Is anyone in the process of developing automatic brakes?

Mr. WHEELER. Yes, ma'am. We have met with all the car manufacturers to first find out if there are any brakes, and we found out there are none. And since then we have been talking with them as to how we can get some developed as soon as possible.

Mrs. HANSEN. Has the Department appeared on behalf of this provision before the Education and Labor Committee?

Mr. WHEELER. We have not gone back to them yet. We will have to after we study all the provisions of the law. We are now studying this law section by section to determine what the problem areas are. This is just one which is obvious on the face of it that I have decided to use. There are others.

Mrs. HANSEN. Will you please insert in the record other areas of the Coal Mine Health and Safety Act which cause similar problems?

Mr. WHEELER. Yes, ma'am.

[The information follows:]

"In addition to the matter of the act requirement for car brakes which must be resolved before March 30, 1970, there are other unresolved problems. Among these are:

"1. Sec. 315 of the Act provides that the Secretary may require that rescue chambers, properly sealed and ventilated, be erected at suitable locations in the mine. Such chambers to be equipped with first-aid materials, an adequate supply of air and self-contained breathing equipment, an independent communication system to the surface, and proper accommodations for the persons while awaiting rescue, and other equipment. Where shelters are required, there shall be an approved plan for the erection, maintenance, and revisions of such chambers and an approved training program for the use of the shelter.

"Much of the technology involved is unclear, especially in connection with an integrated standby system. A contract for the

development of a total rescue and survival system should be awarded shortly and completed within a year thereafter.

"2. Section 317(e) requires the Secretary to propose standards by December 30, 1970, under which all working places in a mine shall be illuminated by permissible lighting within 18 months after promulgation of the standards.

"The nature and content of these standards is being considered in the light of practicability. Some research may be required and new permissibility standards may have to be developed. These efforts are being carried on at a rapid pace in order to meet the deadlines. It is not certain, however, that the present uncertainties can all be resolved in the available time.

"3. Section 317(j) authorizes requiring electric face equipment, including shuttle cars, be provided with canopies or cabs to protect the miners from roof falls and from rib and face rolls where the height of the coal bed permits.

"Practical designs are under consideration and consideration is being given to determining the minimum height of the coal bed which will permit installation of such devices.

"4. Section 317(g) provides that the Secretary shall require, when technologically feasible, that devices to prevent and suppress ignitions be installed on electric face equipment.

"Research on an ignition suppression system has been carried out in the Bureau's laboratories and experimental mine for several years. We are presently concentrating on converting our basic knowledge into a commercially feasible system. Progress is being made and emphasis placed on the project; nevertheless, it is not possible to set a specific completion date."

It is obvious that the Department's witness is not very familiar with the provisions of the Act in making this criticism. None of the standards referred to in the Department's four numbered paragraphs just quoted requires action by March 30, 1973. In the case of the rescue chambers, the Department, by section 315 of the Act is given discretion to require them when the technology is available. The same is true for underground lighting and canopies and cabs. In the case of ignition suppression devices (the reference is section 317(q), not section 317(g)), we fail to see why it is the Bureau's responsibility to convert its experiments into a "commercially feasible system." Why not make this knowledge public and let American business convert it competitively into an effective commercial system?

In regard to automatic brakes, the Act only requires them "where space permits." The Department, in its letter of July 17, 1969, to the Senate Committee on Labor and Public Welfare (Sen. Hearings-Part 5 Appendix, p. 1589, 1594) said that the provision "should be deleted at this time because *in many instances it is not physically possible in the limited space underground in some mines to install and operate such automatic brakes.*" (emphasis supplied.) Based on this comment, the Congress added "where space permits", the Department did not say, as it is now contended, that they were unavailable in all mines or that they were "nonexistent". "Where space does not permit," other devices may be used to achieve the same objective. What has the Department done to insist on such other devices?

#### X. Mine Closures by Operators

We are deeply concerned about the increasing number of coal mine operators in this country who are closing their mines.

A. Some are closing because of the uncertainty surrounding the Department's administration of the law. The Interior Department has contributed to this situation by its long delay in issuing regulations and republishing old ones and by eliminating any opportunity for the operators and the miners to express their views on them

before they were finalized. Only a short while ago, Assistant Secretary Dole wrote, in connection with regulations for metal mines, that by publishing proposed regulations "the Bureau is following a long-established policy to afford the public an opportunity to participate in the rule-making process." He noted that "the benefits to be reaped from analysis and consideration of comments received may save considerable legal involvement later." He did not follow his own sage advice for coal mines.

Further, the Department in applying the statute to each mine apparently has failed to recognize that some violations, such as the failure to have a bulletin board, are not as serious as others. It has treated them equally in its fee schedule and thus caused operators to turn to closing their mines rather than pay the same penalty for all violations, regardless of their gravity.

B. Some are closing with the objective of creating a coal shortage in lieu of meeting the requirements of the Act. Many of them predicted early last year, when the legislation was being considered by Congress, that it would close many mines. Now they are apparently attempting to make their predictions come true without any sincere, good faith effort to comply with the new law.

They are using these tactics to embarrass the Congress for passing a strong health and safety law designed to protect coal miners. They are attempting to demonstrate that the Act will close mines, cause coal shortages, and eventually cause blackouts. They have not, however, even made a good faith effort to comply with the Act. Many are marginal operators whose profits are dependent on not providing safe and healthful working conditions. In some cases, one need not even go underground to find hazardous conditions. An inspector need only look at the unsafe conditions on the surface to realize that many of these operators are not safety conscious, but rather are profit and production conscious only.

C. In our opinion, both of these reasons are an attempt to create a crisis in the industry to force changes in the law. We are certain that Congress will not stand for such a patent attempt to weaken the law.

Please provide us (a) with a list of the mines closed in each State by the operators since April 1, 1970; (b) the number of persons working in each; (c) the reason for closure, if known; and (d) the estimate of tons lost per day from such closures. If a mine was reopened since then, was it inspected as required by section 303(x) of the Act? If not, why not?

Also, we would appreciate your providing us (a) with a list of the mines inspected during the first three weeks of this month; (b) the number of working sections in each; (c) the working sections inspected; (d) the violations per working section; and (e) the fines assessed or paid per violation.

#### XI. Temporary Relief

Section 301.15 of the regulations (35 F.R. 5256) provides a procedure for filing applications for temporary relief, except "in the case of a notice issued under section 104(h) or section 104(i) of the Act." The reference to section 104(h) is in error. Section 105(d) of the Act provides that the exception applies to notices "issued under section 104(b) or (i)." Please advise us when this section is corrected, and when it is amended to show that such relief is *not* available in cases of "an order issued under section 104(a)" of the Act.

*XII. Notices*

Section 301.10 provides that an operator or miner or the miner's representative may file an application "for review of orders and notices." We believe that this provision needs clarification to assure that review of notices is limited only to the reasonableness of the time prescribed therein as is explained in the Senate's section-by-section analysis of the Conference Report (Cong. Rec., December 18, 1969, p. S. 7169) as follows:

Subsections (a), (b), and (c) establish a procedure for reviewing administratively withdrawal orders issued by an inspector, modifications or terminations of such orders by an inspector and the reasonableness of the time limits in notices, upon request made by an operator or representative of the miners. Upon making the request, the Secretary must undertake a special investigation to ascertain the facts which must include an opportunity for a public hearing pursuant to 5 U.S.C. 554. (Emphasis supplied.)

On December 18, 1969, when the Congress adopted the conference report, both the Department and the operators should have been certain of its provisions, but for the threat of a "veto" by the Administration which threat was not quashed until December 30, 1969, when the President signed it. Congress provided an additional delay period of 90 days before the safety standards became effective to enable the Department and the operators to adjust to the new law. This delay was only 30 days less than that recommended by the Department. Based on the Department's performance to date, twice as much time would apparently not have been enough.

The Department's actions, or rather its inaction, has given the operators ammunition to wage war against the new law. It is time that the industry and the Department recognize the fact that the Congress and the public will not tolerate unsafe and unhealthful working conditions in the coal mines. Both expect, so long as the program remains in Interior, that the Department will act reasonably and responsibly to administer the law and to obtain quickly the personnel to do so. To date, Congress, the public, and, most important, the miners and many operators have been disappointed.

We hope to hear from you on these vital issues by May 4, 1970.

Sincerely,

JOHN H. DENT, Chairman.  
PHILLIP BURTON.  
KEN HECHLER.

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DEPARTMENT OF THE INTERIOR NEWS RELEASE, JANUARY  
15, 1969

MINES BUREAU HEALTH AND SAFETY ACTIVITIES  
REORGANIZED

A reorganization of mineral industry health and safety functions within the Bureau of Mines was announced today by Secretary of the Interior Stewart L. Udall.

The changed setup was described by Secretary Udall as "one result of our intensive review of the Bureau's health and safety activities," which he said had been underway for several months. Primary aims, he said, are to modernize and more effectively coordinate traditional Bureau programs in mine health and safety and related fields, and to prepare it for the assumption of even broader responsibilities.

Secretary Udall explained that he will, in a matter of days, be proposing the first federal health and safety standards ever developed for the Nation's non-coal mines. He said that many of the standards, to be promulgated under authority of the Federal Metal and Non-metallic Mine Safety Act of 1966, will be mandatory and the Bureau of Mines will be charged with their enforcement.

"When these standards become effective," Secretary Udall stated, "the Bureau will be taking on major new responsibilities for the health and safety of some 200,000 workers at non-coal mines, both surface and underground. Add to those the more than 140,000 coal miners for which the Bureau already has some health and safety responsibility, and you have what amounts to a critical mission. Reorganizing the Bureau's health and safety activities for greater efficiency and economy in operation has thus become mandatory."

Sharper definition of research objectives in mine health and safety, and more efficient monitoring of progress toward those objectives, are additional important aims of the reorganization, according to Bureau Director John F. O'Leary. This will be accomplished, he said, by tying operations at the Bureau's Health and Safety Research and Testing Center at Pittsburgh, Pa., more closely to the experience acquired through field offices that have direct responsibility for mine inspection, accident investigation, health and safety training, and related functions.

"The keys to this more effective liaison," O'Leary explained, "are three new top-echelon posts at the headquarters level." These positions, involving both line and staff responsibilities, he named as Assistant Director of Coal Mine Safety, Assistant Director of Metal and Non-metal Mine Safety, and Assistant Director of Mineral Industry Health.

Each of the new assistant directors will exercise line supervision with regard to his field organization. He will also serve in a staff, or advisory, capacity to the Bureau's Associate Director—Health and Safety, who in turn is responsible to the Director of the Bureau of Mines for the total health and safety program.

In addition, O'Leary said, each assistant director will participate in the technical supervision of appropriate research activities at the Health and Safety Research and Testing Center. In this way, he added, the experience of those working directly with mine health and safety problems can be quickly translated into guidance for those who are seeking solutions.

An additional source of information and advice for use in program planning and review will be provided by a newly created Office of Accident Prevention and Education. Reporting directly to the Associate Director—Health and Safety, this office will be responsible for collecting and analyzing statistics on mine accidents and injuries and job-related illness among miners. It also will conduct studies in the behavioral sciences to gain better insight into the fundamental causes of accidents and to aid in developing more effective safety education and training programs.

O'Leary noted that the Bureau's deputy director, Earl T. Hayes, is currently Acting Associate Director—Health and Safety. The Associate Directorship, as well as the newly established positions, will be filled as promptly as possible, he added.

"Naturally," O'Leary said, "we want to get people who are as highly qualified as possible for these critically important jobs, and our selections will be made very carefully." He noted that the organizational changes, of themselves, would not increase the number of positions in the Bureau's Health and Safety Activity. He added, however, that broader and more effective programs are being planned and a substantial number of new positions will be required in order to carry them out.

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U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, D.C., April 28, 1970.

Hon. JOHN H. DENT,  
*Chairman, General Subcommittee on Labor, Committee on Education and Labor, House of Representatives, Washington, D.C.*

DEAR MR. DENT: This will acknowledge receipt of the letter of April 22, 1970, from you and Congressmen Burton and Hechler, concerning the Coal Mine Health and Safety Act of 1969. A full reply will be sent to you shortly.

Sincerely yours,

GENE P. MORRELL,  
*Deputy Assistant Secretary of the Interior.*

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U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SOLICITOR,  
Washington, D.C., June 2, 1970.

Hon. KEN HECHLER,  
*House of Representatives, Washington, D.C.*

DEAR MR. HECHLER: This is in reply to your letters of April 22, 1970 and May 20, 1970, commenting on this Department's enforcement policies under the Federal Coal Mine Health and Safety Act of 1969 and requesting the comments and opinions of this Department. Your letter of February 20, 1970, was answered on April 30, 1970. A detailed response to the April 22, 1970 letter was being prepared, but in the meantime on May 1 and May 14, 1970, protracted meetings were held between representatives of this Department and representatives of both the Senate and House Labor Subcommittees.

The purpose of these meetings—the first of which was attended by the Under Secretary, the Assistant Secretary and me and members of our staff—was to initiate a dialogue concerning enforcement policies and problems under the Act. I am happy to report that the purpose of the meetings was achieved and there developed an extended and candid exchange of views concerning this Department's enforcement plans in general.

Each of the subjects raised in your letters was discussed at some length at these meetings which lasted more than eight hours. It would appear that the staff members from the House Labor Subcommittee who were present—Messrs. Vagley, Finnegan, Bernstein, Baker and Sellers—have not yet had an opportunity to report the results of these meetings to the members of the Subcommittee. I am certain you will find that comprehensive answers to your questions already have been provided.

Inasmuch as further meetings are contemplated, I believe that any other questions can be dealt with most effectively in this way.

One further comment should be made at this time. Difficult enforcement problems have been encountered and this Department is making every effort to meet its obligations under the Act in such a way as to insure the health and safety of the miners. In discharging these responsibilities this administration is not and will not be dominated by any interest group, industry or labor, in the enforcement of the Act.

I am sending copies of this letter to Congressmen Dent and Burton who also signed the April 22 letter.

Sincerely yours,

MITCHELL MELICH, *Solicitor.*

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CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., June 8, 1970.

Hon. WALTER J. HICKEL,  
*Secretary of the Interior,  
Department of the Interior,  
Washington, D.C.*

DEAR SECRETARY HICKEL: Solicitor Melich's letter of June 2, 1970, to Chairman Dent and Congressman Burton, and myself is entirely unresponsive to our joint letter of April 22, 1970, and my letter of May 20, 1970, both to you. Attached is a copy of his letter.

In both letters, we specifically called your attention to a number of issues concerning the Interior Department's administration of the Federal Coal Mine Health and Safety Act of December 30, 1969 (Public Law 91-173; 83 Stat. 742) and requested your response to each of them. In some instances, detailed factual data was requested as part of this response.

While we are completely aware of the meetings held last month with representatives of the Department and House and Senate staff members, we cannot accept Mr. Melich's conclusion that, in the record of those meetings, we "will find that comprehensive answers to your questions have been provided." A considerable amount of the discussion is not, at the request of the Under Secretary and other departmental representatives present, on the record. Further, if Mr. Melich believes the answers are, in fact, in the record then it is his responsibility to identify those portions of the record (copies of which were furnished to the Department) that are intended as a response to each of the issues raised in the above letters.

Further, I cannot agree "that the purpose of the meetings was achieved." It was not.

The purpose of the meetings was to discuss the Department's administration of the law and, hopefully, to explore ways where the Department could substantially improve its administration without further court action. While there was some slight indication on the part of some of the Department's participants to develop new approaches which would largely moot the existing court orders, in nearly a month's time since the last meeting of May 14, 1970, we are unaware of any action by the Department leading to this objective. As a matter of fact,

subsequent *Federal Register* publications have only served to exacerbate the situation further.

I therefore request that your Department provide promptly to me and the members of the House Subcommittee chaired by Congressman Dent a more responsive reply to the above two letters. If your Department cannot

be more responsive, I will urge that the subcommittee hold a public hearing to more fully outline the Department's administration under the new law.

Sincerely,

KEN HECHLER,  
*Member of Congress.*

## (287-C)

## SURVEY FORM 11: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
May 15, 1970	George P. Shultz, Secretary of Labor	Secretary of Labor	Administration's comments on two bills to amend the Fair Labor Standards Act to increase the Federal minimum wage rate and extend coverage of the Act to additional workers.			There was no formal refusal to testify. Neither the Secretary's office nor the Legislative Liaison Office would give a date certain when the Secretary would appear. After waiting a reasonable length of time, the subcommittee concluded 18 days of hearings without receiving the Administration's views.

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE # 307:

Submitted by: (Comm/SubComm)  
House General Subcommittee on Labor  
By: Miss Adrienne Fields  
Title: Administrative Assistant  
Extension

U.S. HOUSE OF REPRESENTATIVES,  
GENERAL SUBCOMMITTEE ON LABOR,  
COMMITTEE ON EDUCATION AND LABOR,  
Washington, D.C., May 15, 1970.

Hon. GEORGE P. SHULTZ,  
Secretary, U.S. Department of Labor,  
Washington, D.C.

DEAR MR. SECRETARY: The General Subcommittee on Labor will begin hearings early in June on proposed amendments to the Fair Labor Standards Act.

In conjunction with scheduling hearings, I have introduced a bill which would establish a new method for imposing minimum wage rates. A copy of the bill, H.R. 17596, is enclosed for your information. The other principal bill before the subcommittee is H.R. 10948, a copy of which is also enclosed.

There are several other bills pending before the subcommittee which would amend the Act. Testimony, therefore, will not be limited to the two cited bills. Rather, we want to have a comprehensive dialogue on the subject matter.

You are invited to appear before the subcommittee to present the views of the Department on these proposals. The dates of June 2, 3, and 4 are available for your appearance.

Would you please notify me as to which date would be convenient for you.

With kindest regards, I am,  
Sincerely yours,

JOHN H. DENT, Chairman.

(287-D)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

In early February, 1970, the subcommittee staff contacted by telephone the Office of Legislative Liaison, Department of Labor. The Office was informed that the subcommittee was starting hearing on private welfare-pension plan legislative proposals and wished to have testimony from the Administration on its proposal, a draft of which had been prepared. The initial response from that Office was that the legislation had not been finalized. To the contrary, the subcommittee staff had been informed by reliable Departmental sources that the Administration's bill had been completed, approved, and was ready for introduction. Subsequent phone calls to the Liaison Office were fruitless. On March 2, 1970, Chairman Dent sent a letter to the Secretary of Labor (self-explanatory copy attached). On March 16, Congressman Ayres introduced the Administration bill (H.R. 16462); on April 15, 1970, the Secretary appeared before the subcommittee and presented testimony on the Administration bill. The Secretary's testimony was very helpful to the subcommittee in determining the final version of a bill to be reported to the full Committee.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILE 287

U.S. HOUSE OF REPRESENTATIVES,  
GENERAL SUBCOMMITTEE ON LABOR,  
COMMITTEE ON EDUCATION AND LABOR,  
*Washington, D.C., March 2, 1970.*

Hon. GEORGE P. SHULTZ,  
*Secretary of Labor,*  
*U.S. Department of Labor, Washington, D.C.*

DEAR MR. SECRETARY: As you know, the General Subcommittee on Labor, of which I am Chairman, is currently in the midst of hearings on proposed private welfare and pension plan legislation. For six months now, we have been hearing reports that the Administration's proposals in this area would be submitted momentarily, but we have yet to see them. I feel that this legislation is of the highest priority and am very anxious to move

Submitted by: (Comm/Subcomm)

House General Subcommittee on Labor

By: Miss Adrienne Fields

Title: Administrative Assistant

Extension

toward final action on it. The fact that an Administration bill has not been introduced is slowing progress considerably. Not only are my colleagues and I at a loss to know what the Department experts feel about the subject, but we are experiencing a great reluctance on the part of other potential witnesses to testify before an Administration bill is introduced.

The millions of American working people whom this legislation will affect should not have to wait interminably for the protection to which they are entitled. It is my intention to begin markup sessions on a bill following the Easter Recess, unless a proposal on the subject is forthcoming from the Administration.

With kindest regards, I am,  
Sincerely yours,

JOHN H. DENT, *Chairman.*

(492)

(287-E)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

By letter of April 5, 1971, Chairman Dent invited Secretary of Labor Hodgson to testify before the subcommittee on H.R. 7130, a bill to amend the Fair Labor Standards Act to increase the Federal minimum wage rate and extend coverage of the Act to additional employees. Follow-up calls were made by the staff, but the Secretary would not respond. On April 16, Chairman Dent wrote a provocative letter to the Secretary (copy attached). On April 27 the Secretary responded by letter indicating he would appear and testify on April 29, 1971.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

FILF 287

U.S. HOUSE OF REPRESENTATIVES,  
GENERAL SUBCOMMITTEE ON LABOR,  
COMMITTEE ON EDUCATION AND LABOR,  
Washington, D.C., April 5, 1971.

Hon. JAMES D. HODGSON,  
*Secretary of Labor,*  
*Department of Labor, Washington, D.C.*

DEAR MR. SECRETARY: The General Subcommittee on Labor will conduct hearings on H.R. 7130 and related bills to amend the Fair Labor Standards Act.

You are invited to appear before the subcommittee and present the Administration's views on the pending legislation or to present any other proposal.

The hearings are scheduled to begin at 10:00 A.M., on Tuesday, April 20, 1971 in Room 2175 R.H.O.B.

Copies of the proposals currently pending before the subcommittee will be forwarded to your office under separate cover.

I will appreciate receiving, at your earliest convenience, a favorable response to this invitation.

With kindest regards, I am,  
Sincerely yours,

JOHN H. DENT.

Submitted by: (Comm/Subcomm)

House General Subcommittee on Labor

By: Miss Adrienne Fields

Title: Administrative Assistant

Extension

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON EDUCATION AND LABOR,  
GENERAL SUBCOMMITTEE ON LABOR,  
Washington, D.C., April 16, 1971.

Hon. JAMES D. HODGSON,  
*Secretary of Labor, U.S. Department of Labor,*  
*Washington, D.C.*

DEAR MR. SECRETARY: On April 5, I invited you to appear before this subcommittee on Tuesday, April 20, to present the Administration's views with respect to H.R. 7130, my bill to amend the Fair Labor Standards Act, or to present any other proposal.

Yesterday, a representative of your office called to say you could not appear because of a schedule conflict. I regret it took ten days to determine a scheduling problem, as we looked forward to hearing from you on the 20th and had arranged our hearing schedule accordingly. Although your representative did not—in cancelling your appearance—indicate your anxiety or willingness to testify at a future date, I would like to invite you to appear on Thursday, April 29. It was not my original intent to extend hearings on the legislation beyond April 22, but I believe it is important for the subcommittee to have the benefit of the

Administration's views on minimum wage legislation. If it is impossible for you personally to appear on the 29th, we would welcome your representative or any individual authorized to present the Administration's views. The hearings simply cannot be extended beyond April 29.

I hope you favor us with an early response to this invitation. I am beginning to be reminded of a similar situation last year when—on May 15 to be precise—I invited the Secretary of Labor to present views on minimum wage legislation before us at that time. Although our hearings were conducted through June, July, August, and September, we were not even afforded the courtesy of a response to an invitation which had been issued several months previous.

I shall look forward to hearing from you.

Sincerely yours,

JOHN H. DENT, *Chairman.*

U.S. DEPARTMENT OF LABOR,  
OFFICE OF THE SECRETARY,  
*Washington, April 27, 1971.*

Hon. JOHN H. DENT,  
*Chairman, General Subcommittee on Labor, Committee on  
Education and Labor, Washington, D.C.*

DEAR Mr. CHAIRMAN: Please be advised that I will appear before the General Subcommittee on Labor on Thursday, April 29, 1971 to present the Administration's views with respect to H.R. 7130, to amend the Fair Labor Standards Act.

Sincerely,

J. D. HODGSON,  
*Secretary of Labor.*

## **FILE 299**

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### **HOUSE SELECT COMMITTEE ON CRIME**

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(299-A)

HOUSE OF REPRESENTATIVES,  
SELECT COMMITTEE ON CRIME,  
*Washington, D.C., March 27, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: You know I am pleased to respond to your inquiry regarding federal officials' noncooperation with the Congress and I am enclosing a copy of your survey form as completed.

You are one minently sound ground in seeking to restore the Congress as a coequal branch of the Federal Government, and I heartily endorse your efforts in this vital undertaking. I look forward to your hearings with great interest.

Warm regards, and  
Believe me,  
Always sincerely,

CLAUDE PEPPER, *Chairman.*

(497)

## (299-B)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)
7-8-69	J. Edgar Hoover, Director Federal Bureau of Investigation	Mr. Hoover	Dimensions of the Crime Problem in the United States	July, 1969	Mr. Hoover, through an assistant	<p>Mr. Hoover testified before Appropriations Committees only, not before any other committees.</p> <p>Comment: The refusal was made by telephone in July, 1969; there is no written documentation of the refusal.</p> <p><u>Attachments:</u></p> <p>1) Copy of letter of request to Mr. Hoover</p> <p>2) News Clipping</p>

Separation of Powers Subcommittee Survey  
U. S. Senate, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-8421, 8422

Submitted by: (Comm/SubComm) Select Committee on Crime, U.S. House of Representatives  
By: Chris Nolden  
Title: Chief Counsel  
Extension 8145

.FILE 299:

HOUSE OF REPRESENTATIVES,  
SELECT COMMITTEE ON CRIME,  
Washington, D.C., July 8, 1969.

Hon. J. EDGAR HOOVER,  
Director, Federal Bureau of Investigation,  
Washington, D.C.

MY DEAR MR. HOOVER: You may have heard that the Select Committee on Crime has been established by Special Resolution of the House of Representatives for the purpose of recommending action programs, whether they be legislative or otherwise, as a response to the crime problem in the United States.

In view of your position as a preeminent authority in this field, the contributions which you can make to our Committee are, of course, substantial, and we hope that you will find it possible to appear as the first witness at our opening hearings on Monday, July 28th.

The initial hearings of our Committee will be designed to set forth the dimensions of the current crime problem in the United States. We shall expressly disavow at these opening hearings any intention of duplicating what other committees and commissions have adequately studied, and it is further not one of our purposes to accumulate additional recommendations on matters upon which all enlightened individuals agree. We hope that our hearings

can be completed expeditiously and that we can set about promptly to implement the conclusions of the Committee.

If you can testify before our Committee, and I earnestly hope that you can, I would be happy to discuss the subject of your testimony further with you over the telephone at your convenience.

Kindest regards, and  
Believe me,

Always sincerely,

CLAUDE PEPPER,  
Chairman, Select Committee on Crime.

[Excerpt from the New York Post, Aug. 2, 1969]

## A DEAF EAR

(By Rowland Evans and Robert Novak)  
WASHINGTON.\* \* \*

\* \* \* \* \*

FBI Director Hoover has shown the same independence of Attorney General Mitchell as of all his previous superiors in the Justice Department by peremptorily refusing a friendly invitation to testify before a select

House committee, despite Mitchell's assurances of full cooperation.

Rep. Claude Pepper of Florida, chairman of the committee given \$375,000 to study causes of crime, had wanted to tap Hoover's vast knowledge of the causes of crime. So, Pepper wrote asking Hoover to lead off the testimony of government experts.

From his Olympian heights, however, Hoover sent a

formal regret. He only testified, he said, before Congressional appropriations committees—never before any other committee.

But before writing to Hoover, however, Pepper had paid a congenial visit to Mitchell to discuss his hearings. Mitchell promised him all the department's resources—presumably including the FBI.

\* \* \* \*



## **FILE 307**

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### **HOUSE COMMITTEE ON PUBLIC WORKS**

#### **SPECIAL SUBCOMMITTEE ON ECONOMIC DEVELOPMENT**

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## (307-A)

## SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

See pages 12, 13, and 15 of attached hearings:  
 STATUS OF PROJECTS AND SEC. 702 UNDER  
 PUBLIC WORKS AND ECONOMIC DEVELOPMENT  
 ACT OF 1965 (90-20), November 15, 1967  
 (Hearing before the Special Subcommittee on  
 Economic Development Programs of the  
 Committee on Public Works, House of Representatives,  
 Ninetieth Congress, First Session)

Separation of Powers Subcommittee SURVEY.  
 U.S. SENATE, March 5, 1973  
 Contact: Joe L. Pecore, Asst. Counsel  
 225-8421, 8422  
 FILE 307

Submitted by: (Comm/Subcomm)  
 Economic Development Subcommittee of the  
 House Public Works Committee  
 By: Carl J. Lorenz, Jr.  
 Title: Counsel, Economic Extension 56151  
 Development Subcommittee

[Excerpt from hearings entitled "Status of Projects and Sec. 702 Under Public Works and Economic Development Act of 1965," before the Special Public Works, House of Representatives, 90th Cong., 1st sess., Nov. 15, 1967, pp. 12-16]

Mr. CRAMER. Mr. Chairman.  
 Mr. EDMONDSON. Mr. Cramer.

Mr. CRAMER. Mr. Chairman, I have a question on the documents that have been requested, very briefly.

Mr. Secretary, I feel obliged to advise you that so far as the minority is concerned, relating to our effort to exercise the function that it is commanded we do by this committee in the form of oversight, that I for one am very unhappy with the lack of cooperation, the inability to get information, that has been experienced by at least the minority side of this staff.

I constantly receive from the staff complaints about lack of cooperation, unwillingness to provide information, lack of openness in discussing subject matters, having to go in and dig out what they are interested in rather than to have it volunteered.

For instance, the staff does not have, and I understand it was just the other day made available to the committee, a complete manual of economic development orders. I think the staff ought to have all the guidelines, regulations, criteria, and standards established.

I think the staff ought to have all of the directives and instructions and reports in whatever form they may be issued. And I think that at least two copies of such docu-

ments ought to be made available to this committee, one to the minority, and that there should be a free flow of information.

Frankly, I for one would have to be less than candid if I did not say that I am very unhappy with the lack of flow of information, the lack of cooperation, and the lack of willingness to provide information when requested.

I would appreciate it, Mr. Secretary, if you would instruct those who have the responsibility of liaison to see that such information is readily available and to be willing to provide it.

Mr. O'MALLEY.<sup>1</sup> Congressman, certainly as far as EDA is concerned there is no minority, so far as this committee is concerned, so far as any Member of Congress is concerned. You are entitled to every bit of information that can be made available to you within legal restrictions.

To my knowledge there has been no complaint from the staff of this committee that they have not received, upon request, any information that they required. Certainly we would be enthusiastic in providing each member of this committee and the staff of this committee with any kind of information to which they desire.

Mr. CRAMER. I am registering such a complaint at this time.

Mr. O'MALLEY. Have you registered it prior with any of us?

<sup>1</sup> Deputy Assistant Security for Economic Development Operations, Economic Development Administration.

Mr. CRAMER. Yes. It has been registered through the staff time and time again, and I am registering it to you at this time.

Mr. O'MALLEY. I will be glad to accept that and see that any derelictions that may have occurred will be eliminated.

Mr. CRAMER. I understand that about the only thing available to this committee as a matter of course are the public announcements, and that information relating to your orders and guidelines and regulations and directives and so forth, has not been readily made available to the committee.

Mr. O'MALLEY. As I say, Congressman, to my knowledge no request has been made by the staff of this committee that has not been fulfilled.

If that is true, I would like to know about it, and I am sure my associates would like to know about it. I am certain Mr. Davis would like to know about it. If those requests have been made and have not been fulfilled, we will determine that, and any request from the staff that is made to me will be fulfilled, and I can assure you of that.

Mr. CRAMER. I would suggest, for instance, that any regulation you adopt or any criteria you adopt or any orders that you issue or instructions that you adopt should automatically come to the staff and to this committee so that we will know whether or not the intent of Congress is being carried out. Only in this manner can we as an oversight committee, properly exercise our function.

Mr. O'MALLEY. We would be glad to cooperate with you in exercising that function.

Mr. EDMONDSON. I certainly want to agree with the gentleman from Florida that when a request comes from the committee staff that there should be proper reply to it. I can tell the gentleman from Florida that this is the first notice that I have had that there was interest in the manual or in the directives and orders of the EDA that had not been satisfied. And I think that there is no question about the right of the minority to have access to that information; and we will certainly cooperate at our end to see that it is made available.

Mr. CRAMER. I will say to the Chairman it has been like pulling teeth to get any information out of this agency.

Mr. HOWARD. Would the gentleman yield?

Mr. CRAMER. Yes.

Mr. HOWARD. If we were to get all the booklets, pamphlets, regulations, and other printed material from the agency, I believe we would still not be informed as to some of the policy operations of the agency.

Mr. O'Malley, I would like to ask you whether or not Mr. Davis is continuing his personal policy of limiting the consideration of projects according to the unemployment rate in specific economic development areas?

Last year Mr. Davis stated that he did not have all the money he needed, and certainly not the amount of money needed to approve all the projects that would normally be approvable. So on his own, he made the decision that he would only consider applications from areas with the highest amount of unemployment.

At that time he stated that many of the counties in the Nation or economic development areas which did qualify

under the act passed by the Congress were not even being considered by the agency.

He stated that some counties have unemployment rates up to 33 percent. And with the amount of money the agency had on hand, they could only look at projects in areas where the employment was down to maybe 15 percent.

Anything below that would not even be considered.

I know that it is not universal, but I would presume that almost all of the projects listed in this booklet are in areas certainly in excess of an unemployment rate of 12 percent. Is that not true?

Mr. O'MALLEY. I would have to review specifically the balance, Congressman; but I would say I know this: that in the last half of the past fiscal year, that is 1967, the investment of EDA moneys in the very high unemployment areas was much greater than it had been in the first 6 months of that fiscal year.

Mr. HOWARD. Have you, in the last few months, been considering or looking at projects in an area where the unemployment rate might be 8 percent?

Mr. O'MALLEY. Yes, we have been looking at them and will continue to look at them.

Mr. HOWARD. This is a change, then, from Mr. Davis' stated policy when he appeared before the subcommittee?

Mr. O'MALLEY. Well, I am not verifying your description of Mr. Davis' statement. I think what he said was that with the limited resources that we have that our policy generally was to look first at the areas of worst need, and from that proceed downward to those areas in which the need was lesser.

Now, it is true that in many of those areas where the unemployment rate is very high that there are no applications or no projects or no economic development process that makes them susceptible to the investment of moneys. That being true, we move down, then, to the next area or to the next lower area and look at that.

It is not to say that because an area has a high unemployment rate that we say to them: Here is money, you invest it. We do not do that. If there is no project there susceptible under criteria to the investment of funds, we move down the line, so it is quite probable that we will reach, under that kind of process, the lowers—

Mr. HOWARD. He stated he would look first to the areas with the greatest unemployment, but the funds available were so small and so limited there was no opportunity for any second looks.

In other words, these areas of 15 to 17 percent unemployment and up were the ones that were using all the money.

Now, if he had all the money he needed, then he would be able to get down to these other areas; but he was not at that time considering applications in an area, of, say, below 12 percent, I believe. He may have said 15, but certainly below 12 percent.

I asked him whether he had staff members in these economic development areas below 12 percent to help municipalities prepare applications and send them on to the agency, and if he was doing that in these low areas, I asked him if that was not a great waste of money since the agency knew these areas were not even going to be considered.

I would think the agency would be able to use the personnel in areas where they are going to at least consider the application. I do not know whether we have anything in writing, that we could get from the agency, to indicate what Mr. Davis' policy was at the time he appeared before this subcommittee and whether we have heard, in writing, or have anything available to us that we might be able to read, indicating that his policy seems to have changed since that time. I think it could save a lot of time, money and effort if people would be told that we are not considering 8, 9, 10, 11 percent areas, and that they should not bother to send in applications, and use the taxpayers' time by having Federal agents come into those areas to help or advise them; we would let them know when we are going to start considering those areas.

With the number of counties that we say are covered by this act, there are many, many of them that are in no better position to obtain Federal help for economic development than the wealthiest counties in the Nation would be as far as the operation goes.

This is done despite the act. You cannot read the act to find out what the agency is doing.

Mr. EDMONDSON. I think the gentleman has a good point. I think if there is a policy at this time with reference to the employment level that is a prerequisite to approval of projects, we would like to know what it is. Is there?

Mr. O'MALLEY. There is no specific level above or below which an application will not be considered.

Mr. EDMONDSON. In other words, there are factors other than unemployment which are evaluated to measure the needs?

Mr. O'MALLEY. There are many factors. As I said to Congressman Howard, it is a good question.

I am sure that the policy generally as described, and I say I am not verifying his description of it as entirely accurate, leads us to look first at those counties where obviously the need is greatest. But as we look at those and nothing is apparent that we should do, we move down the list.

So it is quite possible, Congressman, that with that policy, and without any conflict in that policy, we will reach certain area projects in the lower rate areas, and we have done that.

Mr. HOWARD. If you do look at a project in an area of say 7 percent, if you look at it and consider it now, then that is a change from the policy as stated when Mr. Davis was here.

Mr. O'MALLEY. I do not think it is a change.

Mr. HOWARD. He stated they would not consider one from a 7 percent area, and now he will. That seems to be a change to me.

Mr. CRAMER. Mr. Chairman, I want, for the record, to substantiate my remark, and then I know the gentleman from New Hampshire wants to ask some questions.

But on December 7, 1965, Mr. Enfield, under my instructions, sent a letter to Mr. Francis Dooley, special assistant for congressional liaison:

I would appreciate very much being placed on your mailing list to receive one copy of each publication, directive, and other documents issued by the Economic Development Administration, to implement and carry out the provisions of the Public Works and Economic Development Act of 1965.

The December 13, 1965, reply from Mr. Dooley states:

This will acknowledge your letter of December 7th in which you ask to be put on the mailing list to receive all future Economic Development Administration publications. This has been done as you ask.

We have received nothing but public announcements. And I would like to have those two letters made a part of the record.

Mr. EDMONDSON. Without objection, they will be; and so will the project list that has been supplied. I would like to say that I am very disappointed that there is not a reserve group of projects in larger numbers than just 18 to meet the possibility of a considerable increase in level of activities without reserve projects that have been established to meet that situation.

[Documents referred to follow:]

DECEMBER 7, 1965.

Mr. FRANCIS X. DOOLEY,  
*Special Assistant for Congressional Liaison, U.S. Department of Commerce, Economic Development Administration, Washington, D.C.*

DEAR FRANK: Thank you for your letter of December 2, 1965, and the material you forwarded concerning the Economic Development Program.

I would appreciate very much being placed on your mailing list to receive one copy of each publication, directive, and other documents issued by the Economic Development Administration, to implement and carry out the provisions of the Public Works and Economic Development Act of 1965.

Sincerely yours,

CLIFTON W. ENFIELD.

U.S. DEPARTMENT OF COMMERCE,  
ECONOMIC DEVELOPMENT ADMINISTRATION,  
*Washington, D.C., December 13, 1965.*

Mr. CLIFTON W. ENFIELD,  
*Committee on Public Works,  
House of Representatives,  
Washington, D.C.*

DEAR MR. ENFIELD: This will acknowledge your letter of December 7th in which you ask to be put on the mailing list to receive all future Economic Development Administration publications. This has been done as you ask.

Please let us hear from you if we may be of further help at any time.

Sincerely,

FRANCIS X. DOOLEY,  
*Special Assistant for Congressional Liaison.*

## OFFICE OF PUBLIC WORKS

PROJECTS IN DENIAL-RESERVE STATUS, FISCAL YEAR 1968, AS OF OCT. 31, 1967

Project No.	Date denied	Location	Project type	EDA funds (thousands)					
				Grant	Loan	Total			
<b>ARKANSAS</b>									
Desha: Arkansas City... Water/sewer.....									
08-1-00562	Aug. 20			\$149	\$149	\$298			
08-2-00366	do		Sewage treatment..	8	21	29			
<b>CALIFORNIA</b>									
07-1-00396	do	San Diego: San Diego.	Industrial park...	447	-----	447			
		San Joaquin:							
07-1-00480	Sept. 22	Stockton....	Warehouse/port...	700	-----	700			
07-1-00481	do	do	Port facilities...	750	-----	750			
07-1-00482	do	do	do	238	-----	238			
07-1-00483	do	do	do	750	-----	750			
07-2-00484	do	do	Sewage treatment..	344	-----	344			
07-2-00486	do	do	do	313	-----	313			
<b>COLORADO</b>									
08-1-00607	Oct. 13	Costilla: San Luis...	Tourist center....	514	-----	514			
<b>MASSACHUSETTS</b>									
01-1-00085	Aug. 11	Fall River: Fall River.	Shrine develop- ment.	2,000	2,000	4,000			

## OFFICE OF PUBLIC WORKS—Continued

PROJECTS IN DENIAL-RESERVE STATUS, FISCAL YEAR 1968, AS OF OCT. 31, 1967—Continued

Project No.	Date denied	Location	Project type	EDA funds (thousands)		
				Grant	Loan	Total
<b>MISSISSIPPI</b>						
04-1-00366	Aug. 15	Tallahatchie: Cascilla.	Water.....	\$472	\$118	\$590
<b>NORTH CAROLINA</b>						
03-1-00459	Aug. 11	Columbus: Fair Bluff.....	Water/sewer.....	111	-----	111
03-2-00460	do	do	Sewage treatment..	29	-----	29
<b>NEW MEXICO</b>						
08-1-00326	Sept. 27	Sandoval: San Yadero (Zia Indian Reserva- tion).	Multipurpose community building.	120	-----	120
<b>OREGON</b>						
07-1-00130	Sept. 28	Wasco: The Dalles...	Harbor facilities...	170	-----	170
<b>WASHINGTON</b>						
07-1-00313	Sept. 18	Klickitat: Dalles- port.	Industrial park...	499	499	998
		Total 17 projects.		-----	7,614	2,787
						10,401

Note: No denials reconsidered to date.

## **FILE 308**

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### **HOUSE COMMITTEE ON PUBLIC WORKS**

#### **SUBCOMMITTEE ON INVESTIGATIONS AND REVIEW**

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#### **C O N T E N T S**

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(507)



(308-A)

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON INVESTIGATIONS AND REVIEW  
OF THE COMMITTEE ON PUBLIC WORKS,  
*Washington, D.C., March 20, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, U.S. Senate, Committee on the  
Judiciary, Washington, D.C.*

DEAR SENATOR: For the most part, the various administrative agencies have been responsive and cooperative whenever this Subcommittee has called upon them for testimony and/or information.

There is one very notable exception, however. It cannot be documented in the sense of an absolute refusal to a subpoena, nor otherwise anywhere in writing except for the rather guarded and cautious expressions contained in the enclosed exchange of correspondence between myself and former Postmaster General Winton M. Blount.

It is quite true, however, that Postmaster Blount did decline to testify before our Subcommittee during the last Congress on questions involving the unilateral and in some instances high-handed manner in which the Postal Service undertook to manage its building program and to make the General Services Administration a secondary partner in what theretofore had been the primary responsibility of the GSA.

But among other things, Postmaster Blount instructed employees of the Postal Service not to enter into conversations with Members of Congress in regard to this program, nor to respond directly to any inquiry from any Member of Congress. This much is documented in the record of our hearings, copies of which can be made available to you if you wish.

As for the Blount episode, I did not force the issue by insisting that he personally appear before the Subcommittee. In retrospect, I feel that I probably should have done so. Postal employees still are under instructions not to communicate directly with Members of Congress, and I think this is a thorough outrage.

Sincerely,

JIM WRIGHT,  
*Chairman, Subcommittee on Investigations and Review.*

(509)

(308-B)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

No refusal experienced.

Subcommittee on Separation of Powers Staff note:

See attached documents on Mr. Winton M. Blount's refusal on July 26, 1971.

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-3421, B422

FILE 308

Submitted by: (Comm/Subcomm) House Public Works  
Subcommittee on Investigations and  
By: Walter R. May Review  
Title: Chief Counsel 5-3274  
Extension

JULY 23, 1971.

Hon. WINTON M. BLOUNT,  
*Postmaster General of the United States,*  
*U.S. Postal Service,*  
*Washington, D.C.*

DEAR MR. BLOUNT: As you know, this subcommittee has been holding hearings since July 13 on the Impact of the Postal Building Program on Federal Agencies. During the course of these hearings there has been testimony which relates to the USPS (Post Office Department) and actions which you have taken in its behalf.

With the foreknowledge that these matters would be inquired into, I instructed my staff to contact your office and convey to you the fact that the subcommittee was desirous of your presence for purposes of testimony in order that the record might be developed in full. I understand that on June 28 a representative of your office was advised that the most efficacious date for your appearance would be either July 15 or July 22, and that on July 6 he was informed the date had been firmly set for July 22 at 10:00 a.m.

Subsequently I was told that your office advised my staff on July 15 that you would be unable to appear on the 22nd due to a speaking engagement you had accepted for that date in California, and that you had proposed instead that we have testimony from certain of your

representatives. While I appreciate your offer, their appearance without you was not satisfactory to the needs of the subcommittee and your office was so informed. We were agreeable to adjust the format of our hearing to accommodate you on either July 20 or 21 and so advised your office. When my staff was told that you could not attend on either of those two dates, we made inquiry as to your availability during the week of July 26 and have had no definitive answer to date.

We have received your invitation to have breakfast with you in your office where a few members might discuss these matters with you informally. We appreciate your proffered hospitality and I shall be happy to join you for breakfast on Tuesday. However, an informal off-the-record "briefing" would not satisfy the purposes of the subcommittee. In view of the literally hundreds of millions of dollars of the taxpayers' money which is directly involved in these transactions, we feel very strongly that such information as the subcommittee develops must be divulged in open hearings for the public record.

It is my considered opinion, and I believe that opinion is shared by other members of the subcommittee, that the testimony we have received thus far has been significant and conclusive on the major points covered. It would be helpful, of course, to have your confirmation

and further elucidation on certain details since apparently you personally managed and directed most of the negotiations with which our inquiry is involved.

My purpose in addressing this letter to you at this time is to make the record clear that we have attempted to accommodate your very busy schedule and to offer you the opportunity to appear and clarify any matter which you felt necessitated it. In the absence of a request by you to appear before the subcommittee at some mutually agreeable date next week, we will consider that you have no objections to our closing the transcript and having it printed.

As you are undoubtedly aware, Congress will be in recess during most of the month of August. It may be that, following our resumption in September, the membership of the subcommittee may elect to resume hearings and that your presence may be required at that time.

Very best wishes.

Sincerely,

JIM WRIGHT,  
Chairman, Subcommittee on Investigations  
and Oversight.

THE POSTMASTER GENERAL,  
Washington, D.C., July 26, 1971.

Hon. JIM WRIGHT,  
Chairman, Subcommittee on Investigations and Oversight,  
Committee on Public Works, House of Representatives,  
Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of July 23 regarding the hearings that your Subcommittee has been holding on the impact of the postal building program on Federal agencies. I appreciate your thoughtfulness in writing, and I would like to express my acknowledgement and thanks, both for your offer to let me testify before the transcript is closed and for your effort to accommodate my schedule in this regard.

As you know, the Postal Service has been involved in critically important collective bargaining negotiations that have occupied a major portion of my time during the course of your hearings. After marathon negotiating sessions, we finally reached an agreement that was signed at 4:30 p.m. Tuesday, July 20, and I was thus enabled to keep a commitment in California that I had been hoping to be able to honor, and that required me to leave Washington the next day.

Since my return, I have been very much involved in monitoring employee reaction to the contract in New York City, and in view of the uncertainty of the situation there, I think it best to avoid commitments during the next several days.

Our labor agreement, furthermore, leaves a number of items open for further negotiations, and bargaining over these matters will begin August 16, 1971. In the interim, I shall be deeply involved in work relating to the implementation of the new agreement and preparations for the next round of negotiations. Our top field managers will be meeting with me this week on these and other subjects, and the demands on my time are such that I honestly do not believe I could make a significant contribution to your hearings at this time.

I regret that the Subcommittee did not hear the testimony of Mr. H. F. Faught, Senior Assistant Postmaster General for Mail Processing, whom I had designated as my spokesman for your hearings. His testimony was ready for delivery to your Subcommittee July 20. If you should like to have his statement, I will be glad to make it available.

It is my understanding that representatives of the Corps of Engineers, the General Services Administration, the General Accounting Office and the Office of Management and Budget have all testified before your Subcommittee, as have several officials of the Postal Service. I am sure that the testimony of these witnesses has been significant, and I am not aware of any major addition that I could make to the Subcommittee's understanding of the impact of our postal building program on other Government agencies.

Regarding my involvement in the negotiation of the Corps of Engineers agreement, I also understand that the Subcommittee has entered into the hearing record the text of my letter of April 2, 1971 to Mr. George P. Shultz, Director of the Office of Management and Budget. This letter to Mr. Shultz contains a full report on the Corps of Engineers negotiations, and I will be happy to stand on it. An additional copy is enclosed for ready reference.

In addition, your staff presented mine with some 59 written questions. My staff has drafted answers to these questions, and they are enclosed herewith, with the exception of three answers, containing voluminous technical material, which were delivered to your staff earlier.

Sincerely,

WINTON M. BLOUNT.

*Editor's note: The following addendum report was received without survey report form and is entered here in the files.*

(308-C)

ADDENDUM REPORT

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., May 9, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Government Operations Committee,  
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Recently you inquired of sub-committee chairmen with respect to any difficulties we may have encountered in getting testimony and responses from members of the executive branch of government.

The enclosed may not fall in the category of your inquiry, but might be worthy of consideration in this connection.

As can be seen from the document, the House Committee on Public Works on January 26 initiated an inquiry for executive branch comment on a bill which had been introduced and referred to our committee. Our response finally came through the Office of Management and Budget exactly three months later—on April 26. While this does not constitute a refusal to respond, so long a delay—if this is general—might become a subtle means

of imposing executive reticence upon the committees of Congress.

This is sent for your consideration in connection with your inquiry.

Very best wishes.  
Sincerely,

JIM WRIGHT.

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF MANAGEMENT AND BUDGET,  
Washington, D.C., April 26, 1973.

Hon. JOHN A. BLATNIK,  
Chairman, Committee on Public Works,  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of January 26, 1973, for the views of the Office of Management and Budget on H.R. 1288, a bill "Concerning the allocation of water pollution control funds among the States in fiscal 1973 and fiscal 1974."

In its report to your Committee on H.R. 1288, the Environmental Protection Agency recommends against enactment of the bill and indicates in detail the reasons for their opposition. We concur in the views expressed by the Agency and, accordingly, recommend against enactment of H.R. 1288.

Sincerely,  
WILFRED H. ROMMEL,  
Assistant Director for  
Legislative Reference.

(512)

**FILE 309**

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**HOUSE COMMITTEE ON PUBLIC WORKS**  
**SUBCOMMITTEE ON ENERGY**

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## (309-A)

## SURVEY FORM I: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks. (6)
9/20/72	Mr. John Ricca, Chairman, Emergency Petroleum Supply Committee, Office of Oil & Gas, Department of the Interior  Referred to Mr. Gene P. Morrell, Director, Office of Oil & Gas. On October 2, 1972, Mr. Morrell wrote he would prepare a response to the questions "as soon as possible".	Issue of survival in current lifestyle if U. S. were cut off from oil and gas imports.	Response to request still not received.		Attached is the exchange of letters. There has been no further exchange of communication on this subject.  N.B. - We hesitate to characterize this delay in receiving requested information as a "refusal".  There may be good reason for the delay, but if there is, we have not as yet been advised.  <i>Bellus</i> <i>SD</i>

Separation of Powers Subcommittee SURVEY.  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421  
FILE 309

Submitted by: (Comm/Subcomm)  
Subcommittee on Energy  
House Committee on Public Works  
By: A.J. DiCarlo  
Title: Chief Counsel 53274  
B-374 RHB Extension

[Excerpt from committee print, "Relationship of Energy and Fuel Shortages to the Nation's Internal Development," interim report of the Subcommittee on Flood Control and Internal Development to the Committee on Public Works, House of Representatives, 92d Cong., 2d sess., October 1972, pp. 30-32]

## IMPACT OF IMPORTING

This reliance on imports has created and will continue to create grave national problems, among which are the following:

1. Should the United States be cut off from its imported gas and oil, what would be in store for our citizens? In an effort to find out there was the following exchange of letters between Mr. Howard and the Department of the Interior:

U.S. HOUSE OF REPRESENTATIVES,  
Washington, D.C., September 20, 1972.

Mr. JOHN RICCA,  
Chairman, Emergency Petroleum Supply Committee,  
Office of Oils and Gas, Department of the Interior,  
Washington, D.C.

DEAR MR. RICCA: Last month our Subcommittee on Flood Control and Internal Development held hearings on the Relationship of Energy and Fuel Shortages to the Nation's Internal Development. During those hearings the question was raised as to how long our Nation could

survive in its current "lifestyle" if it were cut off from the oil and gas being imported from out of this hemisphere.

We have been advised that your office is equipped to respond to the question. Accordingly, we would be obliged for any information indicating, if such cut-off were to materialize:

1. The amount of such fuels in storage;
2. The availability of the stored fuels to different parts of the country;
3. The extent to which fuel reserves could be tapped;
4. The availability of these reserves to the rest of the country;
5. To what extent could other fuels be immediately substituted for oil and gas;
6. Would the use of stored, reserve, and substitute fuels enable the country to continue in its current "lifestyle"; if such use would, for how long?
7. If such use would not, what measures would have to be taken; what would be the priorities; what would be the impact—securitywise, socially, economically;
8. Is it possible the Nation would come to a complete "stand-still"? In how long?
9. What plans are there to lessen the severity of these impacts?

Thank you for the background material you sent to Counsel Salvatore J. D'Amico. Your assistance is greatly appreciated.

Sincerely,

JAMES J. HOWARD,  
*Member of Congress.*

U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF OIL AND GAS,  
*Washington, D.C., October 2, 1972.*

Hon. JAMES J. HOWARD,  
*House of Representatives,*  
*Washington, D.C.*

DEAR MR. HOWARD: We are pleased to have an opportunity to provide as meaningful a response as possible to the questions you asked in your letter of September 20, 1972, to Mr. John Ricca, Chairman of the Emergency Petroleum Supply Committee.

The EPSC or its Chairman is not in a position to answer such questions, since the Committee is neither constituted

nor chartered to make continuing assessments of the impact on our Nation of various postulated emergencies.

The Emergency Petroleum Supply Committee while in standby status, and ready for action if called upon, can only be activated if a serious emergency is threatened or actually occurs. The Committee may then make a precise, up-to-the-minute assessment of the situation and recommend actions that would alleviate shortages or minimize the impact of the shortage. If such recommended actions are announced by Government, then the Committee members would carry out such actions.

The Office of Oil and Gas, however, has the ongoing responsibility for continuing assessments of the impact of various postulated emergencies and to maintain in readiness the best conceived mechanisms, plans, and procedures to minimize the impact. Consequently, we will prepare an appropriate response to your questions as soon as possible.

Sincerely yours,

GENE P. MORRELL,  
*Director.*

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*Part IV*

**Reports of Compliance by the  
Executive Branch**

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*Subcommittee Note:* Of the three hundred and eight committees and subcommittees of the Congress, and the Comptroller General of the United States, to which questionnaires were forwarded, sixty-two responded by letters which related either their generally satisfactory experiences in obtaining information from the Executive branch, or their lack of contact with that branch, due to the nature of their responsibilities. An additional twenty-three committees or subcommittees responded simply by endorsing one of the survey forms and returning it to the Subcommittee, using language such as "none," "no refusals," or other words in similar vein.

Review of the letters by which negative response to the survey were reported provides a sufficiently valuable insight into Congressional relationships to justify the reproduction of the letters in this report. Accordingly, these letters are to be found on the following pages, preceded by a list of the Committees and Subcommittees which responded in the negative to this Survey.

## ***Part IV—Reports of Compliance by the Executive Branch***

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\*Response by endorsed survey form only, not reproduced.

<sup>1</sup>Chairman Holifield initially indicated a negative response in his letter of March 30, 1973 (Part IV, File 243). Later, by his letter of April 11, 1973, he reported positive findings, herein identified and reported in File 25-C, Part III.

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(File No. 1)

U.S. SENATE,  
COMMITTEE ON AERONAUTICAL  
AND SPACE SCIENCES,  
*Washington, D.C., March 26, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*Washington, D.C.*

DEAR SAM: This is in response to your letter of March 9, 1972, in connection with your inquiry regarding the providing of information to Congressional committees by officers or employees of the executive branch of the government.

As you know, I have been a member of the Committee on Aeronautical and Space Sciences during only a small portion of the period specified in your letter. However, I am informed that there have been no instances of refusal to provide information as defined in the three categories outlined in your letter. In my experience, the agencies with which this Committee deals, primarily the National Aeronautics and Space Administration, have been unusually open and frank in supplying the Committee with the information that it requires to carry out its responsibilities.

There was an incident during hearings held in 1967 in connection with the Apollo 204 accident at which time there was an initial misunderstanding between the Committee and NASA officials about the nature of the information being sought. While this matter was eventually clarified, some members of the Committee at the time felt that NASA officials had not been as candid as they might have been. Subsequently, however, the evidence is that NASA officials have exerted every effort to insure that further misunderstandings not recur.

I have asked Robert F. Allnutt, Staff Director, to be responsive to any further inquiries you or your staff may have regarding this Committee's relations with the executive branch of the government.

Sincerely,

FRANK E. MOSS, *Chairman.*

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(File No. 5)

U.S. SENATE,  
COMMITTEE ON BANKING,  
HOUSING AND URBAN AFFAIRS,  
*Washington, D.C., March 20, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your letter of March 9 in which you request information regarding the refusal of Federal officers or employees to appear before or to provide information to the Banking, Housing and Urban Affairs Committee or to one of its subcommittees.

As you know, I have been a member of this Committee since January, 1947, and Chairman since January, 1967, and I do not recall an instance where a Federal officer or employee has refused to testify before the Committee during my tenure on the Committee. It is true, of course, that on some occasions when we have invited the head of a department or agency to come before us, he was unable to do so because of conflicting schedules, or the like. Nevertheless, in such cases, he designated one of his subordinates to appear and, in general, the designated official satisfied the Committee's needs.

In addition, I do not recall any incidents where any Federal department or agency has denied furnishing requested information to the Committee. Certainly there have been occasions when Federal witnesses were not prepared to answer questions or to present information at a hearing, but such questions were subsequently answered or the information was submitted to us at a later date. In some cases the information submitted was not responsive and it required us to request that additional information be furnished. This, of course, caused delays that were time consuming but information sought was eventually presented.

I hope that the information contained herein is a sufficient response to your survey.

With best wishes, I am,

Sincerely,

JOHN SPARKMAN, *Chairman.*

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(File No. 8)

U.S. SENATE,  
COMMITTEE ON FINANCE,  
*Washington, D.C., March 30, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,*  
*U.S. Senate,*  
*Washington, D.C.*

DEAR SENATOR ERVIN: This is in reponse to your request for information on instances in which Federal officers or employees have refused to provide information requested by the Committee on Finance.

While it is true that it has sometimes been difficult for the Committee to get information, particularly from the Department of Health, Education, and Welfare, I am inclined to attribute the problem to ineptitude rather than a desire to withhold information. In a few instances the information simply was not available, but the problem has usually been an inability to supply it within a reasonable time.

I hope this information will be helpful.

With every good wish, I am,

Sincerely,

RUSSELL LONG,  
*Chairman.*

(File No. 11)

U.S. SENATE,  
 COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
*Washington, D.C., March 19, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
 on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SAM: I am writing in response to your letter of March 9, 1973, requesting information relating to the refusal of Federal officers or employees to provide information requested by the Committee on Interior and Insular Affairs.

There have been no instances, to my knowledge, of information requested by the Committee being refused. There have been several instances of inordinate delay in furnishing requested information and instances in which the information submitted was either incomplete or not responsive necessitating a further request. While these delays (such as witnesses not having factual details or being unprepared) cause inconvenience, I would not characterize them as "refusals."

If I can be of any further assistance to you, please do not hesitate to contact me.

Sincerely yours,

HENRY M. JACKSON, *Chairman.*

(File No. 16)

U.S. SENATE,  
 COMMITTEE ON RULES AND ADMINISTRATION,  
*Washington, D.C., April 3, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
 U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Recently you wrote me about the survey your subcommittee is conducting on the subject of federal officers or employees refusing to provide information requested by congressional committees and subcommittees over the last nine years.

Since becoming chairman of the Rules Committee, I have not experienced any difficulty in this area. In looking over the Rules Committee records for the period covered by your survey, I have not found any data indicating that the Executive refused to appear and testify before the committee or provide requested information and documents. The same is true regarding my stewardship on the Subcommittee on Aviation, Subcommittee on National Stockpile and Naval Petroleum Services, Joint Committee on Printing, and the Subcommittee on Tactical Air Power.

Should you require further information for the purposes of your survey, please advise me accordingly and I will be pleased to respond in full. I am pleased that you are undertaking this effort and want to do all that I can to assist.

With best wishes, I am,  
 Sincerely,

HOWARD W. CANNON.

(File No. 19)

HOUSE OF REPRESENTATIVES,  
 COMMITTEE ON APPROPRIATIONS,  
*Washington, D.C., March 19, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
 U.S. Senate,  
 Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your inquiries directed to me in my capacity of Chairman of the House Committee on Appropriations and as Chairman of the Defense Subcommittee in regard to problems experienced in obtaining information from the Executive Branch.

I want to be helpful, but it is my considered opinion that on the whole the Committee has not experienced serious and continuing problems in obtaining information from the various departments and agencies of the government. Over the years we have required certain information which we felt necessary to carry out our responsibility of making objective examination of the budget estimates presented to Congress. Of course, there have been some unfortunate instances over the years but, considering the magnitude of information requested by the Committee each year, this has not represented a serious problem.

Of course, our hearing process this year is just becoming fully operative and it may be that the Committee will experience some difficulties. I will be alert to the situation, keeping your interest and the study of your subcommittee in mind.

Best wishes.  
 Sincerely,

GEORGE H. MAHON,  
*Chairman.*

(File No. 22)

U.S. HOUSE OF REPRESENTATIVES,  
 COMMITTEE ON THE DISTRICT OF COLUMBIA,  
*Washington, D.C., March 21, 1973.*

HON. SAM J. ERVIN, Jr.,  
*Chairman, Judiciary Subcommittee on Separation of Powers,  
 U.S. Senate,  
 Washington, D.C.*

DEAR MR. CHAIRMAN: Congressman Ronald V. Dellums, Chairman of our Education Subcommittee, has directed me to reply to your inquiry to him on March 9th in the nature of a committee survey and to advise you that in his brief tenure as chairman, there have been no instances in which Federal officers or employees have refused to testify before or provide information requested by his subcommittee.

As to the period from January 1, 1964, to this Congress, I might state that as Clerk of the Committee during that period, there were no such refusals except the consistent declination of the Federal Budget Office (now OMB) to testify on legislative matters; these rare instances have never been documented by us.

Sincerely yours,

JAMES T. CLARK,  
*Legal Consultant.*

(File No. 24)

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON FOREIGN AFFAIRS,  
*Washington, D.C., March 22, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers,  
Committee on the Judiciary, U.S. Senate,  
*Washington, D.C.*

DEAR MR. CHAIRMAN: This will acknowledge and thank you for your letter of March 9 sent to me as Chairman of the Committee on Foreign Affairs explaining your Subcommittee's survey of the instances in which federal officers have refused to provide information requested by Congressional committees and subcommittees.

I am happy to comply with your request for cooperation in this matter.

Upon receiving your letter and the enclosed survey forms, I directed the Committee staff to examine the Committee records and their own recollections concerning refusals to provide information or to testify by Executive branch officials. As a result of this study, it has been concluded that the Committee can provide no instances within the time period specified by your Subcommittee in which the Committee on Foreign Affairs was denied information which it requested.

It is appropriate to note at this point that the Committee on Foreign Affairs generally has received good cooperation with respect to requested information and witnesses from those departments and agencies of the government over which it has legislative and oversight authority. Subcommittees of the Committee on Foreign Affairs, however, have at times experienced problems in obtaining information and witnesses. It is my understanding that each Subcommittee chairman will have an opportunity to report to you on those situations and that they need not be recounted by me as Chairman of the full Committee.

If I or the staff of the Committee on Foreign Affairs can be of any further assistance to you and your Subcommittee, please feel free to let me know.

With best wishes,

Sincerely,

THOMAS E. MORGAN, *Chairman.*

(File No. 31)

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,  
*Washington, D.C., March 21, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, *Washington, D.C.*

DEAR MR. CHAIRMAN: In reply to your solicitation of March 9, 1973, our Committee has had no occasion of any refusal of witnesses to testify or refusal of requests by our Committee for any agency to produce information.

The survey forms enclosed with your letter are returned.

With kindest regards,

Sincerely yours,

THADDEUS J. DULSKI, *Chairman.*

(File No. 33)

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON RULES,  
*Washington, D.C., April 6, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Committee  
on the Judiciary, U.S. Senate, *Washington, D.C.*

DEAR MR. CHAIRMAN: Chairman Madden asked me to acknowledge and thank you for your nice letter with the enclosed survey forms relative to information which might have been requested by this committee and refused by federal officers or employees.

The staff knows of no such instances of refusal to any request made by the House Committee on Rules, although, of course, we would like to remind you that our committee does not operate like the normal legislative committee since we usually hear Members of Congress only. So we have seldom asked for such information from the Executive Department in the last ten years. However, when we have asked for federal officers to testify on rare occasions or to furnish us with certain information, they have done so to the best of our knowledge.

The Chairman sends his warm, personal regards.

Sincerely,

L. C. BATTLE, *Staff Director.*

(File No. 34)

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON SCIENCE AND ASTRONAUTICS,  
*Washington, D.C., March 30, 1973.*

Chairman, Subcommittee on Separation of Powers,  
Committee on the Judiciary,  
U.S. Senate, *Washington, D.C.*

Attention: Mr. Joe Pecore.

DEAR SIR: The Chairman has received your letter of March 9 requesting information on the refusal of Federal officials or employees to furnish information to the Committee. During the time period January 1, 1964 through February 28, 1973 we had no instances of such refusal, either to subcommittees or to the full Committee.

We did have such an instance in 1960, and we are sending you a copy of the hearings which will explain the matter. Although this instance is not within the time period of your investigation, we thought it would be of interest to you.

Very truly yours,

CHARLES F. DUCANDER,  
*Executive Director and Chief Counsel.*

(File No. 35)

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT,  
*Washington, D.C., March 12, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Committee  
on the Judiciary, U.S. Senate, *Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your letter of March 9, 1973 regarding federal officers or employees

refusing to provide information requested by the Committee, please be advised that no such occasion has arisen during the course of this Committee's existence.

With kindest regards.

Sincerely yours,

MELVIN PRICE, *Chairman.*

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(File No. 36)

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON VETERANS' AFFAIRS,  
Washington, D.C., March 28, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I am pleased to acknowledge your recent letter to me and similar letters to members of our standing Subcommittees requesting certain information for use in your current survey which is designed to document all instances of refusals of Federal officers and employees to comply fully with requests for information of whatever nature by a Congressional Committee or Subcommittee during the time period from January 1, 1974, through February 28, 1973.

We have carefully reviewed our Committee records and find that they reveal no instance which would document any such refusal to comply with a request by either the full Committee or any of our five standing Subcommittees during the mentioned period. It follows, of course, that our relations in this regard with the Executive Branch have been excellent.

In view of the foregoing, we have no data to report as contemplated by your survey forms I, II and III.

Sincerely yours,

WM. J. BRYAN DORN, *Chairman*

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(File No. 37)

COMMITTEE ON WAYS AND MEANS,  
U.S. HOUSE OF REPRESENTATIVES,  
Washington, D.C., March 20, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
on the Judiciary, U.S. Senate,*

DEAR MR. CHAIRMAN: I have just reviewed your letter of March 9, 1973, advising of the survey which your Subcommittee on Separation of Powers is conducting in an effort to document all instances in which Federal officers or employees have refused to provide information requested by Congressional committees and subcommittees during the period from January 1, 1964 through February 28, 1973.

While I certainly understand and appreciate the context within which you are making this survey, and while I am confident your survey will produce very valuable information, there is very little information which I can give you with reference to the Committee on Ways and Means except to say that we have always had, since I have become Chairman, the fullest cooperation from the officials of the Executive Branch in appear-

ing before the Committee on Ways and Means when requested or invited and in providing our Committee with whatever information we have requested as a basis for legislation. Actually, I know of no instance since I became Chairman (January, 1958) in which the Executive Departments have intentionally withheld any information which we have requested or insisted upon. Also, I know of no instance in which executive privilege was claimed on the part of an official in refusing to testify before the Committee.

You understand, of course, that the bulk of the work of the Committee on Ways and Means has involved the development of legislation rather than activities of an investigatory nature, and naturally there would be less occasion for us to encounter the type of problem which your subcommittee is investigating.

I appreciate your interest in advising me of the activities of your subcommittee, and I am confident that you will develop information in the interest of the Congress and in the public interest.

Sincerely yours,

WILBUR D. MILLS, *Chairman.*

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(File No. 40)

U.S. SENATE,  
SELECT COMMITTEE ON STANDARDS AND CONDUCT,  
Washington, D.C., March 28, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: In the absence of the Chairman of the Select Committee on Standards and Conduct, Senator John C. Stennis, your letter of March 9, 1973 has been given to me. The related letter of the Majority Leader encouraging compliance with the survey being undertaken by your letter also is noted.

A search of our Committee files and the recollections of Members and staff who have been with the Committee since its inception, does not reveal any instances in which Federal officers or employees have refused to provide information to us upon our request. Over the past seven and one-half years the Committee has dealt with numerous Federal Departments and Agencies on many questions and to my information and belief has received ample cooperation in each case.

With best personal wishes.

Sincerely yours,

WALLACE F. BENNETT, *Vice Chairman.*

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(File No. 44)

CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON DEFENSE PRODUCTION,  
Washington, D.C., March 26, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SAM: Your letter relating to the survey which you are conducting as Chairman of the Subcommittee on

Separation of Powers is appreciated. You indicate that an effort is being made to document all instances in which Federal officers or employees have refused to provide information requested by Congressional Committees and Subcommittees during the period from January 1, 1964 through February 28, 1973.

Your request has been reviewed for the years indicated, and it is concluded that the Joint Committee on Defense Production has not received refusals for documents or written matter from within the Executive branch.

With best wishes, I am,  
Sincerely,

JOHN SPARKMAN, *Chairman.*

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CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON DEFENSE PRODUCTION,  
*Washington, D.C., March 26, 1973.*

Hon. MIKE MANSFIELD,  
*The Majority Leader,*  
*U.S. Senate, Washington, D.C.*

DEAR MIKE: Reference is made to your letter of March 22, 1973, in which you call attention to the survey which Senator Ervin is conducting as Chairman of the Judiciary Subcommittee on Separation of Powers. In your letter you indicate that the purpose of the survey is to document all instances from January 1, 1964 through February 28, 1973 in which Federal officers or employees have refused to provide information requested by Congressional Committees and Subcommittees.

A review has been made for the period indicated in your letter, and it is concluded that this Committee has not received refusals for documents or written matter from within the Executive branch.

With best wishes, I am,  
Sincerely,

JOHN SPARKMAN, *Chairman.*

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(File No. 48)

CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON PRINTING,  
*Washington, D.C., March 20, 1973.*

HON. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I am advised by the Staff Director of the Joint Committee on Printing that a thorough search of all its files shows no occasion wherein they were refused information by any Executive Department.

With kindest personal regards, I am,  
Very sincerely yours,

HOWARD W. CANNON,  
*Chairman.*

(File No. 51)

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
*Washington, D.C., March 23, 1973.*

HON. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SAM: This letter is in response to yours of March 9, in which you advised me of the inquiry your Committee is conducting.

This is to advise that during the last two years in which I have been Chairman of the Senate Appropriations Subcommittee on Agriculture, Environmental and Consumer Protection, I have not had any instances in which any Administration or Departmental witness refused to appear or furnish any information requested by me or the Subcommittee.

I trust that this is fully responsive to your inquiry. However, if I can be of any further assistance, please do not hesitate to call upon me.

Sincerely,

GALE W. McGEE,  
*Chairman, Subcommittee on Agriculture, Environmental and Consumer Protection.*

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(File No. 54)

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
*Washington, D.C.*  
(Undated<sup>1</sup>)

HON. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your letter of March 9, 1973 regarding the survey being conducted by your subcommittee of all instances in which federal officers or employees have refused to provide information requested by Congressional committees or subcommittees during the period from January 1, 1964 through February 28, 1973.

After consultation with the staff of my subcommittee, I can advise you that there have been no instances in which federal officials or employees have refused to provide information requested by my subcommittee during the aforementioned period.

Sincerely,

BIRCH BAYH,  
*Chairman, Subcommittee for the District of Columbia.*

<sup>1</sup> Received March 23, 1973.

(File No. 61)

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
*Washington, D.C., March 21, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Senate  
Committee on the Judiciary, Washington, D.C.

DEAR MR. CHAIRMAN: In the absence of Senator Stennis, I am responding to your request of March 9, 1973 in connection with the survey being conducted by the Senate Judiciary Subcommittee on Separation of Powers.

There were no instances, during the time period from January 1, 1964 through February 28, 1973, when the Executive Branch refused to honor requests for information or testify before the Subcommittee on Public Works of the Senate Committee on Appropriations. I am returning herewith the survey forms.

Warmest personal regards.

Cordially,

ALAN BIBLE,  
Acting Chairman,  
Subcommittee on Public Works.

(File No. 62)

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
*Washington, D.C., March 16, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in answer to your letter of March 9, 1973, with regard to the survey being conducted by your Subcommittee of all instances in which federal officers or employees have refused to provide information requested by Congressional committees or subcommittees during the period from January 1, 1964 through February 28, 1973.

After consultation with the staff of my Subcommittee, I can advise you that there have been no instances in which federal officials or employees have refused to provide information requested by my Subcommittee during the aforementioned period.

Sincerely,

JOHN O. PASTORE,  
Subcommittee for the Departments of State, Justice,  
Commerce, the Judiciary, and Related Agencies.

(File No. 64)

U.S. SENATE,  
COMMITTEE ON APPROPRIATIONS,  
*Washington, D.C., March 27, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge and thank you for your letter of March 9, 1973, regarding the survey being conducted by the Subcommittee on Separation of Powers.

The Committee records show there has been no instance in which federal officers or employees have refused to testify before this Subcommittee or provide information requested.

Sincerely,

JOSEPH M. MONTOYA,  
Chairman, Treasury, Postal Service and General  
Government Appropriations Subcommittee.

(File No. 73)

U.S. SENATE,  
COMMITTEE ON BANKING, HOUSING  
AND URBAN AFFAIRS,  
*Washington, D.C., March 21, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am using this letter to respond to your requests for information from me both as Chairman of the Subcommittee on International Finance, and as Chairman of the District of Columbia Committee, Subcommittee on Business, Commerce and Judiciary.

I became Chairman of the International Finance Subcommittee in January 1973, and as yet, have had no occasion to request the cooperation of any members of the Executive Branch. I would suggest that your staff contact Mr. Dudley O'Neal, staff director and general counsel of the Banking Committee. He should be able to provide earlier records of the Subcommittee under previous chairmen.

As Chairman of the District of Columbia Committee, Subcommittee on Business, Commerce and Judiciary since 1971, I have been privileged to work with members of the District Government. They have always been courteous, prompt, and helpful to requests from the Subcommittee. Again, if you think that information prior to 1971 would be relevant, I would suggest that your staff contact Mr. Robert Harris, staff director of that Committee.

I applaud your efforts on this important issue and hope they will cause the Executive to be more cooperative when receiving Congressional requests for information.

With warm regards,

Sincerely,

ADLAI STEVENSON III.

(File No. 79)

U.S. SENATE,  
COMMITTEE ON FINANCE,  
*Washington, D.C., March 26, 1973.*

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for forwarding to me the materials prepared in connection with your survey to document instances in which Federal officers or employees have refused to provide information requested by Congressional Committees and Subcommittees.

I regret that I am unable to supply such information on the part of the Subcommittee on State Taxation of Interstate Commerce. This Subcommittee has just recently been formed and has not, as of yet, held any hearings or sought any information whatever from Federal officers or employees. If, in the course of carrying out the Subcommittee's work we are faced with this situation we will, of course, notify you of each specific instance. Should you need any further information in this regard, we will be happy to make it available to you.

With warmest regards, I am,

Sincerely yours,

WALTER F. MONDALE.

(File No. 103)

U.S. SENATE,

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
Washington, D.C., March 27, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SAM: Thank you for your letter of March 9 requesting a report on the instances in which Federal officers or employees have refused to provide information which was requested by the Subcommittee on Water and Power Resources of the Senate Interior Committee.

Senator Jackson, on March 19, responded to your inquiry on behalf of the Interior Committee. I am in accord with his report that the record is one of delay or inadequate responses rather than of refusals to respond. I can document no refusal to respond to official inquiries made in regard to Water and Power Subcommittee business.

If I can be of assistance in your further investigations, please call upon me.

Sincerely yours,

FRANK CHURCH,  
Chairman, Subcommittee on Water  
and Power Resources.

(File No. 116)

U.S. SENATE,

COMMITTEE ON LABOR AND PUBLIC WELFARE,  
Washington, D.C., March 22, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your letter of March 9 regarding the survey of Executive Branch response to committee requests for information. Since its establishment in the first session of the 91st Congress, the Special Subcommittee on the National Science Foundation has experienced no instances in which officials of the Executive Branch refused to provide information or refused to appear and testify.

Sincerely,

EDWARD M. KENNEDY,  
Chairman, Special Subcommittee on the  
National Science Foundation.

(File No. 120)

U.S. SENATE,

COMMITTEE ON POST OFFICE AND CIVIL SERVICE,  
Washington, D.C., March 22, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In reference to your letter of March 9 asking that I document instances in which Federal officers or employees have refused to provide information requested by my Subcommittee on Compensation and Employment Benefits, I am writing to inform you that whatever material is available in this regard has already been provided by the full Post Office and Civil Service Committee in their response.

I have been assured by the Committee staff that their response was as comprehensive as possible, therefore, I trust that my Subcommittee has been taken care of for your purposes.

For your convenience in filing this response, I am enclosing copies of the forms you sent which are, I understand, specially numbered.

With kind regards, I am,

Sincerely,

QUENTIN N. BURDICK,  
Chairman, Subcommittee on  
Compensation and Employment Benefits.

(File No. 128)

U.S. SENATE,

SUBCOMMITTEE ON AGRICULTURAL PRODUCTION,  
MARKETING, AND STABILIZATION OF PRICES,  
COMMITTEE ON AGRICULTURE AND FORESTRY,  
Washington, D.C., March 16, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I have received your letter of March 9 requesting information on instances in which information, and requests for information, was denied to my Subcommittee on Agricultural Production, Marketing and Stabilization of Prices.

To date, no request for information, reports or appearances by government employees has been denied.

I hope that this information will be helpful to you in preparing your report.

With kind regards,

Sincerely,

WALTER D. HUDDLESTON,  
Chairman.

(File Nos. 137 and 138)

U.S. SENATE,

COMMITTEE ON ARMED SERVICES,  
Washington, D.C., March 23, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Committee on Separation of Powers,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In connection with your letters of March 9 to me as Chairman of the Arms Control Sub-

committee and the Nuclear Test Ban Treaty Safeguards Subcommittee of the Armed Services Committee, I do not recall any significant instance in which federal officers or employees have refused to provide information requested by those Subcommittees during the period from January 1, 1964 through February 28, 1973.

Sincerely yours,

HENRY M. JACKSON,  
Chairman, Subcommittee on Arms Control, and Sub-  
committee on Nuclear Test Ban Treaty Safeguards.

(File No. 147)

U.S. SENATE,  
COMMITTEE ON BANKING, HOUSING  
AND URBAN AFFAIRS,  
Washington, D.C., March 21, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, U.S.  
Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am using this letter to respond to your requests for information from me both as Chairman of the Subcommittee on International Finance, and as Chairman of the District of Columbia Committee, Subcommittee on Business, Commerce and Judiciary.

I became Chairman of the International Finance Subcommittee in January 1973, and as yet, have had no occasion to request the cooperation of any members of the Executive Branch. I would suggest that your staff contact Mr. Dudley O'Neal, staff director and general counsel of the Banking Committee. He should be able to provide earlier records of the Subcommittee under previous chairmen.

As Chairman of the District of Columbia Committee, Subcommittee on Business, Commerce and Judiciary since 1971, I have been privileged to work with members of the District of Columbia Government. They have always been courteous, prompt, and helpful to requests from the Subcommittee. Again, if you think that information prior to 1971 would be relevant, I would suggest that your staff contact Mr. Robert Harris, staff director of that Committee.

I applaud your efforts on this important issue and hope they will cause the Executive to be more cooperative when receiving Congressional requests for information.

With warm regards,

Sincerely,

ADLAI STEVENSON III.

(File No. 156)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
Washington, D.C.  
(Undated.<sup>1</sup>)

Mr. JOE PECORE,  
Assistant Counsel,  
Subcommittee on Separation of Powers,  
Senate Judiciary Committee.

DEAR MR. PECORE: On behalf of Senator Hruska, I am responding to the letter from Senator Ervin on the subject

of federal officers refusing to provide requested information to the Subcommittee on Federal Charters, Holidays, and Celebrations.

It is my understanding that no federal officer or employee has refused to give such information to the above subcommittee within the time frame specified in Senator Ervin's letter.

If you have any further questions on this matter, please contact me at your convenience (5-6551).

J. CHARLES BRUSE,  
*Legislative Assistant*  
*of Senator Roman L. Hruska.*

(File No. 158)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON IMPROVEMENTS  
IN JUDICIAL MACHINERY,  
Washington, D.C., April 25, 1973.

Mr. JOE L. PECORE,  
Assistant Counsel,  
Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.

DEAR MR. PECORE: Your survey on executive privilege which was sent to Senator Burdick as chairman of the Subcommittee on Improvements in Judicial Machinery was referred to me for completion. The subcommittee has not, to my knowledge, had any occasion where officials have refused to produce exhibits or to appear and give testimony. Therefore, I am returning your forms.

Sincerely,

MICHAEL J. MULLEN,  
*Deputy Counsel.*

(File No. 161)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON PATENTS,  
TRADEMARKS, AND COPYRIGHTS,  
Washington, D.C., March 14, 1973.

JOE PECORE, Esq.,  
Assistant Counsel, Subcommittee on Separation of Powers,  
Washington, D.C.

DEAR Mr. PECORE: Senator McClellan has directed me to respond to Senator Ervin's letter and questionnaire concerning Executive Privilege.

The answer to each question in the Subcommittees, questionnaire is "none". Much of the work of this Subcommittee is devoted to the consideration of copyright legislation. The Copyright Office is part of the legislative branch of the Government and consequently the issue of Executive Privilege would not arise in that phase of this Subcommittee's activity.

Sincerely,

THOMAS C. BRENNAN,  
*Chief Counsel.*

<sup>1</sup> Reply received March 19, 1973.

(File No. 169)

U.S. SENATE,  
COMMITTEE ON PUBLIC WORKS,  
*Washington, D.C., March 19, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

**DEAR MR. CHAIRMAN:** Thank you for your letter of March 9 advising me of the survey being undertaken by your Separation of Powers Subcommittee to determine the degree to which government agencies and the Executive may have denied Congress access to requested information during the past decade.

Because of my own strong conviction that the legislative branch has both the right and duty to demand any government data which is essential to effective performance of our public responsibilities, I am in complete and whole-hearted accord with the objective of the inquiry you are initiating.

Therefore I want to assure you of my fullest support and cooperation both as Chairman of the Senate Public Works Subcommittee on Water Resources and as an individual Senator in carrying out this vitally important project.

Having been Water Resources (formerly Flood Control-Rivers and Harbors) Chairman only since January, I am relying on the knowledge of past and present staff members with whom I have discussed the matter when I report that there appears to have been no cases since 1964 in which requested information was withheld from the subcommittee by government agency or Administration sources.

Should evidence of such denial to this subcommittee or other branches of Congress come to my attention, however, you may be certain that I will advise you or your staff immediately.

Meanwhile, you have my every good wish for the success of your vital undertaking.

Most sincerely,

MIKE GRAVEL,  
*Chairman, Subcommittee on Water Resources.*

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(File No. 171)

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C., March 22, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, U.S. Senate, Washington, D.C.*

**DEAR MR. CHAIRMAN:** This is in reference to your letter in which you asked me to document all instances in which federal officers or employees have refused to provide information requested by my Subcommittee on Disaster Relief.

As this Subcommittee was newly created in this Congress, I am unable to provide the information you request. I am, this week, beginning an extensive series of hearings into our disaster relief laws and should I experience problems with the federal officers, I will be sure to con-

tact your Subcommittee. At this time, however, this Subcommittee on Disaster Relief has nothing to report.

For purposes of your files, I am enclosing a copy of the survey form which you sent as I understand they are specially numbered.

With kind regards, I am,

Sincerely,

QUENTIN N. BURDICK,  
*Chairman, Subcommittee on Disaster Relief.*

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(File No. 174)

U.S. SENATE,  
COMMITTEE ON RULES AND ADMINISTRATION,  
SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS,  
*Washington, D.C., March 15, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Senate Office Building, Washington, D.C.*

**DEAR MR. CHAIRMAN:** In reply to your letter of March 9, 1973, requesting data on refusals by Federal officers or employees to furnish information to Congressional committees and subcommittees during the period from January 1, 1964, through February 28, 1973, the Subcommittee on Privileges and Elections of the Committee on Rules and Administration has no instances of any such refusals to report.

For your committee's files, I am returning the survey forms, file number 174.

Warm regards.

Sincerely,

CLAIBORNE PELL,  
*Chairman, Subcommittee on Privileges and Elections.*

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(File No. 178)

U.S. SENATE,  
COMMITTEE ON RULES AND ADMINISTRATION,  
*Washington, D.C., March 19, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

**DEAR MR. CHAIRMAN:** This will acknowledge your letter of March 9, 1973, with reference to your Subcommittee conducting a survey in an effort to document all instances in which Federal officers or employees have refused to provide information requested by Congressional committees during the period from January 1, 1964, through February 28, 1973.

I am anxious to cooperate with you fully, but the Subcommittee on the Restaurant has not, to my knowledge, at any time during this period requested information from Federal officers or employees. The very nature of our work precludes our having information which would be helpful to you.

As you requested, enclosed is the survey Form 1, properly completed.

With every good wish,

Sincerely,

JAMES B. ALLEN,  
*Chairman, Subcommittee on the Restaurant.*

(File No. 181)

U.S. HOUSE OF REPRESENTATIVES,  
 SUBCOMMITTEE ON STATE DEPARTMENT  
 ORGANIZATION AND FOREIGN OPERATIONS,  
 COMMITTEE ON FOREIGN AFFAIRS,  
 Washington, D.C., April 30, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
 on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: The pressure of other Committee business has delayed my earlier acknowledgement of the survey you are undertaking on the subject of availability of information from the Executive Branch.

As Chairman of the Subcommittee on State Department Organization and Foreign Operations I have not experienced any difficulty in securing whatever material the subcommittee has needed in connection with its legislative oversight responsibilities. There are, of course, the usual occasions when the witness did not have with him the details sought but this has been supplied subsequently for the record.

Sincerely yours,

WAYNE L. HAYS,  
*Chairman.*

(File No. 184)

U.S. HOUSE OF REPRESENTATIVES,  
 SUBCOMMITTEE ON ASIAN AND PACIFIC AFFAIRS,  
 COMMITTEE ON FOREIGN AFFAIRS.  
 Washington, D.C., March 19, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, U.S.  
 Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you very much for your letter and survey of March 9, 1973.

I have just assumed the chairmanship of the Subcommittee on Asian and Pacific Affairs. As far as I know, my predecessors have not had any difficulty in obtaining information from the Executive Branch.

As Chairman of Postal Subcommittees, I have experienced reluctance to answer questions, but with persistence this was usually cleared up.

Sincerely,

ROBERT N. C. NIX, *Chairman.*

(File No. 189)

COMMITTEE ON FOREIGN AFFAIRS,  
 HOUSE OF REPRESENTATIVES,  
 Washington, D.C., March 22, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
 on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This will acknowledge and thank you for your letter of March 9 written to me in my role as Chairman of the Special Subcommittee on Review of Foreign Aid Programs. I appreciate hearing from you and will do what I can to be of assistance.

As you may know, the Subcommittee for the Review of Foreign Aid Programs is composed of the senior mem-

bers of the full Committee and has as its purpose exercise of the oversight responsibilities for foreign economic and military assistance. On receiving your letter, I directed the Subcommittee staff consultant and other members of the Committee staff who have conducted investigations under the auspices of the Subcommittee to review the files and report to me about any instances in which information had been denied by Executive branch officials.

As a result of this review it has been determined that no instances of refusal occurred during the time period in which your Subcommittee is interested.

If I can be of any further assistance to you in this matter in my role as Chairman of the Special Subcommittee on Review of Foreign Aid Programs, please feel free to contact me again.

With best wishes,  
 Sincerely,

THOMAS E. MORGAN,  
*Chairman, Special Subcommittee  
 on Review of Foreign Aid Programs.*

(File No. 195)

CONGRESS OF THE UNITED STATES,  
 HOUSE OF REPRESENTATIVES,  
 Washington, D.C., March 15, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
 on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for your recent communication, addressed to me in my capacity as Chairman of the Subcommittee on Cotton of the House Committee on Agriculture, relative to the accessibility of information from the various Federal agencies and their employees.

I certainly recognize the importance of this survey and am more than happy to cooperate in any way I possibly can. However, as I have just assumed this subcommittee chairmanship with the convening of the 93rd Congress, I do not feel that I am in a position to properly comment on difficulties the subcommittee may have encountered in this regard dating back to January 1, 1964. I am taking this opportunity to return the survey form to you as well.

With warm regards,  
 Sincerely,

B. F. SISK,  
*Member of Congress.*

(File No. 197)

HOUSE OF REPRESENTATIVES,  
 COMMITTEE ON AGRICULTURE,  
 Washington, D.C., March 14, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
 Senate Committee on the Judiciary.*

DEAR MR. CHAIRMAN: Thank you for your letter requesting information about instances in which federal officers or employees have refused to provide information requested by my subcommittee.

I assumed the position of chairman of the Forests Subcommittee in this Congress. I have been advised by

the members of the staff of the House Committee on Agriculture that there have been no instances in which requested information has been refused.

With kindest personal regards,  
Sincerely,

JOHN R. RARICK,  
*Chairman, Subcommittee on Forests.*

(File No. 202)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
*Washington, D.C., March 14, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I have received your letter of March 9th and the attached forms concerning the survey on instances where government officials have refused to testify or produce information requested by Congress.

During my experience as a Subcommittee Chairman, there has been no occasion when testimony has been refused or information was withheld by government officials. I am, therefore, returning the survey forms for your further use.

With best regards, I am,  
Sincerely yours,

JOSEPH P. VIGORITO,  
*Member of Congress.*

(File No. 221)

COMMITTEE ON INTERIOR  
AND INSULAR AFFAIRS,  
U.S. HOUSE OF REPRESENTATIVES,  
*Washington, D.C., March 15, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: In response to your letter of March 9 regarding instances of Federal departments refusing to testify or produce information, I am returning the requested report.

You will note that during the period January 1, 1964 through February 28, 1973, the Subcommittee on Public Lands has no record of any refusal.

Sincerely,  
JOHN MELCHER,  
*Chairman, Subcommittee on Public Lands.*

(File No. 224)

COMMITTEE ON SCIENCE AND  
ASTRONAUTICS,  
HOUSE OF REPRESENTATIVES,  
*Washington, D.C., March 29, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I am returning the forms furnished by your Subcommittee, File number 224, since the Subcommittee on Manned Space Flight which I chair,

has no occasions where information, documents, or testimony was refused to the Subcommittee.

If there are any questions, members of your staff may contact Mr. J. E. Wilson (ext. 56373) of the Committee staff.

Sincerely,

DON FUQUA,  
*Chairman, Subcommittee on Manned Space Flight.*

(File No. 225)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
COMMITTEE ON SCIENCE AND ASTRONAUTICS,  
*Washington, D.C., March 15, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for your letter of March 9 regarding the Subcommittee survey concerning cooperation of the executive branch with committees of Congress.

To my knowledge, there have been no cases in which an officer has refused to appear or information has been denied the Subcommittee on Space Science and Applications.

I hope this information is helpful.

Sincerely,

JAMES W. SYMINGTON,  
*Chairman, Subcommittee on Space Science  
and Applications.*

(File No. 234)

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C., March 20, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee  
on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: As requested, I am pleased to return the survey forms which accompanied your letter of March 9, 1973.

As you will note from the forms, the Subcommittee which I am privileged to chair was established this Congress. Therefore, we have as yet had no occasion to make requests falling within the scope of your survey.

Sincerely yours,

WILLIAM L. HUNGATE,  
*Chairman, Special Subcommittee on Reform  
of Federal Criminal Laws.*

(File No. 236)

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON HOUSE ADMINISTRATION,  
*Washington, D.C., March 27, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Please find enclosed copies of the survey forms which you have sent to me in my capacity as Chairman of the Subcommittee on Elections.

Since I have been Chairman only since January, I have no first-hand knowledge of difficulty in obtaining documents from the Executive branch. The files of the Subcommittee give no indication of such refusals either. I have indicated this on the first sheet of the enclosed survey form. If I can be of any other assistance please contact me.

With every kind regard, I am,

Sincerely yours,

JOHN H. DENT,  
Chairman, Subcommittee on Elections.

(File No. 242)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., March 15, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary.

DEAR MR. CHAIRMAN: Thank you for your letter of March 9 in which you ask me to document all instances in which Federal offices or employees have refused to provide information requested by the Subcommittee on Personnel of the House Administration Committee.

Please be advised that the jurisdiction of the Subcommittee on Personnel relates only to the House of Representatives. Consequently, it has not been necessary for me, as Chairman of the Subcommittee on Personnel, to request any information from Federal officers or employees in the Executive Branch of government.

With every best wish, I am,

Sincerely,

FRANK ANNUNZIO,  
Member of Congress.

(File No. 243)

HOUSE OF REPRESENTATIVES,  
LEGISLATION AND MILITARY  
OPERATIONS SUBCOMMITTEE OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., March 30, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, U.S.  
Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of March 9 requested information from the chairman of each subcommittee with regard to Executive Branch withholding of information from the Congress. This letter is written in my capacity as Chairman of the Subcommittee on Legislation and Military Operations.

I regret to say that this subcommittee does not have information in readily available form on withholding by the Executive Branch. In the years covering your survey, we have had many discussions and negotiations with the Department of Defense and other agencies regarding the availability of given persons, documents, or items of information. Generally we have not resorted to formal written requests for information or the appearance of persons when we knew in advance that they would not be available for one reason or another.

As you well understand, there are many reasons why information is withheld, some valid, others arguable or improper. On the whole we have received good cooperation in obtaining information necessary for our investigative and legislative purposes. We have been less interested in confrontations than in getting the job done, and we do not have too many complaints.

I trust that other chairmen of Government Operations subcommittees will be able to supply more specific information.

Sincerely yours,

CHESTER HOLIFIELD, Chairman.

(File No. 244)

HOUSE OF REPRESENTATIVES,  
GOVERNMENT ACTIVITIES SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
Washington, D.C., April 3, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Many thanks for your letter requesting my comments on any difficulties my Subcommittee may have had in obtaining information which we requested from the Executive Branch. This is an important problem, and I congratulate you and your Subcommittee for undertaking this survey.

It would be most difficult to attempt to document specific instances of refusals that may have occurred since January 1964, as all of our records have been sent to Archives for storage. In fairness, I must say that complete denials of information requests have been very rare.

Problems have generally been caused by delays in submitting requested information, or by the agencies not having the information in the form in which it was requested. This latter problem, in my opinion, compromises the work of the Legislative Branch to a substantial degree. The Executive Branch collects data in a format designed to support its needs, not necessarily those of the Congress. For this reason, Congress included in the Legislative Reorganization Act of 1970 a provision requiring that the Office of Management and Budget, in cooperation with the General Accounting Office, develop a standardized data system which would serve the needs of both the Executive and the Legislative Branches.

I realize that this is not precisely the issue with which your Subcommittee is concerned at the present time, but I do think they are inseparable. We must not only deal with intentional denials of information by the Executive Branch, but we must also get to the heart of the problem, which, all too often, is that the information just does not exist in a manner in which we can use it.

I appreciate the opportunity to comment on this issue, and I wish you well in your continuing investigation. You might consider expanding it to include the problem I have mentioned above.

With every good wish, I am,

Sincerely,

JACK BROOKS, Chairman.

(File No. 252)

HOUSE OF REPRESENTATIVES,  
ARMED SERVICES SUBCOMMITTEE NO. 3,  
Washington, D.C., March 16, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Committee on the Judiciary, Subcommittee on  
Separation of Powers, Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your March 9 letter. I have no memory of any refusal of anyone in the Executive Branch to cooperate with my subcommittee and, therefore, I have not filled out the forms since I have no information to put upon them.

With kindest personal regards, I am,  
Sincerely,

CHARLES E. BENNETT.

(File No. 263)

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CENSUS AND  
STATISTICS OF THE COMMITTEE ON  
POST OFFICE AND CIVIL SERVICE,  
Washington, D.C., March 14, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Committee  
on the Judiciary, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of March 9th concerning the survey your Subcommittee is conducting in an effort to document all instances in which Federal officers or employees have refused to provide information requested by Congressional Committees and Subcommittees.

My election to be Chairman of the Census and Statistics Subcommittee took place on March 1st, and prior to that date I did not hold a Committee Chairmanship.

Therefore, I have no such instances to report at this time. Should circumstances arise of which I feel your committee should be made aware, I will be in contact with you.

With best regards, I am,  
Sincerely yours,

RICHARD C. WHITE, Chairman.

(File No. 264)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
COMMITTEE ON APPROPRIATIONS,  
Washington, D.C., March 15, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Senate  
Judiciary Committee, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of March 9, 1973, with enclosures.

I am sending this on to the Subcommittee asking that they supply the information which you request.

With best wishes,  
Sincerely,

JAMIE L. WHITTEN,

Chairman, Appropriations Subcommittee on Agriculture-Environmental and Consumer Protection.

36-653-74--35

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
COMMITTEE ON APPROPRIATIONS,  
Washington, D.C., March 20, 1973.

Hon. SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers, Senate  
Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: With further reference to your letter of March 9, 1973, this is to report that there has been no instance in which federal officers or employees have refused to provide information requested by the Agriculture-Environmental and Consumer Protection Subcommittee on Appropriations during the period January 1, 1964 through February 28, 1973.

During that period, the Subcommittee had no occasion to request information emanating from the White House or relating to the internal proceedings of the Office of Management and Budget.

The pre-numbered reply forms transmitted with your letter are returned herewith.

Sincerely,

JAMIE L. WHITTEN,  
Chairman, Appropriations Subcommittee on Agriculture-Environmental and Consumer Protection.

(File No. 269)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., March 15, 1973.

Hon. SAM J. ERVIN, Jr.,  
U.S. Senator,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you so much for your letter of March 9th. I have just talked with my former Clerk of the Interior Subcommittee on Appropriations and neither of us recalls any instances where we have been denied information concerning any agency under our purview. Our Committee has been very fortunate in always having been supplied with all data requested by us from the agency.

The great gap in appropriation hearings and budget submissions, however, is the failure of anyone from the Office of Management and Budget to appear. An agency will come before us, having allocated money in the budget as it left their department, and yet, when that agency appears before us, those allocations have been cut by the OMB. It is this single lapse of responsibility in the budget process that gives us difficulty.

For instance, this year the Smithsonian budget was increased by 25 million, yet the Forest Service budget and other natural resource agencies show no increase for the management of resources, per se. The Arts and Humanities was increased sizably, and yet the Bureau of Sport Fish and Wildlife's budget was cut in the category of recreational programs. What consideration of programs was made at the Office of Management and Budget to cut one agency and yet allow another agency complete freedom of spending?

There was the statement made, "We feel this is the local and state's responsibility". Now obviously, an overall yardstick is not used at the Office of Management and

Budget. Programs stand or fall by the determination of the particular bureaucrat in the OMB dealing with an agency with which he is charged.

Thank you so much for your inquiry, and if anything occurs through a careful re-examination of our file, we will notify you immediately.

With my warmest personal regards, I am,  
Yours most sincerely,

JULIA BUTLER HANSEN,  
*Member of Congress.*

(File No. 282)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
*Washington, D.C., April 30, 1973.*

HON. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
Washington, D.C.*

DEAR MR. CHAIRMAN: Please excuse the delay in responding to your recent questionnaire requesting information involving denial by the Executive Branch of requests by the subcommittee for information essential in the discharge of our legislative responsibilities. I have recently reorganized my subcommittee staff and experienced some delay in discussing the matter with the present staff director's predecessor.

At this point, I can state that we fortunately have not experienced any difficulties of the nature set forth by your excellent questionnaire, but certainly I will immediately advise your staff should such occurrences arise in the future.

Permit me also to express my appreciation and admiration for the splendid manner in which you and your staff are conducting the current investigation of the deplorable Watergate incident.

Sincerely yours,

FERNAND J. ST GERMAIN,  
*Member of Congress.*

(File No. 283)

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON INTERNATIONAL FINANCE  
OF THE COMMITTEE ON BANKING AND CURRENCY,  
*Washington, D.C., March 28, 1973.*

HON. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
Senate Judiciary Committee, Washington, D.C.*

DEAR SENATOR: I have your letter and survey form regarding instances in which federal officers or employees have failed to provide, or refused to provide, requested information.

During my tenure as Chairman of this Subcommittee, no official has refused to provide me requested information. On occasion, information has been given reluctantly, but in no instance have I had anyone refuse to provide requested data. Should there be any such incident, I will report it to you promptly.

With best wishes, I am,  
Sincerely yours,

HENRY B. GONZALEZ,  
*Member of Congress.*

(File No. 293)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
*Washington, D.C., March 22, 1973.*

HON. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
Committee on the Judiciary, U.S. Senate.*

DEAR MR. CHAIRMAN: To date, my subcommittee has not been refused information requested from federal departments and agencies.

Thank you for your inquiry.  
Sincerely,

W. S. (Bill) STUCKEY, Jr.,  
*Chairman, House District Subcommittee  
on Business, Commerce and Taxation.*

(File No. 295)

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
DISTRICT OF COLUMBIA COMMITTEE,  
*Washington, D.C., March 14, 1973.*

SENATOR SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
Committee on the Judiciary.*

DEAR SENATOR: I appreciated receiving your letter of March 9 regarding your Subcommittee's survey.

Unfortunately, the Government Operations Subcommittee of the House District of Columbia Committee was newly created in January, 1973 and had no prior counterpart. Thus, we have no experiences in this area to share with you.

Your study is certainly an important one and I hope your survey is successful. Please be assured we will keep your investigation in mind and relate to you any problems we might encounter in the near future.

Yours very truly,

BROCK ADAMS,  
*Chairman, Subcommittee on  
Government Operations.*

(File No. 302)

CONGRESS OF THE UNITED STATES,  
 HOUSE OF REPRESENTATIVES,  
*Washington, D.C., March 15, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Subcommittee on Separation of Powers, Committee on the  
 Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for your letter of March 9, 1973, with enclosed survey form addressed to me in my capacity as Chairman of the House Select Committee on Parking.

As this is an "in-house" committee with jurisdiction over regulating parking spots for Members and Staff of the House of Representatives, occasions do not arise for us to request information from other Federal officials or employees. In view of the fact that the survey form does not apply to the operations of the Select Committee on Parking, I am taking the liberty of returning it to you herewith.

With kindest regards,  
 Sincerely,

B. F. SISK,  
*Chairman, Select Committee on Parking.*

(File No. 304)

CONGRESS OF THE UNITED STATES,  
 HOUSE OF REPRESENTATIVES,  
*Washington, D.C., March 19, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers,  
 U.S. Senate, Washington, D.C.*

DEAR SENATOR ERVIN: Reference is made to your letter of March 9, and the attached survey on Executive Privilege.

Since I have just been Chairman of this Subcommittee some thirty days, we have had no Administration witnesses before the Subcommittee. Therefore, we have had no one make any refusal.

I am sorry this is not an adequate response, but I assure you that we will provide you with any information which comes before the Subcommittee that would be helpful along this line.

Sincerely yours,

RAY ROBERTS,  
*Chairman, Subcommittee on Water Resources.*



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## *Appendices*

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## Appendices

### APPENDIX A

*Editor's Note: Copy of letter dated March 9, 1973 addressed to Chairmen of all committees and subcommittees of the Senate and the House of Representatives and the Comptroller General.*

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON SEPARATION OF POWERS,  
Washington, D.C., March 9, 1973.

Honorable \_\_\_\_\_,  
Chairman, Subcommittee on \_\_\_\_\_  
Committee on \_\_\_\_\_  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Senate Judiciary Subcommittee on Separation of Powers is conducting a survey in an effort to document all instances in which federal officers or employees have refused to provide information requested by congressional committees and subcommittees during the period from January 1, 1964 through February 28, 1973. Enclosed are survey forms and instructions for their use and submission.

Because of the growing awareness of the Congress that it cannot adequately carry out its legislative functions without obtaining the information it requests from federal departments and agencies, this Subcommittee, in conjunction with the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, plans to conduct hearings during the first week in April on the refusal to testify and to produce information requested by Congress. Because the information sought is critical to the effort on the part of the Congress to restore itself as a coequal branch of the Federal Government, and will be an invaluable aid to the Subcommittees in their upcoming hearings, I respectfully request that you use every means at your disposal to see that the information sought in this survey be accurately and promptly transmitted to the Subcommittee on Separation of Powers.

Needless to say, the success of the survey depends upon the cooperation of every committee and subcommittee chairman. While the information sought may present a prodigious task for some committees and subcommittees, I urgently request that you utilize every means possible to make this survey a success, for I firmly believe that it is in the best interest of the future of the Congress and of our form of government that we devise means to terminate the rapid flow of power to the Executive branch of the government and away from the Legislative branch.

In addition to an ample supply of survey forms, you will find attached full instructions on preparing the forms. Should any of the staff members to whom you assign this project have any questions of whatever nature, please

instruct them to call Mr. Joe Pecore, Assistant Counsel to the Subcommittee on Separation of Powers (5-8421).

With all kind wishes, I am  
Sincerely yours,

SAM J. ERVIN, Jr.,  
Chairman, Subcommittee on Separation of Powers.

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON SEPARATION OF POWERS,  
Washington, D.C.

### EXECUTIVE PRIVILEGE SURVEY INSTRUCTIONS

Please read carefully.

*Purpose of Survey.*—This survey is designed to document all instances of refusals of Federal officers and employees to comply fully with requests for information of whatever nature by a Congressional Committee or Subcommittee during the time period from January 1, 1964, through February 28, 1973.

*Definition of Withholding of Information.*—For purposes of this survey, refusal to provide information includes the refusal to provide documents, exhibits of any nature, charts, or written information of any kind, as well as the refusal to appear and give testimony. The survey is designed to document any refusal to provide information to congressional committees and subcommittees despite the reason given, and includes, but by no means is limited to, formal invocation of executive privilege.

*Survey Sheets.*—The survey seeks information on three categories of refusals to provide information, i.e.:

(1) refusals to produce exhibits, documents, charts, or written information of any kind (Survey Form I collects this type of information),

(2) refusals to appear and give testimony (Survey Form II collects information concerning these instances), and

(3) initial refusals to produce information or testimony which request was subsequently honored (Survey Form III collects this information; however, requires narrative description of each incident rather than tabulated data).

*Completing the Survey Forms.*—The forms are intended to be self-explanatory; however, certain general guidance in their use is provided in order to facilitate their use and to simplify their analysis and recapitulation upon their return to the Separation of Powers Subcommittee of the Senate Committee on the Judiciary.

(1) Please use a separate form as appropriate to the nature of the refusal to report each incident of a refusal.

(2) Note that each form is to be used to report a different type of refusal:

Form I: Refusal to provide documents or other written matter.

Form II: Refusal to appear and testify as a witness.

Form III: Instances where an initial request for information is refused but subsequently honored.

(3) In completing the forms, do not feel restricted by the amount of space provided. Use continuation sheets as required in order to adequately describe the incident which you are reporting. Please refer to, and attach whenever possible, hearing record information, correspondence and other data which substantiate and identify the incident.

(4) In instances where subpoena or other process is used to compel delivery of documents or witnesses, report the incident on Survey Form III. Likewise; use this form to report incidents which witness appearance or document delivery was accomplished only under threat of use of process by the committee or subcommittee. In such cases please explain in detail the time lapse between the request and the ultimate compliance, the nature of congressional pressure applied to obtain compliance, and the explanations given for the initial refusal and for the subsequent compliance.

(5) Refusals as used in this survey includes any failure to provide any information or testimony requested for any reason, except scheduling difficulties arising in the normal course of events. The term is

by no means limited to instances involving the formal invocation of executive privilege, although such instances certainly should be reported as such. In the event that your committee or subcommittee has not experienced such a refusal, please so indicate on the forms and return to this Subcommittee within the time period specified.

*Submission of completed forms.*—Please note that each set of forms bears a file serial number on the lower left corner of the form. For purposes of this survey, each committee and subcommittee to which the survey forms have been addressed has been assigned a file number. In instances in which your return of the survey forms will include extensive attachments and reference material it is requested that you mark your assigned serial number on such supplemental documents. This will assist greatly in keeping individual submissions intact for analysis and compilation.

Please identify your committee or subcommittee and your staff contact person in the blanks provided on the survey forms.

Please complete the survey and forward the completed forms on or before March 26, 1973, to Senate Subcommittee on Separation of Powers, Room 1418, New Senate Office Building.

In the event you have any questions in regard to this survey, or need additional forms or instructions, please call Mr. Joe L. Pecore, Assistant Counsel, Subcommittee on Separation of Powers, (Extension 5-8421, 5-8422) who is our staff contact for this survey.

We shall appreciate your cooperation and assistance.

## SURVEY FORM 1: REFUSALS TO PROVIDE EXHIBITS, DOCUMENTS, CHARTS OR WRITTEN INFORMATION OF ANY KIND

Date of Request (1)	To whom addressed, and agency represented (2)	Nature of information requested, and nature of hearings or other reason for which requested. (3)	Date of Refusal (4)	Person authorizing refusal (5)	Reason given for refusal, and documentation of refusal as available, and other remarks (6)

Separation of Powers Subcommittee SURVEY,

U.S. SENATE, March 5, 1973

Contact: Joe L. Pecore, Asst. Counsel, 225 8422, 8421

FILE \_\_\_\_\_

Submitted by: (Comm/Subcomm)By:Title:

Extension

(543)

## SURVEY FORM II: REFUSALS TO APPEAR AND TESTIFY

Date of Request (1)	To whom addressed, and agency represented (2)	Person requested to testify (3)	Nature of testimony requested, nature of hearings, or other reason for which requested. (4)	Date of refusal (5)	Person authorizing refusal (6)	Reason given for refusal, documentation of refusal as available, and other remarks. (7)

Separation of Powers Subcommittee Survey  
 U. S. Senate, March 5, 1973  
 Contact: Joe L. Pecore, Asst. Counsel  
 225-8421, 8422

Submitted by: (Comm/SubComm)

By:

Title:

Extension

FILE \_\_\_\_\_

(544)

SURVEY FORM III: REQUESTS FOR TESTIMONY OR DOCUMENTS INITIALLY REFUSED BUT SUBSEQUENTLY HONORED

Please describe each instance in narrative form. Provide information tending to document or substantiate the incident as available. Provide information as to whether the information ultimately provided was then useful for the purpose for which originally requested.

Separation of Powers Subcommittee SURVEY,  
U.S. SENATE, March 5, 1973  
Contact: Joe L. Pecore, Asst. Counsel  
225-3421, 8422

Submitted by: (Comm/Subcomm)

By:

Title:

Extension

U.S. SENATE,  
OFFICE OF THE MAJORITY LEADER,  
Washington, D.C., March 22, 1973.

Honorable \_\_\_\_\_,  
Chairman, Subcommittee on \_\_\_\_\_,  
Committee on \_\_\_\_\_,  
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Senate Judiciary Subcommittee on Separation of Powers, under the Chairmanship of Senator Ervin, is conducting a survey in an effort to document all instances in which federal officers or employees have refused to provide information requested by congressional committees and subcommittees. The survey covers the period from January 1, 1964 through February 28, 1973.

As you are aware, one of the most serious issues facing the Congress and the nation today involves Executive usurpation of legislative authority. This survey is an effort to enable Congress to determine the extent to which there have been refusals to produce documents and other written matter and refusals to appear and testify before congres-

sional committees and how these refusals may have hampered the Congress in performing its constitutional duties.

It is my understanding that the Subcommittee on Separation of Powers, jointly with Senator Muskie's Inter-governmental Relations Subcommittee, also plans to conduct hearings on Executive Privilege and Government Secrecy beginning April 10. The information gathered by this survey will be extremely useful to both Subcommittees in this connection and in otherwise trying to devise legislative means of bringing about accountability of government to the people of the nation.

I support this survey wholeheartedly and request that survey be completed and returned to the Subcommittee on Separation of Powers under Senator Ervin. This survey, if handled in an expeditious and accurate manner, can be helpful in restoring the Congress to its rightful role in the Federal system.

With best personal wishes, I am  
Sincerely yours,

MIKE MANSFIELD.

## APPENDIX B

### COMMITTEES OF THE CONGRESS WITH FILE NUMBERS ASSIGNED

#### **Committees of the Senate:**

	Committee file number
Committee on Aeronautical and Space Sciences----- (No subcommittees.)	1
Committee on Agriculture and Forestry----- (Subcommittee file Nos. 126-131.)	2
Committee on Appropriations----- (Subcommittee file Nos. 51-64.)	3
Committee on Armed Services----- (Subcommittee file Nos. 132-143.)	4
Committee on Banking, Housing and Urban Affairs----- (Subcommittee file Nos. 144-150.)	5
Committee on Commerce----- (Subcommittee file Nos. 65-72.)	6
Committee on the District of Columbia----- (Subcommittee file Nos. 73-75.)	7
Committee on Finance----- (Subcommittee file Nos. 76-81.)	8
Committee on Foreign Relations----- (Subcommittee file Nos. 82-91.)	9
Committee on Government Operations----- (Subcommittee file Nos. 92-97.)	10
Committee on Interior and Insular Affairs----- (Subcommittee file Nos. 98-104.)	11
Committee on the Judiciary----- (Subcommittee file Nos. 151-165.)	12
Committee on Labor and Public Welfare----- (Subcommittee file Nos. 105-117.)	13
Committee on Post Office and Civil Service----- (Subcommittee file Nos. 118-121.)	14
Committee on Public Works----- (Subcommittee file Nos. 166-172.)	15
Committee on Rules and Administration----- (Subcommittee file Nos. 173-179.)	16
Committee on Veterans' Affairs----- (Subcommittee file Nos. 122-125.)	17
Select Committee on Nutrition and Human Needs----- (No subcommittees.)	38
Select Committee on Small Business----- (No subcommittees.)	39
Select Committee on Standards and Conduct----- (No subcommittees.)	40
Special Committee on Aging----- (No subcommittees.)	41

#### **Joint Committees:<sup>1</sup>**

	Committee file number
Atomic Energy-----	43
Defense Production-----	44
Economics-----	45
Internal Revenue Taxation-----	46
Library-----	47
Printing-----	48
Reduction of Federal Expenditures-----	49
<b>Comptroller General of the United States (Office of)</b> -----	50
<b>Committees of the House of Representatives:</b>	
Committee on Agriculture----- (Subcommittee file Nos. 195-204.)	18
Committee on Appropriations----- (Subcommittee file Nos. 264-276.)	19
Committee on Armed Services----- (Subcommittee file Nos. 250-257.)	20
Committee on Banking and Currency----- (Subcommittee file Nos. 277-284.)	21
Committee on the District of Columbia----- (Subcommittee file Nos. 293-298.)	22
Committee on Education and Labor----- (Subcommittee file Nos. 285-292.)	23
Committee on Foreign Affairs----- (Subcommittee file Nos. 180-189.)	24
Committee on Government Operations----- (Subcommittee file Nos. 243-249.)	25
Committee on House Administration----- (Subcommittee file Nos. 235-242.)	26
Committee on Interior and Insular Affairs----- (Subcommittee file Nos. 215-221.)	27
Committee on Internal Security----- (No subcommittees.)	28
Committee on Interstate and Foreign Commerce----- (Subcommittee file Nos. 205-209.)	29
Committee on the Judiciary----- (Subcommittee file Nos. 228-234.)	42
Committee on Merchant Marine and Fisheries----- (Subcommittee file Nos. 210-214.)	30
Committee on Post Office and Civil Service----- (Subcommittee file Nos. 258-263.)	31
Committee on Public Works----- (Subcommittee file Nos. 304-309.)	32
Committee on Rules----- (No subcommittees.)	33
Committee on Science and Astronautics----- (Subcommittee file Nos. 222-227.)	34
Committee on Standards of Official Conduct----- (No subcommittees.)	35
Committee on Veterans' Affairs----- (Subcommittee file Nos. 190-194.)	36

<sup>1</sup> File numbers were not assigned to subcommittees of joint committees.

**Committees of the House of Representatives—Con.**

	Committee file number
Committee on Ways and Means----- (No subcommittees.)	37
Select Committee on Crime----- (No subcommittees.)	299
Select Committee on Parking----- (No subcommittees.)	302

**Committees of the House of Representatives—Con.**

	Committee file number
Select Committee on Small Business----- (No subcommittees.)	303
Select Committee on the House Beauty Shop----- (No subcommittees.)	300
Select Committee on the House Restaurant----- (No subcommittees.)	301

## APPENDIX C

*Editor's Note: The Samuel Pool Weaver Constitutional Law Essay Competition Committee selected for its 1973-74 award the submission of Mr. David B. Frohnmayer entitled, An Essay on Executive Privilege, which is reproduced here with permission of the American Bar Foundation, 1155 East 60th Street, Chicago, Illinois, Mr. Frohnmayer is a professor of law at the University of Oregon, and received a \$5,000 cash award for achieving first place in the competition. The essay contest is named for the late professor of law at Gonzaga University.*

### AN ESSAY ON EXECUTIVE PRIVILEGE

(Samuel Pool Weaver Constitutional Law Essay Competition)

A legislative body deprived of information on the conduct of public affairs is impotent to act in the national interest. The judicial process becomes a mockery unless it has the capacity to determine the truth in controversies between parties. Any legal doctrine which denies information to legislatures or courts threatens the essence and independence of these institutions, and must therefore be justified, if it can be justified at all, only by the most compelling considerations of law and policy. The stakes in the long standing debate on the existence and constitutional scope of the doctrine of executive privilege could not be higher.

The political and legal developments arising out of the 1973 Watergate investigations have cast the executive privilege question onto the center stage of public controversy. Yet the complex problems which appear in that controversy have been implicit in American constitutional theory from the beginning. And, although the doctrine of executive privilege has sometimes been witnessed exclusively in the narrow context of the relationship between Congress and the Executive branch, it is now doubly clear that the question also entails a confrontation between the Executive branch and the Judiciary. Not only are courts called upon to rule on the validity of congressional demands for executive branch information;<sup>1</sup> courts themselves, as agents for prosecutors, grand juries, or the integrity of their own processes, are called upon to demand compulsory production of documents and testimony from officers and employees of the executive branch.<sup>2</sup>

This essay will examine the scope and constitutional basis of the doctrine of executive privilege as it has been asserted in courts and legislatures. Since recent litigation has acknowledged the existence of an executive privilege, it becomes particularly important to analyze the unsatisfactory and incomplete rationale advanced for the doctrine in order to define the contours and limits upon which courts should insist. Otherwise executive privilege becomes the assertion of an implied royal prerogative not

witnessed for two centuries in this nation. As such it would be an open invitation to the destruction of representative government, and thereby, to tyranny.

### I. PROBLEMS OF DEFINITION

It is ironic but perhaps understandable that the doctrine of executive privilege had not even been susceptible of a uniformly accepted precise definition. The formal term "executive privilege" itself originated only two decades ago,<sup>3</sup> although Presidents have claimed the right to withhold information from Congress, the courts and the citizenry since the earliest days of the Republic.<sup>4</sup>

The asserted scope of the doctrine reached its historical zenith when former Attorney General Richard Kleindienst recognized no right of judicial review of the claim, and testified that executive privilege denotes—

"The constitutional authority of the President in his discretion to withhold certain documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government, if he believes disclosure would impair the proper exercise of his constitutional functions."<sup>5</sup>

A more restrictive view of the privilege was recently offered by Senator Sam Ervin, who urged a rationale focussing on confidential communications, and limited to those who advise the President in matter directly related to the official functions of the office of the President:

"Executive privilege is the power of the President to keep secret confidential communications between the President and an adviser or even among the advisers of the President which are made for the purpose of enabling the President, of assisting the President, to exercise in a lawful manner some constitutional or legal obligation resting upon him in his official capacity."<sup>6</sup>

The latter definition rejects the unlimited Presidential discretionary power urged in the Kleindienst testimony and requires that the communications relate to the lawful conduct of the President's duties. To that degree the Ervin definition commendably circumscribes exaggerated claims of prerogative and provides independent standards for judging the propriety of a claim of privilege. However, this definition presents problems of its own. Modern history demonstrates that the constitutional or legal obligations which Presidents have asserted to lie within an "official capacity" are breathtakingly sweeping in scope. Scholars,<sup>7</sup> until recently,<sup>8</sup> have described and even

<sup>1</sup> See Schlesinger, Executive Privilege: A Murky History, *Wall Street J.*, Mar. 30, 1973, at 8, col. 3.

<sup>2</sup> See generally, Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A.L. Rev. 1043, 1288 (1965); Schwartz, Executive Privilege and Congressional Investigatory Power, 47 Calif. L. Rev. 3 (1959).

<sup>3</sup> Hearing before the Subcomm. on Intergov't Rel. of the Comm. on Govt Operations and the Subcomm. on Separation of Powers and Administrative Prac. and Proc. of the Senate Comm. on the Judiciary on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073, 93d Cong., 1st Sess. 20 (1973) [hereinafter cited as 1973 Executive Privilege Hearings]. Kleindienst argued that the President could assert the privilege claim with respect to proposed testimony by any of the 2½ million employees of the executive branch *Id.* at 46.

<sup>4</sup> *Id.* at 41.

<sup>5</sup> C. Rossiter, *The American Presidency* (2d ed. 1960); E. Corwin, *The President: Offices and Powers 1787-1957* (4th ed. 1957); R. Neustadt, *Presidential Power* (1960).

<sup>6</sup> A. Schlesinger Jr., *The Imperial Presidency* (1973).

<sup>1</sup> Senate Select Committee v. Nixon, 42 U.S.L. Week 2212 (D.D.C. Oct. 17, 1973).

<sup>2</sup> See, e.g., *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973), *aff'd sub nom.* Nixon v. Sirica, 42 U.S.L. Week 2211 (D.C. Cir. Oct. 12, 1973) (en banc).

encouraged an exalted view of the uses and scope of Presidential power.

Although eminent authorities have accepted the arguments justifying an executive privilege in some form,<sup>9</sup> agreement even on this proposition is by no means unanimous. Legal historian Raoul Berger recently testified that the entire doctrine "rests on unproven assertion by the executive branch" and is a "myth, without constitutional foundations."<sup>10</sup>

The first conclusion compelled by these contradictory statements, then, is that it is both difficult and undesirable to state a uniform definition of the privilege. Sound analysis requires a careful examination of the varying contexts, judicial or legislative, in which the doctrine is asserted,<sup>11</sup> the persons who attempt to invoke it, and the subject matter which it is asserted to cover. In fact, "executive privilege" is not one concept, but many. Wigmore noted no less than seven analytically separable doctrines which have been asserted as the basis of a governmental privilege of non-disclosure: the substantive tort immunity of executive officers; the constitutional assertion of the executive's freedom from compulsory process, from the duty to be a witness, or from the duty to attend court; the doctrine that official records are irremovable; the privileges relating to informers' communications to government; and the topical privilege for state secrets and official information.<sup>12</sup>

This essay will focus principal attention on the definition, origin and scope of the asserted constitutional argument for executive privilege in relation to the duty of executive branch officials to testify or produce documents to Congress and its committees. It is obvious that unless careful contextual distinctions are respected, authorities relating to one aspect of doctrine will be used impossibly in the articulation of another.

## II. CONSTITUTIONAL SOURCES OF EXECUTIVE PRIVILEGE

The dispute over the existence and scope of executive privilege cannot be resolved by a traditional lawyer's retreat to adjudicated cases.<sup>13</sup> As a consequence, the question of executive privilege must be determined by resort to other jurisprudential techniques of constitutional interpretation: interpretation of the constitutional text; analysis of inferences from constitutional structure; reference to historical intent and precedent; or analysis of principle and policy. As will be seen, neither the text nor structure of the Constitution provide an unassailable basis for a privilege to withhold information from Congress. The argument from history and the "framer's intent" is at best fraught with ambiguity, but on balance supports Congressional inquiry rather than executive privacy. Only the argument

from policy and principle suggests any deference to the executive. Even this argument, however, does not support an unqualified privilege to withhold information, and, although the Constitution places some limits on the scope of Congressional inquiry, which the President, as any other citizen might claim, these arguments for a presidential privilege seem, upon analysis, largely non-constitutional in origin and justification.

### A. The constitutional text

The few textual provisions of Article II enumerating presidential powers make no mention of an executive privilege to withhold information. Nor does it appear that the cryptic phrase, "executive power," can be so construed.<sup>14</sup> On the contrary, the only explicit, textual authorization for governmental secrecy of any kind is vested in Congress.<sup>15</sup> Likewise, only Congress was granted the immunity of the Speech and Debate Clause,<sup>16</sup> which could serve as the theoretical foundation for a refusal to divulge information. Moreover, *McGrain v. Daugherty*<sup>17</sup> represents clear decisional authority for a construction of the term "legislative power" to legitimate the broadest types of investigatory functions by Congress into executive conduct.

In light of the obligation imposed upon the President by article II, section three to "give to the Congress Information of the State of the Union . . .," some commentators, including Justice Story, have even concluded that there exists an affirmative duty on the part of the President to assist the deliberations of Congress by providing all requested information.<sup>18</sup> At the very least, however, the thrust of such a clause should negate any inference that the faithful execution clause of article II provides generalized support for the executive privilege.<sup>19</sup> In short resort to constitutional text provides no clear justification for the executive branch to deny information to Congress.

### B. Constitutional structure

A distinguished commentator has argued forcefully that inferences from constitutional structure should be utilized as an intellectual method of legal interpretation.<sup>20</sup> Such a mode of reasoning is explicit in recent assertions by the Attorney General concerning the justification for executive privilege:

"The authority of the President to withhold information from the coordinate branches of the Federal Government stems from the separation of powers doctrine embedded in the first three articles of the Constitution and implicit throughout the document. While not expressed in a constitutional clause, executive privilege necessarily flows from the powers vested in the President by article II."<sup>21</sup>

This interpretation is said to confer unreviewable discretion in the President to invoke the privilege and to extend its scope to all employees of the Executive branch.

Whatever be its virtues in other contexts, this assertion is structuralism run rampant. The defects, however, are

<sup>9</sup> Corwin, *The Constitution and What It Means Today* (13th ed. 1973).

<sup>10</sup> R. Berger 1973 Executive Privilege Hearing 234-244.

<sup>11</sup> See e.g., Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers* 20 U. Pitt. L. Rev. 755 n. 1 (1955). However, Younger's conclusion that the "political doctrine of executive secrecy" should be sharply distinguished from the "evidentiary rule of executive privilege" seems less persuasive when the executive branch invokes the identical rationale: the protection of candor in presidential advice, for denying both legislative and judicial access to evidence of the internal deliberations of the White House.

<sup>12</sup> Wigmore, *Evidence* § 2367 (McNaughton rev. 1961).

<sup>13</sup> An Assistant Attorney General recently could cite only six cases even remotely bearing on the executive's alleged right of nondisclosure: *United States v. Reynolds*, 345 U.S. 1 (1953); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936); *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (Stewart, J., concurring); *Environmental Protection Agency v. Mink*, 93 S.Ct. 827, 834 (1973); *Soucia v. David*, 448 F.2d 1067, 1071 n. 9 (D.C. Cir. 1971); and *Ethyl Corp. v. Environmental Protection Agency*, Civ. No. 72-2355 (4th Cir. 1973). Hearings on the Freedom of Information Act (H.R. 5425, H.R. 4960) Before a Subcomm. of the House Comm. on Gov't Operations, 93d Cong., 1st Sess. 171-72 (1973). See also *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 944, 141 Ct.Cl. 38 (1958).

<sup>14</sup> R. Berger, 1973 Executive Privilege Hearings at 245.

<sup>15</sup> U.S. Const. art. I, § 6 cl. 3.

<sup>16</sup> U.S. Const. art. I, § 6 cl. 1. See generally Ervin, *The Gravel and Brewster Cases: An assault on Congressional Independence*, 59 Va. L. Rev. 175 (1973); Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973).

<sup>17</sup> 273 U.S. 135 (1927).

<sup>18</sup> See Memorandum prepared in 1971 at the request of Senator Stevenson of Illinois, "The Doctrine of Executive Privilege," 1973 Executive Privilege Hearings 104, 105-106.

<sup>19</sup> See Schwartz, *supra* note 4 at 40.

<sup>20</sup> C. Black, *Structure and Relationship in Constitutional Law* (1969).

<sup>21</sup> Statement of Hon. Richard G. Kleindienst, 1973 Executive Privilege Hearings 18, 20.

less those of intellectual method than of a failure to understand the structure to which the method is purportedly applied. The separation of powers theory in reality refers not to separated and distinctive "powers", but rather to separated institutions which were designed deliberately to share a wide range of overlapping powers and functions.<sup>22</sup> As the Supreme Court has explicitly acknowledged, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."<sup>23</sup>

The defect of the structuralist method here, then, is that a properly understood doctrine of the separation of powers yields no inference, as a matter of deductive logic, from which the power to withhold information necessarily flows. In truth, the obverse, interdepartmental comity in sharing information, would seem a more justifiable inference. And, just as the separation of powers doctrine fails to produce a satisfying theory of the origin of the privilege, it also provides no clear analytical basis which would guide the President, or anyone else, in invoking his discretion as to the proper scope for the doctrine in a given instance. A structuralist justification of the doctrine, at this level of abstraction, is simply tautological.<sup>24</sup> As a leading authority has accurately put it, "*the 'separation of powers' does not confer power; it only protects a power otherwise conferred.* The existence of withholding power must therefore be proven, not assumed."<sup>25</sup>

Since many state constitutions possess a separation of powers structure, state court precedents from such jurisdictions would be persuasive authority on the validity of an executive privilege shield against disclosure to a legislative body. The only modern state decision on this point arose two decades ago in Massachusetts. The court there expressly denied the executive's power to withhold information.<sup>26</sup> This result is especially significant in repudiating the structuralist theory inasmuch as the Massachusetts Constitution states the separation of powers theory in its most rigid and unyielding form.<sup>27</sup>

#### *C. The argument from intention and historical precedent*

As Shakespeare reminded us respecting the scriptures the devil may likewise cite history for his own purposes, the arguments for constitutional interpretation by reference to the Framers' intentions and the precedents of historical experience call for obvious caution. As one noted historian put it:

"[M]ost talk about the intent of the Framers—whether in the orations of politicians, the opinions of judges, or the monographs of professors—is as irrelevant as it is unpersuasive, as stale as it is strained, as rhetorically absurd as it is historically unsound. . . . On some of the great issues of constitutional law that have agitated our

<sup>22</sup> See, e.g., Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 *Or. L. Rev.* 211, 215-20 (1973); *In re Subpoena to Nixon*, 360 F Supp. 1, 8 (D.D.C. 1973) *aff'd sub nom. Nixon v. Sirica*, 42 U.S.L. Week 2211 (D.C. Cir. Oct. 12, 1973) (en banc).

<sup>23</sup> The Special Prosecutor has correctly noted that the Framers' intention to lodge the powers of government in separate bodies also included a plan for interaction between departments. A 'watertight' division of different functions was never their design. The legislative branch may organize the judiciary and dictate the procedures by which it transacts business. The judiciary may pass upon the constitutionality of legislative enactments and in some instances define the bounds of Congressional investigations. The executive may veto legislative enactments, and the legislature may override the veto. The executive appoints judges and justices and may bind judicial decisions by lawful executive orders. The judiciary may pass on the constitutionality of executive acts" (Footnotes omitted)

<sup>24</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>25</sup> See Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 *Calif. L. Rev.* 3, 8 (1959).

<sup>26</sup> Berger, *Secrecy and the Presidency*, Wash. Post, July 24, 1973, at A20, col. 5. (Emphasis in original).

<sup>27</sup> Opinion of the Justices to the Senate, 328 Mass. 655, 102 N.E. 2d 79 (1951).

<sup>28</sup> See Mass. Const. art. XXX (1780).

times the Framers expressed no clear intent, or invited their descendants to generate an intent of their own; on others they divided . . . on still others they framed their intent in words whose meaning is now so different from what it was in 1787 that to quote a Framer at all is to quote him quite out of context.<sup>28</sup>

Both advocates<sup>29</sup> and opponents<sup>30</sup> of the doctrine of executive privilege have resorted extensively to historical precedents in support of their respective positions, and, indeed, the United States Supreme Court has expressly sanctioned the resort to English Parliamentary history and colonial experience as an important device of constitutional interpretation.<sup>31</sup>

Insofar as historical claims with respect to the Framers' intentions can safely be evaluated, opponents of an executive privilege have marshalled by far the most impressive evidence.<sup>32</sup> Berger described his findings as follows:

" . . . Parliament enjoyed an untrammeled power of inquiry into executive conduct . . . no Minister or subordinate interposed any objection to the right of Parliament to inquire, and [there is] substantial evidence that the Founders meant to adopt this power of the 'Grand Inquest of the Nation', without the slightest indication that they intended in any way to cut it down. Against this history, the pseudo-precedents after 1787 carry an all but impossible burden."<sup>33</sup>

The history of executive privilege following the adoption of the Constitution yields more ambiguous conclusions. Attorney General Rogers referred to "150 years of legislative acquiescence"<sup>34</sup> by Congress in the assertion of executive power to withhold information. A successor Attorney General stated even more confidently that this history of acquiescence in the privilege yielded "Burkean rules of constitutional prescription of the highest vitality."<sup>35</sup>

Careful study<sup>36</sup> has shown the embarrassingly inaccurate historical research which underlay the initial arguments of the Attorney General for executive privilege. But history does not clearly demonstrate that Congress always has been conscious to insist on its prerogatives of inquiry in demanding information of the executive. If history is to value the precedent of Congressional demand, it should also account for presidential refusals. Even presidents, such as Jefferson,<sup>37</sup> who have ultimately complied with the substance of demands by Congress and the courts for information have formally asserted their theoretical legal discretion to withhold it.

In short, the post-1787 precedents are of limited value. They bear all of the earmarks of their essential character as political compromises, and thus yield no unitary conception of the Constitutional basis of a privilege. There exists no compelling reason to insist on the rule of *stare*

<sup>28</sup> C. Rossiter, 1787—The Grand Convention 288 (Mentor ed. 1966). See also Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 *U. Chi. L. Rev.* 502 (1964).

<sup>29</sup> See, e.g., Wilkinson, *Demands of Congressional Committees for Executive Papers*, 10 *Fed. B.J.* 103 (1949); *The Power of the President to Withhold Information from Congress*, Memorandum of Attorney General Rogers compiled by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958); *Statement of Attorney General Kleindienst*, 1973 Executive Privilege Hearings, 18, 20-26.

<sup>30</sup> See, e.g., authorities cited notes 4, 14 and 18, *supra*.

<sup>31</sup> See, e.g., *Ex parte Grossman*, 267 U.S. 87, 103 (1925); *Powell v. McCormack*, 395 U.S. 486, 522-31 (1969).

<sup>32</sup> See Berger, *supra* note 4 at 1053-78.

<sup>33</sup> Berger, 1973 Executive Privilege Hearings 243, 244.

<sup>34</sup> See Memorandum of Attorney General Rogers, *supra* note 28 at 71.

<sup>35</sup> Statement of Attorney General Kleindienst, 1973 Executive Privilege Hearings at 19.

<sup>36</sup> Berger, *supra* note 4 at 1078-97.

<sup>37</sup> See Frohnmayer, *supra* note 21 at 227 n 69.

# HEINONLINE

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551 (1974) <br> <span class="cite\_title"> Refusals by the Executive Branch to provide information to the Congress, 1964-1973 : a survey conducted by the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, of instances in which executive agencies of the government have withheld information from members and Committees of the Congress and from the Comptroller General of the United States. </span>

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*decisis* for historical episodes which are ambiguous in contour, unyielding to conceptual analysis, and uniquely the product of the particular political struggles from which they arose.

Finally, on a matter of such fundamental constitutional importance as access to information which may affect the destiny of a nation, it is well to question the validity of any "Burkean rule of constitutional prescription."<sup>37</sup> Even though executive pretensions may never have been repudiated, this fact does not demonstrate their legal validity. "Nor does a governmental practice conceived in error become elevated to the plane of legality because the error has been long persisted in."<sup>38</sup> In short, barring the existence of other authority, the essential ambiguity of historical experience will not serve to establish the constitutional basis for executive privilege.

#### D. The argument from principle and policy

In litigation concerning the Special Prosecutor's right of access to recordings of White House conversations, the Federal courts<sup>39</sup> though without citation of textual authority, acknowledged some residual validity to the concept of an executive privilege to resist judicial process. In fact, the real justification for the claim appears to rest on arguments from principle and from an assessment of competing policies respecting the scope of judicial discretion. Such considerations are not specifically constitutional in nature, but to the extent that any doctrine of executive privilege can be sustained, these imperfectly articulated arguments are its strongest bulwark.

The merits of policy considerations which may justify a claim of executive privilege in the context of a congressional inquiry are best assessed in three categories. First, there exist concerns respecting the dangers of excessively broad and unjustified Congressional investigations such as characterized the era of Senator Joseph McCarthy. Second, some have argued the necessity to preserve absolute candor in vital processes advisory to the President. Finally, it is important to assess policy rationales for certain testimonial privileges, nonconstitutional in origin, which are sometimes inappropriately confused with a constitutional claim on behalf of the President. It is in this last context that the arguments of *In re Subpoena to Nixon* merit closest consideration.

#### 1. The Scope of Legislation Investigations

Decades ago, *McGrain v. Daugherty*<sup>40</sup> securely established the sweeping scope of the Congressional power of investigation. Many authorities, Woodrow Wilson among them,<sup>41</sup> have even regarded investigative oversight of the executive as a more significant legislative function in a representative government than legislation itself. Surely this power is even more vital in an era of Presidential government wherein executive agencies manage a public sector of historic dimension and possessing unprecedented power to affect national life.

Yet the dangers of legislative investigations to personal liberties have often been noted.<sup>42</sup> Even those who do not favor an expansive role for executive privilege have

candidly acknowledged the dangerous potential of a future legislative McCarthyism.<sup>43</sup>

President Eisenhower's refusal in 1954 to disclose information to Congressional investigating committees<sup>44</sup> might in reality find its true justification not in the theory of the separation of powers, but rather in the protection of privacy of innocent third parties from Congressional tactics of improper public exposure.

This rationale for an executive privilege has a certain initial appeal, particularly since the right of privacy has been given an explicit constitutional justification.<sup>45</sup> Moreover, there is some suggestion that the Supreme Court might recognize the right of privacy as a substantive limitation on Congressional powers of investigation.<sup>46</sup>

However, the "privacy" rationale is also subject to serious limitations. The substantive constitutional doctrine is subject to trenchant criticism.<sup>47</sup> Apart from this point it is not clear why the executive branch, rather than affected individuals, should invoke these protections. Finally, it is questionable whether the "privacy" right is fairly applicable to matters of such inherent public interest as the subjects of a congressional investigation, particularly in view of the decimating impact which the first amendment doctrines of *New York Times v. Sullivan*<sup>48</sup> and its progeny have visited on the parallel law of defamation.<sup>49</sup> Nor is this policy rationale significantly clarified by reference to the executive's own right of privacy. As Judge Sirica correctly observed, Presidential privacy of itself has no merit; it should be granted deference only insofar as it furthers a public rather than personal interest.<sup>50</sup>

It is fair to acknowledge that legislative demands for information could become vehicles for harassment of the executive. However, historically, political means of adjustment have seemed capable of moderating most excesses. And should such controversies ever reach the courts, the restraint can be imposed through the means by which discovery devices have traditionally been controlled.

Supreme Court adjudication, most notably concerning the commerce clause, has typically determined that once an area of plenary congressional power is established, the Constitution imposes few constraints other than through protections for individual liberties which act as restraints on governmental power generally. This principle appears particularly appropriate to the Congressional power of investigation. If the power is acknowledged, it is difficult to articulate a workable countervailing theoretical principle of executive power which moderates its exercise. Degrees of permissible legislative activity cannot be established. In this light, a doctrine of executive privilege constitutes an inappropriate mechanism for constraining legislative inquiry. It is better to focus on the limits of Congressional power to demand rather than on any substantive executive power to withhold.

<sup>43</sup> See e.g., Statement of Senator Adlai E. Stevenson III, 1973 Executive Privilege Hearings 90, 92.

<sup>44</sup> "Eisenhower was . . . provoked by the persistent demagoguery of Senator Joe McCarthy, and we who are skeptics about executive privilege must face responsibly the onus questi denagostichery raises."

<sup>45</sup> Public Papers of the Presidents: Dwight D. Eisenhower 483 (1954).

<sup>46</sup> *Roe v. Wade*, 93 S.Ct. 705 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>47</sup> Cf. *Doe v. McMillan*, 93 S.Ct. 2018 (1973).

<sup>48</sup> Ely, *The Wages of Crying Wolf: A Comment on Foe v.; Wade*, 82 Yale L.J. 920 (1973) Cf. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1 (1973).

<sup>49</sup> 376 U.S. 254 (1964).

<sup>50</sup> *But cf. Time, Inc. v. Hill*, 385 U.S. 354 (1967).

<sup>51</sup> *In re Subpoena to Nixon*, 360 F. Supp. 1, 5 n. 8 (D.D.C. 1973).

<sup>38</sup> Schwartz, *supra* note 4 at 22.

<sup>39</sup> *In re Nixon*, *supra* note 2.

<sup>40</sup> 273 U.S. 135 (1927).

<sup>41</sup> W. Wilson, *Congressional Government* (Meridian ed. 1956).

<sup>42</sup> See, e.g., T. Taylor, *The Grand Inquest* (1955).

Legislative investigations can be made fully subject to judicial controls which serve to protect important countervailing interests. Inquiries potentially infringing on personal rights can be circumscribed by techniques of statutory construction,<sup>51</sup> by insistence on the adjudicatory procedures of due process,<sup>52</sup> or by a careful review of authorizing legislation or the scope of a given committee's investigatory authority.<sup>53</sup> Substantive infringements on individual rights by Congressional actions are explicitly subject to judicial review,<sup>54</sup> and the Supreme Court has not hesitated to limit the scope of legitimate legislative purposes within the confines of the Fourth and Fifth Amendments.<sup>55</sup>

These limitations on Congressional action were forged in the context of the claims of an individual against his government, rather than in the conflict between two coordinate branches of that government. But the limitations exist as powerful weapons against most significant legislative excesses. The factor which distinguishes the inquiries of a Senate Select Committee investigating the Watergate scandals from the inquisitions of a Joseph McCarthy is neither the substantive reach of investigative power nor the subject matter of investigation. Rather, it is the growth in intervening decades of a greater judicial sensitivity to Constitutional limitations favoring personal freedoms.

## 2. The Plea for Candor in Executive Deliberations

The policy basis for the judicial decisions in *In re Subpoena to Nixon* rests explicitly on an acknowledgement that the President might be deprived of candid advice were his advisors to be subject to later questioning. Two points are immediately apparent. First, this appears to be a consideration of legislative policy rather than constitutional prescription. It is analogous to the policies underlying testimonial privileges created by statute and the common law which apply to confidential communications arising out of certain important relationships. It suggests that any such privilege is the proper subject of congressional statutory definition, rather than an inherent attribute of executive power.

Second, if the privilege focuses on personal advice of this nature, the policy would dramatically and properly restrict past executive assertions about the scope of executive privilege and limit it to personal relationships of advice to the President.

The conclusion which follows, then, is that executive privilege as to judicial process is in reality a non-constitutional doctrine relating to the exercise of judicial discretion. The doctrine is one of special deference to unique needs of an institutional presidency. It is a principle of judicial discretion which, because of these concerns, calls for a more exacting demonstration of need for disclosure. These are concerns to be evaluated in arguments on the return of court process, as in *United States v. Burr*,<sup>56</sup> not reasons for fusing its issuance. Proper focus on the demand for relevance and a special showing of necessity prevents a judicially unmanageable inquiry

into the substantive kinds of executive information which privilege is said to protect beyond disclosure otherwise prohibited by law.

Although courts could forge a broad, judicially-created doctrine of immunity, as was acknowledged in *Barr v. Matteo*,<sup>57</sup> the competing policies which favor disclosure of relevant information to Congress and courts must preclude such a conclusion.

In short the plea for candor cannot constitute the basis for an unreviewable and absolute privilege for executive discussions. Still less could this be true in the impeachment process, where the very function of the constitutionally authorized legislative process is investigation of executive misconduct.

## 3. Policies of Governmental Privileges Against Disclosure

The District Court in *In re Subpoena to Nixon* commendably rejected the absolutist theory of executive privilege and properly asserted a judicial role in evaluating the claim.<sup>58</sup> However, it erred seriously in accepting *United States v. Reynolds*<sup>59</sup> as sound authority for an executive privilege.<sup>60</sup> *Reynolds* explicitly dealt with a governmental, not an executive privilege. Although the executive branch asserts the claims in court proceedings, the privilege itself descends from the evidentiary doctrine of state secrets, and is thus a matter the substance of which is fully within the legislative power to define. This point is of particular importance since the fine line of demarcation between disclosures which involve "national security" as opposed to mere political embarrassment should be subject to congressional scrutiny.

This essay cannot examine all of the evidentiary doctrines relating to state secrets, the identity of informers, and the confidentiality of investigative files.<sup>61</sup> However, to the extent that the bases of such privileges do not rest securely on statutory authority which Congress has the power to grant or modify, they are based implicitly upon arguments respecting desirable policy, not inherent executive authority to withhold information.

## III. THE JUDICIAL ROLE

The evidentiary doctrines applicable to executive privilege in court processes are similar in rationale to those urged to deny disclosure of information to Congress. Congress, no less than the courts can show a necessity for information, since it functions as a "grand jury to the nation."<sup>62</sup> And since the power of congressional inquiry has no limitation to "case or controversy," some authority suggests that congressional power to seek information is even more sweeping.<sup>63</sup>

But it does not follow that the Federal Courts should necessarily always be arbitrators of the appropriate flow of information between the President and Congress. The doctrine of executive privilege against disclosure to Congress has little theoretical foundation. But the considerations respecting the Constitutional duty to assist Congressional inquiry are analytically independent of issues

<sup>51</sup> *E.g.*, *Tenny v. Brandhove*, 341 U.S. 367 (1951).

<sup>52</sup> *E.g.*, *Powell v. McCormack*, 305 U.S. 486 (1969).

<sup>53</sup> See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Rumely*, 345 U.S. 41 (1953); *Sinclair v. United States*, 279 U.S. 263 (1929).

<sup>54</sup> *Gravel v. United States*, 408 U.S. 606, 620 (1972).  
<sup>55</sup> In so doing, the court followed the precedent of all common law countries including, more recently, England. See generally, Cappelletti & Golden, Crown Privilege and Executive Privilege: A British Response to an American Controversy, 25 Stan. L. Rev. 836 (1973).

<sup>56</sup> 345 U.S. 1 (1953).

<sup>57</sup> 360 F. Supp. at 5.

<sup>58</sup> See generally authorities cited *supra* note 4.

<sup>59</sup> *Schwartz, supra* note 4 at 24, 31.

<sup>60</sup> *Id.* at 28-30.

concerning the appropriate method for enforcing such an obligation.

In an earlier era a conflict of this magnitude between Congress and the Executive would quickly have occasioned invocation of the "political questions" doctrine. However, on the basis of the Court's decision in *Baker v. Carr*,<sup>64</sup> a leading authority has argued elaborately that the executive privilege question is appropriate for adjudication.<sup>65</sup> Moreover, the Court has shown an increasing willingness to demarcate the boundaries of Congress and the Executive, and even to adjudicate with respect to their allegedly "internal" affairs.<sup>66</sup>

Justice Rehnquist, in his former capacity as Assistant Attorney General, acknowledged that an executive officer who refuses to appear or supply information is subject to contempt citation for refusal to honor a Congressional subpoena.<sup>67</sup> The issue might well be posed to the courts, for example, in the case of an executive branch official subject to conflicting directives regarding disclosure of information in his possession. It is therefore important to consider certain principles of judicial discretion, analogous to those respecting the evidentiary privilege, which can limit and define the judicial role, even if they do not deny jurisdiction to the Court.

First, it is obvious that many questions concerning access to information can be settled by political accommodation between the two branches of government. To the extent that such accommodation succeeds, it furthers the purposes of the constitutional separation of powers theory.<sup>68</sup>

Second, contrary to the problems faced by a court in enforcing compulsory process, Congress has powerful political means to enforce its demands. Senator Kennedy recently stated the point accurately:

"Congress already has subpoena and contempt powers. It can presently hold up nominations, cut off funds, or withhold authorizations. Until it has utilized, much less exhausted, its existing powers to require testimony or documents from the executive it need not develop more powerful arsenals for enforcing its will."<sup>69</sup>

A doctrine of "exhaustion of Congressional remedies" which abdicated a judicial role unless Congress had re-

sorted to the draconian power of impeachment would ask too much, in view of practical political realities. But a demand that Congress speak with clarity, and as an institution, is surely an appropriate consideration for argument on the return of compulsory process issued by Congress.

This consideration is especially significant in affording time for accommodation, in permitting issues to be cast in sharper relief, in permitting political accommodation without judicial intrusion, and in forcing Congress as an institution, rather than in one of its committees, to determine the appropriate occasion for a Constitutional confrontation.

Third, to the maximum extent possible, Congress, by statute, should codify the interwoven evidentiary doctrines which are now called executive privilege into coherent statutory law. Such action would clarify, if not resolve, many legal issues, present questions more clearly for eventual judicial resolution, and provide Congress with more refined techniques by which to confront the executive.

Fourth, and finally, courts should, where possible, resolve questions of privilege and inquiry by traditional techniques of a nonconstitutional nature. Judicial examination of authorizing resolutions or the statutory authority of Congressional committees is one such method. Together with a sensitivity to questions of relevance and the possibility for harassment and inconvenience, these techniques for the exercise of judicial discretion permit resolution of many vital questions without creation of a constitutional crisis.

#### IV. CONCLUSION

The question of executive privilege presents a myriad of important issues which are beyond the scope of this essay to relate. Questions concerning the amenability of executive officials to court process, the types of persons entitled to assert privilege, and the applicability of the doctrine of waiver call for immediate attention. Yet surely most important is the threshold issue concerning the Constitutional basis of the asserted privilege.

Our generation has debased the superlatives of its political rhetoric by overuse. But surely one conclusion does not distort the use of language. The fate of representative government in the United States will hinge on the ability of our legislative and judicial institutions to resist an uncontrolled executive prerogative over the life blood of a democratic society: access to information.

<sup>64</sup> 360 U.S. 186 (1962).

<sup>65</sup> Berger, *supra* note 4 at 1349. However Schwartz questions whether article III permits such a result, *supra* note 4 at 45.

<sup>66</sup> See e.g., Powell v. McCormack, 395 U.S. 486 (1969); Doe v. McMillan, 93 S.Ct. 2018 (1973).

<sup>67</sup> 11 Hearings before a Subcomm. on Foreign Op. and Gov't Info. of the House Comm. on Gov't Op. on the Pentagon Papers 379, 385 (June, 1971).

<sup>68</sup> See generally Froehnauer, *supra* note 21.

<sup>69</sup> Opening Statement of Senator Kennedy 1973 Executive Privilege Hearings 15, 17.

## APPENDIX D

417 U.S. 683

### SUPREME COURT OF THE UNITED STATES

No. 73-1766—UNITED STATES, PETITIONER v. RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL.

No. 73-1834—RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER, v. UNITED STATES

*On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit before judgment.*

[July 24, 1974]

Mr. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case (No. 73-1766) presents for review the denial of a motion, filed on behalf of the President of the United States, in the case of *United States v. Mitchell* (D.C. Crim. No. 74-110), to quash a third-party subpoena *duces tecum* issued by the United States District Court for the District of Columbia, pursuant to Fed. Rule Crim. Proc. 17(c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17(c). The President appealed to the Court of Appeals. We granted the United States' petition for certiorari before judgment,<sup>1</sup> and also the President's responsive cross-petition for certiorari before judgment,<sup>2</sup> because of the public importance of the issues presented and the need for their prompt resolution. — U.S. —, — (1974).

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals<sup>3</sup> with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted co-

<sup>1</sup> See 28 U.S.C. §§ 1254(1) and 2101(e) and our Rule 20. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 579, 584 (1952); *United States v. United Mine Workers*, 329 U.S. 708, 709, 710 (1946); 330 U.S. 258, 269 (1947); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Rickett Rice Mills v. Fontenot*, 297 U.S. 110 (1936); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 344 (1935); *United States v. Bankers Trust Co.*, 294 U.S. 240, 243 (1935).

<sup>2</sup> The cross-petition in No. 73-1834 raised the issue whether the grand jury acted within its authority in naming the President as an unindicted coconspirator. Since we find resolution of this issue unnecessary to resolution of the question whether the claim of privilege is to prevail, the cross-petition for certiorari is dismissed as improvidently granted and the remainder of this opinion is concerned with the issues raised in No. 73-1766. On June 19, 1974, the President's counsel moved for disclosure and transmittal to this Court of all evidence presented to the grand jury relating to its action in naming the President as an unindicted coconspirator. Action on this motion was deferred pending oral argument of the case and is now denied.

<sup>3</sup> The seven defendants were John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. Each had occupied either a position of responsibility on the White House staff or a position with the Committee for the Re-Election of the President. Colson entered a guilty plea on another charge and is no longer a defendant.

conspirator.<sup>4</sup> On April 18, 1974, upon motion of the Special Prosecutor, see n. 8, *infra*, a subpoena *duces tecum* was issued pursuant to Rule 17 (c) to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others.<sup>5</sup> The Special Prosecutor was able to fix the time, place and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a "special appearance" and a motion to quash the subpoena, under Rule 17 (c). This motion was accompanied by a formal claim of privilege. At a subsequent hearing,<sup>6</sup> further motions to expunge the grand jury's action naming the President as an unindicted coconspirator and for protective orders against the disclosure of that information were filed or raised orally by counsel for the President.

On May 20, 1974, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. — F. Supp. — (1974). It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed," *id.*, at —, to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected jurisdictional challenges based on a contention that the dispute was nonjusticiable because it was between the Special Prosecutor and the Chief Executive and hence "intra-executive" in character; it also rejected the contention that the judiciary was without authority to review an assertion of executive privilege by the President. The court's rejection of the first challenge was based on the authority and powers vested in the Special Prosecutor by the regulation promulgated by the Attorney General; the court concluded that a justiciable

<sup>4</sup> The President entered a special appearance in the District Court on June 6 and requested that court to lift its protective order regarding the naming of certain individuals as coconspirators and to any additional extent deemed appropriate by the Court. This motion of the President was based on the ground that the disclosures to the news media made the reasons for continuance of the protective order no longer meaningful. On June 7, the District Court removed its protective order and, on June 10, counsel for both parties jointly moved this Court to unseal those parts of the record which related to the action of the grand jury regarding the President. After receiving a statement in opposition from the defendants, this Court denied that motion on June 15, 1974, except for the grand jury's immediate finding relating to the status of the President as an unindicted coconspirator.—U.S.— (1974).

<sup>5</sup> The specific meetings and conversations are enumerated in a schedule attached to the subpoena, 42a-46a of the App.

<sup>6</sup> At the joint suggestion of the Special Prosecutor and counsel for the President, and with the approval of counsel for the defendants, further proceedings in the District Court were held *in camera*.

controversy was presented. The second challenge was held to be foreclosed by the decision in *Nixon v. Sirica*, — U.S. App. D.C. —, 487 F. 2d 700 (1973).

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that, under the circumstances of this case, the presumptive privilege was overcome by the Special Prosecutor's *prima facie* "demonstration of need sufficiently compelling to warrant judicial examination in chambers. . . ." — F. Supp., at —. The court held, finally, that the Special Prosecutor has satisfied the requirements of Rule 17(c). The District Court stayed its order pending appellate review on condition that review was sought before 4 p.m., May 24. The court further provided that matters filed under seal remain under seal when transmitted as part of the record.

On May 24, 1974, the President filed a timely notice of appeal from the District Court order, and the certified record from the District Court was docketed in the United States Court of Appeals for the District of Columbia Circuit. On the same day, the President also filed a petition for writ of mandamus in the Court of Appeals seeking review of the District Court order.

Later on May 24, the Special Prosecutor also filed, in this Court, a petition for a writ of certiorari before judgment. On May 31, the petition was granted with an expedited briefing schedule. — U.S. — (1974). On June 6, the President filed, under seal, a cross-petition for writ of certiorari before judgment. This cross-petition was granted June 15, 1974, — U.S. — (1974), and the case was set for argument on July 8, 1974.

## I—JURISDICTION

The threshold question presented is whether the May 20, 1974, order of the District Court was an appealable order and whether this case was properly "in," 28 U.S.C. § 1254, the United States Court of Appeals when the petition for certiorari was filed in this Court. Court of Appeals jurisdiction under 28 U.S.C. § 1291 encompasses only "final decisions of the district courts." Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration if the District Court order was final. 28 U.S.C. § 1254(1); 28 U.S.C. § 201(e).

The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See, e.g., *Cobbedick v. United States*, 309 U.S. 323, 324-326 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation. In applying this principle to an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena *duces tecum*, it has been repeatedly held that the order is not final and hence not appealable. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *Cobbedick v. United States*, 309 U.S. 322 (1940); *Alexander v. United States*, 201 U.S. 117 (1906). This Court has

"consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order

with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal."  
*United States v. Ryan*, 402 U.S. 530, 533 (1971).

The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in *Perlman v. United States*, 247 U.S. 7 (1918), a subpoena had been directed to a third party requesting certain exhibits; the appellant, who owned the exhibits, sought to raise a claim of privilege. The Court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege. *Id.*, at 12-13. That case fell within the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States v. Ryan*, *supra*, at 533.

Here too the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order. The appeal from that order was therefore properly "in" the Court of Appeals, and the case is now properly before this Court on the writ of certiorari before judgment. 28 U.S.C. § 1254; 28 U.S.C. § 2101 (e). *Gay v. Ruff*, 292 U.S. 25, 30 (1934).<sup>7</sup>

## II—JUSTICIABILITY

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution.

That argument has been renewed in this Court with emphasis on the contention that the dispute does not present "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into area committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, *Confiscation Cases*, 7 Wall. 454 (1869), *United States v. Cox*, 342 F. 2d 167, 171 (CA5), cert. denied, 381 U.S. 935 (1965), it is contended that a President's decision is final in determining what evidence

<sup>7</sup> The parties have suggested this Court has jurisdiction on other grounds. In view of our conclusion that there is jurisdiction under 28 U.S.C. § 1254(1) because the District Court's order was appealable, we need not decide whether other jurisdictional vehicles are available.

is to be used in a given criminal case. Although his counsel concedes the President has delegated certain specific powers to the Special Prosecutor, he has not "waive nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." Brief for the President 47. The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under *Baker v. Carr*, 369 U.S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

The mere assertion of a claim of an "intra-branch dispute," without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry. In *United States v. ICC*, 337 U.S. 426 (1949), the Court observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *Id.*, at 430. See also: *Powell v. McCormack*, 395 U.S. 486 (1969); *ICC v. Jersey City*, 322 U.S. 503 (1944); *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *FMB v. Isbrandsten Co.*, 356 U.S. 481, 482 n. 2 (1958); *United States v. Marine Bancorporation*, — U.S. — (1974), and *United States v. Connecticut National Bank*, — U.S. — (1974).

Our starting point is the nature of the proceeding for which the evidence is sought—here a pending criminal prosecution. It a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. *Berger v. United States*, 295 U.S. 78, 88 (1935). Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.<sup>8</sup> The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking

<sup>8</sup> The regulation issued by the Attorney General pursuant to his statutory authority vests in the Special Prosecutor plenary authority to control the course of investigations and litigation related to "all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General." 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. In particular, the Special Prosecutor was given full authority, *inter alia*, "to contest the assertion of 'Executive Privilege' . . . and handle[ all aspects of any cases within his jurisdiction.'" *Ibid.* The regulation then goes on to provide:

"In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney-General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and Minority Leaders and Chairman and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

evidence deemed relevant to the performance of these specially delegated duties.<sup>9</sup> 38 Fed. Reg. 30739.

So long as this regulation is extant it has the force of law. In *Accardi v. Shaughnessy*, 347 U.S. 260 (1953), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. *Service v. Dulles*, 354 U.S. 363, 388 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), reaffirmed the basic holding of *Accardi*.

Here, as in *Accardi*, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so.<sup>10</sup> So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress. Note 8, *supra*.

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Government within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." *United States v. ICC*, 337 U.S., at 430. The independent Special Prosecutor with his asserted need for the subpoenaed material in the under-

<sup>9</sup> That this was the understanding of Acting Attorney General Robert Bork, the author of the regulation establishing the independence of the Special Prosecutor, is shown by his testimony before the Senate Judiciary Committee:

"Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that he has the power to use judicial processes to pursue evidence if disagreement should develop."

Hearings before the Senate Judiciary Committee on the Special Prosecutor, 93d Cong., 1st Sess., pt. 2, at 470 (1973). Acting Attorney General Bork gave similar assurances to the House Subcommittee on Criminal Justice. Hearings before the House Judiciary Subcommittee on Criminal Justice on H.J. Res. 784 and H.R. 10937, 93d Cong., 1st Sess. 266 (1973). At his confirmation hearings, Attorney General William Saxbe testified that he shared Acting Attorney General Bork's views concerning the Special Prosecutor's authority to test any claim of executive privilege in the courts. Hearings before the Senate Judiciary Committee on the nomination of William B. Saxbe to be Attorney General, 93d Cong., 1st Sess. 9 (1973).

<sup>10</sup> At his confirmation hearings Attorney General William Saxbe testified that he agreed with the regulation adopted by Acting Attorney General Bork and would not remove the Special Prosecutor except for "gross impropriety." Hearings, Senate Judiciary Committee on the nomination of William B. Saxbe to be Attorney General, 93d Cong., 1st Sess., 5-6, 8-10 (1973). There is no contention here that the Special Prosecutor is guilty of any such impropriety.

lying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S., at 204. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power. *Id.*, at 198.

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

### III—RULE 17(c)

The subpoena *duces tecum* is challenged on the ground that the Special Prosecutor failed to satisfy the requirements of Fed. Rule Crim. Proc. 17 (c), which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings. If we sustained this challenge, there would be no occasion to reach the claim of privilege asserted with respect to the subpoenaed material. Thus we turn to the question whether the requirements of Rule 17 (c) have been satisfied. See *Arkansas-Louisiana Gas Co. v. Dept. of Public Utilities*, 304 U.S. 61, 64 (1938); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346–347 (1936). (Brandeis, J., concurring.)

Rule 17 (c) provides:

"A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1950). This case recognized certain fundamental characteristics of the subpoena *duces tecum* in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases. *Id.*, at 220; (2) its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of subpoenaed materials.<sup>11</sup> *Ibid.* As both parties agree,

<sup>11</sup> The Court quoted a statement of a member of the advisory committee that the purpose of the Rule was to bring documents into court "in advance of the time that they are offered in evidence, so that they may then be inspected in advance, for the purpose . . . of enabling the party to see whether he can use [them] or whether he wants to use [them]." 341 U.S., at 220 n. 5. The Manual for Complex and Multi-district Litigation published by the Administrative Office of the United States Courts recommends that Rule 17(c) be encouraged in complex criminal cases in order that each party may be compelled to produce its documentary evidence well in advance of trial and in advance of the time it is to be offered. P. 142, CCH Ed.

cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States v. Iozia*, 13 F.R.D. 335, 338 (SDNY 1952), as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary<sup>12</sup> and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity. Our own review of the record necessarily affords a less comprehensive view of the total situation than was available to the trial judge and we are unwilling to conclude that the District Court erred in the evaluation of the Special Prosecutor's showing under Rule 17 (c). Our conclusion is based on the record before us, much of which is under seal. Of course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment. *United States v. Gross*, 24 F. R. D. 138 (SDNY 1959). With respect to many of the tapes, the Special Prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time. As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment.

We also conclude there was a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment. The most cogent objection to the admissibility of the taped conversations here at issue is that they are a collection of out-of-court statements by declarants who will not be subject to cross-examination and that the statements are therefore inadmissible hearsay. Here, however, most of the tapes apparently contain conversations to which one or more of the defendants named in the indictment were party. The hearsay rule does not automatically bar all out-of-court statements by a defendant in a criminal case.<sup>13</sup> Declarations by one defendant may also be admissible against other defendants upon

<sup>12</sup> The District Court found here that it was faced with "the more unusual situation . . . where the subpoena, rather than being directed to the government by the defendants, issues to what, as a practical matter, is a third party." *United States v. Mitchell*, — F. Supp. — (D.C. 1974). The Special Prosecutor suggests that the evidentiary requirement of *Bowman Dairy Co.* and *Iozia* does not apply in its full vigor when the subpoena *duces tecum* is issued to third parties rather than to government prosecutors. Brief for the United States 128–129. We need not decide whether a lower standard exists because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the District Court's refusal to quash the subpoena.

<sup>13</sup> Such statements are declarations by a party defendant that "would surmount all objections based on the hearsay rule . . ." and, at least as to the declarant himself "would be admissible for whatever inferences" might be reasonably drawn. *United States v. Matlock*, — U.S. — (1974). On *Lee v. United States*, 343 U.S. 747, 757 (1953). See also McCormick on Evidence, § 270, at 651–652 (1972 ed.).

a sufficient showing, by independent evidence,<sup>14</sup> of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. The same is true of declarations of coconspirators who are not defendants in the case on trial. *Dutton v. Evans*, 400 U.S. 74, 81 (1970). Recorded conversations may also be admissible for the limited purpose of impeaching the credibility of any defendant who testifies or any other coconspirator who testifies. Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial. See, e.g., *United States v. Carter*, 15 F. R. D. 367, 371 (D. D. C. 1954). Here, however, there are other valid potential evidentiary uses for the same material and the analysis and possible transcription of the tapes may take a significant period of time. Accordingly, we cannot say that the District Court erred in authorizing the issuance of the subpoena *duces tecum*.

Enforcement of pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c). See, e.g., *Sue v. Chicago Transit Authority*, 279 F. 2d 416, 419 (CA7 1960); *Shotkin v. Nelson*, 146 F. 2d 402 (CA10 1944).

In a case such as this, however, where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of government, should be particularly meticulous to ensure that the standards of Rule 17(c) have been correctly applied. *United States v. Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (1807). From our examination of the materials submitted by the Special Prosecutor to the District Court in support of his motion for the subpoena, we are persuaded that the District Court's denial of the President's motion to quash the subpoena was consistent with Rule 17(c). We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production before trial. The subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown. *Bowman Dairy Co.*, *supra*; *United States v. Iozia*, *supra*.

#### IV—THE CLAIM OF PRIVILEGE

##### A

Having determined that the requirements of Rule 17(c) were satisfied, we turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." App. 48a. The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the

<sup>14</sup> As a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury. *United States v. Vaughn*, 385 F. 2d 320, 323 (CA4 1973); *United States v. Hoffa*, 349 F. 2d 20, 41–42 (CA6 1965), aff'd on other grounds, 385 U.S. 203 (1966); *United States v. Santos*, 385 F. 2d 43, 45 (CA7 1967), cert. denied, 390 U.S. 954 (1968); *United States v. Morton*, 483 F. 2d 573, 576 (CA8 1973); *United States v. Spanos*, 462 F. 2d 1012, 1014 (CA9 1972); *Carbo v. United States*, 314 F. 2d 718, 737 (CA9 1963), cert. denied, 377 U.S. 953 (1964). Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge.

claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena *duces tecum*.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential presidential communications for use in a criminal prosecution, but other exercises of powers by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. *Powell v. McCormack*, *supra*; *Youngstown*, *supra*. In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U.S. Const. Art. I, § 6. *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1973); *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Johnson*, 383 U.S. 169 (1966). Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell v. McCormack*, *supra*, 549. And in *Baker v. Carr*, 369 U.S., at 211, the Court stated:

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art. III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (C. F. Mittel ed. 1938). We therefore reaffirm that it is "emphatically the province and the duty" of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury v. Madison*, *supra*, at 177.

##### B

In support of his claim of absolute privilege, the President's counsel urges two grounds one of which is common

to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.<sup>15</sup> Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers;<sup>16</sup> the protection of the confidentiality of presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, *Humphrey's Executor v. United States*, 295 U.S. 602, 629-630; *Kilbourn v. Thompson*, 103 U.S. 168, 190-191 (1880), insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

<sup>15</sup> There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. T. Farrand, *The Records of the Federal Convention of 1787*, xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 U.S. Stat. At Large, 15th Cong. 1st Sess., Res. 8 (1818). Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written. Warren, *The Making of the Constitution*, 134-139 (1937).

<sup>16</sup> The Special Prosecutor argues that there is no provision in the Constitution for a presidential privilege as to the President's communications corresponding to the privilege of Members of Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in *McCulloch v. Maryland*, 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was considered as accompanying the grant, has been so universally applied that it suffices merely to state it." *Marshall v. Gordon*, 243 U.S. 521, 537 (1917).

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

### C

Since we conclude that the legitimate needs of the judicial process may outweigh presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President. *United States v. Burr*, 25 Fed. Cas. 187, 190, 191-192 (No. 14,694) (1807).

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.<sup>17</sup> In *Nixon v. Sirica*, — U.S. App. D.C. —, 487 F. 2d 700 (1973), the Court of Appeals held that such presidential communications are "presumptively privileged," *id.*, at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual." *United States v. Burr*, 25 Fed. Cas. 187, 191 (No. 14,694) (CCD Va. 1807).

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need

<sup>17</sup> "Freedom of communication vital to fulfillment of wholesome relationships is obtained only by removing the specter of compelled disclosure . . . [G]overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss*, Jena, 40 F. R. D. 318, 325 (D.C. 1966). See *Nixon v. Sirica*, — U.S. App. D.C. —, 487 F. 2d 700, 713 (1973); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958) (*per* Reed, J.); *The Federalist No. 64* (S. F. Mitteil ed. 1938).

to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,

"that the public . . . has a right to every man's evidence' except for those persons protected by a constitutional, common law, or statutory privilege, *United States v. Bryan*, 339 U.S., at 331 (1949); *Blackmer v. United States*, 284 U.S. 421, 438. . . ." *Branzburg v. United States*, 408 U.S. 665, 688 (1973).

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.<sup>18</sup>

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. In *C. & S. Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948), dealing with presidential authority involving foreign policy considerations, the Court said:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be tolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Id.*, at 111.

In *United States v. Reynolds*, 345 U.S. 1 (1952), dealing with a claimant's demand for evidence in a damage case against the Government the Court said:

"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When

this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice.<sup>19</sup> The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.<sup>20</sup>

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiali-

<sup>18</sup> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence in criminal trials.

<sup>19</sup> Mr. Justice Cardozo made this point in an analogous context. Speaking for a unanimous Court in *Clark v. United States*, 289 U.S. 1 (1933), he emphasized the importance of maintaining the secrecy of the deliberations of a petit jury in a criminal case. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published in the world." *Id.*, at 13. Nonetheless, the Court also recognized that isolated inroads on confidentiality designed to serve the paramount need of the criminal law would not vitiate the interests served by secrecy:

"A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate bar barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice." *Id.*, at 16.

<sup>18</sup> Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Justice Frankfurter, dissenting in *Elkins v. United States*, 364 U.S. 206, 234 (1960), said of this: "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

ality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

D

We have earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the presidential material was "essential to the justice of the [pending criminal] case." *United States v. Burr, supra*, at 192. Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption and ordered an *in camera* examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection. Accordingly we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court's responsibilities in conducting the *in camera* examination of presidential materials or communications delivered under the compulsions of the subpoena *duces tecum*.

E

Enforcement of the subpoena *duces tecum* was stayed pending this Court's resolution of the issues raised by the petitions for certiorari. Those issues now having been disposed of, the matter of implementation will rest with the District Court. "[T]he guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of the [district] court after the subpoenas have issued; not in any circumstances which is to precede their being issued." *United States v. Burr, supra*, at 34. Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. At this stage the District Court is not limited to representations of the Special Prosecutor as to the evidence sought by the subpoena; the material will be available to the District Court. It is elementary that *in camera* inspection of evidence is always a procedure calling for scrupu-

ulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall sitting as a trial judge in the *Burr* case, *supra*, was extraordinarily careful to point out that:

"[I]n no case of this kind would a Court be required to proceed against the President as against an ordinary individual." *United States v. Burr*, 25 Fed. Cases 187,191 (No. 14,694).

Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary<sup>21</sup> in the public interest to afford presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to presidential records that high degree of deference suggested in *United States v. Burr, supra*, and will discharge his responsibility to see to it that until released to the Special Prosecutor no *in camera* material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

*Affirmed.*

MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

<sup>21</sup> When the subpoenaed material is delivered to the District Judge *in camera* questions may arise as to the excising of parts and it lies within the discretion of that court to seek the aid of the Special Prosecutor and the President's counsel for *in camera* consideration of the validity of particular excisions, whether the basis of excision is relevancy or admissibility or under such cases as *Reynolds, supra*, or *Waterman Steamship, supra*.

## APPENDIX E

(Note: The following excerpt from the Congressional Record, November 26, 1974, pp. S20163 et. seq., provides scholarly perceptions as to the effect of the July 24, 1974, decision of the U.S. Supreme Court in the case of *U.S. v. Richard M. Nixon, President of the United States*, 417 U.S. 683, upon the topic of Executive privilege in its separation of powers context.)

[From the Harvard Law Review, 88 Harv. L. Rev. 13 (1974)]

### THE SUPREME COURT, 1973 TERM—FOREWORD: ON PRESIDENTIAL PRIVILEGE

(By Paul A. Freund\*)

At the October 1973 Term, the Supreme Court for the first time passed on the question of executive privilege for confidential communications to which the President is a party. The Court gave the privilege a constitutional status, but a defeasible one, and left resolution of important questions to another day.

*United States v. Nixon*<sup>1</sup> rejected the President's generalized claim of privilege, based on the confidentiality of his conversations with a cabinet officer and White House advisers, as a defense to a pretrial subpoena of sixty-four tape recordings of those conversations for use by the Special Watergate Prosecutor in the pending criminal prosecution of those individuals.<sup>2</sup> The opinion of Mr. Chief Justice Berger is notable for the resolute understatement with which it marches to the ultimate doom, for its sedulous avoidance of any characterization of President Nixon's involvement in the offenses charged, and above all—doubtless related to the tone of the opinion—for its unanimity.<sup>3</sup>

#### I. PRELIMINARY QUESTIONS

The case came to the Supreme Court trailing clouds of jurisdictional and procedural issues, one or more of which might have presented a barrier to the resolution of the question of executive privilege. The district court had denied the President's motion to quash the subpoena.<sup>4</sup> From that order the President appealed to the court of appeals, and thereupon the Special Prosecutor filed a petition for certiorari, which was granted by the Supreme Court over the opposition of the President.<sup>5</sup> This action of the Court raised both a question of jurisdiction and one of discretion. Jurisdictionally, the Supreme Court's power to review was conditioned on the propriety of the appeal

to the court of appeals, and that in turn depended on the finality of the order of the district court. Although it is hornbook law that the denial of a motion to quash, in connection with a criminal proceeding, is not a final appealable order,<sup>6</sup> an application of that rule to the present case would have been, as the Court noted,<sup>7</sup> an excessively mechanical judgment. The reason for the normal rule—to avoid the interruption and fragmentation of a criminal trial unless the witness is cited for contempt and so is prepared to risk punishment if he takes an appeal and loses—points to its inaptness here. The very question whether a President may be cited for contempt could itself fragment and interrupt the proceedings. Moreover, it would be an act of supererogation to force the President to face penalties for contempt in order to appeal from an order to whose enforcement he was plainly and inexorably opposed.<sup>8</sup>

As a matter of discretion, the Court might have declined to grant certiorari prior to submission and judgment in the court of appeals.<sup>9</sup> The delicacy of the issue, and the pendency of impeachment proceedings in the House of Representatives, might have counseled restraint, deliberate speed rather than majestic instance.<sup>10</sup> This consideration would have had greater force if the court of appeals had not already, in the earlier case of *Nixon v. Sirica*,<sup>11</sup> rendered an en banc decision on the issue of executive privilege in a similar contest. To be sure, that case arose on a subpoena issued by the grand jury, not at the behest of the Special Prosecutor after indictment, but the difference, while of some significance on procedural questions, was hardly of sufficient importance to insist on another submission to the court of appeals. As it turned out, the Supreme Court's decision on July 24 set in motion a rapid train of events: the disclosure of a fatally damaging taped conversation, a solidifying of sentiment on the House Judiciary Committee, and the President's resignation on August 8. But while in the event the decision became the precipitating cause of these ultimate political developments, the decision itself cannot be called precipitate.

Most insistently pressed of the jurisdictional and procedural arguments was the contention that the dispute was one within the executive branch, one which the President, not the courts, has the authority to resolve. The argument rests on the premise that the dispute over the tapes was wholly intra-executive, and consequently the authority to resolve it is granted by article II to the President alone.<sup>12</sup> From this premise two related conclusions

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<sup>1</sup> 94 S. Ct. 3090 (1974), *noted* pp. 50-61 *infra*.

<sup>2</sup> Transcriptions of twenty of the conversations had meanwhile been released by the President, 94 S. Ct. 3907; as to the taped recordings of these his counsel apparently did not continue to raise objections.

<sup>3</sup> *Id.*

<sup>4</sup> See *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Cobbledick v. United States* 309 U.S. 323 (1940).

<sup>5</sup> 94 S. Ct. at 3099.

<sup>6</sup> *Id.*

<sup>7</sup> See 28 U.S.C. § 2101(e) (1970).

<sup>8</sup> But with unhurrying chase,/And unperturbed pace,/Deliberate speed, majestic instance.

*The Hound of Heaven, I THE WORKS OF FRANCIS THOMPSON* 107 (1913),

<sup>11</sup> 437 F. 2d 700 (D.C. Cir. 1973), *noted* in 87 Harv. L. Rev. 1557 (1974).

<sup>12</sup> See Brief for Respondent at 27-28 ("the Judiciary is without jurisdiction to intervene in the solely intra-executive dispute presented here"; [t]he ultimate authority over all executive decisions is, under Article II of the Constitution, vested exclusively in the President of the United States").

are drawn. One is that judicial intervention would violate notions of separation of powers inherent in the case or controversy limitation of article III.<sup>13</sup> The other is that the President's power to remove executive officials would enable him to replace the Special Prosecutor and so render moot any demand for the subpoenaed materials, thus giving any decision of the Court the character of an advisory opinion.<sup>14</sup> Either conclusion would require finding the suit nonjusticiable.

The premise of a unitary executive, and particularly of a hegemonic President, however, has a strangely hollow ring in the context of the present case. The regulation establishing the office of Special Prosecutor ensures his independence in a variety of ways,<sup>15</sup> and specifically grants him the authority to contest presidential claims of executive privilege.<sup>16</sup> Moreover, it vests appointment power in the Attorney General, not the President, and permits removal only upon the commission of extraordinary improprieties and with the assent of congressional leaders.<sup>17</sup> Although the regulation refers to a presidential power to "effect" the Special Prosecutor's removal,<sup>18</sup> the practical difficulties and dubious legality of that process were sufficiently revealed in the episode of the removal of the first Special Prosecutor, Professor Cox.<sup>19</sup> Thus, there existed here a legal barrier between the parties which distinguishes their relation from that in more conventional intra-executive disputes. Even if that barrier could be eliminated through revocation of the regulation by the Attorney General,<sup>20</sup> a court would not presume that he

<sup>13</sup> *Id.* at 29-44; see *Flast v. Cohen*, 392 U.S. 83, 85 (1968):

[I]n part [the case or controversy requirement of article III] define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

<sup>14</sup> Cf. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). See the lively and learned exchange between Professors Alexander M. Bickel and Paul M. Bator, *Bickel, On Mr. Jaworski's Quarrel With Mr. Nixon*, N.Y. Times, May 23, 1974, at 41, cols. 1-4; Bator, *Disputing Mr. St. Clair on the Jurisdictional Issue*, N.Y. Times, May 30, 1974, at 37, cols. 1-4; Letter from Alexander M. Bickel to the Editor, N.Y. Times, June 3, 1974, at 30, cols. 3-4.

<sup>15</sup> Department of Justice Order No. 551-73, 38 Fed. Reg. 30738, as amended, Order No. 554-73, 38 Fed. Reg. 32805 (1973). The regulation provides, in part:

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not command or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.

<sup>16</sup> 38 Fed. Reg. at 30739.

<sup>17</sup> *Id.* at 30739 (Special Prosecutor shall have "full authority . . . [to determine] whether or not to contest the assertion of 'Executive Privilege'").

The promulgation of these regulations by the administration led to the tabling of bills in both houses which would have authorized the district court to appoint a special prosecutor. See Brief for the United States at 10 & n. 13. On the constitutional validity of such a provision under article II, compare *Ex parte Siebold*, 100 U.S. 371, 397-98 (1879) (upholding federal statute authorizing courts to appoint supervisors in federal elections). See Petition of Law School Deans, N.Y. Times, Oct. 23, 1973, at 33, cols. 2-3.

The Court made no reference, however, to congressional forbearance in reliance on these regulations. Nor did it lay stress on the provision that congressional leaders be consulted on any proposed dismissal of the Special Prosecutor; and indeed it is dubious whether designated members of Congress may participate in decisions to dismiss executive officials. Cf. *Myers v. United States*, 272 U.S. 52, 161-62 (1926); *Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 599-609 (1953); *Jackson, A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953). Rather, the Court relied on the proposition that a regulation is binding, even on its promulgator, until amended or repealed. 94 S. Ct. at 3101-02; see, e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

<sup>18</sup> See note 15 *supra*.

<sup>19</sup> See *id.*

<sup>20</sup> The removal was held illegal, as not in conformity with the published regulation, in *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973), discussed in Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629, 632-33 n. 18 (1974). The standing of the plaintiffs, members of Congress, is being challenged on appeal. See *Saxbe v. Nader*, No. 74-1260, D.C. Cir., *appeal docketed* Feb. 20, 1974.

When Cox was dismissed the regulation prohibited removal of the Special Prosecutor except for extraordinary improprieties. See Department of Justice Order No. 551-73, 38 Fed. Reg. 14668 (1973). The regulation was subsequently amended to condition dismissal not only on the commission of gross improprieties but also on the assent of congressional leaders. See note 15 *supra*.

<sup>21</sup> The Court in *Nixon* noted that it was "theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority." 94 S. Ct. at 3101.

would revoke and remove to render the case moot, any more than it is presumed that the Congress would refuse, as it might, to pay a judgment of the Court of Claims.<sup>21</sup> Finally, the notion of a unitary executive branch in which tensions between contending executive interests are authoritatively resolved by the President loses its claim when striking allegations of misconduct have been levelled against high executive officials, including the President himself.

The President implicitly recognized this conflict of interest when he effectively excused himself from controlling the discretion of the Special Prosecutor; and more than the maxim that "the President is the Executive Department"<sup>22</sup> would be required to conclude that this act of natural justice cannot form the basis of a justiciable controversy because of some inescapable embodiment of executive authority in the presidency. In the world of reality, legal and political, the President and the Special Prosecutor were in truth in a highly adversary relation, which was not amenable to solution by executive action. In the context of a suit to enforce a subpoena in a criminal action, there was a justiciable controversy calling insistently for adjudication.

A final procedural question was whether the requirements of rule 17(c) of the Federal Rules of Criminal Procedure, under which the pretrial subpoena duces tecum was issued, were satisfied. It was common ground that the rule embodies the criteria of relevancy, specificity, and admissibility.<sup>23</sup> Applying the appropriate standard of review, namely, whether the ruling of the district court was clearly erroneous, the Supreme Court was unable to reverse on the score of lack of relevancy or specificity.<sup>24</sup>

The question of admissibility was given closer consideration, and it is here that the abstemiousness of the opinion with respect to Mr. Nixon was most marked. The recorded conversations took place between the President and one or more of those indicted as conspirators. The President had been named by the grand jury as an unindicted co-conspirator, an action which was before the Court on a cross-petition seeking review of the district court's refusal to expunge. The Special Prosecutor regarded this action of the grand jury as helpful, though not essential, on the issue of the admissibility of the tapes sought.<sup>25</sup> Without focusing on the President, the Court was able to hold most of the tapes potentially admissible either as out-of-court admission by a defendant or as declarations by a co-conspirator made in the course of the conspiracy and in furtherance of it.<sup>26</sup>

Had the Court examined the question of admissibility with greater particularity, it might have been forced to address the role of the President as an alleged co-conspirator. One group of tapes included conversations between the President and Charles W. Colson,<sup>27</sup> who was

<sup>21</sup> So long as judgments of the Court of Claims were reviewable by the Secretary of the Treasury, the Supreme Court refused to take jurisdiction over appeals from those judgments. See *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865), 117 U.S. 697 (1885); cf. *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851) (no jurisdiction to review similar judgment of federal district court). But when Congress amended the Court of Claims Act to provide that judgments would not be subject to revision by the Secretary, the Court did take jurisdiction despite the continuing possibility that particular judgments might on occasion not be honored by Congress. See *Gifford Co. v. Zdanok*, 370 U.S. 530, 552-54, 568-70 (1962) (plurality opinion); *United States v. Jones*, 119 U.S. 477 (1886).

<sup>22</sup> Reply Brief for Respondent at 1-2, quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 509-01 (1867).

<sup>23</sup> See Brief for Petitioner at 125-29; Brief for Respondent at 123-25.

<sup>24</sup> See 94 S. Ct. at 3103.

<sup>25</sup> Reply Brief for Petitioner at 59-64.

<sup>26</sup> S. Ct. at 3104 & nn. 13-14.

<sup>27</sup> Reply Brief for Respondent at 42 n.30.

one of those indicted but who had been dismissed as a defendant pursuant to a plea bargain under which he pleaded guilty to an offense in another case. Thus, the admissibility of these tapes would have to be based on either the President's or Colson's status as a co-conspirator. Although it is possible that all of the recorded conversations might be admissible by virtue of Colson's status alone, the Court apparently chose not to address this possibility.<sup>28</sup> Reliance on the naming of Mr. Nixon by the grand jury would have afforded clearer support for admissibility, but the Court understandably may have preferred some measure of discreet logical blindness for the sake of greater blandness.

## II. EXECUTIVE PRIVILEGE

And so we are brought to the question of "executive privilege" itself. The term appears to be of recent origin,<sup>29</sup> but that circumstance sheds little light on the legitimacy of the concept itself, just as Jeremy Bentham's invention of the term "international law"<sup>30</sup> gave a new name, but not a new birth, to a body of received doctrine. Of greater concern is the problem of the meaning of the term, which can embrace at least two distinct, though related, claims.

The privilege might be invoked as an immunity of the President from legal process. This position, advanced on the President's behalf in the earlier tapes case,<sup>31</sup> was not renewed in the present controversy. A concession that a President is not subject to compulsory process was made, *arguendo*, in *Marbury v. Madison*<sup>32</sup> by Charles Lee, counsel for Marbury, in contending that James Madison, as Secretary of State, was by contrast subject to mandamus for the performance of a ministerial duty. Lee said in oral argument:<sup>33</sup>

"It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a mandamus to a secretary of state, is equivalent to a mandamus to the President of the United States. I declare it to my opinion, grounded on a comprehensive view of the subject, that the president is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution."

This concession could be readily made, however, because a practical alternative existed—the President's subordinate could stand in judgment. In the trial of Aaron Burr four years later, when a subpoena duces tecum addressed to President Jefferson himself directly raised the question of immunity from process, Chief Justice Marshall, presiding on circuit, treated it as a matter not of legal immunity but of practical convenience.<sup>34</sup> This approach, eschewing absolutes, serves to maintain the rule of law in

<sup>28</sup> The tapes might conceivably be admissible for purposes of impeaching, or rehabilitating, either Colson or President Nixon as a witness; but as the opinion observes, without reference to the precise problem, "[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." 94 S. Ct. at 3104. The opinion is content to state that "most of the tapes apparently contain conversations to which one or more of the defendants named in the indictment were party." *Id.* Perhaps the very bulk of the materials subpoenaed by the Prosecutor facilitated a relatively general approach by the Court to the question of admissibility.

<sup>29</sup> The earliest use which the author has discovered is in the government briefs in the *Reynolds* case. Petitioner's Brief for Certiorari at 11, 12, *United States v. Reynolds*, 345 U.S. 1 (1953). See R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 1 & n.3 (1974).

<sup>30</sup> OXFORD ENGLISH DICTIONARY 409-410 (1933), citing J. BENTHAM, PRINCIPLES OF LEGISLATION xvii § 25 (1780).

<sup>31</sup> See *Nixon v. Sirica*, 487 F. 2d 700, 708-12 (D.C. Cir. 1973).

<sup>32</sup> U.S. (1 Cranch) 137 (1803).

<sup>33</sup> *Id.* at 149.

<sup>34</sup> *United States v. Burroughs*, 1 U.S. Cas. 30, 34-35 (No. 14,692d) (C.C.D. Va. 1807).

its most elementary aspect. In the tension between the claims of governance and those of restraint, the ancient tension between *gubernaculum* and *jurisdictio*,<sup>35</sup> the availability of a subordinate has served as a way of procedural accommodation. If members of Congress cannot be sued for their official conduct, still officers of their house may be answerable for carrying out those actions,<sup>36</sup> as cabinet officers may be legally accountable for executing presidential directions.<sup>37</sup> This time-honored means of accommodation was made unavailable in the tapes cases by the President's action in formally taking sole custody of the tapes. Thus the usual suit against a subordinate became impossible, and a confrontation was compelled.<sup>38</sup> In the eighteenth-century Newtonian universe that is the Constitution, an excessive force in one direction is apt to produce a corresponding counterforce. The forcing of the issue in the tapes cases served in the end to solidify the principle of presidential amenability to process.

A second possible meaning of executive privilege is the evidentiary claim directly raised in the tapes case, an exemption from a duty to produce testimony or documents and a legal capacity to control the production of certain kinds of evidence by others. Such a privilege with respect to military secrets or sensitive diplomatic communications and intelligence, recognized in the law of evidence, was not in issue. The controversy was limited to the "generalized" claim, as the brief of the Special Prosecutor<sup>39</sup> and the Court's opinion<sup>40</sup> put it, of a privilege concerning confidential communications to which the President was a party.<sup>41</sup>

In considering whether such a privilege exists, do we look to the Constitution or to the law of evidence? Actually the question is not a very meaningful one. It resembles the query raised by some irreverent friends of Lord Rutherford, who asked whether he had really discovered the nucleus of the atom or had simply put it there. The privilege, unlike the immunity accorded to members of Congress under the "speech and debate" clause,<sup>42</sup> is not expressly granted by the Constitution. It would, confessedly, be a privilege implied by the necessities of the system, in particular by the separation of powers,<sup>43</sup> as intergovernmental tax immunities are implied in the cause of a working federalism. If certain relationships, like that of lawyer and client, are deemed to require the preservation of confidentiality of communications even from the demand of litigation, then arguably a similar privilege should be recognized for the relationship of President and confidant. Whether it ought to be recognized calls for the kind of weighing of interests, *mutatis mutandis*, that is practiced in assessing relative needs in other relationships. If the

<sup>35</sup> See C. MELVILLE, *Constitutionalism: Ancient and Modern* *passim* (rev. ed. 1947).

<sup>36</sup> See Powell v. McCormack, 395 U.S. 486, 504-06 (1969); *Jurley v. MacCracken*, 294 U.S. 125 (1935) (petitioner for writ of habeas corpus being held in custody of the Sergeant-at-Arms of the Senate on account of destruction of documents under subpoena by a Senate committee).

<sup>37</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>38</sup> See *Nixon v. Sirica*, 487 F. 2d 700, 709 (D.C. Cir. 1973); 87 HARV. L. REV. 1557, 1562-63 (1974).

<sup>39</sup> See Brief for Respondent at 85 n. 65.

<sup>40</sup> See 94 S. Ct. at 3109-10.

<sup>41</sup> Another possible meaning of executive privilege is a substantive immunity from liability, qualified or absolute. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967); *Tenney v. Brandhove*, 341 U.S. (1951); W. PROSSER, *LAW OF TORTS* § 132, at 987-92 (4th ed. 1971). Absolute immunity, designed to protect certain discretionary functions from even the burden of litigation, is more familiar in the law of torts than of crimes, perhaps because of the greater public concern and the greater screening process in the bringing of actions in the latter area. Cf. *Gregoire v. Biddle*, 117 F. 2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.).

There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.

<sup>42</sup> See 94 S. Ct. at 3105-06 & n. 16; *Grave v. United States*, 408 U.S. 606 (1972).

<sup>43</sup> See 94 S. Ct. at 3105, 3107.

balance is struck by the courts in favor of confidentiality, the resulting principle as applied to the presidential office becomes one of constitutional dimensions. Although the analysis is similar in the private and the official spheres, the differences in content are significant. Full and frank interchange is a desideratum in both spheres; but the President is a public trustee in a sense beyond that applicable to a lawyer or physician, and so the countervailing interest in disclosure should weigh more heavily.

The principal clue to a resolution of the interests at stake can be derived from the intergovernmental tax doctrine itself. It was put thus by Chief Justice Hughes:<sup>44</sup>

"The principle invoked by the petitioner of the immunity of state instrumentalities from federal taxation, has its inherent limitations. It is a principle implied from the necessity of maintaining our dual system of government. Springing from that necessity it does not extend beyond it."

If the Court had accepted the grand jury's naming of the President as an unindicted coconspirator<sup>45</sup> the issue of privilege could have been more easily resolved; on the analogy of other confidential relationships, the privilege would not extend to communications in furtherance of a course of criminal conduct.<sup>46</sup> Once more, in bypassing this action of the grand jury, proffered by the Special Prosecutor,<sup>47</sup> the Court elected to take broader ground in support of the Special Prosecutor's position. The same is true with respect to the question who is to decide on the balance of interests. More than once the Court's opinion quotes Marshall's magisterial words in *Marbury v. Madison*: ". . . it is emphatically the province and duty of the judicial department to say what the law is."<sup>48</sup> But of course the judiciary might declare "the law" to be that the President is the sole determiner of the need for protecting the confidentiality of particular communications, just as "the law" grants him sole authority over recognition of the legal government of a foreign state.<sup>49</sup> To support such an authority in a case where there was complicity between the President and the defendants would offend violently against the ancient precept that no man shall be judge in his own cause. The Court chose, however, to base its decision more impersonally, and hence more broadly, on the proposition that a court in a criminal case possesses the ultimate authority to decide what is required on balance to be produced in the interests of the administration of criminal justice.<sup>50</sup>

In striking a balance, the degree of relevance and materiality of the evidence is a significant factor. It is here that the real problems arise, particularly where the evidence sought is documentary and may contain material of varying relevance and sensitivity. The problems are those of procedure and mechanics, and they were first addressed by John Marshall, preliminarily in *Marbury v. Madison*<sup>51</sup> and more fully in the trial of Aaron Burr.

The proceedings in *Marbury v. Madison* in 1803 were something of a rehearsal for the issue of executive privilege

in the Burr trial in 1807. A summons was issued to Levi Lincoln, then attorney general, who had been secretary of state at the outset of Jefferson's administration in 1801, when the commissions signed by the outgoing President Adams were allegedly withheld from Marbury and his co-petitioners. Lincoln objected to answering written questions as to any facts which came officially to his knowledge while acting as secretary of state.<sup>52</sup> Charles Lee, counsel for Marbury, conceded that Lincoln need not answer as to any facts which came to his knowledge in the discharge of that part of his duties as "an agent of the president, bound to obey his orders, and accountable to him for his conduct"<sup>53</sup> but maintained that the facts concerning the commission were within an independent branch of his duties, as a public ministerial officer of the United States.<sup>54</sup> The Court allowed Lincoln until the next day to consider his position, but took occasion to express its views in a monitory way:<sup>55</sup>

" . . . [the Court] had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world has a right to know. If he thought any of the questions improper, he might state his objections."

The next day Lincoln went far toward an accommodation, agreeing to answer all the questions except one, namely, what had been done with the commissions. He professed to have no knowledge whether they ever came into the possession of Secretary of State Madison.<sup>56</sup> The Court, evidently relieved that a full-scale confrontation could be avoided, now absolved Lincoln of a duty to answer that question: ". . . he was not bound to say what had become of them; if they never came into the possession of Mr. Madison, it was immaterial to the present causes what had been done with them by others."<sup>57</sup>

And so the issue of materiality provided an escape, although if the question of privilege had not been involved it is difficult to believe that the question put to Lincoln would have been excluded. After all, evidence concerning the further disposition of the commissions might have been useful in producing further witnesses who could throw clearer light on the previous whereabouts and state of the documents, and on the question whether they were in fact brought to the attention of President Jefferson, in which event his failure to order delivery might be taken as an intended removal from office.<sup>58</sup>

Marshall again faced the question of executive privilege at the Burr trial, or more accurately trials. In the course of those proceedings, he delivered the following two statements concerning the duty of the President to respond to a subpoena duces tecum in a criminal case:<sup>59</sup>

<sup>44</sup> *Id.* at 143-44.

<sup>45</sup> *Id.* at 143.

<sup>46</sup> *Id.* at 144-45.

<sup>47</sup> *Id.* at 145.

<sup>48</sup> *Id.*

<sup>49</sup> The recession of the Court at this stage may be compared with the cadence of Marshall's opinion on the full case, taking occasion to castigate an executive who would "at his discretion sport away the vested rights of others," *id.* at 168, then avoiding a collision by holding that the Court could not exercise original jurisdiction to issue a writ of mandamus, although of course in so abstaining the Court established the momentous doctrine of judicial review of congressional acts.

<sup>50</sup> *25 F. Cas.* at 34, 192.

<sup>51</sup> *See, e.g., 8 J. Wigmore, EVIDENCE § 2298 (McNaughton rev. ed. 1961) (attorney-client privilege).*

<sup>52</sup> *See Brief for Petitioner at 90-102.*

<sup>53</sup> 5 U.S. (1 Cranch) at 177, quoted in 94 S. Ct. at 3105, 3106.

<sup>54</sup> *United States v. Belmont*, 301 U.S. 324, 330 (1937).

<sup>55</sup> *See* 94 S. Ct. at 3107.

<sup>56</sup> 5 U.S. (1 Cranch) 137 (1803).

"The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it.

"In no case of this kind would a court be required to proceed against the president as against an ordinary individual."

The juxtaposition, though tantalizing, is not altogether fair: Marshall was not suffering from judicial schizophrenia. Rather, he was speaking at two different points in the proceedings and was addressing two different issues—the issuance of a subpoena to the President, and its enforcement after the President's counsel made a return claiming privilege.

The Burr trials<sup>60</sup> passed through four stages: the grand jury inquiry (indictments for treason and misdemeanor were returned on June 24 and 26, 1807); the treason trial (Burr was acquitted on September 1); the misdemeanor trial (Burr was acquitted on September 15); and commitment to the Federal Circuit Court for Ohio on a misdemeanor charge.<sup>61</sup> Two subpoenas were issued by Chief Justice Marshall and the district judge sitting with him as the Circuit Court for Virginia on motion of counsel for Burr: one on June 13, addressed to President Jefferson, calling for the production of a letter written to Jefferson by General Wilkinson on October 21, 1806; the second on September 4, addressed to the United States Attorney, George Hay, for a letter from Wilkinson to Jefferson written on November 12, 1806. The actual content of these letters was not described or disclosed, but that of October 21 had been referred to by Jefferson in a message to Congress as establishing Burr's guilt beyond doubt,<sup>62</sup> and that of November 12, it was intimated throughout the arguments of counsel, contained scandalous charges by Wilkinson against other respectable officials. Both letters were evidently sought to provide a basis for impeaching the credibility of Wilkinson should he testify for the prosecution.<sup>63</sup>

In support of his demand for the first letter Burr submitted his affidavit stating simply that "he hath great reason to believe that a letter from General Wilkinson to the president of the United States, dated 21st October, 1806, as mentioned in the president's message of the 22d January, 1807, to both houses of congress . . . may be material in his defence, in the prosecution against him. . . ."<sup>64</sup> Burr's argument to the court contained a concession with respect to state secrets and to confidential matters not relevant to the case:<sup>65</sup>

"If the letter contained state secrets which it would be inconsistent with the public safety to disclose, the president could say so in the return to the subpoena; but it was not to be assumed until he did say so. Or, if the letter

contained anything of a confidential character, not relating to the case, the president could point out such parts as he did not wish to have exposed, and they need not be read in court."

The United States Attorney, George Hay, was remarkably close to Burr's position on when disclosure was appropriate, although he resisted the issuance of a subpoena. The difference turned mainly on whether the executive or judiciary should decide. Hay informed the court that he had written the President "stating the motion that was to be made this day, and suggesting the propriety of sending on the papers required; but reserving to himself [Hay] the right of retaining them, till the court saw them, and determined their materiality."<sup>66</sup> Jefferson, in response, stating that the letter in question was no longer in his possession, having been entrusted to Attorney General Rodney, undertook to see that it was delivered to Hay, but insisted on the principle that the President must "decide, independently on all other authority, what papers coming to him as president, the public interest permits to be communicated, and to whom." He added, "I assure you of my readiness, under that restriction, voluntarily to furnish, on all occasions, whatever the purposes of justice may require."<sup>67</sup> Then, referring to his lack of actual possession of the letter, he devolved discretion regarding materiality upon Hay:<sup>68</sup>

"But as I do not recollect the whole contents of that letter, I must beg leave to devolve on you, the exercise of that discretion which it would be my right and duty to exercise, by withholding the communication of any parts of the letter which are not directly material for the purposes of justice."

A further message from Jefferson to Hay, read to the court, explained that he had written to Attorney General Rodney but had received no information concerning Wilkinson's letter; Jefferson referred to certain other letters and orders that were wanted, stating, "[t]he receipt of these papers has, I presume, so far anticipated, and others this day forwarded, will have substantially fulfilled the object of a subpoena from the district court of Richmond. . . ."<sup>69</sup> He repeated his insistence that with respect to papers not in the public domain the President "must be the sole judge of which of them the public interest will permit publication."<sup>70</sup> Jefferson managed a delicate thrust at what he regarded as judicial pretensions:<sup>71</sup>

"The respect mutually due between the constituted authorities in their official intercourse, as well as sincere dispositions to do for every one what is just, will always insure from the executive, in exercising the duty of discrimination confided to him, the same candour and integrity, to which the nation has in like manner trusted in the disposal of its judiciary authority."

Meanwhile, between Hay's letter to Jefferson and the receipt of the latter's responses, Marshall had proceeded to issue the subpoena, with an opinion, already quoted,<sup>72</sup> taking broad ground concerning the amenability of the President to the court's process, but adding that any claim of privilege would be considered in due course if made

<sup>60</sup> Recent discussions of the Burr trials include: Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1111-22 (1974); Nathanson, *From Watergate to Marbury v. Madison: Some Reflections on Presidential Privilege in Current and Historical Perspectives*, 16 ARIZ. L. REV. 59, 61-65 (1974); Rhodes, *What Really Happened to the Jefferson Subpoena*, 60 A.B.A. J. 52 (1974); Wills, *Executive Privilege: Jefferson & Burr & Nixon & Fehlman*, The New York Review of Books, July 18, 1974, at 38; R. BERGER, *supra* note 29, at 187-94; 5 D. MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT, SECOND TERM*, 1805-08, at 215-370 (1974).

The trials are reported in two shorthand transcriptions: T. CARPENTER, *THE TRIAL OF COL. AARON BURR* (1807) (three volumes) [hereinafter cited as CARPENTER]; D. ROBERTSON, *THE TRIALS OF COLONEL AARON BURR* (1808) (two volumes) [hereinafter cited as ROBERTSON]. The opinions of Chief Justice Marshall and some of the arguments of counsel are reported at 25 F. Cas. 207 (N. 14 6 2a-14, f94a) (C.C.D. Va. 1807).

<sup>61</sup> See Berger, *supra* note 60, at 1112; Rhodes, *supra* note 60, at 52-53.

<sup>62</sup> See J. RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 412 (1896).

<sup>63</sup> See 25 F. Cas. at 31-32; 2 ROBERTSON 512-27. Wilkinson testified before the grand jury, but he was not in fact called as a witness in the two trials. See 5 D. MALONE, *supra* note 60, at 336, 344.

<sup>64</sup> 25 F. Cas. at 31; 1 ROBERTSON 119.

<sup>65</sup> 25 F. Cas. at 31.

<sup>66</sup> 1 ROBERTSON 120.

<sup>67</sup> Letter from Thomas Jefferson to George Hay, June 12, 1807, 1 ROBERTSON 210.

<sup>68</sup> *Id.*

<sup>69</sup> Letter from Thomas Jefferson to George Hay, June 17, 1807, 1 Robertson 254-55.

<sup>70</sup> *Id.* at 255.

<sup>71</sup> *Id.*

<sup>72</sup> See p. 23 *supra*.

on the return. Marshall adumbrated the criteria he would apply if a claim were made that disclosure would be incompatible with the public interest:<sup>73</sup>

"That there may be matter, the production of which the court would not require, is certain; but, in a capital case, that the accused ought, in some form, to have the benefit of it, if it were really essential to his defense, is a position which the court would very reluctantly deny . . . There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed."

And then, in an obvious reference to Jefferson's public denunciation of Burr, Marshall thrust the rapier:<sup>74</sup>

"It is not easy to conceive that so much of the letter as relates to the conduct of the accused can be a subject of delicacy with the president. Everything of this kind, however, will have its due consideration on the return of the subpoena."

The issue proceeded no further, however, for the original of the October 21 letter seems never to have come into the United States Attorney's possession, and Burr's acquittal in the treason trial rendered the matter academic in that context,<sup>75</sup> the question whether disclosure would be compelled, who would be the arbiter of privilege, what criteria would apply, and what procedures would be adopted, were not finally resolved at this stage.

Although Burr renewed his demand for the letter of October 21 at the outset of the trial for misdemeanor, attention turned now to Wilkinson's letter of November 12, which had been presented to the grand jury. Evidently it contained material embarrassing to Jefferson in that Wilkinson made serious charges against certain of the President's political friends.<sup>76</sup> Marshall issued a subpoena for the letter to the United States Attorney, although Marshall had doubts about its materiality to the defense. The Chief Justice was evidently familiar with it, since at one point he observed that "[w]e must consider the subject as if we had not seen the letter."<sup>77</sup> He intimated broadly that the contents were not so significant as the spirited contest over their production might suggest:<sup>78</sup>

"It is with regret that I decide a question under such circumstances, because it is probable that those parts of the letter which are withheld, are of much less importance than gentlemen suppose; and that the effect of their production would be to dissipate suspicions which are now entertained, and to shew that the subject of the controversy is by no means proportioned to the zeal with which it has been maintained."

Discussion turned to the mechanics by which the character and materiality of passages objected to might be

<sup>73</sup> 25 F. Cas. at 37.

<sup>74</sup> *Id.*

<sup>75</sup> A copy of the October 21 letter was apparently delivered to the clerk of the court, *see 3 CARPENTER* 112 (statement of Aaron Burr), and during the commitment proceedings a portion of that copy was quoted by John Wickham, one of Burr's counsel, in his cross-examination of General Wilkinson. *Id.* at 265-66. It is unclear from the trial transcript whether the whole letter or only portions of it were made available to the defense, but Hay's remark that he no longer objected to the disclosure of all of the letter, *see 2 ROBERTSON* 505, suggests that the entire document was turned over.

<sup>76</sup> ROBERTSON 520-30; Rhodes, *supra* note 60, at 53.

<sup>77</sup> 2 ROBERTSON 511.

<sup>78</sup> *Id.* at 533-34.

decided. On this procedural problem the defense maintained that "the party, and not the court, judges of the materiality of witnesses or documents; that the materiality when sworn to by the party is always admitted" for purposes of a subpoena.<sup>79</sup> The prosecution, on the other hand, proposed a procedure that would consist of an in camera hearing on the sensitivity and materiality of the portions it sought to withhold. Specifically, Mr. Hay "said that he was willing that Mr. Botts, Mr. Wickham and Mr. Randolph should examine them. He would depend on their candor and integrity to make no improper disclosure; and if there should be any difference of opinion, as to what were confidential passages, the court should decide."<sup>80</sup> Burr's counsel were not only Messrs. Botts, Wickham, and Randolph, but also Luther Martin, the "federal bulldog,"<sup>81</sup> and his response was predictably explosive:<sup>82</sup>

"Mr. Martin objected to this as a secret tribunal. He had never heard of such a distinction. The counsel had a right to hear them publicly without their consent. If gentlemen, said he, are willing that the court should decide on a written argument, and that the whole shall be conducted as a secret tribunal, let them speak plainly."

Marshall concurred in this objection to the extent of remarking that the defendant himself should be allowed to examine the entire letter.<sup>83</sup>

Marshall's opinion at this stage is the most comprehensive and considered statement on the problem in the course of the trials. He was plainly troubled and in search of a middle way:<sup>84</sup>

"That the President of the United States may be subpoenaed and examined as a witness, and required to produce any paper in his possession, is not controverted. I cannot, however, on this point, go the whole length for which counsel have contended. The president, though subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. I do not think precisely with the gentlemen on either side."

The opinion proceeds to set forth dialectically Marshall's analysis. In an ordinary case an affidavit of materiality would suffice to order production. But the President may have sufficient reasons for withholding a document whose exposure would be of "manifest inconvenience." It would be "a very serious thing," however, to withhold from the accused "any information material to the defense." But "on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly show the paper to be essential to the justice of the case." On the weight to be given to the President's objection, "the court would unquestionably allow their full force to those reasons." If a reservation of certain portions of a paper were made by the President, "all proper respect" would be

<sup>79</sup> *Id.* at 532.

<sup>80</sup> *Id.* at 501. The suggestion was repeated, for the prosecution, by William Wirt. *Id.* at 529.

<sup>81</sup> Jefferson, in his letter of June 19, 1807, to Hay referred to Martin as "this unprincipled & imprudent federal bull-dog." 9 THE WRITING OF THOMAS JEFFERSON 58 (P. Ford ed. 1898). Henry Adams embellished the portrait: "the rollicking, witty, audacious Attorney-General of Maryland; . . . drunken, generous slovenly, grand; bull-dog of federalism. . . ." H. ADAMS, JOHN RANDOLPH 141 (1882).

<sup>82</sup> 2 ROBERTSON at 502.

<sup>83</sup> 25 F. Cas. at 192. Marshall's agreement that Burr should be given access to the entire letter and consulted during the editing of it appears to have derived from a belief that Burr himself was better qualified than either his counsel or Marshall to assess the evidentiary value of the letter. *See id.*

<sup>84</sup> *Id.* at 191.

paid to it. Here, however, no objection had been interposed by the President himself, but only by his delegate, the United States Attorney. With the case in this posture, and because “[t]he only ground laid for the court to act upon is the affidavit of the accused,” “the court is induced to order that the paper be produced, or the cause be continued.”<sup>85</sup>

President Jefferson subsequently sent a copy of the letter, with his own deletions, to the United States Attorney, but Burr did not press his demand, probably because his acquittal on the misdemeanor charge, as on the trial for treason, was confidently expected (and did occur). Demand for the letter was renewed, however, in the final stage of the proceedings, on motion to commit Burr to the custody of the federal marshal for transfer for trial in Ohio. At this stage Marshall delivered no further opinion but made rulings in the course of colloquies with counsel. The Chief Justice's private knowledge of the contents of the letter was shared by Burr's counsel,<sup>86</sup> and doubtless by Burr himself, and Marshall was manifestly annoyed that the defense offered no further statement of its materiality; the contest over production had become a protracted bout of shadowboxing. But Marshall did reassert his opinion that it was his responsibility to weigh the President's claim. Addressing Burr, he said:<sup>87</sup>

“After such a certificate from the president of the United States as has been received, I cannot direct the production of those parts of the letter, without sufficient evidence of their being relevant to the present prosecution. I should suppose, however, that the same source, which informed you of the existence of this paper, might inform you of the particular way in which it was relevant.”

In the end Marshall refrained from ordering production, ruling instead that the omitted parts of the letter might be taken to support the defendant's assumption regarding them:<sup>88</sup>

“After a long and desultory argument, the Chief Justice determined that the correct course was, to leave the accused all the advantages which he might derive from the parts already produced; and to allow all the advantages of supposing that the omitted parts related to any particular point. The accused may avail himself as much of them, as if they were actually produced.

\* \* \* \* \*

“I have already decided this question. It is certainly fair to supply the omitted parts by suppositions, though such ought not to affect General Wilkinson's private character. If this were a trial in chief, I should perhaps think myself bound to continue the cause, on account of the withholding the parts of this paper: and I certainly

<sup>85</sup> *Id.* at 192.

<sup>86</sup> See 3 CARPENTER 282.

<sup>87</sup> *Id.* at 280-81.

<sup>88</sup> *Id.* at 281-82, 284.

A ruling such as Marshall's might conceivably reflect an opinion that the matter was indeed privileged but that the prosecution was, in effect, estopped from taking advantage of the privilege. See *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946) (Frank, J.) (“When the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege.”) Marshall, however, gave no indication that he was silently renouncing his position that the judge, not the President, was the ultimate arbiter, and his remarks to Burr, quoted in the text, indicate the contrary. Moreover, in context Marshall's ruling was as helpful to the defense as actual delivery of the letter would have been. See note 90 *infra*.

cannot exclude the inferences which gentlemen may draw from the omissions.”

Marshall's ruling at this stage appears to have been compounded of exasperation, desire to avoid an outright collision with Jefferson, and conviction that commitment proceedings were not an appropriate forum for resolution of difficult legal questions. He stated a preference for leaving such questions to the trial judge, who could certify them to a higher court.<sup>89</sup>

The Burr trials may be taken to have established four principles, all pertinent to and important for the tapes case: (1) There is no absolute privilege in a criminal case for communications to which the President is a party. (2) Upon a particularized claim of privilege by the President the court, giving due respect to the President's judgment, will weigh the claim against the materiality of the evidence and the need of the accused for its production. (3) For purposes of determining whether disclosure is required, the material sought may be ordered to be produced for *in camera* inspection by the court, with the participation of counsel and, it seems, of the accused. (4) In lieu of such production, the court may direct that inferences shall be drawn favorable to the accused, or that the prosecution be dismissed.

In the tapes case these principles were largely confirmed,<sup>90</sup> and the mechanics of an *in camera* inspection were refined. If the President invokes a claim of privilege in response to a subpoena, the district judge should treat materials as “presumptively privileged” and order *in camera* inspection only if the Special Prosecutor demonstrates that they are “‘essential to the justice of the [pending criminal] case.’”<sup>91</sup> Since the Special Prosecutor has already been required to demonstrate relevancy in order to obtain the subpoena in the first instance,<sup>92</sup> presumably this further requirement calls for a stronger showing of need. During the inspection the judge should exercise the utmost care for the safekeeping of the materials.<sup>93</sup> In determining whether particular portions are to be excised, the judge in his discretion may call upon the aid of counsel for both sides, although neither appears to be entitled to participate as of right.<sup>94</sup> Such procedures ensure that presidential confidentiality will not be broken except where a genuine need exists; enable the court to

<sup>89</sup> See 3 CARPENTER 400. Marshall appeared anxious to terminate his part in the Burr affair. Shortly afterwards, he wrote to Judge Peters of Philadelphia, thanking him for a volume of *Admiralty Reports* and revealing something of his feelings about the Burr trials:

“I have as yet been able only to peep into the book. . . . I received it while fatigued, and occupied with the most unpleasant case which has ever been brought before a judge in this or, perhaps, in any other country which affected to be governed by laws, since the decision of which I have been entirely from home. The day after the commitment of Colonel Burr . . . I galloped to [his vacation home in] the mountains. . . .”

J. THAYER, JOHN MARSHAL 97 (Phoenix ed. 1967).

<sup>90</sup> The *Nixon* Court nowhere expresses any view as to the propriety of permitting evidentiary inferences on behalf of the accused in lieu of requiring production of evidence. In *Nixon* the inappropriateness of that alternative was evident: the materials sought included conversations between indicted conspirators and others and therefore would be likely to relate to central elements in the case; their actual contents were unknown and in some instances in dispute; and they were being sought for use by both the prosecution and the defense in a criminal trial in chief. In *Burr*, however, it appeared to make little real difference to the outcome of the proceedings whether the defense received the inference or the actual letter: the letter was only marginally relevant to the defendant's case, being sought solely in order to impeach the veracity of a witness, see 3 CARPENTER 280-81; and most important, the actual contents were already known both to the defense and to Marshall, who was sitting without a jury and would be the sole judge of whether to commit Burr for a new trial. See *id.* at 280, 282; 2 ROBERTSON 509.

<sup>91</sup> 94 S. Ct. at 3110 (brackets in original), quoting *United States v. Burr*, 25 F. Cas. at 102.

<sup>92</sup> See p. 17 *supra*.

<sup>93</sup> See 94 S. Ct. at 3110-11.

<sup>94</sup> See *id.* at 3110 n 21.

make an informed judgment about the need for disclosure of specific segments of subpoenaed materials; and protect against disclosure of irrelevant portions.<sup>95</sup>

In the tapes case the Court was not called upon to deal with materials that contain military or diplomatic secrets. Nevertheless, citing *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*<sup>96</sup> and *United States v. Reynolds*,<sup>97</sup> the opinion observes that the "high degree of deference" shown to the executive's judgment in such cases need not be shown where the privilege claimed is only the generalized one in confidentiality.<sup>98</sup> The apparent approval given to the *Reynolds* decision may be disquieting. There the Court held that in a tort action by the widows of three civilian engineers who were killed in the crash of an Air Force plane on which experimental and secret electronic equipment was carried, the plaintiffs were not entitled to the production, even for in camera inspection by the trial court, of a report of an official board of inquiry investigating the airplane accident. There was no suggestion that the electronic equipment figured in the cause of the crash. The decision reversed a strong court of appeals (Judges Maris, Goodrich, and Kalodner)<sup>99</sup> and drew a dissent from Justices Black, Frankfurter, and Jackson. Particularly surprising was Chief Justice Vinson's observation that production of the report was of dubious necessity since the survivors themselves, who had been interviewed by the board, were available as witnesses;<sup>100</sup> one might have thought that this circumstance enhanced the value of the report in the interest of completeness and confrontation.<sup>101</sup>

The *Reynolds* Court's willingness to honor a claim of privilege merely on the basis of the executive's judgment is not, however, a forceful precedent for the inappropriateness of an in camera hearing to determine whether production of national security information may be compelled in the course of criminal proceedings. *Reynolds* was a civil case—a situation with which the *Nixon* Court was expressly not concerned,<sup>102</sup> and one in which the litigant's demand for evidence was arguably less appealing because his suit was permissible only by virtue

<sup>95</sup> There is, of course, one conspicuous difference between the *Burr* case and the tapes case: in the latter the documents were sought not by the accused but by the prosecution. The difference, however, is more conspicuous than significant. Not only does the pursuit of justice have a double aspect, but in fact the interests of the accused may be served by production at the instance of the prosecution. Under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), the accused is entitled to access to evidentiary material of an exculpatory nature in the possession of the prosecution, and several of the defendants were asserting rights under that doctrine. As Mr. Justice Douglas pointed out at the oral argument, the rights of the accused were lurking not far beneath the surface of the case.

QUESTION: I thought the heart of this case was the right of defendants in a criminal trial to that evidence. It may be exculpatory and free them of all liability. . . .

Mr. JAWORSKI: Well, it certainly is in the case. Now, of course what you have reference to also, I am sure, Mr. Justice Douglas, is *Brady*.

QUESTION: And the question of whether or not the defendants, under the *Brady* doctrine are entitled to subpoena information and material that is not now in your possession but is in the possession of the President, was an issue that was left undecided by the District Court.

Mr. JAWORSKI: That is correct, sir.

Transcript of Oral Argument at 41-42. The Special Prosecutor freely stated that he would make available to defendants any material to which they were entitled under *Brady*, and that obligations "extend even to 'privileged' evidence." Reply Brief for Petitioner at 64 n.37.

<sup>96</sup> 333 U.S. 103 (1948).

<sup>97</sup> 345 U.S. 1 (1953).

<sup>98</sup> 94 S. Ct. at 3108-09.

<sup>99</sup> 192 F.2d 987 (3d Cir. 1951).

<sup>100</sup> 345 U.S. at 11.

<sup>101</sup> Compare the remark of George S. Kaufman in the course of a bridge game, whose application to the tapes case need not be labored: "I would like a review of the bidding, with the original intonations." L. KRONENBERGER, THE CUTTING EDGE 169 (1970). Possibly more authoritative is the statement of Lord Reid when a similar ground was suggested for exclusion of official reports:

"No doubt if a report contains more than a statement of the facts there may be reasons at least for withholding that part which ought not to be disclosed, but I fail to see what public interest is served by permitting evidence to be given but withholding the contemporary report of the witness about the facts."

Conway v. Rimmer, [1968] A.C. 910, 946.

<sup>102</sup> 94 S. Ct. at 3109 n.19.

of the Government's consent as manifested in the Tort Claims Act.<sup>103</sup> However that may be, an important and reassuring footnote near the end of Chief Justice Burger's opinion assimilates claims of military and diplomatic secrets to those of general confidentiality for the purpose of the availability of an in camera procedure.<sup>104</sup> The somewhat greater deference to the executive that the *Nixon* opinion indicates is appropriate when national security information is under subpoena thus appears to go to the weight to be accorded the needs of confidentiality versus the needs of litigants, rather than to the procedures for striking that balance. A litigant may be required to make a stronger showing of need before a district judge will order production of national security material for in camera inspection,<sup>105</sup> but such an inspection remains the primary method of resolving the conflicting claims of the executive branch and the criminal process.

The British rule, too, is that no absolute Crown privilege can be claimed on the ground of confidentiality.<sup>106</sup> It was so decided by the House of Lords in 1968, in a unanimous decision repudiating an earlier statement of Lord Simon accepting as conclusive a claim of privilege by a principal Minister.<sup>107</sup> That practice had proved quite unacceptable, for the reason put concisely in Lord Pearce's speech: "It is not surprising," it has been said . . . , "that the Crown, having been given a blank cheque, yielded to the temptation to overdraw,"<sup>108</sup> There is no reason to suppose that this is a peculiarly British phenomenon.<sup>109</sup>

Most "great" cases, those that, in Justice Holmes' words, "deal with the Constitution or a telephone company,"<sup>110</sup> are argued with prophecies of doom. The tapes case was no exception. The brief for President Nixon closed with these words, referring to the decision of Judge Sirica in the district court: "If sustained, that decision will alter the nature of the American Presidency

<sup>103</sup> 60 Stat. 842 (codified in scattered sections of 28 U.S.C. (1970)). See *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (footnote omitted):

"Respondents have cited to us those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented."

<sup>104</sup> When the subpoenaed material is delivered to the District Judge in camera questions may arise as to the excising of parts and it lies within the discretion of that court to seek the aid of the Special Prosecutor and the President's counsel for in camera consideration of the validity of particular excisions, whether the basis of excision is relevancy or admissibility or under such cases as *Reynolds*, *supra*, or *Waterman Steamship*, *supra*.

94 S. Ct. at 3111 n.21 (emphasis added).

<sup>105</sup> Indeed, the *Reynolds* Court went so far as to state that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." 333 U.S. at 11.

<sup>106</sup> Conway v. Rimmer, [1968] A.C. 910. The Scottish law is in accord. See Glasgow Corp. v. Central Land Bd. (1956) S.C. (H.L.) 1.

In *Conway* the House of Lords analyzed the claim of governmental privilege for confidential documents as a "class" privilege, a characterization essentially the same as the Supreme Court's phrase "generalized privilege." See 94 S. Ct. at 3109-10. In each case, the assertion of such privilege was held insufficient to preclude in camera review. Each court also left room for more specific claims, the House of Lords speaking of "contents" and the Supreme Court of "particular excisions" in referring to the examining judge's authority to excise portions of the documents. See 94 S. Ct. at 3111 n. 21; [1968] A.C. at 952-53, 994-96.

<sup>107</sup> See *Duncan v. Cammell Laird & Co.*, [1942] A.C. 624.

<sup>108</sup> [1968] A.C. at 983, quoting H. WADE, ADMINISTRATIVE LAW 285 (2d ed. 1967).

<sup>109</sup> Compare the statement of the Special Prosecutor:

"In oral argument before the district court on the enforceability of the grand jury's subpoena, counsel representing the President stated that 'the President has told me that in one of the tapes that is the subject of the present subpoena there is national security material so highly sensitive that he does not feel free even to hint to me what the nature of it is.' Transcript of Hearing on August 22, 1973, at 56, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 F. Supp. I (D.D.C. 1973). Nevertheless, when the recordings were submitted to the district court in compliance with later orders of that court and the court of appeals, counsel for the President no longer asserted that any of the subpoenaed conversations included matters relating to the national security and no such information was found."

Reply Brief for Petitioner at 45 n. 23.

<sup>110</sup> John Mitchell, reprinted in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 131, 134 (M. Howe ed. 1962) [hereinafter cited as OCCASIONAL SPEECHES].

profoundly and irreparably."<sup>111</sup> History has a way of mocking these specters of disaster forecast from judicial decisions.<sup>112</sup> So long as the courts retain their resourcefulness in applying precedents, and their authority to reconsider doctrine in the light of "the lessons of experience and the force of better reasoning,"<sup>113</sup> fears of irreparable harm are likely to prove exaggerated. Moreover, transforming decisions, however dramatic, are generally reflections of deeper currents in the national thought and culture. To borrow again from the wisdom of Holmes:<sup>114</sup> "I have no belief in panaceas and almost none in sudden ruin. I believe with Montesquieu that if the chance of a battle—I may add, the passage of a law—has ruined a state, there was a general cause at work that made the state ready to perish by a single battle or law." But the short answer to the apprehensions over an affirmation of Judge Sirica's decision is that it could be said with stronger reason that a reversal would have marked a fundamental alteration in our standards of criminal justice.

### III. BEYOND THE TAPES CASE

The opinion of the Supreme Court was careful to state that it was concerned with executive privilege only in the context of the criminal law, and not in the setting of presidential relations with Congress.<sup>115</sup> Nevertheless, the rejection of a generalized privilege in the President's discretion, and the adoption of a standard of weighing the need for information against the injury to the national interest through disclosure, will doubtless have a radiating effect. Indeed the United States Court of Appeals for the District of Columbia Circuit, in judging the Watergate Committee's suits for presidential tapes, applied essentially the same standards it had employed in the first Special Prosecutor's suit, though with a different outcome.<sup>116</sup>

The issue of executive privilege is one aspect of a reexamination by Congress of the larger subject of relations between Congress and the President. A rationalization of congressional procedures, long overdue, has been seen as a necessary element in congressional oversight. The purse and the sword are the instruments of national policy that have been of most acute concern to Congress, and in each of these fields new legislative controls have been devised.

Out of these recent efforts a pattern seems to be emerging, one that would replace the isolation of the two branches, their unilateral acts and recriminations, with a procedure for consultation and for informed review by Congress. With respect to presidential impoundment of

appropriated funds,<sup>117</sup> a statute now requires the President to communicate his reasons to Congress, which in turn must approve the impoundment (if it constitutes more than a deferral) as a condition of its becoming effective.<sup>118</sup> With respect to military action, the War Powers Resolution of 1973 recognizes the power of the President to commit troops to hostilities abroad in certain emergencies without a declaration of war, but requires a ratifying vote by Congress within sixty days.<sup>119</sup> A like proposal regarding presidential proclamations of states of national emergency is before Congress.<sup>120</sup>

Similar procedures for dealing with executive privilege are under active consideration. In general, the proposals would require an executive department to furnish any information or records within thirty days of receipt of a request from a House or committee of Congress, unless the department can supply a statement signed by the President explaining why the material is privileged.<sup>121</sup> Some of the proposals would detail the grounds which the President could legitimately advance for nondisclosure: the need to withhold, for example, military secrets, other information whose disclosure might create grave and irreparable harm to the vital interests of the United States, and advice and opinions concerning policy in relation to legitimate functions of government.<sup>122</sup> Provision for limited disclosure, as in executive session, might further narrow the scope of the privilege, just as such a provision might warrant a request for otherwise privileged investigatory files in connection with appointments and removals.<sup>123</sup>

All such efforts to provide standards and procedures are laudable, though experience with the Freedom of Information Act,<sup>124</sup> applicable to private demands for information, cautions against seeking clear and distinct solutions by codification.<sup>125</sup> The efforts are nonetheless praiseworthy because they compel closer attention to standards which serve the public interest, recognize the need for restraint both in the demand for information and in the assertion of privilege, encourage rational communication between the two branches, and furnish a basis for more informed public judgment if in the end confrontation occurs.

The more troublesome question is whether, if an impasse does develop, resort should be had to the courts. Given the widespread and appreciative acceptance of the courts' role in resolving the contest over production of the tapes, it seems natural enough to turn to the judiciary for settlement of congressional-presidential disputes as well.

<sup>111</sup> Brief for Respondent at 137.

<sup>112</sup> See, e.g., Justice McReynolds' dissenting opinion delivered from the bench in *The Gold Clause Cases*. *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935): "Shame and humiliation are upon us now. Moral and financial chaos may confidently be expected," 334 U.S. at xi. Or witness Chief Justice Fuller's dissent in *The Lottery Case*, *Champion v. Ames*, 188 U.S. 321, 375 (1903) (footnote omitted):

"Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith."

<sup>113</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting). See F. CORNFORD, MICROSMOGRAPIA ACADEMICA 15 (1908).

The *Principle of the Dangerous Precedent* is that you should not now do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which, *ex hypothesi*, is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.

<sup>114</sup> See Baade, *Mandatory Appropriations of Public Funds: A Comparative Study*, Parts I, II, 60 V.A. L. REV. 393, 611 (1974); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973).

<sup>115</sup> See Pub. L. No. 93-344, tit. X, 88 Stat. 297, 332 (U.S. CODE CONG. & AD. NEWS 1720, 1761 (93d Cong., 2d Sess. July 12, 1974)).

<sup>116</sup> See Pub. L. No. 93-148, 87 Stat. 555, (U.S. CODE CONG. & AD. NEWS 614 (93d Cong., 1st Sess. Nov. 7, 1973)). The 60-day waiting period before congressional ratification is required may give the administration the opportunity to argue with some plausibility that the resolution gives the President a free hand, independent of congressional opinion, to conduct military actions of less than two months duration. See T. EAGLETON, WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER 216, 218-21 (1974).

<sup>117</sup> See S. 3957, 93d Cong., 2d Sess. (1974), reprinted at 120 CONG. REC. 15788-89 (daily ed. Aug. 22, 1974).

<sup>118</sup> See H.R. 12462, 93d Cong., 2d Sess. (1974).

<sup>119</sup> See Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OINT. ST. L.J. 1, 11-33 (1974); Committee on Civil Rights, *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 THE RECORD 177 (1974).

<sup>120</sup> See Dorsen & Shattuck, *supra* note 122, at 24-29.

<sup>121</sup> 5 U.S.C. § 552 (1970).

<sup>122</sup> See EPA v. Mink, 410 U.S. 73, 79 (1973); NOTE, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047 (1973). See also Committee on Federal Legislation of the Association of the Bar of the City of New York, Amendments to the Freedom of Information Act, Fed. Legis. Rep. No. 74-1 (April 22, 1974).

There are, however, significant differences that counsel against an easy transference of judicial review. The tapes case arose in the setting of a criminal proceeding. That factor gives rise to three distinctive characteristics that bear on the appropriateness of judicial review. In the first place, there was a conventional case already lodged in the court, not a plenary proceeding between two branches of government. Second, and related to the first characteristic, is the fact that private interests of the most acute kind—the potential loss of liberty of the defendants—were at stake. Third, the weighing of the need for disclosure is more congruent with the judicial function, and more comfortably performed, in a criminal case than in a legislative investigation: relevance and materiality are more focused in the search for defined facts than in a wide-ranging inquiry either to furnish a basis for legislation or to probe into maladministration.<sup>126</sup>

If a prosecution were brought against an executive officer for contempt of Congress in refusing to give evidence or produce records, or if a House itself committed an officer to custody on that ground, a court ought not to

refrain from deciding the issue; basic personal rights would have been put in jeopardy by a solemn act of the legislative body. Short of that kind of collision, at the very least there ought to be a considered resolution of the full House before a legislative committee would seek, and a court would provide, judicial review.<sup>127</sup> But adoption of such legislation at this time may be premature. The whole subject of executive privilege is under close scrutiny; executive cooperation is likely to be more forthcoming, and Congress, for its part, is sensitive to criticisms of past excesses of some of its committees. A pattern of communication and better understanding, together with the force of public opinion, ought to be allowed to have its day. Routine resort to the courts could stunt these promising developments, draw the judiciary into intragovernmental controversies in their raw, politically-tinged state, and expose the courts to the risk of rendering unsatisfactory judgments on matters where the judicial touch is likely to be unsure. Here, as elsewhere in our constitutional order, when personal rights are not in jeopardy,<sup>128</sup> it is well to give scope for "a frank and candid co-operation for the general good."<sup>129</sup> The vision may be too ideal, the hope misplaced. But in the freer and healthier atmosphere into which we are emerging the vision and the hope deserve a trial.

<sup>126</sup> See C. MOSHER *et al.*, WATERGATE: IMPLICATIONS FOR RESPONSIBLE GOVERNMENT 121-22 (1974); Nathanson, *supra* note 60, at 77.

Those especially who would look to the courts to vindicate the legislature's right to obtain information may reflect on the unanimous decision of the court of appeals against the Senate Watergate Committee. The court ruled that production of the tapes was not vitally necessary to the Committee on two grounds: that these tapes would probably come into the possession of another legislative group charged with investigative and reporting responsibilities similar to that Committee's, and that fulfillment of the Committee's lawmaking responsibilities did not require access to such detailed information as the tapes held. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732-33 (D.C. Cir. 1974). This result may well be disquieting to supporters of broad judicial review to vindicate congressional authority.

<sup>127</sup> Cf. O'Brien v. Brown, 409 U.S. 1, 5 (1972) (per curiam) (denying review of action of credentials committee of Democratic National Convention).

<sup>128</sup> Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315, 401 (1819).

<sup>129</sup> Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 238 (1824) (Johnson, J., concurring).

