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U.S. GOVERNMENT INFORMATION POLICIES AND  
PRACTICES—PROBLEMS OF CONGRESS IN OBTAIN-  
ING INFORMATION FROM THE EXECUTIVE BRANCH  
(PART 8)

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HEARINGS  
BEFORE A  
SUBCOMMITTEE OF THE  
COMMITTEE ON  
GOVERNMENT OPERATIONS  
HOUSE OF REPRESENTATIVES  
NINETY-SECOND CONGRESS  
SECOND SESSION

—  
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# U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—PROBLEMS OF CONGRESS IN OBTAINING INFORMATION FROM THE EXECUTIVE BRANCH

(Part 8)

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FRIDAY, MAY 12, 1972

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2154, Rayburn House Office Building. Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead and Gilbert Gude.

Staff members present: Norman G. Cornish, deputy staff director; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

MR. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

Today the Foreign Operations and Government Information Subcommittee is taking a forward look at Government information activities. We are looking at the Government's plans for the control of information in some possible national emergency.

The Office of Emergency Preparedness has been given the job, by an Executive order, of developing plans for emergency information and wartime censorship. Nearly 10 years ago the subcommittee held hearings on the same subject.

We found, then, that the OEP had not taken the press into its confidence in planning for censorship of the media within the United States in a national emergency. After our hearings, the President appointed an official to serve as a Standby Director of Censorship, but his identity became a classified secret.

Since then, the identity of the Standby Director of Censorship has been disclosed, but the OEP reported the job has been abolished. They also report that a list of 26 newsmen, editors, and others who would administer the censorship system has been cut to eight persons—all of them Government employees, retired military officers, or corporation executives.

Apparently, there have been no improvements in the Standby Censorship Code since the subcommittee's last hearings. In fact, it has not even been sent out to the newspapers and broadcasting stations which

will have to follow the code as soon as the President declares a national emergency.

I hope the OEP witnesses today will be able to clarify their current censorship plans and problems.

Our witnesses today will be Mr. E. J. Quindlen, Assistant Director for Government Preparedness, Office of Emergency Preparedness.

Mr. Quindlen, we are pleased to have you here. Will you introduce your associate for the record?

**STATEMENT OF E. J. QUINDLEN, ASSISTANT DIRECTOR FOR GOVERNMENT PREPAREDNESS, OFFICE OF EMERGENCY PREPAREDNESS; ACCOMPANIED BY JOHN W. NOCITA**

Mr. QUINDLEN. Mr. Chairman, with me today is Mr. John W. Nocita, who is the member of my staff with the principal planning assistance responsibility to me for this area which we now call wartime information security.

As you indicated, Mr. Chairman, under the terms of section 301 of Executive Order 11051 issued September 27, 1962, the President assigned to the Office of Emergency Preparedness, among other things, the "primary responsibility \* \* \* for developing in association with interested agencies the emergency planning for \* \* \* wartime censorship."

Upon my assumption of responsibility for this program in 1969, I moved to have its designation changed to the wartime information security program, as this term more appropriately describes the objectives of the program. When we discuss wartime information security, it is in a relatively narrow connotation and has nothing to do with the control of news at its source. We do not consider the term "censorship" applicable to a situation where press and broadcast releases are covered by a code which is completely voluntary. The wartime information security program is the technical mechanism where international mail, telecommunications, and travelers can be controlled and where the domestic public media can cooperate in avoiding giving information to the enemy by adhering to a voluntary code which describes categories of information which could be of help to an enemy in prosecuting a war against this Nation.

In planning for wartime information security, we have available to us the past experiences of World War I and World War II. In World War I, the Navy assumed responsibility for submarine cable censorship. Postal censorship was primarily guided by the Post Office Department. The War Department participated in the censorship program when an Executive order in 1917 placed telephone and telegraph lines leading across American borders, under the Army. The press contributed to the program through a voluntary withholding of information that would be of help to the enemy. This arrangement was not wholly satisfactory due to the fragmentation and rigidity of the program.

The situation in World War II was considerably better when the program was run by Byron Price whose background in the public media served to bring a balance between the rights of the American people for information and the needs for the Nation for security in wartime. Mr. Price reflected this approach to his task in his report to



President Truman upon leaving the job of director. He stated: "Censorship is an indispensable part of war, and planning for it should keep pace with other war plans," and later qualified that statement by writing, "All planning for censorship should rest firmly on a determination to apply restraints in such a way as to preserve, rather than to destroy, free institutions and individual liberties."

The successful application of the program by Mr. Price, of which there were relatively few criticisms, has served as a guide in our planning activities. The elements of the wartime information security program present in our planning today are similar to those used by Mr. Price. They are: the control of all means—postal, travelers, and telecommunications—which may be used to transmit information across the borders of the United States, and the voluntary withholding of military and other information (which would not be released in the interest of effective prosecution of the war) by the domestic public media.

The philosophy of Mr. Price, which was discussed before hearings of this subcommittee in 1963, was then and, we feel, still is applicable to this program. Planning for wartime information security has encompassed a range of contingencies including the possibility of nuclear war. As part of our continuing responsibility for planning for wartime information security, we have had the program under review to determine the relevance of existing plans to current conditions. From this review we have concluded, on the basis of our experience since World War II, particularly the Korean war and the present Vietnam conflict, that it would be unlikely that any element of the wartime information security program would be implemented in any contingency short of a nuclear attack situation. We do consider, however, that a wartime information security program is an indispensable part of plans for such a contingency. While the contingency of nuclear attack on the United States is regarded as unlikely, planning for such a contingency is necessary because of the seriousness of the consequences if it does occur.

We have in being today specific and concrete plans for wartime information security, but we have been reviewing and studying them to determine if we can make them more responsive to a nuclear war contingency. As we are all aware, the problems of supporting the national security objectives of our Nation, should we be subjected to a massive nuclear attack, differ considerably from a situation in which we can operate in a more normal environment. We are, therefore, concerned that should a need arise for a wartime information security program that the elements of the program will be able to respond when needed.

The broad objectives of wartime information security and the organization for obtaining those objectives remain substantially unchanged from the time of your 1963 hearings. I would like to review for the committee the element of information security contained in our planning for this program. If the wartime information security program is implemented by the President, the first activity of the Director of the Office of Wartime Information Security, when appointed by the President, will be to initiate voluntary information security of the domestic public media. It is recognized that the success of such information security must depend upon the confidence of the public media

industries. Therefore, while initially the personnel to bring this function into being would come from public media members of the National Defense Executive Reserve, the Director of Wartime Information Security would turn to the public media for additional experienced personnel known personally to the industries and respected by them.

Voluntary information security by the domestic public media would be complemented by the Director of Wartime Information Security with positive information security of international communications. By agreement between the OEP and the Department of Defense, the Department of Defense has agreed to assume the initial responsibility for activating and operating postal, travelers, and telecommunications information security. As quickly as the Office of Wartime Information Security is in a position to function it will assume control over these programs.

I would like to return to the voluntary information security of the domestic public media and discuss briefly with you the Voluntary Information Security Code. This code was first developed in World War II to support that aspect of the wartime information security program. The code was last revised in 1963, and copies were furnished to your committee. Byron Price assisted in the last revision and OEP invited representatives of key media organizations to review the code and provide any recommendations on the content of the code. The revision of the code and its distribution were of interest to your committee in 1963, and more recently in correspondence with OEP in 1970.

The Director of OEP distributed the 1963 revision in that year at meetings with various media organizations. No formal distribution was made at that time but the Voluntary Code had been published in prior years in trade magazines. Since the last revision of the code, copies have been provided by OEP on request.

In our continuing review of the wartime information security program we plan to determine whether any revision to the voluntary information security code may be necessary. This is a good code and any plans for revision would be only to insure that the code is applicable to the type of wartime emergency in which the program might be implemented. We shall seek the assistance of the public media organizations in this review of the code.

Mr. Chairman, I assure you that my staff and I will always be available to you or to your committee to furnish you any additional information you might desire. I appreciate the opportunity to review this program for the committee.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Quindlen.

I understand that there is a standby Presidential Executive order which is classified. Is that correct, Mr. Quindlen?

Mr. QUINDLEN. Sir, we have both a proposed standby Executive order and a proposed draft piece of emergency legislation, either of which would be used, depending on the situation.

Mr. MOORHEAD. Do I also understand that you can supply to the subcommittee the classified Executive order with a deletion so that that can be made public; is that correct?

Mr. QUINDLEN. Yes; Mr. Chairman. I believe you are referring to our overall plan as well as the proposed Executive order. We can submit them with a deletion primarily of one classified area.

Mr. MOORHEAD. And do I understand that the primary deletion would be the location of the Office of Wartime Information Security?

Mr. QUINDLEN. Yes, sir; that is true. We would have to remove all references to locations and other specifics of operations included in the plan.

Mr. MOORHEAD. We would appreciate it if you would submit that for the record. And without objection the declassified order will be made a part of the record.

(The documents referred to follow :)

## OFFICE OF CENSORSHIP BASIC PLAN

### OEP—OFFICE OF EMERGENCY PREPAREDNESS

#### CHAPTER I

##### GENERAL

###### *Section 1. Purpose*

The purpose of national censorship in the United States, in time of war, is to safeguard the security of the United States and its allies in the fields of communication and information and to assist in the prosecution of the conflict.

###### *Section 2. Definitions*

*a. United States.*—The term "United States" includes the 50 States, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and Swains Island, the Canal Zone, the Trust Territories of the Pacific Islands, and any territory or area under the jurisdiction of the United States or which is committed to its control as administering authority by treaty or international agreement.

*b. Communication.*—The term "communication" shall include any letter or book, plan, map, or other paper, picture, sound recording or other reproduction, telegram, cablegram, wireless message or conversation transmitted over wire, radio, television, optical or other electromagnetic system, and any message transmitted by any signalling device or any other means.

*c. National censorship.*—The control and examination of communications entering, leaving, transiting, or touching the borders of the United States and the voluntary withholding from publication by the domestic public media industries of military and other information which should not be released in the interest of the safety and defense of the United States and its allies.

*d. Public media censorship.*—The voluntary cooperation of the domestic press, publishing, broadcasting and motion picture industries in withholding from publication military and other information which should not be released in the interest of the safety and defense of the United States and its allies.

*e. Telecommunications censorship.*—Within the scope of national censorship the control and examination of communications transmitted or received over the circuits of commercial communications companies classified by the Federal Communications Commission as "common carriers" and not under the control, use, supervision or inspection of a Federal agency.

*f. Postal and travelers censorship.*—Within the scope of national censorship the control and examination of postal communications; communications carried on the person or in the baggage or personal possessions of travelers; and all other communications subject to censorship and not within the purview of other elements of the Office of Censorship.

###### *Section 3. Mission*

The mission of national censorship is twofold: To keep from the enemy information which would aid his war effort or hinder our own or that of our allies, and to collect information of value in prosecuting the war and make that information available to the proper agencies.

To accomplish this mission, international communications are censored to prevent the disclosure, either purposely or inadvertently, of information relative to

the identification, equipment or movement of armed forces; location, cargo and routes of shipping; war production and plants; or any other information pertaining to the national war effort. At the same time censorship accumulates, and makes available to the proper authorities, like information about the enemy activities. In addition to information of value in the armed conflict, much data is acquired that assists the United States to deprive the enemy of funds and commodities with which to carry on the war.

Censorship of the domestic press, publishing, broadcasting, and motion picture industries is accomplished by a coordinated, voluntary withholding from publication of military and other information which should not be released in the interest of effective prosecution of the war.

#### *Section 4. Scope*

(a) National censorship includes: (1) Public media censorship; (2) postal and travelers censorship; and (3) telecommunications censorship.

(b) National censorship does not include: (1) Censorship within an area occupied or controlled by the Armed Forces; and (2) censorship of communications transmitted via communications systems of the Armed Forces.

Note.—The Office of Censorship, acting as agent for the Department of Defense, will perform certain secondary censorship of Armed Forces mail.

(c) Communications subject to censorship are: communications by mail, land lines, cable, radio, television, or other means of the transmission crossing the borders of the United States; communications carried by any vessel, aircraft, or other means of transportation bound to or from any foreign country and touching at any port or place of the United States; communications between any of the following: Continental United States, the State of Hawaii, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa and Swains Island, the Canal Zone, the Trust Territories of the Pacific Islands, and any other territory or area under the jurisdiction of the United States or which is committed to its control as administering authority by treaty or international agreement; communications carried on the person or in the baggage or personal possessions of any passenger, crew member, stowaway or workaway traveling in vessels, aircraft or other means of transportation as outlined above.

#### *Section 5. Authorities*

Legislation authorizing the censorship of communications during World War I was contained in section 3(d) of the "Trading with the Enemy Act" of October 6, 1917. This section of the 1917 act remains in effect as 50 App. U.S.C. 3(d).

World War II censorship legislation was contained in section 303 of the "War Powers Act" of December 18, 1941. This legislation included the same wording as section 3(d) of the 1917 act pertaining to the censorship of communications plus section 16 of the same act which established penalties for violations.

A standby bill, the "Defense Resources Act," including legislation authorizing a national censorship (title XI), has been prepared for use in a future emergency.

#### *Section 6. Assumptions*

Censorship is an essential part of war, and planning for it should keep pace with other war planning.

In the event of war, the President will impose national censorship.

The imposition of national censorship will be supported by appropriate legislation.

Upon imposition of national censorship the President will establish an Office of Censorship and appoint a Director of Censorship.

The Office of Censorship will be an independent Federal agency reporting directly to the President.

#### *Section 7. Fundamentals of censorship*

(a) An effective censorship operation requires complete control of all means used to transmit information across the borders of the United States. No voluntary censorship of the domestic public media can be successful without an accompanying censorship of international communications. And no censorship of international communications can be successful unless it is comprehensive.

Regional censorship of international communications, that is, censorship of communications between specified areas of the United States and specific foreign countries, cannot be effective for reason of the highly sophisticated worldwide communications complex which makes available many diverse means of circumvention.

(b) The Office of Censorship should not be charged with any responsibility for the establishment of Government information policy, the release of information, or the conduct of propaganda programs. In short, it should not be responsible for censoring the Government.

Such responsibility should be vested in an entirely separate agency or office. Experience has shown that censorship cannot successfully be mixed with public information programs or propaganda operations.

#### *Section 8. Policies*

The Office of Censorship will control completely and exclusively all censorship, voluntary or otherwise, within the United States, with the exception of military censorship, and all censorship of international communications, other than those in Federal Government or military channels.

National censorship is strictly a wartime measure, initiated only in time of war and discontinued immediately when the need for it no longer exists. As such, censorship will be concerned only with matters directly related to the war effort. Censorship will not be used to suppress information other than in the interest of national security and defense, will not assist in the enforcement of peacetime statutes unconnected with the war effort, and will not act as a guardian of public morals.

The Office of Censorship will have no investigative or law-enforcing function. It will have no propaganda mission.

National censorship will not exercise control over Federal Government communications circuits, or facilities which may be allocated to Federal agencies, or which may come under their control, use or supervision, nor will it censor the official releases of Federal agencies.

#### *Section 9. Responsibilities*

The Office of Emergency Preparedness, in the Executive Office of the President, is responsible for directing, coordinating, and monitoring the overall planning for national censorship. (Executive Order 11951, Sept. 27, 1962.)

The Secretary of Defense and the Director of the Office of Emergency Preparedness, for the Office of Censorship, have entered into an agreement setting forth the responsibilities of each agency with respect to the planning for, and the operation of, national censorship.

##### **(a) Planning:**

(1) The Office of Emergency Preparedness will:

- (a) Coordinate and monitor all aspects of national censorship planning.
- (b) Develop a plan for establishing the public media censorship.
- (c) Develop a plan, in coordination with the Department of Defense and other interested agencies, for the Office of Censorship.
- (d) Furnish policy and training guidance, a coordinator, and training space for the Special Analysis Division.
- (e) Develop plans to coordinate for the Office of Censorship the procurement of equipment necessary to support the operations of the Special Analysis Division.

(f) Accept responsibility for procuring space for all elements of National Headquarters of the Office of Censorship.

(g) Develop plans for the Office of Censorship to coordinate the hiring of all civilian personnel to be used by all elements of the National Headquarters of the Office of Censorship.

(h) Maintain an activation file containing the necessary directives for the establishment of national censorship. This includes proposed proclamations, executive orders, and legislation.

(i) Coordinate, in conjunction with the Department of Defense, liaison on national censorship policy matters with foreign governments.

(2) The Department of Defense will:

(a) Develop plans and preparations for telecommunications censorship, postal and travelers censorship, and the special analysis division (except those responsibilities assigned to the Office of Emergency Preparedness in a. (1) (d) and (e) above) as elements of the Office of Censorship.

(b) Maintain liaison with foreign governments on technical and operational planning matters.

(c) Maintain duplicate activation files containing the necessary directives for the establishment of national censorship.

(d) Achieve and maintain an adequate degree of readiness at all times for the activation of those elements of the Office of Censorship for which the Department of Defense is responsible.

(b) Operating:

(1) The Department of Defense:

Upon the establishment of the Office of Censorship and the appointment of a director (simultaneous with the imposition of national censorship), the Director's first efforts will be directed to coordinating the voluntary censorship of domestic public media, and to organizing the headquarters Office of Censorship. As it is imperative that the censorship of international communications be initiated immediately upon the imposition of national censorship, the Secretary of Defense has been assigned the mission of initiating such interim actions as are necessary to carry out certain of the functions assigned to the Director or the Office of Censorship relative to the censorship of international communications.

In accordance with this assignment, and the cited agreement, the Department of Defense will activate and initially operate the postal and travelers censorship, telecommunications censorship, and the special analysis division.

Upon determination by the Director that the Office of Censorship is prepared to assume control over these functions, responsibility for their conduct shall be vested in the Director.

(2) The Office of Emergency Preparedness:

The Office of Emergency Preparedness has no assigned responsibility for the operation of national censorship or of the Office of Censorship. Once censorship is imposed, the Office of Censorship established and a director appointed, the Director of Censorship will have the sole responsibility and authority, under the President, for all national censorship operations, except for the interim Department of Defense mission referred to in the preceding paragraphs. However, the actual imposition of censorship may be preceded by a period of increased readiness, partial mobilization, or strategic alert. During such a period selected individuals from the military elements of the planned Office of Censorship may be called to active duty with the object of making preparations for full activation: acquiring real estate, establishing the national censorship communications network, procuring equipment, establishing station teams in duty station locations, and making preliminary arrangements for civilian recruitment. The Office of Censorship not being established or a Director appointed at this time, any actions taken to increase the readiness for operation of the Director's Office or the Press and Broadcast Divisions, and to coordinate readiness preparations of the headquarters elements, will be the responsibility of the Office of Emergency Preparedness. This will include the initial call-up of Executive Reserves and clerical and administrative cadres; negotiations for office space, communications, and other services; and the procurement of equipment and supplies.

#### *Section 10. Other censorships*

(a) United States:

The only censorship, other than that operated by the Office of Censorship (national censorship) which may be operated by any agency under the jurisdiction of the Federal Government is that under the purview of the Department of Defense. These censorships, operated by the Armed Forces and classified as military censorship, are as follows:

(1) *Armed Forces censorship.*—The control and examination of personal communications to and from persons in the Armed Forces of the United States and persons accompanying or serving with the Armed Forces of the United States.

(2) *Civil censorship.*—The control and examination of communications entering, leaving, or circulating within areas occupied or controlled by the Armed Forces of the United States, except those already controlled by other forms of United States or allied censorship.

(3) *Enemy prisoner of war and civilian internee censorship.*—The control and examination of those communications to and from enemy prisoners of war and civilian internees held by the U.S. Armed Forces.

NOTE.—The censorship of communications to and from enemy prisoners of war and civilian internees held in areas where national censorship is operating is the responsibility of the Office of Censorship.

(4) *Field press censorship.*—The security review of news material subject to the jurisdiction of Armed Forces of the United States, including all information or material intended for dissemination to the public.

Extensive liaison will be maintained between the national censorship organization and the censorship organizations of the Armed Forces to insure the maximum coordination and cooperation.

(b) Other nations:

Much valuable information would be lost to the United States and much security information compromised if foreign communications which do not travel across our borders were allowed to reach their destination without interception by a friendly censorship. For that reason, international agreements and worldwide coordination and cooperation are necessary to form an integrated network of censorships of maximum effectiveness and productivity.

Most of the principal allies of the United States will have censorship organizations in time of war. An exchange of information, techniques, requirements, and watch listings will be made, commensurate with the individual country's political reliability and the efficiency and security of its censorship operation.

Close liaison is necessary to establish uniform policies and practices; to exchange special techniques with our allies; and to coordinate the combined effort. Liaison will be maintained with allied and neutral censorships at both headquarters and operating levels.

## CHAPTER II

### ORGANIZATION

#### *Section 1. Office of Censorship*

The Office of Censorship will consist of: The Office of the Director; Press Division; Broadcast Division; Telecommunications Division; Postal and Travelers Division; and Special Analysis Division.

The functions and organization of these elements of the Office of Censorship will be generally as shown in the following sections, and in the plans of the respective offices and divisions. However, as the circumstances of activation, and subsequent operation, are not known or cannot be predicted with any assurance of accuracy, the entire organization for national censorship must be sufficiently flexible to adjust to any possible situation.

#### *Section 2. Office of the Director*

Functions:

(a) Exercise general administrative direction over all national censorship operations.

(b) Establish policies for the voluntary censorship of the public media, and limitations, operating procedures, rules, and regulations for the censorship of international communications.

(c) Carry out the orders of the President of the United States in connection with the censorship of communications by mail, cable, radio, television, or other means of transmitting information between the United States and foreign countries.

(d) Control the authorization of communications to nationals of enemy, enemy-allied or enemy-dominated countries.

(e) Maintain liaison with censorship and intelligence organizations of friendly foreign countries for the purpose of coordinating worldwide censorship activities.

The Office of the Director will consist of the Director, Deputy Director, an executive assistant, and such special assistants as shall be required. Included in this office will be such administrative services as are necessary to the operation of an independent Federal agency.

A cadre to activate and to staff key positions in the Office of the Director, and in the Press and Broadcast Divisions, is composed of preselected specialists, fully qualified in their respective fields, who are enrolled in the National Defense Executive Reserve.

#### *Section 3. Press Division—Functions*

(a) Administer the voluntary code, restricting the publication of information which might be of aid or comfort to the enemy.

(b) Counsel with newspaper, magazine, book, trade, and other publishers regarding the publication of certain types of war information.

(c) Maintain liaison with various Government departments and agencies, obtaining their views regarding material for publication.

(d) Act on appeals from editors regarding alleged unreasonable requests by other Government officials or agencies concerning the withholding of material.

(c) Supervise censorship of press dispatches entering or leaving the United States.

(f) Interpret, on request, provisions of the code and make decisions on matters not specifically covered by the code.

The Press Division will be activated with, and operate under the direct supervision of, the Office of the Director. It will be headed by an Assistant Director for Press.

#### *Section 4. Broadcast Division—Functions*

(a) Administer the voluntary code and the censorship code of practices for nonmilitary radio and television point-to-point services restricting the broadcasting of information that might be of aid or comfort to the enemy.

(b) Monitor domestic foreign language broadcasts and check against code to assist foreign language broadcasters in keeping their programs within code provisions.

(c) Counsel with broadcasters, commentators, news services, motion picture producers, advertising agencies, and others regarding the broadcasting or other dissemination of certain types of war information.

(d) Maintain liaison with various Government departments and agencies, obtaining their views regarding material for broadcasting.

(e) Act on appeals from broadcasters regarding alleged unreasonable requests by other Government officials or agencies concerning the withholding of material.

(f) Interpret, on request, provisions of the code and make decisions on matters not specifically covered by the code.

(g) Supervise censorship of all outgoing international shortwave programs subject to censorship.

The Broadcast Division will be activated with, and operate under the direct supervision of, the Office of the Director. It will be headed by an Assistant Director for Broadcast.

#### *Section 5. Telecommunications Division—Functions*

(a) Censor communications by cable, radio, and land line transmitted over "common carrier" circuits and crossing the borders of the United States.

(b) Maintain close liaison with the telecommunications censorship operations of allied foreign countries for the purpose of exchanging information and coordinating operations.

(c) Advise and assist other Federal agencies on matters relating to telecommunications censorship.

(d) Coordinate with international communications companies on matters relating to the censorship of telecommunications.

The Telecommunications Division will be activated and initially operated by the Chief Telecommunications Censor under the Secretary of the Navy. Upon assumption of control by the Director of Censorship, the Chief Telecommunications Censor will continue operational control under the Director of Censorship and will assume the additional title and responsibilities of Assistant Director of Censorship for Telecommunications.

The Navy has active Reserve units in training whose mission will be to open, staff, and operate the chief telecommunications censor's office, located at the national headquarters of the Office of Censorship. Stations will be established in locations throughout the United States, Puerto Rico, Guam, the Virgin Islands, Guantánamo (Cuba), and the Canal Zone.

Operational plans have been developed and are kept current. Manuals and instructions are prepared and distributed.

#### *Section 6. Postal and Travelers Division—Functions*

(a) Censor mail and communications carried by travelers, crossing the borders of the United States, and all other communications subject to censorship and not within the purview of other elements of the Office of Censorship.

(b) Perform certain secondary censorship of Armed Forces mail.

(c) Maintain liaison with the postal censorship operations of allied countries for the purpose of exchanging information and coordinating operations.

(d) Advise and assist other Federal agencies on matters relating to postal and travelers censorship.

The Postal and Travelers Division will be activated and initially operated by the Chief Postal Censor under the Secretary of the Army. Upon assumption of control by the Director of Censorship, the Chief Postal Censor will continue operational control under the Director of Censorship and will assume the additional



title and responsibilities of Assistant Director of Censorship for Postal and Travelers.

The Army and Air Force have active Reserve component units in training for postal and travelers censorship. These units are designated to open, staff, and operate the Chief Postal Censor's office, located at the national headquarters of the Office of Censorship, and in locations throughout the United States, Puerto Rico, and the Canal Zone.

Operational plans have been developed and are kept current, manuals and instructions have been published and distributed, and a small stockpile of station equipment is maintained in readiness.

#### *Section 7. Special Analysis Division—Functions*

(a) Maintain liaison with user agencies and others concerning requirements for collection, suppression, and allocation of information obtained through censorship.

(b) Prepare, maintain, and disseminate lists or instructions necessary for the effective operation of the censorship collection effort.

(c) Allocate the censorship product.

(d) Establish policies and provide guidance for technical operations.

(e) Provide for technical analysis and cryptanalysis requirements of the censorship organization.

(f) Provide data processing techniques, systems and operations in support of the Office of Censorship.

The Special Analysis Division will be activated and initially operated by the Chief of Special Analysis under the Secretary of the Army. Upon assumption of control by the Director of Censorship the Division will be headed by an Assistant Director for Special Analysis.

The initial cadre for this Division is composed of Army, Navy, and Air Force Reserve component officers. The Special Analysis Division will be located at the national headquarters of the Office of Censorship.

### CHAPTER III

#### PERSONNEL

#### *Section 1. Requirements: See Annex G*

#### *Section 2. Recruitment*

The personnel of the Office of the Director and the Press and Broadcast Divisions will be entirely civilian. Key staff members will be preselected and enrolled in the National Defense Executive Reserve. A limited number of clerical personnel and teletypewriter operators will be preselected, trained, and carried on the Office of Emergency Preparedness rolls as WAE (intermittent) employees. Augmentation of this cadre upon activation will be through the authorized channels and procedures for the employment of civilians. It is anticipated that the requirements for specialists in certain fields: budget, personnel, audit, etc., will be met by transfer of experienced employees from other Federal agencies.

The personnel patterns of the Divisions activated by the military services will be varied. The Telecommunications Division will be predominantly naval (commissioned and enlisted) and will remain so throughout its operation. A limited number of civilians will be recruited for clerical positions and in the field of foreign language censors and translators.

The Postal and Travelers Division will be predominantly civilian, with Army and Air Force Officers in key executive and supervisory positions. Stations will be activated by military teams organized and trained for the mission. All augmentation will be civilian.

The Special Analysis Division will be predominantly civilian, with officers of the three services in key executive and supervisory positions. All augmentation will be civilian.

The recruitment of civilian employees by the Telecommunications and Postal and Travelers Divisions in the field, while operating under interim control of the military authorities, will be in accordance with policies and procedures then in effect for civilian procurement within the respective services. Upon assumption of operational control by the Director of Censorship recruitment policies and procedures authorized by the Office of Censorship will apply.

Recruitment of civilians for all elements of the operational headquarters, once the Office of Censorship has been established, will be through a joint per-

sonnel office operated by the Office of Censorship. All civilians recruited for the headquarters elements, when Office of Censorship funds are available, will be enrolled initially as employees of the Office of Censorship.

### *Section 3. Reassignment of military personnel*

When censorship operations are well underway, and trained civilian replacements available, military personnel may be withdrawn by their respective services as mutually agreed by the Secretary of Defense and the Director of Censorship.

### *Section 4. Administration*

Personnel administration within the national censorship organization will be both military and civilian. From the beginning of the operation all records of civilian personnel at the operational headquarters will be maintained by the personnel branch of the Office of Censorship. The records, and the administration, of civilian employees in the Telecommunications and Postal and Travelers Divisions in the field during the period from activation until assumption of control by the Director, will be the responsibility of the Divisions.

Upon assumption of control of these Divisions by the Director of Censorship all civilian employees of the Divisions, including civilian personnel sections, will be transferred to the Office of Censorship and all personnel administration relative to civilian employees within the national censorship organization will become the responsibility of the Office of Censorship.

Personnel records of military personnel on duty with the national censorship organization will be maintained by the appropriate military command. Personnel administration—assignment, leave, promotion, pay, etc., pertaining to the military will be the responsibility of the respective military services.

## CHAPTER IV

### ACTIVATION

#### *Section 1. Contingencies*

The contingencies to be considered in any emergency planning within the Federal Government are many and varied. In planning for national censorship it is necessary to consider only those contingencies, or situations, wherein the national security may require imposition of such censorship.

Generally stated, these are: (a) General war; and (b) Limited war, or conflicts of the "brush fire" type, in which U.S. forces are involved elsewhere in the world on land, sea, or in the air.

#### *Section 2. Initial actions*

The widely divergent contingencies under which national censorship may be imposed will definitely affect the ease and rapidity with which the censorship organization can be established and get into full operation. However, regardless of the circumstances at the time of imposition, there are certain actions which must be taken to accomplish the activation of the censorship organization and the initiation of censorship operations. The circumstances of the emergency may influence the timing or the order in which these initial actions are taken.

#### *Section 3. Occupation of sites*

The various sites to be occupied by the Office of Censorship and the time and manner of occupation will be dictated by circumstances existing at the time of activation.

#### *Section 4. Security*

The physical security of censorship field installations will be the responsibility of the individual installations heads under policies and procedures established by the appropriate divisions. Upon assumption of operational control by the Director, the Office of Censorship security officer will coordinate with the operating divisions on security matters.

Initially the physical security of the operational headquarters will be the responsibility of the respective divisions. As soon as practicable after activation the Office of Censorship security officer will establish a coordinated guard system which will replace or supplement the initial independent systems.

## CHAPTER V

## OPERATIONS

The operations of the several elements of the national censorship organization, after activation, can be categorized in three different phases, or periods, as described in the following sections. These periods are the interim operations, normal operations, and emergency operations periods.

*Section 1. The interim operations period*

That period between the imposition of national censorship and the time the Director of Censorship assumes control over those functions for which the Secretary of Defense has interim responsibility.

During this period the Director of Censorship, through Press and Broadcast Divisions, will coordinate the establishment of a voluntary censorship of the domestic public media (press, publishing, broadcast, and motion picture industries). He will consult and coordinate with the Secretary of Defense on matters of censorship policy and in arrangements for the assumption of control over those censorship functions initiated by the Department of Defense. And he will establish within the Office of Censorship those administrative elements necessary to the operation of an independent Federal agency and develop, as rapidly as possible, the capability required for assumption of administrative responsibility for the entire national censorship organization other than the military personnel.

The Chief Telecom Censor, under the Secretary of the Navy, will direct the telecommunications censorship operations.

The Chief Postal Censor, under the Secretary of the Army, will direct the postal and travelers censorship operation.

The Chief of Special Analysis, under the Secretary of the Army, will direct the operations of the Special Analysis Division.

*Section 2. The normal operations period*

That period, subsequent to the assumption of control over the censorship of communications by the Director, when the entire national censorship organization is operating under a unified control. With all communications in operation and all facilities functioning the operational and administrative control over all Office of Censorship activities will be from the Office of the Director through normal organizational channels to all elements.

*Section 3. The emergency operations period*

Any period when, due to enemy actions or other cause, centralized control of censorship operations is interrupted. Such a condition would presumably be temporary and would be the result of major attack on the United States, either by nuclear or conventional weapons.

In an emergency period all elements of the national censorship organization will maintain all possible contact with other elements of the organization and will coordinate and cooperate in the common effort to continue censorship operations and to resume normal operations as rapidly as possible.

*Section 4. Standby agreements*

Various agreements and understandings have been entered into with other Federal agencies and with cooperating foreign governments. These agreements relate to the coordination and cooperation necessary for the successful operation of national censorship. The actions and functions required of other Federal agencies will be authorized and directed by the Executive order imposing such censorship.

## CHAPTER VI

## LOGISTICS

*Section 1. Real estate*

The procurement of office and operating space in the field for the various elements of national censorship upon activation is the responsibility of the agency or service initiating the activation. The Executive order establishing the Office

of Censorship will direct all agencies of the Government to transfer to the Office of Censorship, without reimbursement therefor, whatever leases have been entered into for censorship operations. The Department of Defense will transfer such leases at the time the Director of Censorship assumes control over the censorship of communications.

Space for telecommunications censorship stations, except the Office of the Chief Telecommunications Censor, will be procured by the respective naval district commands. Some field stations or units will be located in the operating spaces or on the premises of commercial communications companies.

Space for postal and travelers censorship stations, except the office of the Chief Postal Censor, will be procured by the respective ZI Army commands.

Space for all elements of a censorship operational headquarters—administrative sections, Press, Broadcast, and Special Analysis Divisions, Chief Telecommunications and Chief Postal Censor Offices—will be provided. Allocation of space and facilities, arrangements for normal utilities and services, procurement of space, and any other matters related to activation and occupation of the operational headquarters will be coordinated by the Office of the Director. In the event of a partial mobilization or a period of increased readiness prior to establishment of the Office of Censorship, the Office of Emergency Preparedness will act for the Office of Censorship. All lease negotiations for the operational headquarters will be conducted by the General Services Administration for the Office of Censorship.

### *Section 2. Funds*

The funding of national censorship operations, during the interim period, is the responsibility of the agency initiating the activation of the respective elements of the organization.

During this interim period the elements activated and initially operated by the Department of Defense will be financially supported by the appropriate services from emergency funds available at the time.

The Office of the Director, and the Press and Broadcast Divisions, will operate on funds allocated to the Office of Censorship from the "Emergency Funds for the President, National Defense," or obtained by emergency appropriation.

Upon assumption of control by the Director all funding for national censorship will become the responsibility of the Office of Censorship. At this time the operating divisions will furnish to the Budget and Fiscal Branch of the Office of the Director the budget estimates necessary for the preparation of the first Office of Censorship appropriation request.

### *Section 3. Supplies and equipment*

The procurement of supplies and equipment for national censorship operations during the interim period, and any stockpiling prior to activation, is the responsibility of the activating agency.

During this period those elements of national censorship activated by the Armed Forces will be supplied and equipped by the appropriate services through military channels.

The Office of the Director, and the Press and Broadcast Divisions will receive supplies and equipment from the sources, and through the channels, normally available to Federal agencies other than the military.

Upon assumption of control by the Director the logistical support of all national censorship operations will become the responsibility of the Office of Censorship. The Executive order establishing the Office of Censorship will direct all Government agencies to transfer to the Office of Censorship, without reimbursement therefor, all items of equipment and supplies necessary for and being used or allocated to censorship at the time of the transfer.

### *Section 4. Communications*

All traffic dealing with classified matters and emanating from any source in the field organization not having secure means of communications will be delivered to the nearest military or other Government installation having such capability for transmission.

Detailed plans for local and internal communications cannot be completed until the conditions of occupation are known. Upon activation, or during any partial mobilization prior to activation, all elements of the operational headquarters will submit to the Office of Censorship communications officer all plans and/or requirements for interagency, local, or interior communications.

The communications officer will coordinate all planning and will conduct all negotiations relative to operational headquarters communications with the appropriate companies through GSA channels.

LIST OF EXECUTIVE RESERVISTS IN WARTIME INFORMATION SECURITY PROGRAM—AS OF SEPTEMBER, 1963

Mr. Philip D. Adler, Davenport Newspapers, Inc., Davenport, Iowa.  
 Mr. Hugh M. Anderson, attorney at law, Hillsboro, Mo.  
 Mr. William E. Becker, Securities and Exchange Commission, Washington, D.C.  
 Mr. Edward H. Bronson, National Institute of Dental Research, Washington, D.C.  
 Mr. Norman V. Carlson, retired, San Francisco, Calif.  
 Mr. Edward Cooper, Motion Picture Association of America, Inc., Washington, D.C.  
 Mr. John P. Cosgrove, communications consultant, Washington, D.C.  
 Dr. Lowell S. Ensor, Western Maryland College, Westminster, Md.  
 Mr. Philip T. Foss, Eastman Kodak Co., Oak Brook, Ill.  
 Mr. Arthur E. King, Broadcasting Magazine, Washington, D.C.  
 Mr. Theodore K. Koop, Columbia Broadcasting System, Inc., Washington, D.C.  
 Mr. Harold V. Lauth, Kaiser Industries Corp., Oakland, Calif.  
 Mr. Julian Lazrus, Benrus Watch Co., Inc., New York, N.Y.  
 Mr. Jack H. Lockhart, Scripps-Howard Newspapers, New York, N.Y.  
 Mr. Stephen J. McCormick, Mutual Broadcasting System, Inc., Washington, D.C.  
 Mr. Robert Y. Phillips, retired, Beaufort, S.C.  
 Mr. James W. Scully III, retired, Delray Beach, Fla.  
 Mr. Samuel M. Sharkey, Newhouse National News Service, Washington, D.C.  
 Mr. William P. Steven, Chicago Daily News, Chicago, Ill.  
 Mr. James P. Taff, Bureau of the Census, Washington, D.C.  
 Mr. J. Lloyd Straughn, Western Maryland College, Westminster, Md.  
 Mr. Sol J. Taishoff, Broadcasting Magazine, Washington, D.C.  
 Mr. H. Mason Walsh, Phoenix Newspapers, Inc., Phoenix, Ariz.  
 Mr. James E. Warner, Department of Health, Education, and Welfare, Washington, D.C.  
 Mr. Robert M. White II, Mexico Evening Ledger, Mexico, Mo.  
 Mr. Eugene Willis, Western Maryland College, Westminster, Md.

EXECUTIVE OFFICE OF THE PRESIDENT,  
 OFFICE OF EMERGENCY PLANNING,  
 Washington, D.C., September 1963.

STANDBY VOLUNTARY CENSORSHIP CODE

(For all media of publication or broadcast)

To all newspapers, magazines, radio and television broadcast stations,<sup>1</sup> and other conveyors of information to the public.

In time of war it is essential that no information of possible value to our enemies be made available to them. This code is a guide for the media and cannot cover all possible contingencies. It is the objective of Government, in wartime, to provide the public with all possible information regarding the situation without disclosing data that would be of value to the enemy. In every instance, one should ask oneself, "Is this information that I would like to have if I were the enemy?" and then act accordingly. Use of implication or speculation as a device to convey information helpful to the enemy undermines the purpose of voluntary censorship.

If anyone is in doubt, in any particular case, whether the information in question would aid the enemy, he should ask for clarification from the Office of Censorship.

<sup>1</sup>The term "radio broadcast station" means a radio station licensed by the Federal Communications Commission for the transmission of radiotelephone emissions and/or video signals primarily intended to be received by the general public. The code recognizes that the emergency broadcast system may be activated under certain emergency conditions. The emergency broadcast system is a system in which certain broadcast facilities are permitted by the Federal Communications Commission to operate under national defense emergency authorization. In such cases the Office of Censorship will be concerned only with those stations that are broadcasting.

All media are asked not to publish or broadcast information in the categories set forth below unless the information is made available for publication or broadcast by appropriate authority<sup>2</sup> or if no objection is found by the Office of Censorship:

#### WAR PLANS

War plans, or diplomatic negotiations, or conversations which concern military operations.

#### ATTACKS

Information about actual or impending enemy attacks on continental United States, its territories or possessions, and its establishments abroad or those of its allies.

It must be borne in mind constantly that in possible nuclear warfare, in particular, every editor and broadcaster should assume responsibility in preventing panic and needless loss of life. It would be most damaging to the public interest to circulate the following:

1. Rumors, unconfirmed reports and speculation about destruction of life or property or fallout possibilities until officially announced.
2. Information about actual or impending enemy attacks on continental United States, its territories or possessions, and its establishments abroad except that released by appropriate authority.

It is requested that information published or broadcast concerning an impending attack be limited to that released by appropriate authority.

It is requested that information published or broadcast immediately following an alert be limited to that released by appropriate authority.

It is also requested that information published or broadcast during an attack or immediately following an attack be limited to that released by appropriate authority, except for:

1. The fact of the attack and the general, but not the specific, area of its impact.
2. The bare fact that defense measures are being taken.

Except as officially announced, the nature of the attack (whether conventional or nuclear, whether by air, missile, or otherwise, or how many planes, missiles, or other weapons were involved), should not be disclosed or estimated.

In publications and broadcasts summarizing events after an attack has ended, there is no objection to general descriptions of what has happened provided such reports (except for official announcements) do not:

1. Deal with or refer to unconfirmed versions of rumors.
2. Estimate the strength of the enemy attack force, such as the number of planes or missiles; or their position or routes; or buildup of enemy troops or task forces or their movements.
3. Estimate the extent of casualties or make any reference to damage to military objectives.
4. Describe except in the most general terms the defensive measures being taken.

At no time should photographs, films, or live television programs portray any more information than is given official clearance by appropriate authority or the Office of Censorship.

In short, it is vital that the enemy should not learn from our press or broadcasters just what the attacking forces have accomplished.

On the other hand, there is left considerable scope for news enterprise. It is not intended to place any restrictions on the reporting of local stories of such matters as feats of heroism, incidents of personal courage, or the call of an individual to duty with the military or civil defense organizations.

#### ARMED FORCES

Location, identity, composition, equipment, movement, or prospective movement of Army, Navy, or Air Force units of the United States or its allies.

Identification of combat casualties until made available by the Department of Defense or next of kin.

<sup>2</sup>The term "appropriate authority" appears throughout this code. Since the prosecution of war is a Federal responsibility, an appropriate authority, as employed in this code, must meet either of two criteria:

(a) He must be a constituted Federal official duly authorized, either by rank or position or direct investment of authority, to speak for publication and broadcast on matters under his jurisdiction which are dealt with in this code;

(b) or he may be a State or local official speaking officially on civil defense matters under his jurisdiction or to whom special Federal authority has been transferred during an emergency.

## SHIPS

Identity, location, character, description, equipment, assembly, parts, movements, and prospective movements of naval vessels, transports, and convoys, whether of the United States, its allies, or the enemy.

Identity, location, cargoes and movements of merchant vessels of any nationality.

Existence of minefields or other harbor defense, including secret guides to navigators, by sea or by air.

Production, launchings or commissioning of vessels of any type by the United States, its allies, or the enemy.

Information about the sinking or damaging of war or merchant vessels of the United States, its allies, or the enemy.

## AIRCRAFT, MISSILES, AND SATELLITES

Disposition, composition, movements, missions, or strength of United States, allied, or enemy air units; military activities of commercial airlines.

Production data, including information concerning new and current military aircraft and related items of equipment, missiles, and satellites.

## FORTIFICATIONS AND INSTALLATIONS

Location and description of fortifications, military bases, missile sites, and defense installations, including defense installation details of public airports used for military purposes or location or description of camouflaged objects.

## PRODUCTION

New or secret weapons, identity and location of plants making them; secret designs, formulas, processes, or experiments connected with the war.

Rate of production, stockpiling, and consumption of any specific type of war material used in or for specialized military operations.

Location, movement, or transportation of war materiel.

## MILITARY INTELLIGENCE

Information concerning war intelligence or counter-intelligence operations, sources, personnel, methods, or equipment of the United States, its allies, or the enemy and any indication of success or failure of deciphering enemy codes.

Classified detection devices.

Classified U.S. or Allied means or systems of military communications.

Sabotage or what could be profitable sabotage targets to the enemy.

## WAR PRISONERS

Information as to arrival, movements, confinement, or identity of prisoners of war.

Identity of persons arrested or interned as enemy aliens; locations or operation of alien internment camps; places of confinement of civilians convicted of treason, espionage, or sabotage; persons who have voluntarily submitted themselves to protective custody.

## TRAVEL

Information about the movements of the President of the United States or of other high ranking civilian or military officials on diplomatic or military missions for the United States or its allies.

## PHOTOGRAPHS AND MAPS

Photographs or maps conveying any of the information specified in other sections of this code; aerial photographs of harbors, war plants, military or vital defense installations.

## WEATHER

Weather forecasts or warnings other than those officially issued by the Weather Bureau under specific statement that they are cleared for publication and/or broadcast. When appropriately cleared forecasts or warnings applying to areas within the continental United States are received, those published by a newspaper, or broadcast by a radio or television station, should cover only the State in which published or broadcast and not more than four adjoining States, parts of which

lie within 150 miles of the point of publication or broadcast. When appropriately cleared forecasts or warnings applying only to oceanic or coastal waters (including storm, gale, or hurricane warnings for coastal areas) are received, they may be published or broadcast without restriction as to area.

Wind direction or barometric pressure in current, forecast, or past weather (including summaries and recapitulations) except when contained in emergency warnings released by the Weather Bureau specifically for broadcast.

Weather maps less than 10 days old.

**NOTE**—News stories and photographs about current and past weather occurrence in the State of publication and outside the State within 150 miles of the point of publication may be published but not broadcast. News stories and photographs about weather occurrences in other areas, especially storms and other extremes, will be appropriate for publication only when specifically cleared through the Office of Censorship. A consolidated table containing temperature and precipitation data for not more than 20 localities may be published but not broadcast. News stories, photographs, and films about weather occurrence in any area will be appropriate for broadcast only when specifically cleared through the Office of Censorship.

#### WAR INFORMATION COMING INTO THE UNITED STATES

Except as noted below, war information originating outside U.S. territory may be published or broadcast if the source of the information is carefully stated (no material conflicting with the code should be added in rewriting information received from abroad). Exceptions:

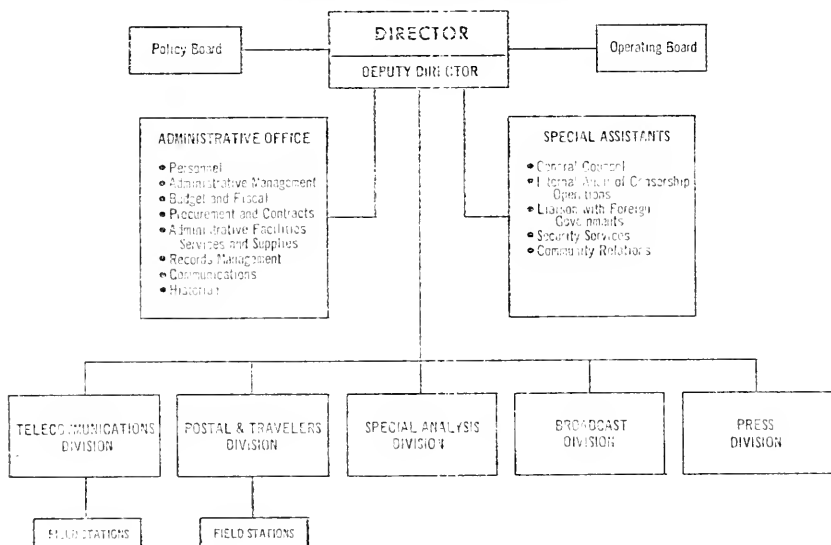
1. Interviews with service men or civilians involving combat operations outside the United States (including accounts of escapes) should be submitted before publication or broadcast either to the Office of Censorship or the appropriate armed services public information officer.

2. Letters from combat areas are censored in the field only for home consumption, not for publication or broadcast. When such letters are published or broadcast, information in conflict with provisions of this code should be eliminated. Special care should be used in handling escape accounts to eliminate all escape details and information which might lead to reprisals or endanger future escapes.

#### ACCREDITED CORRESPONDENTS

No provisions in this code modify obligations assumed by accredited correspondents who accompany U.S. Armed Forces.

### OFFICE OF CENSORSHIP





## WORKING DRAFT—PROPOSED DRAFT EMERGENCY LEGISLATIVE PROPOSAL

## A BILL To Provide Authority for the President To Intercept, Examine, and Control International Communications, And for Other Purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in order to provide for the national defense and the public safety, the present emergency situation confronting the United States requires that the President be authorized to control international communications. It is the purpose of this act to provide such authority, and it is the intent of Congress that the powers herein granted shall be broadly construed to effectuate that purpose, but with all possible regard to the ultimate preservation of our form of Government, our personal liberties, and our way of life.

SEC. 2. Whenever the President shall deem that the public safety demands it, he may cause to be intercepted, examined, and controlled under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, television, or other means of transmission crossing the borders of the United States which for the purpose of this section shall include the continental United States, Alaska, Hawaii, Guam, the Virgin Islands, American Samoa, Swain's Island, the Canal Zone, the Pacific Islands, and any other territory and area under the jurisdiction of the United States, or which is committed to its control as administering authority by treaty or international agreement; or communications which may be carried by any vessel, airplane, or other means of transportation bound to or from any foreign country and touching at any port or place of the United States.

SEC. 3. (a) Any person who willfully violates the provisions of this act or regulations issued thereunder, or who willfully evades or obstructs the interception, examination, or control of communications as provided by section 2 hereof, or who willfully attempts to use any code or other device for the purpose of concealing the intended meaning of communications found upon interception and examination to be inimical to the national defense, shall be guilty of a felony and shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both; and any property, funds, security, papers, or other articles or documents, or any airplane, vehicle, or vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation, shall be forfeited to the United States.

(b) Mail matters found upon examination under section 2 to be inimical to the national defense shall be forfeited to the United States and may be disposed of by the President as he shall deem appropriate in the public interest.

(c) Any employee of the Federal Government having access to information resulting from interception and examination of communications who willfully uses or attempts to use such information either for nongovernmental purposes prejudicial to the defense interests of the United States, or with the intent to malign, to defraud, or to seek personal gain, shall be fined not more than \$10,000 or imprisoned for not more than 1 year, or both.

SEC. 4. (a) Whenever the President finds, pursuant to section 2 of this act, that steps must be taken to intercept and examine communications, he is authorized to establish a new and independent agency known as the Office of Wartime Information Security which shall be headed by a Director of Wartime Information Security to be appointed by the President. The Director shall exercise such powers and perform such functions as the President may prescribe. After the President establishes an Office of Wartime Information Security and until the Director is appointed and assumes the duties of that office, the President may designate an official of the executive branch to serve as the Acting Director of Wartime Information Security and exercise the powers of the Director. The Director shall be compensated at such rate as the President may prescribe and as may be permitted by law. There shall be a Deputy Director of Wartime Information Security and not more than five Assistant Directors, who shall be appointed by the President and be compensated at the rate prescribed for positions in levels IV and V, respectively, of the executive schedule (5 U.S.C. 5315 and 5316 respectively).

SEC. 5. Section 605 of title 47, United States Code, is amended by adding at the end thereof the following new subsection:

"(b) Nothing contained in this section shall limit the power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain for-

eign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."

SEC. 6. This act and all authority conferred hereunder shall expire in whole or in part at such time as may hereafter be provided by law.

**WORKING DRAFT—PROPOSED DRAFT EXECUTIVE ORDER ESTABLISHING THE OFFICE OF WARTIME INFORMATION SECURITY AND PROVIDING FOR INTERCEPTION, EXAMINATION AND CONTROL OF INTERNATIONAL COMMUNICATIONS**

Whereas a hostile foreign power has launched an armed attack upon this Nation employing nuclear weapons and causing such widespread death, injury, and destruction as to compel the immediate institution of emergency measures, including the marshalling of this Nation's defenses and resources: and

Whereas I have proclaimed the perpetration of an Act of War, the existence of an unlimited national emergency, and a state of civil defense emergency:

Now, therefore, by virtue of the authority vested in the President by the Constitution and laws of the United States, and deeming that the public safety demands it, it is hereby ordered as follows:

**PART I. OFFICE OF WARTIME INFORMATION SECURITY**

SEC. 101. There is hereby established the Office of Wartime Information Security at the head of which shall be a Director of Wartime Information Security who shall be appointed by the President and who shall receive compensation at such rate as the President may prescribe and as may be permitted by law.

SEC. 102. The Director of Wartime Information Security is hereby authorized and directed to request and to coordinate the voluntary cooperation of the domestic press, radio and television broadcasters, and motion picture producers in the withholding from publication military and other information which should not be released in the interest of effective prosecution of the hostilities.

SEC. 103. (a) The Director of Wartime Information Security shall, in accordance with such rules and regulations as the President shall from time to time prescribe, cause to be intercepted and examined, in his absolute discretion, communications, by mail, cable, satellite, radio, television, or other means of transmission crossing the borders of the United States or communications which may be carried by any vessel, airplane, or other means of transportation bound to or from any foreign country and touching at any port or place of the United States or communications between any of the places enumerated in subsection (b) of this section. The establishment of rules and regulations in addition to the provisions of this order shall not be a condition to the exercise of the powers herein granted or the interception examination and control of international communications by this order directed.

(b) For the purposes of this order, the term "United States" includes the Continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands, American Samoa and Swains Island, the Canal Zone, the Trust Territories of the Pacific Islands, and any other territory or area under the jurisdiction of the United States or which is committed to its control as administering authority by treaty or international agreement.

SEC. 104. The Secretary of the Treasury shall exercise his functions under section XI of Executive Order No. 2729-A of October 12, 1917, relative to the sending, or taking out of, or bringing into, or attempting to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail, in accordance with such policies, procedures, and regulations as the Director of Censorship may prescribe.

SEC. 105. There is hereby created a Wartime Information Security Policy Board to advise the Director of Wartime Information Security with respect to policy and the coordination and integration of the functions herein directed. The Wartime Information Security Policy Board shall consist of the Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Director of the Office of Emergency Preparedness or his successor, and Chairman of the Federal Communications Commission. The Secretary of Defense shall be the Chairman of the Board.

SEC. 106. The Director of Wartime Information Security shall establish a Wartime Information Security Operating Board, which, under his supervision, shall perform such duties with respect to wartime information security operations as

the Director shall determine. The Wartime Information Security Operating Board shall consist of representatives of such agencies of the Government as the Director shall specify. Each representative shall be designated by the head of the agency which he represents.

SEC. 107. All communications crossing the borders of the United States by any means and intercepted by any private individual or agency of the Government, for whatever purpose, shall be submitted by the intercepting agency to the Office of Wartime Information Security for examination in the absence of specific directives or agreements to the contrary.

SEC. 108. All agencies of the Government shall cooperate to the fullest extent with the Director of Wartime Information Security by providing information, including classified data, for his aid and guidance in accomplishing the wartime information security mission. Except as provided in this Order and in the Executive order entitled "Control of Weather Reports and Coordination of Civil Meteorological Facilities," and in other appropriate Executive orders, no agency shall, without the express authorization of the Director of Wartime Information Security, exercise any form of wartime information security either in the domestic public media field or in the field of communications entering or leaving the United States.

SEC. 109. The Postmaster General shall deliver to the Director of Wartime Information Security for examination all mail requested by the Director.

SEC. 110. Agencies of the Government are hereby authorized to transfer to the Office of Wartime Information Security without reimbursement therefor whatever leases have been entered into for wartime information security operations and all items of equipment and supplies necessary for and being used or allocated to wartime information security operations at the time of transfer.

SEC. 111. The Director of Wartime Information Security is hereby authorized to issue such instructions as he deems necessary to carry out the purposes of this order.

SEC. 112. The Director of Wartime Information Security is authorized to take all measures necessary or desirable to administer the powers hereby conferred, and, in addition to the utilization of existing personnel in any agency of the Government available therefor, to employ or authorize the employment of, such additional personnel as he may deem requisite.

SEC. 113. The provisions of this part shall not apply to such areas and communications as may be exempted by agreement between the Secretary of Defense and the Director of the Office of Emergency Preparedness or his successor.

#### PART II. INTERIM OPERATIONS

SEC. 201. Pending a determination by the Director of Wartime Information Security that the Office of Wartime Information Security is prepared to assume operational control over the examination of communications pursuant to section 103 of this order, the Secretary of Defense, or his designee, shall serve as the Acting Director of Wartime Information Security and shall immediately cause to be initiated such interim actions as are necessary to carry out the functions assigned to the Director or to the Office of Wartime Information Security by sections 103, 104, 107-113. Upon such determination by the Director that the Office of Wartime Information Security is prepared to assume operational control over those functions, responsibility for their conduct shall be vested in the Director.

MR. MOORHEAD. Does this include the proposed Executive order, Mr. Quindlen?

MR. QUINDLEN. We will provide also a copy of the proposed Executive order and the proposed draft emergency legislation.

MR. MOORHEAD. Is the proposed legislation in any way classified?

MR. QUINDLEN. Yes. We will review the document of which it is a part to determine the unclassified form in which we can submit it. This is in addition to the plan, Mr. Chairman.

MR. MOORHEAD. Thank you.

We will want to have properly cleared members of the staff look at the classified and the declassified versions. But only the declassified Executive order and proposed legislation will be printed in the record.

One thing that concerns me is that Executive Order 11051 talks about national emergency. And you come before us talking about wartime information security. Is it possible that this censorship—I will just have to call it censorship, the other is very close to the same meaning—could be invoked in any situation short of wartime emergency?

Mr. QUINDLEN. No, sir. As the testimony of the Director of the OEP in the 1963 hearings indicates, we do not foresee any situation short of wartime in which it could be invoked. In addition, our experience since World War II has led us to the conclusion that the primary contingency for which plans should be prepared, and particularly with emphasis on the voluntary code, is the situation of nuclear attack. While such an attack may be unlikely, it is such a disastrous situation that we should be prepared for it.

Mr. MOORHEAD. Just to make it absolutely clear, is it your testimony that there can be no national emergency short of war in which this censorship plan could be put into effect, no national disaster, no nationwide rail strike or any other national emergency?

Mr. QUINDLEN. That is my testimony, yes, sir.

Mr. MOORHEAD. And is that based on your interpretation of Executive Order 11051?

Mr. QUINDLEN. Sir, under Executive Order 11051, which contains a codification of assignments made by previous Executive orders, the various functions of the Office of Emergency Preparedness growing out of the National Security Act of 1947, the Defense Production Act, and various other acts, are described.

The Executive order indicates that we are to be prepared for a range of contingencies. The individual programs for which we plan, however, may apply only to certain aspects of these contingencies. Thus, our review over the past year has led us to the conclusion that planning for the wartime information security program should be directed primarily at a nuclear attack situation, and that in no case would those plans be applied in any situation short of war.

Mr. MOORHEAD. Was the Office of Emergency Preparedness placed on any sort of alert after the President's recent speech involving the mining of Haiphong and other ports of North Vietnam?

Mr. QUINDLEN. We are in a condition of normal preparedness. In view of our situation as an emergency agency, we have to be prepared at all times, whether for a typhoon or an earthquake, or as we found out last August, for a wage-price freeze. We did administer with very little notice the President's phase I of the wage-price freeze. Our condition is a condition of normal readiness.

Mr. MOORHEAD. I want to get back again to this phrase "national emergency." As I read the executive order, there are times where it merely says—for example, in section 301 it talks about, "in time of national emergency." It doesn't refer to "wartime emergency." It just says, in time of national emergency. Is there a section of the Executive order that you can point to that will allay my concern that something other than war would create a national emergency that would bring about censorship?

Mr. QUINDLEN. I hope so, Mr. Chairman, because that is how we interpret section 301. Under section 301 we are given the responsibility: under the direction of the President, the Director shall have primary responsibility, (1) for planning assumptions, and broad non-

military emergency preparedness objectives. Our planning assumption with respect to wartime information security is that we will be primarily—and this is an assumption that the Director of OEP has specifically approved—that the readiness for wartime information security should be primarily a readiness for nuclear war, that such readiness might have an application to a large scale war which is not nuclear, such as World War II, but that it should not be a priority matter in our planning, and that there are no other circumstances for which we should be ready. The plan has no provision for readiness short of a war emergency.

Mr. MOORHEAD. That to me is very important to have on the record.

In the event there is a wartime national emergency, and the plan goes into effect, I notice that there is a distinction you make between postal, travelers and telecommunications, where you have used the word "control," and voluntary withholding of information by the domestic public media.

Mr. QUINDLEN. That is right. By control we mean control of information and people going beyond the borders, control of international communications.

Mr. MOORHEAD. This is not voluntary?

Mr. QUINDLEN. This is a Government-operated program, but with domestic press and broadcast not included.

Mr. MOORHEAD. This is what you would define as censorship because it is not voluntary, is that correct?

Mr. QUINDLEN. Yes, although we use the term wartime information security, because really the purpose is to keep the enemy from obtaining information which has to do with the national defense and national security.

Mr. MOORHEAD. Then because broadcasts, particularly radio, can be picked up at extraordinary distances, would there be control over broadcasting media?

Mr. QUINDLEN. No, sir. We are only talking about international postal travelers and telecommunications communications and not domestic press and broadcast. These are not covered in any way under this plan by a Government control.

Mr. MOORHEAD. Mr. Quindlen, what changes have been made in the standby voluntary censorship code since it was updated in September of 1963?

Mr. QUINDLEN. There have been none made.

Mr. MOORHEAD. When was the last time either the code or other standby censorship plans were discussed with any representatives of the information media?

Mr. QUINDLEN. With the then designated director of the wartime information security program, about 2 years ago, but not with representatives of the public media associations. We certainly intend to do this. We have been going through a process of study of the entire program.

Mr. MOORHEAD. I notice that you do say—this is page 7 of your testimony—"We shall seek the assistance of the public media organizations in this review of the code."

Mr. QUINDLEN. Yes, sir.

Mr. MOORHEAD. When will this take place, when will you have a review and when will you have the meeting with the public media?

Mr. QUINDLEN. Within the near future. I don't have a date established as yet as we have not determined what revisions, if any, may be needed in the code. I think the code is basically sound. There may be, however, certain small areas in the code which perhaps have been overtaken by technology. For example, there is a reference to weather in the code. It may be that this no longer needs to be covered in as much detail. We don't know right at this point. And, if there is any way we can simplify the code, we certainly want to get advice on that. The code was reviewed in 1963, as you recall. At that time, the representatives of the various public media associations submitted comments—there were very few submitted at that time—I think perhaps because the code had been developed during World War II by Byron Price with the assistance of the entire industry.

Mr. MOORHEAD. I realize you are not in a position to give us a firm date. But when you say in the near future, are you talking about weeks or months or years?

Mr. QUINDLEN. I would say in the next 3 or 4 months. But we don't have a schedule worked out at this point.

Mr. MOORHEAD. Is there now a standby director of censorship or director of wartime?

Mr. QUINDLEN. There is not.

Mr. MOORHEAD. Why has the number of executive reservists who would operate the censorship system been reduced from 26, which was in 1963, to eight?

Mr. QUINDLEN. Starting in early 1970, we began a review of our whole executive reserve program for all purposes. This also at that time was a responsibility of my office. One of the problems with an executive reserve, as with any similar program, is that it needs reviewing and updating. People retire from jobs in an industry and we are all aging. Those of us who were involved in activities in World War II are perhaps not the people that should be turned to for those activities now. We have a 3-year review of this program. Both the executive reservists in support of the wartime information security program and other designations come up for review. Some of the people involved in the activities were of an age where their services perhaps should be appropriately recognized, and they should not be reappointed. There were others who had not been active, and who had not attended any of the—even the national training sessions. So when they came up for a review, inasmuch as we had the program under study, we just didn't renew. The eight reservists identified in support of the wartime information security program are those whose designations have not terminated. There was one exception. I think probably Ted Koop, who formerly had been designated director. His term in the reserve was renewed.

Mr. MOORHEAD. Are there any current working newsmen on the standby executive reserve?

Mr. QUINDLEN. None of these eight are newsmen at this point.

Mr. MOORHEAD. Why don't you have any newsmen? You say in your testimony that the success of the World War II program was due to the participation of representatives of the media.

Mr. QUINDLEN. Well, until 1970, and until the review of this program, there were newsmen represented. I personally am not sure either at this time how large an executive reserve component is needed to

support this program or the extent to which you should look to industry for the people who happen to be key people at the time of implementation. This is one of the elements that we will discuss with the associations when we meet with them, as well as discussing the code and how it should be implemented.

Mr. MOORHEAD. When was the last time a meeting was held with the executive reservists to either get their advice on necessary changes in the standby censorship system or provide training for their duties in the event of the existence of a wartime emergency?

Mr. QUINDLEN. The last session was in October 1967. That was a national executive reserve conference to which the then censorship reservists were invited along with the other reservists. There was some general training on one day, and the following day was devoted to specific training in their own program.

(A copy of the report on the October 23-24, 1967, National Defense Executive Reserve meeting is in the subcommittee files.)

Mr. MOORHEAD. Do you think that a 5-year lapse is sufficient to keep these reservists up to date in their proposed activities in the event we really do have a fast-breaking national wartime emergency?

Mr. QUINDLEN. Our schedule calls for a 3-year cycle of national meetings. The one in September 1970 was cancelled primarily because of budgetary limitations.

Mr. MOORHEAD. What has been done within OEP to review the standby censorship system and bring it up to date?

Mr. QUINDLEN. We started a review approximately 15 months ago. I obtained the services of Mr. Nocita on a consultant basis. He was with a private research organization. And I gave him the assignment of reviewing all our plans and all our preparations in this area. I was directed to move on such a study by General Lincoln to determine how we should go, and what further preparations we should make. We have the study completed, and are now moving; we have reached certain conclusions about the necessity for a program, such as the greater attention to the nuclear war situation, and we are moving to implement the recommendations of the study.

Mr. MOORHEAD. Would you or Mr. Nocita give us some background as to whether he has had any work experience in the news media.

Mr. QUINDLEN. He has not had work experience in the media.

John, would you give a résumé of your experience.

Mr. NOCITA. Yes, sir.

I am a retired military officer, U.S. Army, colonel. I retired at the end of 1968. I went to work at that time for Planning Research Corp. as a systems analyst. My background has been primarily in planning. I spent 3 years with the Planning Research Corp. as a systems analyst. I undertook this task from the viewpoint of a systems approach to the problem, and to make recommendations as to how best the program could be conducted.

Mr. MOORHEAD. Before 1968 your career was in the military?

Mr. NOCITA. That is correct, sir.

Mr. MOORHEAD. Regular Army?

Mr. NOCITA. That is right, sir.

Mr. MOORHEAD. Have you consulted with newsmen to get their feeling of how this program should be put into effect?

Mr. NOCITA. During my study Mr. Quindlen had occasion to talk to Mr. Koop. I did not personally interview any newsmen. In my review of the voluntary code, I came to the conclusion that it is a good code, and I made the recommendation that the news media should be brought in at the time that we wished to look at it in terms of any revision.

Mr. MOORHEAD. I think it is very important, particularly in view of the fact that this is voluntary, that you do get the input of the news people, because, as Mr. Quindlen mentioned, technology, if nothing else, has changed since 1963.

Mr. NOCITA. Yes, sir; I recognized that and did make that recommendation.

Mr. MOORHEAD. Who has the responsibility within OEP for overseeing the standby censorship system? Is that you, Mr. Quindlen?

Mr. QUINDLEN. I do, yes. And I have another member of my staff who actually sits in the same office with Mr. Nocita. He joined OEP in 1961 from a position as chief of the Washington Bureau of Cox Newspapers. And he does have 28 years of newspaper experience. Although he doesn't have a prime responsibility here, we do call on his background for suggestions as to associations and points of contact.

Mr. MOORHEAD. And your background, Mr. Quindlen, does not include any—

Mr. QUINDLEN. My background is 30 years of Government management and administrative experience, much of it operational. It includes a role in direction of disaster relief in Alaska, in typhoon Karen in Guam, hurricane Carla in Texas, and a responsibility for overall Government preparedness dating back to—my present level of designation dates back to 1962.

Mr. MOORHEAD. If the President declared a national wartime emergency with the imposition of censorship, how would the standby voluntary censorship code be disseminated to newspapers and broadcasting stations.

Mr. QUINDLEN. We would put it on the UPI-AP wires immediately. In my judgment this would have to be done under any situation in which the President took such action, because prepositioned documents are difficult to keep handy. It is our estimate that we could have it available to the newspapers and the broadcast stations within 45 to 60 minutes. It would be primarily just the mechanics of the time of getting it out.

Mr. MOORHEAD. Is it contemplated that in the event of such a national wartime emergency that there would be the appointment of a director of censorship or wartime information security?

Mr. QUINDLEN. Yes, our plans do call for that. And that person would be appointed by the President.

Mr. MOORHEAD. But there has been no standby appointment?

Mr. QUINDLEN. There has not. In our planning—

Mr. MOORHEAD. Has your office prepared a list of persons that the President can consider for appointment?

Mr. QUINDLEN. We have a list of people we might consult for recommendations, but we do not have a list at this point. We could make up such a list of recommendation. The President would obviously have many, many sources of recommendation including, if he wished, to turn directly to the public media associations himself. So, we might



be called on to make a recommendation: I couldn't say at this point that it would occur.

MR. MOORHEAD. Frankly, Mr. Quindlen, I have two concerns after the staff study and your statement. One, that this might be a system that could be put into effect short of a very serious wartime situation, particularly a national emergency rising from typhoons or strikes or something else.

MR. QUINDLEN. No, sir.

MR. MOORHEAD. In that event I was pleased that the program did not seem to be geared up to impose censorship. Second, in the event of attack, and particularly a nuclear attack, when the President will have many more important things to do than wartime censorship or control of defense information, I don't know that you are ready. It seems to me that, not having had a meeting of the reservists for a long time, and not having a director ready practically standing in the wings, so that you know exactly who it is going to be, that if we really and truly had a nuclear attack on this country from which anybody survived, that we are not really ready to move. So, that I look at it in two different ways. If you are only going to use it in the event of probably nuclear attack, I want you to be even better prepared and ready to move quicker than you even might appear to be.

MR. QUINDLEN. Mr. Chairman, as you know, this planning has gone on since World War II. I assumed responsibility for the program in 1969. Previously it had not been a part of my responsibilities. One of the questions that concerned us is that we could be ready for a World War II situation and not be prepared for a nuclear war situation. And this is exactly the point we are trying to correct. Again, it is pretty clear to us that voluntary information security by the public media is going to be basically the voluntary code as it exists today and revised in conjunction with the public media organizations to make any changes, particularly those required by technology. For example, there is no sense in withholding weather information if the weather information can be otherwise available from satellites or other sources of information. Again, it must depend on the judgment and willingness because the code is just a general guide of the people in the broadcast and press industries. And certainly they must be consulted, and we will consult with them. There is no intention, and never has been, in any of the planning in any of the years since World War II, for this program to be applied, except in a wartime situation. I think that some of the planning done between the end of World War II and 1969 was directed at a World War II type situation which doesn't deserve a high priority in terms of our planning. The most difficult situation for all planning is the nuclear attack contingency. Although improbable, it requires particularly careful planning and preparation. That is the kind of review and reemphasis and restatement we are trying to achieve in this program.

MR. MOORHEAD. Thank you, Mr. Quindlen.

I am about to yield to Mr. Gude. But I think at this time I would like to administer the oath to both you and Mr. Nocita retroactively and prospectively.

Would you please rise?

Do you solemnly swear that the testimony you have given and are about to give this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. QUINDLEN. I do.

Mr. NOCITA. I do.

Mr. MOORHEAD. Mr. Gude?

Mr. GUDE. Thank you, Mr. Chairman.

Mr. Quindlen, you said that the last scheduled meeting of the reservists was postponed due to budgetary reasons.

Mr. QUINDLEN. Yes, it was primarily budgetary reasons.

Mr. GUDE. Was this initiated at your level, or was it OMB?

Mr. QUINDLEN. It was initiated at our level.

Mr. GUDE. At your level?

Mr. QUINDLEN. Right.

Mr. GUDE. You felt that this had a low priority in regard to the—

Mr. QUINDLEN. One element was that the executive reserve program was being updated, because many of the executive reservists had been in the reserve program for many years. We were asking the various agencies of Government to look over their lists, to look for new people in the Reserves. The scheduled training for 1970, with the budgetary question of amounts of money available, and in light of the ongoing review was just an inappropriate time. The next conference is scheduled for November of next year.

Mr. GUDE. November of 1973?

Mr. QUINDLEN. Yes, sir.

Mr. GUDE. How many of those that are on the list of executive reservists have met since coming on board, have actually met at a previous meeting?

Mr. QUINDLEN. Of the original group, I would say—I would have to consult the record on this—that of the original 26, all had met at one time or another, whether for the initial orientation meeting or subsequent national meetings. Of the remaining eight, I am sure that all of these have at one time or the other attended executive reserve meetings.

Mr. GUDE. In other words, all of the present membership has attended one or more sessions?

Mr. QUINDLEN. Yes, although I would have to check the record on that.

Mr. GUDE. I think that information would be helpful to us as to how many meetings these gentlemen have attended, and when.

Mr. QUINDLEN. Yes.

Mr. GUDE. Mr. Chairman, may that be inserted in the record at this point?

Mr. MOORHEAD. Without objection, it is so ordered.

(The information referred to follows:)

#### BACKGROUND OF NATIONAL DEFENSE EXECUTIVE RESERVISTS AS OF MAY 1972

Cooper, Edward—Motion Picture Association of America, Inc., Washington, D.C.

Vice president of the MPAA. Extensive background and long familiarity with motion picture industry.

Foss, Philip T.—Eastman Kodak Co., Oak Brook, Ill. Extensive experience in World War II wartime information security, both national and military.

Koop, Theodore F.—retired, Washington, D.C. Former vice president, Columbia Broadcasting System. Extensive experience in World War II wartime information security. Was Deputy to Director Byron Price at end of World War II.

Broad experience in broadcast industry.

- Phillips, Robert Y.—retired, Beaufort, N.C. Former Director of Emergency Operations Office, OEP. Supervised plans and programs in wartime information security until retirement in 1969.
- Scully, James W., III—retired Army officer, Delray Beach, Fla. Extensive background in defense communications and special communications needs of wartime information security.
- Taff, James P.—Bureau of the Census, Washington D.C. Chief of Personnel Division, Bureau of the Census.
- Tajshoff, Sol J.—Broadcasting magazine, Washington, D.C. Experience in publishing broadcasting trade magazine with extensive knowledge of industry.
- Willis, Eugene—Western Maryland College, Westminster, Md. Broad experience in facilities management and maintenance.

#### NATIONAL DEFENSE EXECUTIVE RESERVISTS TRAINING

- Edward Cooper—initial orientation, 1967. Invited for training on two occasions but could not attend due to absence from United States.
- Philip T. Foss—initial orientation, 1967. NDER training conference, 1967.
- Theodore F. Koop—3 to 4 days per year, 1956-70. NDER training conference, 1967.
- Robert Y. Phillips—NDER training conference, 1964. Extensive contact with program as Director, Government Readiness Office, OEP.
- James W. Scully III—initial orientation, 1967; invited to NDER training conference in 1967 but did not attend.
- James P. Taff—initial orientation, 1967; invited to NDER training conference in 1967 but did not attend.
- Sol Tajshoff—initial orientation, 1964; NDER training conference, 1964; NDER training conference, 1965; invited to NDER training conference in 1967 but did not attend.
- Eugene Willis—initial orientation, 1966. NDER training conference, 1967. Frequent contact with OEP program officer.

Mr. GUDE. Then in the outline of the operating procedure which has been set forth for this unit, it is envisaged that it would only come into effect during a full scale war or a war which involved atomic attack?

Mr. QUINDLEN. Yes, sir; that is true.

Mr. GUDE. In any of the domestic disasters in which your agency has been involved, or in Vietnam, has any consideration been given to engaging in planning or gaming in order to determine how your organization would operate under a given situation so that you could see if the plans actually would work in reality?

Mr. QUINDLEN. We run exercises, Mr. Gude, usually on an annual basis. But we have in no case related this program to the Vietnam situation or to any disasters or even to the Korean war. These have not been occasions for a review of this program, or for any consideration of application of the program. But we review on a regular basis, our readiness to move into position for nuclear attack warnings or nuclear attack situations. We review the documents regularly.

Mr. GUDE. How are the executive reservists apprised of the results of your review of, say, a particular exercise or a situation which you set up?

Mr. QUINDLEN. Well, our contact in connection with the exercises has been in the past with the director designate. We do not have a director designate now. As I indicated earlier in testimony, we will be reviewing our preparedness with the various associations in the public media industry.

Mr. GUDE. Do I understand that you actually apply the program of your organization to a specific game plan for an atomic attack?

Mr. QUINDLEN. We do this at least annually.

Mr. GUDE. At least annually?

Mr. QUINDLEN. Yes, sir.

Mr. GUDE. For example, a simulated attack on an American city?

Mr. QUINDLEN. Right.

Mr. GUDE. You say you formulate what the reaction and the subsequent actions of the agency would be, but how are the reservists geared into this?

Mr. QUINDLEN. The reservists are invited to some exercises, but not to others. We are presently planning an exercise for sometime next spring at which some reservists will be invited to participate.

Mr. GUDE. When was the last exercise you had of this kind.

Mr. QUINDLEN. Last fall.

Mr. GUDE. And how many reservists attended that exercise?

Mr. QUINDLEN. This was not an exercise that generally involved reservists. I think that two or three of our field offices—we have 10—did invite reservists to participate with them. But we had no reservists participating nationally.

Mr. GUDE. By that you mean that they weren't reservists from this list? Are there reservists from regional lists?

Mr. QUINDLEN. Yes, there are regional reservists, but none of them in the wartime information security program. Our regions have reservists who would assist them in other of their wartime functions.

Mr. GUDE. It seems to me there is a real gap in the involvement of the news media reservists in the activities of your program.

Mr. QUINDLEN. We certainly are in agreement that in our review of the program we have reached the point where we need to consult with public media representatives on the possible revisions in the code and the method of carrying out the code.

Mr. GUDE. Then you are thinking in terms of a news media committee which would self-police the voluntary code?

Mr. QUINDLEN. No, sir; not necessarily a committee, because, of course, there are associations which represent the publishers, the newspaper editors, the weekly newspapers, and so on, but certainly conferences with and consultations with those groups in terms both of whether they see any difficulties with the code and how the code might be further distributed.

Mr. GUDE. To what extent has OEP issued rules and regulations on issues of censorship under section 501 of the Executive order.

Mr. QUINDLEN. Mr. Gude, section 501 of which order?

Mr. GUDE. Executive Order 11051, which prescribes the responsibilities of the Office of Emergency Planning and the Executive order of the President. It is section 501, general provisions.

Mr. QUINDLEN. We have published nothing in the way of regulations pertaining to the implementation of this program. There are regulations in many other of the areas covered by the Executive order, since our functions range all the way from disaster assistance under the Disaster Act of 1970 through the functions of imports threatening the national security. We have many regulations published on a wide variety of subjects. The basic directive for the wartime information security program is the plan which the chairman earlier asked us to submit. That is the basic plan covering this program.

Mr. GUDE. Do you mean the standby Executive order?

Mr. QUINDLEN. We have a plan, a proposed standby Executive order, and a proposed standby piece of legislation.

Mr. GUDE. You say that from time to time there are orders which provide for regulations in several different areas, and one of these areas happens to include censorship of news media, is that the idea? In other words, provisions regulating the news media are scattered through it?

Mr. QUINDLEN. No, sir; in a standby program such as this we do not publish in advance regulations in the Federal Register. We have a plan, and a proposed standby Executive order, and a proposed standby piece of legislation. But there are no published regulations on any of our standby programs, because these are programs which may or may not ever come into effect, and on which the regulations would be issued at the time the organizations came into being. The Executive order would be issued, the legislation would be proposed at the time they are needed.

Mr. GUDE. So, the standby order contains regulations on censorship, but this would not be published in the Federal Register until the time—

Mr. QUINDLEN. Until the time it was needed; yes, sir.

Mr. GUDE. Are the executive reservists aware of the provisions in this standby Executive order?

Mr. QUINDLEN. Yes.

Mr. GUDE. And they are apprised of this?

Mr. QUINDLEN. Yes.

Mr. GUDE. What mechanism is there for feedback as far as their views on this are concerned?

Mr. QUINDLEN. We solicit, at the time reservists are appointed, any suggestions they have about the programs. I think that the training sessions should be more of a mechanism for getting these comments, and for reviewing the program, than they have been. And I am sure that our national conference next year will offer such a mechanism. However, I am more interested in the review and comment by the industry representatives as a whole to be sure that we are getting the views of the various parts of the public media industry.

Mr. GUDE. You say you are more interested in what the reaction of the news media as a whole is?

Mr. QUINDLEN. Right.

Mr. GUDE. By what mechanisms would you obtain this?

Mr. QUINDLEN. By consultation with the various associations, the publishers, the newspaper editors, the various groups representing publishers and broadcasters.

Mr. GUDE. And how does this consultation take place?

Mr. QUINDLEN. Well, as I indicated earlier in my testimony, it has not taken place recently. We have been doing a thorough review of the program. I will consult, with members of my staff, with the various associations, asking them for their comments on the code and for their comments on the distribution of the code and any changes they might think necessary.

Mr. GUDE. Is this a piecemeal review, or would this all take place within a short period of time?

Mr. QUINDLEN. We haven't determined whether we will meet with them individually or in groups. We may do both. We may provide the information in advance, and then consult with them individually or have a meeting of the whole. We haven't determined that.

MR. GUDE. And you say that this process has not taken place for some time now?

MR. QUINDLEN. It has not.

MR. GUDE. When was the last time this took place?

MR. QUINDLEN. The last time was in 1963.

MR. GUDE. Was in 1963?

MR. QUINDLEN. Yes.

MR. GUDE. And what was the reaction of the news media at that time?

MR. QUINDLEN. They had very few comments to offer on the code, and were generally in support of the code—were entirely in support of the code. They had very few comments to offer, and for this reason there hasn't seemed to be a particular need to question whether the code is an adequate code. I personally feel that it is an adequate code.

MR. GUDE. You personally feel that it is?

MR. QUINDLEN. That it is an adequate code.

MR. GUDE. Have any of the standby reservists objected to it, to the plan, the voluntary code, or the Executive order?

MR. QUINDLEN. No, sir.

MR. GUDE. Thank you, Mr. Chairman.

MR. MOORHEAD. Mr. Cornish.

MR. CORNISH. Thank you, Mr. Chairman.

MR. QUINDLEN, you have testified that there is a standby Executive order to be issued by the President.

MR. QUINDLEN. Yes, sir.

MR. CORNISH. And you have agreed to provide a sanitized version of that for the subcommittee.

On what statutory or other authority is that proposed Executive order based?

MR. QUINDLEN. In our emergency preparedness we operate on two contingencies within the nuclear war situation. One is where nuclear attack might come suddenly, with the Congress not available, Congress not in session, in which case the President might have to act on his inherent constitutional powers. But the basic assumption is the submission of legislation which would call for the establishment of the office and authority for the President to carry out the program. This is the primary and preferred method of operation in any case.

MR. CORNISH. So, that is the purpose actually of the standby legislation?

MR. QUINDLEN. That is right. And it offers alternatives, either as a piece of legislation, or as an Executive order, depending upon the circumstances. This has been the basis of planning this alternate approach for the past 20 years.

MR. CORNISH. When you speak about the President's constitutional powers, I assume you are referring to the section dealing with his responsibilities as Commander in Chief?

MR. QUINDLEN. That is right.

MR. CORNISH. And also his responsibility to protect the public safety.

MR. QUINDLEN. Right.

MR. CORNISH. I think it is interesting that in this connection Justice White said in his concurring opinion on the New York Times Pentagon papers case: "When the Espionage Act was under consideration in

1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe under the threat of criminal penalty the publication of various categories of information related to the national defense. Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press."

Now, do I assume correctly that the reason that this code is voluntary is because of that fact?

Mr. QUINDLEN. I can't say that, Mr. Cornish. I really hadn't considered that point. I would say that it is voluntary, because that is the nature of our press and broadcast system, and that is the way it is going to operate. If it operates, that is the way it is going to operate best. In fact, we have never considered anything but a voluntary code.

Mr. CORNISH. I wonder if you might consult with the counsel of the Office of Emergency Preparedness on that point and submit a brief statement on it for the record—if that is appropriate, Mr. Chairman.

Mr. QUINDLEN. Yes, sir.

Mr. MOORHEAD. Can you do that, Mr. Quindlen?

Mr. QUINDLEN. Yes.

Mr. MOORHEAD. Without objection, it is so ordered.

(The information referred to follows:)

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF EMERGENCY PREPAREDNESS,  
Washington, D.C.

Date: May 19, 1972.

Subject: Wartime Information Security Program.

To: Mr. Eugene J. Quindlen, Assistant Director for Government Preparedness.

You requested information as to the reason from the point of view of the Office of the General Counsel, for the limitation for all plans and draft legislation concerned with the wartime information security program to voluntary, rather than mandatory, treatment of the press and communications media.

To our knowledge, this agency as a whole, as well as the Office of the General Counsel, has considered any attempt at mandatory control of the press and the media not only to be unworkable, but so inimical to fundamental freedoms as to be completely beyond the proper scope of our consideration.

Therefore, the fact this agency has refrained from any planning or drafting of standby documents which would impose other than voluntary measures in this area is based upon considerations that go beyond the legislative history of the Espionage Act.

ELMER F. BENNETT,  
General Counsel.

Mr. CORNISH. Mr. Quindlen, what role will you play if the button is ever pressed and the missiles start coming? I am thinking especially about the wartime information aspect of the thing.

Mr. QUINDLEN. In a buildup period, I have many functions, and the staff working for me have many functions relating to our readiness to carry out our overall responsibilities. In this area, and the question of whether we move to readiness to carry out this program, I look primarily to Mr. Nocita. And we have in our emergency actions some actions specifically pertaining to this program, to include the dissemination of the code by means of the UPI and AP lines, but I have no role in the administration of the program when implemented. We will have a role in seeing that the arrangements necessary to get it into operation are carried out. I will not have a role in its administration.

Mr. CORNISH. Maybe you can answer this. To whom is the wartime information director going to be responsible?

Mr. QUINDLEN. To the President.

Mr. CORNISH. Directly to the President?

Mr. QUINDLEN. Directly to the President.

Mr. CORNISH. No layer in between there?

Mr. QUINDLEN. None.

Mr. CORNISH. That is very interesting.

Now, I think it was your testimony that in the event of such a war-time attack that you would have transmitted over the Associated Press and United Press International wires the text of the code and other necessary instructions in documents, is that correct?

Mr. QUINDLEN. Yes. I address myself primarily to the code, because that is the document that local press and broadcast people would use.

Mr. CORNISH. And you would in all probability transmit the Executive order, too; would you not?

Mr. QUINDLEN. Depending on the circumstances. That may not be particularly appropriate. It may be enough to say that the Congress has passed legislation or the President has taken certain action, that might be sufficient.

Mr. CORNISH. I think you said it would take approximately 45 minutes.

Mr. QUINDLEN. We haven't run a test on this, but I think that is what it would take.

Mr. CORNISH. Do you have an agreement with the wire services to transmit that information if such an event actually occurred?

Mr. QUINDLEN. We have communications arrangements with the wire services—we have certain emergency ties with the wire services. And, of course, we put material on the wire services, information-type material in our daily operations that they pick up regularly. We do not have a specific agreement to transmit the voluntary code. I have not explored this with the wire services.

Mr. CORNISH. The reason I ask this is because their facilities are limited and heavily taxed, and I can imagine in an attack situation, that their wires would be extremely heavy, with voluminous copy being transmitted on the attack itself, and informing the American people and press of what was going on. So here we have 45 minutes of copy—

Mr. QUINDLEN. I was talking about the time necessary to complete the actions. This certainly is not 45 minutes of copy. The code itself is a relatively brief document. As a matter of fact, it is so basic in terms of the guidance included in it that I am sure even in those places that do not have it, it would not be received as a surprise.

Mr. CORNISH. When you speak of 45 minutes, in other words, you are counting the time it takes to run a copy over from the Office of Emergency Preparedness?

Mr. QUINDLEN. No, sir; we have communications in our own building. We have excellent emergency communications. I was talking about the total time required from the point when we first determined that it was necessary to the point that we would be assured that the recipients at the end of the line actually had it.

Mr. CORNISH. I hope you are not telling me that you can actually break into a news agency's line and take over—



MR. QUINDLEN. No, sir. We would provide it to them for transmission. I am sure this would be a very, very important item of news for them.

MR. CORNISH. But they don't have it now?

MR. QUINDLEN. They do not have it now.

MR. CORNISH. How long do you think it would take a nuclear missile to cross either the Atlantic or Pacific Oceans and strike the United States?

MR. QUINDLEN. Well, the estimates on time, depending on the circumstances, range from 15 to 30 minutes, in terms of time from first warning of takeoff.

MR. CORNISH. So, it is very possible that the missile could strike at a number of major industrial centers, and other cities, prior to the time that this material was transmitted?

MR. QUINDLEN. No, sir. We regard it as highly improbable that attack without warning could occur.

MR. CORNISH. It did, I think, once before, if you will recall.

MR. QUINDLEN. It did, there is no question about it, in a day of different technology, it certainly did.

MR. CORNISH. But human nature hasn't changed that much since then; has it?

MR. QUINDLEN. It has not; no.

MR. CORNISH. Is there any reason why the standby legislation couldn't be passed in advance, so that you won't have to run through this exercise sort of after the fact?

MR. QUINDLEN. That is a question that has been considered often over very many years. I think it is difficult, with the press of other day-to-day matters—and take the many matters with which this committee is concerned—to present something for congressional action which might seem highly unlikely, highly improbable, and which doesn't seem to have any particular relationship to any situation but nuclear attack.

Also, the fact that it becomes legislation means that if you want to make any changes in the future, they would have to be legislated changes.

We feel that it is more appropriate to have standby legislation, which hopefully will never have to be used, but would be presented to the Congress when the situation arose.

MR. CORNISH. You also said that to augment the Standby Reserve you would turn to the press associations and other media groups for personnel and expertise.

MR. QUINDLEN. Right.

MR. CORNISH. Has any arrangement been made with those groups so that they themselves have designated personnel within their organizations to do this sort of thing?

MR. QUINDLEN. No, sir. This certainly would be part of the discussion which I indicated we will be carrying on with these groups.

MR. CORNISH. So this is going to be part and parcel of the discussions which will be carried on 3 or 4 months from now?

MR. QUINDLEN. Right.

MR. CORNISH. Thank you, Mr. Chairman.

MR. MOORHEAD. Mr. Gude?

Mr. GUDE. Mr. Quindlen, last year the Army inadvertently made a mistake in sending out a message which implemented the Conelrad system. You recall that affair? And what happened, in effect, was that a message went out advising certain radio stations to go off the air and others to shift over to the Conelrad system.

Is that, in effect, what happened there?

Mr. QUINDLEN. Yes, sir. Actually it was a notification of the implementation of plans under the emergency broadcasting system, which is a successor to the Conelrad program. That is right. Actually, as I recall the circumstances, a wrong tape was used to transmit a message which indicated that the emergency broadcast system was to be activated.

Mr. GUDE. Was that a voluntary stricture that was put on the station, or was it—

Mr. QUINDLEN. This is a program in which the broadcast industry has been cooperating with the Government to make available to the President, in time of national emergency, their facilities so that the President can reach the people. It is a voluntary arrangement on which an industry advisory group has been working. There are designated stations which are part of the system. There are communications links to these stations. This was a message alerting those stations that the system was going to be put into effect. And, of course, it was erroneous.

Mr. GUDE. When this takes place are some stations advised to go off the air as well as some stations to shift over and make their facilities available to the Executive?

Mr. QUINDLEN. As I recall—and I don't have particular responsibility nor does our agency for this program—there are certain stations which are used to carry the President's speech, because of the extent of their coverage. But it is not my memory that the original restrictions of Conelrad apply any longer. You may recall, the Conelrad program was a program designed to restrict navigational aids by having almost all stations go off the air. I don't think the same plan applies today.

John, do you have any comment on that?

Mr. NOCITA. I have nothing further to offer on that, Mr. Gude. As Mr. Quindlen said, it is a program outside the functions of our agency. It is intended primarily to afford the President the opportunity to reach the American people in the event of a major catastrophe, such as a nuclear attack.

Mr. GUDE. Did I understand, Mr. Quindlen, that the reservists have approved this, your reservists have reviewed this program and approved it?

Mr. QUINDLEN. Yes, sir. The wartime information security program has been reviewed many times. And, of course, many of the original reservists who reviewed it were people who had worked in the program in World War II when substantially the same voluntary code was used.

Mr. GUDE. In a sense many of these reservists are wearing two hats, in that they are familiar with or responsible for this program as it goes through the military as they are for the one that goes through your organization; is that correct?

Mr. QUINDLEN. No, sir. The reservists who have been in this program have had no relationship to any military activities in connection with

this. This part of the program is strictly civilian, strictly the public media, strictly a voluntary code.

Mr. GUDE. But it is implemented or triggered by the military, an action of the military?

Mr. QUINDLEN. No, sir. The military situation might lead to its triggering, but if you are referring to the emergency broadcast system, that is triggered by the White House specifically. And if you are talking about the wartime information security program, again a determination is made by the President as to whether the program should be implemented.

Mr. GUDE. So when the wrong tape was put on the air in effect—this individual was not acting on behalf of the military, he was acting on behalf of the White House?

Mr. QUINDLEN. Yes. As I recall, it was a regular test. His responsibility was to run a regular test. And he took a real tape instead of a test tape.

Mr. GUDE. I understand that. But the chain of command comes from the White House, not from the military.

Mr. QUINDLEN. That is right. As I recall in that particular instance nobody told him to put that tape on. He put it on as a part of his regular procedure. The chain of authority for the emergency broadcast system is quite clear. The emergency broadcast system is operated by the White House.

Mr. GUDE. It wasn't the President that made the mistake; I understand that. But if it were done for real it would be because of an action of the White House?

Mr. QUINDLEN. Right.

Mr. GUDE. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Copenhagen?

Mr. COPENHAVER. Mr. Quindlen, to pursue a question that Mr. Gude was developing here, I must say I am quite surprised that there appears to be no coordination by or no authorized input by your organization into the emergency radio system.

Mr. QUINDLEN. The emergency broadcast system?

Mr. COPENHAVER. The emergency broadcast system. Can you explain that? Because it seems so closely related to a form of censorship, a form of control over the news media.

Mr. QUINDLEN. No, sir; there is no control involved in it. As a matter of fact, the President does have an Office of Telecommunications Policy, as part of the Executive Office. We certainly have had some involvement in the planning for the emergency broadcast system, but we do not have responsibility for it. The emergency broadcast system, which again is not a responsibility of our Office, is intended solely to make a broadcast capability available to the President to reach the people, and is not censorship in any form.

Mr. COPENHAVER. Does the Office of Telecommunications constitute the office of the White House which has direct control over the emergency broadcast system in your opinion?

Mr. QUINDLEN. That is my understanding.

Mr. COPENHAVER. To your knowledge have they laid down any rules or regulations, or do they have any standby plans with regard to the operation of the emergency broadcast system?

Mr. QUINDLEN. Since this is a part of a program, not a part of our Office, I would prefer instead to submit from the appropriate parties

a description of the emergency broadcast system. I didn't come prepared to discuss that, since that wasn't within the request of the committee.

Mr. COPENHAVER. I will ask the chairman for permission for you to do that. My question was prefatory to another question, and therefore I was merely asking you for your current knowledge on that, the basis being that if the Office of Telecommunications has the authority or has in fact entered into rules and regulations or prepared standby authority for the operation of the emergency broadcast system, this could potentially be a means of regulating, voluntarily or otherwise, the communications network, which in essence would mean that we have thereby established a dual arrangement, voluntarily or otherwise, for news media communications. If that be the case, of course, it would be of value to the committee to determine what those standby rules and regulations on telecommunications are. But more important, I think I detect perhaps a breakdown of coordination, which I might say I am not blaming anybody for.

Mr. QUINDLEN. I don't think either situation obtains. I consider that the work on the emergency broadcast system with the industry has been complete and thorough. With great cooperation from the industry, there has been established by the FCC with the industry a National Industry Advisory Committee which is advisory on this point. This is voluntary participation by the industry, and doesn't constitute control in any way. I think in addition that the coordination on it has been quite thorough.

Mr. COPENHAVER. Mr. Chairman, what Mr. Quindlen suggests that he provide for the record is a description of the operation of the emergency broadcast system by the Office of Telecommunications—

Mr. QUINDLEN. There are various agencies involved—the FCC in particular, the industry, and the Office of Telecommunications Policy. I would be glad to submit a statement that covers the general operation of the program.

Mr. MOORHEAD. Without objection the statement will be received and made a part of the record.

(The statement referred to follows:)

#### THE EMERGENCY BROADCAST SYSTEM (EBS)

1. The Emergency Broadcast System (EBS) was established in 1962 to supersede the Conrad System.

2. The purpose of this system is to allow the President to speak to the public throughout the continental United States via the commercial broadcast networks, on a 5-minute notice basis, regardless of his location.

3. In 1971, the White House designated the Office of Telecommunications Policy (OTP) as the office responsible for developing the Emergency Broadcast System to the fullest potential, reviewing plans, and coordinating requirements of the Federal departments and agencies in support of the EBS. In short, the Office of Telecommunications Policy (OTP) establishes the official White House EBS requirements and policies, based on Presidential needs, and monitors the system.

4. The Federal Communications Commission (FCC) is responsible for formulation and publication of pertinent rules and regulations required by industry to operate the Emergency Broadcast System when requested by the President.

5. The Office of Emergency Preparedness (OEP) is responsible for provision of those communications facilities required to notify the industry (broadcasters, commercial common carriers, and the news services) to activate and deactivate the EBS, and specified program feed facilities which originate at the White House and other locations.

6. The telecommunications industry (broadcast, common carrier, and news services) furnish those broadcast, interconnect facilities, and news dissemination services required for the EBS on a voluntary basis in coordination with the designated Government agencies. Participating in EBS operations is a Broadcast Services Subcommittee which is a part of the National Industry Advisory Committee (NIAC). The subcommittee is composed of representatives of the major networks and the National Association of Broadcasters, all of whom cooperate with the Federal Government and play an active, positive role in the operations of the EBS.

7. The revised system now being installed will provide greater survivability and accuracy and is designed to preclude inadvertent erroneous transmissions such as that experienced in February 1971.

Mr. COPENHAVER. Could I get from you again, sir, a brief description of what is in the plan, in the standby plan.

Mr. QUINDLEN. The standby plan discusses the organization, the various elements of the program, the general procedures for implementing the plan, and a few indications of the operation of the wartime agency. It is a general plan regarding the manner in which the agency would be brought into being, and would carry on its functions.

Mr. COPENHAVER. Is that classified, did you say?

Mr. QUINDLEN. Yes; primarily because of some classified information about operational activities and centers from which the organization would operate.

Mr. COPENHAVER. Aside from the standby Executive order, the standby legislation and plan, is there any other information within your agency having to do with the voluntary censorship program or the wartime information security program which is classified?

Mr. QUINDLEN. John.

Mr. NOCITA. I am not sure I understand the question.

You say is there anything else classified? Of course, there are numerous correspondence and memorandums and things of that type accumulated over the years. But if you are referring to specific published documents, I would say no. Those are the three major documents that govern the program.

Mr. MOORHEAD. Any further questions, Mr. Gude?

Mr. GUDE. No.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. Quindlen, when I was questioning before, I mentioned the transmission of the voluntary information, wartime information. I am a little lost as to what we call this thing now.

Mr. QUINDLEN. I personally don't like the term "censorship." And I don't think it is apt. But it is certainly an easier term than "wartime information security program."

Mr. CORNISH. I was asking questions on the transmission of the code and other instructions. And I think you responded to me when I was wondering how this would compete on the news wires with all the flashes and bulletins and so forth—you said that it would be a very important item of news for them. And I gather you were indicating by that that it would be fully competitive with what news would be transmitted at the time.

Mr. QUINDLEN. One of the things that we have learned in 25 years of emergency planning and emergency preparedness is that it is very difficult to reproduce the situation and to live through what might be taking place. I would say that this would be an item that would be of

such interest to broadcasters and the press that it would certainly be competitive. But again, since we can't reproduce the situation, obviously we can't make a complete flat statement on its competitiveness.

Mr. CORNISH. Why can't you transmit it to them from time to time, say, on a hold basis in the event of an emergency?

Mr. QUINDLEN. You can. And certainly one item we will consider in our meeting with the various public media associations is how the voluntary code can be best transmitted. I would certainly not consider it appropriate, for example, to transmit it today. It would be regarded as having a special meaning in relation to the facts of this week, or this day, or this afternoon. This is one of the difficulties in the whole question of legislation.

Mr. CORNISH. In other words, you would have to pick a rather quiet time?

Mr. QUINDLEN. Yes. And if you pick a quiet time, or use it in exercises, people will say there is no apparent problem now so why are they doing it now?

Mr. CORNISH. Is there also the danger that you might get into a "War of the Worlds" Orson Welles-type thing, too?

Mr. QUINDLEN. We are very careful in exercises, for example, always to label everything—every message in an exercise has to read "Exercise," the first word and the last word, because this is a continuing problem.

Mr. CORNISH. Did I understand that the proposed legislation is classified, or just a part of it.

Mr. QUINDLEN. My memory is not complete on that.

John, do you recall?

Mr. NOCITA. I cannot answer that either. I would have to go back and look at it within the context of the entire document in which it is contained.

Mr. QUINDLEN. I feel certain that we can furnish you the legislation on an unclassified basis.

Mr. CORNISH. If a portion of it is classified for some reason, can you tell me whether that would be classified under Executive Order 10501?

Perhaps Mr. Nocita can answer that better.

Mr. QUINDLEN. Yes. It would have to be under that Executive order as a matter affecting the national defense, as it is listed in the exemptions in the Freedom of Information Act. In the matter of classification I would say that at most it would be classified confidential.

Mr. CORNISH. But even under that classification it would have to be of such a nature to damage the national defense of the United States.

Mr. QUINDLEN. Yes. And we will take a look at that. I feel confident that we can submit that piece by itself as an unclassified matter.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you very much, Mr. Quindlen and Mr. Nocita. We appreciate your testimony. It has been a great help to the subcommittee.

(Sundry correspondence and material relative to the hearings follow:)

FOREIGN OPERATIONS AND GOVERNMENT  
INFORMATION SUBCOMMITTEE,  
Washington, D.C., June 26, 1972.

HON. GEORGE A. LINCOLN,  
*Director, Office of Emergency Preparedness,  
Washington, D.C.*

DEAR MR. LINCOLN: As you know, the Foreign Operations and Government Information Subcommittee received testimony last month from officials of the Office of Emergency Preparedness on plans for the control of information in potential national emergency situations. This hearing was part of the subcommittee's overall hearings on information policies and practices of the executive branch of our Government.

Last week, I directed the staff of the subcommittee to investigate the alleged involvement of one of the suspects in the attempted "bugging" of the Democratic National Committee headquarters in activities of the special analysis military reserve unit of OEP.

Meetings were held by the staff with Mr. David O. Cooke, Principal Deputy Assistant Secretary of Defense (Administration), and with Mr. John W. Nocita of your staff, who is responsible for the formulation of the broad scope of the special analysis military reserve unit's program activities and for OEP's coordination with that unit.

Since this aspect of the OEP and DOD plans for implementation of the wartime information security program had not been mentioned or dealt with in any way during our May 12 hearings or staff meeting prior to the hearing, we would appreciate having a response to this letter for inclusion in the hearing record, covering the following subject areas: (1) a description of the role of OEP under its agreement with DOD for the operations of the special analysis military reserve unit; (2) a description of the various training programs and objectives of the unit since its inception; (3) the date when the unit commenced its operations; and (4) other details of that subject as discussed during the staff conference with Mr. Nocita.

Your cooperation in this matter will be appreciated so that the hearing record can be complete on this additional subject area of the program.

With best regards,

Sincerely,

WILLIAM S. MOORHEAD, *Chairman.*

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF EMERGENCY PREPAREDNESS,  
Washington, D.C., July 7, 1972.

HON. WILLIAM S. MOORHEAD,  
*Chairman, Foreign Operations and Government Information Subcommittee, Com-  
mittee on Government Operations, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your letter of June 26, 1972.

General Lincoln has asked me to respond to your letter as it is related to matters in my area of responsibility.

The information you have requested regarding the special analysis division, a military reserve unit associated with the wartime information security program, is enclosed. Additional information on the training programs of this unit is being collected and will be forwarded by July 10, 1972.

Sincerely,

EUGENE J. QUINDLEN,  
*Assistant Director for Government Preparedness.*

Enclosure.

ANSWERS TO REQUEST FOR INFORMATION BY CHAIRMAN, HOUSE GOVERNMENT  
INFORMATION SUBCOMMITTEE

1. A description of the role of OEP under its agreement with DOD for the operations of the special analysis military reserve unit:

The Department of Defense, by a 1963 agreement with OEP, has peacetime preparedness responsibility for the postal and travelers, telecommunications,

and special analysis aspects of wartime information security. These functions, which involve only communications crossing the borders of the United States, would, in time of war, be carried out by the Secretary of Defense until the Wartime Information Security Office was operational. DOD carries out these peacetime responsibilities through military reserve units.

The Special Analysis Division (SAD) is one such military reserve unit, composed of officers from the Army, Navy, and Air Force. This unit would be a major element of a Wartime Information Security Office, when activated, as it would have the function of coordinating the information collection effort of national wartime information security.

The Division meets monthly at OEP Headquarters, the Executive Office Building Annex, but is under the jurisdiction of the Department of Defense.

By written agreement with the DOD, the OEP furnishes policy and training guidance to DOD, a coordinator to serve as liaison between OEP and DOD for the WISP, and training space for the military reserve unit.

OEP provides to the SAD, as well as other DOD elements of the program, broad policy and training guidance related to WISP planning objectives. The provision of policy and training guidance by the OEP program officer is a primary coordinating mechanism for all elements of the WISP assigned for peacetime planning and training to the Secretary of Defense. Internal supervision and training of the Special Analysis Division remain a responsibility of the Secretary of Defense.

2. A description of the various training programs and objectives of the unit since its inception :

The objectives of the Special Analysis Division have remained unchanged since the unit was initially organized. As stated, the primary function of the SAD is the coordination of the information collection effort of national wartime information security. It is connected with planning for the coordination of the collection activities of the operating elements (i.e. postal and telecommunications) of the wartime information security program with the requirements of the user elements of the program. To further clarify the functions of the SAD, an organizational and functional chart which portrays the activities of this unit is enclosed.

Training activities of the SAD since its inception have been in support of the functions listed in the enclosed chart. Additional detail which will provide specifics of that training is being collected and will be forwarded by July 10, 1972.

3. The date when the unit commenced its operations : March 1960.

4. Other details of the SAD as discussed during the staff conference :

The wartime information security program, if implemented in wartime, would be a civilian program with the present military reserves identified with the program activated to serve as a cadre until the director of wartime information security could determine when they could be released for other military duty. In the case of the Special Analysis Division, the activities associated with this unit, when activated, would remain at the headquarters of the director of wartime information security. The unit would be responsible for the specialized functions of coordinating the needs of the users of the program (i.e. information directly related to the war), and the collection of information from international communications by the postal and telecommunications elements of the program; to provide data processing techniques and operations in support of the wartime information security program; and to provide for the technical analysis requirements of the wartime information security organization, and in performing liaison for technical operations with user agencies.

Testimony related to the activities of the military reserve units associated with the wartime information security program was given in both closed and open sessions before the House Foreign Operations and Government Information Subcommittee in 1963. The director, OEP, at that time, in his classified testimony before an executive session of the subcommittee described the Special Analysis Division and the activities of that unit.

In addition, the subcommittee was provided with an unclassified version of the basic plan for the wartime information security program on May 25, 1972. Included in sections 5, 6, and 7 of chapter II of the plan submitted by me to the subcommittee for the hearing record, are direct references to the military reserve units in support of the WISP.





3. The 1961 organization had another branch called the Operational Services Branch. This branch was eliminated in 1963 when its functions were transferred to the Data Processing Branch.

Training activities of the Special Analysis Division have been in support of the functions first defined in 1961 and which remain unchanged today. As a planning staff, considerable effort has been expended by members of the unit to develop a body of written plans and procedures for use by the Director of Wartime Information Security for activating this function, should the program be implemented. This has been an extremely large task as the Special Analysis Division's World War II predecessor organization did not leave behind a body of written plans and procedures which could be used as a starting point for revision and updating.

Illustrative of training activities of the Special Analysis Division are the following:

*December 1963—Tasks underway within the unit:*

#### TECHNICAL OPERATIONS BRANCH

1. Develop subcourse for active duty technical operations training for summer encampment.
2. Prepare a correspondence subcourse in technical operations.
3. Continue efforts to create a technical operations library.
4. Complete technical operations input to Special Analysis Division basic plan.

#### REQUIREMENTS AND ALLOCATIONS BRANCH

1. Prepare draft requirements guide.
2. Prepare inputs to Special Analysis Division basic plan.

#### DATA PROCESSING BRANCH

1. Prepare proposed PERT network approach for information storage and retrieval.
2. Prepare interim data retrieval and storage plan.
3. Prepare input to Special Analysis Division basic plan.

*May 1967—Tasks underway within the unit:*

#### TECHNICAL OPERATIONS BRANCH

1. Prepare detailed plans for summer encampment.
2. Prepare 6-month training forecast information.
3. Develop outline for technical operations manual.

#### REQUIREMENTS AND ALLOCATIONS BRANCH

1. Develop operating procedures.
2. Update annual operating budget.
3. Prepare detailed plans for summer encampment.

#### DATA PROCESSING BRANCH

1. Study ORBIT document retrieval system.
2. Prepare requirements for incorporation in Special Analysis Division budget.
3. Prepare flowcharts of tape to printer program.
4. Continue preparing computer procedures for compiling a watchlist. No actual watchlist is maintained by the unit, or is planned, unless, and until, the WISP is implemented under wartime conditions.

*February 1972—Tasks underway within unit*

#### TECHNICAL OPERATIONS BRANCH

1. Continue technical operations contingency planning for nuclear situation.
2. Review microfilm detection techniques.

#### REQUIREMENTS AND ALLOCATIONS BRANCH

1. Complete Special Analysis Division basic plan update.
2. Continue revision of requirements guide.

## DATA PROCESSING BRANCH

1. Review manual and automated submission procedure requirements with R. & A. branch.
2. Continue preparation of data processing standards and procedures manual.
3. Prepare initial plan for operation in nuclear situation.

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE,

*Washington, D.C., June 27, 1972.*

Mr. WILLIAM G. PHILLIPS,  
*Rayburn House Office Building,*  
*Washington, D.C.*

DEAR MR. PHILLIPS: I trust the enclosed study paper, complementing our discussion of June 21, 1972, will resolve the questions you raised concerning Department of Defense participation in the Office of Emergency Preparedness Special Analysis Division.

If I can be of further assistance to the committee, you or your staff, please feel free to contact me.

Sincerely,

D. O. COOKE,  
*Deputy Assistant Secretary of Defense.*

Attachment.

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE,

*Washington, D.C.*

Subject: Special Analysis Division (SAD) of the Office of Emergency Preparedness (OEP).

Responses to the questions posed by the Moorhead Committee staff, June 21, 1972, are set forth as follows:

1. Question: *Furnish full identification of the 16 SAD reservists:*

(a) *Their civilian jobs.*

(b) *Their military jobs.*

Answer: Army element—SAD:

Col. James J. Landis, USAR: National Distillers Chemical Corp., Washington, D.C.; telephone: 347-1150; duty MOS: 9335 (censorship officer).

Lt. Col. John B. Farmakides, USAR: Atomic Energy Commission, Washington, D.C.; telephone: 973-3756; duty MOS: 9335 (censorship officer).

Maj. Robert A. Young, USAR: Department of State, Washington, D.C.; telephone: 632-8444; duty MOS: 9335 (censorship officer).

Maj. Jerome J. Donovan, USAR: Food and Drug Administration, Washington, D.C.; telephone: 962-8027; duty MOS: 9335 (censorship officer).

Maj. Raymond J. Mahach, USAR: Federal Deposit Insurance Corporation, Washington, D.C.; telephone: 389-4474; duty MOS: 9335 (censorship officer).

Maj. Robert M. Duncan, USAR: Military Management and Terminal Service—Army, Arlington, Va.; telephone: 756-1971; duty MOS: 9335 (censorship officer).

Sp4 Philip C. Jones, USAR: Export-Import Bank, Washington, D.C.; telephone: 382-2328; duty MOS: 716.40 (administrative NCO).

Navy element—SAD:

Capt. Richard L. Franz, USNR: Federal Communications Commission, Washington, D.C.; telephone: 632-7191; Code: 1105 (general line).

Comdr. Stephen L. Grossman, USNR: Interstate Commerce Commission, Washington, D.C.; telephone: 737-9765, extension 611; Code: 1105 (general line).

Comdr. David C. Barry, USNR: Internal Revenue Service, Washington, D.C.; telephone: 964-6101; Code: 1105 (general line).

Lt. Comdr. Deane C. Allard, Jr., USNR: U.S. Naval History Division, Washington, D.C.; telephone: 693-3170; Code: 1105 (general line).

Lt. Comdr. Norman F. Davis, USNR: Defense Intelligence Agency, Washington, D.C.; telephone: 693-6370; code: 1635 (intelligence).

Lt. Comdr. Arthur E. Storer, USNR: Tracor, Inc., Arlington, Va.; telephone: 929-5190; code: 1105 (general line).

USAF element—SAD:

Maj. Eugene T. Nepa, USAFR: Westinghouse Electric Underseas Division, Annapolis, Md.; telephone: 301-765-5583; AFSC: DS111 (security police officer); P7016 (administrative officer).

Maj. John S. Cosby, Jr., USAFR; National Oceanic and Atmospheric Agency, Rockville, Md.; telephone: 304-496-8288; AFSC: D8111 (security police officer); P5135B (computer systems analyst—Software Specialization).

Capt. Robert M. Shaver; Bureau of Customs, Washington, D.C.; telephone: 771-9351; AFSC: D8111 (security police officer); P5135A (computer systems analyst—applications).

*2. Question: How long has SAD existed?*

Answer: SAD was initiated with a letter from the Office of Civil and Defense Mobilization to the Secretary of Defense, dated October 1, 1959. On October 28, 1959, the ASD (Manpower and Reserve) forwarded a memo to the service secretaries advising them of the ODDM letter and asked for service recommendations. On December 7, 1959, the ASD (Manpower, Personnel, and Reserve) again wrote a memorandum to the service secretaries reminding them of their concurrence in the establishment of a joint reserve planning unit to accomplish the planning of the organization and operations of a SAD in the Office of National Censorship.

*3. Question: How long has it been composed of Reserve mobilization designation people?*

Answer: Since its inception. No personnel other than military reservists have been assigned to this unit.

*4. Question: For the interim period, in event of national emergency and activation of the Office of Wartime Information Security (WISP) the Secretary of Defense is the Acting Director of WISP. Especially as regards media (WISP), which staff will he use? What staff is now in being for that purpose?*

Answer: Existing operational planning directives do not task the Secretary of Defense to assume control, even as an interim measure, over public media voluntary censorship.

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NATIONAL CENSORSHIP AGREEMENT BETWEEN DEPARTMENT OF DEFENSE AND OFFICE OF EMERGENCY PLANNING, OCTOBER 1, 1963

A. PURPOSE

The Secretary of Defense and the Director of the Office of Emergency Planning, for the Office of Censorship, enter into the following agreement setting forth the responsibilities of each agency with respect to the planning for, and the operation of, national censorship.

B. MISSION OF NATIONAL CENSORSHIP

1. To keep from the enemy information which would aid his war effort or would hinder our own or that of our allies, and
2. To collect information of value in prosecuting the war and to make that information available to the proper agencies.

C. SCOPE OF NATIONAL CENSORSHIP

1. National censorship includes:

- (a) Public media censorship;
- (b) Postal and travelers censorship; and
- (c) Telecommunications censorship.

2. National censorship does not include:

- (a) Censorship within an area occupied or controlled by the Armed Forces;
- (b) Censorship of communications transmitted via the communications systems of the Armed Forces.

D. PLANNING RESPONSIBILITIES FOR NATIONAL CENSORSHIP

1. The Office of Emergency Planning will:

- (a) Coordinate and monitor all aspects of national censorship planning;
- (b) Develop a plan for establishing the Public Media Censorship;
- (c) Develop a plan, in coordination with the Department of Defense and other interested agencies, for the Office of Censorship;
- (d) Furnish policy and training guidance, a coordinator, and training space for the Special Analysis Division;

(e) Develop plans to coordinate for the Office of Censorship the procurement of equipment necessary to support the operations of the Special Analysis Division;

(f) Accept responsibility for procuring space for all elements of National Headquarters of the Office of Censorship;

(g) Develop plans for the Office of Censorship to coordinate the hiring of all civilian personnel to be used by all elements of the National Headquarters of the Office of Censorship;

(h) Maintain an activation file containing the necessary directives for the establishment of national censorship. This includes proposed proclamations, Executive orders, and legislation;

(i) Coordinate, in conjunction with the Department of Defense, liaison on national censorship policy matters with foreign governments.

2. The Department of Defense will:

(a) Develop plans and preparations for Telecommunications Censorship, Postal and Travelers Censorship, and the Special Analysis Division (except those responsibilities assigned to the Office of Emergency Planning in D. 1 (d) and (e) above), as elements of the Office of Censorship;

(b) Maintain liaison with foreign governments on technical and operational planning matters;

(c) Maintain duplicate activation files containing the necessary directives for the establishment of national censorship;

(d) Achieve and maintain an adequate degree of readiness at all times for the activation of those elements of the Office of Censorship for which the Department of Defense is responsible.

E. OPERATING RESPONSIBILITIES FOR NATIONAL CENSORSHIP

1. Pending determination by the Director of Censorship that the Office of Censorship is prepared to assume control of Postal and Travelers Censorship and Telecommunications Censorship, and the operation of the Special Analysis Division, the Secretary of Defense will be responsible for such functions.

2. Upon determination by the Director that the Office of Censorship is prepared to assume control of Postal and Travelers Censorship and Telecommunications Censorship, and the operation of the Special Analysis Division, responsibility for such functions shall be vested in the Director.

3. The Office of Censorship, acting as an agent for the Department of Defense, will perform certain secondary censorship of Armed Forces mail.

4. Military personnel assigned to the Office of Censorship may be withdrawn for reassignment by their respective services as mutually agreed upon by the Secretary of Defense and the Director of Censorship.

This agreement becomes effective after approval and signature by the Secretary of Defense and the Director, Office of Emergency Planning, at which time it supersedes the existing agreement signed by the Secretary of Defense February 21, 1955, and the Director, Office of Defense Mobilization, March 7, 1955.

For the Department of Defense:

ROSWELL GILPATRICK,

For the Office of Emergency Planning:

EDWARD McDERMOTT.

Date: October 1, 1963.

[Reprint—with changes through May 21, 1971 incorporated]

JUNE 25, 1965.

DEPARTMENT OF DEFENSE DIRECTIVE 5230.7: WARTIME INFORMATION SECURITY PROGRAM (WISP)

References: (a) DOD Directive 5230.7, "Censorship planning," May 29, 1959 (hereby canceled); (b) DOD Directive 5120.33, "Classification Management Program," January 8, 1963; (c) National Censorship Agreement Between the Department of Defense and the Office of Emergency Planning, October 1, 1963.

I. REISSUANCE

This directive reissues policy on, and assigns responsibility for, WISP planning involving the Department of Defense. Reference (a) is hereby superseded and canceled.

## II. APPLICABILITY AND SCOPE

This directive applies to the Military Departments, the Organization of the Joint Chiefs of Staff, and the Assistant Secretaries of Defense (Administration) and (Public Affairs), and governs planning within the DOD for National WISP including Armed Forces, Civil Enemy Prisoner of War and Civilian Internee, and Field Press WISP.

## III. DEFINITIONS

A. *WISP*.—The control and examination of communications to prevent disclosure of information of value to an enemy, and to collect information of value to the United States.

B. *United States*.—The term "United States" includes the 50 States, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa and Swain's Island, the Canal Zone, the Trust Territories of the Pacific Islands, and any territory or area under the jurisdiction of the United States, or which is committed to its control as administering authority by treaty or international agreement.

C. *Communication*.—The term "communication" includes any letter, book, plan, map, or other paper, picture, sound recording, or other reproduction, telegram, cablegram, wireless message, or conversation transmitted over wire, radio, television, optical, or other electromagnetic system, and any message transmitted by any signaling device or any other means.

D. *National WISP*.—The control and examination of communications entering, leaving, transiting, or touching the borders of the United States, and the voluntary withholding from publication by the domestic public media industries of military and other information which should not be released in the interest of the safety and defense of the United States and its allies.

1. *National Telecommunications WISP*.—Within the scope of National WISP, the control and examination of communications transmitted or received over the circuits of commercial communications companies classified by the Federal Communications Commission as "common carriers," and not under the control, use, supervision, or inspection of a Federal agency.

2. *National Postal and Travelers WISP*.—Within the scope of National WISP, the control and examination of postal communications, communications carried on the person or in the baggage or personal possessions of travelers, and all other communications subject to review and not within the purview of other elements of National WISP.

E. *Armed Forces WISP*.—The examination and control of personal communications to or from persons in the Armed Forces of the United States and persons accompanying or serving with the Armed Forces of the United States.

F. *Civil WISP*.—Review of civilian communications, such as messages, printed matter, and films, entering, leaving, or circulating within areas or territories occupied or controlled by the Armed Forces of the United States.

G. *Enemy Prisoner of War and Civilian Internee WISP*.—The review of communications to and from enemy prisoners of war and civilian internees held by the U.S. Armed Forces.

H. *Field Press WISP*.—The security review of news material subject to the jurisdiction of the Armed Forces of the United States, including all information on material intended for dissemination to the public.

I. *Primary WISP*.—Armed Forces review performed by personnel of a company, battery, squadron, ship, station, base, or similar unit, on the personal communications of persons assigned, attached, or otherwise under the jurisdiction of a unit.

J. *Secondary WISP*.—Armed Forces review performed on the personal communications of officers, civilian employees, and accompanying civilians of the Armed Forces of the United States, and on those personal communications of enlisted personnel of the Armed Forces not subject to Armed Forces primary review, or those requiring reexamination.

## IV. NATIONAL WISP

A. *Objectives*.—The objectives of national WISP are to (1) deny to the enemy information which would aid his war effort or would hinder our own; and (2) collect information of value in prosecuting the war and make it available to proper authorities.

B. *Assumptions*.

1. In the event of war, the President will impose National WISP.

2. The imposition of national WISP will be supported by appropriate legislation.

3. Upon imposition of national WISP, the President will establish an Office of WISP and appoint a Director of WISP.

4. The Office of WISP will be an independent Federal agency reporting directly to the President.

*C. National WISP Operating and Planning Principles.*

1. WISP is an indispensable part of war, and planning for it should keep pace with other war plans.

2. WISP restraints will be enforced only for reasons of military import as described in subsection IV.A., above. WISP will not be used to (a) suppress information, other than in the interest of national security or defense, (b) assist in the enforcement of peacetime statutes unconnected with the war effort, or (c) act as a guardian of public morals.

3. Although there are no restrictions on the authority of the Director of WISP (to be established by the President under paragraph IV.B.2., above), National WISP normally will not be exercised over Government communications, over non-Government communications facilities allocated to Federal agencies, or those which may come under the control, use, supervision or inspection of Federal agencies.

4. During the interim between the imposition of National WISP by the President and the determination by the Director of WISP that the Office of WISP is prepared to assume control of Postal and Travelers WISP, Telecommunications WISP, and the Special Analysis Division, the Secretary of Defense will be responsible for such functions.

5. The Director of WISP will notify the Secretary of Defense when the Office of WISP is prepared to assume control of the functions set forth in paragraph IV.C.4., above, after which date responsibility for such functions shall be vested in the Director of WISP.

6. After the Director of WISP assumes control of Postal and Travelers, Telecommunications WISP and the Special Analysis Division, military personnel of the DoD assigned to the Office of WISP will be under the administrative control of their Services, and the operational control of the Director of WISP. Military personnel may be withdrawn by their respective Services as mutually agreed upon by the Secretary of Defense and the Director of WISP.

7. At the time of transfer of control from the Department of Defense to the Office of WISP, all items of equipment and supplies necessary for and being used or allocated to WISP operations, and all leases that have been entered into for WISP operations, will be transferred to the Director of WISP without reimbursement.

*D. Delineation of planning responsibilities.*—Responsibilities for advance National WISP planning are assigned as follows:

1. The Office of Emergency Preparedness (OEP), under the provisions of reference (c), will:

(a) Coordinate and monitor all aspects of National WISP planning.

(b) Develop a plan for establishing public media WISP.

(c) Develop a plan, in coordination with the DOD and other interested agencies, for establishing an Office of WISP.

(d) Furnish policy and training guidance, a coordinator, and training space for the Special Analysis Division, Office of WISP.

(e) Develop plans for the Office of WISP providing for the coordination of the procurement of equipment necessary to support the operations of the special analysis division.

(f) Accept responsibility for procuring space for all elements of National Headquarters of the Office of WISP.

(g) Develop plans for the Office of WISP to coordinate the hiring of all civilian personnel to be used by all elements of the National Headquarters of the Office of WISP.

(h) Maintain an activation file containing the necessary directives for the establishment of National WISP. This includes proposed proclamations, Executive orders, and legislation.

(i) Coordinate, with foreign governments, in conjunction with the DOD, liaison on National WISP policy matters.

2. The Department of Defense under the provisions of reference (c) will:

(a) Develop plans and preparations for National Postal and Travelers WISP, National Telecommunications WISP, and the special analysis division as elements of the Office of WISP.

(b) Maintain liaison with foreign governments on technical and operational planning matters.

(c) Maintain duplicate activation files containing the necessary directives for the establishment of National WISP.

(d) Achieve and maintain an adequate degree of readiness at all times for the activation of those elements of the Office of WISP for which the DOD is responsible.

E. *Specific responsibilities within the Department of Defense.*—1. The Assistant Secretary of Defense (Administration) is responsible for:

(a) Overall coordination and direction of the National WISP policy and program within the DOD.

(b) Representing the DOD with other Government agencies on National WISP matters.

(c) Maintaining liaison with foreign governments on National WISP matters.

(d) Maintaining activation files containing necessary directives, proposed proclamations, Executive orders, and legislation. These will be duplicates of activation files maintained in the Office of Emergency Preparedness.

(e) Monitoring the military departments' National WISP functions and responsibilities to achieve and maintain readiness for the imposition of National Postal and Travelers WISP, National Telecommunications WISP, and for the operation of the special analysis division.

2. The Assistant Secretary of Defense (Public Affairs) is responsible for:

(a) Overall coordination and direction within the DOD for the National Public Media WISP policy and program.

(b) Representing the DOD with other Government agencies on National Public Media WISP matters and for developing a policy and program covering DOD participation in National Public Media WISP.

3. The Secretary of the Army, in coordination with the Secretary of the Air Force, is responsible for the development of plans and preparations for Postal and Travelers WISP as an element of National WISP. These responsibilities include:

(a) Preparing logistic and operation plans for Postal and Travelers WISP.

(b) Preparing operational instructions and guidance for review.

(c) Developing plans for M-day recruitment and assignment of qualified civilians to selected positions in Postal and Travelers WISP.

(d) Maintaining liaison with other Government agencies on planning and activation matters.

4. The Secretary of the Army is responsible for developing and preparing plans for the Special Analysis Division as an element of National WISP, and for planning for and operating the National Postal and Travelers WISP organization and the Special Analysis Division, when so directed. This responsibility includes:

(a) Selecting and training personnel of the Reserve Components of the Department of the Army for mobilization assignment to National Postal and Travelers WISP.

(b) Selecting personnel of the Reserve Components of the Department of the Army for mobilization assignment to the Army Element, Special Analysis Division.

(c) Developing Tables of Distribution for M-day recruitment and assignment of civilians to positions in Postal and Travelers WISP.

(d) Stockpiling essential supplies and equipment as a readiness measure for National Postal and Travelers WISP.

5. The Secretary of the Navy is responsible for developing plans and preparing for activation of, and the operation of, Telecommunications WISP as an element of National WISP. This responsibility includes:

(a) Preparing logistic and operations plans for National Telecommunications WISP.

(b) Recruiting and assigning personnel of the Reserve Components of the Department of the Navy to mobilization billets in Telecommunications WISP.

(c) Selecting personnel of the Reserve Components of the Department of the Navy for mobilization assignment to the Navy Element, Special Analysis Division.



(d) Developing plans for immediate M-day recruitment and assignment of qualified civilians to selected positions in National Telecommunications WISP.

(e) Conducting liaison with commercial communications companies, governmental agencies, and others as required on technical operational planning and activation matters.

(f) Developing and administering necessary training in Telecommunications WISP including the conduct of seminars and exercises, and preparation of curriculums and guidance for review units.

(g) Preparing and promulgating operational procedure and guidance for reviewers.

(h) Stockpiling certain essential supplies and equipment as a readiness measure for National Telecommunications WISP.

6. The Secretary of the Air Force is responsible for making the following preparations for Postal and Travelers WISP and the Special Analysis Division as elements of National WISP. This responsibility includes:

(a) Selecting personnel of the Reserve Components of the Department of the Air Force for mobilization assignment to National Postal and Travelers WISP.

(b) Selecting personnel of the Reserve Components of the Department of the Air Force for mobilization assignment to the Air Force Element, Special Analysis Division.

(c) Training personnel of the Reserve Components of the Department of the Air Force and making such personnel available to the Department of the Army for duty upon imposition of National WISP.

F. National WISP Planning Security Classification.

1. The fact of the existence of National WISP planning is unclassified.
2. Classification will be determined in accordance with issuances under reference (b).

#### V. FIELD PRESS WISP

A. Objectives and Scope.

1. The objectives of field press WISP are to (a) insure the prompt release to the public of the maximum information consistent with security, and (b) prevent the disclosure of information which would assist the enemy.

2. Accreditation of correspondents, provision of communication facilities, civil review, and the internal dissemination of communications are not within the province of field press WISP.

B. Policy.

1. The governing principle will be that the security review of news material will be accomplished within the shortest practicable time, and the maximum information released to the public consistent with denial of aid to the enemy.

2. Every effort will be made to conduct field press review at locations convenient to processing and transmission facilities.

3. Field press review will be conducted in accordance with U.S. Armed Forces doctrine which will apply to the security review of news material subject to the jurisdiction of elements of the Armed Forces, whether acting jointly or independently. The security review of news material subject to the jurisdiction of the U.S. Armed Forces portion of combined commands will be governed by procedure prescribed by the combined force commander insofar as such procedure is in consonance with the principles set forth in paragraphs V.B. 1. and 2., above.

4. Upon declaration of war, or if the United States is attacked, or if the United States is believed about to be attacked, field press WISP may be established in the United States as directed by the Secretary of Defense with the approval of the President.

5. Field press WISP may be placed into effect immediately outside the continental United States by a joint, specified, or other area commander of an area in which U.S. Armed Forces are operating, in the event of (a) a declaration of war by the United States, (b) an armed attack upon the United States, its territories or possessions, or areas occupied or controlled by the United States, (c) an armed attack on the Armed Forces of the United States, or (d) the commitment to combat of Armed Forces of the United States as a separate force or as a part of a United Nations effort.

6. Whenever initiated or established, field press WISP will cease only upon the direction of the Secretary of Defense.

C. Responsibilities.

1. The Assistant Secretary of Defense (Public Affairs) will develop overall plans and provide policy direction for the operation of field press WISP.
2. The Secretaries of the military departments will be responsible for:
  - (a) Preparing logistic and operations plans for field press WISP.
  - (b) Selecting and training personnel for assignment to field press WISP.
  - (c) Preparing and issuing uniform technical operational instructions and guidance to reviewers.
  - (d) Stockpiling essential supplies for field press WISP.

#### VI. ARMED FORCES WISP

A. *Objectives.*—The objectives of Armed Forces WISP are to (1) prevent the disclosure of information which might assist the enemy or which might adversely affect any policy of the United States; and (2) collect and disseminate information which may assist the United States in the successful prosecution of a war.

##### B. *Policy.*

1. Armed Forces WISP may be imposed in time of peace only when specifically directed by (a) the President, (b) the Secretary of Defense, or (c) by the commander of a unified or specified command, as an emergency security measure, upon indications that an outbreak of hostilities is imminent or has occurred within his area.

2. Subsequent to a declaration of war by the United States, the following conditions will govern the imposition of Armed Forces WISP:

(a) *Within the continental United States.*—(1) If the United States is attacked or believed about to be attacked, Armed Forces WISP will be established in areas under military control by order of the Secretary of Defense; (2) When deemed necessary to maintain security at installations under military control, Armed Forces WISP may be imposed after approval by the Secretary of Defense. The appropriate military department will request such approval; (3) responsible commanders will impose immediate review at ports of water or aerial embarkation and related staging areas to maintain adequate security, and advise the Departments of the Army, Navy, or the Air Force, as appropriate, of such imposition.

(b) *Outside the continental United States.*—In all land or water areas where persons in, serving with, or accompanying, the Armed Forces of the United States are stationed, Armed Forces WISP will be imposed immediately.

3. Secondary Armed Forces WISP will be performed by the military components as directed by the appropriate unified or specified commanders in compliance with the order imposing Armed Forces WISP.

4. Armed Forces WISP will cease only when so directed by the Secretary of Defense upon recommendation by the joint staff or the appropriate military department.

C. *Responsibilities.*—1. The Secretaries of the military departments will be responsible for:

(a) Preparing overall plans and uniform policies for their support of Armed Forces WISP.

(b) Preparing logistic and operations plans for Armed Forces WISP.

(c) Selecting and training personnel for assignment to Armed Forces WISP.

(d) Preparing and issuing Armed Forces WISP regulations.

(e) Stockpiling essential supplies for Armed Forces WISP.

2. Within overseas areas, primary and secondary Armed Forces WISP will be the responsibility of unified or specified commanders. Within CONUS, WISP at water and aerial ports of embarkation and staging areas will be the responsibility of the official of the military department having control of the facility.

#### VII. CIVIL WISP

A. *Objectives.*—The objectives of civil WISP are to (1) collect and disseminate information that will assist the United States in the successful prosecution of a war, and (2) prevent the disclosure of information which might assist the enemy, or which might adversely affect any policy of the United States.

B. *Policy.*—1. When civil WISP is established in a foreign territory, jurisdiction will be exercised over all communications entering, leaving, or circulating within the territory, except those controlled by other forms of United States or allied WISP.

(a) Establishment of civil WISP in a foreign territory controlled by the Armed Forces of the United States may be directed by the Secretary of Defense.

(b) Establishment of civil WISP in foreign territories occupied by the Armed Forces of the United States as the result of military operations may be directed by the appropriate unified or specified commander.

2. The Secretary of Defense will determine the time and phasing of civil WISP termination or transfer to other than military control.

C. *Responsibilities*.—1. The Secretary of the Army is responsible for the continuous planning for civil WISP as a military measure, working in close cooperation with the Secretaries of the Navy and Air Force in:

(a) Preparing logistic and operational plans.

(b) Planning for the selection and training of military personnel for civil WISP duty assignments.

(c) Conducting operational planning and activation liaison with other Federal agencies.

(d) Preparing and issuing technical operational instructions and guidance for reviewers.

(e) Monitoring the conduct of civil WISP when imposed.

2. The Secretary of the Navy will assist the Secretary of the Army in developing plans, policy, and preparations for the telecommunications element of civil WISP, including the selection, training, and assigning of Naval personnel to civil WISP.

3. The Secretary of the Air Force will assist the Secretary of the Army in the developing of plans, policy, and preparations for the postal and travelers element of civil WISP, including the selection, training, and assigning of Air Force personnel to civil WISP.

4. Unified or specified commanders will operate civil WISP as a military measure in United States occupied territory, or in controlled territory within limits determined by mutual agreement between the recognized government of the controlled territory and the U.S. Government.

5. Unified or specified commanders will plan for the operation of civil WISP in areas subject to occupation or control in accordance with war plans.

#### VIII. ENEMY PRISONER OF WAR AND CIVILIAN INTERNEE WISP

##### A. *Objectives*.

1. To collect and disseminate information that will assist the United States in the successful prosecution of a war.

2. To prevent the disclosure of information which might assist the enemy, or which might affect any policy of the United States.

3. To collect and furnish to authorities of enemy prisoner of war and civilian internee camps information that may help maintain discipline and physical security.

##### B. *Policy*.

1. The operation of Enemy Prisoner of War and Civilian Internee WISP will be undertaken only with a full understanding of the rights guaranteed to enemy prisoners of war and civilian internees by the Geneva Conventions to which the United States is a signatory.

2. All enemy prisoner of war and civilian internee mail, with the exceptions required by the Geneva Conventions, will be subject to review.

C. *Responsibilities*.—The Secretary of the Army is responsible for continuous planning for Enemy Prisoner of War and Civilian Internee WISP and will exercise the following responsibilities in close cooperation with the Secretary of the Navy and the Secretary of the Air Force:

(a) Pre-mobilization planning for Enemy Prisoner of War and Civilian Internee WISP.

(b) Preparation and promulgation of Enemy Prisoner of War and Civilian Internee WISP regulations.

(c) Guidance for unified and specified commanders in matters pertaining to Enemy Prisoner of War and Civilian Internee WISP.

2. Unified or specified commanders are responsible for all matters pertaining to Enemy Prisoner of War and Civilian Internee WISP in the area under their jurisdictions.

3. Prisoner of War WISP Detachments will be established, trained, and assigned to oversea area commands by the Department of the Army.

4. In areas where national WISP is operating, the Director of WISP, Office of WISP, will review communications to and from enemy prisoners of war and civilian internees in accordance with Armed Forces WISP regulations.

#### IX. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. Two (2) copies of each implementing document will be forwarded to the Assistant Secretary of Defense (Administration) within sixty (60) days.

CYRUS VANCE,  
*Deputy Secretary of Defense.*

[From the Washington Post, June 21, 1972]

#### CONGRESS TO PROBE ARMY CENSOR UNIT

(By Ron Shaffer)

A report of a group of military reservists involved in wartime censorship contingency planning has drawn the concern of two congressional subcommittee directors who review government information policies and constitutional rights.

Larry Baskir, staff director of the Senate Subcommittee on Constitutional Rights, and Bill Phillips, staff director of the House Subcommittee on Foreign Operations and Government Information, said yesterday they planned to look into the operation of the reserve unit described in Monday's Washington Post.

A source, who asked not to be identified for fear of retribution, said that the 15-man reserve unit meets once a month to develop a list of radicals and contingency plans for censorship of the news media and U.S. mail in time of war.

The unit is called the special analysis division of the Government's Office of Emergency Preparedness (OEP).

The report of the unit in the Post was carried in an article summarizing events of the attempted bugging of Democratic National Headquarters at the Watergate last weekend.

James W. McCord, a suspect arrested at the site of the break-in, is an Air Force Reserve lieutenant colonel who was a member of the special analysis division team. He dropped out of the unit about 4 months ago.

Baskir said he was interested in the list of radicals that the unit was allegedly formulating. Phillips said he would look into the censorship operation of the unit and that there might be hearings on that subject.

Donald Carbone, a public relations officer for OEP, confirmed the existence of the reserve unit yesterday, but denied that team developed a list of radicals or worked on plans for mandatory press or mail censorship.

Carbone said that two units connected with the special analysis division were working on contingency censorship plans for telecommunications, international postal and traveler surveillance as part of the wartime information security program, an emergency plan created by Executive order in 1962.

He said he did not have details of the contingency planning, and referred a reporter to the Pentagon, which he said is responsible for the selection of the reservists and the operation of the special analysis division and other such teams.

Col. Mack Seacord, a Pentagon spokesman, said last night that he was unable to provide details on the operation of the wartime contingency planning teams. He said his information office would research the query.

[From the Washington Post, June 21, 1972]

#### CAST OF CHARACTERS INVOLVED IN DEMOCRATIC OFFICE BUGGING CASE

(By Bart Barnes)

Here is the list of principal individuals who have emerged following the attempt early Saturday to bug the Democratic National Committee headquarters.

#### HOWARD E. HUNT

Hunt, an employee of the Central Intelligence Agency from 1949 to 1970, last worked as a consultant to the White House on March 29 of this year.

Hunt's name and telephone number were listed in two address books seized by police from two of the five suspects arrested in the bugging attempt.

Hunt's consulting work at the White House involved declassification of the Pentagon Papers and, more recently, intelligence work in the area of narcotics enforcement.

Currently, Hunt is a writer with the public relations firm of Robert R. Mullen & Co., 1700 Pennsylvania Avenue NW.

Hunt lives at 11120 River Road in a large, white wooden frame house in a sparsely populated and affluent section of Potomac in suburban Montgomery County.

The nearest house is 450 yards away. Neighbors knew little about him. A sign out front says "Beware of Dog," and another sign near a mailbox says "Witches Island."

No one answered a knock on the door, and Hunt was reported not at work yesterday.

CHARLES WENDELL COLSON

Colson, 49, special counsel to the President. Colson, a Bostonian and a lawyer, has been described by White House officials as "a doer, a tough-minded ambitious man who gets things done."

A one-time administrative assistant to former Massachusetts Senator Leverett Saltonstall, Republican, Colson was said in 1970 to have worked with a Life magazine reporter on an article charging that former Maryland Senator Joseph D. Tydings, Democrat, used the prestige of his office to promote the interests of a company in which he held stock.

Tydings was cleared of the charges after the November election, which he lost, and Colson has always had no comment on the issue.

Colson, said to be a specialist in delicate assignments for the President, signed on Howard E. Hunt in 1971 as a special consultant at \$100 a day. Hunt and Colson, both alumni of Brown University, are said to have met in 1966 when both were active in the Washington chapter of the Brown alumni club.

JAMES W. MCCORD, JR.

An employee for the Central Intelligence Agency for 19 years, McCord, now retired, was until Sunday the security coordinator for President Nixon's reelection committee.

McCord, also an ex-FBI agent, also held a contract to provide security services to the Republican National Committee. After retirement from the CIA, McCord established his own security consulting firm, McCord Associates in Rockville.

A resident of Rockville, McCord, 53, is active in the First Baptist Church of Washington. According to neighbors, he is from Texas where he and his wife graduated from Baylor University. They have three children: two daughters, and a son who is in his third year at the U.S. Air Force Academy.

McCord is also a lieutenant colonel in the Air Force Reserve and was part of a unit whose duties included developing plans for compiling lists of radicals and developing plans for censorship of news and mail in the event of war. He was one of the five arrested inside the Democratic National Committee offices.

BERNARD L. BARKER

Barker, 55, was born in Havana of one Cuban and one American parent. He grew up both in Cuba and in the United States and during World War II was a captain in the Army Air Corps. He was shot down over Germany and for 17 months was held as a prisoner of war.

In the late 1950's, Barker served under Castro's guerrilla movement in Cuba, but he became disillusioned and fled to Miami in 1959. He is said to have been one of the organizers of the Bay of Pigs invasion in 1961 and is said to have been working for the CIA since then.

He is married and lives with his wife in Miami. A daughter, Maria Elena B. Moffet, works in Bethesda for the Prudential Insurance Co. of America.

About a year ago, Barker started a real estate firm, Barker Associates, in Miami. An auto rented here by the suspects in the bugging was rented in the name of Barker Associates.

Barker was one of five arrested inside the Democratic National Committee offices.

## FRANK STURGIS

Sturgis, 37, was born in Norfolk, Va., as Frank A. Fiorini but changed his name in 1952 when his mother married Ralph Sturgis.

Known in Cuban exile circles in Miami as having extensive CIA contacts, Sturgis has been described in news accounts as a soldier of fortune.

An ex-marine, he joined Castro in the hills of Oriente Province in 1958 and was later named to oversee gambling operations in Havana after the revolution succeeded in January 1959.

Later that year, however, there was a falling out and Sturgis fled Cuba for Miami and has been active in anti-Castro affairs since.

According to the Miami Herald, Sturgis was arrested in waters off British Honduras with 12 companions during what Sturgis said was a voyage to make a commando raid in Cuba. The Mexican captain of the boat, however, said Sturgis had hijacked the craft.

Sturgis was one of the five suspects arrested inside the Democratic National Committee offices.

## EUGENE MARTINEZ

A real estate agent and a notary public, Martinez has been active in the anti-Castro movement in Miami. A Cuban native, he originally sided with Castro against Batista but then fled the country after the revolution succeeded.

About 2 weeks ago he tried to line up housing at the University of Miami for 3,000 Young Republicans who will be attending the Republican National Convention there this summer.

Martinez is a salesman in the real estate office of another suspect, Bernard L. Barker. Martinez was one of the five suspects arrested inside the Democratic National Committee offices Saturday.

## VIRGILIO R. GONZALEZ

The fifth suspect to be arrested inside the Democratic National Committee offices at the Watergate, Gonzalez is a locksmith by trade and, according to a motion in court for a reduction of his bond, has been steadily employed for some years.

He lives in Miami with his wife and children and works at the Missing Link Key Shop. According to his employer, he came to the United States sometime around the time Castro became well known and he has worked at the Missing Link since 1959. He has been described as "pro-American and anti-Castro."

## DOUGLAS CADDY

Caddy, 34, is a lawyer with the firm of Gall, Lane, Powell & Kilcullen in Washington. About a year ago, he said, he met Barker over cocktails at the Army-Navy Club here. According to Caddy, the two men had a "sympathetic conversation."

Caddy appeared at the arraignment Saturday of the five suspects in the bugging case, and told a reporter that he had obtained Joseph A. Rafferty as counsel for the five.

Shortly after 3 a.m. Saturday, he said he received a call from Barker's wife. "She said that her husband told her to call me if he hadn't called her by 3 a.m., that it might mean trouble," Caddy said.

A graduate of Georgetown and New York University Law school, Caddy was the first executive director of the conservatively oriented Young Americans for Freedom. In the early 1960's, he was a leader in the Youth for Goldwater organization.

According to Robert Bennett, president of the public relations firm where Hunt works, Caddy and Hunt worked together for a time and the two became good friends. Bennett said the friendship between Caddy and Hunt developed when Caddy represented a client whose public relations account was held by Bennett's firm.

Mr. MOORHEAD. When the subcommittee adjourns it will adjourn to meet on Monday next at 10 o'clock, in this room.

The subcommittee is now adjourned.

(Whereupon, at 11:40 a.m., the subcommittee adjourned, to reconvene at 10 a.m., Monday, May 15, 1972.)

# U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—PROBLEMS OF CONGRESS IN OBTAINING INFORMATION FROM THE EXECUTIVE BRANCH

(Part 8)

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MONDAY, MAY 15, 1972

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead and Gilbert Gude.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Committee on Foreign Operations and Government Information will please come to order.

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 lipservice to the Freedom of Information Act 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 nonconstitutional 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 180 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 obtain testimony from 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 policymakers 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 percent. Amazingly enough, many of these persons are considered personal advisers to the President and will not appear before Congress.

Earlier this year, this subcommittee invited Mr. Herbert Klein, the President's 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, I think, donning his hat as an adviser 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 Prof. Raoul Berger, probably the leading academic authority on executive privilege whose prior articles have clearly demonstrated the extralegal 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 U.S. Information Agency—all of whom will attempt to explain and justify departmental policies toward congressional requests for information.

Today we are particularly honored to have two distinguished Members of Congress as our witnesses. The first witness was formerly a member of this subcommittee, formerly the ranking minority member. He is no longer a member of the minority and we welcome him back first as a former member of this subcommittee and with deep feeling of regret, Mr. Reid, that you are not sitting up here instead of there, but we are also very pleased that you are continuing your interest in the work of this subcommittee and you are willing to contribute to it.

We also will receive testimony from another distinguished colleague, also from the State of New York—New York seems to be almost overrepresented here today—our colleague, Mr. Lester Wolff, a very able and dedicated Member of Congress.

Why don't you both come forward to the witness table. We will hear first from Mr. Reid and then from Mr. Wolff.

#### **STATEMENT OF HON. OGDEN R. REID, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK**

Mr. REID. Thank you very much, Mr. Chairman.

Let me say at the outset how delighted I am to have the opportunity to appear before your distinguished subcommittee and more particularly to commend you personally for your continuing leadership in this area in the national interest at a time when I personally believe the press is under a most serious attack in its history. And I think Mr. Cornish, Mr. Phillips, and Mr. Copenhaver and other distinguished counsel on both sides are rendering along with the members of the committee a very vital service, but I would particularly like to salute you for your leadership, Mr. Chairman, in this area that I think is a very dangerous one and I think Americans have a right today to feel very real concern.

Mr. MORRHEAD. I appreciate those remarks very much but I would also say for the record that it was in large part your suggestion and inspiration that we got into these hearings and I think you are absolutely right that it is terribly important that we readdress the balance between the executive and the legislative branches of our Government and this subcommittee is doing a little bit toward that goal.

Mr. REID. Mr. Chairman, I was struck by your opening remarks, and it is very clear to me that there is a substantial accretion of power to the Presidency at the expense of the Congress. I think the point you made and George Reedy made is exactly correct, that more and more elements of the executive are being removed from any area where they can be requested by Congress and placed specifically within the White House tent. This is a shift which means that increasingly information from the White House may not be obtainable in very broad areas, not just foreign relations but now the budget, to mention another example.

I personally feel that the testimony that you have been conducting on the recent Executive order of the President, 11652, is extremely pertinent, and I would judge that the new section 1 is far from clear. It strikes me that it could be an expansion of executive authority at the expense of the Congress, again by virtue of the use of the words "national defense or foreign relations, hereinafter collectively called national security."

Does this, Mr. Chairman, cover, for example, domestic surveillance? Should not this Executive order limit much more the term "top secret"?

In my judgment the original top secret definition, the first part of the Executive Order 10501, is really the kind of definition that should refer to top secret and there shouldn't be a further broadening of it.

Specifically, as you may recall, in section 1 (A) in the original Executive Order 10501, top secret was defined in the following way:

The top secret classification shall be applied only to that information or material defense aspect of which is paramount and the unauthorized disclosure of which could result in grave danger to the Nation, such as leading to definite break in diplomatic relations effecting the defense of the United States, armed attack against the United States or its allies.

Very simply that strikes me as a definition touching on something that could effect World War III. It has been my experience that "top secret" has been put almost on dinner invitations when this was not congenial to public knowledge. My own personal view is that if the Freedom of Information Subcommittee can narrow the definition so that "top secret" is not used in an indiscriminate way along with the appropriate procedures, so that the Congress has the right of oversight and the power to declassify that which is improperly classified, that you will be rendering a genuine service.

I might also say that as a result of the hearings under your chairmanship and other talks, private and otherwise, I am increasingly persuaded that prior restraint should be removed from the reach of the Executive, because if prior restraint is going to be used in any kind of broad way to preclude newspapers, the fundamental right they have enjoyed for 200 years, the right to publish, then I think we could also get into very dangerous waters. I believe the more I think about it that the newspapers should enjoy the right they have had historically over

the years to publish, and, of course, be responsible for the consequences, but I am disturbed by the definitions in some of the Supreme Court opinions. I am afraid at some point this administration might invoke prior restraint again and quite possibly you should consider legislation in that area.

I might also say that there are two other developments I want to mention briefly before getting into my prepared testimony.

(1) I am not reassured at all by the recent statements of Pat Buchanan of the White House on his assessment of the press and some of the recommendations he suggests, and further, I am not reassured by the actions of the FCC starting to invade the questions of content during the licensing procedures, some of which are upcoming. I continue to believe that the FCC should concern itself with the equitable placing of frequencies, so that one station or TV does not violate the other in a technical sense of frequencies and the fairness doctrine, which to me means operating in support of the public interest and to be sure that all points of view are fairly heard. But when the FCC starts to threaten or suggest control over content or say that licensing procedures will take into consideration the kind of drug lyric music that may or may not be played on the radio, or other questions wherein they might feel that an interpretative piece of reporting was too interpretative then it seems to me they are invading the area of content, which I believe is clearly covered by the first amendment. I think this administration has yet to understand that the press has a paramount responsibility in news reporting and in interpretative pieces and editorials, and the administration seems to me frequently to confuse an editorial with a straight news account. To the extent they increasingly think it is good politics to attack the press, I think they are starting to undermine very fundamental liberties.

Needless to say, Mr. Chairman, as I mentioned at the outset, it is a particular privilege to be with you this morning, and I have some prepared testimony and I would ask at this point in the record, if I may, that the full statement be included in the record.

Mr. MOORHEAD. Without objection the full statement will be included in the record.

(Hon. Ogden R. Reid's prepared statement follows:)

PREPARED STATEMENT OF OGDEN R. REID, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF NEW YORK

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 to 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 from 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 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 subpoena and the power of the purse. The power of subpoena, 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, Aug. 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 on 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 nonoccurrence 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 insure that either 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 coequal 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.

Mr. REID. I will touch, if I may, therefore, only on certain aspects.

It is clear, of course, during these hearings you will be hearing from Members of Congress who have experienced difficulty in 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.

I might say that we have some instances here which we can talk about later, should you be interested, but I would highlight here one point. Frequently the executive just doesn't respond or it says it will have to look into the matter or it says it might be feasible or timely to reveal certain information, and this procedure seems to go on with the GAO as well as Members of Congress before there is a final question or not, and frequently the final question or not has no relationship to their invoking through the President any concept of executive privilege.

I think that there has been a distinct erosion of prompt responses to the Congress and the GAO. As you know particularly, clearly 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.

I might say that I believe that in the Senate and particularly Senator Fulbright is of the opinion that at this point in time the Senate Foreign Relations Committee is only receiving something less from the Department of State. And, as you pointed out, in the past, Mr. Chairman, the field submission reports that we used to routinely get

from AID and other agencies were so routine that effectively they were not read by all of the members, they were necessary, extremely necessary for the staff to analyze to see what the facts were, but it was hardly a matter of total urgency and even yet routine reports today are being denied this subcommittee.

Under the heading constitutional implications a few words: the bed-rock 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.

In their entirety, less so by this administration than any other in recent memory. 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, now Supreme Court Justice, 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."

Mr. Chairman, it seems to me that, first, I don't think there is any inherent right of executive privilege, but to the extent that proposition is argued, and if we go back to the days of George Washington, it is one thing to have an appropriate protection for staff papers of a very small staff dealing with the President; it is quite another matter, it seems to me, when the White House staff gets measured in hundreds if not thousands, when many of these people have no daily and frequently no direct access at all to the President, and to cover all of these by any so-called doctrine of executive privilege seems to me to be a very different matter indeed.

The other thing that disturbs me is that the administration, and it is not unique to this, has frequently indulged in a double standard. Matters of highest secrecy, top secret, were often leaked or made available or handed over to the press when it placed the administration in a good light, but the minute something develops which is secret that places the administration in an unfortunate light and anyone leaks that, that immediately becomes a matter of great concern, and I don't think the administration or any administration can have it both ways.

Basically, the principle here, it seems to me, is accountability to the Congress and American people and accountability has reached to things that go wrong as well as those that go right.



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.

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, with Congressman Moss, 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;

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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 on the part of the Congress would be greatly facilitated.

A word about the certification procedure: 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.

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.

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I wish to make clear this means disclosure of all information not requested, not merely all information which the executive branch deems it appropriate to disclose.

A word about 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.

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 insure that factual information—such as a finding by the President's science advisers that the SST would deplete the earth's zone supply or the Amchitka report—be made available to Congress when relevant to its responsibilities.

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 of 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.

It has become common for administrations to apply a double standard to the release of information. Favorable classified information, which I mentioned earlier, 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 coequal 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 on 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.

I just might add in conclusion, Mr. Chairman, that we have had about three recent instances wherein the Executive has withheld information clearly vital and appropriate to the Congress and clearly in derogation, in my judgment, of the constitutional responsibilities that pertained to the President and clearly in violation of shared powers which, I think, the Constitution imposes on both the Executive and the Congress.

First, I refer to the reports that have been carried in newspapers in recent days about the statements of the Vietnamization program by members of the executive in 1969. Had that information been made available either in executive session or in any fashion to the Congress I think that it would have shown that the Vietnamization program was one of very grave risk, quite unlikely of any major success and yet the Executive came before the Congress repeatedly asking for funds for this program when they had in their own possession information forecasting very serious doubt about this. At the least, candor would have required the administration to be honest, to have said

that this program has very serious pitfalls; we wish to proceed in any event. To my knowledge that point was never made with clarity or precision.

A second instance that troubled me was the failure of the administration during the recent events in the subcontinent to at any point report to the Congress that they were going to tilt toward Pakistan and that a fundamental decision had been made, and this was a foreign policy judgment of very serious consequences and weight.

More recently we have seen the instance of the renewed bombing and particularly the mining of Haiphong and other harbors.

I spent the day prior to the announcement of the President doing what little I could as one Member to facilitate action by the House in consonance with the Senate toward the end that a bipartisan group would meet with the President prior to any unilateral decision. Not only were these efforts not successful, but the President and the White House explicitly rebuffed requests from Senator Mansfield and Speaker Albert to meet for this purpose. There was a ritual laying on of hands at 8 o'clock, 1 hour before the President went on the TV, but interestingly enough the Speaker of this House, Mr. Chairman, was not apprised by the administration either of the fact the President was going to make a speech or the fact that he was finally going to be called down to the White House at 8 o'clock until very late in the day and he first learned of this from the press.

Not only was this, in my judgment, discourteous to the Speaker but it is a rather arrogant display of Executive decisionmaking that clearly requires joint action under shared powers of the Congress and the Executive.

I might add, Mr. Chairman, that I talked with the man who I believe to be the most knowledgeable in the field of international law. He believed in this regard that the steps we were taking approached an act of war and that the action the President was going to take could clearly violate international law. Coming from what almost could be said the authority in the field, it is an interesting question here that the President made no effort to consult with the Congress, explicitly refused to do so, and when the briefing did occur he participated in it only for 20 minutes and it was essentially as I understand it, just that, no effort to make a joint or shared decision but just a very routine briefing after the fact, after the orders had been issued and after all of the decisions had been put into motion. Interestingly enough, the President didn't even have the courtesy in this case to call in the Soviet Ambassador, he left this to an assistant, and great things hung on the balance, the summit meeting and SALT talks, both of which may now proceed, but you would think when we were entering in an area that could be an act of war, which is very explicitly dealt with in the Constitution, that the Executive would want to work with the Congress. This is not the case and, therefore, it adds, I believe, a certain urgency to your deliberations because we saw on that day a unilateral act of the President, not one that I am sure was agreed to unanimously by members of his administration, one that I suspect the Department of State was not apprised of until quite late, and this means that increasingly the powers are falling into hands of one man.

This was not the intent of the Founding Fathers and I think one of the best remedies is for forthright hearings by this subcommittee, hopefully actions by this committee, on appropriate legislation and an awakening of the American people to the fact there has been a serious and fundamental erosion of congressional powers which in matters of war and peace could become very dangerous indeed.

Thank you, Mr. Chairman.

Mr. MOORMHEAD. Thank you, Mr. Reid. I think of your experience not only in the newspaper field, but also in the foreign affairs field as Ambassador. As I listened to your statement, I again regret that you are not sitting up here beside me instead of sitting out there; but certainly we appreciate your continued interest in the work of this subcommittee and we look forward to analyzing the legislation and joint resolution which you offer.

I think the procedure we should follow is to hear from Congressman Wolff and then have both of you, if you would be willing to stay for a bit. I think the statements that both of you have made have stimulated a lot of thought on our part and there are some questions we would like to offer and have a dialog between the members of the subcommittee and the witnesses.

So, Mr. Wolff, would you proceed, sir?

#### STATEMENT OF HON. LESTER L. WOLFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. WOLFF. Thank you very much, Mr. Chairman. I, too, want to express my thanks to you and the subcommittee for giving me this opportunity to testify on the question of access to information, a subject which is of very 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, when we were going into the session, 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. Unlike some other types of clandestine recorders that are used perhaps at some times on Members of Congress, this was highly visible and since I felt that some of the material which

was discussed at this meeting could possibly be of a sensitive nature, to safeguard its security, 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; except the tape on the drug information, which is now so secure I can't secure it for myself. I can't obtain it for myself.

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 2 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 which I have with me, and I asked of the man delivering the tape some sort of receipt, and I have the handwritten receipt here from Colgate Prentice, Deputy Assistant Secretary for Congressional Relations, and it says:

This is to certify that the Department of State is in possession of a tape recording of American Ambassador Hanley's January 13 briefing of Representative Rosenthal's delegation which Ambassador Hanley has stated was recorded without his knowledge.

This is totally erroneous since I myself went to a member of his staff and told him I was making this recording and the tape recorder was right on the table in front of him.

They have also said that certain sections shall be considered secret and they furnished the transcript to me.

MR. MOORHEAD. Is the transcript complete so far as you know?

MR. WOLFF. I don't know whether it is complete. I haven't had an opportunity of going through it all. They did bring the tape back to me one day and it is about a 2-hour tape, and to try to go through a 2-hour tape with our time limitations is somewhat difficult. But strangely enough in parts of it they say that the information is unintelligible and obscured in some fashion. I must say that they are still holding the tape; they apparently are afraid I might give out not only the Ambassador's words but his voice. I would like to now declassify part of the State Department classification, which is secret, which happens to be my very own question which they have classified secret now.

MR. MOORHEAD. Mr. Wolff, we have again an example of frustration. Under the rules of the full committee, which this subcommittee operates under, we must receive information that is labeled classified, no matter how ridiculous it is, in executive session, so if the portions you are going to read is still labeled this way, we will withhold and at the conclusion of your—

MR. WOLFF. I request the committee declassify my questions at a later time.

MR. MOORHEAD. Let us go off the record for a side bar consultation with counsel to the minority.

(Discussion off the record.)

MR. MOORHEAD. I think this is another example of how we in the Congress tend to hamstring ourselves, but now let us go back off the record.

(Discussion off the record.)

MR. MOORHEAD. We have completed our side bar discussion here. We will have witnesses from the State Department before the subcommittee on Thursday and we would like to have either the transcript submitted to the subcommittee for study and use in questioning the State Department officials, or at the end of our public hearing we can have you read the relevant statements that you think are important into the record in executive session.

It puts me into the most embarrassing position, frankly, to be chairman of a Freedom of Information Subcommittee talking about hearing testimony in executive session, but I do believe that I have to follow the rules of the committee until I can get them changed, but I think we can accomplish your objective. The timeliness is very fortuitous with the State Department coming up before us on Thursday.

MR. WOLFF. I think you have already accomplished my objective to show the utter nonsense attached with the classification of this type of material and I am sorry to have put you in an embarrassing position.

MR. MOORHEAD. No, no, you have not. We welcome your testimony. We would like to see that transcript to help us phrase questions of the State Department on Thursday.

MR. WOLFF. I would be delighted to turn it over to you but I do believe that the cavalier treatment of personal property of a Member of Congress is nothing short of intolerable and represents a direct challenge by the executive to congressional autonomy.

By the way, I had a congressional seal on the tape recorder as well, so that either on the basis of the personal property of a Member of Congress or on the basis of the property of the Congress itself, the tape that was taken is my property and not the State Department's property and they have confiscated it. That is all that they have done.

But leaving that and going to another type of treatment that took place last October when I felt impelled to introduce 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. We in the House and the American people have a right to know of any participation of the United States in the Vietnamese election. Our voiced purpose in being in Vietnam was the right of self-determination. 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 20 to know that the distinguished chairman of the Foreign Affairs Committee received a letter dated October 8 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.

Subsequent to that time and 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 16 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.

These surveys include questions relating to Vietnamese awareness of the presidential election, attitudes on the effect of the election, the kind of anticipated issues and characteristics of hypothetical candidates. These surveys which are included are classified "limited official use only." I regret that this inaccuracy was in my last letter.

However, what they did not say is that this limited official use, was limited to President Thieu and not even to our own people, which was subsequently included in a letter to the chairman of the committee, which I attempted to get declassified and finally was able to get declassified. Because of the political sensitivity of the question, Embassy officials classified the results and did not include them in the surveys classified for official use only, which was distributed to interested officials in the U.S. Mission in Vietnam and the U.S. Government agencies in Washington.

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.

I think this is incredible, I think it is disgraceful to put a classification for "limited official use only" and for that to mean for limited official use of Mr. Thieu, the President of Vietnam.

Mr. REID. If my colleague will yield on that point I might just add that several witnesses who have appeared before this committee also came to me and stated that one of the reasons they resigned from their service in Vietnam was because of these particular polls that were being done with the clear purpose of facilitating and making more possible wise decisions by Thieu in the upcoming election and they thought it was improper use of U.S. funds and they up and resigned.

Mr. WOLFF. I thank the gentleman. Actually 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 toward the war, is still classified.

I might add as well that from this information there were names of various people who were opposed to the attitudes of the administration in Vietnam. As a result of this President Thieu was made aware of these people who were opposing him and was able to get rid of them before the election so that no one else could get on the ballot. This was our participation in the situation and elections of Vietnam, which is still classified from the American public.

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 Near 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 1-year delay in publishing the hearings.

Mr. Chairman, I could cite other examples. I bring before you the recent hearings that we held on the foreign assistance of 1972 where I



brought to the attention of the American people the link that has occurred between people who are in the Thai government and who are engaged actively in the drug traffic. When I said this it upset the State Department substantially because of the fact that I introduced a resolution before the Congress to cut off all aid to Thailand until such time as they take steps that are necessary to cut the drug traffic through Thailand. Well, I was told to keep it quiet and in fact I read from the testimony of Mr. Rogers. He said:

I would appreciate it when you have information of this kind you would let us have it privately, we will do everything we can to convey to the government to take proper action. And then I went on to say that our Bureau of Narcotics and Dangerous Drug people in Hong Kong know the names of the people who are trafficking in drugs and I cannot get that information. Can you get it for me?

The Secretary said he will gladly give me any information that we have and be glad to give any information that is available. "I do think that in these cases if we could work quietly it would be better, it causes difficulty with other governments."

However, the fact is that with all of this there is information that has been on the record and I can show you that Mr. Steele and Mr. Murphy of the Foreign Affairs Committee brought this information to the attention of the State Department almost a year ago and absolutely nothing has been done on it and then they say bring this information to us quietly.

I think it is about time that some people started to shout about some of the information.

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.

(Hon. Lester L. Wolff's prepared statement follows:)

PREPARED STATEMENT OF HON. LESTER L. WOLFF, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF NEW YORK

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 2 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 21, I finally received the transcript of my own tape. The tape itself, as this L 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 for 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 20 to know that the distinguished chairman of the Foreign Affairs Committee received a letter dated October 8, 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 16, 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 19, 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 toward 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 Near 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 1-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.

Mr. MOORHEAD. We thank you very much, Mr. Wolff, for your controlled outrage. I think that you have reason to have uncontrolled outrage, but you have certainly kept your cool.

I just wish that all 535 Members of the Congress of both Houses could hear this testimony because if we could collectively realize that we are being denied access to information, as you point out, Mr. Wolff, and that the denial of access to information distorts the balance of power between branches of government, as you point out, Mr. Reid, I think we might get some action. But I think it is going to take us a lot of sermonizing and talking to other Members before we can show others how we are being had by the executive branch and how we are failing in our duties to the American people. We probably are not going to convert the executive branch whichever party is in control. We are going to have to stand up collectively for the rights of all the Members of Congress of both parties, who are representatives of the American people.

Mr. REID. Mr. Chairman, on that point I might mention very briefly, if I might, a letter that I received on November 29, 1971, from Elmer Staats, and I will only quote from part of it. He said:

As brought out in the enclosed documents, our reviews are hampered and delayed more by time-consuming delaying tactics than by formal denials of claims of executive privilege. These delays often are the equivalent of de facto denials. Accordingly we believe there is a need for additional legislation of the type which will assist the General Accounting Office in gaining timely access to the information that it requires.

I might add that I will submit for the hearing record two examples of denials of access to information to the General Accounting Office. One deals with the review of U.S. occupation costs in Berlin, and the other was a review of U.S.-supported bases in Vietnam. I might read three sentences to the latter:

In September, 1970, the GAO requested permission to visit Thai and Korean camps in Vietnam in order to observe whether these camps had an excess amount of U.S. supplies. The review would have consisted solely of visual observations and talks with U.S. military liaison personnel stationed at the camps.

The request was denied at the local level, and the denial was subsequently reaffirmed by the Department of State (in the Thai case) and the Department of Defense (in the Korean case).

In the Thai case, the reason given for the denial was that the GAO should have no need to consult foreign officials or agencies. No reason was cited in the Korean case (insofar as GAO accounts of the incident indicate).

I would submit the full memorandum for the record at this point, if I might.

To say categorically that the GAO should have no need to consult foreign officials or agencies is an interesting statement of executive policy.

Mr. MOORHEAD. Without objection the memorandum will be made a part of the record. We would also like to have the letter or relevant portions of it made part of the record because tomorrow we will have the Deputy Comptroller General before this subcommittee and we want to use that opportunity to cite examples to him and have him cite examples to us where GAO, the arm of Congress, has been denied access to information.

(The documents referred to above follow:)

OCTOBER 20, 1971.

HON. ELMER B. STAATS,  
*Comptroller General of the United States,  
 General Accounting Office,  
 Washington, D.C.*

DEAR MR. STAATS: It was good meeting with you and your associates yesterday and discussing the problems frequently encountered in endeavoring to obtain information from the executive branch of the Government.

Pursuant to the matters we touched upon, I would very much appreciate your apprising me of the number of instances in the past few years where the executive branch has expressly refused or otherwise failed to furnish specific information requested by the General Accounting Office, the reasons commonly cited to justify such refusals or failures, and detailed case histories of the more flagrant of such refusals or failures, together with supporting documentation where available.

More specifically, I would be grateful if you could furnish me copies of: The State Department circulars sent to all foreign missions setting rules for the release of information to the GAO; the letter from Mr. Stuart French of the Defense Department asserting that the GAO has a right to fiscal records only; the recent letter of President Nixon asserting executive privilege to avoid a cutoff of funds under the provisions of the Foreign Assistance Act; and any other letters or memorandums you might have bearing upon the policy of the executive branch with regard to the release of information.

As to the case histories, I would be interested to have a breakdown of the lengths of delay in furnishing requested information, particularly as to cases still current. Additionally, it would be helpful if some tabulation could be provided as to the reasons cited for refusal to supply information: executive privilege, "internal working papers," security classification, "not within the jurisdiction of our agency," etc.

At our meeting we discussed the inadequacy of existing law to aid the GAO in obtaining information from the executive branch, the lack of subpoena power being a major problem. It was indicated that the GAO has not received full cooperation from Congress over the years in seeking to strengthen its position in this regard. I would appreciate it if you could amplify on this, making any suggestions you might have as to how the law can be amended to establish effective procedures in this area.

My thanks for your cooperation and assistance.

Sincerely yours,

OGDEN R. REID.

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COMPTROLLER GENERAL OF THE UNITED STATES,  
*Washington, D.C., November 10, 1971.*

HON. OGDEN R. REID,  
*House of Representatives,  
 Washington, D.C.*

DEAR MR. REID: This has reference to your letter of October 20, 1971, and our prior meeting on the problems we frequently encounter in obtaining information from the executive branch of the Government. Enclosed herewith is a package of documents which contain information pertinent to this matter. I believe these documents are a good background on our access problems and will provide you with the information you requested.

With respect to your request for examples wherein the executive branch has refused, or otherwise failed to furnish, information requested by the GAO, we have included the following:

Tab A.—Statement of Oye V. Stovall, Director, International Division, U.S. General Accounting Office before the Senate Appropriations Committee, Subcommittee on Foreign Operations, June 24, 1971.

Tab B.—Letter from the Comptroller General of the United States to the chairman, Senate Foreign Relations Committee, B-163582, September 10, 1971, enclosing a compilation of GAO access to records problems encountered in making audits of foreign operations and assistance programs.

These two documents present a broad picture, as well as specific examples, of the problems we have encountered in obtaining access to information, and the efforts to resolve these matters which we have exercised both within the executive branch and the Congress.

Most of our problems have been encountered in our reviews of international activities. In the Department of Defense these relate primarily to military assistance activities. We are continuously working with officials of the Department of Defense to resolve these issues as evidenced by my letter to Secretary Laird, dated October 13, 1971 (tab C). The enclosures to that letter include copies of instructions and directives to local commands which illustrate the current restrictive measures we must contend with.

We have experienced similar problems within the Department of State. The most serious was a denial by the Department of access to the records relating to U.S. occupation costs in Berlin, Germany. On April 20, 1971, I addressed separate letters to appropriate chairmen of House and Senate committees on this matter and I have included a copy of that letter as tab D. A copy of State Department Foreign Affairs Manual, 4 FAM 934, involving release of information to GAO is included as tab E.

There have been attempts in the Department of Defense to limit our access to information to that strictly of a financial nature. Subsequent to our testimony before the Foreign Operations Subcommittee of the Senate Committee on Appropriations, I received a letter from the Principal Assistant to the Assistant Secretary of Defense, International Security Affairs. I have included a copy of this letter (tab F) which illustrates an attempt of this nature.

The GAO has always taken a firm position on its right of access to information pertinent to its work. However, in the absence of effective means of enforcing such right to access to needy information is granted at the discretion of executive agencies. The Deputy Comptroller General testified before the Senate Committee on the Judiciary on S. 1125 with regard to the exercise of executive privilege. A copy of his testimony is included at tab G. Recently the President exercised his right of executive privilege in regard to a request of the Senate Foreign Relations Committee for the Five-Year Plan for Military Assistance. A copy of the President's memorandum of August 30, 1971, is enclosed (tab H).

As brought out in the enclosed documents, our reviews are hampered and delayed more by time-consuming delaying tactics than by formal denials or claims of executive privilege. These delays often are the equivalent of de facto denials. Accordingly, we believe there is a need for additional legislation of a type which will assist the GAO in gaining timely access to the information it requires. As we discussed in our meeting, we are now considering various alternative courses of action and we will be advising you of our suggestions in the near future.

I am pleased to be of assistance to you in this matter.

Sincerely yours,

ELMER B. STAATS,  
*Comptroller General of the United States.*

COMPTROLLER GENERAL OF THE UNITED STATES,  
*Washington, D.C., November 29, 1971.*

HON. OGDEN R. REID,  
*House of Representatives,*  
*Washington, D.C.*

DEAR MR. REID: In our report to you of November 10, 1971, in which we detailed the difficulties the General Accounting Office has encountered in obtaining information from the executive branch of the Government, we advised that our reviews are hampered and delayed more by time-consuming delaying tactics than by formal denials or claims of executive privilege and that these delays are often the equivalent of de facto denials. We stated it to be our view that there is need for additional legislation of a type which will assist us in gaining timely access to needed information, that we were considering alternative courses of action, and that we would be advising you of our suggestions in the near future.

As you know, Senator Ribicoff's bill, S. 4432, 91st Congress, 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. It 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 has been introduced in the 92d Congress. This bill 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 the records of the executive branch, they are examples of efforts being made for our Office to strengthen its role as agent of the Congress.

With regard to the denial of information by the executive branch to the Congress and to the General Accounting Office, it is our view that a measure now pending in the Senate Committee on the Judiciary would serve as well as any that we can devise to meet the problem. Specifically, S. 1125, 92nd Congress, as introduced, would amend 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 can refuse to do so on the grounds that he intends to assert executive privilege and 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 executive privilege be asserted as to the testimony or documents sought. Senator Fulbright, the author of S. 1125, offered an amendment to his bill which would help avoid the delays that our office has encountered in obtaining records from the executive branch. This amendment, No. 343, of July 29, 1971, copy enclosed, would impose a sanction along the lines of that now providing for a cutoff of foreign assistance funds under section 634(c) of the Foreign Assistance Act of 1961, 22 U.S.C. 2394(c). Specifically, this amendment would provide that upon a determination by the General Accounting Office that any information requested of the executive branch by a committee or subcommittee of the Congress or the General Accounting Office has not been made available within 60 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 70th day after such request is received by such agency unless and until such information has been made available or the President invokes executive privilege with respect to such information. In addition to helping alleviate the problems that we have had in delays in obtaining information we feel that the Fulbright amendment to S. 1125 would also assist the Congress and its committees in its day-by-day operations which require information, independent of the hearing process.

The matter of refusals by the executive branch to grant the General Accounting Office access to records and the delays that the executive branch has put this Office to when requesting information has been under serious study for a number of years. Insofar as what might be done to alleviate the problem, it is our view that amendment No. 343 to S. 1125 would be the most effective means available to assist our Office in the delays that it is encountering over access to executive department records.

We have been informally advised that S. 1125 has been amended in subcommittee to permit executive privilege to be invoked by agency heads as well as the President. We are of course opposed to any such amendment and it is our hope that either in deliberations of the full committee or in floor debate S. 1125 will be revised along the lines of its original language so as to allow executive privilege to be invoked only by the President.

Sincerely yours,

ELMER B. STAATS,  
*Comptroller General of the United States.*

MR. REID, I would be happy to make both letters available to the committee under the only stipulation that counsel determine in consultation with the GAO whether there is anything in here that might have to be handled in executive session, but I think the gist of these letters, which were personal to me at my request, deal with some of the instances wherein the GAO has been unable to require or to get access to information.

I might add, Mr. Chairman, that if my memory is not incorrect, it took us 1 or 2 years, perhaps longer than that, in the early days of the Vietnam war to even get the GAO into Indochina. We went through a period of time when neither Defense nor State was felicitous to having any audits being taken out there and the record unfortunately is pretty plain through the years that GAO has either been hampered or denied access and frequently has been unable to discharge the kind of thoughtful evaluation responsibility that the Congress needs.

Mr. MOORHEAD. In that connection the bill you describe on page 3 of your testimony speaks of "Committee of Congress." Does it cover or is it intended to cover the General Accounting Office; could it be amended to include GAO?

Mr. REB. I think that may be a good suggestion. The GAO needs a similar power of subpoena of some kind, it seems to me, and when it is faced either with delay or obfuscation or denial it is relatively powerful.

Mr. MOORHEAD. I think we in the Congress should do everything we can to strengthen our investigating arm. Neither you, nor I, nor any Member, nor any committee of the Congress has sufficient personnel to oversee all of the activities of the executive branch. We rely greatly on the General Accounting Office, which has a very good record of discretion, almost too good, in my judgment. They have not always insisted sufficiently on their rights as an arm of the Congress.

A few quick questions.

You mentioned the expansion of the executive branch. The subcommittee recently received a study by the Congressional Research Service of the Library of Congress which has some rather startling figures. In 1939 there were six advisers to the President, none listed under White House staff or Executive Office staff. By 1954 that had gone up to 25 advisers, 266 White House staff, 1,175 Executive Office staff, but by 1971 the original 6 advisers had jumped to 45, White House staff to 600, and the Executive Office staff to 5,395. This study also shows that it is not only the State Department affairs that are being handled in the White House, but also affairs of the Department of Commerce in which it is stated the important man to see is not the Secretary of Commerce but a White House aide, Mr. Peter Flanigan.

Without objection, I include this Congressional Research Service study in the appropriate part in the record.

(The document referred to above follows:)

#### THE LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE

##### THE DEVELOPMENT OF THE WHITE HOUSE STAFF

(Harold C. Relyea, Analyst, American National Government, Government and General Research Division Apr. 26, 1972)

The Constitution of the United States mentions only indirectly that the President might make use of subordinate administrative officials in an advisory capacity. But the language of article II, section 2, wherein it is stated that the President may "require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," is generally regarded as the authority for the Cabinet. Thus it was that for many years the President's chief advisers probably were his Cabinet members and only in rare instances did a Chief Executive rely upon

other officials. These individuals attached to the President's Office were secretaries and aides who provided clerical assistance to the Chief Executive but no advisory support.

The actual arrangements for an enlarged White House staff can be credited to the report of The President's Committee on Administrative Management, issued in 1937. This report called for executive assistants to assist the President "in dealing with managerial agencies and administrative departments of the Government." The report went on to say:

These assistants, probably not exceeding six in number would be in addition to his present secretaries, who deal with the public, with the Congress, and with the press and the radio. These aides would have no power to make decisions or issue instructions in their own right.

They would not be interposed between the President and the heads of his departments. They would not be assistant presidents in any sense. Their function would be, when any matter was presented to the President for action affecting any part of the administrative work of the Government, to assist him in obtaining quickly and without delay all pertinent information possessed by any of the executive departments so as to guide him in making his responsible decisions; and then when decisions have been made, to assist him in seeing to it that every administrative department and agency affected is promptly informed. Their effectiveness in assisting the President will, we think, be directly proportional to their ability to discharge their functions with restraint. They would remain in the background, issue no orders, make no decisions, omit no public statements. Men for these positions should be carefully chosen by the President from within and without the Government. They should be men in whom the President has personal confidence and whose character and attitude is such that they would not attempt to exercise power on their own account. They should be possessed of high competence, great vigor, and a passion for anonymity. They should be installed in the White House itself, directly accessible to the President. In the selection of these aides the President should be free to call on departments from time to time for the assignment of persons who, after a tour of duty as his aides, might be restored to their old position.<sup>1</sup>

The idea for and statement on executive assistants was provided by Louis Brownlow, chairman of the President's Commission. Commenting on the suggestion of establishing executive assistants, a later analysis of the reorganization report noted:

These men were to act as anonymous servants exercising no initiative independently of the President's wishes. No authority was delegated to them. Their function was to extend the President's power to listen wherever useful information could be gathered and to see whatever needed to be seen to provide the information required for decisions. In order to give them the utmost responsibility, to presidential will, as well as ultimate flexibility, their functions were not to be defined except as the President saw fit to define them. As such they would not constitute either an additional institution or certainly not an independent one, but rather an extension of the Presidency itself.<sup>2</sup>

A reorganization act authorizing administrative assistants for the President was passed in early April of 1939. On September 8, 1939, when issuing his "Limited National Emergency" Proclamation after the outbreak of war in Europe, Roosevelt also quietly released an executive order which called for the reorganization of the Executive Office and involved the transfer of the Bureau of the Budget from the Treasury Department as well. When the changes were effected, the Executive Office staff counted some 800 individuals in 1939.

Since 1939 the Executive Office of the President has included various emergency panels, specialized agencies and policy councils. As of this year these units include; the White House Office, created in 1939; the Office of Management and Budget, transferred (then as the Bureau of the Budget) in 1939 from Treasury; the Council of Economic Advisers, established in 1946; the National Security Council, initiated in 1947; the National Aeronautics and Space Council, set up in 1958; the Office of Emergency Preparedness, established in 1961; the Office of Science and Technology, initiated in 1962; the Office of the Special Representative for Trade Negotiations, instituted in 1963; the Office of Economic Opportunity, legislated in 1964; the Office of Intergovernmental Relations, created in 1969;

<sup>1</sup> The President's Committee on Administrative Management, Report of the Committee (Washington: U.S. Government Printing Office, 1937), p. 5.

<sup>2</sup> Barry Dean Karl, "Executive Reorganization and Reform in the New Deal" (Cambridge: Harvard University Press, 1963), p. 241.



the Domestic Council, created in 1970; the Council on Environmental Quality and Office of Environmental Quality, set up in 1970; the Office of Telecommunications Policy, established in 1970; the Council on International Economic Policy, created last year; the Office of Consumer Affairs, created last year; and the Special Action Office for Drug Abuse, also a 1971 addition to the Executive Office.

The number of Presidential advisers and special assistants has, as the following table indicates, exhibited generally steady growth, regardless of national or international events, changes of administration, or differing management styles of the Chief Executives. While the number of advisers was reduced during the Kennedy administration, the size of the White House staff continued to mount. As Theodore Sorenson, a Kennedy adviser, has explained:

Kennedy wanted his staff to be small, in order to keep it more personal than institutional. Although in time a number of "special assistants" accumulated for special reasons, he kept the number of senior generalists to a minimum. Both my office, which dealt mostly with domestic policy, and that of McGeorge Bundy, which dealt exclusively with foreign policy, combined in relatively small staff the functions of several times as many Eisenhower aides. I relied on the excellent staff work of the Bureau of the Budget and Council of Economic Advisers.<sup>3</sup>

Thus, while statistics might reflect a reduction in the number of advisers to the President, there was, in effect, no reduction in the number of White House aides. Similarly, the statistics for the Johnson administration indicate a further reduction in the number of Presidential advisers but an increase in Executive Office staff, again reflecting no real reduction in the number of White House aides.

The following table indicates the growth of White House advisers, the White House Office, and the Executive Office of the President. The number of advisers was computed by examining the individuals and their titles listed in each year of the U.S. Government Organization Manual.

GROWTH OF THE WHITE HOUSE STAFF

Year	Advisers	White House staff <sup>1</sup>	Executive Office staff <sup>2</sup>	Year	Advisers	White House staff <sup>1</sup>	Executive Office staff <sup>2</sup>
1939	6			1956	35	374	1,196
1940	6			1957	33	387	1,218
1941	8			1958	34	394	1,255
1942	9			1959	37	405	2,759
1943	11			1960	37	446	2,887
1944	11			1961	24	411	2,838
1945	12			1962	21	467	1,676
1946	11			1963	23	388	1,664
1947	11			1964	23	349	1,542
1948	12			1965	19	333	2,871
1949	12			1966	20	295	4,683
1950	13			1967	20	272	4,815
1951	12			1968	21	273	5,305
1952	13			1969	39	328	4,896
1953	22			1970	51	331	4,265
1954	25	266	1,175	1971	45	600	5,395
1955	32	290	1,167	1972	48		

<sup>1</sup> Totaled from appropriate U.S. Government Organization Manuals.

<sup>2</sup> U.S. Civil Service statistics as of June for each year cited.

Such advisers might be referred to as counselors, assistants, counsels, or consultants. Clerical aides were not included as advisers in the computations for the table. Beginning with fiscal year 1971, personnel statistics and cost estimates for the White House Office were changed to reflect the actual number of people employed and moneys spent in that office. Previously the statistics for that office had included personnel and related funds which, though credited to executive departments, were actually detailed to the White House Office.

The principal reason for suggesting an increased Presidential staff, and the main reason given for the continuous growth of the White House Office, is better management of the growing and uncoordinated government. As the report of the President's Committee on Administrative Management noted:

In addition to \* \* \* assistance in his own office the President must be given direct control over and be charged with immediate responsibility for the great managerial functions of the Government which affect all of the

<sup>3</sup> Theodore C. Sorenson, "Kennedy" (New York: Harper & Row, 1965), p. 262.

administrative departments, as is outlined in the following sections of this report. These functions are personnel management, fiscal and organizational management, and planning management. Within these three groups may be comprehended all of the essential elements of business management.<sup>4</sup>

But, as Prof. Richard F. Fenno has noted, managerial authority has been given over to the President's advisers because other executive management instruments, such as a Cabinet, have proven unsuitable for this function. Fenno comments:

Whether manifested by a benign lack of interest or by purposeful competition, departmentalism operates to reduce the potentialities of the Cabinet as a coordinating mechanism. Yet in view of the extent to which executive decisionmaking must now be conducted across departmental boundaries, it does not seem too much to say that the Chief Executive's primary managerial task is precisely this one of coordination. From the seminal recommendations of the President's Committee on Administrative Management in 1939 to the present day, the President's need for assistance in this area has been widely recognized. This, indeed, is the *raison d'être* for the phenomenal proliferation of those staff organs with interdepartmental planning, operating, and advisory functions which now comprise the Executive Office of the President. The expansion of this Office—of, for instance, the Budget Bureau, the National Security Council, the Office of Defense Mobilization, the Council of Economic Advisers, the White House Office—must be considered in part as an inevitable response to the new dimensions of governmental activity, but also in part as an adverse reflection on the ability of the Cabinet in coping with the difficult problems of coordination involved.<sup>5</sup>

Thus it is the White House Office which has come to better serve the President as a coordinator of executive functions. And as managers of the Government as well, they have come to play policy roles, refining policy suggestions and, often, even a potential policymaker's access to the Chief Executive. But, as Theodore Sorensen has noted, such a role carries with it certain dangers.

A White House adviser may see a departmental problem in a wider context than a Secretary, but he also has less contact with actual operations and pressures, with Congress and interested groups. If his own staff grows too large, his office may become only another department, another level of clearances and concurrences instead of a personal instrument of the President. If his confidential relationship with the President causes either one to be too uncritical of the other's judgment, errors may go uncorrected. If he develops \* \* \* a confidence in his own competence which outruns the fact, his contribution may be more mischievous than useful. If, on the other hand, he defers too readily to the authority of the renowned experts and Cabinet powers, then the President is denied the skeptical, critical service his staff should be providing.<sup>6</sup>

Indeed, what may be fast becoming a profound problem with the White House Office is noted here by Sorensen: that is, the development of the Presidential advisory staff, or some arm of the Executive Office, into an entity equal to a department. Reflective of this possibility is the growing amount of money spent each year by the Executive Office of the President. Indeed, the entire Executive Office of the President has greater expenditures than such important bodies as the Federal Communications Commission (FCC), the Federal Power Commission (FPC), or the Federal Trade Commission (FTC).

[Expenditures in thousands of dollars]

Fiscal year	EOP	FCC	FPC	FTC
1971.....	46,961	26,715	19,493	22,405
1972.....	56,922	30,683	22,164	24,957
1973.....	64,044	32,582	23,054	26,996

As the White House Office and/or the presidential advisers move toward the possibility of departmental authority, whether such authority be measured in fiscal or political influence terms, the wrath of official department heads can, and often is, incurred. As Theodore Sorensen notes:

<sup>4</sup> The President's Committee on Administrative Management, *op. cit.*, p. 6.

<sup>5</sup> Richard F. Fenno, Jr., "The President's Cabinet" (New York: Random House, originally published 1959), pp. 141-142.

<sup>6</sup> Theodore C. Sorensen, "Decision-Making in the White House" (New York: Columbia University Press, 1963), pp. 71-72.

No doubt at times our roles were resented. Secretary Hodges, apparently disgruntled by his inability to see the President more often, arranged to have placed on the Cabinet agenda for June 15, 1961, an item entitled "A candid discussion with the President on relationships with the White House staff." Upon discovering this in the meeting, I passed the President a note asking "Shall I leave?"—but the President ignored both the note and the agenda.<sup>7</sup>

Such disputes with the executive "family" can be viewed as merely matters of paternal favor. When these encroachments of power become enmeshed in executive relationships with other branches of Government, then a constitutional crisis may be in the offering.

A short time ago, in testimony before the House Foreign Operations and Government Information Subcommittee, former White House Press Secretary George Reedy made the following observation on the increasing authority of the White House staff and the significance of this development both in terms of information flow and accountability.

At one time, the White House staff was a relatively small group of people. They consisted of personal advisers to the President, and here you have the whole question of executive privilege which has been exercised, in my judgment, in an extremely legitimate form. I do not think that you should be able to pry loose from a President what he does not want to be pried loose. But, even if you should be allowed to do it, there is simply no way of getting at it. I do not care what law you write, or what you put through the Congress, or how many safeguards you set up, there is another branch of the Government, and to really try to pry loose from the President his thoughts, and his personal advice, I think, would even come close to precipitating a congressional crisis. But, because the authority lies within the White House, rather this ability lies within the White House, of exercising executive privilege, what has happened with the proliferation of White House staff members is that you are to the point where you are gradually getting a shift of the operating agencies into the White House itself.<sup>8</sup>

What seems to be fast approaching is a government controlled by exclusive decisionmakers, untouchable by either the Congress or perhaps even the departmental bureaucracy. The most notorious of these elite policymakers is Dr. Henry Kissinger and his National Security Council staff which has usurped the field of American diplomatic affairs. Not only has Kissinger and his staff undermined the State Department in this policy sphere, but Congress cannot compel him or any member of the NSC to provide an account of any aspect of their activities.<sup>9</sup> Senator Fulbright has recently noted that "Mr. Kissinger and his entire staff have taken the position of executive privilege."<sup>10</sup>

But the matter is no different when domestic policy is considered. In a speech given last May in San Jose, Calif., Sen. Ernest F. Hollings, Democrat of South Carolina, remarked:

It used to be that if I had a problem with food stamps, I went to see the Secretary of Agriculture, whose Department had jurisdiction over that program. Not any more. Now, if I want to learn the policy, I must go to the White House and consult John Price.

If I want the latest on textiles, I won't get it from the Secretary of Commerce, who has the authority and responsibility. No, I am forced to go to the White House and see Mr. Peter Flanigan. I shouldn't feel too badly. Secretary Stans has to do the same thing.<sup>11</sup>

Price was a Special Assistant to the President and a staff member of the Domestic Council. Flanigan is simply acknowledged as an Assistant to the President.

<sup>7</sup> Sorensen, "Kennedy," op. cit., p. 259.

<sup>8</sup> Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, "U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act," 92d Cong., second sess., taken from hearing transcript for Mar. 6, 1972.

<sup>9</sup> For a view of the National Security Council and its position vis-a-vis the State Department in the Nixon administration see: I. M. Destler, "Can One Man Do?" Foreign Policy, No. 5 (Winter, 1971-72), pp. 28-40; John P. Leacacos, "Kissinger's Apparatus," Foreign Policy, No. 5 (Winter 1971-72), pp. 3-27. Dr. Kissinger's views on elite decisionmaking are discussed in George Sherman, "A Sickness at State," Washington Evening Star (Mar. 7, 1972), pp. A-1, A-4.

<sup>10</sup> Committee on Foreign Relations, U.S. Senate, "War Powers Legislation," 92d Cong., first sess. (1971), p. 453.

<sup>11</sup> Dom Bonafede, "Ehrlichman acts as policy broker in Nixon's formalized Domestic Council," National Journal, III (June 12, 1971), p. 1240.

Even officials in the executive agencies are becoming distraught over the growing authority of the White House staff and the usurpation of line department functions. A top Commerce Department bureaucrat recently complained in a New York Times interview that "the business community pays no attention to this Department: if you have a policy problem, you go see Peter Flanigan—and he is available."

"Peter Flanigan," the official said with a sigh, "is to the Department of Commerce what Henry Kissinger is to the Department of State."<sup>12</sup>

The problem posed is not merely one of obtaining information from the Executive, but more importantly a matter of accountability. And even if the dispute were considered at the information level, history records very few denials of records to the Congress. Noting that Washington was the first President to, on at least one occasion, refuse information to Congress, Telford Taylor writes:

In the years to come, Jefferson, Monroe, Jackson (thrice), Tyler (twice), Polk, Fillmore, Lincoln, Grant, Hayes, Cleveland, Theodore Roosevelt, Coolidge, and Hoover (twice) encountered congressional demands for information which they saw fit to reject. Secure and powerful in his relations with Congress during his first two terms, Franklin D. Roosevelt did not confront the problem until his third term, during which no less than six such requests were refused, and under Truman the issue was drawn to a still higher pitch of intensity. Although partisan politics have frequently generated these conflicts, it is apparent from the foregoing list that party affiliation has never affected the basic position of the Presidents \* \* \*<sup>13</sup>

At present the White House staff is at its largest number with an accompanying operating budget which equates it with certain of the important independent agencies of Government. In brief, the White House staff is claiming an exclusive prerogative in terms of information, decisionmaking, and policy priorities. Such a trend has been evident throughout past administrations and has reached a culmination of exclusive authority during the present presidential regime.

The foregoing paragraphs raise certain points of consideration which are essential to any analysis of this subject. The general presentation seeks to portray a trend in governmental activity, a trend which has been viewed by various authorities both within and outside of the governmental system. No conclusion is reached by this analysis except the obvious view that a problem—of both a constitutional and operational nature—exists and is rapidly reaching crisis proportions. Solutions to this problem are, however, outside the scope of this analysis.

Mr. REID. Actually, Mr. Chairman, you can almost at this point turn it around and I say are there areas in Washington that the Congress now has the opportunity to question wherein the decision is made in those agencies to any significant degree, because if you take Budget and Commerce and Foreign Affairs and Defense and place those all under the White House wing, what is left for the Congress to deal with?

Mr. MOORHEAD. The answer, of course, is very darn little.

Mr. WOLFE. The question of OMB, that is involved, I don't know if OMB figures are included anywhere near the figures that you have quoted. Are they included in that?

Mr. PHILLIPS. Yes.

Mr. MOORHEAD. Mr. Reid, you have former associations with the newspaper industry. I am going to read you a portion of a paragraph of a speech made by Mr. Kevin T. Maroney, the Deputy Assistant Attorney of the Internal Security Division of the Department of Justice. He says, "I will address myself particularly to two concepts of Government confidentially, (1) information relating to the national security that disclosure of which would be detrimental to our national defense interests, including the conduct of our foreign affairs, and, (2) interdepartmental memoranda containing the candid debate and rec-

<sup>12</sup> New York Times, Mar. 20, 1972.

<sup>13</sup> Telford Taylor, "Grand Inquest" (New York, Ballantine Books, 1961), p. 119.

ommendations of Government officials relating to the decisionmaking process."

Then he goes on, "Information embraced within the first of these two concepts is protected under the sanction of the criminal law; information embraced within the second concept normally is not so protected."

In view of your statement about the attack on the press and the media, and based also on your experience in the newspaper field, how would you interpret those statements?

Mr. REID. Well, I would interpret them almost totally differently with an addition as well. First, matters that statement seems to indicate are questions of national security or national defense are equally matters that concern the Congress under the war-making powers, and I think that there is no sanction whatsoever in the Constitution or in judicial precedents that would, in the main, permit the Executive to deny Congress information central to Congress' constitutional responsibilities in this area, and I think there is no question but what the record will show that the Congress has been asked to pass resolutions, be it the Gulf of Tonkin or more recent ones, frequently without all of the facts and in more recent cases with virtually none of the facts.

To say that this area is covered by criminal law would say that criminal laws supersede the Constitution, which seems to me an absurdity on the face of it.

Second, to say that the material that is confidential between the staffs is not covered by criminal law might well be accurate but it is the kind of information that I think, as distinct from the decision, should probably be protected. If the President can't talk privately with key members of his staff and be sure that the confidentiality of those recommendations or indeed the debate that might have occurred, then he is not going to have access to good staff people or good information.

Quite obviously I think the President has the right and the obligation to protect that as well as confidential discussions with chiefs of state that may be conducted through an ambassador but he has no right, in my judgment, to withhold from the Congress fundamental benchmark decisions, and Justice Goldberg, I think, listed one of those as tilting toward Pakistan and pointed out that that was a decision the Congress had every right to know about and that that was not a question of staff recommendations, it was a policy decision and the President did not have the right to withhold that kind of information.

Mr. MOORHEAD. Thank you. I will yield to Mr. Gude. Before I do that I think some comment has to be made, Mr. Wolff, on page 2 of your testimony where you received a letter from the State Department regretting an inaccuracy. That is one of the most diplomatic words I have heard when they first say no, there weren't any polls and then it comes out yes, there were four polls, that is categorized by Mr. Abshire as "an inaccuracy."

Mr. Gude?

Mr. GUDE. Thank you, Mr. Chairman.

I commend both of my colleagues on their concern over one aspect of the erosion of legislative prerogative and power. I think we see a correlary of Parkinson's law, to the extent that Congress refuses to

assert itself the Executive is just going to move in and engulf the whole field.

I would like to ask one question in regard to your legislation, Mr. Reid. Do you feel that you should leave the decision as to the cut-off of funds to the committee or should you require this to be reported to the full House? Would the Senate act in the same manner?

Mr. REID. First, I very much appreciate the chance of appearing before you and your comments. We have a bill and joint resolution. The joint resolution obviously is to facilitate consideration by the Congress of this question and try to get the Congress to take a stand on this in general terms and the thought was this perhaps could be the first step and that it would be easier to put this through than the actual bill.

On the bill itself the thought was that a committee would vote in the first instance that they would require information, and the second, the committee has to take a second action if the certification does not arrive or if it seems inadequate. So my conviction would be that the committee itself should be able to take action, but it would be a second step after careful review by count as to whether or not the Executive had complied with the information and certification. Whether that should in turn go before the full House, it would seem to me that might be a little cumbersome. I don't think any committee of the House would take a second formal action without the most careful consideration, and indeed it really should be the committee that is concerned because that is the committee that would have all of the facts and details before it. We shouldn't have to go before the full House or both Houses to require the Executive to provide information that is clearly necessary to the functioning of one of our committees.

Mr. GUBE. Thank you, Mr. Chairman.

Mr. MOERHEAD. I would like to ask the opinion of both of you gentlemen as to a suggested proposal for the establishment of a commission—with the majority of the members appointed by the two Houses of Congress—to review matters of classification.

Let's say that it would provide that all material would become declassified after a certain period of years unless the agency wanting to continue classification would appear before the commission and make a case why it should be continued. The commission would be made up of people knowledgeable in the classification field. The commission would also be available to render advisory opinions to either Members of Congress or to the President. If an individual Member or newspaperman came into possession of a document with the label of secret, for example, they could go to the commission for an advisory opinion. The commission might conclude that the document isn't properly classified, that there is no reason it shouldn't be released. Or, they might conclude that it is properly classified; then the Member of Congress or the newspaperman would then be on his own to decide what to do. But I do believe that Members of Congress are reluctant to exercise their right to declassify, just as Mr. Wolff's testimony showed I was reluctant here today under our rules.

Do you think such a commission would help both Congress and the newspaperman to reach a rational decision?

Mr. REID. Mr. Chairman, I think that such a mechanism or commission would be highly desirable and I think that there are two points

that should be considered in its formulation. One is the procedural question, and here it seems to me the commission or agency perhaps made up of Members of Congress and some outsiders would have oversight of the procedures, the classification, how often matters were classified, the general criteria, and so forth, and equally they could well have a role in determining promptly whether something should be made available in a public way or executive session or whatever.

The more fundamental question, and this is my second point, is how to insure that such a mechanism or commission has access in the first place? The trouble is the Congress frequently just doesn't know what is going on and if the commission was limited to reviewing procedures or documents that the Executive chose to put in front of the commission and didn't have the right of spot checking and access to see whether there was fundamental withholding of information in certain areas, then it would only be able to fulfill about 50 percent of its role, it seems to me.

Mr. MOORHEAD. Do you have any thoughts, Mr. Wolff?

Mr. WOLFF. Yes, I do, Mr. Chairman. I think that, first, I would certainly go along with the idea that there is something new that is necessary in order to in some way reverse the present situation. I understand there are still Civil War documents classified as secret documents.

The Department of State has told me that the job is of such magnitude they cannot do the job themselves and, therefore, classification remains on material because of the fact they aren't able to get around to declassifying it. I would like to see one thing done by this Commission and that is to limit the number of people who can actually put classification upon material, because today there is an indiscriminate classification put upon material by people, by the vast number of people who are able to classify.

Secondly, I think that maybe we ought to proceed before the classification. Maybe we ought to have this board look into the item before it is classified, rather than looking at it with hindsight, because in many cases time is of the essence in these things and just as I am today bringing before this committee the question of the polls in the Vietnam election and the results being classified, it was more important for us to have that information prior to the time of the election that these polls were going on and that the information obtained from these polls is after the fact.

I think that it is important for a commission like this to be set up but I do believe there should be some sort of screening board that the Commission sets up.

Mr. RED. One other point that I would be constrained to mention and that is I think there should be a fundamental premise here, and that is that classification should be limited only to matters essentially of great sensitivity and that this material should be relayed in ways and means that facilitate the protection of high confidentiality. Neither is the case today.

As my colleague, Mr. Wolff, pointed out, there are many people with the power to classify. Each Ambassador has that power and on any given day an Embassy sends a number of telegrams and perhaps hundreds of pages of reports. I think much of that doesn't need to be classified and, further, if you are going to send a telegram

back to the Department and if it is fairly highly classified, it goes through a process not only in decoding, but it goes to a radio room, it then goes from there to appropriate desks, it can go upward or downward to a hundred different agencies. Well, at each point along the road someone has to carry it and initial it, and before very long, I have never sought to figure this out, you probably had a thousand people look at the telegram, many of which are in the vicinity of the Xerox machine, if one is concerned, and I think an Ambassador does have a concern at times making sure very highly sensitive material does not appear in print the next day, but the system we are following almost guarantees that that possibility exists.

I would not have a whole series of classifications plus another series on top of that that triggers access because what you are really talking about then are five or 10 different classifications not governed by any statute or Executive order. With literally hundreds of thousands of people seeing it, it is about as porous as a sponge as far as security is concerned, and all it does frequently is impede some people seeing it that need to and doesn't serve a security purpose.

If a few things were really classified highly and through certain mechanisms that are possible to retain in that fashion and the bulk of this material was not classified, I think both our knowledge and our security would be enhanced.

MR. MOORHEAD. I agree, the sheer volume of this classified material cheapens it, people no longer have respect for it. If we limited it strictly, then people would have respect and would not resort to the Xerox machine which, as you point out, they can do so readily now.

Incidentally, you describe the top secret category as defined in the Executive order, it covers very serious types of information. We had a representative of the Justice Department before this subcommittee last week and read to them from a Jack Anderson column that a file on Jane Fonda was allegedly marked "top secret" and he wouldn't deny the possibility that such a top secret classification could be applied on domestic surveillance of an American citizen.

MR. WOLFF. I think your testimony about the confiscation of your tape is an example of the terrible distrust that exists on the part of the State Department about Members of Congress. You went through every procedure, prenotification, obvious display of the tape recording, then to show further good faith and your belief in the interests of national security that you would have the tape returned by diplomatic pouch, but your total confidence in our State Department is reciprocated by the kind of shabby treatment they gave to you. It certainly would make another Member of Congress think twice before he reposed that type of confidence in the State Department.

MR. WOLFF. I think the State Department takes better care of the laundry sent through the pouch than they take care of material that is necessary to congressional duties.

MR. MOORHEAD. Would you gentlemen be willing to answer some questions that the staff who have been working on this matter for a long time are willing to pose to you?

MR. WOLFF. Yes.

MR. REID. Yes.

MR. PHILLIPS. Thank you, Mr. Chairman. This question of the JUSPAO polls raised by Congressman Wolff is just an incredible thing



and it is so typical of the frequency with which the State Department and other executive agencies deliberately lie to the Congress.

To reenforce the record on this, on October 8, 1971, Assistant Secretary Abshire said, "The U.S. Information Agency has informed us that JUSPAO has not conducted any polls, surveys, formal or informal, concerning or involving the Vietnamese election."

But in July, 1971—3 months earlier—this subcommittee had Mr. Reinhart from USIA as a witness on the JUSPAO operations. Not only did he admit that there were such polls, we discussed them in an open hearing, copies of those polls were made available to the subcommittee; they are in our files now; we have read them; we discussed the fact that at that time, of course, that there were two other serious presidential candidates in the Vietnam election, or it appeared there would be, Vice President Ky and General Minh. We discussed with Mr. Reinhart in a colloquy how available these polls would be to President Thieu.

Mr. Reid, I am sure, remembers, and certainly the chairman, we were all there. But 3 months later, they say the polls don't exist after it has been discussed in an open hearing. This is utterly ridiculous.

Mr. WOLFF. By the way, this letter was not sent to me, it was sent to the chairman of the Foreign Affairs Committee, so it reached even higher authority.

Mr. PHILLIPS. It is incredible. But it is so typical of the things that we see here.

Mr. REID. Mr. Phillips, I think ridiculous is about the least one can say about it. It is either deliberate obfuscation or extraordinary poor staff work.

I might just add on the subject, Mr. Chairman, we were talking about a little earlier, it is involved in this question as well, is the fundamental definition of security. We seem to design it these days as meaning we will prevent information reaching the American public and the Congress which we are willing to exchange with President Thieu or we are willing to tell Hanoi.

In the case of the Pentagon papers, much of that information was known to foreign governments but not to the Congress or the American people, and I think that this business of equating dissent with treason, which creeps into some of these definitions, is also very dangerous.

I believe if President Kennedy were alive today, Jack Kennedy, he would reaffirm that which I believe he said to the New York Times at one point. In retrospect, he would have preferred to have had the Bay of Pigs information come out rather than to have made the phone call requesting the Times not to publish, the reason being the publication in that instance might have prevented the United States from making what I believe President Kennedy thought was a serious mistake after the event.

No one seems to consider in the executive that there should be a mechanism for circulating dissent, for having some thoughtful dissention on matters that could quite clearly trigger nuclear confrontation. They consider they are the sole judge of what is patriotism, and there is no effort to recognize that our processes should permit the weighing of alternatives in a judicious and thoughtful manner before fundamental, sometimes very dangerous, decisions are made. The Vietnam war is

replete with instances of very bad judgment by a number of people in the executive, if not by the Congress, which might well have been precluded or avoided had there been anything resembling a free flow of information and judgment between the Congress and the executive. The failure of the executive to understand this has undoubtedly resulted in thousands of lives being lost that would not have been lost had there been anything representing a sharing of information and of the decisionmaking between the Congress and the executive, and so I hope that somehow we can define security not just as a technical question whether the executive wants to classify or not but whether the material broadly should be known to prevent wise decisions.

Mr. PHILLIPS. Also, Mr. Chairman, I think the record should reflect that in connection with Mr. Reid's comments about the GAO difficulties in obtaining access to information, and particularly in Vietnam, during the hearing we held last summer, Mr. Stovall of GAO testified on the pacification program and the attempts that GAO made to obtain figures to show what the real expenditures by AID and the Defense Department were in the pacification program. He described the great difficulties that GAO had in the field in obtaining such data and also the same difficulties in trying to get an explanation of some \$1.7 billion, I believe, that was unaccounted for in their preliminary study. We also noted the great efforts that were made in the Pentagon to explain how some of this money was in the pipeline and so on. But it does pose a great problem for GAO. This problem is what GAO witnesses are going to be testifying about here tomorrow.

Mr. REID. Mr. Phillips, I think your point is extremely well taken. I might say there are at least three instances of things that the American people have never really been apprised of and GAO has really never been able to get the facts on. I think at a minimum \$2 billion of goods, medicines, have gone to the wrong addresses in Vietnam. There is no doubt in my mind, second, that there has been and there is continuing corruption at the highest levels in the Vietnamese Government and we have known about it, officials in the U.S. Government have known about it, and they have consistently sought to prevent this information from being known.

And, third, in the general area of Vietnamization, pacification, Phoenix program, there is no question but that methods have been used contrary to the Geneva Convention. Clearly the net of all of this was whether we were fingering particular people for assassination, for killing, or whether we were doing other things. We were contributing to an atmosphere that was almost guaranteed to fail when it was pushed a little bit. I think the current ruins of the Vietnamization program that we see lying about are testimony to the fact that we tended to support an elite corrupt group and did not do things early on such as land reform that have been meaningful to the individual or the family and it is really a case where the executive has deliberately sought to deny the American people the facts in support of the program that wasn't working. It is precisely because this is the case that we need to change all of this so we do not repeat this kind of mistake.

Mr. PHILLIPS. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Copenhaver.

Mr. COPENHAVER. Mr. Reid and Mr. Wolff, may I commend you for excellent statements and Mr. Reid particularly, I think, you have given

one of the best statements that have been given before our subcommittee on discussion of the whole constitutional aspect.

I have, if I may, just two comments to make. One is a follow-on to your discussion about your statement with regard to the ramifications of the executive department's failure to keep Congress or the public informed.

Would you agree that what you are trying to do in your legislation is not to undermine executive branch authority but rather to restore the public's confidence in the executive branch?

Mr. REID. Precisely; I think there is fundamental distrust of government at all levels throughout the United States. It has come because government has lied, has obfuscated, and has deceived and also because I think the executive has failed to both honor the Constitution and to opt for shared decisions that the Constitution requires.

What we are seeking by the legislation is in essence an accommodation. We are saying the Congress is entitled under the Constitution to information before making a judgment. Hopefully the executive would understand that this is being done in a spirit that would represent a joint sharing of powers. If, however, the executive increases its arrogance in this area and feels that they alone have the right to certain information then I think the Congress if it wishes to continue as a coordinate branch, if it wishes to have any capacity of check and balance, then must show the will and guts to cut off the funds. That is the ultimate power. I would hope it won't come to that but I see very little evidence that suggests any willingness to share with the Congress and, therefore, the Congress can become an appendage of the White House, relatively powerless, unless it is willing to stand up and cut off funds to insure a right that should be a joint right and on which the Constitution is clear.

Mr. COPENHAVER. Thank you.

Mr. MOORHEAD. Mr. Cornish.

Mr. CORNISH. Thank you, Mr. Chairman.

Congressman Reid, I noticed with great interest that you mentioned the refusal to this subcommittee of the Cambodian country field submissions. When President Nixon issued that order on March 15, it was in the form of a directive, as you recall, to the Secretary of State and to the Director of the U.S. Information Agency. I would like to quote the language and to get your comment on it, especially as to its blanket effect. The order directed the Secretary of State and the Director of USIA, and I quote:

Not to make available to the Congress any interim 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.

The fascinating thing about this is that at the moment the chairman received it we had in our possession the fiscal 1973 country field submission for Laos, which seems to me much more sensitive than the same document for Cambodia.

The second point is this: on that date, I believe—and perhaps Congressman Wolff may wish to correct me on this if I am wrong—but the administration's foreign aid authorization already had been sent up to the Congress and they were indeed asking money for Cambodia,

and it would thus appear from the President's order that you were looking at an unapproved position.

MR. WOLFF. This is correct. I would like to confirm what you have said. We did have before us the submission for assistance to Cambodia and Laos at the same time and unfortunately the dates are inconsistent with actually the fact.

MR. CORNISH. Of course my third concern was probably the most important of all, and that is President Nixon's directive appears to me to be a blanket denial of all such documents from that point on.

MR. REID. Mr. Cornish, I think that your point is very well taken. My impression of what happened—and I was involved in some discussions on this privately—was that this was an effort not directed primarily at the Cambodian report but an effort to establish a new precedent, and if that is correct, as I interpret it, this is a vast widening of a policy of withholding from the Congress and I think it is wrong on its face because it is starting to say that any kind of staff material of any kind prior to an agreed position or the facts related in some of these studies can be withheld by subordinations, this is no longer the doctrine of a few key staffers around the President, this is in effect saying anything in a subsidiary wages way down the line that may be going into something that may ultimately become a position. None of that can be made available because the field reports are not of that degree of confidentiality. I have prepared a fair number of them myself. They are the country team assessment as to the level of foreign aid program and the kinds of programs that look felicitous with some documents as to why these reports and these programs are effective and should work.

This is precisely the kind of information the Congress should have if it is to make an intelligent assessment either as to economy and efficiency in this committee or in the broad policy considerations in the Foreign Affairs Committee and I think this is just a further tightening and, in my judgment, in this area quite wrong.

I might say that I have had my opportunities in the executive to be aware of matters that I think are highly classified; in one case a matter I think known to five people in the government, and to other matters that are far less so. These kinds of reports are almost technical in nature; they are the fundamental grist that is essential for any basic policy judgment by the Congress of any AID judgment and to start classifying and withholding this is totally ridiculous and unwarranted. I think it could set a very bad precedent.

MR. WOLFF. Our adversaries seem to have the information before the Congress has.

MR. CORNISH. I might say there apparently is some misunderstanding on the part of the executive branch that the Congress doesn't know what these documents are. Of course we realize that in a sense they are planning documents but at the same time they contain a tremendous amount of factual information and detailed justification for the programs existing as well as those projected and they describe the real political and economic situation in a country—what the goals and objectives of the U.S. assistance program are and their rationale—and they discuss the specific issues of major significance.

MR. WOLFF. It is actually the raw data, too, upon which we can base opinion rather than have that interpreted for us by someone else and I think this is the important element involved here.

Mr. CORNISH. Thank you, sir, and the comment or suggestion we got from the Department of State was that, "Well, gentlemen, we can't make available to you this basic document but what we will do is sit you down and tell you about it." That is all very well and good and I am sure that someone could come over and try to give you an accurate picture of what is actually the information in the document, but it is just possible that they might leave out some little tidbit of information which we are really interested in.

Mr. WOLFF. Either they figure Congress is unable to read or that we read too well.

Mr. REID. I might add, Mr. Cornish, that Anthony Eden, now Lord Avon, both when he was Foreign Secretary and Prime Minister, also insisted on reading the cables, telegrams, raw cables, and telegrams from the field; he did not want to take home with him in his dispatch box at night compilations that had been put together in the Foreign Office, and I would submit this is pretty good advice for Congress as well.

Mr. WOLFF. I might respectfully suggest that either some members of your subcommittee or perhaps committee staff appear before the Foreign Affairs Committee and feed us some of the information we have heard about here today that would help us in making our decisions because it is quite obvious that we are not getting all of the information we need to adequately perform our function.

Mr. MOORHEAD. We are pleased to have two such distinguished members of that committee before us and we certainly want to cooperate as much as possible with the Foreign Affairs Committee. I think we have had a good working relationship with the chairman of that committee, but any way we can improve our relationship we are open to suggestion.

Well, thank you, gentlemen, very much for two very thought-provoking statements. Your experience in both the foreign affairs field and in the difficulty of getting information and the resulting loss of power to Congress from the lack of this information has been very important to this subcommittee and we appreciate it very much.

We will now insert in the record the letter the subcommittee sent to all Members of the House and the Senate.

We will also insert in the record a statement of our colleague, James R. Mann, from South Carolina, citing a situation where the American Revolution Bicentennial Commission refused to give financial information to a duly constituted subcommittee of Congress. Also inserted are statements by Representative Abner Mikva and Senator Vance Hartke.

(The statements referred to above follow :)

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C., March 27, 1972.*

DEAR COLLEAGUE: As you may have noted, the House Foreign Operations and Government Information Subcommittee is currently holding hearings on the administration and efficiency of the Freedom of Information Act (5 U.S.C. 552), which became effective on July 4, 1967.

As part of these oversight hearings, we have planned several days of testimony, beginning on Monday, May 15, on the problems of Congress in obtaining information from executive agencies.

The subcommittee is particularly interested in knowing of specific case histories of denials of information to Congress by the Executive. If you have been involved in such a case, we would greatly appreciate receiving from you a written statement for the hearing record setting forth the details. Such cases would add immensely to the documentation of the extent of Executive withholding practices and would be of important value to the Subcommittee in its hearings.

We will look forward to hearing from you at an early date. If you or your staff have any questions in this connection, please call the subcommittee staff director, William G. Phillips (5-3741).

With best regards,  
Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

PREPARED STATEMENT OF HON. JAMES R. MANN, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, I welcome the opportunity to advise the committee of an instance which, in my judgment, constitutes an improper withholding of information to the Congress by the Executive. I would not have considered this specific instance worthy of mention had it not involved that vaunted power of the legislative branch, the "power of the purse". As we have seen the power of the Congress slowly erode, through both our own neglect and usurpation by the Executive, I, for one, have become particularly sensitive in the area of fiscal responsibility.

On November 10, 1971, Subcommittee No. 2 of the Committee on the Judiciary was considering H.R. 7374, a bill to amend the joint resolution establishing the American Revolution Bicentennial Commission, as amended. The bill sought to make miscellaneous amendments with reference to the American Revolution Bicentennial Commission legislation, but the most important of its provisions was an authorization for the appropriation of \$4.3 million for fiscal year 1972. Among the witnesses testifying at a hearing before the subcommittee on the above date was Mr. Hugh A. Hall, Deputy Executive Director, American Revolution Bicentennial Commission. I quote here from pages 26 and 27 of the hearing transcript. The questioning is by Representative George E. Danielson of California, a member of the subcommittee.

Mr. WALDIE. Half of them were reconstituted out?

Mr. SKORA. Some resignations on an individual basis, yes.

Mr. WALDIE. Would that happen again, for example, if there is a change in the administration next national election?

Mr. HALL. Hopefully not.

Mr. WALDIE. I mean, will they traditionally all resign?

Mr. HALL. Hopefully not.

Mr. WALDIE. Do the staff people resign, too?

Mr. HALL. No, sir.

Mr. WALDIE. Of course, you only had two members of the staff.

Mr. SKORA. It was just the public members through the chairman submitting an en bloc resignation to the new President-elect, whomever he might be.

Mr. WALDIE. I think that was an unfortunate precedent.

Mr. DONOHUE. Mr. Flowers?

Mr. FLOWERS. Thank you, Mr. Chairman.

It is designed to go through 1983; is that correct?

Mr. SKORA. That is what the legislation provides.

Mr. HALL. Could I state, though, what the Commission has decided and has been incorporated in the report of the Commission: 210 or 211 million people are not going to accept a bicentennial that runs that long. So we have recommended through a resolution that the focal year for the bicentennial be 1976, the focal day, of course, will be July 4; that most of the activities will take place in the tail end of 1975 and 1976 and that a substantial portion of the staff will go out of business in the spring of 1977. And that the historical events related to the Revolution go through 1983—and there are even challenges that it should go through 1987—and would be left to the local interest and regional interest groups to stage their own individual activities around those moments in history. We have been complimented on the realism that the bicentennial must be concentrated in a year's activities basically.

Mr. FLOWERS. I would agree with that thought.

I have no further questions.

Mr. DONOHUE. Mr. Danielson?

Mr. DANIELSON. I have two questions. Down there in section 3, section 7(a) of the law, authorizing appropriations of such sums as may be necessary. Now, we have made reference to the \$4.3 million or maybe \$4.5 million for grants to the various States. Aside from that feature, it costs something to run this Commission. What is your budget authorization? What is your budget request for authorization in this year?

Mr. HALL. Fiscal year 1972, it is \$4.3; \$1.9 is for staff and expenses to carry on the everyday business of the Commission.

Mr. DANIELSON. And the other \$2.4 is to pass out to these various States and so on?

Mr. HALL. Grants to the States.

Mr. DANIELSON. In other words, \$1.9 is what you are talking about for running your Commission?

Mr. HALL. Yes, sir.

Mr. SMITH. Does that include the area offices that are authorized too?

Mr. HALL. It does, sir.

Mr. DANIELSON. What are your projections—forgetting the grants to the different States now—what are your projections as to how that \$1.9 is going to grow between now and 1976? I am sure you have worked out some pro forma projections.

Mr. HALL. There is a procedure in which a Commission such as ours submits our plans to the Office of Management and Budget. The Office of Management and Budget reviews in detail our proposals. We are putting together today, and have put together, a program for fiscal year 1973. We are preparing to put together a total program that will include 1973 through 1976 and come before Congress requesting a single package authority rather than coming up each year. But that has not been approved by the Office of Management and Budget, so we can't discuss those details on figures and projections until they have been completely reviewed by them, and the other governmental agencies will have an opportunity to review it.

Mr. DANIELSON. I can envision if this bill comes up on the floor and some people with extremely fine vision read that language down there, they might say, "What are the projections for 1972, 1973, 1974, 1975, and 1976?" And it would have kind of a hollow effect if one said, "We asked the Commission but they declined to provide the information." That would go over like a lead balloon, in my opinion.

Mr. HALL. This authority is only for fiscal year 1972.

Mr. DANIELSON. But most of the Members of the Congress look further ahead than fiscal year 1972.

Mr. HALL. Correct, sir.

Mr. DANIELSON. I will answer the question that they have declined to furnish the information, if that is what you request. That is your choice.

Mr. HALL. I don't think we have our 5-year package well enough prepared.

Mr. DANIELSON. I can answer it that way then, that it is not prepared and they don't know where they are going.

Mr. SKORA. It would ultimately depend on Congress with the authorization and appropriations.

Mr. DANIELSON. This is the contingency with which I am asking the question. It depends on Congress, therefore Congress must have some knowledge.

Very well, I have an answer.

Mr. HALL. We are in a process of preparing a total package.

Mr. DANIELSON. At the present time, you do not know and decline to furnish the information that you are not sure of.

Going on to the exposition, do you plan to conduct and promote an exposition?

Mr. HALL. The commission in its report to the President invited Philadelphia to stage an international exposition, a noncommercial, historical and cultural, special type of exposition to be a part of the bicentennial in 1976. We did that because Boston, Philadelphia, Washington, D.C., and, shortly thereafter, Miami, on their own initiative, proposed to stage an international exposition in 1976 as their city's participation in the bicentennial.

Frankly, some of those cities were underway with these plans prior to this Commission's existence. And I think Congress foresaw that these kinds of activities were going to start to pop up all over the country and that is why the Commission was created.

Let us now consider the meaning of the refusal of Mr. Hall to advise the Congress, acting through Subcommittee No. 2 of the Committee on the Judiciary, of the projected cost of a program that he, on behalf of the executive, was asking Congress to fund. It is clear from Mr. Hall's testimony that he was already in possession of projected cost figures for fiscal year 1973. Although there may be some question about it, I also think that it is reasonably inferable that he also had some idea as to the total cost of the program but refused to give it to us because "that has not been approved by the Office of Management and Budget, so we can't discuss those details on figures and projections until they have been completely reviewed by them, \* \* \*". So, we see that Congress was being called upon to buy a pig in a poke, and the reason given was that "there is a procedure in which a commission such as ours submits our plans for the Office of Management and Budget." Here we see a typical example of the power that we have permitted to be assumed by that "invisible government", concerning which there is much public confusion about whose tool it is, which confusion often affords the President sanctuary while the blame falls upon the Congress. I refer to that super executive "enforcer", the Office of Management and Budget.

Mr. Chairman, I will not belabor the point. As I indicated earlier in my statement, I lament any effort to further debilitate the capacity of the Congress to fulfill its primary function, the appropriation of funds. I would hope that the Congress, rather than the Office of Management and Budget, would be the guardian of the public purse. I reject the idea that an agency or commission of government cannot disclose to the Congress the total or potential cost of a program when it is before the Congress seeking authorization and appropriation. I reject a policy that closes the mouths of those at the operating level, because the Office of Management and Budget has not, in effect, told them what the President plans to tell us about the fiscal needs of the agency or commission.

I believe in planning, and I commend the executives of the American Revolution Bicentennial Commission for making plans. However, it is nothing but doubletalk for them to allege that planning procedures in this case prevent them from giving the Congress an estimate of the total cost of the program. As indicated earlier in my statement, I assert that they do have an estimated total cost of the program, and refused to give it to the subcommittee. If they do not have such an estimate, then it is indicative of an even greater danger to our system of government, when the executive can request, and Congress grant, as it already has in this case, a large amount of money, for a program of unknown dimensions. I am a great supporter of the bicentennial program, but I am an even greater supporter of fiscal responsibility. The interplay between the executive and the Congress will not result in fiscal responsibility if we permit the executive to assert the fiscal guidance that it has in this case, leading a "blind" Congress into providing funds without revealing information known to it.

The Office of Management and Budget may serve a worthwhile executive purpose with reference to the management of appropriated funds and the preparation of budget requests, but it should not be permitted to "manage" the Congress by procedures which prevent a full disclosure by executive agencies of any and all fiscal matters in response to congressional inquiry.

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CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, D.C., April 5, 1972.

HON. WILLIAM S. MOORHEAD,  
*Chairman, Subcommittee on Foreign Operations and Government Information,*  
*Washington, D.C.*  
(Attention: William Phillips).

DEAR MR. CHAIRMAN: In response to your recent letter, I would like to describe two occasions on which I have been denied access to information specifically requested from departments of the executive branch.

In December 1971, I wrote to Jerris Leonard, administrator of the Law Enforcement Assistance Administration, and requested a copy of a report prepared by LEAA in May 1971 dealing with the privacy and security of computerized criminal justice information systems.

I had been told that this report would cast some light on the change in emphasis on privacy considerations which had accompanied the transfer of control over the development of project SEARCH from the States to the FBI. At the time, I was drafting legislation dealing with this subject, and felt that the LEAA report's recommendations might be useful.



On February 11, 1972, I received a reply from Mr. Leonard denying my request for the report.

The second incident involved a report which I was told had been submitted by the Environmental Protection Agency to the Office of Management and Budget, outlining an accelerated cleanup program to abate pollution in the Great Lakes and requesting inclusion in the budget of funds to carry out this program.

On February 2, 1972, I wrote to William Ruckelshaus and asked that a copy of the report be sent to me. My office subsequently received a telephone call from an employee of the EPA advising that the report would not be made available.

The report was eventually obtained privately, and was discussed in the Congressional Record. The information it contained has been useful in connection with the consideration of H.R. 11896, the Federal Water Pollution Control Act amendments, and will be even more useful when we consider the EPA appropriations bill for fiscal year 1973.

Copies of the correspondence referred to above are enclosed. I hope this information will be useful to your subcommittee.

Sincerely,

ABNER J. MIKVA,  
*U.S. Congressman from the State of Illinois.*

DECEMBER 22, 1971.

Mr. JERRIS LEONARD,  
*Law Enforcement Assistance Administration,*  
*Washington, D.C.*

DEAR MR. LEONARD: It came to my attention recently that LEAA prepared a report in May 1971 dealing with security and privacy considerations in computerized criminal justice information systems.

This is a subject of great concern and interest to me. As a member of the Judiciary Committee I expect to be dealing with legislation on this subject in the near future, and would appreciate your supplying me with a copy of the report mentioned above.

Thank you for your cooperation.

Sincerely,

ABNER J. MIKVA,  
*U.S. Congressman.*

U.S. DEPARTMENT OF JUSTICE,  
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION,  
*Washington, D.C., February 11, 1972.*

HON. ABNER J. MIKVA,  
*House of Representatives,*  
*Washington, D.C.*

DEAR CONGRESSMAN MIKVA: This is in response to your recent letter regarding data gathered by the Law Enforcement Assistance Administration dealing with security and privacy considerations in computerized criminal justice information systems.

Although the report you requested was not submitted to the Congress, I am enclosing some material about LEAA funding of criminal justice information systems which should assist you in your study of this important subject.

If I can provide additional information, please let me know.

Sincerely,

JERRIS LEONARD,  
*Administrator.*

FEBRUARY 2, 1972.

Mr. WILLIAM RUCKELSHAUS,  
*Director, Environmental Protection Agency,*  
*Washington, D.C. 20460*

DEAR Mr. RUCKELSHAUS: I understand your Department has done a study of the antipollution effort in the Great Lakes, entitled "Accelerated Great Lakes Program—Summary of Proposals." Would you please send a copy of that report to me.

Thank you.

Sincerely,

ABNER J. MIKVA,  
*U.S. Congressman.*

U.S. SENATE,  
 COMMITTEE ON FINANCE,  
 Washington, D.C., April 5, 1972.

Congressman WILLIAM S. MOORHEAD,  
 Chairman, Foreign Operations and Government Information Subcommittee of  
 the Committee on Government Operations, House of Representatives, Wash-  
 ington, D.C.

DEAR MR. CHAIRMAN: Your recent letter stated that your subcommittee is conducting hearings on the administration and efficiency of the Freedom of Information Act (5 U.S.C. 552). Aside from the general reluctance of the executive branch to release information there is one instance in which my office has been personally involved which certainly leads me to question the success of the FOIA in raising the shroud of secrecy within which the executive branch carries out so much of its activity.

On July 30, 1971, I wrote to the Executive Director of the Federal Trade Commission, Mr. Basil J. Mezines. I requested a Federal Trade Commission report on the administration of the motion picture consent decrees by the Department of Justice. On August 19, 1971, Mr. Mezines advised me that the "Commission has felt it advisable \* \* \* to defer to the judgment of the Attorney General as to whether or not any such report should be released".

On September 15, 1971, I requested Attorney General Mitchell to release a copy of the report to me. On October 5, 1971, Assistant Attorney General McLaren advised me that it was not possible to make this report available to me. Mr. McLaren stated that information in the report was secured pursuant to provisions contained in the judgments which enjoin divulgence of the information "by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law".

Presently I am in the process of making specific application for the release of this information under the Freedom of Information Act. I have enclosed copies of the relevant correspondence concerning this matter. If you desire further information, please contact either Howard Marlowe or Greg Williams at 54814.

Sincerely,

VANCE HARTKE,  
 U.S. Senator.

Enclosures.

JULY 30, 1971.

Mr. BASIL J. MEZINES,  
 Executive Director, Federal Trade Commission, Pennsylvania Avenue at Sixth  
 Street, Washington, D.C.

DEAR MR. MEZINES: It has come to my attention that there is a Federal Trade Commission report on the administration of the motion picture consent decrees by the Department of Justice.

I would very much appreciate having a copy of this report at your earliest convenience. Thank you for your consideration.

Sincerely,

VANCE HARTKE,  
 U.S. Senator.

FEDERAL TRADE COMMISSION,  
 Washington, D.C., August 19, 1971.

Re *U.S. v. Paramount Pictures, Inc., et al.*, file No. 55-034.

HON. VANCE HARTKE,  
 U.S. Senate,  
 Washington, D.C.

DEAR SENATOR HARTKE: This is in further reference to your letter of July 30, 1971, requesting a copy of the FTC report on the administration of motion picture decrees by the Department of Justice. I acknowledged your letter on August 10, 1971, and advised that you would hear from me in the near future.

The Commission completed an investigation as to the manner and form of compliance with the judgments and decrees in the matter of *United States v. Paramount Pictures, Inc., et al.* (U.S.D.C. Southern District New York, Equity No. 87273).

Following completion of an extensive investigation, the Commission on February 25, 1965, forwarded its report to the Attorney General containing its conclusions and recommendations with respect to the extent of compliance with the above judgments and decrees.

The investigation was conducted at the request of the Attorney General pursuant to the provisions of section 6(c) of the Federal Trade Commission.

The Commission has felt it advisable with respect to previous requests involving access to the above-referenced report and others which were prepared by the Commission pursuant to the provisions of section 6(c) of the Commission Act to refer to the judgment of the Attorney General as to whether or not any such report should be released. In this connection I feel it advisable to invite your attention to the provisions of paragraph VIII 111b of the Court's decree which provides:

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings to which the United States is a party or is otherwise required by law.

I believe it advisable therefore to suggest that you direct your request for release of a copy of the Commission's report to the Attorney General. I regret that I cannot be of more positive assistance with respect to your request in this matter.

With kindest personal regards,  
Sincerely,

BASIL J. MEZINES,  
*Executive Director.*

SEPTEMBER 15, 1971.

HON. JOHN N. MITCHELL,  
*Attorney General of the United States,*  
*Department of Justice,*  
*Washington, D.C.*

DEAR GENERAL MITCHELL: It has come to my attention that there is a Federal Trade Commission report on the administration of the motion picture consent decrees by the Department of Justice, *United States v. Paramount Pictures, Inc., et al.*

I contacted Director Mezines to obtain a copy of the report and was informed that I should direct that request to you. I would appreciate having a copy of this report at your earliest convenience. Thank you for your consideration.

Sincerely,

VANCE HARTKE,  
*U.S. Senator.*

OCTOBER 5, 1971.

HON. VANCE HARTKE,  
*U.S. Senate,*  
*Washington, D.C.*

DEAR SENATOR HARTKE: The Attorney General has asked me to reply to your letter of September 15, 1971, concerning the Federal Trade Commission's compliance investigation report relating to the judgments entered in the case entitled *United States v. Paramount Pictures, Inc., et al.* The report was transmitted to this Department in March of 1965.

The compliance investigation to which the report pertains was made by the Commission at the request of the Department of Justice. Information was secured pursuant to provisions contained in the judgments which enjoined divulgence of the information "by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law." We are, therefore, proscribed by the judgments from making the report available to anyone other than appropriate representatives of the Department, except in the course of legal proceedings in which the United States is involved as a party.

We appreciate your interest and regret that it is not possible to make this report available to you.

Sincerely yours,

RICHARD W. McLAREN,  
*Assistant Attorney General, Antitrust Division.*

(0-750-7)

U. S. DEPARTMENT OF JUSTICE  
WASHINGTON, D. C. 20530



REQUEST FOR ACCESS TO OFFICIAL RECORD  
UNDER 5 U.S.C. 552(a) and 20 CFR PART 16

See instructions for payment and delivery of this form at bottom of page

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DATE		NUMBER OF COPIES REQUESTED	OFFICE AND CITY WHERE RECORD IS LOCATED (if known) U.S. Senate, U.S. Capitol Building, Washington, D.C.
DO YOU WISH TO RECEIVE COPIES? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO			
IF YES, SO INDICATE (no more than 10 copies or any category will be furnished)			
DESCRIPTION OF RECORD REQUESTED (Include any information which may be helpful in locating record)			
<p>Re: Senate Trade Commission's compliance investigation report relating to the securities entered in the sub-committee United States v. Frederick Nicholas Howe, et al. The report was transmitted to the Department of Justice in 1970.</p>			
LITIGATION: DOES THIS REQUEST RELATE TO A MATTER IN PENDING OR PROSPECTIVE LITIGATION? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO			
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*Thrice Strike*  
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This form may be delivered to any of the offices listed in 28 C. F. R. 16.2 or mailed to: Office of the Deputy Attorney General, Department of Justice, Washington, D. C. 20530

Mr. MOORHEAD. When the subcommittee adjourns today it will adjourn to meet tomorrow at 10 o'clock in this room when we will hear from Mr. Robert F. Keller, Deputy Comptroller General of the General Accounting Office, and our colleague, the distinguished Congresswoman from Hawaii, Patsy T. Mink.

The subcommittee is now adjourned.

(Whereupon, at 11:55 a.m., the hearing was adjourned, to reconvene at 10 a.m., Tuesday, May 16, 1972.)

# U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—PROBLEMS OF CONGRESS IN OBTAINING INFORMATION FROM THE EXECUTIVE BRANCH

(Part 8)

TUESDAY, MAY 16, 1972

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS.

*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, John N. Erlenborn, and Frank Horton.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; and T. H. Saunders, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

Today, we commence the second day of our hearings into the problems of Congress in obtaining information from the executive branch, as part of our overall hearings on the operations of the Freedom of Information Act.

All of us—as Members of Congress and as members of committees and subcommittees of the House—have had personal experiences of requesting information from some executive agency and being told that it was unavailable, or nonexistent, or would take many man-years to compile, or dozens of other stalling, nonresponsive excuses.

But few of us have had the types of frustrating experiences that are the everyday routine with the General Accounting Office—an arm of Congress charged with heavy responsibilities in ferreting out the waste, inefficiency, and nonauthorized use of Government funds by executive agencies.

The GAO is in the frontline trenches in the fight against Government secrecy and has been for many years—from administration to administration, regardless of political coloration. It is obvious to all that, if the GAO is denied access to the information it needs to evaluate programs created by Congress or to conduct the in-depth type of audit necessary to assure that taxpayers' funds are being properly expended, then it simply cannot do the job it has been set up to do.

We will hear, firsthand, of some of the recent case histories in which GAO has experienced the general tightening-up of the access to vital information from the executive branch under the Nixon administration. This subcommittee and many others in both the House and Senate can also testify to this fact.

We will also hear from a distinguished colleague who has fought the battle to obtain information under the Freedom of Information Act as a private citizen after it was denied to her and other Members of Congress by the executive branch as a constitutional right.

We are pleased to have as our first witness the able Deputy Comptroller General of the United States, an old friend of mine. We warmly welcome Mr. Robert Keller. Then at 11:30 we will hear from our colleague, the gentlewoman from Hawaii, Congresswoman Patsy T. Mink.

Will you come forward, please, Mr. Keller?

Mr. Keller, it is the custom of this subcommittee as an investigating subcommittee to administer the oath to the witnesses, which we will do when we have a proper quorum present. I just warn you and your colleagues ahead of time and if you would introduce your colleagues then you may proceed as you see fit.

**STATEMENT OF ROBERT F. KELLER, DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES; ACCOMPANIED BY OYE V. STOVALL, DIRECTOR, INTERNATIONAL DIVISION; JAMES A. DUFF, ASSOCIATE DIRECTOR, INTERNATIONAL DIVISION; AND JAMES E. MASTERTON, SENIOR ATTORNEY, OFFICE OF THE GENERAL COUNSEL**

Mr. KELLER. Thank you, Mr. Chairman. On my right is Mr. Oye Stovall, who is Director of our International Division, and on my left is Mr. James Duff, who is an Associate Director of our International Division. Both of these gentlemen have appeared before this subcommittee before and I am sure you are familiar with their work.

First, let me say, Mr. Chairman, we are glad to be here, and we appreciate the subcommittee's interest in the work of the General Accounting Office, in particular our problems concerning access to documents of 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.

If I may at this point, I would like to offer for the record a summary of the pertinent statutes which governs the responsibilities of the Gen-

eral Accounting Office in the areas where it is required to carry out investigations and audits.

Mr. MOORHEAD. We would welcome that and without objection it will be made a part of the record.

(The material follows:)

BUDGET AND ACCOUNTING ACT, 1921 PUBLIC LAW 13, 67TH CONGRESS

INVESTIGATIONS AND REPORTS BY COMPTROLLER GENERAL

SEC. 312. (a) 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.

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committees of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time.

INFORMATION FURNISHED TO COMPTROLLER GENERAL BY DEPARTMENTS AND ESTABLISHMENTS

SEC. 313. 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 purposes of securing such information, have access to and the right to examine any book, 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.

LEGISLATIVE REORGANIZATION ACT OF 1946—PUBLIC LAW 601, 79TH CONGRESS

EXPENDITURE ANALYSES BY COMPTROLLER GENERAL

SEC. 206. The Comptroller General is authorized and directed to make an expenditure analysis of each agency in the executive branch of the Government (including Government corporations) which, in the opinion of the Comptroller General, will enable Congress to determine whether public funds have been economically and efficiently administered and expended. Reports on such analyses shall be submitted by the Comptroller General, from time to time, to the Committees on Government Operations, to the Appropriations Committees, and to the legislative committees having jurisdiction over legislation relating to the operations of the respective agencies, of the two Houses.

BUDGET AND ACCOUNTING PROCEDURES ACT OF 1950—PUBLIC LAW 784,  
81ST CONGRESS

SEC. 117. (a) Except as otherwise specifically provided by law, the financial transactions of each executive, legislative, and judicial agency, including but not limited to the accounts of accountable officers, shall be audited by the General Accounting Office in accordance with such principles and procedures and under such rules and regulations as may be prescribed by the Comptroller General of the United States. In the determination of auditing procedures to be followed and the extent of examination of vouchers and other documents, the Comptroller General shall give due regard to generally accepted principles of auditing, including consideration of the effectiveness of accounting organizations and systems, internal audit and control, and related administrative practices of the respective agencies.

LEGISLATIVE REORGANIZATION ACT OF 1970—PUBLIC LAW 510, 91ST CONGRESS

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 committee 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 of programs under the jurisdiction of such committee or joint committee.

MR. KELLER. I would call the subcommittee's particular attention to section 204(a) of the Legislative Reorganization Act of 1970 which directs the Comptroller General to "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, upon his own initiative, or when requested by any committee \* \* \* having jurisdiction over such programs and activities."

We think this section is important because it goes a lot further than just looking at vouchers and strictly financial type audits. It calls for program evaluation. Consequently, many of the records we need involve how a program is being carried out and what are the results rather than being limited to how much a particular program costs, or how much was paid out under a contract, and so forth.

The more important factors underlying the law, the 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 evaluative 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, which was established by Congress last year.

#### 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, U.S. 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.

Mr. MOORHEAD. Without objection it will be made a part of the record and, if you have any updating of that compilation, we would also welcome that.

(The material follows:)

COMPTROLLER GENERAL OF THE UNITED STATES,  
*Washington, D.C., September 10, 1971.*

B-163582

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

DEAR MR. CHAIRMAN: On February 25, 1971, you wrote to our office concerning executive branch denial of access to records. You pointed out that in recent years the committee has been denied access to many documents and other materials and that such denials preclude effective legislative oversight of executive branch performance.

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.

You ask that our office analyze the matter and furnish a compilation of summaries of all significant instances in recent years when we have been denied access to executive branch records or materials. You also ask that we submit our legislative recommendations to insure that the Congress cannot be denied access to executive branch documents unless the President exercises executive privilege.

As evidenced by the enclosed compilation and by recent testimony of officials of our office, insofar as GAO is concerned, absolute denial by the executive branch of access to records has in recent years been quite rare. For example in testifying on your bill S. 1125, 92d Congress, before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, copy enclosed, the Deputy Comptroller General on July 28, 1971, characterized our current problems on access as being those of frustrations and delays in carrying out our statutory responsibilities rather than those attending outright refusal of access on claims of executive privilege.

With regard to legislative recommendations, the Deputy Comptroller General stated in that testimony that the enactment of S. 1125 should result in a freer flow of information to the Congress and its committees except in those cases where the President himself has decided that disclosure shall be precluded on the ground of executive privilege. Specifically, he stated that, under the procedures contemplated by the bill, if the privilege is to be exercised by the President there should be no delays in the hearing processes and if the privilege is not to be claimed there is no basis remaining that we can see which would justify failure to testify. We therefore feel that the enactment of S. 1125 should go a long way to reduce the problems of access to records by the Congress and its committees, and, aside from endorsement of S. 1125 we have no recommendations to make concerning this aspect of the problem.

With regard to the delays that hinder effective performance of the duties of our Office, we feel that your amendment No. 343 to S. 1125 of July 29, 1971, would help avoid these delays and we are unable to fashion legislative recommendations which we feel would be more salutary than the language of your amendment.

This amendment would impose a sanction along the lines of that 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(e). Specifically, the amendment would provide that upon a determination by the General Accounting Office that any information requested of the executive branch by a committee or subcommittee of the Congress or the General Accounting Office has not been made available within 60 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 70th day after such request is received by such agency unless and until such information is made available or the President invoke executive privilege with respect to such information. In addition to helping to alleviate the problems that we have had in delays in obtaining access to information your amendment would also assist the Congress and its committees in day-by-day operations which require information, independent of the hearing processes.

It is hoped that this letter and its enclosure will assist the committee in its consideration of this very important problem. We would of course be pleased to further assist the committee in any way that we can.

Sincerely yours,

R. F. KELLER,

*Acting Comptroller General of the United States.*

Enclosure.

COMPILATION OF GAO ACCESS TO RECORDS PROBLEMS ENCOUNTERED IN MAKING  
AUDITS OF FOREIGN OPERATIONS AND ASSISTANCE PROGRAMS

In response to the request of the chairman, Senate Foreign Relations Committee of February 25, 1971, we have made an analysis of the access to records problem, including a compilation of specific instances where the General Accounting Office (GAO) has been denied access or delayed in obtaining access to executive branch records or materials during recent years.

We have cited examples of denials of information and delaying or hindering actions that have taken place during eight overseas reviews conducted by GAO's International Division during approximately the last 2 years. Five of the reviews were conducted at the request of your committee and the remaining three were initiated by GAO.

We believe the Budget and Accounting Act of 1921, as reinforced by recent expressions of intent by congressional committees, leaves no doubt but that Congress and GAO are expected to have access to all records, documents, or papers necessary to effectively evaluate the various programs of the executive branch.

However, the Departments of State and Defense have in many instances taken the position that certain information is not releasable to GAO and the Congress. Information has been denied our auditors both in the field and at the Washington level and in certain cases, information has been supplied only after time consuming reviews by successively higher organizational levels within the Departments.

The time-consuming processes employed by the departments in many cases have hampered our auditors in the discharge of their duties to the point that audit teams in the interest of our economical use of manpower resources had to be withdrawn from the audit site prior to a decision being made by the departments as to whether our request to examine documents would be approved or denied. In other cases, information was provided on a piecemeal basis and certain documents were withheld which would have provided the continuity of departmental actions necessary in our evaluation of the overall program under review.

In our opinion, the delays result in a de facto denial of records which should be made available in accordance with our legislative authority and the intent of Congress.

Following is a list of types of information that we believe are necessary in the conduct of an audit but have not been provided in a timely manner or refused outright:

1. Future planning information and documents, both formal and informal;
2. Internal working papers and staff recommendations relating to programs planned or in process;
3. Negotiation documents, papers, memorandums, and working papers, before, during and after negotiations, regardless of whether or not the information is considered sensitive;
4. Management reports including recommendations or conclusions reached, whether approved or unapproved by higher authority, field trip reports, observations, and records of conversations pertinent to the matters under review;
5. Access to records, documents or papers originated or directly related to foreign governments but in the possession of U.S. agencies, when they relate to programs in which the United States has a direct interest; and
6. Access to all U.S. supported bases and installations regardless of the geographical location.

Following is a discussion of GAO's authority under the Budget and Accounting Act of 1921, and the Foreign Assistance Act of 1961; Department of State and Department of Defense (DOD) and their various organizational elements, regulations, directives, or messages on GAO's right of access to information; and examples of denials and delays of information by the Departments of State and Defense.

#### GENERAL ACCOUNTING OFFICE AUTHORITY

The position of GAO is that full and complete access to all records pertaining to the subject matter of an audit or review is required. This is required 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. This policy does not admit the propriety of any restrictions on GAO's legal authority other than that specifically contained in law. The right of generally unrestricted access to needed records is not only based on laws enacted by the Congress but is inherent in the nature of the duties and responsibilities of the GAO.

The basic authority governing GAO's access to records of Government agencies is contained in section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 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 laws and GAO's policy of insisting on generally unrestricted access to pertinent records of agencies and contractors in making GAO audits and reviews are summarized below:

1. The making of 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 individuals directly engaged in programs that are an essential and integral part of operations; knowledge of these types is just as important in making an independent review as it is in making the basic management decisions.

3. Withholding information could permit concealment of adverse conditions by responsible officials. The denial of information developed in an internal review to higher authority, or any other official properly concerned, hampers the external review and independent consideration of the effectiveness and efficiency of the activities, and necessitates a duplication of effort and increased costs.

4. Internal reviews on behalf of agency management are highly desirable. Such reviews represent one of the methods by which management can keep informed of how large and complex activities are being carried out. Management should take vigorous corrective action on any deficiencies disclosed. However, the effectiveness of a program of self-evaluation and management improvement is not dependent upon restricting the information developed to the individuals or departmental level responsible for the activity under examination. Such information is of great importance to higher administrative levels of review having a legitimate interest or concern in the subject. The effectiveness with which internal review activities are carried out and the effectiveness with which corrective action is implemented is clearly of interest and concern to the GAO in the performance of its statutory responsibilities and reporting to the Congress.

5. There is no basis in law or logic for a distinction between factual information and internal opinions, conclusions, and recommendations insofar as our authority and need for information is concerned. A sharp distinction between these categories is not only difficult to make but physical segregation of them is impractical.

6. The disclosure to the GAO of frankly stated internal opinions, conclusions, and recommendations is not contrary to the public interest. The system of management control which results in such internal communications should be properly conceived, administered, and dedicated to efficient and effective operations rather than oriented toward a defense of possible criticism. Under these circumstances, the requirement of disclosure should tend to improve the caliber of the internal opinions, conclusions, and recommendations rather than impair their usefulness to the management because of softened criticism, avoidance of doubtful matter, and general restraint.

7. All books, documents, papers, and other records relating to the costs borne by the United States are records relating directly to the financial interest of the United States. Such records are not limited to formal agreements or contracts and the supporting data, but include all underlying data concerning the need, utilization, and disposition of funds which afford the basis for or are involved in any way with the incurrence of costs by the United States. Pertinent records may include, but are not limited to records in support of (a) future plans and programs, (b) internal working papers, observations and trip reports of advisers and (c) evaluations, recommendations and conclusions of internal evaluation groups.

A remedy bearing on our access to records of Government agencies is contained in section 634c of the Foreign Assistance Act of 1961, as amended. Section 634c states that:

"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 Accounting 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."

The above section applies only to funds appropriated under the Foreign Assistance Act; it is not applicable to the military service appropriations.

#### DEPARTMENT OF DEFENSE AND DEPARTMENT OF STATE RESTRICTIVE REGULATIONS

Both the Departments of Defense and State and their various organizational elements recognize GAO's rights to documents, records and papers as contained in the Budget and Accounting Act of 1921, but at the same time the Departments have directed that certain types of information not be furnished to GAO. Normally these regulations or directives and implementing messages do not state that GAO cannot be furnished the information, but rather that their personnel in the field can not furnish the information unless authorization is received from higher authority; this normally means officials of the Departments in Washington.

Following are pertinent excerpts from regulations, directives, and implementing messages of the Departments of State and Defense and their various organization elements restricting GAO's right to records.

#### DEPARTMENT OF DEFENSE

The Department of Defense's basic policy guidance on cooperation with GAO and access to records is contained in DOD directive No. 7650.1, dated July 9, 1958. Although the directive was not agreed to by us, it sets forth the working arrangement under which we have operated. That directive contains three categories of information that DOD considers to be essentially nonreleasable to GAO—those are (1) budgets for future years' programs, (2) reports of non-Department of Defense agencies, and (3) reports of Inspector General and criminal investigation organizations.

However, in some cases implementing messages from DOD and regulations by the military services and major commands have placed additional restrictions on GAO's access to records. The restrictions vary somewhat among the military services and commands. We believe the following two illustrations demonstrate the restrictions imposed by DOD on access to records necessary for GAO to make effective evaluation of DOD programs.

#### *1. U.S. European Command Headquarters, Directive No. 50-5 dated June 18, 1971*

The appendix to the above directive contains a listing of documents and categories of information which the chiefs of Military Assistance Advisory Groups and missions may not release to GAO without approval from higher authority. They are as follows:

- (a) Recommended changes to force objectives.
- (b) Host country replies to NATO questionnaires and related MAAG analyses.
- (c) Information relating essentially to military or international planning considerations and pertaining to matters of strategy, such as war plans or memorandums leading to the formulation of such plans.
- (d) The military assistance 5-year plan for a particular country except data included in the military assistance program which has been initially justified before the Congress.
- (e) The quantity and projected delivery of items and services included in a specific fiscal year military assistance program prior to the initial justification of the program before the Congress.
- (f) Operational status reports concerning tactical effectiveness of host country forces. (Factual data, such as personnel strengths and allowances and equipment inventories and allowances, may be extracted from these reports and furnished the GAO in response to a specific request for such data from the GAO.) Note: This restriction excludes combat capability rating assigned by chiefs of Air Force sections of the MAAG's.
- (g) Reports of the Inspector General, Foreign Assistance, Department of State.
- (h) USEUCOM command inspection reports. (Factual data specifically related to the area of the GAO audit may be extracted from these reports and furnished in response to a specific request for such data from the GAO).
- (i) Documents to intelligence collection and analysis.
- (j) Host country documents, reports, and data.

2. *Joint State-Agency for International Development-Defense message dated December 18, 1970*

This message, which was drafted by DOD, was directed to the American Embassies in Bangkok, Manila, Saigon, and Seoul, and the Pacific Command in Hawaii. It stated missions and commands should not, without specific Washington authority, allow GAO personnel to consult or otherwise have access to the following:

- (a) Documents relating to war plans, future military assistance service funded, or U.S. military operations budgets and planning data.
- (b) Confidential correspondence exchanged between heads of State.
- (c) Presidential memorandums.
- (d) Reports of the Inspector General.
- (e) Performance evaluation reports.
- (f) Internal executive branch working papers and memorandums.
- (g) Telegrams, memorandums, or other documents revealing sensitive information about the conduct of U.S. negotiations with participating countries or South Vietnam.
- (h) Other material which the Ambassador or major military component commanders consider may be sensitive and could, if revealed, have a serious adverse effect on the conduct of U.S. Government relations with the participating countries or with other countries or might otherwise prejudice the national interests of the United States.

The message also contained a statement that GAO representatives will have no need to consult participating country or Government of Vietnam officials or agencies for purposes of present review since such contacts could have adverse consequences.

In reviewing the military service regulations it is interesting to note that the military service regulations were revised between July and September 1970 which allows GAO access to planning estimates for specific programs. This revision, however, has not been incorporated in DOD regulations and implementing instruction.

DEPARTMENT OF STATE

The Department of State's basic overall policy guidance for making documents available to GAO is contained in their Foreign Affairs Manual (FAM), volume 4, section 934. The FAM quotes the pertinent part of section 313 of the Budget and Accounting Act, and states it is the State Department's policy to cooperate by making available to GAO representatives their documents.

However, the FAM further states that Department of State approval is to be obtained first when in the opinion of the Ambassador or bureau head any document requested by GAO is of such significance that:

1. Its disclosure would seriously impair relations between the United States and other countries in the conduct of foreign affairs, or otherwise prejudice the best interests of the United States.
2. It is a document directed to the President, the National Security Council, or a similar White House board.
3. It is a document relating to formulation of sensitive substantive policy (as distinguished from a statement of or implementation of policy).
4. It is a document that is generally restricted, such as personnel security files, records relating to citizenship of individuals, Foreign Service inspectors' reports, visa records, intelligence and investigative records, and classified material of other agencies except in accordance with the applicable regulations and consent of the originating agency.

In a November 17, 1970, message from the Department of State to all diplomatic and consular posts, the State Department restated their guidance on the release of information and documents to GAO. The message emphasized that while GAO has a statutory basis for requesting information and access to documents, the President at the same time, enjoys the historic privilege of withholding certain information the disclosure of which would be incompatible with the public interest.

The message enumerated the restrictions on GAO's access to records as contained in the FAM and also stated that sensitive information about the conduct of U.S. negotiations with foreign countries may come within the category of information restricted to GAO. The message also stated that should GAO representatives indicate an intention to approach the host government, they should be discouraged from doing so, unless contrary guidance is received from the State Department.

In a letter dated December 16, 1970, the Comptroller General requested the Secretary of State to rescind the additional restrictions placed on GAO's access to records as contained in the November 17, 1970, message from the Department of State. The Comptroller General noted in his letter that the new instructions would compound the problems that GAO has been experiencing in obtaining access to records pertinent to our reviews. A copy of the Comptroller General's letter was also forwarded to the Assistant to the President for National Security Affairs on December 19, 1970, in view of the fact that the Secretary of State's message was cleared by the White House prior to release.

On January 22, 1971, the State Department replied to the Comptroller General that it was not the intention of the State Department to issue more restrictive regulations regarding GAO's request in the field for access to documents, but rather to remind their overseas locations of the existing procedures as contained in the FAM on access to sensitive documents.

At the request of the Comptroller General, the State Department informed all diplomatic and consular posts on February 16, 1971, that it was not the intention of the November 17, 1970, message to impose additional restrictions on GAO's access to records.

The Assistant to the President for National Security Affairs replied on February 27, 1971, to the Comptroller's letter of December 19, 1970, and stated that the policy of the administration remains one of the fullest cooperation with the Congress and with the GAO. The letter, however, noted that in regard to the requirement for U.S. missions in the field to refer sensitive decisions back to Washington, that this seems a reasonable administrative procedure, and that it remains incumbent upon the departments to assure that such referrals are handled with dispatch here in Washington.

Based upon the delays that occurred in GAO's gaining access to records during our reviews, we believe that the implementing restrictions of November 17, 1970, to the FAM did in effect result in additional restrictions on GAO's access to records. Examples are included in the following section.

#### EXAMPLES OF DELAYS AND DENIALS OF INFORMATION BY THE DEPARTMENTS OF DEFENSE AND STATE

The Departments by their regulations, directives, and implementing messages have established hierarchic systems which have seriously restricted their field organizations in responding to requests for certain types of information. In many instances, after long delays occasioned by the referral of GAO requests to Washington, the information requested was received. However, by that time our field auditors were no longer at the site and were not in a position to properly evaluate the information in conjunction with other material at the site and could not readily obtain the views of the personnel most familiar with the information.

In addition to these delaying tactics, which hindered an effective timely evaluation of U.S. programs overseas, we were also denied other pertinent and significant information needed to properly carry out our statutory responsibilities. In one instance, we were denied the right to conduct a review; while in two other instances, we were denied the right to visit U.S.-supported military bases in Vietnam.

Shown below are a few examples of the denials and delaying tactics encountered by GAO during eight overseas reviews conducted during the last 2 years.

#### DEPARTMENTS OF DEFENSE AND STATE REFUSAL TO ALLOW GAO TO VISIT U.S.-SUPPORTED BASES IN VIETNAM

The Departments of Defense and State have denied permission to GAO to visit the Thai and Korean camps in Vietnam. Our reasons for requesting the visits were to observe the large amount of U.S. equipment and supplies provided to the Thai and Korean troops and to talk with U.S. military liaison personnel stationed at the camps as to their duties and responsibilities. An additional reason for our requests to visit the camps was the fact that we had observed during a visit to the Thai Overseas Replacement Training Center in Thailand on September 18, 1970, what appeared to be large amounts of excess equipment.

On September 21, 1970, we verbally requested permission from the Commander, U.S. Military Assistance Command, Vietnam, to visit Camp Bearcat, location of the Thai contingent. We were informed by the commander on September 23, 1970, that the visit would not be authorized without prior clearance from higher head-

quarters and that our request should be submitted in writing, which we did on September 25, 1970. While our request stated that we did not intend to talk to any Thai personnel during the visit to the camp, nevertheless, U.S. military officials in Vietnam, with concurrence of U.S. Embassy officials in Bangkok and Saigon, denied us permission to visit the installation at that time without clearance from higher authority. The reason cited for denying our request was that GAO should have no need to consult host country officials or agencies and that such contacts could have adverse consequences.

The Department of State sent a message dated November 17, 1970, to all of its diplomatic and consular posts which provided guidance to the posts for handling GAO examinations. Among other things, the guidance stated that GAO representatives should be discouraged from consulting host country officials or agencies, unless contrary guidance was received from the Department. A joint State-Agency for International Development-Defense message, dated December 18, 1970, reaffirmed this guidance (see page 3068).

The Comptroller General, in a letter to the Secretary of State, dated December 16, 1970, pointed out that GAO has regularly made visits to host government installations to see how assistance financed by the United States is being used. He stated that such inspections are essential if GAO is to carry out its responsibilities for evaluating the effectiveness and improving the management of U.S. programs. He further stated that any contacts GAO might have with host country officials are arranged through U.S. country team channels, and that we know of no problem that has arisen as a result of this phase of our reviews.

On February 5, 1971, our office in Saigon requested permission from the Commander, U.S. Military Assistance Command, Vietnam, to visit the Korean Base Camp at Qui Nhon, Vietnam. As with the Thai base camp request, our office stated that we did not intend to contact Korean personnel or review Korean records, but that we wished to make some visual observations of the condition and utilization of U.S.-provided facilities and equipment. However, on March 6, 1971, a message from the Secretary of Defense to Commander in Chief, Pacific (CINCPAC) stated that the requested GAO visit was disapproved, and that GAO should be satisfied to interview U.S. military liaison personnel at some U.S. facility, other than Qui Nhon.

Contrary to DOD's opinion, the proposal was not satisfactory for purposes of auditing. It would not enable us to make a firsthand observation of the existence, condition, and utilization of U.S. property provided the Korean forces for their use. We believe that the disapprovals of our requests to visit the Thai and Korean base camps in Vietnam were not justified. Furthermore, the disapprovals effectively prevented GAO from exercising its statutory responsibilities.

#### REFUSAL OF THE STATE DEPARTMENT TO ALLOW GAO TO CONDUCT AN OVERSEAS REVIEW

In March 1971, 13 months after GAO informed the U.S. Embassy in Germany that we planned to conduct a review of U.S. occupation costs in Berlin, we were informed by the Department of State that we would not be permitted to do so.

Our proposed review was designed to assure ourselves and the Congress that the U.S. occupation costs in Berlin which are properly chargeable to the Federal Republic of Germany are in fact borne by them, and that U.S. Government financial interests are being properly protected. Accordingly, in February 1970, we informed the U.S. Embassy in Germany and U.S. Army officials of our plan to review the U.S. occupation costs in Berlin. At the time, U.S. Army officials interposed no objections to our examination of their records and processes. However, a U.S. Embassy official expressed a reservation that the basic audit agreement on Berlin did not permit an independent review by any of the powers' supreme audit organizations. In our discussion with Embassy and Department of State officials, we emphasized that our review would be limited solely to U.S. occupation costs and would be based on records available in the U.S. agencies.

In our attempt to resolve the issue, an official of our office, in May 1970, formally requested that the Department of State authorize access to the pertinent records so that we could proceed with our review. In June 1970, we were advised by the Deputy Under Secretary for Administration and the Assistant Secretary for European Affairs, Department of State, that we could anticipate a reply to our request soon. After we had pressed for an answer over a period of 9 months through letters, telephone calls, and meetings, we were officially advised in March 1971 that access was denied.



In denying us access, the response by the Department of State made no reference to invoking executive privilege; the Department of State does not have authority to deny us the right to examine the records or to conduct the review.

The General Accounting Office has the authority and responsibility to audit U.S. records relating to expenditures and receipts of the United States. Refusal on the part of the Department of State to permit our staff to review the necessary records concerning occupation costs in Berlin precludes us from carrying out our responsibility for audits as provided by the Congress under section 305 of the Budget and Accounting Act, 1921. This section states that:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Thus, the right of the General Accounting Office to unrestricted access to pertinent records is not only based on laws enacted by the Congress but is also inherent in the nature of the duties and responsibilities assigned by the Congress to the General Accounting Office.

In the latter part of April 1971, we reported this matter to eight committees of the Congress as well as to the Secretary of State. Following issuance of the report, the chairman, Senate Committee on Foreign Relations addressing a letter to the Secretary of State requesting an explanation of the matter. As of June 1971 GAO has not been advised of a Department of State response.

MANAGEMENT REPORTS, TRIP REPORTS, AND SO-CALLED INTERNAL WORKING PAPERS  
DENIED TO GAO

The GAO during its review and evaluation of United States programs, whenever possible, utilizes the various reports prepared by executive branch personnel to avoid duplication of effort, and to ascertain the degree of internal management control exercised by executive branch personnel over the various programs involving U.S. expenditures.

The denial of these reports to GAO, including the recommendations and conclusions reached by personnel preparing the reports, seriously hinders the GAO from being responsive to congressional requests in a timely manner, and results in duplication of effort and expenditure. Following are a few examples of this type of information denied to GAO.

*Management reports.*—In connection with our review of the administration of the military assistance training program, we requested access to CINCPAC Personnel Evaluation Group reports for Korea, Thailand, and China. These performance evaluation group reports are a product of a CINCPAC evaluation group responsible for evaluating the effectiveness of the military assistance program and the various military assistance organizations in the Pacific Command. Therefore, in order for us to ascertain any program weaknesses and duplications of effort, the reports prepared by this internal management group were essential.

In March 1969 CINCPAC denied us access to the evaluation reports for Korea. We made a formal request to the Secretary of Defense for reports pertaining to Korea, Thailand, and China. Four months after our request, the Secretary of Defense, in a letter dated August 4, 1969, informed us that the reports were not releasable at that time. The Secretary of Defense gave approval on November 25, 1969, for CINCPAC to furnish briefings on the "salient training facts" in the evaluation reports. On December 16, 1969, our Far East branch received a CINCPAC briefing covering the military assistance program training data reportedly contained in the 1969 reports for Korea, China, and Thailand. We advised the DOD personnel briefing us that the general information provided in the briefing was of little value to us in performing our review due to lack of detailed data. We were told that CINCPAC policies and instructions prevented the release of necessary portions of the evaluation reports involving opinions, evaluations, and future planning data.

*Trip reports.*—In connection with our review of the use of Department of Defense excess defense articles in military assistance activities, we were denied access to official trip reports by DOD officials in Greece. The reason for our request was that trip reports, in addition to the factual matters contained in the reports, also contain opinions, observations, and recommendations submitted by subordinates making field inspections. Unless we receive access to the factual information and related interpretations we are inhibited in identifying problem areas.

Because of this need, our European branch representatives requested copies of the Army advisors' trip reports on March 8, 1971. On March 11, 1971, the Joint U.S. Military Advisory Group, Greece, agreed to try and extract for our use, certain portions of the trip reports. Headquarters, U.S. European Command Directive 50-5 permits the release of trip reports after opinions, observations and recommendations, which do not represent final actions, have been removed. However, on March 19, 1971, on the basis of a cable received from the Department of Defense providing guidance on GAO access, the Joint U.S. Military Advisory Group, Greece, informed us that they would not provide any portion of the trip reports that we had requested.

Contents of the DOD cable which established this guidance for the Joint U.S. Military Advisory Group, Greece, was not made available to us.

*Internal working papers.*—In connection with our review of U.S. assistance to Thailand in consideration of their deployment of forces to Vietnam, the Departments of Defense and State have refused us access to a document outlining the criteria for payments to the Thai Government. The document is referred to as the "Scope" document. It is our understanding that this document sets forth the financial framework within which the United States and Thailand operate and the specific commitments and activities the United States engage in relative to support of Thai troops participating in the free world military assistance program in Vietnam.

The Department of Defense refused us access to the Scope document on the basis that it was an internal working agreement, and the Department of State on the basis that the document did not originate with them.

The Scope document according to information provided to us in Thailand, has been used by a U.S. committee in Thailand to evaluate claims for reimbursement submitted by the Thai Government in connection with their forces serving in Vietnam. In our opinion we must know the criteria used by the committee as established in the Scope document if we are to determine that the committee is properly evaluating the Thai claims.

We first requested the Scope document from military officials in Thailand on July 21, 1970. On August 11, 1970, our onsite auditors were informed by the Military Assistance Command, Thailand, that decision on release of the Scope document has been referred to higher authority. We were also informed verbally that the U.S. Embassy in Bangkok was objecting to the release of the document. We contacted State Department officials on August 26, 1970, and they stated they had the document, but that since it was a DOD document they could not release it to us.

On September 1, 1970, we verbally requested that DOD furnish us a copy of the Scope document and on September 9, 1970, we made the request in writing. In reply to our request DOD on November 4, 1970, stated the following:

"The Scope document is a draft internal working agreement between the United States and the Royal Thai Government (RTG) concerning reimbursement rates and procedures, which is still under negotiation. Therefore, since it has no official status, the Scope document is not considered suitable for release to the GAO."

In our opinion the Scope document was clearly a working document needed in our review and should have been made available to us. It is interesting to point out that the DOD refusal as quoted above was classified when initially transmitted to us by DOD, and was not declassified until we specifically requested DOD to declassify the statement.

#### PERTINENT PLANNING DATA NOT PROVIDED TO GAO

GAO, in its reviews of overseas programs, very often needs to know the future planning information of the Departments of Defense and State to properly evaluate the effectiveness of current programs. This planning data often shows the justification or rationale for current programs, and the planned methods or programs to solve deficiencies or shortfalls.

For example, during our review of the use of DOD excess defense articles in Greece, which began in Greece on February 17, 1971, we requested data used by the Joint U.S. Military Advisory Group in programing excess material for Greece under the military assistance program. Some of the data requested included military assistance program force objectives, annual future year planning data, equipment authorization documents, and assets and delivery data to support requirements. The information requested was required in order to properly

validate the basis upon which the requirements for excess materials were computed and to evaluate the utilization of the material by the recipient country.

GAO was subsequently denied the requested planning data although some consolidated requirements and asset data was provided. The accuracy of the limited data provided could not be verified because military assistance program supported listings and equipment authorization documents were not made available.

Due to restricted access, the GAO field team suspended its review efforts in Greece on March 27, 1971, pending resolution of the access problems. At the time of its departure from Greece, 24 written requests for information which had been submitted by the staff to the Joint U.S. Military Advisory Group, Greece, were still unanswered.

The termination of the work in Greece was followed by a series of discussions and correspondence between the GAO field staff and the U.S. European Command in an attempt to reach an agreement on the access problem. The GAO staff in Washington also requested the assistance of the office of the Assistant Secretary of Defense for International Security Affairs. Throughout these discussions, the withholding of information from GAO was defended by DOD officials primarily because it was (1) closely related to Joint Chiefs of Staff objectives which were not releasable to GAO, (2) host country developed data which could be released only with country concurrence, or (3) North Atlantic Treaty Organization information not releasable by the Joint U.S. Military Advisory Group, Greece.

On May 5, 1971, an understanding was reached as to the additional information which would be made available to GAO in both Greece and Turkey. The extent of the additional information to be released was not acceptable to GAO, since it represented abstracted data which could not be verified against source documentation. Moreover, the release of much of the supporting data for requirements computations which was to be provided, remained subject to the approval of the host countries, and under the ground rules established by the U.S. European Command, virtually no evaluative data would be made available. However, in order to obtain as much information as possible on the use of excess material, the GAO field staff returned to Greece on May 24, 1971, to resume the review work which had been suspended almost 2 months earlier.

At the request of the chairman, Senate Committee on Foreign Relations, GAO, in January 1969, undertook a major review of the military assistance training program in 10 countries, including China and Thailand. In the initial phases of the review GAO had a number of problems in obtaining information necessary for the review. As a result, the chairman, Senate Committee on Foreign Relations, in a letter to the Secretary of Defense, dated May 21, 1969, requested that the Secretary of Defense insure that GAO be given access to planning information and all other pertinent information.

On June 26, 1969, the Secretary of Defense replied to Chairman Fulbright's letter of May 21, 1969. The Secretary of Defense stated that the formal 5-year plan for the military assistance program had not, in the past, been made available to GAO or to the chairman, House Committee on Foreign Affairs, because the plan is regarded as a staff study, an entirely tentative planning document at the staff level, and is usually extensively adjusted when the size of the budget submission is decided on by the President. The Secretary of Defense also stated that he, in order to fully cooperate with the committee, would have DOD officials give detailed briefings on the plan, as it relates to training, to anyone designated by Senator Fulbright.

On August 4, 1969, the Secretary of Defense sent a message to the Unified Commands, stating that GAO could be briefed on the military assistance program 5-year training program, comprising for the most part 5-year dollar projections. The message further stated that this guidance was based on the Secretary of Defense reply to Senator Fulbright's May 1969 inquiry as to the release of information to GAO.

In a message dated September 21, 1969, CINCPAC informed the Secretary of Defense that the GAO representatives in China and Thailand had requested access to the military assistance program planning reference books for those countries. The messages stated that CINCPAC, in accordance with DOD guidance, would advise CINCPAC representatives in those countries to provide narratives of the books, provided that extensive editing would not be required to eliminate future planning information. The message concluded by requesting that the Secretary of Defense formally refuse GAO's request for the books because only the Secretary of Defense could properly do so, in accordance with a DOD directive.

On September 26, 1969, the Secretary of Defense advised CINCPAC that the guidance furnished on August 4, 1969, still applied, and that if GAO repre-

representatives requested additional future planning information beyond that authorized, the request should be made to DOD through GAO in Washington, since only the Secretary of Defense can deny such a request.

A month later, October 27, 1969, the Military Assistance Command, Thailand, received approval from CINCPAC to release edited versions of the military assistance program planning books.

In our opinion, receipt of information which has been edited and then provided GAO in briefings does not provide the substantive indepth information required for our evaluation purposes. We believe that the unexpurgated versions of narrative sections of the plan should be made available to us so that we can review and analyze the reasoning and justification of actions taken or proposed with background data that DOD had reference to on making their judgments and decisions.

In our review of military assistance to the Republic of China in 1970, we were denied access by the DOD to a military air defense study for the island of Taiwan, as well as the joint strategic objectives plan for the Republic of China. We were told by DOD that the two documents contained contingency war plans as well as future year planning and were internal management working documents; therefore, they could not be released to us. This denial inhibited our evaluation of the integration, coordination, and contribution of DOD's planning to the achievement of overall U.S. objectives.

#### DELAYING TACTICS OF THE DEPARTMENTS OF DEFENSE AND STATE

The Departments of Defense and State have instructed their field personnel not to provide sensitive information to our field auditors, but to refer the request to Washington. The Departments in their guidance provided examples of some categories of information, such as negotiation documents, and agreements with foreign governments which are to be considered sensitive, but the decision on the classification of documents as sensitive in respect to nonreleasability to GAO apparently rests with appropriate responsible officials in the field. As a result of this guidance, our auditors have been unable to obtain needed information when requested. Documents classified as sensitive have been subject to many levels of reviews, and often before a decision was reached in Washington many months elapsed and our field auditors had left the field site when a decision to release the information had finally been reached.

For instance, in early 1970, we undertook a review of the U.S. assistance to the Philippine Government in support of the Philippine Civic Action Group at the request of the chairman, Subcommittee on U.S. Security Agreements and Commitments Abroad, Committee on Foreign Relations, U.S. Senate. The Departments of State and Defense delayed our work on this assignment to the extent that we had to curtail the scope of our review and qualify our report to the chairman.

Members of our staff were required to wait for periods of 2 weeks to 2 months to look at some documents they had requested, and frequently the documents proved to be of little value for our purposes. We were also restricted by ground rules established unilaterally by the Departments that effectively limited our review in the field to the Departments' very narrow interpretation of what it judged to be the scope of our review. This was perhaps the most restrictive limitation placed on our work, and it completely frustrated our attempts to review assistance to the Philippines that was not funded in the military functions appropriations.

Our audit staff members in the field were advised that documents which they requested that were releasable to us under the restrictions of the so-called ground rules had to be dispatched to Washington for departmental clearance. By early May 1970, only four of 12 documents which were requested by our staff members on January 23, 1970, had been released to them in Manila.

In our review involving U.S. assistance to Thailand, our Far East branch requested on July 30, 1970, certain adjutant general documents and message logs from the Military Assistance Command, Thailand. The message logs were requested in order to identify documents, records, or messages pertinent to our review. The Military Assistance Command advised us in the latter part of August 1970, that it had been necessary to request guidance from higher authority as to releasability of the information and suggested that GAO, also, contact such authority at the Washington, D.C., level. Following their suggestion, we addressed our request to the Department of Defense in Washington on September 9, 1970. We learned that following our request in August, the Military Assist-

ance Command officials had referred our request to the Embassy in Bangkok, who in turn referred the request to the State Department on August 31, 1970. The Department had informed the Embassy in Bangkok that they had no basic objection to the release of the logs; however, since they had not seen the logs, the Embassy would have to decide as to whether to release the logs. In a letter dated November 4, 1970 to GAO the Department of Defense stated that their decision was that access to the logs was authorized, provided the contents were releasable in accordance with existing guidance. However, by this point in time, the GAO audit staff had left the audit site where the logs were located. Thus, the purpose in examining the logs was as effectively defeated by the delays encountered as if an outright denial by the Departments had been made initially.

In connection with Thailand's involvement with free world forces in Vietnam, we requested information from the Department of the Army on October 6, 1970, concerning the computations by which they had arrived at certain amounts shown in quarterly reports to the Congress. This request was made in order that we might evaluate the validity and accuracy of the amounts shown in the quarterly reports submitted by the Department of Defense to the Congress. Although this information was prepared by October 23, 1970, it was not released until March 19, 1971. In a similar request for data made on October 12, 1970, the response was not furnished until March 25, 1971, even though we had made repeated attempts to elicit the information.

In connection with our current review of utilization of excess defense articles in MAP, we requested a country-to-country agreement between the United States and Australia on March 31, 1971. The agreement involves the overseas procurement transaction for the acquisition of trucks and trailers in Australia for delivery to Cambodia. The purpose for the request was to enable us to ascertain why the arrangement was made in lieu of alternatives available and whether, in fact, the agreement was a form of consideration to the Australian Government for their participation in the support of our efforts in Vietnam.

We first made our request for the agreement to the Department of State on March 31, 1971. On the same date the Department of State informed us that the agreement was dated March 4, 1971, and that they believed the document was unclassified but that our request should be channeled to the Department of Defense, rather than to them. Upon addressing our request to the Department of Defense on April 6, 1971, they referred us back to the State Department because State clearance was necessary for release of the agreement. The Department of State advised us on the same day that they were unable to release the document until they acquired clearance from the Australian Government through the Australian Embassy. On April 14, 1971, the State Department advised us that the Department of Defense had sought this clearance from the Embassy; however, on the same date, we received a denial from the Department of Defense of any such communication with the Australian Embassy. On April 15, 1971, the State Department informed us that the Department of Defense had received the Australian Government's clearance but that the Department of Defense must first present a written request for State Department clearance. On the same date, April 15, the Department of Defense told us the Australian clearance was still pending. Four days later, the Department of Defense told us that more internal coordination was necessary before a release was possible. In a followup concerning the status of our request, on April 28, 1971, the Department of Defense official whom we had contacted stated he had forgotten our request.

Finally, on May 5, 1971, DOD provided the agreement as requested. The agreement provided to GAO was classified although the agreement on file in the legal section of DOD was not so classified. In our opinion, the material included in the agreement does not appear to be of such a nature that the interests of the United States would be adversely affected if its contents were released to the public.

During our review of financial and material assistance provided to the Thai Government by the United States, our Far East branch representatives requested, on July 21 and July 28, 1970, 16 messages from the Military Assistance Command, Thailand, that were not received until January 27, 1971. The messages were originated by the Commanders, U.S. Military Assistance Commands, Thailand and Vietnam, the Secretary of Defense, the Department of the Army, and the Joint Chiefs of Staff during the latter part of 1967 and early 1968. Each of these messages was vital to our effective evaluation of U.S. assistance to the Thai Government. Their contents dealt with pertinent areas of our review, such as a HAWK missile system which the United States agreed to provide to

the Thais, training and equipping of Thai Forces, U.S. support related to a Thai Army Division and its deployment to South Vietnam, and the possibilities of further Thai contributions to free world forces in Vietnam.

As of August 28, 1970, the messages had not been received or made available for our review. Military Assistance Command, Thailand officials advised us that they had requested guidance from higher authority as to the releasability of the messages, and suggested we contact such authority at the Washington, D.C., level.

On September 9, 1970, we readdressed our request for the messages to the Department of Defense. Nearly 2 months later, on November 4, 1970, DOD responded, advising us that only two of the subject messages had been located. DOD stated that the two messages had been authorized to be released to our Far East representatives.

Finally, on January 23, 1971, DOD provided copies of the 16 requested messages. We believe that the 6-month delay, before we finally obtained all of the messages, was inexcusably long and seriously impeded our review.

On December 11, 1970, our representatives in Korea requested from the Provisional Military Assistance Advisory Group, Korea, the Provisional Military Assistance Advisory Group, Korea Military Assistance Plan Fact Book for 1969 Defense Ministers Conference. Since our representatives in Korea did not receive the document, a similar request was addressed to the Department of Defense in Washington on January 26, 1971. On January 29, 1971, our representatives in Korea were formally informed that the subject request had been referred to higher authority for determination as to releasability.

The document was provided to us in Washington on April 9, 1971, by the Department of Defense. Due to the delay of approximately four months involved in our acquisition of the document and the fact that our representatives had departed from the audit site by the time of receipt, we were denied the opportunity to analyze and discuss the material with appropriate host country officials.

COMPTROLLER GENERAL OF THE UNITED STATES.  
*Washington, D.C., October 13, 1971.*

DEAR MR. SECRETARY: In our discussion a few days ago I expressed to you my increasing concern with actions within the Department of Defense which are 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, especially military assistance activities.

Various communications from your Department (Office of Assistant Secretary of Defense, International Security Affairs) to the unified commands and military assistance advisory groups around the world and other related communications and directives have severely restricted the discretion of operating officials below the Department level to make information available to GAO auditors.

As you know, one of the most important duties of the General Accounting Office is to make independent reviews of agency programs and to report to the Congress the manner in which Federal departments and agencies carry out the laws enacted by the Congress. Our responsibilities are not limited to financial transactions but cover both the efficiency and effectiveness of agency programs. This was clearly established by the Congress when it enacted section 312 of the Budget and Accounting Act of 1921 and was reiterated by Congress when it enacted section 204(a) of the Legislative Reorganization Act of 1970. The Congress in establishing the General Accounting Office recognized that the Office would need to have complete access to the records of the Federal agencies, and provided the basic authority in section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 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, 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."

- To illustrate the current restrictive measures, I am enclosing copies of:
1. Commander in Chief, Pacific, Instruction 7500.2B, dated May 20, 1969.
  2. European Command Headquarters Directive 50-5, dated June 18, 1971.
  3. Joint State/AID/Defense message, dated December 18, 1970.

We believe these measures have created an atmosphere which has discouraged overseas officials from cooperating with GAO auditors; an atmosphere which has had the effect of restricting immediate access to information to data of a strictly financial nature. It has even been asserted by a DOD official in Washington that GAO requests for access to any document other than that normally categorized as being of a financial nature (implied as being only vouchers, bills of lading, receipts, and other similar documents) must be approved by the Department in Washington. We, obviously, could not function under those conditions. Note statutory citations to General Accounting Office authority enclosed.

Enclosed is a copy of a statement by Mr. Stovall, Director of our International Division, before the Subcommittee on Foreign Operations, Senate Appropriations Committee, June 24, 1971. That statement presented our views on the problems of access which we had experienced up to that time. While that statement related in large part to difficulties we had encountered in the performance of work requested by congressional committees, the same types of difficulties are continuing in relation to current work projects generated by GAO on our own initiative.

On several occasions, including mention in your letter to me dated September 4, 1971, questions have been raised as to the distinction between our reviews which are self-initiated and those undertaken at the specific request of congressional committees, especially when the latter involve the GAO inquiring into the judgmental rationale of management decisions underlying budget requests. Pursuant to section 312(b) of the Budget and Accounting Act of 1921 I would be required to conduct any investigation requested by the Congress. Conceivably, an investigation undertaken at a specific congressional request could be for the purpose of advising the Congress, or a committee thereof, as to the alternatives available in connection with the funding of a program. You will recall we did such a study in 1969 on the MBT-70 at the request of the Chairman of the Senate Armed Services Committee. We had the complete cooperation of the Department of Defense in making this study.

On the other hand, a review being made on our own initiative would normally be for the purpose of evaluating the overall management of an on-going program, or segment thereof, and reaching conclusions and outlining recommendations for improvement. I do not see the GAO role as a congressional bureau of the budget with responsibility for the review of departmental appropriation requests. However, where our review of the results of an on-going program leads us to a point where there could be a question as to the forward funding of the program we would be amiss in not bringing this to the attention of Congress, but without making recommendations as to particular levels of funding.

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.

Sincerely yours,

(Signed) ELMER B. STAATS,  
*Comptroller General of the United States.*

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U.S. GENERAL ACCOUNTING OFFICE,  
*Washington, D.C., Thursday, June 24, 1971.*

STATEMENT OF OYE V. STOVALL, DIRECTOR, INTERNATIONAL DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Committee: We are appearing in response to your request for our views on the problems of access to records and information needed for performance of our audit responsibilities relating to the military assistance programs.

One of the most important duties of the General Accounting Office is to make independent reviews of agency programs and to report to the Congress the manner in which Federal departments and agencies carry out the laws enacted by the Congress. The Congress in establishing the General Accounting Office, recognized that the Office would need to have complete access to the records of the Federal agencies, and provided the 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, 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."

GAO auditors, like all auditors, have to some degree always encountered problems in obtaining access to records and information. These are occupational hazards but we usually have been able to resolve most of our problems without undue difficulty. However, in our reviews of military assistance programs, we have encountered increasing difficulties in obtaining information needed to effectively evaluate and report on the administration of these programs. During the past year or so a number of our audit assignments involving the foreign assistance programs have been hampered and delayed with the result that we have had to some extent curtail the scope of the audit, in effect being precluded from fully carrying out our responsibilities in these cases.

It is not practical to raise the day-to-day access problems to the level of formal top requests and denials, and we have no evidence that any of the situations we have encountered involve the exercise of executive privilege. Absolute denial of access to a document is quite rare. Our reviews are hampered and delayed more by the time-consuming delaying tactics employed by the various organizational elements within and between the Departments of Defense and State in screening records and in deciding whether such records are releasable to the General Accounting Office. It is not unusual for our auditors to request access to a document at an overseas location and be required to wait several weeks while such documents are screened up the channels from the overseas posts and through the hierarchy of the Departments of Defense and State.

Our experience in making a study of the military assistance training program at the request of the chairman, Senate Committee on Foreign Relations, is an example of the problems we have encountered in obtaining access to information. In our report to the chairman on this study in February 1971, we summarized our problems with access to records and set forth the following conclusion, which we believe points up the problems of access to records and the effect of these problems on our ability to carry out effective reviews.

"During our review of the training program on behalf of the Senate Foreign Relations Committee, representatives of the Department of Defense and State have withheld or delayed the release of MAP reports and records essential to a full and complete review and evaluation of this program which is financed by considerable appropriated funds. The access-to-records problems experienced by our staffs during this review are a continuation of similar problems the GAO has encountered over the years in reviewing DOD programs, particularly evaluations of military assistance programs.

"While the DOD has taken the position in the past that future planning information is not releasable to GAO because it is subject to change, we do not believe that the DOD components should use this position to deny our access to such information as the operational status and capabilities of MAP recipient countries' forces merely because it is included as a part of future planning information."

"We believe further that the denial of access to routine reports prepared by MAAG personnel in the performance of advisory functions, on the basis that they are evaluative in nature, is unreasonable. The type of data and reports withheld from us during this review are necessary in our examination of the program as well as our review and evaluation of the administration of the program by the MAAG's and by other DOD elements. In our opinion, it is essential for us to have access to all papers, records, and data which are available to those DOD personnel who make the program decisions in order that we can ascertain how their decisions were made and whether all available pertinent data was considered in reaching the decisions.



"The denial of our access to the CINCPAC program evaluation group reports also impaired our review of this program. In carrying out its statutory audit responsibilities, GAO gives due regard to the effectiveness of the internal audit of an agency, such as the MAP audits performed by the CINCPAC activity and other DOD groups. In conducting our audits on behalf of the Congress, we make use of internal audit reports and other internal evaluations and perform such independent tests of the records as we feel to be justified under the circumstances.

"If we are permitted extensive use of internal audits and other evaluative reports, we are able to concentrate a greater part of our efforts in determining whether action has been properly taken by responsible officials, on the basis of the facts presented in these reports and evaluations, to correct identified program weaknesses. This also helps to eliminate duplication and overlapping in audit effort, and promotes full utilization of existing audit and investigative data.

"We believe that this access-to-records problem involves a matter that critically affects our future ability to conduct on behalf of the Congress thorough and complete reviews of the MAP. In order for GAO to carry out its legal authority to make independent reviews of MAP, it must have access to and make appropriate review and analysis of all DOD reports and records which evidence the expenditure of appropriated funds.

"We believe further that these objectives can be achieved if the Secretary of Defense will refrain from issuing guidelines which have the effect of limiting our reviews and will instead, instruct DOD subordinate commands to take a more cooperative, flexible, and realistic approach in the release of data and information requested by GAO in future MAP reviews."

In early 1970, we undertook a review of the U.S. assistance to the Philippine Government in support of the Philippine Civic Action Group at the request of the chairman, Subcommittee on U.S. Security Agreements and Commitments Abroad, Committee on Foreign Relations, U.S. Senate. The Departments of State and Defense delayed our work on this assignment to the extent that we had to curtail the scope of our review and qualify our report to the chairman. Appendix II to our report to the chairman (B-168501, dated June 1, 1970) set forth our problems as follows:

#### "ACCESS-TO-RECORDS DIFFICULTIES

"We were unable to complete our work and report on this assignment within a reasonable time because of the time-consuming screening process exercised by the Departments of State and Defense before making records available for our examination. Our work was seriously hampered and delayed by the reluctance of the Departments to give us access to the documents, papers, and records which we considered pertinent to our review. In general, we were given access to only those documents, papers, and records which we were able to specifically identify and request, and then we were given access only after time-consuming screening at various levels within the Departments.

"Members of our staff were required to wait for periods of 2 weeks to 2 months to look at some documents they had requested and frequently the documents proved to be of little value for our purposes. We were also restricted by ground rules established unilaterally by the Departments that effectively limited our review in the field to the Departments very narrow interpretation of what it judged to be the scope of our review. This was perhaps the most restrictive limitation placed on our work, and it completely frustrated our attempts to review assistance to the Philippines that was not funded in the military functions appropriations.

"Our audit staff members in the field were advised that documents which they requested that were releaseable to us under the restrictions of the so-called ground rules had to be dispatched to Washington for departmental clearance. By early May 1970, only four of 12 documents which were requested by our staff members on January 28, 1970, had been released to them in Manila.

"Our letter to the Secretary of Defense \* \* \* which is similar to a letter that we addressed to the Secretary of State, illustrates one of our many attempts to resolve our access-to-records problems. The reply from DOD \* \* \* characterizes, in our opinion, the attitude of DOD during our review.

"Although we have been able to obtain sufficient information upon which to base this report, we are not certain that we have the full story. In view of the restricted access to records, there is the possibility that the agencies may have withheld information which is pertinent to our study."

Following our review in the Philippines we initiated a study of U.S. assistance to the Government of Thailand. In an attempt to avoid the conditions previously experienced, the Comptroller General on June 26, 1970, wrote to the Secretaries of Defense and State citing the problems experienced in the Philippines review, requesting that they eliminate the necessity for the lengthy screening process, and citing the scope and authority for our review as follows:

"\* \* \* the scope of our review will be broad enough to permit our representatives to investigate all matters concerning the receipt, disbursement, and application of public funds related in any way to our relations with the Government of Thailand. Pursuant to the authority of section 313 of the Budget and Accounting Act of 1921, 31 U.S.C. 54, representatives of the General Accounting Office will be requesting officials in your Department for access to, and when we consider necessary, copies of any books, documents, papers, or records in the custody or control of your Department which we believe may contain information regarding the powers, duties, activities, organization, financial transactions, and methods of business related to the scope of the review."

Unfortunately, we have experienced similar problems in obtaining access to documents required for our review of assistance to Thailand.

In connection with processing our report on the review of the military assistance training program mentioned earlier, the Special Assistant to the Assistant Secretary of Defense, International Security Affairs, in a letter dated September 25, 1970, stated:

"Similarly, the Department of Defense cannot permit to go unchallenged that section of the report concerning complaints that the GAO auditors were hindered and delayed in their efforts because the Department of Defense had denied them access to 5-year MAP planning data and to inspection and evaluation reports known as PEG reports. Apart from the fact that custom, tradition and precedent have decreed that information of such internal nature will not be disclosed outside the executive branch in order to preserve the confidentiality of the relationship of superior and subordinate, an understanding was also reached a number of years ago between the General Accounting Office and the Department of Defense whereby planning data and inspector type reports would not be provided. The Department is, therefore, both surprised and chagrined over the fact that the GAO would endeavor to make such an issue over these specific categories, an issue which had been resolved years ago."

A copy of this Department of Defense letter was sent to the chairman of the committee by the Department.

In transmitting our report to the chairman the Comptroller General took note of this Department of Defense letter and advised as follows:

"In regard to the Department's position concerning the access-to-records matters discussed in the report, the General Accounting Office has never reached such an understanding with the Department of Defense. To the contrary, we have always maintained that we are entitled by law to have access to, and the right to examine, all records of the Department of Defense and its component commands that we consider pertinent to the matter or subject under review.

"The inspection and evaluation reports referred to in the Department of Defense letter are management reports prepared by a program evaluation group of the Unified Command Headquarters. We have always regarded complete access to reports of this type as necessary in order for us to carry out the responsibilities we have to the Congress."

The policy of the executive branch, with respect to release of information to the Congress, was set forth by the President in a memorandum to the heads of executive departments and agencies, on March 24, 1969, as follows:

"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."

Although the Departments of State and Defense indicate in their directives that it is their policy to provide maximum cooperation and assistance to the General Accounting Office, we have found it quite difficult to obtain the information which we need to conduct our reviews relating to foreign assistance activities.

In our discussions with departmental officials, they have frequently stated that the documents or information being withheld are not releasable to the GAO because of one or more of the following reasons:

(1) Review, examination, or disclosure would seriously impair relations between the United States and other countries, or otherwise prejudice the best interest of the United States;

(2) Access to documents including information and debates used in formulating policy decisions would seriously hamper a candid exchange of views within the agency; and

(3) Access to information on future planning would not be appropriate because it has not received the approval of the President or been presented to the Congress.

Notwithstanding our difficulties in the past we will continue to press for information we think is necessary for us to have in order to carry out our responsibilities.

Mr. Chairman, this concludes our prepared statement. Mr. Duff and I will be glad to answer questions.

COMMANDER IN CHIEF PACIFIC,  
FPO San Francisco, June 19, 1970.

CINCPAC INSTRUCTION 7500.2C.

From: Commander in Chief Pacific.

To: Distribution list.

Subject: Release of information to the U.S. General Accounting Office and to foreign governments; guidance concerning.

Reference: (a) DOD Military Assistance Manual (DOD MAM), part II, chapter W.

(b) CINCPACINST 7500.1 (series).

(c) CINCPACINST 5040.2 (series).

(d) CINCPAC Military Assistance Manual (MAM), part I, section A.

1. *Purpose*.—To provide guidance on the release of information to the U.S. General Accounting Office (GAO) and to foreign governments.

2. *Cancellation*.—CINCPACINST 7500.2B of 20 May 1969 is hereby canceled.

3. *General*:

(a) As an instrumentality of the U.S. Congress, the GAO has broad authority for conducting independent surveys, reviews, audits, and investigations of all agencies and functions of the executive branch of Government, including the review of all activities relating to the MAP. References (c) and (b) pertain.

(b) In general, authorized and properly cleared representatives of the GAO may and should have access to data and documents pertinent to the subject being examined. However, there are certain restrictions on the release of information to the GAO, particularly as they relate to the PACOM military assistance program (MAP), and these are enumerated in paragraph 4, below.

(c) Formal refusal to furnish information requested by the GAO may be made only by the Secretary of Defense or the Secretary of the military department concerned. Accordingly, in instances of GAO requests for information which is not releasable, the GAO auditor should be advised that the data are being withheld only because of the lack of authority to release, and full particulars should be immediately referred to CINCPAC for resolution.

4. *Guidance on release of information to the GAO*:

(a) Internal audit reports of the military department audit organizations and associated working papers shall be made available to the GAO representatives by the audit agency where such reports and working papers are maintained and filed.

(b) Budgets for any future fiscal year will not be released.

(c) Reports of military department Inspectors General and criminal investigation organizations shall not be furnished except upon approval of the appropriate departmental Secretary.

(d) Reports of non-Department of Defense agencies (including FBI reports) shall not be furnished without written consent of the originating agency.

(e) Contents of military plans will not be disclosed except as authorized by the Joint Chiefs of Staff and/or the Secretary of Defense.

(f) Military assistance plans and programs are preliminary planning documents prepared within the executive branch of the Government as a basis for decisions by top executive authorities. This status is not altered by their being approved in Washington as a basis for further planning actions, up to the point where a program has been transmitted to the Congress with a budget request.

Therefore, such documents may not be released to the GAO without specific authorization of the Secretary of Defense. Care should be exercised in the release of information contained in CINCPAC military assistance planning reference books so that information regarding future planning information is not compromised. In this regard, the GAO may be given access to narratives in the above documents (e.g., "Past Accomplishments") which do not contain future planning information. Since DOD internal auditors have access to these documents and since DOD internal audit reports may be available to the GAO when requested, extreme care must be exercised to insure that findings and recommendations on MAP operations based upon information obtained in these documents regarding future plans are not compromised. GAO requests for future planning information will be handled in accordance with the provisions of paragraph 3c of this instruction.

(g) Audited activity and CINCPAC comments on DOD Deputy Comptroller for Internal Audit (DCIA) audit reports shall be furnished only after the ASD/ISA endorsement to the DCIA report is received. Any release prior to that time will be qualified in writing as a tentative management position subject to modification or elaboration.

(h) Reports of CINCPAC evaluations conducted in accordance with reference (c), commonly referred to as PEG reports, shall not be furnished. Extracts from such reports of pertinent factual data are releasable; however, the remainder shall be treated as an internal facet of CINCPAC's management of the MAP and shall not be released. Requests by GAO representatives for information contained in PEG reports which is considered not releasable shall be referred to CINCPAC.

(i) As a general rule, records and reports of a host government held by a MAAG which are necessary to the proper conduct of an audit shall be made available to GAO auditors, except in cases where the host government has placed specific restrictions on their distribution or in exceptional cases concerning sensitive information which the MAAG Chief considers should not be disclosed to the GAO. In the latter case, desires of the host government may be requested after consultation with the Ambassador. Requests by GAO auditors for host government information or documents not in possession of the MAAG should be addressed to the host government only with the concurrence of the Ambassador. CINCPAC will be notified in cases where the host government objects to release of information to the GAO, so that ASD/ISA may be informed.

#### 5. Release of MAP information to foreign governments:

(a) Guidance concerning disclosure of military assistance plans and programs to host government authorities is contained in reference (d).

(b) Chiefs of MAAGs may disclose pertinent details of audit agency reports and CINCPAC PEG reports, including the source of the data, to host government authorities when action by those authorities is required to correct discrepancies or to improve host country armed forces functioning. In this connection, care should be taken to insure that the information released is kept within proper context, U.S. interests are protected, and audit agency personnel and CINCPAC PEG representatives are not involved in matters beyond their purview. Coordination with appropriate U.S. Embassy officials is expected.

F. E. JANNEY,

*Deputy Chief of Staff for Military Assistance, Logistics and Administration.*

### HEADQUARTERS—U.S. EUROPEAN COMMAND, DIRECTIVE NO. 50-5

#### COMPTROLLER

#### (Relationships With U.S. General Accounting Office)

1. *Purpose.*—To define U.S. General Accounting Office (GAO) relationships with USCINCEUR and commanders/chiefs of EEIC, USEUCOM MAAGs/missions, and component commands (joint matters only).

#### 2. *References.*

(a) DOD Directive 7650.1, subject: General Accounting Office Comprehensive Audits.

(b) AR 36-20, subject: U.S. General Accounting Office Audits.

(c) SECNAVINST 5741.2D, subject: Relations With the General Accounting Office.

(d) AFR 11-8, subject: Air Force Relations With General Accounting Office (GAO).

(c) USEUCOM Directive 50-10, subject: Processing of Audit Reports and Reports of Audit Activity.

### 3. Policy.

(a) The GAO, an independent agency of Congress, has broad authority for conducting audits and investigations in the executive departments and agencies (31 U.S.C. 54 and 31 U.S.C. 67). The purpose of this authority is to enable the Comptroller General, as an agent of Congress, to determine how each agency discharges its financial responsibilities; that is, to insure the proper management of fiscal, personnel, and materiel government resources.

(b) GAO comprehensive audits will be directed only to the nontactical operations of the Department of Defense, for the purpose of evaluating the results of financial management (paragraph IIA, reference a). It is JCS and USCINCEUR policy to cooperate to the fullest possible extent in assisting the GAO to pursue its inquiries which are within the responsibilities assigned by Congress.

This directive supersedes ED 50-5 January 8, 1970.

4. *Release of Information to the GAO.*—Authorized representatives of the GAO will be given access to, and allowed to examine, such records as are necessary to permit them to carry out their duties and responsibilities, subject to the limitations cited below which require approval of higher headquarters. Oral requests for information by auditors will normally be honored. However, when the nature of the question is such that a written inquiry would lead to a more adequate response, or for other justifiable reasons, the auditor may be requested to state in writing the particular information desired.

(a) In general, the policies and limitations on release of information cited in AR 36-20 are applicable to Headquarters, USEUCOM and the USEUCOM MAAG's and missions. Component commands will follow applicable service directives (references b through d). Examples of information cited in these directives which requires departmental or JCS approval prior to release are:

(1) Top secret information.

(2) Documents (other than published manuals and regulations) related to tactical operational planning or conduct of military operations, war plans, force deployments, force goals, and intelligence collection and analysis.

(3) Budget program data for future fiscal years that have not yet been presented to Congress, including related preliminary planning documents.

(4) Reports of inspection and investigation.

(b) In addition, it is USCINCEUR policy that the following information will not be released to GAO without prior approval by USCINCEUR or JCS, as applicable:

(1) Any information from USEUCOM—or JCS—originated documents.

(2) Information relating to pending management decisions, including:

(a) Opinions, observations, and recommendations which do not represent final or official action.

(b) Documents referred for decision to a commander or from one echelon to a higher echelon, and on which a final decision has not been reached, including related working papers and internal memorandums.

(3) Minutes of meetings, either verbatim or in summary form, that record proceedings, discussions, and actions.

(c) Information, documents, and reports received from other Government agencies will not be released to the GAO, except as authorized by the originator.

(d) Host country documents, reports, and data will not be released to the GAO until after the host country has been given an opportunity to interpose objection.

(e) In certain instances, GAO personnel may request information which is otherwise releasable but is contained only in documents falling within one of the categories cited above. In such cases, the releasable information necessary to the audit may be summarized from the nonreleasable documents and furnished the GAO.

(f) The fact that a document is classified Secret or Confidential is not in itself reason to deny release to properly cleared GAO personnel. The Comptroller General has established a system for insuring the proper safeguarding of classified matter, and has adopted DOD standards for granting personnel clearances.

(g) See appendixes I and II for examples of nonreleasable and releasable information.

### 5. Requests regarding release of information:

(a) Questions involving the releasability of information to GAO should be addressed to USCINCEUR, Attention: ECCM-F, or service departments, as appropriate.

(b) GAO requests for host country information or documents will be made to the host government only with the concurrence of the U.S. Ambassador.

(c) When it is determined that information is not releasable without approval by higher authority, GAO will be advised that the request for such information must be submitted through GAO channels to USCINCEUR, to JCS, or to DOD/service departments, as appropriate.

6. *Responsibilities:*

(a) GAO European Branch, Frankfurt. By agreement with USCINCEUR, the Director, GAO European Branch, or his representative will advise the Comptroller, Headquarters, USEUCOM, and component command comptrollers of proposed GAO visits to USEUCOM activities. Notification of visits will indicate the date(s), title, and planned scope of the audit or review. (This procedure will be followed by GAO except when advance announcement would defeat the purpose of the audit.) The GAO European Branch will provide current rosters showing the security clearances of all GAO auditors in the USEUCOM area.

(b) Headquarters, USEUCOM (Comptroller). The Headquarters, USEUCOM Comptroller is the designated USCINCEUR point of contact for the GAO. He will maintain necessary liaison with that organization, and will—

(1) Inform the Headquarters, USEUCOM staff, components, and MAAG's/missions of proposed GAO activities in their areas of responsibility.

(2) Process USCINCEUR responses to GAO reviews and reports of audit (reference e).

(3) Assist GAO in scheduling meetings and visits with USEUCOM personnel.

(4) Assist the Headquarters, USEUCOM staff and MAAG's/missions with GAO administrative matters; for example, changing visit dates, obtaining additional clarification of the purpose and scope of proposed audits, responding to GAO reports of audit, providing guidance regarding release of information to GAO (including guidance to components on joint matters).

(5) Maintain close contact with component command comptroller personnel regarding GAO activities within the commands which would be of interest to USCINCEUR.

(c) Headquarters, USEUCOM/MAAG's/Missions. Headquarters, USEUCOM directors/office chiefs and chiefs of MAAG's and missions are authorized to receive accredited GAO representatives after initial contact and necessary liaison have been established by GAO with the Headquarters, USEUCOM Comptroller. Advance preparations will be made to facilitate the conduct of audits. This includes providing adequate working space and facilities, as well as timely assistance in making necessary information and records available. In addition, Headquarters, USEUCOM directors/office chiefs and chiefs of MAAG's/missions will—

(1) Insure that personnel involved in briefing or participating in discussions with GAO representatives are thoroughly familiar with the policies governing release of information to the GAO.

(2) Inform the Headquarters USEUCOM Comptroller when the timing of a scheduled audit will cause major problems (particularly in relations with host countries).

(3) (Chiefs of MAAG's/missions only.) As required, inform the U.S. Embassy and appropriate host country personnel of the purpose of schedule audits and of the statutory responsibility and authority of the GAO.

(4) (Chiefs of MAAG's/missions only.) Keep USCINCEUR advised of GAO activities within their areas of responsibility as prescribed by ED 50-10 (reference e).

(d) Component commands. Component commanders will—

(1) Keep the Headquarters, USEUCOM Comptroller informed of GAO activities within their commands which could be of interest to USCINCEUR.

(2) Insure that personnel involved in briefing or participating in discussions with GAO representatives are thoroughly familiar with the policies governing release of information to the GAO.

For the commander in chief:

Official:

A. D. SURLES, Jr.,

*Lieutenant General, U.S. Army, Chief of Staff.*

H. L. GRAYBILL,

*Lieutenant Colonel, U.S. Air Force, Adjutant General.*

## APPENDIX I

## EXAMPLES OF INFORMATION NOT RELEASABLE TO GAO WITHOUT SPECIFIC AUTHORITY

Listed below are documents and categories of information which may not be released to the GAO without approval from higher authority.

- (a) Recommended changes to force objectives.
- (b) Host country replies to NATO questionnaires and related MAAG analyses.
- (c) Information relating essentially to military or international planning considerations and pertaining to matters of strategy, such as war plans or memorandums leading to the formulation of such plans.
- (d) The military assistance 5-year plan for a particular country. (For data which can be extracted from an MA 5-year plan for release to the GAO, see app. II.)
- (e) The quantity and projected delivery of items and services included in a specific fiscal year military assistance program prior to the initial justification of the program before the Congress.
- (f) Operational status reports concerning tactical effectiveness of host country forces. (Factual data, such as personnel strengths and allowances and equipment inventories and allowances, may be extracted from these reports and furnished the GAO in response to a specific request for such data from the GAO.) Note: This restriction excludes combat capability ratings assigned by chiefs of Air Force sections, MAAG's, for inclosure B, military assistance program report, RCS: AF-V12 (paragraph f, app. II).
- (g) Reports of the Inspector General, Foreign Assistance, Department of State.
- (h) USEUCOM command inspection reports. (Factual data specifically related to the area of the GAO audit may be extracted from these reports and furnished in response to a specific request for such data from the GAO.)
- (i) Documents related to intelligence collection and analysis.
- (j) Host country documents, reports, and data (paragraph 4d and 5b of basic ED).

## APPENDIX II

## EXAMPLES OF INFORMATION RELEASABLE TO GAO

Following are examples of documents and categories of information which may be released to the GAO.

- (a) USCINCEUR supplements to the DOD military assistance manuals, subject to the provision that no material therein is identified by the releaser with NSC documents, meetings, and discussions, and subject to the provision that recommended changes to force objectives are not released.
- (b) A military assistance program for a specific fiscal year once that program has been initially justified before the Congress.
- (c) Data extracted from a military assistance 5-year plan which are in support of or included in a military assistance program which has been initially justified before the Congress.
- (d) Data in response to specific GAO inquiries regarding specified line items of MAP equipment or training in the military assistance programs as follows:
  - (1) Specific training requirements in the currently developed MA program, as initially justified before the Congress. Also, training requirements in subsequent fiscal years which are directly associated with line items of MAP equipment being delivered from prior approved MA programs.
  - (2) Specific equipment in the currently developed MA program, as initially justified before the Congress. Also, equipment contained in subsequent fiscal years which has a direct relationship to line items of training in prior approved programs. Release of data in accordance with these procedures may be made with respect to each succeeding fiscal year MA program once the MA program for the succeeding fiscal year is initially justified before the Congress.
- (e) Journals of military assistance.
- (f) Inclosures A, B, D, G, and H, of the military assistance program report (RCS: AF-V12) and factual data from the narrative portions of this report.
- (g) MAAG unit visit reports, mobile training team reports, and contract technical service personnel (CISP) reports, except for those portions of the reports

which reflect opinions and recommendations which are (1) preliminary in nature, (2) not yet reflected in command policy, or (3) the release of which would interfere with the decisionmaking process.

(h) DOD internal audit reports and MAAG and USCINCEUR responses thereto.

[Department of State Telegram]

JOINT STATE-AID-DEFENSE MESSAGE

DEPARTMENT OF STATE,

March 1, 1971.

Subject: GAO review of USG assistance to countries for their participation in the free world assistance program in Vietnam.

1. The countries participating or who have participated in the free world assistance program in Vietnam who are receiving USG military and economic assistance are Korea, The Republic of the Philippines and Thailand. These three countries are hereafter referred to as "participating countries."

2. Guidance for use in connection with subject GAO review. In responding to GAO field investigators requests for information and access to and/or release of documents follows:

A. DOD directive 7656-1 will apply for DOD personnel and CA-5816, dated November 17, 1970, and provisions of 4 fam 934 will apply for State and AID personnel subject to supplemental guidance below.

B. Care in determining accessibility and releasability of executive branch documents and records must be exercised but, within the limitations prescribed herein, field should adopt fully cooperative attitude toward GAO investigation.

C. GAO representatives, both in Washington and in the field, are authorized to consult official financial documents relating to the receipt, disbursement and application of public funds for free world forces in Vietnam. This would include verification of deliveries of military equipment, supplies and services to the extent this can be accomplished without questioning personnel or agencies of the participating governments or GVN.

D. Any document known to have been given to Pincus and Paul or to Symington subcommittee, or GAO, during prior reviews may be shown to GAO without reference to Washington and copies may also be given, if requested. State sending to embassy Seoul authoritative listing of documents relating to Korea given to Pincus and Paul or directly to Symington subcommittee. State has previously furnished comparable listing to embassy Bangkok.

Embassy Manila is informed as to documents released to Pincus and Paul or directly to Symington Subcommittee. However, documents previously shown to Pincus and Paul but not released to them, Subcommittee, or GAO, should be treated under general guidance (2E, 2F, and 2G below.)

E. Missions and command should not without specific Washington authority allow GAO personnel to consult or otherwise have access to the following:

(1) Documents relating to war plans, future MASF or U.S. military operations budget and planning data.

(2) Confidential correspondence exchanged between heads of state.

(3) Presidential memoranda (other than that of FY 1970 AID program of January 13, 1970).

(4) Reports of inspectors general (not including IGA reports on AID economic assistance to participating countries).

(5) Performance evaluation reports.

(6) Internal executive branch (other than AID or USOM unless subject to (8) below) working papers and memoranda.

(7) Telegrams, memoranda or other documents (other than AID or USOM unless subject to (8) below) revealing sensitive information about the conduct of U.S. negotiations with participating countries or GVN.

(8) Other material which the ambassadors or major military component commanders consider may be sensitive and could, if revealed, have a serious adverse effect on the conduct of U.S. relations with the participating countries or with other countries or might otherwise prejudice the national interests of the United States.

F. If GAO representatives request access to such sensitive material (2E above) which in opinion of ambassadors or major military component commanders should not be released, they should be advised to refer request to State or Defense, as appropriate, through GAO, Washington channels for determination regarding releasability.



G. With exception of documents previously given Pincus and Paul, Symington subcommittee or GAO, copies of DOD documents, other than the type routinely furnished to the GAO without prior DOD approval. If field representatives of the GAO request copies of such documents, they should be advised that DOD prefers to make decision on release of copies after discussion with GAO in Washington.

II. Believe GAO representatives will have no need to consult participating country or GVN officials or agencies for purposes present review and such contacts could have adverse consequences. State expects to reach understanding in Washington that GAO representatives will not approach officials and/or agencies of participating countries. If GAO should seek to do so, matter should be referred to State.

I. Responsible officers of all concerned agencies should consult with the ambassador or his designated representative regarding the applicability of the foregoing guidance to such investigations as the GAO representatives may wish to carry out in those organizations.

3. Two (2) copies of each document requiring Washington decision under (2) above should be sent to the appropriate country director, Bureau of East Asian and Pacific Affairs, Department of State, or to the deputy director for operations, military assistance and sales, OASD (ISA) Department of Defense, as appropriate, unless copies of such documents previously have been provided to Washington agencies. Documents submitted to the Department of Defense will be forwarded through CINCPAC for his recommendation to DOD on release, except that reports of military department inspectors general and performance evaluation reports (PARAS 2EA and (5) above) will be forwarded via the appropriate PACOM component command through established service channels to the appropriate military department.

4. Cases referred to Washington for decision should be supported by the submitting agency's recommendation as to releasability to GAO. ROGERS.

THE SECRETARY OF DEFENSE,  
Washington, D.C., January 27, 1972.

HON. ELMER B. STAATS,  
*Comptroller General of the United States,*  
*Washington, D.C.*

DEAR ELMER: I have given considerable thought to your letter of October 13, 1971, expressing your increasing concern with actions taken within the Department of Defense which you say are having the effect of denying GAO access to information and documents needed to carry out your responsibilities for review of international activities of the Department of Defense, especially military assistance activities.

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.

There are some in the Department who complain that some GAO auditors believe that they are entitled as a matter of absolute right to immediate and ready access to the uncensored files of the Department. As I have stated before, and will emphasize again, I do not believe that GAO auditors have any such absolute right. I think that this is particularly so in the international affairs area which, as you know, contains some of the most sensitive files in the Department. We have even denied access to some of these sensitive files to congressional committees.

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.

I, like you, also am interested in establishing a mutual accommodation within which each of us can carry out our mutual responsibilities. Any such mutual ac-

commodation must, of course, be a two-way street. Unconscionable delays on the part of our people in making otherwise proper documents available to GAO auditors is, I am sure, most irritating and frustrating to your auditors. On the other hand, it is equally irritating and frustrating to our people to have your auditors request "complete access" to reports and documents which are precluded by outstanding directives and instructions. Incidentally, it is not our intent to limit access in the field only to documents of a financial nature—other documents, or summaries thereof, which are otherwise releasable generally will be made available when necessary to complete the audit or review. If certain portions of an existing directive or instruction relating to the international affairs area are particularly troublesome, possibly a modification which will be mutually satisfactory to all concerned can be worked out.

I assure you that I am most anxious to assist in any way possible in having otherwise releasable information and documents in the international affairs area made available to your auditors on a timely and expeditious basis by operating officials at overseas installations, without reference to major commands or departmental level. The "otherwise releasable" information and documentation is pretty well indicated in existing directives and instructions. Under such an arrangement your auditors would be fully aware, in advance of the fact that certain documents and information could not be made available locally. Any basic disagreement as to the releasability of categories of documents must, I think, be resolved by my office in consultation with your designated representative.

Possibly, what might do more to clear the air and set the stage to establish better working relationships in the field of international matters is for each of us to send a representative to some of the overseas installations with a view to creating an atmosphere of mutual cooperation and understanding. Our representatives, after reviewing typical documentation, could help draft clarifying guidance for dissemination to the field. Such communication should serve to improve significantly the working relationships between GAO and DOD at the operating level.

Sincerely,

MELVIN LAIRD.

Mr. KELLER. 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 audit efforts in the past. Although absolute denial of access to a document is quite rare, our reviews 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.

At this time, Mr. Chairman, I would like to have Mr. Duff give you a report of a very recent occurrence, which he just told me about this morning and which I think illustrates what I am talking about here.

Mr. MOORHEAD. We would be delighted to hear you, Mr. Duff.

Mr. DUFF. This involves a review which we are now carrying on in Cambodia and if I might just read what was received from them—

Mr. MOORHEAD. From what are you reading? Is this your own testimony or is it another document that you are reading from?

Mr. DUFF. This particular document I am reading from, part of it was prepared as a chronology in my office of the problems that we had and the cover sheet is the one that was received from the Director of our Far East branch when he first brought the problem to our attention. This involves the monthly activities report prepared by the military requirement delivery team in Cambodia. It contains information on problems encountered in the general status of the military assistance program deliveries, an item used by the Cambodian Armed Forces. These reports are considered a vital and integral part of the internal control system and access to them is, therefore, necessary if we are to adequately evaluate the management of the program in connection with our review of U.S. assistance to Cambodia.

On February 25, 1972, our audit team in Cambodia requested access to these reports.

On the 26th of February, the Military Requirement Delivery Team in Cambodia said they could not release this report to us without approval of higher authority and they, therefore, advised the commander in chief of the Pacific of our request and asked for guidance.

On February 29, CINCPAC forwarded the request to the Assistant Secretary of Defense, International Security Affairs, in the Pentagon, stating that he could not release that type of report to us under his directives and, therefore, requested guidance from the Pentagon.

On March 1, the Assistant Secretary of Defense, ISA replied to CINCPAC stating that the report was an internal planning and management device not releasable in its entirety. The reply noted that the items not otherwise restricted could be released in response to the request for specific information.

On March 7, 1972, the Military Requirement Delivery Team in Cambodia verbally discussed the Assistant Secretary's reply with our audit team. A compromise solution was reached whereby the delivery team would furnish copies of the reports after screening out further planning information. A specific verbal request was made by our team to obtain the sanitized copy of the report.

On March 10, 1972, the Military Requirement Delivery Team requested CINCPAC's concurrence in providing us the screened copies of the reports.

On March 11, CINCPAC nonconcurred stating that the reports contained considerable information on-a-need-to-know basis, CINCPAC stating the report is principally a management document, it gets only limited distribution to subordinate commands, and would generate a considerable administrative workload to sanitize it. CINCPAC authorized discussion only, limited to coincide with the primary mission of the visiting teams auditing contracting missions.

On April 5, our audit team attempted to resolve the matter through discussions with CINCPAC personnel. CINCPAC's position was that sanitization would generate too much workload. Our team suggested an alternative in that GAO would scan the reports themselves and select only those paragraphs or pages which we consider necessary to

conduct our review. This alternative was rejected by CINCPAC and CINCPAC recommended that any further discussion of access to these documents be conducted at the Washington level.

On April 10, the Director of our Far East branch notified us of this problem and the Assistant Director in Washington asked for additional information and through our audit team in the Pentagon set up a meeting with DOD people to discuss this problem. This meeting was finally arranged on April 20, 1972. The GAO assistant director and audit manager met with the DOD representative. However, this representative was not in any position to make any decisions on the matter. During this meeting he attempted to contact several people who were in such a position but was not able to reach them.

On April 25 our representative in the Pentagon inquired as to the status of our request. He was informed that it was expected that the Pentagon would cable CINCPAC the next day to inform the military requirement delivery team in Cambodia to release the sanitized copies of the reports to our team in Cambodia.

On April 27 the cable referred to above was sent to CINCPAC.

On May 10 we queried our Director in the Far East and he advised us that the team in Cambodia had not received access to the reports.

Last night we contacted our Director in the Far East and he told us that he had received word from our team in Cambodia on Friday that the reports would be released to us yesterday. As of now we are not sure whether they have received them.

Mr. MOORHEAD. Could you repeat that last. What is the present status of this?

Mr. DUFF. The present status of it, as we talked to our Director last evening, was that he had received word on Friday from our audit team in Cambodia that they had been told that the report would be released to them yesterday.

Mr. MOORHEAD. Is that the complete report or was it screened and sanitized?

Mr. DUFF. I imagine that would be a sanitized version of the report screening out what is considered future planning information.

Mr. KELLER. I thought this was a good example to bring to the subcommittee's attention. Whether it is sanitized or whether it is a complete report, almost 3 months were required to get whatever we are going to get. Most of the time we can work our men around such problems so they are not just sitting on their hands while waiting for a document to be furnished, but in other cases if we did not pull the men off, we would be in a ridiculous situation of having several staff people sitting around at some isolated location waiting for a considerable length of time while the department makes up its mind whether it is going to give us the document or not. As I mentioned earlier, it is delaying tactics which hurt probably more than the absolute refusals.

Mr. MOORHEAD. It seems to me that the case that you have given us shows two horrible examples. One is the delay and then second is this screening and sanitizing of documents. I don't think that an auditor can come back and report to GAO, to the Congress if they have only seen that which is left after the screening process has taken place.

Mr. KELLER. You are correct, Mr. Chairman. You never know whether you have the complete picture because you don't know what may have been taken out of the file.

Mr. MOORHEAD. I will let you go back to your statement in a minute. But it does seem so important as a case; on page 2 of your testimony, in item 2, you said it is necessary to have recommendations of the persons responsible for the program and yet it sounds to me as though these are the very things that were screened out of the Cambodia Military Requirement Delivery Team's monthly report. Would that be your understanding, Mr. Duff?

Mr. DUFF. Yes.

Mr. MOORHEAD. Or Mr. Keller?

Mr. DUFF. This is our understanding of what they intended to screen out.

Mr. KELLER. I think we would have to reserve final judgment on it until we see what actual papers we are getting.

Mr. MOORHEAD. I want to give Mr. Cornish—

Mr. CORNISH. Thank you, Mr. Chairman. I think it is very important for the record the actual time lag between the original request, and if we are to assume that the documents were provided in the sanitized form yesterday, just how long a time period would that cover?

Mr. DUFF. The initial request by the team was made on February 25—

Mr. CORNISH. Of this year?

Mr. DUFF. Of this year.

Mr. CORNISH. Did that incident or request take place after the famous Cambodian lost battalion incident?

Mr. DUFF. I don't know.

Mr. STOVALL. I don't know.

Mr. CORNISH. Do you know what incident I am referring to, or do you—

Mr. STOVALL. No.

Mr. DUFF. No; I do not.

Mr. CORNISH. There was a point when the Cambodians were under heavy attack and they decided they ought to call some units into action and they found out that the units did not exist, they existed only on paper, but apparently we were paying, helping to pay the cost of those soldiers and probably providing the equipment for these so-called lost battalions.

Do you think that this incident would have anything to do with the refusal to provide the information which you requested?

Mr. DUFF. I have no way of knowing that, Mr. Cornish.

Mr. CORNISH. Do you know if any study was made by the General Accounting Office of the U.S. Military Aid provided to the so-called lost battalions in Cambodia?

Mr. DUFF. We are making a review of the entire assistance program to Cambodia and I would assume if this is part of it, it would have been included.

Mr. CORNISH. I would hope so, Mr. Duff.

Mr. DUFF. I do, too.

Mr. CORNISH. If it isn't I hope you will include it in the record.

Mr. KELLER. We will check that out and let you know.

Would you like me to proceed with my statement?

Mr. MOORHEAD. I would ask you to keep the subcommittee informed of the progress of this Cambodian imbroglio. You may proceed.

MR. KELLER. 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 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 also 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.

MR. MOORHEAD. Without objection copies of the correspondence will be made part of the record.

(See pp. 3058-3059, 3069-3070.)

Mr. KELLER. I also would like to add here that there were several meetings between Secretary Laird and the Comptroller General on this request for access to DOD records.

These meetings took place between the dates of the two letters.

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, U.S. 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, AID 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 AID Assistant Administrator, AID Office Head, or AID 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 Public Law 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 memorandums 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 interference 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 as indicated earlier to the Department of Defense and Department of State.

#### 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 have refused access only 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

The Internal Revenue Service is a problem of long standing, Mr. Chairman. 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 section 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)-100-07 grant several Government agencies specific right to 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 Secre-

tary 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 in these reviews.

#### FEDERAL DEPOSIT INSURANCE CORPORATION

The long and involved history of controversy between GAO and the Federal Deposit Insurance Corporation over GAO's right to 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.

Essentially we are denied the records of the Examination Division of FDIC, which, in terms of personnel and budget, is roughly 75 percent of the operation of FDIC.

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, I might add this was back in 1950, 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 Insur-

ance Act be amended to specifically provide for an unrestricted access to the examination reports and related records pertaining to all insured banks. There has been no action by the Congress in this regard.

#### EMERGENCY LOAN GUARANTEE BOARD

Quite recently, in fact last year, as the subcommittee will recall, the Congress passed the Emergency Loan Guarantee Act. That act set up the Emergency Loan Guarantee Board and certain guarantees have been made to lenders against loss of principal or interest on loans to Lockheed Corporation. It is specifically spelled out in the act that we shall audit any borrower or applicant under the act. We have also taken the position we also have authority and responsibility to audit the activities and the actions taken by the Emergency Loan Guarantee Board itself.

The Board has taken the position—through its Chairman, the Secretary of the Treasury—that it was not the intent of 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).

We believe that we have a responsibility for auditing the activities of the Board and we have the right to examine any records of the Board that the Board used in reaching its decisions. We think these acts quite clearly state our authority and it was not necessary for Congress to spell out in the Emergency Loan Guarantee Act that the GAO would have an audit authority over the Board.

There are new agencies created from time to time by the Congress. As long as they are Government agencies it is not necessary and quite unusual for Congress to spell out in the authorizing act that such agency shall be subject to audit by the General Accounting Office.

A good example is the Department of Transportation which was established a few years ago. The same is true with NASA and with AEC. So, we just do not follow the Board's rationale for its position. But so far we have an impasse.

#### SUMMARY OF GAO POSITION

To summarize, Mr. Chairman, 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 rights 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, at the same time we are not going to yield to unreasonable delays or outright refusals.

Mr. MOORHEAD. Mr. Keller, it seems to me that your testimony which you have given very low key is desperately important. The Congress expects the GAO to audit, and using that in the broadest term, including the operations, not just financial transactions, of the various departments and agencies, but as you have said in your testimony, you have to have available the recommendations, internal working papers, to do a proper job. I personally would not consider it an audit, as I think of the term "audit," if you can only look at screened documents.

You have mentioned certain agencies, State, Defense, and Treasury. Presumably I take it from this that there is not such withholding by other departments and agencies. Do I draw the correct inference?

Mr. KELLER. That is correct. We have many agencies that have no hesitation in giving us access to practically any records in the agency. Others are troublesome.

Now I think it is only fair to exclude perhaps the Federal Deposit Insurance Corporation, and perhaps the Internal Revenue Service. We don't agree with their legal position but they are making a legal argument as to our audit authority as distinguished from our right to look at certain internal documents. At the same token I don't place the Emergency Loan Guarantee Board in that category because I fail to see the Board's argument in this case.

Mr. MOORHEAD. What is the clout that you have over those departments that are cooperating with you; how can you force them to give you documents?

Mr. KELLER. Those not cooperating?

Mr. MOORHEAD. Those that are cooperating. What weapon do you use?

Mr. KELLER. Really no weapon at all. I think they adopt a policy that they are not going to withhold anything from GAO and they have been making their records available. Take, for example, the Atomic Energy Commission. We have had very fine relations with that agency and I don't recall a case where we have had any problem on access to information. Certainly that is a very sensitive type agency.

Mr. MOORHEAD. That is interesting.

Mr. KELLER. I think it is a philosophy of management. Of course, a great deal of our problem is centered in the international area. That may or may not explain it, but at least it brings into question what seems to be one of the sensitive areas as far as DOD and the State Department are concerned, that is, our dealings with foreign governments.

I should also point out that in other State and DOD programs, in the contracting area and in the weapons systems area we have had very good cooperation in obtaining information, but when we get into foreign aid, military assistance, international security affairs, then we have problems.

Mr. MOORHEAD. It is interesting that you mention the Atomic Energy Commission. In another phase of our hearings on access of the public to information, the AEC has compiled a good record, and I think it is consistent that they have granted GAO unrestricted access.

Mr. KELLER. They have had that policy ever since I can recall. I don't remember any problem over the years with the Atomic Energy Commission, and I am using AEC only as an example. They are not the only ones. In most of the departments we do not have any real problems. Occasionally some problem will arise. If it can't be solved at the lower level, either Mr. Staats or I will get in touch with our counterparts in the department and we are usually able to work it out.

Mr. MOORHEAD. In the case of the emergency loan guarantee legislation, it would seem probable and necessary for the Congress to grant GAO access to a private borrower, which you would otherwise not have. But the Congress intended, insofar as a Government agency is concerned, that the basic statutes—the Budget and Accounting Act, Legislative Reorganization Act, et cetera, would cover so far as Government agencies are concerned.

Mr. KELLER. That is our position, Mr. Chairman. Also, as you will recall, I am sure, the law passed by Congress requires certain determinations and findings to be made by the Board before a guarantee can be made.

I think that Congress wants GAO to make sure that the Board, which is another Government agency, is carrying out the requirements laid out for it by Congress.

Mr. MOORHEAD. That certainly would be my construction of the law.

I have some further questions, Mr. Keller, but at this point I would like to yield to Mr. Erlenborn.

Mr. ERLNBORN. Thank you, Mr. Chairman.

I wonder, Mr. Keller, could you cite for us the basic law that gives the GAO the right to access?

Mr. KELLER. Yes, sir; the basic law is in section 313 of the Budget and Accounting Act of 1921 which reads:

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.

As an explanation, section 291 of the Revised Statutes relates solely to the fund which is administered by the Secretary of State which is used for emergencies in the diplomatic and consular services. Expenditures may be made out of that fund on certification by the Secretary of State.

Also, the Congress has from time to time authorized certain other expenditures to be made by some departments and agencies upon certification of the head of the agency. Now we have no authority to go behind the certifications. There are certain confidential funds in a number of the departments and we certainly make no attempt to go behind those certifications.

Mr. ERLBORN. Those confidential funds may be for the use of another agency?

Mr. KELLER. I assume so; yes.

Mr. ERLBORN. This language seems to be quite clear. How have agencies put interpretation on this that apparently gives them the authority to deny access?

I know this says, "shall have access to, the right to examine any books, documents, papers, or records of any such department or establishment."

Now, right offhand I suppose they might say if they had somebody else's documents in their possession it wouldn't be covered by this but other than that it seems to be all inclusive.

Mr. KELLER. There are arguments made that clearance must be obtained from the other agency. However, in many cases they are in effect, claiming executive privilege, without really saying so. Some will argue a right to withhold by virtue of the separation of powers under the Constitution which takes precedence over the statutory law. Nevertheless, I want to make clear I am not buying this argument, I am only trying to explain some of the arguments I have heard.

Mr. ERLBORN. Do they verbalize that rationale or is this something you think is in their thinking but they are not expressing it?

Mr. KELLER. I have heard it argued that way but they won't put it down on paper precisely that way. I think that is what really happens when a department issues an instruction that says don't give GAO or the Congress access to certain types of information before it is submitted to the assistant secretary or the head of the department for a decision as to whether it will be made available or not—a part of the process of deciding whether executive privilege will be invoked.

I can't really vouch for the internal workings of the department, but I think these decisions are probably based on a statement of executive

privilege made by the President in connection with an earlier case or, if not, they may get a specific approval to withhold in a particular case.

Mr. ERLNBORN. Could you tell me as far as the Department of State is concerned and in the example you gave about the planning for future aid to countries receiving aid, why is it necessary for you in an audit capacity to know the plans for the future?

Is this to see whether it is planned to repeat mistakes?

Mr. STOVALL. There is a very extensive intermix of elements. The March 13 statement of the President to the Secretary, for example, if I might just read from that, "I, therefore, direct you not make available to the Congress any internal working documents." but then he goes to say, "concerning the foreign assistance program or international information activities which would disclose tentative planning data."

Now, if there were a clear line of delineation between future planning and present documentation and management many of our problems I think would vanish. Those things really aren't separable in many cases and we find also that in the field there is a confusion in relation to whether the President's instructions and the departmental instruction is centered on not making available to GAO internal working documents without closely relating them to future planning data. This we have found is an increasing problem in the field, that they are not to make internal working documents available because frequently the internal working documents may deal with the current situation but might reach forward also in terms of a tentative plan for next year. So there is a great deal of difficulty in sorting these things out.

Earlier, several years ago, in our discussions with the agencies, the term "internal working documents" was seldom used. There were at that time concerns about not making available to us inspection reports, for example, that dealt with sensitive personnel relationships and those things. During this recent period such as Mr. Keller has discussed here, however, the negative interpretation of these broad statements, some of them ambivalent, has spread to the extent that people are reading these in the field as pretty much precluding them from being able to decide whether to let GAO see an internal working document and understandably you can make that definition broad enough to include just about everything in an office. There aren't many things in an office that aren't internal working documents.

Mr. ERLNBORN. If I understand your answer correctly, you are saying you really are not seeking access to future planning and that would not be necessary, the only problem is that planning is intermingled with other information which you deem to be necessary. Is that correct?

Mr. KELLER. We would want to reserve an opinion on that in relation to each specific situation but by and large we are concerned with the present programs. In some cases they are so interrelated though that we would have a need for both types of information. Also, we could have such need where we are carrying out a request of a congressional committee for a particular study, which could get into future programs, depending on what the committee asked us to do.

Mr. ERLNBORN. Every right to be available must have some means of enforcement—you have here an expressed right in section 313, the right to access.

Is there anything in the act that gives you any method of enforcement of that right?

Mr. KELLER. No, sir; we have no method of enforcement. Our best method of enforcement is when Congress helps us. There is in the Foreign Assistance Act a provision which requires a cutoff of funds if information isn't furnished to a congressional committee or to the GAO within 35 days unless a certification is made by the President.

We have used that right sparingly because we try to get the information some other way. It is not a difficult procedure but it can cause quite a bit of repercussion.

Mr. ERLNBORN. Hard feelings?

Mr. KELLER. I am not worried about the hard feelings but I think, to be perfectly blunt about it, that every time the President makes a claim of executive privilege the agencies read the statement about 20 times and then push it just as far as they can. And if there is some way short of doing it that way I favor it.

Mr. ERLNBORN. Do you have any suggestions for any enforcement authority?

Mr. KELLER. There was legislation considered in the Senate last year. I don't believe it was reported out of the committee. It would require a cutoff of funds unless the President himself, in writing, directed that the information not be furnished. That would be across the board.

Of course, that still brings in the problem of executive privilege. I think there is a real question as to whether Congress by a statute wants to recognize executive privilege. I don't take any position on that but I think that type of legislation does have some merit because it may be a way to bring about an end to the delaying tactics. It would force the agencies to get the President to step in and make the decision as to whether it was going to be denied in a particular case. I would guess any President would not want to be involved in that too often. That, Mr. Erlborn, is the only suggestion I have to make. It is a very difficult problem we are faced with. Also, as you know, some of the committees on the Hill are faced with it from time to time.

Mr. ERLNBORN. I just have two short questions and I want to yield to my colleague from New York, Mr. Horton.

You mentioned that one thing you can do is go to Congress. I can see if you had a request or inquiry from a committee or from an individual Member you could go to them, if access was not made available. But this is not the case if this is something that is being done in your own capacity, not by request. What committee or committees of Congress would you then turn to?

Mr. KELLER. I think we would have to turn to the Government Operations Committee, our parent committee, and perhaps the legislative committee involved if we can get some support.

Mr. ERLNBORN. And you do that frequently?

Mr. KELLER. That is right.

Mr. ERLNBORN. The other question I have is related to suggestions made during these hearings for creation of either an independent agency of some sort of committee within Congress which would have the authority to screen and determine what is properly to be declassi-



fied or made available. Principally this has been in the area of declassification of classified documents.

Would you think that this same sort of device might be useful for the GAO, that is an independent body or committee of Congress to be the arbiter in a dispute between you and another agency as to access of documents?

Mr. KELLER. Certainly I think it would be of help to us if it was set up. Frankly I think establishing a congressional committee is not going to solve the problem. If you could get the executive branch to agree to a group representing both the legislative and the executive with both sides willing to abide by the decisions, perhaps you could get somewhere.

Mr. ERLNBORN. I think that is an interesting observation. I don't know that it has been considered before, to have some joint agency with joint membership.

Mr. KELLER. I am talking about access generally. To make it clear for the record insofar as access to classified information is concerned we have not had any real problem. Where it is withheld it is on other grounds.

Mr. ERLNBORN. Thank you very much.

Mr. MOORHEAD. Would the gentlemen rise while I administer the oath?

Do you solemnly swear the testimony you have given and are about to give this subcommittee has been and will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. KELLER. Yes, sir.

Mr. STOVALL. Yes, sir.

Mr. DUFF. Yes, sir.

Mr. HORTON. Bob, I want to thank you for the excellent statement that you presented here this morning before the subcommittee. It does point out the problem, I guess, in relation to the entire executive branch of the Federal Government the problems that you point out are small in the sense that the majority of the agencies do cooperate with you and you are talking in terms of only five or six areas that you are concerned with. But I think it is an important area that we are talking about.

I noticed that in the Emergency Loan Guarantee Board controversy they claim apparently that because there is nothing spelled out in the law that, therefore, they don't have to comply to make their records available. That is a unique and novel approach, it seems to me.

Mr. KELLER. Mr. Horton, I don't want to encourage this but I think if that argument is good we would have no authority to audit probably 10 or 12 major agencies around Washington, including the Department of Transportation, NASA, AEC and a few others.

Mr. HORTON. That is the point I am making.

Mr. ERLNBORN made reference to this but what additional means do you feel that you need legislatively to make it possible for you to get this kind of information when an executive agency takes this position?

Mr. KELLER. I think as a practical matter the only way it can be effective is some kind of a cutoff of funds when the information is

not made available to the General Accounting Office and perhaps to committees of Congress.

The only other alternative is to give GAO a subpoena power, and while we have asked for that in connection with contractors, grantees and the like, I have reservations as to whether GAO should be granted subpoena power against another department of the Government.

I think you raise some questions which maybe the courts themselves would not want to take on.

Mr. HORTON. The other area that I am most concerned about, and that doesn't mean to diminish my concern about the other areas you have talked about, but the one I am most concerned about relates to the practices of the Internal Revenue Service because this is a large agency that has a great deal of information and has a great deal of activity and particularly now in addition to its tax responsibility it also is involved in the operation of the wage and price control efforts.

Mr. KELLER. Yes, sir.

Mr. HORTON. Are you saying in your testimony that you have really had literally no access to information there sufficient to make any audit or any study as to what they are doing so you can report to Congress?

Mr. KELLER. Yes, sir, that is what I am saying. In connection with the wage and price control enforcement, we have a congressional request to do some work in there now and the IRS General Counsel is considering whether, under section 205 of the Economic Stabilization Act, concerning confidentiality of information obtained under the act, they will furnish GAO access to the information needed. As far as the enforcement of the tax laws, how they handle their workloads, and whether they are making the most effective use of their agents and their personnel, we have had no access whatsoever to any of their operations.

We have tried to make it very clear that we are not trying to second guess the Service on individual tax returns. And we, as well as any other Government employees that have access, are certainly prohibited by statute from disclosing any type of information in a tax return.

We are interested in how well they are carrying out their job just like any other agency.

Mr. HORTON. Well, I think Congress has a right to know and it seems to me that they are intentionally thwarting that effort.

Mr. Chairman, it seems to me appropriate that this committee ask the Commissioner of Internal Revenue Service and those Treasury officials involved to testify before this committee so we can explore this area in more depth. I think that the Congress is being thwarted and also the Government Accounting Office is being thwarted in spite of the statutory requirement that permits the Government Accounting Office to get this type of information. So I would hope that we could arrange to have them in.

Mr. MOORHEAD. The Chair welcomes that suggestion. The witness schedule is awfully full but we will try to work them in.

Mr. KELLER. To make the record clear, we do have access to their administrative operations such as payroll.

Mr. HORTON. I understand that. That is a very small window.

Mr. KELLER. That is right. We are interested in their operating methods. For example, I mentioned earlier that we are doing a review

requested by the Joint Committee on Internal Revenue Taxation. When it is done that way the Internal Revenue Service will cooperate. This is a review on the handling of delinquent accounts throughout the country. Are these accounts equitably handled for all? Is IRS pressing harder some places than others? We think it is a very worthwhile effort because delinquent accounts run some \$2 billion at any given time.

Mr. HORTON. Could I ask you in advance of testimony from the Internal Revenue Service and the Treasury officials involved to prepare for us the areas in which you want to get information and the areas in which you have not been able to get this information; spell it out a little more in detail and specifics than it has been in the testimony here.

Mr. KELLER. Certainly.

Mr. HORTON. I think it would be very helpful to us to ask those kinds of questions.

Mr. KELLER. I will be very glad to, Mr. Horton. We think it is important.

(The information follows:)

#### GAO ACCESS TO RECORDS PROBLEM AT THE INTERNAL REVENUE SERVICE

GAO's review efforts at IRS 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 its appraisal of IRS operations and activities. Without such access, the management of the largest collection agency in the world, employing about 65,000 people, will not be subject to 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 for that of IRS in individual tax cases; rather GAO is interested in examining 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 GAO believed improvements in current operations would bring about better IRS administration of programs, activities, and resources.

It is the position of the Internal Revenue Service that no matter involving the administration of the Internal Revenue laws can be officially before the General Accounting Office. The Commissioner of IRS in a letter dated June 6, 1968, to the Comptroller General referred to a May 20, 1968, opinion of his Chief Counsel and stated:

"\* \* \* I must note that the 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 at 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 in 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 tax returns when reviewing operations of other Government agencies, but has been denied records requested for reviews of IRS operations.

While we recognize that the law governing access to IRS records permits them to deny us access, it is our view that the law does not require such denial and that the reasons accepted for allowing certain agencies access under the regulations found at 26 CFR 301.6103(a)-100-106, have particular validity as a basis for allowing GAO access.

Examples of recent and pending GAO activities at IRS which involve access to records problems follows.

#### ACCESS TO RECORDS DENIED ON CONGRESSIONAL REQUEST ASSIGNMENT

The chairman, Legal and Monetary Affairs Subcommittee of the House Committee on Government Operations on June 28, 1971, requested GAO to review IRS's effectiveness in collecting the Federal highway use tax.

An IRS official advised us that the May 20, 1968, opinion of the Chief Counsel held that IRS was barred from allowing GAO to review any documents that pertained to the administration of the Internal Revenue laws. He advised us also that the Chief Counsel's opinion held that the Internal Revenue Code limited the right to review IRS's administration of the tax laws to the Joint Committee on Internal Revenue Taxation.

IRS did agree, however, to make available to GAO summary data relating to its highway use tax compliance studies and programs. Our review at IRS was therefore limited to an analysis of the summary data provided and to discussions with officials responsible for administering the law pertaining to the highway use tax. This limitation on our review directly affected our ability to reach a conclusion on IRS's effectiveness in collecting the Federal highway use tax.

For example, in fiscal years 1970 and 1971, 47 and 45 IRS district offices, respectively, performed some returns compliance work on the highway use tax which resulted in the collection of additional taxes of \$1,096,000 and \$1,538,000. The major part of this work was carried out by nine IRS districts that formally scheduled returns compliance work on the highway use tax. Because GAO's review was restricted to an analysis of summary data provided by IRS which did not include source data, GAO was unable to ascertain whether the scheduled returns compliance program work for the nine districts represented a partial or complete cross-referencing of State truck registration data against IRS records of truck owners who filed highway use tax returns.

Our report on the administration of the Federal highway use tax by the Internal Revenue Service was issued to the subcommittee on May 15, 1972 (B-164497(3)).

#### ACCESS TO RECORDS DENIED ON GAO INITIATED ASSIGNMENT

The objective of the Alcohol, Tobacco and Firearms Division is to obtain the highest possible level of voluntary compliance with Internal Revenue laws and other laws related to distilled spirits, alcoholic beverages, tobacco products, firearms, and explosives. The Division's program is carried out by over 3,300 employees working in permissive and enforcement activities throughout the United States. The permissive function is concerned with the accurate determination and full collection of Federal revenue from the division's tax activities. The enforcement function is directed toward the suppression of illicit manufacture, distribution, and sale of distilled spirits without payment of tax, and curtailment of the illegal possession and use of firearms and explosives through administration and enforcement of applicable Federal statutes.

The Division's workload has increased significantly in recent years because of the enactment of firearms control legislation and the Organized Crime Control Act of 1970. Also, alcohol and tobacco taxes, which totaled about \$7 billion in fiscal year 1971, constitute a major source of revenue to the Federal Government.

During August 1971, GAO requested that IRS make available records needed to perform a review of the Alcohol, Tobacco and Firearms Division. IRS denied us the right to perform this review and cited the IRS's Chief Counsel's May 20, 1968, decision as the basis for the denial. We were advised that we did not have the right to review either permissive activities because it involved tax adminis-

tration or enforcement activities because the laws governing these activities are part of the Internal Revenue Code.

If we had access to records of the Alcohol, Tobacco and Firearms Division, we would—

Examine into the inspection activities of the permissive group to ascertain whether their procedures are adequate to insure that the distilleries, breweries, and manufacturers of tobacco products are complying fully with applicable Internal Revenue laws; and

Examine into the effectiveness of procedures followed by the enforcement group to carry out its responsibilities in the alcohol, firearms, and explosives control areas.

#### REQUEST PENDING FOR ACCESS TO ECONOMIC STABILIZATION PROGRAM RECORDS

On April 17, 1972, Congressman Glenn M. Anderson requested that GAO review IRS's effectiveness in administering the economic stabilization program in Los Angeles, Calif.

This request is being deferred pending notification from IRS's chief counsel as to whether GAO will be given access to the records needed to carry out the review. The access to records question on this review does not involve sections 6406 and 8022 of the Internal Revenue Code. Rather, section 205 of the Economic Stabilization Act Amendments of 1971 (Public Law 92-210, approved December 2, 1971) provides for the confidentiality of information obtained under the act which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code.

Section 1905 provides as follows:

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report of records made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

In considering GAO's right of access to records on the economic stabilization program, we believe the following quote from House Report 91-714 dated December 7, 1971, on section 205 is pertinent:

"It is the intention of your committee, through provisions of this section, to guard against disclosure of information which would tend to damage the competitive position of persons, organizations, businesses and industries providing such information. At the same time the committee deems it necessary to point out that \* \* \* much of the information obtained in carrying out the purposes of this title cannot be construed as a trade secret or be classified as otherwise sensitive to those disclosing it. Moreover, it is the view of your committee that public disclosure, to the fullest extent possible of the information on which policies, regulations and controls are predicated to carry out the purposes of this title is necessary to achieve and maintain the widest possible confidence, and by the same token, the largest possible degree of public cooperation to assure the success of efforts to achieve economic stability. \* \* \*"

#### STUDY IN PROCESS FOR THE JOINT COMMITTEE ON INTERNAL REVENUE TAXATION

The joint committee on January 13, 1971, authorized GAO, as agent of the joint committee, to undertake a study concerning the policies and procedures established by IRS in connection with the handling and collection of taxpayer's delinquent accounts. The study was to include an examination into the (1) effectiveness of IRS programs to collect past due accounts, (2) equities of collection procedures as applied to all taxpayers, (3) policies and practices in regard to delinquent accounts considered currently uncollectible, and (4) adequacy of the resources devoted to carrying out IRS's responsibilities in regard to the collection of delinquent taxes.

During our review, as agents of the joint committee, we have had IRS's complete cooperation and access to all the records needed to accomplish the objectives of the study, including tax returns by individual taxpayers. Without having had access to individual tax cases, it would not have been possible for GAO to reach any conclusions on the effectiveness of IRS programs to collect past due accounts, equities of collection procedures as applied to all taxpayers, and practices in regard to delinquent accounts considered uncollectible. Any report on a review of taxpayers' delinquent accounts which would not include these elements, in our opinion, would be of nominal value to the Congress in appraising IRS operations.

The field work on the study, which was carried out by GAO's Washington staff and four regional offices, is essentially completed. The final report will be submitted only to the joint committee and no release of the report or any of its contents will be made except by the joint committee. Although we reviewed records of individual tax cases, the reviews were made only for the purpose of evaluating the effectiveness of IRS's delinquent account activities and the identity of individual tax cases will not be included in the report to the joint committee.

#### EXAMPLES OF POTENTIAL AUDIT AREAS WHERE GAO NEEDS ACCESS TO RECORDS

The extent to which GAO's efforts at IRS have been hampered by lack of access to records is illustrated by the following summary of our request to obtain general background information on a tax administration area which would involve only the interviewing of responsible officials and obtaining information that has been made available to the public. Also, following are summaries of two areas involving tax administration which we believe warrant independent review.

*Request to interview officials of the Miscellaneous and Special Provisions Tax Division.*—By letter dated January 13, 1971, the chief of staff of the Joint Committee on Internal Revenue Taxation advised the Comptroller General that the joint committee would like GAO to act as its agent in performing certain reviews of the operations, policies, and procedures of IRS.

Since the field work on the current review on taxpayer delinquent accounts that the joint committee requested us to undertake is nearing completion, we advised IRS by letter dated May 5, 1972, that we anticipate that the joint committee will request us to initiate another review in the near future in another area of tax administration. In this connection, we also anticipate that the joint committee may request our opinion as to other areas which should be examined into.

We explained that, in order to be in a position to provide such information, we plan to obtain background information on other IRS operations involving tax administration such as excise taxes, exempt organizations, and pension trusts which are administered by the miscellaneous and special provisions tax division. We also explained that, since this information will not be gathered under the auspices of the joint committee, we would restrict our activities to interviewing responsible agency officials as to their duties and responsibilities and the functions performed by their particular organizational unit. Further, we explained that we would not request any taxpayer information other than that which is made available to the public.

We stated our belief that these proposed activities would not conflict with the May 20, 1968, interpretation by the IRS Chief Counsel that the Commissioner is barred by sections 6406 and 8022 of the Internal Revenue Code from allowing GAO representatives to review any documents that pertain to the administration of the internal revenue laws.

On May 9, 1972, the Deputy Commissioner of IRS advised us that he had requested the advice of the Chief Counsel as to GAO's legal authority to make this review. He stated that he had asked the Chief Counsel to expedite the matter.

*Integrated data retrieval system.*—In July 1969, IRS began a pilot project in their southwest region to determine if the installation of an integrated data retrieval system (IDRS) would alleviate taxpayer adjustment and correspondence problems and otherwise render sufficient services and increase operational efficiency to justify installation costs. Anticipated services to be provided by IDRS include (1) direct access and retrieval of taxpayer account information, (2) direct input of taxpayer information into the system, (3) computer preparation of correspondence, and (4) the capacity for predeposit search of unidentified remittances.

On the basis of its feasibility study, IRS officials concluded that IDRS was justified on the basis of its positive influence on taxpayer relationships even if

savings are not realized. In December 1970, IRS awarded a \$29.2 million contract for the installation of IDRS equipment in the seven existing service centers with the provision that IDRS would be installed in the three service centers then under construction for about \$12.6 million.

Because of the substantial impact IDRS will have on the effectiveness of IRS's tax collection activities and the amount of equipment being procured, we believe that GAO should be permitted to make an independent evaluation to ascertain:

The adequacy of the feasibility study on which the decision to install IDRS nationwide was based;

Whether IRS has adequately informed the Congress of the substantial costs involved in the installation and annual operation of a nationwide IDRS system; and

Whether IDRS from an operational standpoint can provide the services on which its installation was based and how effective, efficient, and economical such operations can be accomplished.

Access to taxpayer records would be needed to determine the operational capabilities of the system and the effectiveness and efficiency of its operation.

*Selection of tax returns by IRS for audit.*—Over the years the main deterrent to noncompliance with the Federal tax laws has been the audit by IRS of tax returns. However, over the past several years IRS states in its budget justifications that enforcement capability has shrunk in relation to the growing size and complexity of the taxpayer population. In fiscal year 1971, IRS devoted only slightly more audit man-years than it did in fiscal year 1963, while in the same period the number of relatively complex returns went up dramatically.

Under IRS procedures, returns are selected and classified for audit primarily by using the ADP system. According to IRS, the ADP selection technique measures return characteristics against standards, selects returns for examination, and ranks the returns by magnitude of potential tax error. IRS contends that this method not only reduces manpower required for classification but, by more effectively identifying returns with the greatest error potential, makes the most efficient use of audit manpower.

Since IRS has had many years of experience in perfecting its technique for selecting returns for examination, the returns selected would be expected to provide excellent results in terms of tax changes. However, the latest information included in the budget justifications indicate that for fiscal years 1967, 1968, and 1969 about 40 percent of the returns audited did not result in any tax change. In more recent years, this type of information has not been included in the budget justifications.

Access to taxpayer records would be needed in order for GAO to examine into the adequacy of IRS's returns selection and classification technique.

\* \* \* \* \*

It should be recognized that there is no assurance that an unrestricted review of the above areas by GAO would result in the disclosure of material management weaknesses in any specific area. However, in the absence of such a GAO review, the Congress has no independent assurance that IRS is carrying out its operations in an efficient, effective, and economical manner. Also, the magnitude and complexity of Federal tax collection activities is such that we believe independent GAO evaluations of IRS operations would not only assist the Congress in its oversight of tax administration but would also assist IRS in strengthening its administration of programs and activities, and more efficiently use its resources.

Mr. HORTON. Thank you, Mr. Chairman, that is all I have.

Mr. MOORHEAD. Thank you, Mr. Horton.

Off the record now.

(Discussion off the record.)

Mr. MOORHEAD. Would you gentlemen mind standing by?

Mr. KELLER. I would be very glad to. Both Mr. Stovall and Dr. Duff are going out of town tomorrow. If we could finish up today we will appreciate it.

Mr. MOORHEAD. We will finish up today.

Mr. KELLER. Yes, sir.

Mr. MOORHEAD. I think we will finish. Mrs. Mink wants to conclude her statement by noon and we will accommodate her. I think another 10 or 15 minutes could complete your testimony, Mr. Keller.

The subcommittee is now very pleased and honored to welcome our distinguished colleague from Hawaii, one of the ablest and most articulate Members of the House of Representatives, the Honorable Patsy T. Mink of Hawaii.

### STATEMENT OF HON. PATSY T. MINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mrs. MINK. Thank you very much, Mr. Chairman, and members of the subcommittee. I am very grateful to you for your giving me this opportunity and more particularly for interrupting your schedule to allow me to testify on some of the 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 the 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 U.S. Supreme Court and arguments will be heard this fall. It is the first Freedom of Information Act case to be heard by the U.S. 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, prior to the second amendment being considered by the House, an article was published in the Washington Evening Star which indicated that certain Federal agencies had recommended to the White House that Cannikin be canceled. 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.

Mr. MOORHEAD. Without objection, so ordered.

(The article referred to above follows:)

[From the Evening Star, Washington, D.C., July 26, 1971]

#### AGENCIES' VIEWS DIFFER ON AMCHITKA TEST BLAST

(By James Welsh, Star staff writer)

The White House has received conflicting recommendations from various Government agencies on whether to go ahead this fall with an underground nuclear test on remote Amchitka Island.



According to informed sources, two Federal agencies, the Department of Defense and the Atomic Energy Commission, favor a go-ahead for the 5-megaton test blast.

For a variety of reasons, five other agencies—the State Department, the Office of Science and Technology, the U.S. Information Agency, the Environmental Protection Agency, and the Council of Environmental Quality have recommended either canceling the test or postponing it until after the SALT arms-limitations talks.

Amchitka is at the southwestern tip of the Aleutian Islands off Alaska, about 700 miles from the Soviet Union.

In October 1969, the AEC set off a 1-megaton hydrogen bomb 4,000 feet deep within the islands without causing any of the earthquakes, tidal waves or environmental damage feared by critics of the testing.

The megatonnage of this fall's planned test, which is code-named Cannikin, is five times as large. The nuclear device is scheduled to explode 6,000 feet underground. Cannikin is a test of a large Spartan warhead designated for use as a component of an ABM system protecting Minuteman missile sites.

The latest recommendations on the proposed test are a product of a departmental under secretary committee named to investigate the controversy. The recommendations went directly to Henry Kissinger, Nixon's chief foreign policy adviser, and John Ehrlichman, chief domestic adviser.

The Defense Department and AEC. sources said yesterday, continue to favor the testing as important to national security. They minimize the chances that the test will trigger earthquakes or cause other unwanted environmental side effects.

OST, which is the President's scientific advisory arm, reportedly opposes the experiment, not primarily for environmental reasons but because the warhead to be tested has been made obsolete by recent weapons development.

The State Department, sources said, took a middle ground. It did not recommend canceling the test, but advised postponing it until the completion of the SALT talks. The Council of Environmental Quality took much the same position. The Environmental Protection Agency opposes the test, believing that even a slight possibility of earthquake is too much of a chance to take.

Mrs. MINK. 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.

Mr. MOORHEAD. Without objection, so ordered.

(The letter referred to above follows:)

THE WHITE HOUSE,  
Washington, D.C., July 30, 1971.

Hon. PATSY T. MINK,  
House of Representatives,  
Washington, D.C.

DEAR MRS. MINK: This is to thank you and reply to the request which you made on July 28 for the release of agency recommendations on the proposed underground nuclear test at Amchitka Island in Alaska.

These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy. Therefore, I regret to inform you that they are not available for release.

We appreciate your interest in this matter.

Sincerely,

JOHN W. DEAN III,  
Counsel to the President.

Mrs. MINK. Thereafter, on August 11, 1971, 32 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 actions.

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.

Mr. MOORHEAD. Without objection, so ordered.  
(The document referred to above follows:)

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U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

(No. 71-1708)

PATSY T. MINK, ET AL., APPELLANTS, *v.* ENVIRONMENTAL PROTECTION AGENCY,  
WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON APPELLANT'S MOTION FOR SUMMARY REVERSAL

(Decided October 15, 1971)

*Mr. Ramsey Clark*, with whom *Mr. Kenneth C. Bass, III*, was on the motion, for appellants.

*Mr. Jeffrey Aælrød*, Attorney, Department of Justice, with whom *Messrs. Morton Hollander* and *Harland F. Leathers*, Attorneys, Department of Justice, were on the opposition to the motion, for appellees.

Before FAHY, Senior Circuit Judge, and LEVENTHAL and WILKEY,<sup>1</sup> Circuit Judges.

*Per Curiam.*—This is a suit brought by 33 members of Congress, in both their official and private capacities, under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1970), to obtain several documents pertaining to an underground nuclear test explosion which had been scheduled to take place on Amchitka Island, Alaska.<sup>2</sup>

Priority is given by the Act to such suits in the District Court, see 5 U.S.C. 552(a) (3) (1970). In accordance with this Congressional policy, we provide comparable expedition in the appellate court.

## I

Appellees, who were defendants in the District Court, admit the existence of the documents in question, which are concerned with the environmental, national defense, and foreign relations consequences of the planned test. The documents were prepared in report form by a special committee chaired by Honorable John Irwin, Undersecretary of State. The Committee was established by the President on January 20, 1969, and is part of the National Security Council system. The President, on June 27, 1969, directed the Committee to review the annual underground nuclear test program. Pursuant to this direction the Committee prepared a report on the Alaskan nuclear test (code-named Cannikin).

As a result of an apparent leakage of certain portions of the report that suggested some agency disapproval of the test, Representative Patsy Mink asked the White House for copies of the report. The request was denied and this suit followed, with 32 other Members of Congress joining Representative Mink as plaintiffs. They sought summary judgment to compel disclosure of the requested documents. Appellees, defendants, filed an answer, a supporting affidavit executed by Undersecretary Irwin, and a motion to dismiss or in the alternative for summary judgment. A hearing was held on August 27, 1971, before the District Court. The District Court thereafter entered an order which dismissed the complaint insofar as plaintiffs sought to maintain their action in their capacity as Members of Congress, on the ground that they failed to state a justiciable case by virtue of the Separation of Powers doctrine. Insofar as plaintiffs proceeded in their private capacity, the District Court refused to compel disclosure on the grounds that the documents fell within two of the nine exemptions contained in the FOIA, 5 U.S.C. 552(b) (1) (national defense and foreign affairs secrets) and 5 U.S.C. 552(b) (5) (inter-agency memoranda). Plaintiffs, appellants, noted an appeal, and now move in this court for summary reversal.

## II

Congress tailored the Freedom of Information Act to require federal agencies to make information available to any person, unless that information must be withheld for a purpose that Congress deemed paramount to disclosure. Those matters requiring secrecy have been defined in nine exemptions to free disclosure. The two exemptions at issue in this case permit withholding of matters if they are: "(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy . . . (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>3</sup>

The Freedom of Information Act post-dates a 1953 Executive Order—No. 10501—that provides for classification of matters relating to national defense.<sup>4</sup> The legislative history of the Act does not define clearly the relationship between this Executive Order and the exemption of national defense and foreign affairs secrets of 5 U.S.C. § 552 (b) (1). Since the passage of the Act, the Executive Order has continued to be the authority for classification of matters relating to national defense. Appellants argue that the national defense and foreign affairs secrets exemption requires each and every document that an agency wishes to withhold to be classified by separate Executive Order and not by the present classification procedure. After examining the various interpretations

<sup>1</sup> Circuit Judge Wilkey did not participate in the consideration of this case.

<sup>2</sup> The test was originally scheduled for October, 1971, but Congress has provided that it may not take place sooner than May, 1972, unless the President gives his direct approval for an earlier date. Cf. *The Committee For Nuclear Responsibility, Inc. v. Seaborg*, No. 71-1732, October 5, 1971.

<sup>3</sup> 5 U.S.C. 552 (b) (1), (5).

<sup>4</sup> 3 C.F.R. 292 (1970).

given this exemption,<sup>5</sup> we conclude that summary disposition of this issue by this court is inappropriate, and should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand.

We do conclude, however, that summary disposition is appropriate in part, for the purpose of remand, on two of the matters before us.

1. The critical paper before us is the affidavit of Undersecretary Irwin, and particularly its paragraph 5.<sup>6</sup> We note first his statement that the documents in question include a memorandum from the Council on Environmental Quality to Undersecretary Irwin which is attached to the classified report, but "is separately unclassified." Appellees' justification for this bunching of all appendages according to the highest classification of the document to which they are attached is based on the following paragraph of section three of Executive Order 10501:<sup>7</sup>

(b) *Physically connected documents.*—The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the FOIA, enacted subsequently to the Executive Order.

The papers before us contain an assertion, based on an account in the New York Times, that the only reason for the Secret classification of the recommendation transmitted to Undersecretary Irwin by William D. Ruckelshaus, Administrator of the Environmental Protection Agency, is an instruction put on the basis that the entire file would be classified Secret. We take note that Undersecretary Irwin's affidavit identifies certain items (B 1, 2 and 4) as "separately classified," but no such statement is made as to the letter from the Administrator of E.P.A., or from Russell Train, Chairman of the Council on Environmental Quality, or from Dr. Edward E. David, Jr., for the Office of Science and Tech-

<sup>5</sup> Compare *Epstein v. Resor*, 421 F. 2d 930, 933 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970), SEN. REP. 813, 89th Cong., 1st Sess. (1965) at 8, with H.R. REP. 1497, 89th Cong., 1st Sess. (1966) at 9-10, DEPT. OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE A.P.A. (1967) at 30.

<sup>6</sup> 5. "In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:

A. A memorandum prepared by me to the President dated July 17, 1971. This memorandum is classified as Top Secret and as Restricted Data.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin, dated June, 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data; and

5. A memorandum to me from the Council on Environmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.

<sup>7</sup> 3 C.F.R. 295 (1970).

nology. This is not a case where the mere disclosure of the fact of the inquiry is itself secret.

However, we do not think that a matter as important as this is to be determined on the basis of Undersecretary Irwin's affidavit as it stands. Under our remand, the District Court will take evidence on whether, and to what extent, the file contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret. Such documents are not entitled to the secrecy exemption of subdivision (b) (1) solely by virtue of their association with separately classified documents.

The following provision of Executive Order 10501 requires our attention since it is likely to be involved on remand:

(c) *Multiple classification.*—A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

The same reasoning applies to this provision as to the one dealing with physically-connected documents. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed.

2. Similar treatment must be accorded on remand with respect to the Government's claim for exemption under subdivision (b) (5). The Court has recently considered that exemption in *Soucie v. David*, No. 24,573, April 13, 1971, and there is no need to review that opinion at length. It suffices to say that while the exemption protects the decisional processes of the President, or other policy-making executive officials, it does not prevent the disclosure of factual information unless it is inextricably intertwined with policymaking processes.<sup>8</sup>

### III

We turn to the procedure to be followed by the District Court in carrying out the terms of our remand. In approaching this problem we have in mind the very special place the President occupies in the conduct of foreign affairs, both traditionally and constitutionally, apart from his additional responsibilities in connection with the national defense. In the exemption from disclosure contained in Section 552(b) (1) Congress has recognized the need for protection of the channels of communication and advice to the President in both these respects which are involved in the present litigation. Accordingly, *in camera* consideration of the documents by the District Court, looking toward their possible separation for purposes of disclosure or nondisclosure, is necessary, else the possibility of nondisclosure under the guides we have stated would be defeated. Moreover, although we have held in *Soucie v. David*, *supra*, that the policy of the Act requires that the exemptions from disclosure prescribed by FOIA be construed narrowly, this admonition must be tempered somewhat when the documents contain data supplied to the President with respect to nuclear explosions involving not only the national defense but the conduct of foreign affairs by the President in the context of such nuclear testing. In considering the documents also under the exemption granted by Section 552(b) (5) the District Court *in camera* will likewise have in mind, in possibly separating out factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption, the sometimes delicate character of the responsibility of the President in the conduct of foreign affairs.

As already noted, this opinion does not deal with all the questions argued to us. It suffices that for the reasons noted the summary judgment denying all relief to plaintiffs must be reversed, and the case remanded forthwith for further consideration by the District Court.

*So ordered.*

Mrs. MINK. 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

<sup>8</sup> *Soucie v. David*, slip opinion at 18.

are now pending before the Court. My comments today by no means are intended to minimize the importance of all of 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 render later this year.

Thus, I will not elaborate on the various issues such as scope of the "classification" and "internal memorandums" exemptions, the proper procedure for 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 our 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—as a result of these hearings 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 to legislate, 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 linedrawing 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 non-disclosure. 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 important, I would authorize the Court to require a Member of Congress to treat the information with confidentiality, perhaps even requiring closed sessions of congress-

sional 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 withholdings from Congress. Additionally, placing the responsibility on the Federal courts would enable the decisionmaker 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 factfinding 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 U.S. 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.

Thank you very much, Mr. Chairman.

Mr. MOORHEAD. Thank you very much, Mrs. Mink. I think this is a superb statement. You have told this subcommittee in words better



than anyone else has done the dimension of this problem of information. It is a crisis of constitutional dimensions. If we are to have the Congress as a truly coequal branch of Government, with power to represent the people, we must have access to information—either by setting up duplicating agencies, as you suggest and reject, or by having virtually total access to any information which the experts in the executive branch have obtained.

In connection with your testimony, we also had the problem of obtaining the environmental report on the supersonic transport. We were asked to vote on this issue and vote blind without any knowledge of a governmental report paid for by taxpayers' money. Yet we are the people that, under the Constitution have to raise the taxes from other citizens and spend it for them. But in this case, we just were flying blind.

I also appreciate very much your suggested remedies in addition to your sounding the word of crisis here today.

Mr. Horton?

Mr. HORROX. Mr. Chairman, thank you. I, too, want to thank you, Mrs. Mink, for a very thought provoking and a very fine statement. I think you have spotlighted the problem that we have been discussing here for many weeks and the problem is how do we get information for Members of Congress, that critical information that is so needed.

I also note that you make reference to an issue that I have raised many times, and that is that there is a distinction between information that should be made available to Members of Congress to assist them in carrying out their legislative responsibilities and information which should be made available to the public. There is a difference and it is an important difference, an important distinction. You also touched on the subject of maintaining a prohibition on Members of Congress against making public information given to them in confidence. In other words it would be thwarting the purpose of any act that might make the information available to Congress, although not to the public, if Members of Congress could get the information and then make it public. I am interested in how you can effectively enforce such a limitation and that is a subject which I think we haven't solved yet. You did give some direction to it but it is not precise enough, I am sure you will agree, as to protect that interest. But I think that this is a very fine statement that you have given and it does, I think, outline very well what this problem is. You have given us some very, as I said, thought-provoking suggestions as to how to solve the problem. Your idea about going to court for the decision is also very intriguing. That idea has not been suggested. There have been other approaches but the idea of going to a court for decision on it, to the district court, has not been suggested and I think that is something that will involve additional study.

I want to take this opportunity again to thank you.

Mrs. MINK. Thank you very much.

Mr. MOORHEAD. Thank you, Mrs. Mink. The people of Hawaii are very fortunate to have you as their spokesman here in Washington.

Mrs. MINK. Thank you. Thank you very much.

Mr. MOORHEAD. Mr. Keller, would you and Mr. Stovall and Mr. Duff resume your place at the witness table?

Mr. HORTON. I have to leave and our minority counsel is detained at another hearing, unfortunately. I am going to leave it up to Mr. Keller if he feels that you are browbeating him. Because I have to leave I am going to ask him to let me know and I will follow it up at a later date.

Mr. MOORHEAD. You will beat my brow?

Mr. HORTON. That is it.

STATEMENT OF ROBERT F. KELLER, DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES; ACCOMPANIED BY OYE V. STOVALL, DIRECTOR, INTERNATIONAL DIVISION; JAMES A. DUFF, ASSOCIATE DIRECTOR, INTERNATIONAL DIVISION; AND JAMES E. MASTERSON, SENIOR ATTORNEY, OFFICE OF THE GENERAL COUNSEL—Resumed

Mr. MOORHEAD. Mr. Keller, you speak in your testimony that Congress recognized the GAO would have to have complete access and you quote a statute in which it says "any books, documents or papers or any record of any such department or establishment." We couldn't write much stronger language than that, could we?

Mr. KELLER. No, sir. In fact, the only restriction in that statute is expenditures under section 291 of the revised statutes which I explained a little earlier has been interpreted to be confidential funds in the Department of State. They are very small compared to other expenditures.

Mr. MOORHEAD. What sort of access do you have to documents in the Central Intelligence Agency?

Mr. KELLER. None.

Mr. MOORHEAD. I beg your pardon.

Mr. KELLER. None. A number of years ago we were doing some audits of its above-board activities but in its covert activities we could see nothing except the certificate signed by the Director. Yet the implication was that GAO was auditing CIA. So we discontinued our audit at the time. We have performed no audit at CIA for several years.

Mr. MOORHEAD. And is that by special statute, a statutory exemption?

Mr. KELLER. Yes; the statute provides that certain expenditures can be made by CIA on the certificate of the Director of CIA. In other words, there is no documentation furnished. That is a pretty substantial part, as I recall.

Mr. MOORHEAD. So it is GAO's opinion that they couldn't carry on an effective audit so why give the appearance of one when it won't be real?

Mr. KELLER. Yes, sir. That took place, I guess, 7 or 8 years ago. We advised Congress we were no longer going to do any type of audit.

Mr. MOORHEAD. On page 2, the second line, "GAO's policy of insisting on generally unrestricted access." Why the word "generally"?

Mr. KELLER. Mr. Chairman, if there is a way where we can work out getting the information needed without access to all of the files, we would be open to that. For example, if an agency said we want to look at this report and maybe take out something that we don't think

ought to be in the general public, we might say OK, but we want to see the file before they start screening it out.

Mr. MOORHEAD. On page 4 of your testimony you indicate that GAO is having increasing difficulties in obtaining information it needs from the executive branch.

From your vantage point, what do you think is causing this greater secrecy in government?

Mr. KELLER. Our problem is primarily in the international or foreign affairs area both in DOD and in State. I think there is a great sensitivity concerning our relationships with foreign countries. To be perfectly honest there is a sensitivity between Congress and the executive branch on the handling of foreign affairs and I think all of this has entered into the picture.

We recognize that we can't expect the agencies to give us any more than they would give to Congress. So if the executive branch is having a problem with Congress, say, for example, in the handling of foreign affairs, and they are starting to tighten up a bit, we are also going to be on the receiving end. Now that is my own opinion. I think these factors enter into the picture.

Mr. MOORHEAD. Well, since GAO is an arm of the entire Congress, of all 535 Members of Congress, shouldn't any denials of information be required to come directly from the President who is the only constitutional coequal branch of the Government rather than from lower executive branch levels?

Mr. KELLER. Well, we would like to see it that way but in many cases it is the delay before we get to the final denial that is really hurting us. By the time you get the final denial perhaps we have long passed the point in our review where the information will do us any good.

You will take note that the directives which have been put out by DOD and State do not say flatly to refuse to give GAO a certain type of document. They say don't give it out in the field, refer it into us and we in turn will refer it up the line. Now that is where you get into the real problem. You could probably push it all the way up to the President to make the determination of executive privilege. I think there would be a great advantage in finding a mechanism to have the President really make these decisions on an individual basis.

Mrs. Mink very pointedly brought that out and I think it is a very good point because two things happen under those circumstances. First, we just don't run to the boss with every problem. Second, I think that the President, any President, would not like to exercise executive privilege too often because it does have its repercussions from a political standpoint; and I use political in the highest sense of the word.

Mr. MOORHEAD. When something is labeled "tentative planning data," what does that mean to the GAO, especially in an auditing sense?

Mr. DUFF. I would like to answer that as to how they apply it. It is very difficult. We don't see what they consider tentative planning data that they do not make available to us. Where the problem comes in and why we need this planning data is a result of the incremental funding of programs. That is, when they prepare a program and justify a piece of equipment in a country, more than likely that is going to be funded over a number of years. In order to review the justi-

fication and satisfy ourselves that it was within the program guidance we necessarily have to look at the total requirement. That is contained in documents which they consider future planning information. And that can be applied in this particular area to practically any document leading up to the decision of including it in the program.

Mr. MOORHEAD. Mr. Keller, I understand from your testimony that this problem of delay is the favorite gimmick that is used to deny you timely information.

Do you have any suggestions for any cure to that?

Mr. KELLER. I don't believe so, Mr. Chairman, other than the one that I mentioned a little earlier of perhaps an overall limitation on the use of funds if information isn't provided within a certain number of days, or really require the agency to get a written statement from the President in each individual case.

What disturbs me more than anything else with the invoking of executive privilege is that in both cases we have had in the last year, the language used by the President was fairly broad. It applied to those individual cases. But the language can be applied to many similar planning documents for other countries. It does not force another determination by the President. Whether or not you can legislate to require the President to make individual determinations on executive privilege I don't know, except to couple it with a cutoff of funds if he does not.

Mr. MOORHEAD. I personally believe that that directive of March 15, 1972, violates the letter and certainly the spirit of the April 7, 1969, letter and recommendation which Mr. Nixon sent to Congressman Moss who was then the chairman of this subcommittee.

Finally, Mrs. Mink said that this problem is so important that it is reaching constitutional dimensions. I think that your testimony certainly points that out.

You say on page 8 that executive action has seriously interfered with the performance of our responsibilities, that there is increased risk—this is page 9—“of our making reports without being aware of the significant information and the increased risk of our drawing conclusions based on only partial information.” and, finally, the last page, “the actions by the executive in withholding information of documents has seriously impaired our capability to effectively review and evaluate those programs or activities described in this statement.”

In other words, I take your testimony to be that the Congress, which relies on the General Accounting Office in so many fields, had better realize that at least in certain areas—because of the withholding of information from the arm of Congress—that this arm cannot be completely relied on in certain areas to do the kind of job that you think that the GAO should be able to do. Would that be a correct statement?

Mr. KELLER. Yes, sir; I feel quite strongly about it because I think Congress should know when we are not getting complete access. We appropriately qualify our reports, but on top of that I think it is a very bad situation if information is denied because the General Accounting Office just cannot operate without access to information of the agencies. As pointed out, in most cases, we have had very good cooperation, but 10 years from now the situation could be reversed. You

never know what is going to happen. So I think it is very important not only that we in GAO keep this issue alive and try to work out access problems whenever we have them, but also that we receive your help and support in this area.

Mr. MOORHEAD. That is one purpose for these hearings today and I hope that we can acquaint the other Members of Congress with this difficulty you are facing and get support of a majority for whatever action should be taken.

Mr. STOVALL. Mr. Chairman, in reaching for possible ways in which the situation might be improved, if there were some way perhaps legislatively to provide for a written request from the GAO to any agency representative, starting the running of the time period relating to the cutting off of funds or some type of action that would overcome this stairstep type of upward referral. If some way could be found to deal with this from the basis, from the point of the first inquiry, the type of situation that Mr. Duff was referring to, then I think as a practical thing we would be in a much, much better position. It would, I suppose, require legislation.

Mr. MOORHEAD. Yes, I think legislation would be necessary.

Mr. PHILLIPS?

Mr. PHILLIPS. Along this same line, Mr. Chairman, as to informing Congress of this problem, I doubt that a great many individual Members are aware of the difficulties that GAO is having in obtaining information from executive departments and agencies—and not just State or Defense—as you have indicated here in your testimony, many other domestic program areas are affected.

One of the ways to call this to the attention of other Members of Congress might be to put Mr. Keller's statement in the Congressional Record with some appropriate remarks. At least there would be an opportunity for every Member to read it that way and very few certainly would know it from reading the daily press.

On this question of IRS that you described on page 11, Mr. Keller, is this the current position of IRS, has it changed any at all since 1968?

Mr. KELLER. No, sir; it has not changed and they are pretty adamant in their position that they don't think GAO has any business in the Internal Revenue Service. They base their position on section 6406 of the Internal Revenue Code, which is in title 26 of the United States Code—

Mr. PHILLIPS. I have just read it here and I can't see anything in reading that would deny access to GAO for the purpose—

Mr. KELLER. They say this prohibits any administrative review of decisions. We are not trying to do that.

Mr. PHILLIPS. That section deals with individual taxpayer's matters—whether or not there is a claim against them or whether there has been fraud. Mr. Chairman, would it be appropriate to put in the record at this point the text of the two sections of the Internal Revenue Code that have been cited here on page 11 in the IRS letter to the Comptroller General?

Mr. MOORHEAD. I would think so and without objection it is so ordered.

(The document referred to above follows:)

INTERNAL REVENUE CODE

SECTION 6406. PROHIBITION OF ADMINISTRATIVE REVIEW OF DECISIONS

In the absence of fraud or mistake in mathematical calculation, the findings of fact in and the decision of the Secretary or his delegate upon the merits of any claim presented under or authorized by the internal revenue laws and the allowance or nonallowance by the Secretary or his delegate of interest on any credit or refund under the internal revenue laws shall not, except as provided in subchapters C and D of chapter 76 (relating to the Tax Court), be subject to review by any other administrative or accounting officer, employee, or agent of the United States. Aug. 16, 1954, c. 736, 68A Stat. 792.

*Historical note*

1939. *Internal Revenue Code*.—Similar provisions to this section were contained in section 3790 of the 1939 Internal Revenue Code.

*Derivation*.—Section 3790, I.R.C. 1939, was derived from Act Feb. 26, 1926, c. 27, § 1107, 44 Stat. 113.

*Similar Provisions*.—Provisions similar to those in section 3790, I.R.C. 1939, were contained in the following prior Revenue Acts:

1924—June 2, 1924, c. 234, § 1007, 43 Stat. 340.

1921—Nov. 23, 1921, c. 136, § 1313, 42 Stat. 313.

*Text of Revenue Acts*.—Complete original text of Revenue Acts of 1924 to date, see volumes "Title 26—Internal Revenue Acts".

*Legislative History*.—For a comprehensive analysis of this section as contained in House Report No. 1337, Senate Report No. 1622, and Conference Report No. 2543, which accompanied the Internal Revenue Code of 1954, see pp. 4560, 5230 of the 1954 U.S. Code Cong. and Adm. News.

*Notes of decisions*

*Library reference*.—Internal Revenue ⇐ 1982. C.J.S. Internal Revenue § 856.

1. *Generally*.—Determination of Commissioner as to his authority will stand unless plainly inconsistent with language of Internal Revenue Code. *Megibow v. C. I. R.*, C.A. 3, 1955, 218 F.2d 687.

2. *Presumptions*.—The determination of the Commissioner is presumed to be correct, and the burden is on the taxpayer challenging such determination to establish the incorrectness thereof. *Oberwinder v. C. I. R.*, C.C.A.S. 1945, 147 F.2d 255.

The Commissioner's determination in income tax matter is presumptively correct, but there are limits to such presumptive correctness. *U.S. v. State Street Trust Co.*, C.C.A.Mass.1942, 124 F.2d 948.

A determination by Commissioner is prima facie correct. *Herskovits v. C. I. R.*, C.A.A.1940, 110 F.2d 272.

The general presumption of correctness of Commissioner's determination does not constitute substantive evidence in case, and effect of such presumption is only to change burden of going forward with evidence. *Woodward v. U. S.*, D.C. Iowa 1952, 106 F.Supp. 14, affirmed 208 F.2d 893.

In action to recover capital stock taxes paid, determination of Commissioner is presumptively correct and burden is on taxpayer to prove tax nonliability. *Allen v. Rogan*, D.C.Cal.1941, 39 F.Supp. 424.

3. *Change of decision by Commissioner*.—Commissioner who granted tentative refund allowance could change his ruling even on claim as made, and any time thereafter. *Sherwin v. U. S.*, C.A.Cal.1963, 320 F.2d 137, certiorari denied 84 S.Ct. 481, 375 U.S. 964, 11 L.Ed.2d 420, rehearing denied 84 S.Ct. 796, 376 U.S. 946, 11 L.Ed.2d 771.

That government made tentative allowance, without reaching final agreement, granting defendant taxpayer's claim for refund for 1950 in accordance with taxpayer's contention that he was in business of promoting corporations, did not preclude government, in income tax evasion prosecution, from denying that taxpayer was in that business in 1951 with respect to corporation whose losses taxpayer sought to claim as personal operating loss. *Id.*

If the statute of limitations has not run against reassessment of income tax by the Commissioner, he may cancel a deduction taken in one year for a tax which the taxpayer has accrued or paid, when the tax is refunded in a later

year because it was unlawfully imposed. *Ben Binberg & Co. v. Helvering*, C.C.A. 1942, 126 F.2d 412, certiorari denied 63 S.Ct. 32, 317 U.S. 641, 87 L.Ed. 516.

4. *Judicial review*.—Findings of Commissioner in making tax assessment, where reviewable, constitute only prima facie evidence. *Williamsport Wire Rope Co. v. U.S.*, 1982, 48 S. Ct. 587, 277 U.S. 551, 72 L.Ed. 985.

Where it could not be determined whether expenditures of taxpayer were made for allowable deductions or not, Commissioner's determination with respect to such matter would be sustained in taxpayer's action to recover back income taxes paid. *Johnson v. U.S.*, 1941, 39 F.Supp. 103, 94 Ct.Cl. 345.

*Supplementary index to notes*

3a. Notice of deficiencies.—Act of director in issuing notice of additional deficiency in federal income taxes did not violate this section precluding administrative or official review except by tax court of findings of fact in and decision of the Secretary or its delegate on merits of any claims presented under or authorized by internal revenue laws on theory that notice was initiated by the Justice Department since Justice Department attorneys who were representing government in taxpayers refund action for same tax years as those covered by deficiency notice, were not thereby prohibited from counseling with Secretary or his delegate and the Secretary, who issued notice, was not prohibited from acting on such advice. *Crocker v. U.S.*, D.C. Miss. 1971, 323 F. Supp. 718.

§ 8022. DUTIES

shall be the duty of the Joint Committee—

(1) Investigation.—

(A) Operation and effects of law.—To investigate the operation and effects of the Federal system of internal revenue taxes:

(B) Administration.—To investigate the administration of such taxes by the Internal Revenue Service or any executive department, establishment, or agency charged with their administration; and

(C) Other investigations.—To make such other investigations in respect of such system of taxes as the Joint Committee may deem necessary.

(2) Simplification of law.—

(A) Investigation of methods.—To investigate measures and methods for the simplification of such taxes, particularly the income tax; and

(B) Publication of proposals.—To publish, from time to time, for public examination and analysis, proposed measures and methods for the simplification of such taxes.

(3) Reports.—To report, from time to time, to the Committee on Finance and the Committee on Ways and Means, and, in its discretion, to the Senate or the House of Representatives, or both, the results of its investigations, together with such recommendations as it may deem advisable.

(4) Cross reference.—For duties of the Joint Committee relating to refunds of income and estate taxes, see section 6405.

Aug. 16, 1954, c. 736, 68A Stat. 927.

*Historical note*

1939. *Internal Revenue Code*.—Similar provisions to this section were contained in section 5011 of the 1939 Internal Revenue Code.

*Derivation*.—Section 5011, I.R.C. 1939, was derived from Act Feb. 26, 1926 c. 27, § 1203(c), 44 Stat. 127.

*Text of Revenue Acts*.—Complete original text of Revenue Acts 1924 to date, see volumes "Title 26—Internal Revenue Acts."

*Legislative history*.—For a comprehensive analysis of this section as contained in House Report No. 1337, Senate Report No. 1622 and Conference Report No. 2543, which accompanied the Internal Revenue Code of 1954, see pp. 4593, 5279 of the 1954 U.S. Code Cong. and Adm. News.

*Library references*.—United States  $\S$  23(5). C.J.S. United States  $\S$  26.

Mr. PHILLIPS. Since we will be having IRS before the subcommittee, do you see anything in these two sections that—

Mr. KELLER. That is just our position, Mr. Phillips, section 6406 prohibits any administrative review of individual decisions but that isn't our purpose. We don't intend to go in there and second guess on a compromise of a tax case or refund in an individual case.

Mr. PHILLIPS. That would be my interpretation of it too.

Mr. KELLER. But we are interested how they go about auditing returns. We might have some suggestions for improving their audit. With the cooperation of the Joint Committee on Internal Revenue Taxation, we are looking at the delinquent accounts not your or my individual account, but, across-the-board, how it varies between regions, what are the guidelines for writing these off and matters of that type.

The other section, 8022, merely gives the Joint Committee on Internal Revenue Taxation authority to investigate the administration of the tax laws by Internal Revenue. Certainly I don't read that to say they are the only ones that can look at it, which is really their argument.

Mr. PHILLIPS. It seems like they are leaning on two weak reeds. The reason I asked, of course, is that since there is now a new administration and a new Commissioner of Internal Revenue, I think it is interesting to note that there is a parallel in the problem areas that you point out in your statement of GAO access. In many of the same departments and agencies there has been a great difficulty on the part of private citizens obtaining information under the Freedom of Information Act. I think IRS is perhaps the best example. We have had many cases called to the attention of the subcommittee of denial of information under the act itself. When the Internal Revenue Service testified before this subcommittee last month, we explored some of these cases quite fully. I think there is an arrogant attitude here on the part of IRS that extends to Congress, the GAO, and the public at large.

Mr. KELLER. The exchange of correspondence which I mentioned in my statement took place in 1968, but as I recall it the matter was reopened when Mr. Kennedy was Secretary of the Treasury and their position hadn't changed any.

Mr. PHILLIPS. Can you think of any reason why they are reluctant to permit an audit of their own internal administration? I am thinking particularly of appropriated funds—almost a billion dollars annually to run the agency itself.

Mr. KELLER. Well, they are apparently very sensitive about anybody having access to the tax returns.

Mr. PHILLIPS. They were also reluctant to answer some of our questions frankly when they were up here last month.

Mr. KELLER. They are sensitive as to what their methods of audit are and how the tax system is policed.

As I am sure you know, Mr. Phillips, we have close to a volunteer tax payment system in this country which is probably different from anywhere in the world and it is very successful percentagewise. I surmise that Internal Revenue does not want anything to happen to break down the confidence that exists in the public at the present time.

Mr. PHILLIPS. Perhaps one of the reasons I can think of is a study I read recently of the allocation of IRS funds for enforcement purposes in which there seemed to be a disproportionate amount going to audit small taxpayers, the little guy, small businesses, and a very small part of the total going to audit giant corporations. Perhaps that is what they are trying to hide.

Mr. KELLER. I do not know: I can't answer that.

Mr. PHILLIPS. No further questions, Mr. Chairman.



Mr. CORNISH. Mr. Keller, would you agree with me that planning is a vital management function both in government and in industry?

Mr. KELLER. Both in government and in industry?

Mr. CORNISH. Yes.

Mr. KELLER. Oh, yes.

Mr. CORNISH. And it also costs money, doesn't it?

Mr. KELLER. A great deal of money.

Mr. CORNISH. And a lot of taxpayers' money goes into planning activities in Government agencies, I am sure you will agree with that.

Mr. KELLER. Yes, sir.

Mr. CORNISH. And doesn't the General Accounting Office also conduct comprehensive management audits as well as financial audits and other types of reviews?

Mr. KELLER. We do. Mr. Cornish. We really break our audit down in three ways. One is financial audits, another is audits for economy and efficiency in operations and, the third is what we call review of program results, that is, what are the results of the program that is being carried out.

Our program results reviews are based on the idea you can run something very efficiently but it may not be worth doing it all.

Mr. CORNISH. Well, I guess you can see the point I am trying to hammer home, and it is simply this, that planning is definitely a Government activity; it costs money; and it should be examined periodically to see how well it is done and whether it is done economically and efficiently and with effectiveness.

Would you agree with my statement?

Mr. KELLER. Yes, sir.

Mr. CORNISH. You mentioned during the course of your testimony something which you refer to as a personal management document. Do you recall making that reference? Maybe it was Mr. Duff.

Mr. DUFF. That was in the chronology of the problems we had with one document in Cambodia that I mentioned.

Mr. KELLER. Personal management.

Mr. DUFF. That is a term used by CINCPAC.

Mr. CORNISH. Is that the language they used, or is that language that you coined?

Mr. DUFF. No; that was the language they used. They considered it a personal management document.

Mr. CORNISH. It would seem to me that the use of such terminology would indicate they seem to feel that they have a certain right of privacy which goes far beyond personal right of privacy guaranteed in our Constitution under the fourth amendment—that there is a Government right of privacy that applies to officials of the executive branch. Do you get that connotation from the language?

Mr. KELLER. They consider a number of their documents that are used within a command to be the type of documents that should be limited to use by the people in that command.

Mr. CORNISH. Now, earlier, Mr. Duff, I mentioned the lost battalions in Cambodia. Is it your understanding—and perhaps, Mr. Stovall, you might want to enter into this, too—that the agreements, the aid agreements that we have, or the aid understandings that we have with Cambodia, whether it be military or economic, provide for refund claims when our assistance is used improperly and that these are docu-

ments that have the full force of an international bilateral agreement between the two countries and both countries solemnly pledge to adhere to those provisions?

Mr. DUFF. I don't know whether the document with Cambodia is that precise and I am not that familiar with it.

Mr. CORNISH. Mr. Stovall, isn't that a standard provision in practically all aid agreements?

Mr. STOVALL. That is a usual provision, I believe. I don't have the specifics with me but I believe it is true in relation to Cambodia.

Mr. CORNISH. Of course the point I am trying to make here is that this involves, if the charge is true—and I understand that it is—this involves an improper expenditure of U.S. taxpayers' money and that a refund claim should have been presented to the Government of Cambodia for those expenditures and we should have been reimbursed, and I would maintain that very clearly is a matter of interest to the General Accounting Office and to the Congress of the United States.

Would you disagree with that contention? I would hope not.

Mr. STOVALL. It might be that if the committee wishes we could get a more specific statement of this from our Far East branch and make it available for the record. It might be helpful because we can deal more directly with it.

Mr. CORNISH. Well, you would agree that that is a question of economy and efficiency in carrying out an international agreement reached by the United States with a foreign state?

Mr. STOVALL. Yes, indeed.

Mr. KELLER. I think it is a little more than economy and efficiency. It is a financial responsibility which you have to make sure is carried out.

Mr. CORNISH. One of the things that concerns me about the delay question that you made such a point of, Mr. Keller, is that isn't it true that one of the major complaints which this committee—and for that matter other committees of the Congress have frequently brought to the GAO's attention—is the timelag involved in many of the GAO reports? Now I understand this has been improved somewhat in recent years but there still is a timelag and apparently, if I am not mistaken—you may wish to confirm or deny this—the delays which you speak of contribute materially to the overall delays in forwarding very valuable and vital reports to the Congress.

Mr. KELLER. I don't think there is any doubt about that, Mr. Cornish. You are correct that we have been criticized for the delay in making our reports to Congress. You are correct that it has improved somewhat but we have a long way to go and we are working hard to speed up this process. But you are absolutely correct that any delay in getting access to documents and information naturally results in further delay and a longer time in completing the job.

Mr. CORNISH. Now, this is of crucial importance; is it not?

Mr. KELLER. I think it is important because Congress generally is not interested in reports of historical information.

Mr. CORNISH. No, and for that matter—

Mr. KELLER. Congress is interested in current operations, something that can be done at the time the report is made.

Mr. CORNISH. Yes, that is the important point right there. You put your finger right on it. We have authorization bills and appropria-

tion bills coming up on the floor of Congress and we need timely information for the Members to make informed decisions about how they are going to vote on those bills, on amendments and things like that and if there is a delay in the presentation of information then Members of Congress cannot make these informed decisions. It is too late; it is simply too late; and as a result of that situation you have reports that are flowing in after actions have been taken on authorizations and appropriations bills, and you say "Oh, my gosh, I wish I had had this document at the time that measure was up on the floor." I think you would agree this is not an abnormal problem but an everyday situation.

Mr. KELLER. Well, Mr. Cornish, I think we have improved but we have to improve a great deal more.

Mr. CORNISH. With that caveat which I am certainly willing to accept.

Now, on page 7, you mention the instructions which had been sent out by the Agency for International Development on March 23, 1972, to its operating personnel.

Mr. KELLER. Yes, sir.

Mr. CORNISH. And down there in No. 3, in that paragraph reading, and I quote:

In lieu of the disclosure of such documents, the President has directed the 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 circumstances.

Now, would you agree with me that this is a tremendous exercise, a wasteful expenditure of money, to think that officials have got to spend hours and, perhaps days, preparing special oral briefings and special documents. This costs a lot of money; whereas they could present the Congress with the original document with maybe a few caveats on it that sections X, Y, Z of this document is not an approved executive branch position but the remainder of it is?

Mr. KELLER. Certainly. Mr. Cornish, it entails a good deal more expense to do it this way. I think probably one of the problems is sorting out factual information versus opinions. It is sometimes a very difficult thing to do.

Mr. CORNISH. I am glad you brought that up. Now, you may need some assistance from Mr. Stovall on this, in all due respect to you, but the country field submission which this subcommittee was refused, now that, Mr. Stovall, would you agree with me that that is essentially—the bulk of it—a factual document?

Mr. STOVALL. Yes, and it, of course, is an essential element of the whole managerial operation. On this point also we mentioned on page 8, that even though they go through this waste motion and do a screening or summarizing operation, we stated that the end result still wouldn't be acceptable to us unless we knew and had means of knowing that it was a faithful representation of what was in the document.

Mr. CORNISH. Right. One last point, Mr. Chairman. Mr. Keller, to me what you seem to be saying in your testimony is that you are doing the best job possible with what you have got but you don't know what

you have got. And if you don't know what you have, you can't attest to the validity of the conclusions or recommendations or findings which you have made. Would you agree that is a fair statement?

Mr. KELLER. Yes.

But we are not just accepting screened documents, if that is what you are talking about. We are more interested in getting the documents themselves and pushing for an assurance, at least satisfactory to us, that if any files have been gone through, there is nothing pertinent that has been taken out of them.

Mr. CORNISH. We work on—as you know—many investigations which are somewhat similar to yours in character, and I can tell you from my own personal experience that the absence or the omission of certain information has made some of my work totally useless and incorrect.

Mr. KELLER. It certainly could happen, there is no doubt about it.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Phillips?

Mr. PHILLIPS. I think we should point out one good example of this whole question of partial access, and that is in regard to the study which GAO recently conducted at the request of our subcommittee on the cost of administering the security classification system. This was in an attempt to put a dollar sign on the tremendous costs that are involved in all aspects of security classification. The study was requested last summer after our initial hearings into this area, and GAO did what it thought was a fine job, despite the fact that they could not obtain much of the information that is vital to an accurate picture of what the cost of the classification system really is. One big item that was not obtainable from any of the departments in detail was the question of what it costs for security classification measures carried on by Government contractors. This probably is the largest part of the total iceberg. The total dollar amount that was ascertainable as a result of the study was over \$126 million a year just for four agencies that were selected because they would have the bulk of this type of classification activity—the State Department, the Defense Department, AEC, and NASA.

This is a good example of where repeatedly, and most recently last week, GAO tried very hard to get this information from these four agencies as to what the contractor costs for security classification were and these figures were just not available, they said. The agencies said they didn't break them down that way, but we have good reason to believe that the cost of that part of the total is probably a great deal more than the estimate of \$126 million that showed up in the GAO report.

One last question, Mr. Chairman.

GAO recently conducted an audit of the space shuttle engine contract administered by NASA. Mr. Keller, are you satisfied that that audit contained full and complete information from NASA that was necessary to make a good audit? Did you encounter the kind of delay tactics and so forth you have mentioned here in your statement that you often—

Mr. KELLER. To my knowledge we did not have any problems with NASA.

Mr. CORNISH. That wasn't an addition in this particular audit?

Mr. KELLER. No, sir. In fact, I think we have had very few problems with NASA over the years.

Mr. CORNISH. You would consider this a very routine one compared to some others?

Mr. KELLER. Well, very little is really routine.

Mr. CORNISH. In terms of difficulty in obtaining information.

Mr. KELLER. I don't recall any difficulty at all. If there was anything serious, I think I would have heard about it.

Mr. MOORHEAD. I would like to ask you on another case a similar question on the Navy and Mark-48 torpedo. I have your report, which is classified "confidential." I will read you one sentence from a paragraph that is marked "unclassified." And it says, "The June 1971 SAR does not overcome one basic shortcoming of previous SARs," frankly discussing what is happening in the Mark-48 program.

Did you have free and complete access to, in auditing that program particularly, say, to monitor test results?

Mr. KELLER. We have had no problem with the major weapon systems in getting access to information. I think the point that was brought out there was with the SAR report itself. We are auditing against that. The SAR report is prepared by the Department of Defense, as you know. The SAR report doesn't always point out what all their difficulties are, and we are attempting, I believe, in our report to point out some of those difficulties. Our point is we think DOD should be pointing these things out in their report.

Mr. MOORHEAD. In their own report so that you would not have to dig through to find these things out? But you were able to dig through to your own satisfaction?

Mr. KELLER. Yes, sir, we have had very good success in that side of the Defense Department, so to speak.

Mr. MOORHEAD. Thank you, Mr. Cornish.

Mr. CORNISH. Mr. Chairman, Mr. Keller, isn't it true, and I think you refer very briefly to this in your testimony, isn't it true that any State tax commissioner can go to the IRS and ask to see an individual return of a taxpayer residing in that State?

Mr. KELLER. I believe that is provided for. Mr. Masterson has the regulations with him.

This is Mr. James Masterson from our General Counsel's Office.

Mr. MASTERSON. Your specific question was if a State commissioner of taxation can check the personal returns and see—

Mr. CORNISH. There is an agreement, is there not, between IRS and State tax commissioners that they exchange information of that sort?

Mr. MASTERSON. Yes. I think that it would be the regulation in 26CFR301.6103(b)1, (b) (2). Its subject is returns filed in internal revenue district within or including State-General inspection. I think that is the authority you are referring to.

Mr. CORNISH. I think you will find my statement is correct. This matter came up during another investigation conducted by this committee: and, Mr. Chairman, I think it is absolutely incredible that a State agency can see this type of information, but the General Accounting Office, the investigative arm of the Congress, cannot.

Mr. KELLER. I want to make sure, Mr. Cornish, you understand in my prepared statement that—

Mr. CORNISH. I understand that under—

Mr. KELLER. That in performing an audit of a contractor where we think we need to look at that contractor's tax returns, for example, then we can write to the Director of Internal Revenue and request access and we will probably get it. But that is for another purpose, it isn't for the purpose of seeing how effective or efficient a job the Internal Revenue Service is doing.

Mr. CORNISH. That is the point I am trying to reach. I realize there were some other ways of handling some of these other matters.

Mr. KELLER. Yes, sir.

Mr. MOORHEAD. Thank you very much, Mr. Keller, Mr. Stovall, Mr. Duff. We appreciate your testimony. It was very forthright, very strong. I hope that this testimony will help to persuade the Members of Congress that we have got to give you more backing and more support for the job you are doing for us. Thank you very much.

Mr. KELLER. Thank you, sir.

Mr. MOORHEAD. When the subcommittee adjourns, it will adjourn to meet on Tuesday, May 23, at 10 o'clock.

The subcommittee is now adjourned.

(Whereupon, at 12:40 p.m., the hearing was adjourned, to reconvene at 10 a.m., Tuesday, May 23, 1972.)

# U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—PROBLEMS OF CONGRESS IN OBTAINING INFORMATION FROM THE EXECUTIVE BRANCH

(Part 8)

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TUESDAY, MAY 23, 1972

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead and John N. Erlenborn.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will come to order.

This morning we resume our hearings on problems of Congress in obtaining information from the executive branch. Last week we heard from a number of our colleagues in the House on the subject of so-called "executive privilege" in which they outlined cases where information has been denied them. In some cases such denials took place at lower echelon bureaucratic levels far short of the invocation of the "magic phrase," which President Nixon (like his two predecessors) had assured the former chairman of this subcommittee would only be personally exercised.

We also received testimony from Deputy Comptroller General Keller, who testified concerning difficulties of GAO in obtaining certain types of information from executive agencies. Among the most flagrant examples cited by Mr. Keller were those affecting the Internal Revenue Service. As Members will recall, the gentleman from New York (Mr. Horton) suggested that IRS be called to testify on these allegations. Subsequently, a letter was addressed to Commissioner Walters to solicit such testimony for Wednesday morning of this week. Commissioner Walters will appear with other IRS officials to discuss this matter with the subcommittee. In addition to Commissioner Walters, the subcommittee will also hear tomorrow morning from

Mr. Rady A. Johnson, Assistant to the Secretary for Legislative Affairs, Department of Defense, and in the afternoon from Rear Adm. Gene R. La Rocque, retired, Director of the Center for Defense Information.

This morning we are pleased to have as our witnesses our colleague, Representative Bella S. Abzug of New York and Professor Raoul Berger, a leading legal expert on the subject of "executive privilege."

Will you please come forward?

Professor Berger has graciously consented to begin his testimony and to suspend it when Mrs. Bella Abzug arrives. She had to appear before another committee, the Banking and Currency Committee.

So we are particularly pleased to have Professor Berger with us. He is a graduate of Northwestern University, LL.B., Harvard, LL.B., he was in charge of appellate matters for the Securities and Exchange Commission and Special Assistant to the Attorney General.

He served as an Associate General Counsel, and then General Counsel of the Alien Property Custodian Department during World War II. He entered private practice in Washington in 1946. He was invited to the University of California in Berkeley as a Regents Professor in 1962. He remained several years and left to devote himself to his writing.

The first fruit of his study is entitled "Congress Versus the Supreme Court" and was published in 1969 by the Harvard University Press. That press will publish a second book, "Impeachment," in the fall of 1972.

He served as chairman of the section on administrative law of the American Bar Association and as chairman of its special committee on special courts. At present he is a Charles Warren senior fellow of the Harvard Law School.

In 1965 he published a comprehensive study, executive privilege versus the congressional inquiry.

Professor, as a graduate of the Harvard Law School, I particularly want to welcome you, and before you sit down I would like to administer the oath.

Do you swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

Professor BERGER. I do.

Mr. MOORHEAD. You may proceed, sir.

#### STATEMENT OF PROF. RAOUL BERGER

Professor BERGER. I am appreciative of your kind invitation to appear before you because I believe you are engaged in a task that goes to the roots of the American Government, whether it is warmaking by the President, whether it is his singlehanded control of foreign relations, you cannot proceed without information as to what is going on in the subterranean depths of the executive branch. I regard the sustained effort that this subcommittee has made to gain access to such information as a great chapter in the history of Congress.

What we need is not so much more hearings as some decisive action. My concern is going to be with the legal problems that surround executive privilege. I am satisfied that you know much more than I do how painful it is to legislate in the absence of information. With the



long months of hearings behind you. I am sure that you are quite familiar with many things I am going to state. So if I recapitulate some familiar materials, it is because I feel there is the necessity of educating the rest of the Congress and even more important, the American people.

You said, Mr. Chairman, and justly so, the magic words—"executive privilege." In going through some of my papers last night I discovered that George Ball, the former Under Secretary of State, testifying before the Fulbright Senate committee, said executive privilege is a myth; I would add: a myth created by the executive branch itself during the 19th century and more importantly very recently in our own time. So the first thing it behooves us to do is to look at some of the roots of this claim. I think if Congress itself is satisfied that it is dealing with an unsubstantial claim it is going to be vastly encouraged to insist its own rights.

Let me begin with the most recent example of how history is being manufactured right under our noses, the claim of privilege for Peter Flanigan on the ground that he is a member of the White House staff. The counsel for the President, Mr. John W. Dean III, explained that Mr. Flanigan's immunity was grounded on "long-established historical precedents." What are these precedents? When Attorney General Rehnquist testified—I forget whether it was before your committee or not—

Mr. MOORHEAD. Yes; it was this subcommittee.

Professor BERGER. The instances he mustered were the John Steelman case and the General Bradley case in the Truman administration, that is to say they go back to about 1950 or 1951.

Now what were these precedents? According to Mr. Rehnquist they were confidential conversations with the President. Would President Nixon claim that he held confidential conversations with Mr. Flanigan about the ITT case? That is inconceivable. So we have a brand new doctrine of geographical location. If you are located on the White House staff, you have a mantle of immunity. Later I shall return to some of the legal considerations that are tied into confidential conversations, particularly in my discussion about Mr. Kissinger.

I shall begin with the separation of powers because this is the rock on which the executive branch chiefly builds. Second, I shall examine the historical basis of the congressional power of inquiry. Now there we have history, as you will find, we do not have a figment of the imagination.

At the adoption of the Constitution, history shows there was a power of inquiry that pertained to surveillance of executive performance. That is nothing new; it is centuries old.

Then I shall show there is no comparable history for executive privilege and that the earliest "precedents" invoked by Mr. Rehnquist go no further back than the Washington administration. And as I shall show, they don't stretch so far.

Next I shall comment on the recent development of the claim of privilege for so-called candid interchange. The executive branch says if you compel us to tell you how we are doing things, how we are talking them over, we cannot perform so well. In other words, if you write a law and then later on ask what is happening thereunder the

executive branch says, sorry, you will destroy our candor if we tell you what you have asked.

Then I shall discuss the basis for the claim of privilege for confidential conversations. I am sure you will be interested in some of the historical facts I dug up.

Finally, I shall comment on the refusal of the Secretary of Defense to comply with your request for information under the act of 1928. One who refuses to comply with a request authorized by statute is violating the law; he is a lawbreaker. Are you going to sit by while laws are being broken? The next question is, What can you do about it?

The first appeal of the executive branch, repeated before you by Mr. Rehnquist, is to the separation of powers. Let me say at the outset that is one of the real foundations of American Government: nothing I am going to say is intended to be disrespectful to the separation of powers. To the contrary, I wish that when the President goes to Moscow he will bear in mind the separation of powers. But the separation of powers is not an incantation. Before you reach the separation of powers you have to ask, What does it separate? You have to begin with three compartments, and ask, What does each contain? Only then can we say, these three powers which are distinctly identified are to be kept separate. Looking at the separation of powers alone does not tell you a thing about what is being separated. You must start by asking the question, What were the powers of the Legislature at the adoption of the Constitution: and what were the powers of the executive branch at the adoption of the Constitution? It is for this reason I differ with Justice Arthur Goldberg who testified before you in March. Looking at article 2 that confers the executive power is like looking into a crystal ball. So when Justice Goldberg says "it is true that article 2, vesting the executive power of the United States in the President, necessarily implies that certain activities he conducts, either directly or through his staff and the executive departments are privileged" he assumes the answer. He is assuming there is some magic in executive power that insulates it from inquiry. That is precisely the problem that has to be answered. How do we find out when we have certain terms, namely, the legislative power, the executive power, and the judicial power, and the principle of separation of powers? How do we find out what was meant by all that?

We do what the Supreme Court has always done. We look to history. When the courts wanted to determine whether they enjoyed the contempt power—there is nothing said about that power in the Constitution, and it is a tremendous power—they looked to the practice of the English courts. They found that the English courts enjoyed the power and therefore they said, all courts, being set up to exercise judicial power, enjoy what was a judicial power at the adoption of the Constitution; namely, the contempt power. By the same reasoning if we want to find out what was within the scope of the legislative power, we look to history, and we do the same for the executive power.

I think one can safely say that history discloses an established, virtually untrammled, parliamentary power of inquiry, whereas the executive branch—and I want to emphasize this—has not advanced a single precedent prior to the Washington administration which showed the existence of executive power to refuse information to Parliament. The two Washington incidents I will comment on are no precedents

at all, yet they have been advanced by the executive branch time after time.

I shall compact a considerable amount of historical fact that is spelled out in an article I wrote in 1965 that runs over 175 pages: and shall select a few incidents.

The great William Pitt, speaking in 1742 to the proposed investigation of the ousted premier, Robert Walpole, said, "We are called the Grand Inquest of the Nation."

Remember the words "Grand Inquest." They bob up in history time and time again.

Pitt stated, "We are called the Grand Inquest of the Nation, and as such it is our duty to inquire into every step of public management, either abroad or at home, in order to see that nothing is done amiss." "Abroad" has reference to foreign relations. Pitt claimed the power of inquiry into whatever the executive was doing.

Pitt's statement was echoed in 1774 by James Wilson, second only to Madison among the Framers, and said by Professor McCloskey to be the finest lawyer in America at the time: later he was to be a Justice of the Supreme Court. Behold what Wilson said: "The House of Commons have checked the progress of arbitrary power, and have supported with honor to themselves, and with advantage to the Nation, the character of Grand Inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censures, and have appeared at the bar of the House to give an account of their conduct."

So here is Wilson fully cognizant of the English history and later one of the Framers restating what Pitt said. When he later used the words, "legislative power" he knew what it meant. It included virtually unfettered power of inquiry into executive conduct. Reference to the "grand inquest" appears in several ratification conventions. In the Second Congress (1792), Elias Boudinot stated respecting a proposed investigation of the affairs of the Secretary of the Treasury, Alexander Hamilton, that "We're now exercising the important office of the Grand Inquest of the Nation." And he also noted that the inquiry was "into the conduct of an officer of the government in a very important and highly responsible station." George Washington, I might add, welcomed that investigation.

The high priest of the separation of powers who was quoted again and again by the founders—his name is cited in every convention with reference to the separation of powers, was Montesquieu. Here is a man who is the grand architect of the separation of powers. He said, "the legislature should have the means of examining in what manner its laws have been executed by the public officials." It seems to me if Congress passes laws and if there is a duty placed on the President by the Constitution, as there is, to faithfully execute the laws, the minimal question the Congress must ask is, are you faithfully executing the laws? Montesquieu before anybody ever sat down and drafted the Constitution, understood that. So the separation of powers did not extend to executive immunity from legislative inquiry.

All of this was summarized by the Supreme Court in *McGrain v. Daugherty*. And every time you feel at all doubtful about it, it will pay you to go back and read the case. That was one of the upshots of the Teapot Dome scandal. And I want to remind you that if the Congress has had its McCarthys, it has also had its Tom Walshs and

others who exposed corruption on a grand scale. They have done it periodically in our history.

In *McGrain* the Court said "power to secure information by such investigatory means has long been treated as an attribute of the power to legislate."

So the Court is making the point I made earlier, that the power of inquiry is an attribute of the legislature. It goes on to say "it was so regarded in the British Parliament and in the Colonial Legislatures before the American Revolution." The Court also declared there is a second branch of the power. It said by Justice Vandevanter that an investigation of the administration of the Department of Justice, and particularly whether the Attorney General and his assistants were performing or neglecting their duties, was within the jurisdiction of Congress. In sum, first there is the power to legislate, and Congress has to have information to legislate; second, there is the power to investigate into executive performance; and third, there is the power to impeach and, as you know, you may investigate before you impeach.

When you appropriate \$300 million, whether it is for Cambodia or anything else, you are entitled to inquire whether the executive branch is carrying out the purposes which you had in mind when you appropriated those funds. That is the lesson of *McGrain*.

How did Attorney General Rogers in his 1958 memoranda meet that? He met it, in my judgment, in an utterly incredible fashion. He said *McGrain v. Daugherty* involved the brother of the Attorney General, Mal Daugherty, a banker, who sought to resist the investigation, but it is absurd to argue as did Attorney General Rogers that the Attorney General himself could not be called in an investigation of his own derelictions. The Court said Congress can investigate whether the Attorney General is neglecting his duties; and Mr. Rogers maintains that although you can investigate the Attorney General, you can't call the Attorney General himself. To me that is the height of the preposterous.

We have to remember that this contention is met at the threshold by the act of 1789, a statute that was drafted by Alexander Hamilton and enacted by the First Congress, which was virtually an adjourned session of the convention in which sat, I forget how many framers and endorsed by President Washington. That act required the Secretary of the Treasury to give information to either branch of the legislature in person or in writing as may be required respecting all matters which shall pertain to his office.

So here you have a "precedent" by the most competent interpreter we have ever had, because a large number of its members helped to write and to ratify the Constitution. And I want to underscore that the First Congress, Alexander Hamilton and President Washington quite plainly did not regard this statute as a violation of the separation of powers. Washington was the presiding officer of the convention. I should add here that both the Secretary of War and the Secretary of the Treasury appeared before the House in the St. Clair investigation which I shall come to. Now what does that make of the contention of Attorney General Rogers that only a private person was meant by the Supreme Court or only a private person can be compelled to appear? It is utter nonsense.

Here we have, it seems to me, unmistakable history. It speaks on the face of it, whether you look at Pitt, James Wilson, or Montesquieu. The act of 1789 speaks plainly that Congress had and was intended to have a power to require the executive branch to give information. It may be urged that the act only involves the Secretary of the Treasury. But in 1854 Attorney General Cushing said, by implication of law it is a duty imposed on every department head. Where is the comparable history for executive privilege? That is where our real starting point ought to be.

When Assistant Attorney General Rehnquist appeared before you, he stated that this privilege was firmly rooted in history and precedent. He produced no preconstitutional precedent to show that the legislative surveillance of the executive was in any way limited. Bear in mind the importance of pre-Constitution precedent, because it is to those precedents we have to look initially to ascertain what was the scope, what were the attributes, of a given power. Remember that *McGrain v. Daugherty* looked to Parliament history to determine whether there was a legislative power of inquiry. I say to you flatly that no member of the executive branch has ever adduced a pre-Constitution precedent for limited inquiry. Instead Messrs. Rehnquist and Rogers invoked two incidents during the Washington administration; namely, the St. Clair investigation and the Jay Treaty incident. Let me begin with the St. Clair investigation because that is one of the roots of executive privilege claims.

Gen. James St. Clair had been badly defeated by the Indians; there was an uproar in Congress, and it proceeded to investigate. The House called on the Secretary of War for documents. Mr. Rehnquist described an excerpt from Jefferson's notes of the Cabinet meeting, wherein he records that the Cabinet recognized that the House is an inquest (the grand inquest), and has a right to inquire, but concluded there may be some matters, disclosure of which would be injurious to the public interest, and therefore the President must have discretion as to disclosure.

The outcome in this particular case was that there was no reason not to disclose every iota of the whole disastrous affair. So every scrap of the affair was disclosed by Washington to the Congress. If the case is a precedent at all, it shows that President Washington refused to sweep under the rug an utterly discreditable business.

Now, let's look at this case more closely and see out of what cobwebs, executive precedents are built. These notes were private notes of Jefferson, they never got into the executive files, there is no record that the meditations of the cabinet were ever disclosed to Congress. In fact it would have been folly, in a case where you are turning over all the documents to, say, gentlemen, the next time we may not give information to you. The world of politics doesn't operate that way. And Jefferson was a wise man. So no claim of privilege was ever made to the Congress. All you had were Jefferson's private notes which were found long after his death. These were what he called his "Anas", "loose scraps," and "unofficial notes" and were published many years later. There this "precedent" slumbered for 150 years until Secretary Rogers exhumed it. Now is that a precedent?

If it was a precedent, it would fly in the teeth of the statute President Washington himself had signed in 1789. There are no qualifications on the power of inquiry in that statute.

The second historical precedent, to my mind, is even more clearly no precedent at all. This, according to Assistant Attorney General Relinquist, was the refusal of President Washington to turn over to the House the documents of the Jay Treaty. The treaty created a great uproar in the Nation. In fact, Washington didn't even tell Congress about it for four months because he feared it would be unpopular. The papers had been delivered to the Senate but were refused to the House because, said Washington, the House had no part in treaty-making and hence no right to the papers. In the House, it was said that anyone who wants to see those documents can go to the clerk of the Senate and read them.

So Washington refused them to the House on the grounds that treaty-making is a function of the President and the Senate, in which the House has no constitutional right to participate, hence it had no "right" to the documents. Mind, he didn't say the House had a right of inquiry against which he invoked executive privilege. He said the Constitution gave the House no right at all in the premises. Do I make myself clear?

He went on to say, I have no disposition to withhold from the Congress any information to which it is entitled. How does that square with the secret Jefferson notes in the St. Clair investigation? Washington stated, "I have no disposition to withhold any information to which Congress is entitled." and he stated, "Had the House told me they intended to impeach General St. Clair, then they would have a right to ask for information in respect to that."

That, by the way, is another important fact: Washington recognized the Congress' right to get facts before you impeach. You don't have to indict a man before you investigate. You have a right to investigate him before you impeach him.

So I ask you what kind of a precedent is that for executive privilege? The Jay Treaty incident is a case where all of the documents were turned over to the Senate, but where the House had no constitutional right, as Washington read the Constitution, to participate in treaty-making. He was saying to the House, in other words, you are meddling in something you have no constitutional right to meddle in.

The phrase "executive privilege," as far as my reading goes, is a comparatively late term. I wouldn't want to be categorical about it, but I can't recall a single incident during the 19th Century where those words are used in relation to a case against Congress.

The executive power was conceived by the framers as a power to execute the laws. This is something we must not forget. The framers were very jealous in conferring powers. First of all, there were 13 separate sovereign entities, and most of all the people trusted their own elected State representatives rather than the Governors and representatives appointed by the King. The distant Congress was an object of suspicion. But they did trust it more than the Executive. The Executive was given severely limited powers. When James Wilson was blowing up the President's powers in the Pennsylvania ratification, he said, "we are giving him the power to execute the laws." And among these powers was a power to request written opinions from his Cabinet

officers. Even that insignificant power was expressly conferred. By "executive power" the framers meant "power to execute the laws." That is all they meant.

If that is the case, and I believe historically that is virtually undebatable, the legislature must necessarily, in the words of Montesquieu, have the means of examining in what manners its laws have been executed.

We need to recall that the prevalent belief at the end of the colonial period was that the Executive in the words of Edward Corwin was the "natural enemy," it was the "natural enemy, the legislative assembly, the natural friend of liberty." I explained the reason, the legislators had been elected by the colonists. And despite Madison's disenchantment with State legislative excesses in the postrevolutionary period, he yet concluded that "in republican government, the legislative authority necessarily predominates." Today we have the executive branch tell Congress, the senior partner in Government, that disclosure to it of certain information is "inappropriate" or "not in the national interest." For 2 years now, officials in the Department of Defense have not invoked executive privilege but engaged in stalling practices saying, "We don't think it is appropriate for you to know this. It is not in the national interest for you to know this." So Congress, starting off as the senior partner, is now being treated like an office boy and, gentlemen, that is up to you to correct. The Executive won't correct it.

Let me turn to another so-called precedent cited by Assistant Attorney General Rehnquist, the case of the *United States v. Reynolds*. This is a 1953 case, private law litigation, where the litigant sought disclosure of an Air Force report respecting secret electronic equipment. (Private litigations are to be distinguished from congressional inquiry because, to begin with, the stakes are much higher.) Concealment of departmental derelictions, for example, the Teapot Dome frauds, or of foreign commitments, may be far more damaging to the national interest than a failure of justice in a private litigation.

There is a long history of parliamentary inquiry into Executive conduct, but there is no comparable history for the right of a private individual to disclosure in litigation. The latter is a relatively recent development, the roots of which you will find probably no earlier than in the 19th century.

In fact, *Reynolds* speaks against the exaggerated Executive claims. The Supreme Court said it is not for the Executive but for the courts to determine whether the circumstances are appropriate for the claim of privilege. Although the Supreme Court found there was an alternative open to the litigant to get this information and that the litigant did not prove his need for disclosure, it still went on to say judicial control over evidence in a case cannot be abdicated to the caprice of executive officers.

Indeed, Mr. Rehnquist concedes that the "President's authority to withhold information is not an unbridled one." He had the wisdom to part company with Attorney General Rogers. But he concluded that the "potential for abuse" must still be left "for the exercise of Presidential discretion." A bridle on the Executive which only he can check is no bridle.

What kind of investigation would it be if you were halted for instance, by the Secretary of the Air Force who would tell you, I don't think you ought to know this. It would be no investigation at all. This is the lesson of Reynolds; it is no precedent for unlimited executive privilege.

The executive branch is asserting a right to determine what is appropriate for Congress to know after the Supreme Court held that the Executive has no such right against a private litigant.

Now I come to the claim for "candid interchange." You had a recent experience with that claim when you asked for country field submissions for Cambodia. When access to these submissions was refused, the committee invoked the statutory cutoff for aid to Cambodia. At the last minute, the President forestalled the cutoff by an appeal to executive privilege. A similar rebuff was experienced by the Senate Foreign Relations Committee. President Nixon explained 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."

You may remember the occasion—what was the name of that great plane—when some of the admirals burst out of bounds to attack the views that Secretary of Defense McNamara was advancing. It was painful to McNamara but it was healthy, because vast sums were being appropriated and the Congress heard the conflict of opinions itself. Only by hearing conflicting views can you really chart your course.

No trace of this privilege claim is to be found until President Eisenhower claimed that officials in the executive branch have to be free to discuss with each other without being worried that these things will be exposed. This is not rooted in history. The principle of "candid interchange" was laughed out of court by the House of Lords in 1968. As you know, the House of Lords is a Supreme Court of England, and in a private litigation case, as Professor Wade of Oxford said, they utterly shattered the claim. What they said, in effect, was that every professor, every doctor, every professional or businessman has to make a report that maybe somebody else may look at with a critical eye, and we think he should have sufficient fortitude to do his duty and the Government officer must have the same fortitude. So far as the doctrine is concerned in private litigation, it has been shattered in England. Now the President solemnly invokes against the Congress a doctrine which the House of Lords rejected in a private litigation.

There is a lesson to be drawn from your own experience, and that is that it is utterly futile to make a cutoff turn on the President's invocation of executive privilege. You recall, if information is not furnished on your request, you invoke a 60-day period after which aid shall be cut off unless the President invokes executive privilege. Already in at least two incidents—one that you experienced and one that Senator Fulbright experienced—the Department of Defense prevailed on the President to invoke executive privilege. This is not the kind of matter for which the President can put the mining of Haiphong aside, for instance, in order to decide whether or not you are going to get the information. He is going to rubberstamp the departmental recommendation 9 times out of 10. From now on when you draft legislation, make the cutoff depend solely on the departmental refusal. Let the



President worry afterwards. He may conclude it costs too much to assert executive privilege—as he did with Peter Flanigan when the nomination of Richard Kleindienst was at stake. Base your bill on the proposition “no information, no funds.”

Now, I want to look a little more closely, first, at Mr. Peter Flanigan, and then at Mr. Henry Kissinger. We have seen that the claim of privilege for members of the White House staff is new minted. But even the incidents mustered for confidential conversations with the President went back only to the Truman administration. So let's look at Mr. Flanigan for a moment. Suppose he were charged with violation of the Corrupt Practices Act and Congress launched an investigation to ascertain whether there were grounds for impeachment. Suppose that you believed you had sufficient information to inquire into it and you launched an investigation as to whether or not he ought to be impeached. Is it conceivable that he could maintain that he was immune from your investigation? He can't, because impeachment runs to “all offices” of the Government regardless of location. And as George Washington recognized, even Secretary of the Treasury Hamilton could be investigated.

Now, I want to show that the claim for confidential advice to the President—for example, by Mr. Kissinger—is greatly overblown. We are so busy with contemporary events, that very few of us muster the patience to dig into the old dusty books to find out what really happened. There is no need for me to restate Mr. Kissinger's omnipresence in foreign affairs. That he has virtually displaced the Secretary of State in high level functions is open and notorious. Although the Secretary, himself, in the words of Chief Justice Marshall, is a “confidential agent” of the President, yet he enjoys no blanket immunity from inquiry. The Secretary of State comes periodically when you invite him to testify. He is accountable to the Congress.

Mr. Kissinger, however, is not accountable to the Congress. It is a very dangerous doctrine that a man who is making top level decisions, is immune from inquiry.

When Attorney General Rogers referred to confidential information, he cited *Marbury v. Madison*. But Mr. Rogers himself quoted Chief Justice Marshall as saying on the trial of Aaron Burr that “the principle decided there was that communications from the President to the Secretary of State could not be extorted from him.” Even this was pure dictum, because *Marbury* involved a claim to the delivery of a commission which had been signed by the President and sealed by the Secretary of State, about which there was nothing confidential whatsoever. So if *Marbury* is a precedent at all, it does not, according to Marshall, shelter a communication from a high officer to the President. Indeed, in the Aaron Burr case, a private letter from Gen. James Wilkinson to President Jefferson was, in fact, held subject to subpoena by Marshall, and it was turned over to the court by Jefferson.

In fact, *Marbury v. Madison* is absolutely irrelevant to congressional inquiry because it was a private litigation, in which the Court could justly say it is not our province to supervise the conduct of executive affairs. The province of the court is to decide individual cases. But it is precisely that investigatory function which is the “province” of Congress. It may not be the attribute of the courts, but the legislature, stretching back to the parliamentary power of surveillance, has a

power to inquire how does the executive conduct its affairs; and as in *McGrain v. Daugherty*, it has power to inquire whether the Attorney General neglects his affairs. So *Marbury v. Madison* is altogether irrelevant to the question of whether Congress is entitled to confidential information. As a practical matter you may choose to bypass the conversations that the President has with General Bradley, but that is not a matter of the Executive's constitutional right. A practical consideration cannot be converted into a constitutional dogma.

I come to what seems to me the most glaring example of bureaucratic recalcitrance, namely, the refusal of the Defense Department to comply with the request of this committee for information under the act of 1928. This act provides that upon request of the Committee on Government Operations, every executive department shall furnish any information requested of its relating to any matters within the jurisdiction of the committee.

The Assistant to the President, Mr. John Ehrlichman, looking at the accompanying Senate report said that the legislation referred solely to obsolete and valueless reports which were discontinued. Although he prefers a very narrow construction of the act, he states that a broad construction would be permissible. His own construction is that Congress is entitled only to obsolete and valueless discontinued reports. He could make that argument more effectively if the statute had been made to read:

Notwithstanding the provisions of this repealer, the committee may require the discontinued reports.

But the Congress went beyond this. It stated in broadest terms, that any information relating to the matters within the jurisdiction of said committee may be required.

In my statement, which I will file with the reporter, I have cited the Dartmouth College case but I came across a more recent case which I would like to read to you, bearing in mind that the language employed in the act of 1928 goes far beyond discontinued reports. This is styled *Barr v. the United States*, 324 U.S. 83 (1945): I quote:

But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.

Translated, Mr. Chairman, into terms of the 1928 act, if at the time of drafting the statute all that Congress had in mind was the discontinued, valueless reports, it used much broader language, it doesn't matter that they had nothing else in mind. A court will still give effect to the broad language. It follows that Mr. Ehrlichman's narrow construction is unwarranted. What is the next step?

*Marbury v. Madison* teaches us that: "One in whose favor a duty runs," that is to say where a duty is imposed upon an officer, "has the right to sue for a breach of the duty." There it was held that the Secretary of State was under a duty to deliver a commission, which has been signed by the President and that the appointee could bring mandamus to compel delivery of the commission. Similarly, the act of 1928 implies there is a duty to furnish requested information and you should be able to bring mandamus.

I don't want to go into a technical analysis of several of constitutional questions which lie at the threshold of such a suit. I would answer the question, is there a case of controversy by saying that where

two people take adverse positions, then you have a controversy. Is it a political question? I must remind you of *Powell v. McCormack* where the Supreme Court decided that the power of the House to judge the qualifications of its own Members is subject to judicial review. That is as political a question as you can get. I don't think the political question doctrine is really vital today, remains the question of standing to sue. If, as Justice Harlan said, you can confer standing on private litigants, you can confer it on yourself.

So the real question is, how do you institute such a suit? We can't expect the Attorney General to bring a suit to compel an executive officer to comply with a request that runs contrary to executive policy. Indeed, his representation of the House would present a conflict of interest. You have to be in a position to assert your own rights by your own counsel. I remind you that there have been several cases where the Congress had its own counsel. The House had its own counsel in *Powell v. McCormack*, the Senate was represented at the Bar of the Supreme Court by Senator George Wharton Pepper in *Myers v. The United States*. It is bad government and not really constitutional government that you should have a right to insist upon the performance of a duty and yet be powerless to get into court to compel compliance. The way to resolve all doubts is expressly to provide for suit and by your own counsel.

I would urge you to amend your statute of 1928 and, at the same time, amend the statute of 1921, which gives your watchdog, the Comptroller General, the right to require information, which also has been frustrated time and time again. To my own knowledge, the act of 1921 has been repeatedly violated for at least 12 years.

Here you have repeated violations of law under a government where no man is so high but that he is subject to the laws, including the President. You have had repeated violations of law by members of the executive branch and haven't provided yourself with an effective mechanism to compel compliance with the law. So I would urge you enough of studies, enough of hearings, begin some effective action—put teeth into the existing statute which requires the executive to give you the information. Provide for suit to compel compliance with a request under the statute, to be brought on behalf of Congress by the counsel for Congress. You might consider having a permanent counsel who would be attached to the congressional staff, who would develop expertise, and who would screen all requests for information; because I have to say, sadly, not all committee attempts to get information have been equally wise. Recall the practices of Senator Joseph McCarthy. When Dean Acheson appeared before Senator Ervin's committee in July 1971, he waved the bloody shirt; he coupled McCarthy's hearings with Robespierre and the attempted assassination of the King of Morocco. So be sure that those who are assigned to this task are capable of saving you from making a false move. I would say, further, you should provide for the final review by the House. If you want the President himself to put his stamp on the claim for executive privilege, you should be evenhanded and provide for approval of suit by the House.

In the House, just as in this committee, there are varieties of opinion, and there may even be different degrees of talent, so it is good to seek the wisdom of the House if you are going to have a confrontation.

But, above all, in God's name, do something. Amend these two existing statutes which give you the right to require information but leave you helpless to get it. Amend them to enable you to go into court. The issue of executive privilege presents a boundary question. In my view, the boundary being claimed by the Executive is untenable, but it is a claim, and like every other claim it shouldn't be decided unilaterally. It is being decided unilaterally by the President but the claim ought to be submitted to the courts.

When a boundary dispute between the two branches is at issue, said Madison, neither branch can decide the issue. The arbiter is the Court. Justice Frankfurter and Justice Jackson said in the *Youngstown* case, where the President was trying to exercise power reserved to Congress, that the decision must be left to an independent arbiter. Such issues, said the Supreme Court in *Luther v. Borden*, are for the courts.

You may recall that President Andrew Johnson was impeached for his failure to comply with the Tenure of Office Act, which was designed to prevent him from removing Secretary of War Stanton. The question was, did Johnson have the right to remove his Secretary. The Congress was inflamed. Johnson sought to have the issue submitted to the Court, where it should have gone, because it had been prejudged by the Congress itself. When you have conflicting claims to constitutional powers, the best way of resolving the dispute is to submit it to the courts. I don't for a minute believe that when the two branches say this ought to be resolved judicially that the Court will say, no, you must fight it out among yourselves. If it does, it is reverting to the law of the jungle. First, on your agenda, Mr. Chairman, forgive me for emphasizing the first thing is to amend the statutes of 1921 and 1928 to provide for suit to enforce compliance with statutory requests.

I feel satisfied from my experience on the Hill—that is on the Senate side—that you would find many members of both parties, Republicans and Democrats, that would be greatly sympathetic to such a move. If it did nothing more than to set a solid group of Senators to vote for it, it would publicize the question. It would shock the American public into realization that this is a major problem, and not just some bickering between the two branches.

Another way of resolving the issue is by the contempt power. Mr. Rehnquist, in testifying before you, conceded that you could subpoena a member of the executive branch, and that you had the power of contempt against a recalcitrant official. When I wrote about the matter in 1965, I shied away from use of the contempt power. I was thinking of the confrontation in the South when Federal Marshals were met by State troops. And I thought, what if the Secretary of the Navy calls in a file of Marines to resist the Sergeant at Arms. Today that seems to me fanciful.

President Truman himself obeyed the Court in the *Youngstown* steel seizure case. The contempt proceedings should not be regarded as a punitive proceeding but rather as a vehicle for getting into court. When the committee request for information is not honored, you would go to the presiding officer of the House for a warrant to arrest the recalcitrant official. The Sergeant at Arms would take him into custody and hold him. This gives the official an opportunity to obtain a writ of habeas corpus. Then you are in court.

Unless you do something decisive, Mr. Chairman, you are going to have this controversy drag on. And, if I live so long, I will be back 12 years from now, and you will still be saying, what can we do about it. There is something that you can do about it, and that you ought to do about it, because more and more we are coming to realize that executive withholding of information is a dangerous thing. We see this in the solo adventures of the President in war-making. If the Congress doesn't play a role in government as a partner in government, democracy will founder. And, of course, the root of participation is information.

With that, gentlemen, I throw myself on your tender mercies.

Mr. MOORHEAD. I have a feeling you don't have to throw yourself on our tender mercies. I think you can handle yourself pretty well on the witness stand. I think this was an excellent, scholarly, and very dramatic presentation to this subcommittee.

You said something about we are dealing with a problem at the very roots of the American Government, and then you made a quotation on page 6 that said: "The legislative authority necessarily predominates." Well, that may have been true back then but there has been a gradual erosion, in my judgment, of the first branch of the Government so that it is no longer the "first" branch of the Government.

As a matter of fact, one of the changes that has taken place in our democracy is that instead of having representative democracy, we are getting to the point where every 4 years we elect a man who is a dictator for another 4 years. And the only effective control on him is the fact that he has to seek reelection. I don't know whether that fact in his second term places any effective restraint upon him.

The reasons these hearings are important is to try to make the case so that the rest of the Congress will understand that our power has been eroded, and, second, the most important reason it has been eroded is that information is being withheld from us. Because of the lack of information, we just have no real power in the political arena on many important issues.

I understand, Professor, that your recommendation to us is that we enact a statute, an amendment of the act of 1921, and 1928 and so forth. Just for the moment, let's make the assumption that we can get that statute passed, but we would still like to present the most effective case to the courts under existing law. What would you recommend to this subcommittee? Should we act under the provisions of section 2954 of Title 5: United States Code and get seven members of this subcommittee to make a request for a specific document and if it is refused, to seek enforcement of that statute in the courts? That statute gives the seven members mentioned in this statute standing in court to present an appropriate procedure, whether it is mandamus or some other procedure. What would you recommend?

Professor BERGER. I don't want to foreclose that approach but I would want to study it more closely. I must candidly tell you I have some doubt as to this. We have the case of *Reed v. United States*, which declared that a committee of the Senate could not bring suit without authority by the Senate. So you might meet that to begin with. The case, by the way, is mentioned in my statement and if you bring such a suit you might be met at the threshold with the answer that your suit is unauthorized.

You might have the same difficulty in a suit by individual Congressmen. Of course, a subcommittee can't really represent the whole Congress because Congress is a body of varied opinions, and expresses itself only when it makes formal action, so I would have doubts about that approach, too. Having said that, I would want to study that closely and, certainly, your able counsel ought to study it closely and see what the difficulties are. But on first blush I would say you might have real difficulties. Of course, the normal thing to do would be to request the Attorney General to bring suit because he has the authority to bring suit for breach of the laws, but he won't do this or if he does do it, it will be in such a fashion as would be highly unsatisfactory to you.

It might be worthy of investigation by your counsel that in the *Teapot Dome* case, Congress was so little confident of the integrity of the Attorney General or his subordinates that it directed President Coolidge to appoint the counsel; namely, Owen Roberts, who later became a justice and Atlee Pomerene. They were both appointed as special counsel. You might do this. Congress could request President Nixon to appoint special counsel to represent it in a suit against the executive branch on the feeling that the Attorney General would have conflicting interests because he would have to represent the executive branch. This would hit the front pages. Let me make a suggestion: some of your requests for information go to bureau chiefs. Thus you have lesser men in a department refusing the information, go after them.

Mr. MOORHEAD. Go after him via a subpoena? Or by the act of 1928—now recodified as 5 U.S.C. 2954?

Professor BERGER. By the act of 1928. That is one way. But I would hesitate about bringing a suit on behalf of seven members of your committee. I don't know what happened to the *Patsy Mink* case.

Mr. MOORHEAD. It is now pending before the U.S. Supreme Court.

Professor BERGER. So it would be inappropriate for me to express my opinion now, but I do have some doubts about it. If the case comes out in favor of Patsy Mink, you have a pretty good precedent for the kind of suit we are talking about.

My suggestion is to bring a suit under the act of 1928 on the ground that there has been a refusal to comply with the law.

Let me ask this question: Wouldn't the House get behind your committee and write a letter to the President asking him to appoint special counsel to prosecute a violator of the act of 1928, because the Attorney General will have a conflict of interests? In other words, he will represent Congress as well as the executive branch. Do you think that the House would go with you?

Mr. ERLNBORN. Would the chairman yield?

Mr. MOORHEAD. Yes.

Mr. ERLNBORN. I get the impression from your statement that you believe there may be a more immediate and more direct course than resort to the statute?

Professor BERGER. That is right.

Mr. ERLNBORN. That would be by raising the issue through the issuance of a subpoena upon failure to respond either by appearing or writing? As I understand it, you would do this through the Presiding Officer of the House. You would issue a warrant for the individual's

arrest. Would this not be a preferable course? This would then be the action of the House. There would be no question as to the right of individual Members or the right of the committee acting as a committee. It would be the House itself taking this action. Obviously you would have to know you have the support of the House before you went that far because you just wouldn't get the warrant issued. You wouldn't get the issue raised unless you had the support of the House, which would be absolutely necessary I would think if you anticipate any success.

With respect to a group of seven Members, or even the entire membership of one of the subcommittees of the House, I do not think you would be successful if they didn't have the political support of the majority of the House.

Professor BERGER. I agree that that is the more immediate course but I was directing myself to the chairman's question about the act of 1928.

Mr. ERLBORN. Well, which would you prefer given the choice?

Professor BERGER. I would prefer the contempt power course for this reason, gentlemen. To begin with, you have two precedents in the Supreme Court for use of the contempt power. True, they are private litigant cases, but Assistant Attorney General Rehnquist, who is a very good lawyer, agreed with Congressman Moss that you can bring a contempt action against an official who is recalcitrant. You might even consider working the thing out agreeably, by telling the official, this is not punitive; we are not trying to punish you, but to get into court. We won't hold you any longer, then you can rush your lawyers into court and get a habeas corpus. But that is a matter for you to decide.

It is a policy question, gentlemen, as to whether you want to do it, but certainly the contempt course stands on solid ground legally. The course you are suggesting, Mr. Chairman, raises some problems, and in dealing with an issue like this, as a man who has practiced law for a good many years, I prefer the proven ground.

Here I will reveal my political naivete. I don't know what the feeling is in the House. I am confident that in the Senate an amendment to the present statute would find great sympathy, and might even muster a majority because both Republicans and Democrats are united about the honor of the Senate. They feel that its request for information under the statute deserves to be honored. You are dealing with something like home and mother: we can't have any violation of the law on any pretext.

It is ridiculous that we should preach law and order to the men on the streets and tolerate officers who flagrantly violate a legal requirement. So you have a good selling point to your fellow Members. If you won in the Senate and you get a good group of people in the House behind you, you will have a fine start. The public will be educated; it will be informed that this is a real problem that ought to be resolved. I can't believe that public opinion will sympathize with the lawbreakers because that is what people who violate the statutes are. So I would take a two-pronged approach. I would take the approach of the contempt power—and, by the way, let me venture a little further. Why don't you expand the 1928 act to include every committee? Why should you alone have this right to under this statute? I ask you, wouldn't such expansion win you some friends?

MR. ERLBORN. You sound like more than just a good lawyer. You sound like a good tactician and a good politician.

PROFESSOR BERGER. I am one who has a high regard for politicians.

MR. ERLBORN. May I go back to another question as to historical precedence and your reference to the parliamentary system and ask if that is completely valid in your opinion, historically, in light of the fact that in the parliamentary situation, the chief executive officer is usually a member of the Parliament. Most of the people comparable to the Cabinet Members are Members of the Parliament. It varies in the parliamentary situation but usually a majority of them are Members of the Parliament chosen to exercise the executive power by their fellow parliamentarians. As a matter of fact, in most parliamentary situations, even the ultimate judicial power may be exercised, for instance, by the House of Lords in the final disposition of appeals through the judiciary. None of the Parliaments that I am aware of have the history of separation of powers that we have in our form of Government. So the Executive, I think, in a parliamentary situation, must be more responsive to the Parliament or to the legislative body. Is that a fair assessment?

PROFESSOR BERGER. Well, it is fair as far as the present Parliament goes. But the precedent of parliamentary inquiry began at a time of Royalist trends to absolutism in the period of James I and Charles I. Long before ministers were responsible to the Parliament, they were responsible to, and appointed by, the King, and were being investigated from hell to breakfast. In fact, Francis Bacon said to a person placed in an executive post that he should "remember, there is a Parliament."

I should add that at this time the Founding Fathers had their eyes on the 17th century with all its revolutionary ferment rather than on the 18th.

Finally, the Supreme Court said in the *McGrain* case, the inquiry attribute has its roots—this was referring to the Legislature—in parliamentary history. Parliamentary supremacy was developing in the 18th century, and really began to take shape after the 1760's. The framers were constantly looking to English practice, whether it was with respect to the power of appropriation or the power of the King.

Nothing is clearer in American constitutional history than that the framers and the statesmen who drafted the State constitutions before them were bent on cutting the roots of all Royal prerogative. They very carefully circumscribed the Presidential powers. Even as far as the Presidential power of the Commander in Chief—if I may digress for a moment because I was deeply sympathetic to what you were saying about erosion of Executive power—the original power of Commander in Chief was viewed far more narrowly than it is construed by the President today.

But, to return to the relevant parliamentary history to which the framers looked in these matters, it was the 17th century, the anti-Stuart history. The power of the Legislature was picked up, lock, stock, and barrel from parliamentary history, never mind that you now had an independent Executive. They still put the Executive under the power of Congress, witness impeachment, so time and again they were looking to English institutions.



Now, I am not saying to you that there may not prove to be desirable areas of accommodation, and I stress the word "accommodation," for you may feel for one reason or another it is undesirable that you should press General Bradley to tell you what President Truman said to him. But that does not negate the power. What you decide to do as a matter of accommodation, and you have done that throughout your history, is one thing. The Congress has pretty successfully lived with the Presidents, as I read history, but, particularly, in warmaking and foreign policy, it is the President that has made it hard to live with him.

Mr. ERLBORN. I was just looking for a quote that I can't find, but it is something to the effect that of the three branches of government, the legislative branch is superior or it predominates.

Professor BERGER. That is Edwin Corwin's opinion. He said that. No; that was Madison's, I am sorry. Madison said that in the Federalist, I think it was.

Mr. ERLBORN. Many of us remember the things we learned in school about the three coequal branches of the Government. Is it your position that among the equals, the greatest of the equals is the legislative branch? If you so construe it, I want to agree with you.

Professor BERGER. I would say, in George Orwell's phrase, that "some are more equal than others."

Mr. ERLBORN. That is what I gathered.

Professor BERGER. But we are talking now about two different periods in history. Take warmaking. Mr. Congressman, there is no doubt in my mind—and I have just completed an extensive study of it, and others have taken the same view—that the vast bulk of the warmaking powers were given to the Congress. The framers feared, as James Wilson said, to leave it in the hands of a single man to hurry us into war. Can there be any question that all of the powers, as James Wilson said, relevant to warmaking, were left in the hands of Congress? Can there be any question that the two branches are not equal in this respect?

The Chairman stated there has been an erosion of legislative power. I hesitate to use a word like that, because I don't think that is true all of the way. Erosion means something has been washed away and is beyond recovery; boundaries have been altered. I don't think the President can alter constitutional boundaries. Even if the Congress desired to abdicate its powers and confer them on the President, I don't think they could do that. I think constitutional history makes that plain.

What is happening right now is a great awakening, the sleeping giant is stirring and is trying to reassert his place in the sun. Congress is trying to resume powers that were conferred on it by the Constitution. You are not abdicating your powers. You are seeking to resume powers the Constitution gave you in express terms. If we are talking about warmaking, for example—

Mr. ERLBORN. Well, I would like to carry this a little further. Most of our discussion nowadays, generally in the Congress and in the country, is relevant to the power of the executive vis-a-vis the legislative. Looking down the path you started in saying that we are the greatest or the most equal among equals. This can have refer-

once to the judiciary, and, as a matter of fact, many of us prior to the more dramatic confrontation between the Congress and the executive because of the war in Vietnam, felt that our powers were being usurped by the judiciary and that many of the decisions of the judiciary were invading the proper prerogatives of the legislative branch. Your suggested recourse against the executive branch seems to have to rely on the judicial branch. We are going to wind up through habeas corpus and having our authority decided by the judicial branch. They are going to decide how we assert our authority, and how the executive exerts its authority. So how do we become the greater among the equals in that sort of a context?

Professor BERGER. You are making a judgment that I didn't make. It is your judgment.

Mr. ERLÉNBERG. Well, I am thinking of the next fight.

Professor BERGER. Well, with the indulgence of the chairman, it so happens I thought about the judicial-legislative confrontation before the busing moratorium issue became a subject matter for debate. In 1969 I published a book entitled "Congress Versus the Supreme Court," which looked to just that sort of struggle; so if you are interested in seeing just how I stand on it, you can read that.

You proceeded from an abstraction which you carried away from your schoolday memories; namely, the equal among equals. I don't think that can be any more helpful than looking at the abstraction of the separation of powers. I mean, you have to look to history. Now, it is quite plain—all you have to do is go to the Constitution and look at it carefully—that the vast bulk of the governmental powers were given to Congress. For example, the power of Commander in Chief was just meant to be a power to conduct operations once war was commenced. The framers didn't give him power to commence a war or anything of this sort. Although the Congress was given vast powers, it was feared, and the brake that was put on the legislature was not put into the hands of the executive, but in the hands of the Court. There is no question about the fact that the legislature was not meant to overrule the courts. That is why judges were given life tenure. They were given the final power to decide whether laws were "in pursuance of" the Constitution. That is the sole grip the court has; namely, are the laws pursuant to the Constitution? You can't reverse that. You can't change it.

As early as 1942, when the reconstructed court took over and was going to remake the Constitution, I stated that I didn't like it any better when Justice Black read my predilections into the Constitution than when Reynolds and Butler read their predilections into the Constitution, and I don't want Justice Rehnquist reading his predilections into the Constitution. That scares the hell out of me. I want a Constitution, as far as possible, that remains what it was intended to be, as far as we can discern, by the framers. So I don't want you to think that I am all out for a Court that is taking over the policymaking role of the legislature, because I am not in that camp. If you want to know my views on that, read my "Congress Versus the Supreme Court."

Mr. ERLÉNBERG. It seems as though in the final analysis the courts do come up with possibly the final residual power in reviewing the acts of the legislative branch or the executive branch as they interpret the

Constitution. The checks and balances system seems to end up with the final ultimate authority in the Court.

Professor BERGER. That was the design, subject to amendment of the Constitution. If I may presume, you perhaps are a little too young to remember the courtpacking days of 1937.

Mr. ERLÉNBERG. I read about it.

Professor BERGER. Well, there were a lot of people, including Franklin Roosevelt, that were all hot and bothered because the Court was reading laissez-faire economics into the Constitution and was frustrating the then Congress and the will of the people with their delatable economic and social views. Yet Congress couldn't bring itself to pack the Court. Professor Frankfurter at the time wrote to President Roosevelt and said the big problem is that people think when the Court speaks, the Constitution speaks, and the fact is that when the Court speaks the Justices speak. And the public doesn't know that. The public also doesn't know, for example, that the power President Truman used in going into Korea and President Nixon used in going into Vietnam is not a constitutional power. What would be the verdict of the public today if they were shown and understood that this is not a constitutional power? But that is another problem.

How to cope with that requires a process of education. What happens when you have the courts acting in a way that offends public sentiment? For example, you may find that you can get an act that will limit judicial decrees respecting busing; and if the Court cannot read the election returns you may find it possible to get an amendment to the same effect, because when something becomes deeply offensive, the people react.

Mr. ERLÉNBERG. Well, if I might just make a brief comment on that. The phrase we hear very often now today is power to the people. The fact is the power does reside with the people and always has.

Professor BERGER. That is right.

Mr. ERLÉNBERG. Thank you.

Mr. MOORHEAD. Professor Berger, you made one point that I think should be emphasized, and that was the accommodation by the Congress to the President in his having a few private advisers whom he chose not to have appear before congressional committees. The Congressional Research Service study showed us that when the first accommodation was made there were only six White House staff advisers; this was way back in 1939, and now it is something like 2,200. We accommodated the President when it was a very small group, and where in foreign policy, at least, the recommendations came from the Secretary of State who could be called to testify by Congress. But now when the number of advisers has mushroomed to 2,200 and the decisions appear to be made—not only in matters of foreign policy but also in antitrust policies and other fields—by this very large White House staff which has now become off limits to the Congress, we are faced with a different sort of problem, where this old accommodation should end. Is that the thrust of your testimony?

Professor BERGER. Accommodation ends always where the Congress decides it will end. If you have the constitutional power and you are yielding it, you are really in a position of saying, this is by our grace. But I would say the situation that now exists presents a crisis in Government. Top level decisions are being made in secret and you don't know about it until something happens.

MR. MOORHEAD. And unless we hear some conflicting views, we don't know which views are the better views. We didn't know until the Pentagon Papers were published that there were serious internal conflicts about the war and advice given to the President that the war could not be terminated properly. Thus we didn't have the opportunity to investigate, and render the decision to go or not to go—decisions which the framers of the Constitution intended Congress to make.

PROFESSOR BERGER. Right.

MR. MOORHEAD. I even think in the creation of the Department of Defense which I would have explored if I had been in Congress at that time, might have been an error. Maybe the Congress did have a better way to oversee the military budget when the Navy would come in and criticize the Army's activities and the Army would come in and criticize the Air Force's activities. At least, we had knowledgeable people criticizing military programs and we could make an intelligent decision. Now, it is only one group, namely, the Department of Defense and the bargaining and dealing is done between the Services in private and usually it is back scratching or the "I will support your bomber if you will support my tank." So they come up for the bomber and the tank and we don't have the criticizing of the tanks and the bombers that we used to have.

PROFESSOR BERGER. There is one thing that would strengthen your views. We know, as George Reedy, who worked closely with President Lyndon Johnson, writes in his book, that the President lives in a house of mirrors. The people around him can't help but become courtiers. They tell him what he wants to hear with few exceptions. But down here in Congress you could have a heated debate and people would be pounding tables because they have strong views and you would have a true adversary system. I have learned that adversary debate really develops an analysis of the various possibilities, and the presentation of alternatives enables the decisionmakers to decide which way to go. It is much better than hearing one side.

I agree, sir, with you and, as a student of recent history and particularly in the light of constitutional history, both in foreign relations and warrmaking, I feel very strongly that a great deal of our unhappy situation today would have been averted if there had been consultation with the Congress. I feel that had a lot of the moves that were urged on the President been debated, had that debate come in to the public prints as it should have come, a lot of those actions might have been averted.

National debate is a prerequisite of democracy. You can't have a national town meeting, you have the Congress instead. This is where the national, conflicting views find utterance and, if nothing else, you would have had a country more united behind the President once the decision was made. Instead, the people feel well, it was not our decision, and now there are a great many people that are bitter about it. This morning's paper carries an item from Kansas, a Republican stronghold, that the mood has turned to very sharp hostility to the Vietnam war.

MR. MOORHEAD. Professor Berger, recently the Secretary of the Treasury, acting as the Chairman of the Emergency Loan Guaranty Board, refused the General Accounting Office access to records of that Board. Do you think that the General Accounting Office has a

legal right to demand and bring suit against the Secretary of the Treasury in acting as an arm of Congress?

Professor BERGER. I believe it is not in the hands of the Secretary of the Treasury to decide what the Comptroller General is entitled to. In fact, there is an opinion of the Attorney General in 1925 that says the Comptroller General is the judge of what he is entitled to, so roughly, you have a law violator in the Secretary, Mr. Connally. But what to do about it? You come up against the problem I discussed in connection with the act of 1928. In framing those statutes, you didn't do what you did with later statutes. For example, if the National Labor Relations Board issues an order and there is non-compliance, they are authorized by statute to go into court. Shouldn't your own watchdog have the same right? When Mr. Connally refuses to comply with a request of the Comptroller General, he is violating the plain terms of the statute. He should be hauled before the court. But you must amend the act of 1921 to provide for suit. I wouldn't dare to go into court personally unless I was sure of my grounds. This is going to be a historical controversy so why be impeded by procedural doubts? You can state in good conscience that your own watchdog is no less entitled than any agency of the Government to a right to enforce its order.

Why not amend the statute to provide for suit by the Comptroller General by his own counsel. You might want him to consult you, too, before he sues. That is the way, as I see it, to bring this matter to a head, and I would urge you to do that.

I first encountered this some 12 years ago when the Secretary of the Air Force refused to the then Comptroller General a report of the Inspector General's Office. That was an office that then cost millions of dollars a year and had a staff of 1,900 people or maybe 3,000—I don't recall the exact number—and again he relied on the recent pronouncement by the Eisenhower administration that "if we give you this report, the people in the agency won't talk so freely to each other, so they will not be as critical of each other." So here was Congress, faced with the question, shall we continue this big office of the Inspector General? Should we put the function elsewhere? But the Secretary stated we can't disclose departmental discussions because the Inspector General can't function if we do. Now, on what grounds was that justified? The Secretary invoked executive privilege. In a word, the Secretary of the Air Force said that this statute, which had been signed by the President, was unconstitutional. That is very high-handed to my way of thinking. Here we are 12 years later and you are worrying about the same thing. My answer to you, if I may presume, is stop worrying. Amend the act and even if you lose the attempt to amend, it will be a glorious defeat, because you will publicize the problems.

Mr. MOORHEAD. Thank you.

Mr. Phillips?

Mr. PHILLIPS. Thank you, Mr. Chairman. During the past year, we have had a number of incidents involving requests for information of White House staff officials. One has involved on two occasions the Director of Communications, Mr. Herb Klein. The other involved the counsel to the President, Mr. John W. Dean. Another involved the Special Assistant to the National Security Council, Mr. David Young.

The fourth involved Mr. Donald Rumsfeld, who wears two hats: one as Counsellor to the President and one as Executive Director of the Cost of Living Council. And in each one of these cases there has been the usual formal invocation. But in one instance there was an informal invocation of the so-called executive privilege which supposedly denied them the right to testify before this subcommittee. Now, in each case, the reason was that this was a confidential relationship between that individual and the President. Of course, in no instance, and we made this very clear, was there any effort going to be made to inquire into these confidential relationships. We don't want to know what conversations took place between these individuals and the President. What we wanted was testimony on relevant matters of inquiry before the subcommittee involving information practices.

In one case, involving our request for testimony on technical details of the new Executive order on security classifications, which Mr. Young had helped to draft, executive privilege was invoked. In fact, in most all of these cases, the same gentlemen have been available to the press in on-the-record press conferences and have superficially discussed the types of technical detail that we were interested in. But it is frustrating, of course, to this subcommittee not to be able to question and to have direct testimony from these types of individuals. What I would like to ask you is, in your judgment, do you know of any statute or restriction or limitation which prevents the appearance of these types of individuals from the White House staff before committees of Congress? Is there any basis whatsoever for denying them the opportunity even if they want to appear to testify before a duly-constituted committee of Congress?

Professor BERGER. You are asking if an individual—say, Mr. Rumsfeld wants to appear and the President says he can't, whether there is any basis for that restriction. Well, of course we start with the principle that the Chief Executive has control of his own staff and can order him not to appear.

Mr. PHILLIPS. We could subpoena?

Professor BERGER. Sure, there is no immunity from subpoena. There are no constitutional or statutory restrictions or limitations which prevent the appearance of these kinds of individuals in the White House staff before committees like this.

I hope you will find time to look through the last few pages in my statement about the confidentiality question, because I examined that very carefully. I place little or no credence in claims for immunity because of confidential conversations; but I would respect your judgment that you don't want, as a matter of accommodation, to demand a particular discussion between Kissinger and the President. But a claim to blanket immunity because an official is a member of the White House staff is without any constitutional basis.

Mr. PHILLIPS. Of course, as former Justice Goldberg testified in March before this subcommittee, there are many occasions where he had conversations with the President; but this did not prevent him from coming up to the appropriate committees of Congress and giving testimony and being able to disentangle himself from questions that came up in interrogations as to what the precise nature of such conversations would be. So I would think that any of these types of gentlemen

would be just as able to protect the integrity of a private conversation with the President as he, as a Cabinet officer, could do.

Professor BERGER. Now, about a report, for example, are you going to put the seal of secrecy on that? I think this is ridiculous. Government is run by reports, and where does privacy begin and end?

Mr. PHILLIPS. Moving on to another area, there has been expressed from time to time a thought that the courts are reluctant to intervene in disputes between the Congress and the President, over the matters that would involve executive privilege. I note in your testimony on page 8, in the Reynolds case, you say:

In fact, Reynolds speaks against exaggerated Executive claims. The Supreme Court said it is not for the Executive but for the courts to determine whether the circumstances are appropriate for the claim of privilege.

Professor BERGER. This was a private litigation.

Mr. PHILLIPS. Yes, I realize that. It is not quite the same thing but on the last page of your testimony, you cite another case where you quote:

When the two branches are engaged in a boundary dispute, that is as to the extent of their several powers, the issue Madison said cannot be decided by either.

You go on to point out that the decision, as Justice Frankfurter and Justice Jackson said:

Must be left to an arbitrator for such issues in the Supreme Court.

What I am asking is, in your judgment is there any validity to this? Might not the courts be reluctant to take jurisdiction in a properly framed suit involving a head-on collision between the Congress and the President to determine the constitutional basis, if any, of the so-called doctrine of executive privilege? Do you think the court today would be reluctant, or find a technicality, to throw such a suit out?

Professor BERGER. Well, it is very hard with a new Court to make any prognosis, but let me take one thing at a time. There is no case where a congressional dispute about executive privilege has ever been submitted to the courts. I think it is fair to say that the courts will not eagerly embrace disputes of this kind but that is not to say that they will throw them out of court. *The United States v. Myers* was a case where the Congress tried to impose limits on the President's removal of the Postmaster, as I recall it, so you have a conflict between the President and the Congress. Although in form it was a suit by the displaced Postmaster, in fact, it was a dispute between the Congress and the President, and Senator George Wharton Pepper was asked by the Senate to represent it. So there is one example.

In the steel seizure case, again a private suit by the *Youngstown Steel Co. v. Sawyer* what was involved and what moved the court was the fact that the President was impinging on congressional powers.

Probably one could recite other cases, but basically when you have a longstanding dispute between the two major branches which impairs the efficiency of Congress, because it is deprived of information without which it can't act, it would seem to me the court would consider it highly desirable when you submit the issue to decide it.

Let's look at it in the context of a contempt suit. You would take the Secretary of the Army into custody and the Sergeant at Arms would hold him so that the Secretary could obtain a writ of habeas corpus.

The Court would find it difficult to do nothing because if it does nothing, the officer remains in custody. It has to decide the case. The Court made the first giant step when it said you have the right to inquire into whether the Attorney General is neglecting his duties. You have a right to inquire to get information for legislation. Roger Sherman said when the first Congress was drafting the act of 1879, "If we don't have information, we have to go to those who have it," namely, the Secretary of the Treasury.

Given a habeas corpus proceeding, I don't see how that Court could dodge a decision, bearing in mind its recognition of the contempt power of Congress.

MR. PHILLIPS. Of course, there would be nothing to preclude the Congress by statute to require the Court under certain specified conditions to consider and render a judgment in a case that would be related to the questions we are discussing here.

PROFESSOR BERGER. Such a case is an adversary proceeding. You have power, of course, to regulate the jurisdiction of the Federal courts and to confer or take away jurisdiction. And this is an adversary proceeding. It is a longstanding dispute between two branches of the Government. I really don't believe that the Court would disclaim jurisdiction. It took jurisdiction on a much touchier question, not involving the President, to be sure, but involving the immediate constitutional prerogatives of this House, in the *Powell* case. Let us remember two things: When the Court refuses to adjudicate the dispute between Congress and the President, it throws Congress back on its own weapons. One of them, of course, is appropriations. You can start dislocating the executive branch by just cutting off appropriations, which would really rock the United States, or in the case of a cutoff of foreign aid, our international relations. Second, you have the power of impeachment and can say you are constraining us to do the very thing that President Andrew Johnson begged the Congress not to do. You are compelling us to go after members of the executive branch by way of impeachment.

MR. PHILLIPS. I appreciate that very detailed answer, and also, as far as the staff is concerned, I speak for all of us that we very much appreciate your coming here today. Your statement is extremely helpful in clearing up a lot of the gray areas that have been bandied around in hearings in the past. It has been very helpful also in dispelling some of these old myths about executive privilege.

PROFESSOR BERGER. If I can be of any help down the line, please get in touch with me. I came down for just one reason—I am here because I believe what you are doing is important, so get on with it.

MR. MOORHEAD. We expect to take advantage of that very kind offer and call upon you for advice, as we hopefully proceed in the right direction.

MR. COPENHAVER. I want to commend you for your scholarly statement and seek an observation from you. The other night I had the opportunity to read Hannah Arendt's work, "On Revolution." I suppose you have read that. If not, I commend it to you. She was comparing the outcome of the American Revolution with that of the French and Soviet Revolutions. One of her conclusions was that the reason the United States has survived so far as a democratic nation has been the fact that the drafters understood and comprehended power and, in doing so, as you have properly pointed out in your state-



ment, determined where the power should be established, particularly in terms of separation of powers. Therefore, would you not agree that by the Congress abdicating their responsibility—thus permitting their power to erode—the foundation is being laid for the undermining of the Republic?

PROFESSOR BERGER. Undermining, you say? I agree. I have great reverence for the way the framers went about their tasks. In fact, one of the glories of our history is the caliber of those men and the wisdom and foresight, and I agree thoroughly. I haven't read Mrs. Arendt's book, but those boundaries were drawn as protection against totalitarianism. In warmaking, as the chairman said, we are electing a benevolent dictator every 4 years. That is not the government they dreamt of and I have to say, as an American, that is not the kind of government I want. But that is the kind of government you are going to have until Congress takes back the powers conferred on it.

MR. COPENHAVER. One final comment. You and I are in agreement for the most part, but I have a somewhat different opinion on one matter. I believe the Congress should not invoke the authority of the Court but should instead use its plenary power through the appropriations process through its contempt authority which you suggested and otherwise for the purpose of maintaining its equal position under the separation of powers doctrine. I think we must question the makeup of the courts at pertinent and particular times in our history. We should place this ultimate authority in a non-responsive third branch.

PROFESSOR BERGER. Well, you have a tug-of-war here, that has been going on for a long time right under our noses. I used to object to the cutoff of appropriations, but I thought better of it. Experience has led me to feel that almost any mechanism that can produce results needs to be employed, but I would say this: there is an advantage about submitting a controversy to the courts in a contempt proceeding. That is one way of doing it. I concurred with Mr. Erlenborn's views that that should be done. Get it into the courts. There is one thing about the courts and that is that it won't require an endless series of cases. You get a couple of precedents established, and the President and his staff can read those cases. They will comply, especially if they know right off the bat you can get one of them up here before the courts.

If you cut off the appropriations, you will have to repeat that time and again and maybe you will win and maybe you won't. I am sure you have more important matters than that. You shouldn't be fighting about the problem of getting information. You should be legislating on the basis of information you are getting and you should be using all of your energies for advancing the government.

One last thought I want to leave you with is that I would not suggest that the power of inquiry is absolute. Historically I found virtually no limits on the power, but it may well be that a court might decide that inquiry power is not absolute. Absolutes are not presently in favor. Somebody less generous than yourself may want to get confidential conversations between the President and General Bradley and the court might say, you haven't got an absolute right to that information. I react to that as a lawyer. I feel that great controversies need to be put in the hands of the court.

MR. MOORHEAD. Thank you. The staff has some more questions. I wonder if you would be willing to answer written questions submitted to you, sir.

Professor BERGER. Well, this would be a little more difficult because I am right now in the midst of proofing my second book. I am really pretty busy. If you have any questions I prefer to answer them off the cuff. I find when I sit down to write, I am more fastidious than in an off-the-cuff remark.

Mr. MOORHEAD. Our distinguished colleague, the Representative from New York, was unable to be here today. She has asked that her statement be printed in the record.

Without objection, it will be so printed.

(The prepared statement of Congresswoman Abzug follows:)

STATEMENT OF HON. BELLA S. ABZUG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman and members of the subcommittee, I am grateful for the opportunity to testify on the Freedom of Information Act this morning. You and your staff are to be congratulated for the effort and expertise which you have mounted on behalf of this exhaustive inquiry. The whole morass of Government recordkeeping, classification of information, release of information on a selective basis, and so forth, is almost too complex to define or solve. Information is power, and, like power, is not easily surrendered by those who possess it.

The Freedom of Information Act of 1966, was a frontal assault on the bastion of Executive secrecy. For the first time, the burden was placed on the Government to produce the records of its activities or justify its refusal or failure to do so. Under this act, the citizen for the first time could appeal to the courts when denied information by a bureaucrat.

The act has its limitations, however. Vital categories or types of information are exempted from its provisions. The exemption most relevant to this inquiry is information that is "specifically required by Executive order to be kept secret in the interest of the national defense and foreign policy."

The Executive order which covers this class of information is Executive Order 10501 of November 5, 1953. One week from today, Executive Order 10501 will be superseded by a new order, Executive Order 11652. This order, said to be the product of a year's study by a committee appointed by the President in response to the furor over the release of the Pentagon Papers, was issued by President Nixon on March 8, and is the subject of a National Security Council directive of May 17.

The new Executive order purports to speed up the process of declassification of records by providing, among other things, for a "mandatory review" at the end of 10 years of all classified information to determine whether it should remain classified any longer. The new order further establishes a 30-year rule for the automatic declassification of records, giving the Archivist of the United States the authority to declassify records or to request their declassification.

These are improvements, but the time periods are far too long.

Leaving aside certain obvious problems with the language of the order, such as that "mandatory" review turns out to be not mandatory at all, I should like to address the question of just what classified information is.

Under the old order, classified information was "defense information," defined as "official information which requires protection in the interests of the national defense." Under the new order, classified information is expanded to include not only defense information but also information concerning the foreign relations of the United States. To quote from Executive Order 11652, "Security information" is "official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States \* \* \*" (sec. 1). (Emphasis added.)

It has been said that war is too important to be left to the generals. I submit that the foreign relations of the United States, upon which depend in large part our internal well-being as well as the external relationships which bring war or peace around the globe, are too important to be left exclusively to the occupant of the White House. Our Constitution clearly gives Congress the duty and right to participate in the conduct of foreign relations.

Who is it, under this order, who decides what "Security information" is? It is the President of the United States, advised solely by a review committee appointed by the National Security Council and chaired by a person designated

by the President, presently Ambassador John Eisenhower. The members of the Committee are to come solely from the executive branch, without the participation of Congress or other outside members. (Sec. 7(A).)

Who has the authority to declassify "Security Information," once it has been so declared? Again, the President and his subordinates. Under the terms of the new Executive order, they can refuse to declassify it in perpetuity if they so desire.

Far from being an improvement, this new order is a dangerous and unwarranted expansion of the powers of the Executive. It may well be unconstitutional, since by controlling information concerning foreign relations it usurps powers expressly granted to Congress in the field of foreign affairs.

Further, section 8 of this order exempts atomic energy information from its provisions, as required by statute. It is time for us to end our worship of the sacred cow of atomic energy. The Congress should take another look at the provisions of the Atomic Energy Act as they pertain to the release of information said to be "born classified" but now 25 years of age or more. Like the atom itself, unseen and unheard, this category of information permeates nearly every aspect of our daily lives and our relations with other countries, since it concerns the nuclear balance and our vital energy supplies. It is essential that the public be fully informed on these matters.

To those who would argue that either atomic energy information or defense information is "technical" or "scientific" information for which our legislators and our people have no need in order to make wise political decisions, I should like to refer to a recently "declassified" report of a Department of Defense Task Force on Secrecy which I wish to submit in full for the record. This board concluded in July 1970, that it was reasonable to suppose that scientific information originated by us would be discovered by others within a period of *one year*. This prestigious task force, composed of some of our most eminent scientists, believed that "more might be gained than lost if our Nation were to adopt, *unilaterally if necessary*, a policy of complete openness in all areas of information \* \* \*" (Emphasis added.)

The task force continued with an even more remarkable statement :

\* \* \* in spite of the great advantages that might accrue from such a policy [of complete openness], it is not a practical proposal at the present time. The task force believes that such would not be acceptable *within the current framework of attitudes*, both national and international, toward classification. (Emphasis added.)

The Pentagon's own technical advisory board on secrecy recommended a policy of complete openness and then declared that such a policy was not "acceptable." This, of course, was prior to the publication of the Pentagon Papers and other breaches of this ridiculous security classification system which have since occurred.

Let us hope that these hearings and others to come will demonstrate beyond a shadow of a doubt that the current framework of attitudes has changed.

But more is needed than a change of attitudes. We need to overhaul the entire apparatus of Cold War legislation which has made this miasma of secrecy possible. The Congress needs to take a fresh look at such basic legislation as the National Security Act, the Espionage Act, the Atomic Energy Act, and others.

Some constructive legislation has already been proposed by the former chairman of this subcommittee, Mr. Moss, in association with my colleague from New York, Mr. Reid. H.R. 15006, would amend the Freedom of Information Act to provide for automatic cutoff of funds to agencies which fail to provide information on request after certification to a committee of Congress that they have done so. H.R. 9853, introduced by Congressman Hébert last July, would amend the National Security Act to establish a "Commission on the Classification and Protection of Information" composed of four Members of Congress, four members appointed by the President, and four appointed by the Chief Justice. Such a broad group, if established on a permanent basis as a classification review committee, would certainly be an improvement over the National Security Council Review Committee established by the new Executive order.

Mr. Chairman, I understand you plan to introduce in the near future a major amendment to the Freedom of Information Act which would revamp the classification system to make it more responsive to the needs of a democratic society. That is something that needs to be done. I believe Congress should substitute its

judgment for that of the Executive classifiers who have a built-in interest in perpetuating secrecy in Government. One line of approach, which so far as I know has not yet been explored by the subcommittee, may be to amend the Federal Records Act of 1950, which governs records management and defines the duties of the Archivist of the United States but gives him no real authority to set guidelines for the maintenance, use, and disposition of Government records.

Let me sum up this brief statement by urging this committee and other committees of Congress with jurisdiction in the field of information control to have the courage of their convictions. The Freedom of Information Act was "one small step for mankind." I believe it has done some good, but much more work lies before us.

REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON SECRECY

OFFICE OF THE DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING,

*Washington, D.C., July 6, 1970.*

MEMORANDUM FOR THE SECRETARY OF DEFENSE

Through: The Director of Defense Research and Engineering.

Subject: Final report of task force on secrecy.

The following report of the Defense Science Board was prepared in response to a request of the Director of Defense Research and Engineering. The study was conducted by a special task force of the Board under the chairmanship of Dr. Frederick Seitz. In his memorandum of submittal Dr. Seitz emphasizes the need for "major surgery" in the DOD security system.

With the approval of the Defense Science Board, I recommend this report to you for your consideration.

GERALD F. TAPE,

*Chairman, Defense Science Board.*

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OFFICE OF THE DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING,

*Washington, D.C., July 1, 1970.*

MEMORANDUM FOR THE CHAIRMAN, DEFENSE SCIENCE BOARD

Subject: DSB Task Force on Secrecy Final Report.

The Task Force on Secrecy herewith submits its final report. This report, which has been coordinated with all members of the Defense Science Board, concludes the work of the task force.

The report addresses specific questions posed by the D.D.R. & E. in general terms since time and resources did not permit establishment of detailed steps required to correct the deficiencies identified in the present DOD scientific and technical information security classification system. These actions are more appropriately the responsibility of the cognizant DOD elements.

In addition, the task force considered security classification from the national long range and short range viewpoints. These combined considerations, that is, the specific questions posed by the D.D.R. & E. and the national considerations, resulted in a general conclusion that the DOD security classification system requires major surgery if it is to meet the defense, national and international environment of today. Specifically, we found that:

1. It is unlikely that classified information will remain secure for periods as long as 5 years, and it is more reasonable to assume that it will become known to others in periods as short as 1 year.

2. The negative aspect of classified information in dollar costs, barriers between United States and other nations and information flow within the United States is not adequately considered in making security classification determinations. We may gain far more by a reasonable policy of openness because we are an open society.

3. Security classification is most profitably applied in areas close to design and production, having to do with detailed drawings and special techniques of manufacture rather than research and most exploratory development.

4. The amount of scientific and technical information which is classified could profitably be decreased perhaps as much as 90 percent by limiting the amount of information classified and the duration of its classification.

General recommendations to correct these deficiencies are contained in the report.

FREDERICK SEITZ,  
*Chairman, Task Force on Secrecy.*

#### PREFACE

Late in 1969 the Defense Science Board established the Task Force on Secrecy to consider questions pertinent to the classification of information in all stages of research, development, test and evaluation (R.D.T. & E.), as well as procurement and deployment.

The members of the task force were as follows:

Dr. Frederick Seitz (chairman), Dr. Alexander H. Flax, Dr. William G. McMillan, Dr. William B. McLean, Dr. Marshall N. Rosenbluth, Dr. Jack P. Ruina, Dr. Robert L. Sproull, Dr. Gerald F. Tape, Dr. Edward Teller, Mr. Walter C. Christensen (staff assistant).

In the course of its discussions, the task force consulted a number of individuals and groups, among whom were the following persons:

Dr. John S. Foster, Jr., Director of Defense Research and Engineering.

Dr. Gardiner L. Tucker, Principal Deputy Director of Defense Research and Engineering.

Dr. Luis W. Alvarez, professor of physics, University of California, Berkeley.

Mr. Joseph J. Liebling, Deputy Assistant Secretary of Defense (Security Policy).

Dr. Donald M. MacArthur, Deputy Director (research and technology), O.D.D.R. & E.

Lt. Col. John M. MacCallum, Advanced Research Projects Agency.

Dr. Michael M. May, director, and associates, Lawrence Radiation Laboratory.

Mr. Walter McGough, Acting Special Assistant (Threat Assessment), O.D.D.R. & E.

Mr. Rodney W. Nichols, Special Assistant to the Deputy Director (Research and Technology), O.D.D.R. & E.

Vice Adm. Hyman C. Rickover, U.S. Navy, Director of Nuclear Power, Naval Ship Systems Command.

Rear Adm. Levering Smith, U.S. Navy, Director, Strategic Systems Project Office, Naval Material Command.

Dr. Eugene Wiguer, Professor of Physics, Princeton University.

#### SUMMARY

##### GENERAL COMMENTS

1. The task force considered the matter of classification from several viewpoints; however, it focused its main attention on the classification of scientific and technical information.

2. The task force noted that it is unlikely that classified information will remain secure for periods as long as 5 years, and it is more reasonable to assume that it will become known by others in periods as short as 1 year through independent discovery, clandestine disclosure or other means.

3. The task force noted that the classification of information has both negative as well as positive aspects. On the negative side, in addition to the dollar costs of operating under conditions of classification and of maintaining our information security system, classification establishes barriers between nations, creates areas of uncertainty in the public mind on policy issues, and impedes the flow of useful information within our own country as well as abroad.

4. The task force noted that more might be gained than lost if our nation were to adopt—unilaterally, if necessary—a policy of complete openness in all areas of information, but agreed that in spite of the great advantages that might accrue from such a policy, it is not a practical proposal at the present time. The task force believes that such a policy would not be acceptable within the current framework of national attitudes toward classified defense work. A number of areas of information in which classification may be expected to continue are listed in the text.

5. The task force noted that the types of scientific and technical information that most deserve classification lie in those phases close to the design and production, having to do with detailed drawings and special techniques of manufacture. Such information is similar to that which industry often treats as proprietary and is not infrequently closer to the technical arts than to science. The task force believes that most of the force of attention in classifying technical information should be directed to these phases rather than to research and exploratory development.

6. In the opinion of the task force the volume of scientific and technical information that is classified could profitably be decreased by perhaps as much as 50 percent through limiting the amount of information classified and the duration of its classification. Such action would better serve to protect that information necessarily classified since then the regulations concerning the enforcement of classification could be applied more rigorously than at present.

#### RECOMMENDATIONS

##### *General*

1. *Selectivity in classifying.*—In overhauling our classification guides the advantages that might accrue from inhibiting the acquisition of the information by a competitor or potential enemy through classification should be balanced against the advantages of possibly speeding development in the United States through not classifying the information.

2. *Time limit on classification.*—Whenever a document is classified a time limit should be set for its automatic declassification. This time limit should be adapted to the specific topic involved. As a general guideline, one may set a period between 1 and 5 years for complete declassification. (Note, however, the exemptions stated below for certain types of information.) This time limit should be extended only if clear evidence is presented that changed circumstances make such an extension necessary.

3. *Declassification of material now classified.*—All material now classified should be reviewed as soon as possible after the adoption of the new policy; we hope this might be accomplished in as short a time as 2 years. The review should either declassify the document or set an appropriate date for its declassification.

##### *Research, development, and deployment*

1. As a general rule, research and early development should be unclassified. Thus in the main, 6.1 and 6.2 should be open, while 6.3 may be classified. The partition between 6.2 and 6.3 is not rigid, and classification should be tailored to fit the individual circumstances.

2. In general, we expect classification to be most justifiable when the development approaches the "blueprint" stage. This coincides with the phase when expenditures become substantial. Protection is most desirable when an item requiring a considerable leadtime for development is being prepared for deployment.

3. After deployment, classification may be reduced or canceled. At that stage, the information will have been disseminated to many people so tight classification may no longer be realistic. Secrecy will usually be most valuable to maintaining a technological lead during the period of development.

4. The task force believes that the "confidential" category is not appropriate for R. & D. programs and that "special access" limitations are more likely than not to seriously impede difficult technical programs.

##### *Plans and Operations*

1. The contrast, the information involved in high-level planning requires rigid protection on a need-to-know basis. To declassify such information would not speed technical development; the contingencies envisaged in such planning may never arise, and their publication may cause ill feelings. The only reason for declassification is the interest of the historian. Stringently limited distribution and extended classification time limits may be justified in this category.

2. Information relating to specific operational plans should remain classified as long as the plan is in effect—and perhaps even beyond, insofar as declassification could reveal genuine details of possible use to a potential enemy in developing countermeasures. If secrecy is required, the best protection is afforded by frequent changes in the pattern of operations. Classification of a specific operational plan should be promptly canceled if it becomes irrelevant.

*Responses to Specific Questions*

The task force's responses to specific questions posed in its charter are as follows:

*Question. Is our security system generally effective in denying to potential enemies DOD information that affects the national security? As a corollary question, how long can we reasonably expect that classified information will remain unknown to potential enemies?*

Response. Security has a limited effectiveness. One may guess that tightly controlled information will remain secret, on the average for perhaps 5 years. But on vital information, one should not rely on effective secrecy for more than 1 year. The task force believes that classification may sometimes be more effective in withholding information from our friends than from potential enemies. It further emphasizes that never in the past has it been possible to keep secret the truly important discoveries, such as the discovery that an atomic bomb can be made to work or that hypersonic flight is possible.

*Question. Granted that excessive use is being made of classification and limitations on distribution, what practical steps can be taken to better define the DOD information that should be protected in the interest of national security? Consideration of this question should include the cost and effect of controlling DOD information to the United States and its allies, versus the benefits to potential enemies of its open release.*

Response. Starting from the premise that the interests of an open society and the speedy exploitation of technology are best served by minimal classification consistent with essential security, the task force identified a number of critical areas to be discussed below, in which continued classification appears justified. These critical areas span a much narrower region, however, than is now included under existing classification rules.

The task force felt equipped to recommend only general philosophy, as opposed to detailed classification guidelines. Also, we did not consider monetary costs of security measures but only their likely inhibition on U.S. technological development.

Specifically, it is recommended that the present emphasis, that promotes classification, be reversed to discourage classification by requiring in each instance of classification:

A meaningful written justification by the initiator of the classification action; and

A limit on the classification, as short as possible, which could be extended with detailed justification.

*Question. Are there key points in the research, development, production, and deployment cycle at which information should be controlled? That is, should we adopt the policy that all DOD research be unclassified and freely available and therefore impose controls only on information pertaining to specific pieces of hardware? One point which should be carefully considered here is the additional leadtime that will be available to a potential enemy if he obtains knowledge of our significant research and technology activities and thus can predict its end use in a weapon system.*

Response. The task force has weighed the detrimental effect of security controls on the conduct of R. & D. programs against the need to meet other national objectives and to avoid disclosures beneficial to potential enemies. It appears that little is to be gained by classifying basic research; it is noted that DOD policy and practices are already in virtually complete accord with this view. Similarly, it seems that, as a general rule, much of the early exploratory development could be kept unclassified. Exceptions should require formal documentation and formal approval by OSD; each approval of classification in this category should be accompanied by a rigid deadline for declassification.

For all other development work, including advanced exploratory development and advanced development, classification procedures similar to those employed today are suitable. The criteria should be sharpened, however, so that classification may be imposed only to preclude major technological advantages to potential enemies, to prevent disclosure of information of major importance in the development of countermeasures, or to support national policy directives and regulations. Within this framework, the classification of each system, component, subsystem or technique in advanced development should be considered individually on its own merits. Here, too, a rigid schedule for declassification should be imposed from the beginning.

Major programmatic changes in any category of classified R. & D. should be accompanied by reconsideration of the program's security classification. Particularly, when a system is operationally deployed, the large increase in known system technology and its diffusion among many people should be recognized, and classification should be revised accordingly, with major emphasis on preventing disclosure of system vulnerabilities and on forestalling the early development of specific countermeasures by potential enemies.

## DISCUSSION OF PRIME FACTORS AND EFFECTS IN CLASSIFICATION

### 1. GENERAL SIGNIFICANCE OF CLASSIFICATION

Although the task force was composed of individuals whose backgrounds are in science and engineering, the group sought responses to its assignment from a broader viewpoint since it was felt quite strongly that the issue of classification and the way it is handled has a significant effect on the posture of our nation in the international community, particularly in relation to our ability to unite and strengthen the free nations of the world. To emphasize this point, one of the members quoted an opinion expressed by Niels Bohr soon after World War II that, while secrecy is an effective instrument in a closed society, it is much less effective in an open society in the long run; instead, the open society should recognize that openness is one of its strongest weapons, for it accelerates mutual understanding and reduces barriers to rapid development.

We believe that overclassification has contributed to the credibility gap that evidently exists between the government and an influential segment of the population. A democratic society requires knowledge of the facts in order to assess its government's actions. An orderly process of disclosure would contribute to informed discussions of issues.

When an otherwise open society attempts to use classification as a protective device, it may in the long run increase the difficulties of communications within its own structure so that commensurate gains are not obtained. Experience shows that, given time, a sophisticated, determined, and unscrupulous adversary can usually penetrate the secrecy barriers of an open society. The Soviet Union very rapidly gained knowledge of our wartime work in nuclear weapons in spite of the very high level of classification assigned to it. The barriers are apt to be far more effective against restrained friends or against incompetents, and neither pose serious threats.

Beyond such general matters, the task force noted that there are frequent disclosures of classified information by public officials, the news media, and quasi-technical journals. While the reliability and credibility of such information frequently may be in doubt, the magnitude of leaks indicates that, at present, our society has limited respect for current practices and laws relating to secrecy. It would be prudent to modify the present system to one that can be both respected and enforced.

### 2. SOME MAJOR AREAS IN WHICH CLASSIFICATION SHOULD CONTINUE

The task force recognized that there are major areas in which classification is either traditional or expected. The task force did not attempt to reach unanimity on the extent to which such classification is necessary. The following are examples of such areas:

2.1 *International Negotiations.*—There are many international negotiations in which discussions are facilitated by secrecy, even though the results may eventually be disclosed. Secrecy permits greater freedom of discussion at the conference table and the consideration of a much wider framework of new ideas and proposals than might otherwise be the case.

2.2 *Plans for Hypothetical Emergencies.*—It is frequently advantageous to classify plans for assumed emergencies in order to limit their circulation. Such plans may include alarming contingencies that may never occur at all—or, at least, not be realized in the way assumed when the plans were developed.

2.3 *Tactical and Operational Plans.*—There are many tactical and operational plans that would lose their effectiveness, or even be jeopardized, if they were not maintained secure for at least a limited period of time. For example, detailed plans for the disposition and operation of the Polaris fleet, or the state of readiness of combat groups prior to engagement may, for purposes of effectiveness, deserve to be classified for a specified period of time.



2.4 *Intelligence Information.*—Information gained through intelligence channels often must be classified for a period of time in order to protect the sources of information that would dry up if revealed. Nevertheless, intelligence that is critical to an understanding of our national posture should be disseminated as soon as possible, and in as much detail as feasible (consistent with not compromising our collection capability). Careful consideration should be given to the question: To what extent could openness and international sharing of information gathered by physical observation improve our position?

2.5 *Specific R. & D. Efforts.*—There may be a good reason for limiting disclosure of the magnitude and direction of our efforts in specific fields of research and development for a time, when plans for production are congealing, in order to maximize the advantages gained through leadtime. In all such cases we must continue to recognize that the lead gained will be transitory unless each advance is followed by another.

2.6 *Vulnerabilities.*—It appears essential to restrict information concerning major weaknesses of operational systems, particularly before remedies for those weaknesses are completed. At the same time, one must insure that such restrictions do not result in the lack of recognition of the problem or in failure to remedy the situation.

### 3. GENERAL CLASSIFICATION PHILOSOPHY

Some members of the task force are inclined to the view that, as a nation, we would have more to gain in the long run by pursuing a policy of complete openness in all matters. For example, the strategic arms limitations talks (SALT) might be more realistic if they were accompanied by a full and open public disclosure of knowledge of weapons capabilities and state-of-the-art developments, preferably by both sides, but at least on our part—especially what we know about Soviet systems. In this way, the Congress and the general public would be better informed regarding the significance of the SALT discussions. Similarly, some of the members of the task force feel that public discussion of matters such as the Safeguard system would be given a more realistic basis if intelligence information and analysis were made openly available, even if this meant disclosing information on certain collection techniques, providing these would not be jeopardized by open discussion.

Nevertheless, the task force eventually agreed that it would be very difficult to obtain broad acceptance of highly radical change in classification at this time because of understandable conservatism and deeply ingrained attitudes. Such attitudes would make it difficult to alter significantly present laws and regulations. The most that can be hoped for in the short run is that the present system might be overhauled extensively in order to make it more realistic, in which case it could be respected and enforced far more completely.

In spite of this area of agreement concerning the necessity for secrecy in limited cases, the task force emphasizes that there are very great disadvantages to extensive reliance on secrecy in our society.

### 4. CLASSIFICATION OF TECHNICAL INFORMATION

With respect to technical information, it is understandable that our society would turn to secrecy in an attempt to optimize the advantage to national security that may be gained from new discoveries or innovations associated with science and engineering. However, it must be recognized, first, that certain kinds of technical information are easily discovered independently, or regenerated, once a reasonably sophisticated group decides it is worthwhile to do so. In spite of very elaborate and costly measures taken independently by the United States and the U.S.S.R. to preserve technical secrecy, neither the United Kingdom nor China was long delayed in developing hydrogen weapons. Also, classification of technical information impedes its flowing within our own system, and, may easily do far more harm than good by stifling critical discussion and review or by engendering frustration. There are many cases in which the declassification of technical information within our system probably had a beneficial effect and its classification has had a deleterious one:

(1) The United States lead in microwave electronics and in computer technology was uniformly and greatly raised after the decisions in 1946 to release the results of wartime research in these fields.

(2) Research and development on the peaceful uses of nuclear reactors accelerated remarkably within our country, as well as internationally, once a decision was made in the mid-1950's to declassify the field.

(3) It is highly questionable whether transistor technology would have developed as successfully as it has in the past 20 years had it not been the object of essentially open research.

As a result of considerations of this kind, the task force believes that much of research and exploratory development (essentially all of 6.1, most of 6.2, and some of 6.3) should generally be unclassified; at the same time, we realize that the greatest value of classification rests in the preservation of designs and specialized techniques close to assembly and production and more akin to the technical arts.

In this connection one of the members emphasized that, to the extent that technical information should be safeguarded in behalf of national security, the greatest importance should be attached to what might be called proprietary technical information—information not unlike that relating to fabrication and production which industrial organizations attempt to preserve from competitors. Thus significant advantages can be obtained in some areas of categories 6.4 and 6.6 by classification. Even here, however, it should be recognized that restrictions on the dissemination of such information may impede its exploitations within our national community at least as much as it impedes those foreign nations which would not scruple to attempt to obtain it through espionage.

##### 5. CLASSIFICATION CRITERIA AND LIMITATIONS

It is the considered opinion of the task force that past procedures—according to which classification rested largely on the desire to withhold information from other nations—should be modified to give greater consideration to the effects of classification on our own progress. It should be emphasized that a strong voice, that of the U.S. Congress, is primarily influenced by the requirement to withhold information from others. The effects of classification on our own progress will have to be carefully discussed. We believe that scientific and engineering information, short of detailed blueprints and critical techniques relevant to production, should be classified only after having been justified by very special reasons. At the time of classification, a date should be specified after which the classification would be removed. This period should be as short as possible, and an extension should be granted only when fully justified.

At present, a major proportion of technical information classified top secret is subject to a declassification pattern designated as 3-3-6, whereby they are downgraded to secret in 3 years and to confidential in another 3, and made open after an additional 6 years. We believe that, for most technical items, this is much too long.

The task force was inclined to the view that the classification category of confidential, as applied at present to research and development not bearing immediately on field problems of military interests, is probably useless, or even detrimental, for it prevents normal diffusion of information without providing a really effective barrier to leaks. It probably would be much more realistic to confine this category of classification to matters bearing on military plans and readiness.

For somewhat different reasons, it appeared to the task force that the category of special access, as applied to areas of research and technology, should be carefully monitored to avoid unduly limiting the number of competent technical minds that provide innovative contributions in the area. In the one case examined (eighth card), the task force believes that special access should never have been applied. In circumstances such as those that prevailed during World War II, when most of the best scientists and engineers were engaged in classified defense research, on a full-time basis, it may be feasible to bring to bear a suitably diverse spectrum of minds and talents even on those areas designated special access. But this would be exceedingly difficult under present-day conditions when so many competent technologists are associated, if at all, only peripherally to military research and development. The more open the areas of investigation, the more dynamic will be our national approach to the exploratory phases of research and development.

## 6. OTHER OBSERVATIONS

As a result of limitations on time and staff, the task force could not explore all facets of the field of classification. It did, however, attempt to gain an understanding of the way in which classification procedures work at the detailed level in a few cases. The following observations may be made:

(1) Although there are many alert and imaginative professional experts engaged in assigning and administering classification, as long as the classified material remains so voluminous it is obvious that routine procedure can become too burdensome. There is also a quite understandable bureaucratic tendency to overclassify and to continue classification too long. If the amount of classified material could be reduced to, say, 10 percent of its present volume, a much more thoughtful and effective control could be established across the board.

(2) It was noted that the laboratories in which highly classified work is carried out have been encountering more and more difficulty in recruiting the most brilliant and capable minds. One member of the task force made the pessimistic prediction that, if present trends continue for another decade, our national effort in weapons research will become little better than mediocre. In classified work, the increasing isolation and limited accountability to one's scientific peers contribute to this degradation. In addition, it is worth noting that the many scientists and engineers in academic circles who are willing to work on problems related to national defense would find it somewhat easier to do so in the environment which prevails at present if the classified areas were reduced greatly, as the task force believes should be the case.

(3) The task force emphasizes that modification in the pattern of classification alone will not be a panacea for the difficulties the Defense Establishment faces.

Mr. MOORHEAD. I don't know whether you are aware of this or not, but the 1928 act statute was reenacted in 1965, as part of a codification of title 5 of the United States Code. Of course, those absolutely useless reports did not exist in 1965, and I wonder if you feel that the statute has any more standing, inasmuch as it was reaffirmed in 1965.

Professor BERGER. I would say so. On the basis of the *Dartmouth* case and the *Barr* case it doesn't matter whether they thought about anything but the obsolete reports. If the language is so broad as to include other information, you are entitled to get it. The language of the statute, in a word, cannot be construed as confined to obsolete reports.

Mr. MOORHEAD. Let us ask you another quick question—

Professor BERGER. Sir, I am at your service. I would rather stay here as long as you have questions to ask.

Mr. MOORHEAD. Well, I have to answer the quorum call and I have another matter to attend to. Mr. Cornish.

Mr. CORNISH. Professor Berger, I am looking at section 3 of the Constitution which requires the President of the United States to communicate to the Congress and I quote from that: "He shall from time to time give to the Congress information of the state of the Union" and I think that traditionally and historically—and Justice Goldberg made this point before the subcommittee—that the precedents of that go far beyond the state of the Union message.

Professor BERGER. Moreover, you will find in my article I discuss that point. You are very acute to notice it, but I feel that the report to the Union calls for more than the one report.

Mr. CORNISH. And, also, in article 1, under section (a) in the powers of Congress, I notice that one of those powers, No. 14, says: "Make rules for the Government" and I think that also applies in this case here, too.

Professor BERGER. Well, I don't know about that; first I have to make up my mind what the unique prerogatives of each branch are, and the attributes and once I have done that I don't need the "rules for the government—"

Mr. CORNISH. You will have to admit the language of that is very broad and could be applied to many types of situations, and I think it could be applied to the information-seeking situation, where Congress seeks information from the Government and makes rules for that.

Professor BERGER. I confess I never thought of it, and I wouldn't rule it out, but I want to reflect about it before I answer.

Mr. CORNISH. I have enjoyed your testimony tremendously and I thank the chairman for his indulgence.

Mr. MOORHEAD. Thank you very much.

The subcommittee is now adjourned until 10 a.m., tomorrow.

(Whereupon, at 12:10 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, May 24, 1972.)

# U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—PROBLEMS OF CONGRESS IN OBTAINING INFORMATION FROM THE EXECUTIVE BRANCH

(Part 8)

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WEDNESDAY, MAY 24, 1972

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2203, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, John N. Erlenborn, Frank Horton, and Gilbert Gude.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; Harold F. Whittington, staff consultant; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information, will please come to order.

As part of our hearings into the problems of Congress in obtaining information from the executive branch, we have invited testimony from three agencies with whom this subcommittee has, over the years, conducted considerable business both in the foreign operations and in the information field—the Defense and State Departments and the U.S. Information Agency.

This morning we will hear from the first of these witnesses, Mr. Rudy A. Johnson, Assistant to the Secretary of Defense for Legislative Affairs. Next Wednesday, May 31, we will have as our witnesses Mr. David M. Abshire, Assistant Secretary of State for Congressional Relations, and Mr. Charles D. Ablard, General Counsel and Congressional Liaison Director of the U.S. Information Agency.

It is appropriate, we felt, to solicit testimony from these witnesses as to the overall policies, programs, and guidelines used by the agency in the handling of requests for information from committees of Congress as well as from individual Members of Congress. In addition, I am sure that these gentlemen are well aware of many individual cases involving specific problems this subcommittee and members who have testified or submitted statements to us for the record. Of course, we will be directing questions in connection with these problems of access to specific information.

We will also inquire concerning access to various types of information, documents, records, vouchers, and similar data by the General Accounting Office. Testimony last week from Deputy Comptroller General Keller outlined a number of GAO problem areas.

Our first witness this morning will be Mr. Rady A. Johnson, Assistant to the Secretary for Legislative Affairs, Department of Defense. He is accompanied by a regular witness these days before our subcommittee, Mr. J. Fred Buzhardt, General Counsel of the Department of Defense.

Will you gentlemen please come forward?

Do you solemnly swear that the testimony you are about to give this subcommittee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. JOHNSON. I do.

Mr. BUZHARDT. I do.

Mr. MOORHEAD. We welcome you both. Mr. Johnson, you have a prepared statement which you may read to the subcommittee or proceed as you wish.

**STATEMENT OF RADY A. JOHNSON, ASSISTANT TO THE SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS; ACCOMPANIED BY J. FRED BUZHARDT, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE**

Mr. JOHNSON. Since the statement is brief, I would like to read it and then respond to any questions you may have.

Mr. Chairman and members of the committee: it is a privilege to appear before you to discuss the policies of DOD for complying with congressional requests for information and how, in fact, they are handled and perhaps shed some light on the considerations which influence the application of that policy.

I will not attempt to delve into the problems of classification, a subject on which this committee has spent so much time and effort, because I believe they involve entirely separable and largely irrelevant issues from those posed by this hearing. In other words, classification of information is not an interrelated matter to the question of executive privilege.

The policies of the Department of Defense, as well as those established by this administration, regarding the furnishing of information to Congress were established on the belief that Congress must be fully informed of all Government programs and operations in order for the Government to function properly. Consequently, we make every possible effort to satisfy the requirements of Congress for information in connection with the performance of its function in the oversight process, as well as on questions related to proposed legislation.

I don't think this Congress has suffered from a lack of information on any of the administration's programs. The very fact that the current Secretary of Defense came from this body should serve as reassurance that the Department of Defense is sympathetic to the needs of Congress and makes a very sincere effort to work with the Congress. Secretary Laird has repeatedly admonished all DOD components that the Congress is a coequal branch of Government.

In order to give this committee a little background of some of our problems, let me review for you the workload that is generated in

order to respond to the thousands of congressional inquiries received annually. I personally believe we do an excellent job of responding to the vast majority of requests. Although there are times when there are delays in getting some specific or voluminous information, these are exceptions that prove the rule.

The routine requests, such as those on legislation, troop strengths, draft calls, and procurement items, for example, present no problems and generally are responded to by letter within 5 working days. We are, of course, alert to those areas which are sensitive from a standpoint of ongoing operations, foreign policies, and proprietary procurement matters, as examples, and they have to be handled on a case-by-case basis. More often than not, such data is not in Washington, nor compiled in any one central place. On some occasions, the subject material or documents requested have not been sufficiently identified to permit prompt response. Obviously, delays will be encountered in such instances and every attempt is made to so advise the requester.

Again, a particular document may be the result of interagency action, and each of the participating agencies or departments must have time to evaluate the request and offer whatever input it may have to a suitable response. If information can be given in summary form or provided, in part, we attempt to obtain the agreement of the individual member or committee that the material offered will satisfy his requirements. In a vast majority of such instances, we are able to work out an arrangement suitable to the member or committee.

On occasions, a congressional request is generated by a constituent inquiry about an area of unusual security sensitivity. Upon explaining this to the member, it is our experience that he generally fully realizes the circumstances and agrees that such information should not properly be obtained for the constituent. This type of case is rather easy to handle because most members, even on their own, determine that the material is of such a nature that its true value is only suited for committee use.

As I mentioned earlier, some requests are not specific enough to identify the desired material. I believe the committee would agree that it is not a proper expenditure of DOD time or funds to compile research papers for student constituents. If we find a member attempting to carry out major personal investigations by correspondence, we try to talk to the member, or his staff, early in order to find out what is wanted and we assist them if at all possible.

Mr. Chairman and members of the committee, you probably can recall some instances where requests for information have been made of DOD and allegedly the information has not been furnished or there was an undue delay. I, nevertheless, reiterate that I think the Department of Defense does an excellent job of being responsive, but many times the right questions have not been asked, and it is largely a matter of clarifying the congressional request that is sometimes misinterpreted as a refusal to provide the information. Let me say now that I have never refused information as a matter of finality. I think if you review any complaint you may have, you will almost certainly find that the requester has received the substantive information he sought in one form or another.

Again, to my knowledge we have never flatly refused or denied any request. The only possible exceptions to this are those few occasions where executive privilege was ultimately exercised. The most recent

case in the Department of Defense occurred last year in response to the request from the Senate Foreign Relations Committee for out-year planning figures on foreign assistance legislation.

A decision to exercise the executive privilege is not taken lightly and is not exercised by the Department of Defense. It is a privilege reserved for the personal decision of the President of the United States, and I don't think it has been abused by this administration. Though most of you are familiar with our directive, I would like to set forth that portion of DOD Directive 5400.4 that pertains to my office. This is paragraph IV.B.2. (a) and (b) :

2. In the rare case where there is a question as to whether particular information may be furnished to a member or committee of Congress, even in confidence, it will normally be possible to satisfy the request through some alternate means acceptable to both the requester and the DOD.

(a) In the event that an alternate reply is not acceptable no final refusal to furnish such information to a Member of Congress shall be made, except with the express approval of the head of the DOD component concerned, or of the Secretary of Defense. The Assistant to the Secretary of Defense (legislative affairs) shall be informed of any such submissions to the head of a DOD component or to the Secretary of the Defense.

(b) In the event an alternate means of supplying information requested by a committee of Congress proves unsatisfactory, final refusal to provide the information to the committee may be made only by the President of the United States. The Assistant to the Secretary of Defense (legislative affairs) shall be responsible for insuring compliance with all procedural requirements imposed by the President or pursuant to his direction.

When these problems present themselves, I turn immediately to our General Counsel, Mr. Fred Buzhardt, and we work with the particular DOD agency whose information is involved in order to determine the best possible manner in which to satisfy the request. As our directive attempts to make clear, it is only as a last resort, after all alternative means of providing the desired information are exhausted, that any consideration is given to recommending that the President invoke executive privilege. Needless to say, such recommendations must be supported by overwhelmingly persuasive reasons going to the constitutional responsibilities of the President. It is, therefore, not surprising that these recommendations are so rare and that we try so diligently to avoid the necessity for making them by satisfying the congressional requester.

I believe this committee, and all those of the Congress to which we respond annually, recognize the magnitude of our work and would generally concur that we have made a very concerted effort to furnish necessary information on a timely and responsive basis. I have not touched upon the thousands of telephone calls requesting information that come into my office every year. Here again, I am confident that these requests are handled in a very expeditious and proper manner.

I thank the committee and will be happy to answer any questions the committee may have, providing I have the necessary information.

I would like to add, just to give you an idea of the magnitude, the number of requests we receive; we attempt to log most of our phone calls, and, obviously, the letters. Over the years, we have compiled the requests from different people which range from a static display at an air show all the way to letters of congressional inquiry. For calendar year 1971, for all the components of congressional affairs, that is, the Office of the Secretary of Defense, the Army, the Navy and the Air



Force, including the Marines, we received 179,000 written inquiries and over 580,000 telephone inquiries.

Mr. HORTON. What were those figures again?

Mr. JOHNSON. For calendar year 1971, there were 179,218 written inquiries and 583,310 telephone inquiries.

That probably does not include the notes I have picked up walking around the Hill.

Mr. MOORHEAD. I want to assure you that this subcommittee has no complaints about the efficiency of your operation, that is, the routine, and so forth. No question is raised about your operation.

Questions have always been handled very efficiently by your office and from my personal experience I can say this. Obviously, the purpose of this hearing is to explore into the difficult questions. We wish to discuss the ones where for one reason or another, information properly or improperly is withheld from (a) the Congress and (b) the public.

This is the difficult area and not the matter of the efficiency of your operation in handling routine questions.

Mr. JOHNSON. Thank you.

Mr. MOORHEAD. It really comes down to the statement you made here, and I think it is extremely important that "Congress" must be "fully informed of all Government programs and operations in order for government to function properly."

I think this is the essence of the democratic representative system of government. It is this, the foremost issue, that I and other members of this subcommittee want to examine. The question is, Is the Congress being a full participant—as the Founding Fathers intended in the governmental process—or is it failing because we don't have all of the information needed for us to carry out our constitutional obligations and so represent the American people, and to carry out our responsibility to legislate.

We have today a prepared statement by our able colleague, Congressman Aspin, which without objection, I will make a part of the record.

(The prepared statement of Representative Aspin follows:)

PREPARED STATEMENT OF HON. LES ASPIN, A REPRESENTATIVE IN CONGRESS FROM  
THE STATE OF WISCONSIN

Mr. Chairman, first of all I wish to thank this subcommittee and its distinguished chairman, the gentleman from Pennsylvania (Mr. Moorhead) for the opportunity to submit this testimony.

This subcommittee, in its current investigation, is tackling one of the most difficult problems faced by Members of Congress and the American people—learning the truth from the executive branch of Government.

As a Member of Congress and a former official in the Pentagon, I am keenly aware of the problems encountered both by the general public and the Congress in obtaining information from the Department of Defense and other agencies.

I would like to discuss with you today several experiences which I have had which reveal the administration's callous disregard for the needs of Members of Congress to obtain information from the executive branch.

The members of this committee may be interested to know that using its security stamp as an excuse, the Pentagon is covering up tens of millions of dollars of cost overruns and lengthy delays in two Navy programs to build new sonar equipment.

The news of more than \$50 million in cost overruns on a new sonar system designed for submarines has been consciously withheld from the public by the Pentagon.

These huge costs overruns and mammoth delays are being covered up not to protect the national security, but to protect the Navy brass from criticism.

It's also interesting to note that even the General Accounting Office has not been permitted to publicly disclose the cost overruns or delays.

Let me be a little more specific. The Navy is conducting a program of research and development to eventually produce the AN/SQQ-23 sonar. What the Navy has not told the public is that this sonar is behind schedule by a large number of years. However, the exact number of years and effects in this delay cannot be revealed to members of the committee in a public session because it might be considered a violation of security.

The Navy is also developing the AN/BQS-13 sonar system for use in our submarines. In this case, it is the cost overruns that are being hidden from the public's view. As I said earlier, the cost overruns amount to more than \$50 million, however, I am not able to give you a precise figure in a public session.

The Pentagon has also suppressed detailed reasons offered by the GAO supporting a recommendation that Secretary of Defense Melvin Laird review his decision to buy the new AN/BQS-13 sonar which will be placed on some of our destroyers and cruisers. The public will not be permitted to know why the GAO feels this particular program should be reviewed.

Overall, Mr. Chairman, it seems ridiculous but I am unable to tell you the exact amount of the cost overruns or the length of delays because someone in the Pentagon may consider it a violation of security.

It is a system whose principal purpose in my opinion has become to suppress vital information from reaching the public and the press.

The members of the committee may be interested to know that I have written the Pentagon asking them to declassify both secret GAO reports on the two sonar systems so that the public can know the full truth about these overruns and delays.

I am not asking anyone to reveal information vital to the national security. I am only asking the Pentagon to be honest and face up to the fact that these programs are in deep trouble.

I hope that this subcommittee will study legislation that will permit classification in the interest of national security and eliminate the present system which is designed to protect a bunch of self-serving public relations conscious bureaucrats. The day has long since passed when the security stamp really means that a particular piece of information is vital to the defense of the United States. For more years than I wish to count, the security stamp has been an excuse to hide mistakes and cover up the bunglings of bureaucrats.

The subcommittee might also be interested to know that I have encountered a great deal of difficulty in obtaining an unclassified version of the Peers Commission Report on the Mylai massacre. All the trials concerning the Mylai massacre have been completed. One man's case is still on appeal. However, the Pentagon stubbornly refuses to release the Peers Commission Report in an unclassified form.

As a result, on April 4 of this year, I filed suit in Federal District Court in Washington, D.C. pursuant to the Freedom of Information Act in order to obtain a copy of the report. The Defense Department has 60 days to answer my suit. Thus far, they have not filed a brief in Federal District Court.

The public has a right to know the true story behind the Mylai massacre. In this case, the Pentagon is guilty of a double cover up, first, covering up the Mylai massacre, now covering up its own investigation of the tragedy. I plan to pursue this matter in the courts and hope that either the district court or the appeals court will permit release of the report.

Let me say that I believe this subcommittee has a vital role in revitalizing the Freedom of Information Act. The intent of the act is important and it has been underutilized by both members of the press and Members of Congress. It is my hope in the future when I encounter the brick wall in the Pentagon to file suit pursuant to the Freedom of Information Act.

But the Freedom of Information Act is only a short-run solution. In the long run, we need a complete revision of our classification laws that will permit the classification of those matters truly vital to the national defense and national security and the public disclosure of those facts that are not.

Once again, Mr. Chairman, thank you very much for the opportunity to submit my testimony to the committee.

MR. MOORHEAD. As an example, Congressman Aspin cites the refusal of the Pentagon to make public the cost overruns on certain

weapon systems. Such information was furnished to the Congress but it was provided on a security classification basis. Is there any justification for covering up such cost overruns in the DOD procurement system?

Mr. JOHNSON. Let me address part of that and I will ask Mr. Buzhardt to address the legal aspects of it.

I think from the way information is forwarded, the reference is probably to system acquisition reports, which we are required to file quarterly. That may be where the cost difficulties arise.

As far as the public announcement, I think they were released to the committees—

Mr. BUZHARDT. I believe they were released to the committees because the cost figures are rarely, themselves, classified. Oftentimes, you have difficulty putting these cost figures into context because the particular type of defects on some weapons systems, depending on the type of weapon, cannot be classified. It would obviously be of interest to the enemy to know the limitations where requirements are falling down or where there are specific technological problems.

So it is not the cost figures themselves, which are classified. I think if you notice in the newspapers on major weapons systems, they get plenty of advance notice. I met with the Securities and Exchange Commission staff last week and I found them intimately informed on the cost consequences of all major programs that are having difficulties. They, themselves, found no disclosure problems as they have in some cases in the past, because they were getting quite adequate publicity in the newspapers.

Mr. MOORHEAD. Congressman Aspin states something about a particular sonar system, the AN/BQS-13. He has received the total amount of the cost overruns but not the total costs of the programs. He has received the cost overruns, but this data was classified so he could not make that figure public if he had testified before this subcommittee.

Mr. BUZHARDT. Well, I am not familiar with this specific case. Let me say one more thing. We have great difficulty in making information publicly known, although we do make information to the subcommittee known in great detail.

I can remember a number of cases that I have dealt with where there is an overrun and there is a dispute between the Government and the contractor as to who is responsible for the additional costs.

Now as you are well aware, these end up frequently in litigation. When you are faced with that condition, it is a question of whether the overrun is the fault of the Government. Most frequently, it is the Government's position it is not the liability of the Government, and the contractors' position is that it is.

When you are going into litigation, it is frequently the case that the Government's position could be easily endangered by getting into any of the details in public before the early stages of the trial at least, as to the specifics of the Government's position. And so often we don't answer the industry's charges, so this is a limitation.

Mr. MOORHEAD. I will see that you gentlemen have a copy of Congressman Aspin's testimony and, in particular, the testimony with respect to the particular sonar system.

Mr. BUZHARDT. We will be glad to go into that one for the record. (The following statement was subsequently submitted:)

The testimony of Congressman Aspin to this committee on May 19 addressed three specific matters, the R. & D. program for the AN/SQQ-23 Sonar, the AN/BQS-13 Sonar and the Peers Commission report.

With reference to the AN/SQQ-23, Congressman Aspin testified:

"Let me be a little more specific. The Navy is conducting a program of research and development to eventually produce the AN/SQQ-23 sonar. What the Navy has not told the public is that this sonar is behind schedule by a large number of years. However, the exact number of years and effects in this delay cannot be revealed to members of the committee in a public session because it might be considered a violation of security."

*Response.* The schedule slippage on the SQQ-23 program is not and has not been classified. There has been an overall slippage of approximately 4 years resulting from:

An underestimation of the development effort;

Unanticipated technical problems; and

The application of a policy to require an adequately tested system performance before initiating production.

With reference to the AN/BQS-13 Congressman Aspin testified:

"The Navy is also developing the AN/BQS-13 sonar system for use in our submarines. In this case, it is the cost overruns that are being hidden from the public's view. As I said earlier, the cost overruns amount to more than \$50 million, however, I am not able to give you a precise figure in a public session.

"The Pentagon has also suppressed detailed reasons offered by the GAO supporting a recommendation that Secretary of Defense Melvin Laird review his decision to buy the new AN/BQS-13 sonar which will be placed on some of our destroyers and cruisers. The public will not be permitted to know why the GAO feels this particular program should be reviewed."

*Response.* The AN/BQQ-5, which was formerly designated the AN/BQS-13, DNA, is being developed for installation in our newest class of nuclear attack submarines and for backfit into our older nuclear attack submarines.

The new AN/BQQ-5 selected acquisition report and GAO report are classified because of the compendium of information contained therein. Both the selected acquisition report and the GAO report bear the classifications of the most highly classified material contained therein. This information is made available to Congress and specific elements may be declassified and released after review by proper authorities upon specific request. Also contained in these documents is information regarding contract negotiations and award of the contract. Public disclosure of this information prior to award of the contract is not in the best interest of the Government.

The current status of the AN/BQQ-5 development is that the program is on schedule, tests conducted to date indicate that all performance requirements will be met, and development costs are within the cost thresholds established by the Defense Systems Acquisition Review Council (DSARC) in May 1970.

The status of the AN/BQQ-5 Sonar acquisition program is reported quarterly as part of the selected acquisition report (SAR) program. In its report of the June 30, 1971, AN/BQQ-5 SAR, GAO Case No. 3400-51, the GAO reported an increase over the original planning estimate (and in another portion of their report referred to this as "cost growth") which are due mainly to two factors: (1) An authorized increase in the number of submarines the system is to be installed in; hence, an increase in the total, not unit, acquisition cost of the program, and (2) the possible incorporation of a specific new capability that is not a part of the original program. GAO recommended that the decision to incorporate the new capability be reviewed because "it is questionable whether the performance gain justifies the significant cost." This statement was unclassified in the GAO report.

Navy components which were submitted in response to the June 30, 1971, GAO report stated that the decision to incorporate the new capability into production systems has in fact not been made. Tests to determine the improved performance utilizing the new capability will be conducted this summer and fall. The results of these tests will be reviewed by the DSARC in December 1972. At that time the decision will be made to include or not to include the new capability in production systems.

With reference to the Peers report, Congressman Aspin testified:

"As a result, on April 4 of this year, I filed suit in Federal district court in Washington, D.C. pursuant to the Freedom of Information Act in order to obtain

a copy of the report. The Defense Department has 60 days to answer my suit. Thus far, they have not filed a brief in Federal district court.

"The public has a right to know the true story behind the My Lai massacre. In this case, the Pentagon is guilty of a double coverup, first, covering up the My Lai massacre, now covering up its own investigation of the tragedy. I plan to pursue this matter in the courts and hope that either the district court or the appeals court will permit release of the report."

*Response.* The U.S. District Court for the District of Columbia on August 22, 1972, rendered a decision in the case *Les Aspin et al. v. Department of Defense et al.* (Civil action No. 632-72) adverse to the plaintiff, Congressman Aspin, which upheld the decision of the Department of Defense not to release the Peers Commission report. A copy of the memorandum opinion and order of the district court is attached for incorporation in the record.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 632-72

LES ASPIN *et al.*,

*v.*

DEPARTMENT OF DEFENSE *et al.*,

MEMORANDUM OPINION AND ORDER

Plaintiffs brought this suit under the public information section of the Administrative Procedure Act, 5 U.S.C. 552, popularly known as the Freedom of Information Act, to compel the Secretary of the Army to release a report entitled: "Department of the Army Review of the Preliminary Investigation Into the My Lai Incident," more commonly referred to as the "Peers Commission Report," the matter is before the court on cross motions for summary judgment which have been fully briefed. Having reviewed the pleadings and affidavits which comprise the record in this case, the court finds that defendants' motion for summary judgment should be granted.

The documents sought are investigatory files compiled for law enforcement purposes from disclosure because of specific exemptions provided in the Freedom of Information Act; 5 U.S.C. 552(b) (7). The documents consist of 42 bound books organized into four volumes. Volume I has 12 chapters and contains the actual report of investigation. It summarizes the nature and purpose of the Peers inquiry, the evidence uncovered, an analysis of those factors which contributed to the Son My incident, a statement of conclusions regarding the suppression of evidence, and various findings and recommendations made by the Peers Commission which are interspersed throughout the volume. Several chapters from volume I were released to the public in March 1970, with minor deletions. Volume II consists of verbatim transcripts of witness testimony. Volume III consists of documentary evidence, and volume IV contains statements taken by Army criminal investigators, either as part of related criminal proceedings or as part of the Peers investigation. See, affidavit of Mr. Bland West.

The applicable test for determining whether the investigatory files exemption applies to particular documents is stated in *Bristol-Myers Co. v. F.T.C.*, 138 U.S. App. D.C. 22, 26, 424 F. 2d 935, 939 (1970), *cert. denied*, 400 U.S. 824. The test is whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding. The affidavits of Mr. Robert Berry, General Westmoreland, and Col. George Ryker clearly indicate that the report was in fact the basis for the bringing of charges under the Code against both officers and enlisted men. Because the documents which plaintiffs seek figured prominently in the initiation of subsequent court-martial proceedings, they meet the test of *Bristol-Myers*. Furthermore, at least one of these proceedings, that involving Lieutenant Calley, is still on appeal.

An additional reason for exempting the report from public disclosure is the specific exemption in the Freedom of Information Act which exempts from mandatory release interagency or intra-agency documents which would not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C. 552(b) (5). It is well established that this exemption is designed to protect findings and recommendations prepared by a subordinate in order to inform and advise a superior. *Ackerley v. Ley*, 137 U.S. App. D.C. 133, 138, 420 F. 2d 1336, 1341 (1969). The affidavit of Mr. Bland West, describing the docu-

ments desired by the plaintiffs, shows that volume I of the Peers report falls within the terms of this exemption because that volume consists principally of internal working papers in which opinions are expressed and policies formulated and recommended. In the court's opinion the other volumes are appendices to volume I and should share the same protection accorded that volume.

For the above reasons, the court hereby grants defendants' motion for summary judgment.

JOHN H. PRATT,  
*U.S. District Judge.*

Mr. MOORHEAD. If this involves a case where there may be litigation in the courts, then it is not a case of security classification; is it?

Mr. BUZILARDT. That is correct. It is not done in that case on the question of a security classification.

Mr. MOORHEAD. Congressman Aspin says that the data on over-runs in the ANBQS-13 was stamped with a security classification label and that was the reason given. I feel that this is an abuse of the classification system. However justified it may be on the other grounds, this refusal to make this—

Mr. BUZILARDT. If I could just interrupt, I would have to look at the particular correspondence to see what was contained in the letter. Again, we might have had a misunderstanding in the explanation of how the cost rose. They may well have said, discuss the classified performance characteristics. A further discussion may reveal that the figures, themselves, are not classified.

Mr. MOORHEAD. We want to be very sure that the classification system is properly used to conceal things from a potential enemy that are essential to the national defense, but not to conceal an embarrassment to a particular branch of the armed services—cases where a particular weapons systems costs a lot more than anybody anticipated.

Is Mr. J. A. Pitkiel of the Department of Defense in the room?

Mr. PITKIEL. Yes.

Mr. MOORHEAD. Would you please come forward?

#### STATEMENT OF J. A. PITKIEL, DEPARTMENT OF DEFENSE

Mr. MOORHEAD. Do you solemnly swear that the testimony you are about to give this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. PITKIEL. I do.

Mr. MOORHEAD. Mr. Pitkiel, are you an employee of the Department of Defense and, if so, in what capacity?

Mr. PITKIEL. I am an assistant in Mr. Johnson's office.

Mr. MOORHEAD. Have you been attending the hearings of this subcommittee on a regular basis?

Mr. PITKIEL. More or less.

Mr. MOORHEAD. Do you make reports to your superiors on these hearings?

Mr. PITKIEL. Just an informational report of questions and answers, and on statements of the witnesses that appear.

Mr. MOORHEAD. Are these reports in writing?

Mr. PITKIEL. Yes.

Mr. MOORHEAD. Can you supply those for the use of the subcommittee?

Mr. PITKIEL. Yes, sir.

Mr. MOORHEAD. Thank you. We would be pleased to receive them. I presume they are not classified so they can be received publicly?

Mr. PITKIEL. Yes, sir.

Mr. JOHNSON. If I might add, along that line, when we have Department of Defense witnesses testifying in open session, we usually have people there to assist and also to write up the minutes and to pick up the statements that were made. In the case of Mr. Pitkiel, he works primarily for me directly in most of these areas, and I would have to say I don't have these reports, unless he kept copies of some of them.

I don't have copies, but if he has them, I would be willing for them to be made available to you.

Mr. MOORHEAD. That is all we want.

Mr. PITKIEL. The punctuation might not be too good.

Mr. MOORHEAD. If we put them in the record, we will permit you to correct grammatical errors, as we do other witnesses.

(The information referred to above is in the subcommittee files.)

Mr. HORTON. Why do we want this information?

Mr. MOORHEAD. I would like to see what the Defense Department thinks about our hearings, and Mr. Johnson apparently has no objection. I don't intend to make them part of the record unless there is something very dramatic in them, in which case it would, of course, be by unanimous consent.

I yield to Mr. Erlenborn.

Mr. ERLENBORN. Mr. Johnson, do you have any relationship with the GAO?

Mr. JOHNSON. Do I?

Mr. ERLENBORN. Yes.

Mr. JOHNSON. Only on requests, and these are usually worked through our General Counsel. Where GAO is doing work with us, on, say, appropriations, this would be through the General Counsel.

Mr. ERLENBORN. GAO is an arm of Congress, and I don't know if congressional relations would include them—

Mr. JOHNSON. No, we have met occasionally when we had a matter of information to be turned over but mainly just the formalities on it. On the substantive things, it is usually our General Counsel.

Mr. ERLENBORN. I don't know if any of you here would be in a position to respond to some questions I have relative to a statement from GAO in the Senate hearings concerning the lack of access to information.

Mr. BUZHARDT. I can address that.

Mr. ERLENBORN. You can?

You probably are aware of the statement by the General Accounting Office Comptroller General concerning several instances where, in the performance of their audits, they complained that they were unable to get access to certain documents, or even to inspect physical facilities, under the control of the Department of Defense.

Are you familiar with the statement of Mr. Keller that was submitted to the Senate?

Mr. BUZHARDT. Yes, they were both submitted to the Senate and submitted to you. Let me say, initially, there has been a series of discussions and working meetings going on between Mr. Laird, the Secretary of Defense, and Mr. Staats, the Comptroller General, be-

gining some months ago to resolve such difficulties as have existed. These have progressed, you might say, to the working level with the Division Heads at GAO, with Mr. Moot, the Comptroller of the Department of Defense, and myself.

As Mr. Keller testified before this committee, there was an exchange of correspondence between the Secretary and the Comptroller General. I believe there were three personal meetings. There have been many meetings between myself and Mr. Moot and the Comptroller General's people.

I think we have both issued preliminary instructions to the field, which should eliminate many of the problems. We have managed to isolate very narrowly the difficult areas and at the current time, one member of my staff, one representative of the Joint Chiefs of Staff, and two of the people from the General Accounting Office are on a field trip to the various command headquarters with a view toward working out a modus operandi, or a mechanism for resolving to the maximum extent possible the difficulties with access which GAO has experienced.

In most of the cases the General Accounting Office has cited, they have been dealing with subordinate headquarters and field units. As you know, when they go into a particular country, they are dealing with a military assistance advisory group, commanders who work predominantly for the State Department, and certainly the Ambassador in the country. He has a dual chain of command or supervision, if you will, and we are not dealing with an easy problem to resolve in many cases.

We are hopeful that most of the GAO's requests can be answered. We are attempting now to determine what information in the field is essential to their work and how much of it is in Washington. I think we have pretty well resolved it as much as possible.

As much as possible, this information should be requested and addressed at the Washington level before they go on their field trip, because one of the major problems has been the necessity for the field to refer the documents back to Washington. This encourages delay. Now, it is the position of the Secretary of Defense that GAO should not and cannot have unlimited access to any file cabinets they want to walk into at the Department of Defense.

Mr. ERLNBORN. Let me explore that with you. I would like to know the basis of the problem and its scope. First of all, if an auditor of the GAO would seek access, for instance, to the Thai and Korea military installations over in Vietnam, I believe it was, would a security clearance be necessary?

Mr. BUZHARDT. That is right.

But in that particular case, they are seeking access to the bases of a foreign nation and not to our bases. Obviously, we don't have the same degree of access in any sense to a foreign military base that we have to our own, and we are dealing with foreign nations and not our own people.

Mr. ERLNBORN. Did I understand that the difficulty was not that the Department of Defense did not want to give them access but rather that they were refused access by the Thai or Korean military commanders?

Mr. BUZHARDT. No; in many cases, if GAO wanted to go to an



allied installation—and I am not familiar with those specific cases but I am sure it applies—the contacts with these organizations are usually either by the Department of Defense, the Department of State, or AID. They would be just one more stranger, as far as the foreign national is concerned, if they turned up at their gates.

The degrees of rapport we have with the foreign officers or foreign personnel vary quite considerably. There are many factors to be considered. Some of the factors are what is the state of relations at the moment, and so on. There are a great variety of considerations that enter into these things and in some cases, I am quite sure either the Department of Defense or the State Department would feel that it would be inadvisable to approach them for their records at that time.

Mr. ERLBORN. Well, are you aware in these cases whether the GAO was seeking to look at the records of foreign military personnel, or were they seeking access to the American advisers at those bases?

Mr. BUZHARDT. I am not aware specifically.

Mr. ERLBORN. There is no problem of security clearance, is there?

Mr. BUZHARDT. It is not a problem of security clearance. Now, in some cases—and I can't think of any offhand—but it is conceivable it would be a security problem. Obviously, if they wanted information about an immediately pending operation, I think they would be asked to wait.

Mr. ERLBORN. In the same case, there was reference to a SCOPE document. I believe GAO was not able to obtain it. It was the basis apparently for reimbursement to the Thai and Korean forces and, in performing their audit, GAO said there was no way for them to completely audit without seeing the agreement on which these reimbursements were made. Now, on what basis would that document be denied to GAO?

Mr. BUZHARDT. I am not familiar with that specific document.

Mr. ERLBORN. Has the Department of Defense responded to this review or in listing the problem areas that GAO has?

Mr. BUZHARDT. I am not sure. The ones which they have submitted to the Department of Defense for comment, I feel sure have already been commented on, but we have in the various committee hearings or in the press, likely found out about GAO reports, which we have never previously been aware of.

Obviously, we cannot comment on them if we don't know what they say. It is their usual custom over the years to submit their reports to the Department of Defense for comment before they are made public; at least, for verification by Defense. There have been numerous deviations from that procedure in recent times.

Mr. ERLBORN. I doubt that we could take time this morning to go into these in detail, even if you would be prepared to answer them in detail; but would the Department be prepared to answer each of the allegations contained? I can call your attention to the statement on page 310—

Mr. BUZHARDT. We would be glad to.

Mr. ERLBORN (continuing). Of the hearings before the Subcommittee on the Separation of Powers of the Committee on the Judiciary of the U.S. Senate, 92d Congress, first session. The dates of these hearings are: July 22, 28, 29; August 4 and 5 of 1971.

This is a printed report of the hearings and it is entitled: "Executive Privilege—the Withholding of Information by the Executive."

Mr. BUZILARDT. Yes, I was a witness at those hearings.

Mr. ERLÉNORN. I would appreciate it if you would furnish us then a written answer to each of the allegations contained in that.

Mr. BUZILARDT. I would be glad to.

Mr. ERLÉNORN. Thank you.

(The following statement was subsequently submitted:)

#### THE SCOPE DOCUMENT

The GAO alleges that the SCOPE document, to which it was denied access, was prepared and implemented by the Department of Defense, that it described the terms of the U.S. commitments to Thailand as they related to reimbursement rates and procedures regarding Thailand's participation in Vietnam and that the document served as the basis for approval of reimbursement claims.

The so-called SCOPE document was a draft internal proposal serving as a tentative basis of negotiation between the United States and the Royal Thai Government relating to reimbursement rates and procedures. Discussions with the Thais concerning SCOPE were suspended by the Royal Thai Army representatives at a meeting with U.S. representatives in June 1970. Discussions over SCOPE were never reopened since it was considered doubtful if complete agreement could be reached. Moreover, the then impending redeployment of Thai forces from Vietnam more or less eliminated the necessity of achieving agreement on the SCOPE document.

Actually, reimbursement of Thai expenditures was made pursuant to the terms of a letter dated November 9, 1967, and signed by our Ambassador to Thailand. Moreover, the GAO was given an accurate, comprehensive list of the U.S. reimbursement rates for Thai forces and Thai pay scales so that it is difficult to understand how the denial of the SCOPE document impeded the GAO in discharging its responsibilities. The SCOPE document was withheld because it was an internal, tentative, draft proposal that never received any official status, sanction or approval.

#### *Visits to Thai and Korean military installations in Vietnam*

The purpose, according to the GAO, in visiting the Thai and Korean military base camps at Bearcat and Qui Nhon, respectively, was to make visual observations of the condition and utilization of facilities and equipment furnished by the United States under military assistance programs to free world forces in Vietnam. Assurances were given that GAO personnel would not contact Thai or Korean personnel nor review records maintained by units of either. They would, however, during the visit, wish to talk to U.S. military liaison personnel assigned to each installation.

Contrary to the allegations of the GAO, the nature of the occupation and control over these military base camps by the Thais and Koreans was tantamount to the exercise of almost absolute sovereignty. Accordingly, any visit to either of these bases required that all visitors be introduced to the base commanders. In such a courtesy interview, the reason for the visit would unquestionably arise and a truthful answer would require an admission that representatives of an arm of the U.S. Congress were there to investigate the foreign government and the manner in which it cared for and utilized its own equipment. Under the military assistance program, legal title to such equipment is conveyed upon transfer to the foreign government subject to certain restrictions regarding disposal or retransfer to others without U.S. consent. The impropriety of such an investigation by the GAO and its prejudicial impact upon our foreign relations with those countries are self-evident.

The U.S. military liaison personnel assigned to those installations were, however, made available to the GAO for interview at other locations under U.S. control.

#### *Review of U.S. occupation costs in Berlin, Germany*

The costs incurred by the allied occupying powers of West Berlin—the United States, France, and Britain—to occupy West Berlin are borne by the Federal Republic of Germany, such costs being paid for by West German authorities from German funds appropriated by the West German Government. For the United States, this amounts to the equivalent of about \$50 million annually and includes all costs associated with our presence there except for the pay of U.S. military personnel stationed there (\$20.6 million) and approximately \$400,000 in U.S.

appropriated funds for incidental, associated costs that simply cannot be paid for in German deutsche marks.

Expenditures from the special deutsche mark account are made by German authorities upon receipt of proper authorization from designated U.S. officials and are charged accordingly to the West German budget. Therefore, except for the equivalent of approximately \$4.6 million out of the \$50 million annually which is drawn down in cash to pay the salaries of Department of the Army civilians, military quarters allowances, certain per diem expenses, and government bills of lading, these German marks do not change hands nor come into the actual physical possession of U.S. personnel.

The German Federal Audit Court, which is roughly equivalent to our own GAO, is the final audit authority for the occupation costs and mandatory expenses accounts for the western sectors of Berlin and, pursuant to such authority, prepares and submits annually to each sector commandant, a final report on the audit of occupation costs in his sector.

The position of the GAO is that the primary objective of its proposed audit is to satisfy itself that the costs of the United States properly chargeable to the West German Government for Berlin occupation expenses are, in fact, borne by the Federal Republic of Germany. However, inasmuch as all expenses associated with our presence in Berlin, except the pay of military personnel and the \$400,000 of U.S. appropriated funds, are now borne by the Federal Republic of Germany, the GAO can readily achieve its stated objective by auditing the \$400,000 of U.S. appropriated funds to determine whether any or all of it should be shifted over to the German budget. The GAO, however, rejected this alternative. However, the GAO did review Army Audit Agency reports and internal review reports of the Berlin Brigade.

There is little doubt that our relations with the Federal Republic of Germany and the other occupying powers would be seriously impaired if American auditors of the GAO were to check on the work of German auditors in auditing German funds appropriated by the German Government, disbursed by German authorities and already properly audited by an agency of the German Government.

#### *Review of U.S. military operations and commitments in the Philippines*

In the conduct of this review, the GAO sought to make its own determination of what our foreign policy and national security interests should be with reference to the Philippines rather than properly confining its inquiry to an assessment of the efficiency of the management of those activities being conducted there. Examples of some of the questions and data requested by the GAO are as follows:

(a) The roles of U.S. military bases in the Philippines, individually and collectively, with regard to U.S. defense objectives in the Philippines and worldwide.

(b) The U.S. negotiating position and the concessions the U.S. Government is willing to make in connection with the renegotiation of the military bases agreements.

(c) Why is it necessary to maintain military facilities in the Philippines?

(d) What contingencies or alternatives are available in the event that access to Philippine bases should be denied?

(e) Provide justification for the continued operation and use of each military installation and discuss how the operations of each base relate to general war plans and major contingencies, etc.

We do not challenge the authority of the GAO, either on its own initiative or upon the request of a congressional committee, to review the results of approved, ongoing programs with a view toward making recommendations looking to greater economy or efficiency in public expenditures. We do not, however, construe the Budget and Accounting Act as authorizing the GAO to conduct an investigation for the purpose of advising the President, the Department of Defense, or the Congress as to whether our foreign policy, national security interests, and military operations are advisable, adequate, unwise, or prudent. Consequently, requests for information of the kind cited above necessarily were not honored.

#### *Review of U.S. assistance to Philippine Government in support of the Philippine Civic Action Group (PHILCAGV)*

Personnel in the field requested guidance as to the releasability to the GAO of certain sensitive documents relating to the deployment to Vietnam of the Philippine Civic Action Group. One such request, for example, related to a confidential exchange of correspondence personally between President Marcos of the Philip-

pires and President Johnson of the United States. Instructions were, therefore, issued to the effect that documents of such sensitivity should be reviewed in Washington before being released. Moreover, this relieved the personnel in the field from the rather burdensome anxiety of inadvertently releasing a document the disclosure of which might prejudice our relations with the Philippine Government. Although this did inject an additional time-consuming element in the work of the GAO, nevertheless, the reviewing was done, it is believed, with relatively expeditious dispatch under the circumstances.

Twelve documents were in the process of being reviewed and were about to be released when the GAO concluded its investigation by filing its final report to the Congress. In having completed its report and terminated its investigation, it was assumed by force of circumstances that the documents were not, after all, essential to the inquiry and that the requests were, therefore, no longer outstanding.

We know of no instance where access was denied, as alleged, to records on the regular military assistance program unless it related to the tentative planning data of the military assistance program in the out years for which executive privilege was invoked on August 30, 1971.

#### *Review of military assistance—Republic of China*

In this allegation, the GAO refers to the denial of a request for "a document which concerned the military planning and rationale used in meeting overall U.S. military objectives. The planning outlines existing and potential threats, both internal and external, the related equipment and manpower needed to meet a variety of situations and contingencies, and the priorities established for the U.S. support of recipient country forces."

In its allegation, the GAO neglects to mention the fact that the document in question is, in reality, the joint strategic objectives plan (JSOP), the joint war plans, military objectives, and requirements for the development of forces for the Republic of China.

Again, we do not construe the Budget and Accounting Act as authorizing the GAO to conduct an investigation for the purpose of advising this Department or the Congress whether war plans, Armed Forces requirements of a friendly nation, or the level of funding for military assistance of a particular country are adequate or inadequate. It is not in the national security interests of the United States to release or disclose war plans, emergency war orders or military contingency planning.

The second allegation related to the denial of a request for a document entitled "Taiwan Air Defense Study." This was a preliminary study of various aspects of the air defense of Taiwan prepared by personnel of the Pacific Air Force. At the time of the GAO request for it, the study had not yet then even been forwarded to CINCPAC for approval or disapproval. Since the study had not received any official sanction by the higher authority required to review it before it could be implemented, it necessarily had to be treated as a draft, internal working document which, because of the yet-to-be-approved status, are not normally releasable outside the executive branch. Of course, had the study been approved as an ongoing program in the process of implementation, access would have been granted without question.

#### *Review of administration of the military assistance program*

The first allegation under this topic relates to the denial of GAO requests made in China, Korea, and Thailand for "data on recipient country force capability and operational readiness status." Stated somewhat differently, the GAO wanted to know the combat effectiveness of the armed forces of China, Korea, and Thailand in order to conclude whether the level of military assistance and military training was adequate or inadequate. This same principle was discussed earlier as being outside the authority conferred upon the GAO by the Budget and Accounting Act. Moreover, it would not be in the public interest to disclose all we may know of the composition, strength, order of battle, operational readiness, and combat effectiveness of the armed forces of friendly nations. If the roles were reversed, would we look kindly upon the release by a foreign friendly government of such information about our own Armed Forces?

A somewhat similar difficulty is presented by GAO requests for reports prepared by performance evaluation groups. These so-called PEG reports are designed as internal management tools by which to evaluate the effectiveness of a recipient country of military assistance in utilizing equipment already provided. The criticisms, opinions, and recommendations in these PEG reports are frank and forthright so that the disclosure of their contents verbatim out-

side the executive branch could risk adverse reactions from some of the governments concerned. Moreover, the value of the reports as an instrument of management would be impaired because the authors would begin to temper their remarks once it was made known that the reports were to be more widely disseminated.

Again, in an effort to be cooperative and to facilitate the work of the GAO while preserving the value of the reports, briefings on the contents of the reports have been given to the GAO.

*Review of the use of Department of Defense excess Defense articles in the military assistance activities*

The allegations under this topic relate to another request for the joint strategic objectives plan for Greece and for trip reports which, in essence, are the same as PEG reports, both having been discussed previously.

Mr. MOORHEAD. As a subcommittee of the Government Operations Committee, we are interested in the economy and efficiency of the Government.

We also have with us today invited witnesses from the Internal Revenue Service, and I wonder if we could proceed this way. Mr. Horton is going to make a brief statement and I think it will only take a few minutes. So if you gentlemen would stand aside for a few minutes, I would like to call the witnesses from the Internal Revenue Service. We want to get the Internal Revenue Service back to their noble tasks of extracting dollars from the taxpayers of America.

**STATEMENT OF JOHNNIE M. WALTERS, COMMISSIONER, INTERNAL REVENUE SERVICE; ACCOMPANIED BY LEE H. HENKEL, JR., ACTING CHIEF COUNSEL; AND DONALD O. VIRGIN, CHIEF, DISCLOSURE STAFF, OFFICE OF ASSISTANT COMMISSIONER FOR COMPLIANCE**

Mr. MOORHEAD. Commissioner Walters, would you and your associates please stand?

Do you solemnly swear that the testimony you are about to give this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. WALTERS. We do.

Mr. MOORHEAD. We welcome you, but only briefly, frankly, Mr. Commissioner.

I think there has been a total lack of communication between this subcommittee, the Internal Revenue Service, and the staff of our subcommittee. Last week our staff discussed the problem that we wanted to pose to you but you must have misunderstood, because in my judgment the prepared statement you have submitted is not responsive to the inquiry of this subcommittee.

We are not interested in having this subcommittee or its staff, or the GAO or its staff, look at individual income taxes, or other tax returns, per se. We are interested in seeing to it that the Internal Revenue Service be covered by the kind of management audits that the General Accounting Office conducts in every other department and agency of the U.S. Government.

Congress appropriates almost \$1 billion a year for the operation of the Internal Revenue Service and the Congress, through its arm, the General Accounting Office. According to GAO testimony here last week, they have no way of really determining the efficiency and the economy of the operations of the IRS.

The statement you have submitted merely states that under your interpretation of the law and regulations, they have no such right. This subcommittee is interested in the underlying legal basis for your view, not just the fact that some IRS general counsel in 1968 stated an opinion that the GAO had no such right, which the GAO disputed in great detail. We want your interpretation of the legislative history of the sections of the law which you cite as the basis. The question is, should GAO have the right to conduct management audits? Maybe legislation in the Congress is needed to clarify this dispute; maybe it isn't; maybe you are a special animal whose management functions should not be audited.

These are the issues. The statement which has been submitted is unresponsive to our request, in my opinion. It was at Mr. Horton's suggestion that we asked you to come up and discuss this problem of GAO access. After reading your statement, it seems that we are two ships passing in parallel courses, but never meeting the issues that are really of concern to this committee—one, information that is available to the Congress through its arm, the General Accounting Office; and, two that Congress is concerned with the economy and the efficiency of the Government, including how IRS spends its appropriated funds.

My suggestion is that we release you as witnesses today. Let's get our staffs together to clarify the basic questions I have just outlined, so that your testimony can be more responsive. I am going to suggest Thursday morning, June 1, at 10 a.m., in room 2154. I know that is agreeable with Mr. Horton. I don't know if it is agreeable with Mr. Erlernhorn or Mr. Gude. Let's see if we can't face up to this issue squarely at that time.

For the purpose of the record, I should include at this point my letter to you requesting your appearance; without objection, it will be made a part of the record at this point.

(The document referred to follows:)

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE,  
Washington, D.C., May 16, 1972.

HON. JOHNNIE M. WALTERS,  
*Commissioner, Internal Revenue Service,*  
*Washington, D.C.*

DEAR MR. WALTERS: This is to confirm the subcommittee staff conversation this afternoon with Mr. John Hanlon of your office, in which he was apprised of the subcommittee's desire to receive testimony from IRS on serious matters raised by Deputy Comptroller General Robert E. Keller concerning the IRS failure to provide certain records and other information available to GAO to permit an effective review of IRS operations and activities.

The subcommittee would appreciate your testimony at the hearing on May 24 at 10 a.m. in room 2203, Rayburn House Office Building. I would expect that you would also make available a witness from your legal office to discuss the reasons why IRS has not complied with the provisions of the law.

A copy of the statement by Mr. Keller is attached. As was explained to Mr. Hanlon, a copy of the transcript containing several colloquys on this same subject during our hearing today will also be available for your use in preparation of testimony.

Enclosed for your use is a copy of the committee rules which govern our hearings. As you will note, 50 copies of your prepared testimony should, without fail, be delivered to the subcommittee office 24 hours in advance of your testimony.

Your full and complete cooperation in this important matter will be appreciated.

Sincerely,

WILLIAM S. MOORHEAD,  
*Chairman.*

Mr. MOORHEAD. I now yield to Mr. Horton.

Mr. HORTON. Thank you.

At the hearing on May 16 when Deputy Comptroller General Keller testified, he documented on page 10 of his testimony the difficulties the GAO has in getting information from the Treasury and from the Internal Revenue Service.

Now, I asked if they would prepare a memorandum to give us an idea of their problems, and they have. I want to concur in what the chairman has said with regard to the testimony that you have prepared to make here today. I don't think it is responsive to the problem that was presented by the GAO. It would be possible, I guess, for us to ask you questions about this but I think it would be more helpful to give you an opportunity to study this additional information which I have been furnished and which the subcommittee has been furnished at my request by the Comptroller General's Office.

For example, I have here a copy of the memorandum I just received from Mr. Keller, and the first three paragraphs I will read. They are very short. This is entitled: "GAO Access to Records Problems at the Internal Revenue Service."

It says:

GAO review efforts at the Internal Revenue Service have been materially hampered and in some cases terminated because of the continued refusal of the Internal Revenue Service to grant GAO access to records necessary to permit it to make an effective review of Internal Revenue Service operations and activities.

Without access to necessary records, GAO cannot effectively evaluate Internal Revenue Service administration of operations involving billions of dollars of annual gross revenue collections (about \$192 billion in fiscal year 1972) 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 Internal Revenue Service budget requests and its appraisal of Internal Revenue Service operations and activities. Without such access, the management of the largest collection agency in the world, employing about 65,000 people, will not be subject to independent audit.

GAO has taken every opportunity to impress upon Internal Revenue Service officials that it is not interested in the identity of individual taxpayers and does not seek to superimpose its judgments for that of the Internal Revenue Service in individual tax cases; rather, GAO is interested in examining 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 Internal Revenue Service operations and activities. GAO has in general directed its efforts toward those areas where GAO believed improvements in current operations would bring about better IRS administration of programs, activities, and resources.

Then it goes on and talks about access to records denied on congressional request assignment. This has to do with the chairman of the Legal and Monetary Affairs Subcommittee of the Government Operations Committee requesting GAO to review Internal Revenue Service's effectiveness in collecting Federal highway use taxes and access to records denied on GAO initiated assignment.

This had to do with the Alcohol, Tobacco, and Firearms Division. Another is a pending request for access to economic stabilization program records.

So I think they pretty well spelled it out here, and it is not as the chairman said, just a request by the GAO to look at individual returns, but it is a much broader mandate with regard to the GAO's function and the possibility of it reporting to the Congress.

So I would agree with the chairman that I think it would be much more helpful and fruitful if we could furnish you a copy of this memorandum from the GAO and give you an opportunity to come back and testify based on this information.

As the chairman said, it may be that we have a problem that is going to require legislation but, as I understand it, this is a ruling from your General Counsel and perhaps it can be ironed out by communications between your staff and our staff and perhaps by working the thing out with the GAO. Maybe it is a problem that is not solvable that way, and maybe we would have to do something else.

Mr. MOORHEAD. Just one other thing—could you submit to this subcommittee the IRS General Counsel's opinion dated September 5, 1967, on this issue?

Mr. WALTERS. Yes, sir.

Mr. HORTON. It may be you would want to review that opinion of the General Counsel. I realize it was 5 years ago and it may be that the General Counsel now would have a different opinion in regard to that. So suppose we give you this memorandum, and give you an opportunity to look at that and perhaps you can be more responsive to the problems raised by GAO.

Mr. Gude?

Mr. GUDE. No questions.

Mr. HORTON. The Commissioner might want to say something.

Mr. WALTERS. I think if you want us to respond to these specifics, you are certainly right that we should postpone this hearing until we see them and study them. We will furnish that opinion you referred to plus—I wish to say this has been reviewed since that opinion—and we will furnish you all of this. I think the chairman is right in thinking that possibly you should be thinking of legislation because the auditor reviewers we have over the years, have indicated that Congress chose the joint committee as the one that would investigate and supervise us. And let me say this, the service welcomes congressional supervision. We need it. So we aren't trying to avoid it.

Mr. MOORHEAD. Then you are one of the few agencies that welcomes such congressional supervision.

Mr. WALTERS. We have one of the toughest jobs, too. So, we know we need help and we will be pleased to come back.

Mr. MOORHEAD. Yes, I think we understand the situation better now. This is the reason I asked the DOD to step aside temporarily. I think this has been cleared up. Thank you very much. Will you have someone call us back?

Mr. WALTERS. Yes, sir.

Mr. HORTON. I think it would be helpful to us if you did detail and specifically set forth what the General Counsel's opinion was and trace the history and give us as much background information as you can with regard to the conflict that exists between the GAO and your agency.

Mr. WALTERS. We will, sir.

#### STATEMENT OF RADY A. JOHNSON AND J. FRED BUZHARDT OF THE DEFENSE DEPARTMENT—Resumed

Mr. MOORHEAD. We will now continue, Mr. Johnson.

Mr. HORTON. I don't think I have any questions to ask. I think they have been covered.



Mr. MOORHEAD. Mr. Gude?

Mr. GUDE. Yes, Mr. Chairman. I would like to ask Mr. Johnson about a series of letters which Senator Cranston and I wrote, in which we corresponded with the Defense Department in regard to reports that the Air Force was using weather modification techniques in South Vietnam.

If I could quote from several of these letters to give the chain of thought that set the stage. Senator Cranston and I wrote last June:

We have noted recent reports that the Air Force is using weather modification techniques to wash out sections of the Ho Chi Minh Trail. At first glance, this appears to be a relatively harmless defense project, but it carries some disturbing implications. Using weather modification as a military tool opens the door to a vast unknown category of warfare. Although the techniques are primarily primitive today, experience with other military systems suggest that refinements inevitably will come. At present, we do not know the ecological consequences of such activities. The possible redirection of storm centers, producing prolonged draught conditions or fostering other types of climatic movements, however, suggest an awesome potential. Any move into this area without the most painstaking analysis of environmental implications, would be most unwise. Indeed, it would be scientifically and morally wrong for the United States to become the first nation to use such capabilities for military purposes.

Unless there is a clear governmental policy to the contrary, the United States may find itself charged rightly or wrongly with initiating a new form of warfare. Other Nations might well justify wartime weather modifications or climatic alteration activity on the basis of our involvement in this area. U.S. military weather modification projects could also embarrass our systems engaged in legitimate research.

We went on in the letter to ask for information from Secretary Laird. We received a reply which we found unresponsive to the specific question we raised about weather modification in Southeast Asia, although the department discussed at great length weather modifications and experiments they were conducting which were not related to military operations. So Senator Cranston and I wrote again on October 15, 1971, referring to our letter of June 15, and requested specific information regarding the use of weather modification techniques by the Air Force or other U.S. agencies in Southeast Asia.

I might add that Dr. John S. Foster, in his reply to our June letter dated July 12, gave us useful information concerning the development of such techniques but failed to direct his comments specifically to our request.

We found his decision to withhold information with "No comment." to be unsatisfactory, and inappropriate. We stated that in a letter and we went on to say that we would like answers to the specific questions as to the types of weather alteration programs that were being conducted in Southeast Asia, under whose authority, in which countries; and do these countries have knowledge of, and have they given approval for these activities; how long have these programs been in force, and so on. And, also, the number of people involved and finally just what is the national policy in this area. In addition to Senator Cranston's and my efforts, Senator Pell of Rhode Island put in the Congressional Record an exchange of correspondence (page S 507 of the January 26, 1972, Congressional Record) in which he as the chairman of the Subcommittee on Oceans and International Environment, asked for information about weather modification. This, of course, was a request by a chairman of a subcommittee, who was acting on behalf of his subcommittee, which was refused.

(The article follows:)

## 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:

SEPTEMBER 23, 1971.

Mr. RUDY 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 the 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.*

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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.*

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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 percent. 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 6 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 1-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.*

DECEMBER 3, 1971.

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

DEAR MR. SECRETARY: On September 28 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 questions 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 December 3, 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.

Mr. BUZHARDT. Let me say it was provided to the committee which Congress designated to have primary jurisdiction over the matter. It was provided to the Armed Services Committee and he was so informed. Incidentally, the chairman discussed it with Senator Pell at our request.

Mr. MOORHEAD. Are you drawing a distinction, not only between an individual Member and a committee, but also within what seems to be a hierarchy of the committees? It appears that even though weather modification surely affects the jurisdiction of the Senate Oceans and International Environment Subcommittee, the chairman was not provided this information. It couldn't be clearer that the subcommittee had a prime jurisdictional need to have this information if it is going to carry out its studies about the international environment.

Mr. BUZHARDT. That is true. At the same time, you don't expect us to exchange information between committees of Congress as a matter of discretion.

That is a matter between the committees. And if there is doubt, we provide it to the committee you have designated as the primary committee, and then it is in congressional hands.

Mr. MOORHEAD. It is not a distinction between friendly and hostile committees?

Mr. BUZHARDT. No; it is not.

Mr. MOORHEAD. You feel if a committee clearly having jurisdiction, such as the Subcommittee on Oceans International Environment, which would have jurisdiction to look into the effects of weather modification—if they requested such information, your reply would be, "we gave it to the Armed Services Committee"?

Mr. BUZHARDT. If it is on a sensitive classified operation, we would follow this course. And there are many reasons for it that are very practical.

Mr. HORTON. What was that statement again?

Mr. BUZHARDT. I said, if it were on a sensitive classified subject, we would probably prefer and would in most cases, provide it to the Armed Services Committee that would have the primary jurisdiction.

Mr. HORTON. Well, why does the Armed Services Committee have jurisdiction over everything you do? They don't have jurisdiction over everything you do, do they?

Mr. BUZHARDT. Over all of our programs, with the exception of the Corps of Engineers.

Mr. HORTON. Government operations has jurisdiction too.

Mr. BUZHARDT. Oversight jurisdiction, but as far as programs are concerned—

Mr. HORTON. Pardon?

Mr. BUZHARDT. As far as programs are concerned—

Mr. HORTON. That is an important area, isn't it?

Mr. BUZHARDT. Yes.

Mr. HORTON. In this letter from Mr. Foster he indicates that:

Recognizing that Congress is concerned with activities which bear on the quality of our environment, I have at the direction of Secretary Laird seen to it that the chairmen of the committees of Congress with primary responsibility for this departmental operation, have been completely informed regarding the details of all classified weather modifications undertaken by the Department.

Now, No. 1, can you furnish this committee the direction of Secretary Laird with regard to this specific information that was asked for? Can you tell us which chairmen of committees were furnished this information? We don't have it now. I would also recommend or suggest in the future, if this type of letter is written, that information be given to the Members of Congress as to where the information has been placed. In other words, if I write and try to get some information and I get a letter like this, I would like to know which chairman of which committee gets this information.

What I would have done with this, I would have written back to you and said I would like to be informed as to what committee has received this information so I could have it and go to the committee and get it. It is not in here and I think that would probably be a good modification of the letter to indicate where the information is. As a matter of fact, that is a pretty vague statement that is not precisely related to the information requested. It is a pretty broad statement with regard to "all weather modification." And that specific information, I think, should be available to the Members of Congress through the committees.

Now, whether the committee gives it to him or not—and your theory about that is another matter—you are not involved with it, but—

Mr. GUDE. If the gentleman will yield?

Mr. MOORHEAD. It is still your time.

Mr. GUDE. I fail to see the distinction you are making between a committee and a Member of Congress. Under the Constitution, I see no recognition of committees of Congress as being part of the established structure of Congress. Committees are established by Congress and they can be abolished by Congress and committees come and go but the Members of Congress are what constitute the Congress of the United States. I would really like to know the Department's legal authority for supplying this information, not to the committee, or to the members, but to the chairman of the committee that has jurisdiction over the Department of Defense.

I think the Department of Defense has developed a distorted view of what constitutes Congress. It is not a group of committees. It is people elected by the citizens of the United States.

Mr. BUZHARDT. That is quite true.

Mr. GUDE. According to you, some committees are second-class committees and some committees are first-class committees, and members, I suppose, are third class, if you are not on the right committee.

Mr. BUZHARDT. The Congress makes the rules that set the jurisdiction.

Mr. GUDE. We make our internal rules, but have you had directives from Congress as to where information should be directed? You get requests, of course, from committees that have primary responsibility for the legislation.

Mr. BUZHARDT. That is correct.

Mr. GUDE. But is there a law or legal authority that says information shall only be available to committee chairmen, of favored committees and not to members of the committees and not to individual members?

Mr. BUZHARDT. No; there is not, Mr. Chairman, but I am sure you would agree that no individual Member of Congress can speak for the entire Congress or is he the Congress as it is spoken of in the Constitution.

Mr. GUDE. No; no committee can speak for Congress either.

Mr. BUZHARDT. To the extent the Congress authorizes them by its own rules to speak for them or to conduct the business for the Congress in a particular subject area it can.

Mr. GUDE. In what law or rules does it say that the Department of Defense will provide information only to certain committees or committee chairmen? Of course, we have rules to govern how these committees operate in relationship to each other but I would like to know the legal authority that states the Department of Defense must give certain information to certain chairmen or certain committees, or only to certain members.

Mr. BUZHARDT. Let me say this: There is no such law as you speak of, but at the same time, as a coequal branch of Government, the Department, as well as any portion of the executive branch, must deal with the Congress as a separate branch and as a separate entity. We could not hope to deal with the hundreds of individual members and, therefore, we deal with them officially as duly constituted committees, because that is the way the Congress has structured itself.

If the Congress chose to let each Member act in all areas and speak for the Congress as a whole, because our obligation is to provide information to the Congress, then that would be another matter.

Mr. HORTON. Would you yield again?

Do you have all of this in writing? Is there a directive to this effect or are you making this up as you go along?

Mr. BUZHARDT. No; I am telling you the practical application. I am giving you the rationale for the practical application as it is applied.

Mr. HORTON. Is there anything in writing? Have you made an opinion as General Counsel?

Mr. BUZHARDT. I have made no opinion.

Mr. HORTON. What you are giving us now is your opinion as General Counsel?

Mr. BUZHARDT. And it reflects the practice.

Mr. HORTON. And what you just told us is what the practice is?

Mr. BUZHARDT. That is correct.

Mr. HORTON. How long has that practice been in effect?

Mr. BUZHARDT. As far back as I know.

Mr. HORTON. How long have you been the General Counsel?

Mr. BUZHARDT. About 20 months.

Mr. HORTON. What about the General Counsel before you, did he discuss this matter with you?

Mr. BUZHARDT. There is great continuity in my office. As far as I know, I guess my office has continuity to the beginning of the Department of Defense.

Mr. HORTON. You are giving us your personal opinion now as General Counsel. The question I am asking is, whether or not that opinion you have given here as General Counsel represents the official opinion of the Department of Defense although you are giving us your general opinion as General Counsel, and you have indicated there is nothing in writing on this.

Mr. BUZHARDT. To my knowledge. There may be opinions I haven't researched.

Mr. HORTON. But, certainly, you are not talking now about a legal opinion that has been rendered by a General Counsel in writing because if you had, you would have referred to it. Now, there may be such a thing or maybe there isn't.

Mr. BUZHARDT. It may be I have read it but I don't recall at the moment whether there is or not.

Mr. HORTON. So what you are giving us here is your opinion as the General Counsel based on what you understand the practice to be. The question I am asking is, What is the basis on which you premise that opinion that this practice has gone on prior to your time? Did you have some discussions with the prior General Counsel about this, or is this a matter of the people in the office saying this is the way it has always been?

Is it pretty well defined or not so well defined?

Mr. BUZHARDT. It is fairly well defined. I have an Assistant General Counsel that deals primarily with this area. We have one special list of opinions in this area on the Freedom of Information Act, for instance. While we have never discussed it in terms of whether it was a practice, we have certainly discussed the rationale that has been applied. I have reviewed the rationale applied and the rationale given from my office and from the other legal offices, in the Department of Defense, from time to time.

Mr. HORTON. Have you discussed this with the General Counsel of any other agencies or departments? This subject we are talking about now, namely, the question of—

Mr. BUZHARDT. My recollection is I have discussed it in meetings where representatives were present, if not the General Counsel, but I don't specifically remember the occasion.

Mr. HORTON. Are the opinions you have expressed here today different from the opinions of other General Counsel or are they the same?

Mr. BUZHARDT. So far as I know, it is the same.

Mr. HORTON. Thank you.

Mr. MOORHEAD. Mr. Johnson, again, I commend you for your statement that without adequate information, the Congress and the Government can't function, and yet you recite on page 5 a case where the Department of Defense refused under the so-called doctrine of "Executive privilege," it refused a congressional request for "out-year" planning figures for foreign military assistance.

Did the President invoke it?

Mr. JOHNSON. He is the only one who can invoke it, yes.

Mr. MOORHEAD. Going back to your statement—in order for government to function properly Congress needs information—it seems to



me planning for future military assistance programs is essential to the Congress before we can legislate on this year's program because we have to know where do we think we are going in the future. We have to know whether we are just starting a program or if this is the beginning of a big program.

Mr. JOINSON. I think the question is, the information requested was really information not, in essence, available in a working planning document. It is subject to change from June to August, just in a couple of months, just by relationships alone by the countries. So to give a 5-year projection would be to give you a hoped-for, but by no means would it be concurrent in any way. I think from a budgetary restatement, the overall amount was pretty well available.

Mr. MOORHEAD. Well, I think that unless you assume that we are all congenital idiots up here, we know that plans change. You may think you are going to do something next year and the third or fifth year thereafter, but they can be changed; but it gives us an idea as to how to take this year's program into account. So we should have the right to know where the program is going in the future and what the planners contemplate.

It seems to me your original statement—we can't have a functioning government if Congress isn't informed—would apply here to this information you have discussed on page 5 of your statement.

Mr. BUZILARDT. Mr. Chairman, the specific documents requested contained so-called out-year planning figures. The specific documents were not planning figures by any high level planners. They were the raw input from field organizations. They had no official sanction. They had none of the policy considerations that the higher levels of government cranked in. They were not cranked in, in this instance. I think it was primarily Defense Department planning input. As you know, another department of government has the final voice on what the planning should be so we were dealing with something that was primarily advisory inputs rather than the planning of the executive branch, which was being addressed.

Mr. MOORHEAD. This isn't a situation where you followed the "most favored chairman" approach and gave the documents to the most favored chairman?

Mr. JOINSON. No.

Mr. BUZILARDT. I might say that the words "most favored chairman" are your words and not ours. You elect the chairmen of your committees, we don't.

Mr. MOORHEAD. I think the favoritism is indicated by your testimony. You said you give it to the chairman having what you considered as having the primary jurisdiction and you make that consideration.

Mr. BUZILARDT. Really is there any deviation from the Armed Services Committee as having primary jurisdiction over operational programs?

Mr. MOORHEAD. I think the complaint you are hearing voiced by the members of this subcommittee is that there are many overlapping jurisdictions such as the environmental question of a particular policy, which may be primarily military and may be secondarily environmental. The arm of the Congress which is asking you for the information may have primarily jurisdiction on the environmental question, but that is a secondary committee as far as you are con-

cerned. You have two pieces of paper: a Xeroxed copy and the original. Why don't you give the original to your "most favored chairman" and give the carbon to the secondary chairman?

Mr. BUZHAROV. It is not that easy.

In many cases, we recognize the obligation to provide information to the Congress but in many cases we have a judgment that the material is extremely sensitive. In many cases, the other committees do not have the facilities to store or safeguard the material. What we do, in effect, is take it to the Armed Services Committee, who has the full detail and background similar to what we have, and if they don't have it in the particular case, we provide it to them with the background of what we considered to be its sensitivity. And then the judgment of the executive branch is passed to the committee. You might call it passing the decision to the Congress. It is a very workable and very practical consideration.

Mr. MOORHEAD. If you said to a committee "we are not going to supply you this document because you don't have the right safe," I am sure they would understand that, and either obtain the necessary safe or make other arrangements. That would be purely a technical consideration.

Mr. HORTON?

Mr. HORTON. No further questions.

Mr. MOORHEAD. Mr. Phillips?

Mr. PHILLIPS. Getting back to the request of Senator Pell, Mr. Johnson, on page 5 of your statement you talk about the procedure by which Executive privilege is invoked. It is invoked by the personal decision of the President under a letter of agreement with this subcommittee. But it seems to me in reading the text of the letter signed by Dr. Foster, dated December 16, 1971, to Senator Pell, addressed to him as Chairman: "Dear Mr. Chairman," he says in his last sentence: "I find it necessary to respectfully and regretfully decline to make any further disclosures of the details of these activities at this time." It seems to me that whether you call it Executive privilege or say merely "no, you can't have it," the effect is the same. Who authorized Dr. Foster to use Executive privilege in this particular case?

Mr. JOHNSON. You are calling it Executive privilege.

Mr. PHILLIPS. The effect is the same.

Mr. JOHNSON. Nobody but the President can execute Executive privilege.

Mr. PHILLIPS. Why didn't he do so in this case?

Mr. JOHNSON. In any case.

Mr. PHILLIPS. In this particular case, why didn't the President do it instead of Dr. Foster?

Mr. JOHNSON. Because the information has not been declined to an arm of the Congress; namely, the Armed Services Committee. The information had already been furnished to the Congress but not through this particular Senator. There was no need to claim Executive privilege.

Mr. PHILLIPS. Senator Pell is a chairman of another subcommittee.

Mr. JOHNSON. Right. But the way the information was supplied was correct in accordance with the guidelines we operate under. We supplied it to the committee with primary jurisdiction if that was the question.

In further response to you, I think Senator Pell's request has been answered since then by that committee chairman.

Mr. PHILLIPS. He only had to wait 11 months.

Mr. JOHNSON. No, Mr. Pell's unavailability necessitated that.

Mr. PHILLIPS. But the point is, I have read the jurisdiction of the Armed Services Committee. I don't find anything in their jurisdictional areas of responsibility—at least, spelled out in the House or in the Senate rules—that mentions weather modification.

Mr. JOHNSON. In this case, there was a question of military weather modification. I think that this puts it in the Armed Services Committee.

Mr. PHILLIPS. But you make that decision.

Mr. JOHNSON. No, as far as the information, Mr. Pell was not correct anyway. But the information he was requesting had to do with military application. I don't think it would be proper for us to take military information and give it to the Education, Labor, or any other committee, which does not have the responsibility of authorizing the program.

Mr. PHILLIPS. How about the investigation of it? Isn't that important, too?

Mr. JOHNSON. I don't think it was in Mr. Pell's request in this particular case. The fact is, he had the information available to him by going to the appropriate committee and he knew where it was.

Mr. PHILLIPS. Is he happy now?

Mr. JOHNSON. To my knowledge, he is.

Mr. PHILLIPS. Let me move on to another area.

Over the years, our subcommittee and many others request documents or other information from your office.

Can you spell out the ground rules as to the degree of preciseness in identification that you require? You may recall last summer we requested something called the Defense Intelligence Collection Manual. We had the wrong TM number. We reversed the numbers, or we had the 35 instead of the 38, or something like that. We had a great deal of difficulty getting it. We finally did obtain it. You brought it over yourself personally. But there have been other cases over the years where we have asked for an area of information without knowing the precise title of a report or study. I want to know where do you draw the line in making them available?

Mr. JOHNSON. Let me say, I understand the question. The question is, unless you identify it precisely as titled, would you get it? No, we are not going to deny you the information on that basis. Of course, there are a lot of documents—I think you can appreciate that from your background—there are a lot of documents that deal with the subject matter you are talking about but if you can identify it, not specifically by title and identification number, but in the area that is concerned, so that we know it is only one document as opposed to four or five different studies, and is something we can get a handle on, I am sure you will get it.

I would say in that case—well, one case we did have difficulty identifying it but that wasn't this particular case. But finally by going backward and forward, we were able to identify it. However, in this case, there wasn't that much difficulty in identifying it as there was in obtaining it, even from my standpoint.

Mr. PHILLIPS. From our view, we would hope the "rule of reason" would apply. There have been some cases where it has been difficult to

obtain documents. Perhaps there has been a lack of communication or some such difficulty in understanding our precise area of interests.

For example, sometimes when you are very precise, you can't even get the information. I recall some correspondence from last summer with Mr. Bartimo in which we asked for copies of two trip reports that involved black market investigations in Vietnam, that the subcommittee was engaged in studying. We have a letter from Mr. Niederlehner dated last July 26, in which he said the information will be available in a couple of weeks.

Mr. JOHNSON. I will apologize to you on that one. That was in our interdepartmental action task group. At that time, Mr. Bartimo was charged with it. In the interim, Dennis Doolin was charged with it, but he has gone to Europe for 3 weeks, and just found out about his assignment on it.

Mr. PHILLIPS. Mr. Rossides of the Treasury Department was also on that committee, as well as representatives from the State Department. Mr. Rossides testified before this subcommittee last August that he had no objection to making it available; the State Department also advised us that they have no objection, but it took many months of going from one to the other to get to the point where we are now. But after a year, there are no objections from anybody but we still don't have the two trip reports.

Mr. JOHNSON. You will have them. I will apologize for that.

Mr. PHILLIPS. We haven't been able to finish that report because we haven't received those documents. We would like to finish it before the 92d Congress adjourns, although they are probably out of date by now.

Mr. JOHNSON. OK. That wasn't intentional. In fact, it didn't really come to my attention until just a couple of weeks ago, when Dennis left.

Mr. MOORHEAD. Would you gentlemen be willing to answer questions submitted in writing?

Mr. JOHNSON. Sure.

(The questions and answers follow:)

QUESTIONS SUBMITTED TO DEPARTMENT OF DEFENSE FOR INCLUSION IN HEARING  
RECORD OF MAY 24, 1972

1. In your opinion, what committee of the House of Representatives has primary jurisdiction over monitoring the economy and efficiency of Government activities at all levels?

2. Mr. Johnson, you mention in your testimony President Nixon's refusal to provide the Senate Foreign Relations Committee with tentative planning figures on military assistance. I assume this refusal was recommended by the Department of Defense. Is that correct?

3. It is totally beyond my (Chairman Moorhead) comprehension why the executive branch cannot share such information with the Congress. What valid justification can there be for such a refusal?

4. Planning is an integral function of good management in government, isn't it? It also costs money—tax money. Why shouldn't the planners and their product be subject to congressional scrutiny? We certainly know their recommendations are only tentative and subject to change until refined and adopted as policy.

5. If Members of Congress are going to authorize spending ceilings on military assistance and then appropriate the actual money, don't you think they have a "need to know" what is being planned in that regard? After all, they have the constitutional duty to parcel out these funds, and at present, the administration is asking us to parcel out money we haven't got!

6. You state in your testimony that Secretary Laird has and I quote "repeatedly admonished all DOD components that the Congress is a coequal branch of

Government." Would you kindly supply those repeated admonitions for the record at this point?

7. You say it is the policy of the Department of Defense and this administration to fully inform the Congress of all Government programs and operations in order for the Government to function properly. Fully is an all-inclusive word and I noticed that you did not qualify it. You state it categorically. Then you describe how much information is provided to Congress. However, in my view, categorical statements must be judged by the exception and not the rule. The Department and the President told the Senate Foreign Relations Committee that military assistance planning figures were none of its business but solely proprietary. The Department refused to provide this committee with the Pentagon papers in what I regard as a violation of the law. We are still waiting for the interdepartmental action task group reports on black-market currency manipulations in Vietnam requested July 13, 1971. There are many other examples. That is not a very good track record for keeping the Congress fully informed, is it?

Answers to questions submitted to the Department of Defense for inclusion in the hearing record of May 24, 1972:

1. As Mr. Buzhardt indicated in his testimony, "The Congress makes the rules that set the jurisdiction."

2. The Department of Defense supports the decision of the President on this assertion of Executive privilege.

3. This was discussed by Mr. Johnson on page 2373, lines 15-22, of the transcript and by Mr. Buzhardt on page 2374, lines 9-20.

4. This was discussed by Mr. Johnson on page 2373, lines 15-22, of the transcript and by Mr. Buzhardt on page 2374, lines 9-20.

5. This was discussed by Mr. Johnson on page 2373, lines 15-22, of the transcript and by Mr. Buzhardt on page 2374, lines 9-20.

6. Mr. Johnson's reference to Secretary Laird's having " \* \* \* repeatedly admonished all DOD components that the Congress is a coequal branch of Government," was not intended to infer that this had been done by written formal memorandums or directive, but rather orally on numerous occasions in staff discussions, at public appearances as well as before committees of Congress.

7. On the contrary, in the DOD it is considered a good "track record" in view of the data presented by Mr. Johnson during his testimony. Those cases cited were discussed in full by the Defense witnesses.

Mr. MOORHEAD. We thank you very much for testifying. If we appeared critical, I want you to understand this is not personal, but institutional. We are concerned about the relationship between the Congress and the executive branch as it affects the availability of information. So this is an institutional problem that concerns us, and not a personal one.

Thank you very much.

The subcommittee would now like to hear from the distinguished retired naval officer, Adm. Gene R. La Rocque. He was a rear admiral of the U.S. Navy and was retired on April 1, 1972.

I have a biographical note which, without objection, I would like to submit for the record.

(The biographical document on Admiral La Rocque follows:)

Gene R. La Rocque, Rear Adm. (retired) spent some 31 years in the service of our country as a commissioned officer of the U.S. Navy. Commissioned in March 1941, Admiral La Rocque was at Pearl Harbor during the Japanese attack on December 7, 1941, and served in the Pacific Theater during World War II in destroyers. He participated in 13 separate engagements.

Following World War II, he commanded two destroyer escorts, a cruiser, a division of destroyers, and a destroyer flotilla. Later, he served with the 6th Fleet in the Mediterranean as commander of a task group.

Since 1957, he has been stationed at the Pentagon where he served on the strategic planning staff of the Navy, on the strategic planning staff of the Joint Chiefs of Staff, and was Assistant Director of Strategic Plans, Navy Department.

He is a graduate of the Naval War College, the Industrial College of the Armed Forces, and in 1969 was awarded the Legion of Merit by the Navy Department for his work in strategic planning.

Mr. MOORHEAD. I would like to call attention to the fact that his career included service in World War II in destroyers in the Pacific which is the same type of duty I had, but not as long as the admiral's. His last command was as commander of a task group in the 6th Fleet in the Mediterranean; while in the 6th Fleet his ship was the *Saratoga*.

In more recent years, he was involved in strategic planning in the Navy staff of the Pentagon, and he was involved in planning in the Joint Chiefs of Staff in the Pentagon. In 1969, he was awarded the Legion of Merit by the Navy for his work in strategic planning.

We welcome you here, sir.

**STATEMENT OF REAR ADM. GENE R. LA ROCQUE (RETIRED),  
EXECUTIVE DIRECTOR, CENTER FOR DEFENSE INFORMATION**

Mr. MOORHEAD. Admiral, will you please stand while I administer the oath?

Do you solemnly swear the testimony you are about to give this subcommittee, will be the truth, the whole truth and nothing but the truth, so help you God?

Admiral LA ROCQUE. I do.

Mr. MOORHEAD. Thank you. You may proceed now.

Admiral LA ROCQUE. Mr. Chairman, should I go through this prepared testimony or do you prefer that I read it?

Mr. MOORHEAD. It is short, Admiral. I think it would be helpful if you read it. If you want to skip anything, we will put the entire statement in the record.

Admiral LA ROCQUE. I would certainly like to include this first part, which I feel deeply about.

Mr. Chairman, distinguished members of this committee, your invitation to appear before this committee is appreciated and I am pleased to be here. I wish to congratulate this committee for its past success and its continuing effort to insure a free flow of information within our society.

We cannot have a democratic society if the people and the peoples' representatives in the Congress do not have access to the information necessary to make sound judgments.

For the past 31 years, it has been my privilege to serve this Nation as a commissioned officer of the U.S. Navy. I plan to continue service to my country as a private citizen. For this reason, I have assumed the position of Director of the Center for Defense Information here in Washington, D.C. The Center is an independent organization conducting analyses of Defense Department policies, both current and projected, and is totally independent of both Government and industry. The results of these analyses are being made available to the public and to the executive branch and to the Congress when requested. We also make the results of our analyses available to any private citizen group that wants it.

We are trying to make some of this business of defense matters intelligible to more people. My experience in the dissemination and classification of information has been entirely within the Defense Department. Perhaps it would be useful for me to explain the attitude I have found in the Defense Department on information dissemination and offer some suggestions to increase the flow of information for our national benefit.

As a general rule, most officers recognize their responsibilities to provide the public and the Congress with accurate, timely information. Unfortunately, the nature of a military organization makes it easy for an individual to avoid this responsibility. Since everyone has an officer senior to him, each person is reluctant to release any information, as it may not be in accord with his boss' views. This is said in no way to denigrate officers, as the system functions best when there is a high level of loyalty. This loyalty is also an essential quality for promotion.

In the military, the best way to prevent disclosure of information is to classify it. Classification is made for a variety of reasons. First, to prevent it from falling into the hands of a potential enemy; this is legitimate but accounts for only a small portion of the material classified. Other reasons for classifying material are: to keep it from the other military services, from civilians in their own service, from civilians in the Defense Department, from the State Department, and of course, from the Congress. Sometimes, information is classified to withhold it for later release to maximize the effect on the public or the Congress.

Frequently, information is classified so that only portions of it can be released selectively to the press to influence the public or the Congress. These time-released capsules have a lasting effect.

The ritual begins each spring with the Pentagon implying that a potential enemy is developing a very threatening weapon, "but unfortunately the exact details are classified." These incomplete statements are the stock in trade at appropriations time to persuade the Congress to authorize military appropriations. Last year it was big holes in the ground in the Soviet Union. This year it is evidence of a Soviet ship under construction which might be a carrier or a merchant ship.

Regrettably, far too much material is classified, much of it just because it is easier to classify than not. You cannot get into trouble by overclassifying, only by failing to classify. And, it is easier to maintain secure files if all material is classified. In that way, only one set of files need be maintained.

Classification is also very simple; all one needs is a typewriter or a "secret" stamp. In most offices, the secretaries or the yeomen establish the classification. And since most typed matter is not signed, no one ever knows who classified the material or for what reason. There is no central record of what was classified by whom, when, or for what purpose.

It has been a matter of concern to me that the Congress, charged with raising and supporting our Armed Forces and for declaring war, has increasingly been denied the very elemental information necessary to make these decisions. I find it difficult to understand why the Representatives of the people, the Congress, accept this situation.

There is an attitude among some officers that the Congress cannot be trusted with classified information because of the penchant of some to tell all to the public. In the Pentagon's lexicon, they are "bad security risks." If this attitude prevails in the military and if Congress fails to assert itself, civilian control of the military will further erode. There are some simple, workable steps, compatible with our Constitution, which could reduce the amount of classified material and, consequently, make more information available to the public and to the Congress.

First, each paper, document, or article classified should bear the name and rank of the person making the classification.

Second, each person authorized to classify information should be so authorized in writing.

Third, it should be clearly established that it is the obligation of the Department of Defense to provide Congress with adequate and pertinent information regardless of classification, which the Congress needs to base its decisions to raise and support Armed Forces and to declare war. Each Member of Congress by virtue of his position should be provided all such information in order to carry out his duties under the Constitution.

Fourth, establish a section of GAO, or an independent board with maximum security clearance, to examine on a continuing basis the security system in the Defense Department.

Fifth, require classification of documents be limited to those affecting national defense—rather than national security, a broader and more ambiguous concept.

Sixth, require the Secretary of Defense and his major subordinates to appear before Congress and respond to questions whenever a majority of the Congress so requests.

Seventh, require the President, as Commander-in-Chief, to appear before a joint session of Congress and respond to questions whenever a majority of Congress so requests.

In a 1969 memo to the heads of executive departments and agencies, the President gets to the heart of the problem of free flow of information within our Government. The President's memo states, "The policy of this administration is to comply to the fullest extent possible with congressional requests for information." No pretense is made of an effort to keep the legislative branch informed, but only to respond to the "fullest extent possible" to questions. The problem is that the people and the peoples' Representatives in the Congress frequently don't know what questions to ask. Some of the burden for informing the Congress should be shifted to the executive branch of the Government.

Regardless of what specific rules are made and what regulations are established, it may be very difficult still to get a handle on control of information emanating from the Defense Department or, hopefully, would emanate from there. But I think we have to do some sort of thing to change the atmosphere and to facilitate this flow of information from the Defense Department to bring into better balance the executive branch and the legislative branch in this very important matter of national defense.

Mr. MOORHEAD. Thank you very much. That was an excellent statement.

I note on page 4 you say, "Congress with its war powers is still being denied adequate information to make proper decisions" and you wonder why we accept this situation.

One of the purposes of these hearings is to bring this situation more forcefully to the attention of our colleagues so that they will realize that we shouldn't stand for it. Maybe some day we will get a majority that will stand up and try to change the situation.

I agree wholeheartedly with your conclusions that the attitude should be for the executive branch to go out of its way to inform the Congress and not just as you point out, to respond to questions.



Do you have any suggestions as to how we can solve that? How could we legislatively require the executive to deal with the Congress as an equal branch of the Government with equal access to information?

Admiral LA ROCQUE. That is really the heart of the problem, I agree, Mr. Chairman. I think first of all the hearings that this committee is holding are a step in the right direction. First of all, I think we have to make people aware. The public and perhaps the rest of the Congress should be made aware of the general attitude which prevails in the Pentagon insofar as providing information to the Congress. The attitude in the Pentagon is one that starts from the premise that the first amendment of the Constitution says that the Congress will not abridge the right of free press. Then from that, it sort of becomes a game. We are under no obligation in the Pentagon; there is no statutory requirement that says that we must furnish information but rather the press has to get it the very best way they can.

So to some extent, this is also true of the Congress. So, I suppose the first step is to make people aware of the fact that the people in the Pentagon by and large are reluctant and feel no need to provide information. Second, perhaps by—I don't want to suggest legislation because that is your area, but I think some sort of requirement from the Congress, perhaps it would have to be legislation, which would place on them this obligation as a step in turning them around in their thinking to provide this information so essential to the Congress.

They really feel, of course, based on experience, that they are much better off if they can feed you selective information and not provide you any more than what is absolutely necessary to get their appropriations and to do the things that they would like to do in that branch of the Government.

Mr. MOORMEAD. I think until we arrive at that best-of-all-possible-worlds we will probably have to continue to play the games. One of the handicaps, as you pointed out, is that Congress doesn't even know the questions to ask to bring into effect the President's 1965 directives. This is where I think your Center for Defense Information could be of tremendous value to us.

We can ask the right questions and ask for the right documents. If we can do that, we have a much better chance of winning that game than we do without it.

I notice that in your service, you had service on an aircraft carrier. One of the issues before the Congress, is whether we should go on building more aircraft carriers. I would presume that the Navy would have had studies both pro and con on the subject of aircraft carriers. As a matter of information, what questions should we ask, or what documents should we seek for the Congress, or is this the kind of information we are just not going to get?

Admiral LA ROCQUE. Well, sir, I think you should ask questions, and I think you might get some answers. I think they do tend to respond if you can ask the right questions often enough and with some evidence you have some knowledge about it to begin with. They are basically honorable people thinking they are doing what is right for the country by hoarding this information.

In the matter of the carrier, the basic issue that has not been addressed and the question that has not been asked, is what will be the role of the carrier in the 1980's? Why do we need an aircraft carrier?

We seem always to get quickly involved in the question whether it ought to be a nuclear carrier or a conventional carrier or the type of aircraft it is going to have and various electronic components and details of it, the mechanical aspects rather than the fundamental question of, do we need an aircraft carrier at all? That is the sort of question it seems to me ought to be asked and, in reading the testimony of Mr. Laird and Admiral Moorer, they don't really address themselves to the question of need for an aircraft carrier. For example, if you were to take a look at the roles of an aircraft carrier today—and I don't want to get into too many military things—but an aircraft carrier has no real role in the defense of the United States, per se. The aircraft carrier has no role in a nuclear exchange with the Soviet Union. It is not part of that plan.

So that only leaves you one other role for an aircraft carrier and that is to project U.S. power ashore somewhere. Then you have to ask where? Well, is it Africa, South America, India, or other parts of the world where this projection of the U.S. power can be made? If that is why we want to spend \$1 billion for an aircraft carrier, that is up to the Congress and the people. So rather than consider that because we always had 15 aircraft carriers and because some of them are getting old, and maybe older yet in 10 years, that may be the reason to build a new carrier: we should instead consider the need.

Mr. MOORHEAD. On an information request—and using the carrier only as an example—how would you phrase a question and to whom would you put it on let's say, vulnerability of the carriers. Is there any way that we can find out who might be the critic of the program who is knowledgeable to bring before a committee of Congress? Is this the kind of information you are just not going to get?

Admiral LA ROCQUE. I don't think you are going to get it, Mr. Chairman, for the reason that there aren't any critics of the carrier in the Pentagon who can speak out if you were to bring them before this committee. Believe me, there are people who question very strongly the need for a carrier within the Navy, but if they were to testify of their objection to it, they would probably be ordered to the Philippines the next day for duty. It is just that simple.

We have nice neat control over the officers. Also, we have within the Navy, as well as the other services, not only an unwritten law, but a very explicit direction that once the Chief of Naval Operations has made up his mind that we are going to go in for these things, items in the budget, no one is permitted to speak in opposition to it after he has made up his mind and the budget has been put to bed.

One interesting thing in that connection, when I was in the Joint Staff as a captain, before the budget came to the Congress, each of the chairmen of the Joint Chiefs of Staff were required to sign a letter saying that they would support the budget as submitted by Mr. McNamara. I know, because I carried that note from office to office to the various chiefs to get it signed. So this is another thing that takes place once they make their decisions over there, and it is very hard to get anybody to tell you anything other than the official word that has been published.

Mr. MOORHEAD. What if one of the chiefs refused to sign the paper? Would the Secretary of Defense be able to remove him?

Admiral LA ROCQUE. I think he would have removed him at the earliest possible time. He removed Chief of Naval Operations Anderson after 2 years. He didn't reappoint him, that is. At that time, they were serving just for 2 years. That was over a difference of opinion, so it is easy to remove him. But the big thing is that the Secretary of Defense could simply withhold putting in an aircraft carrier in this year's budget or in next year's budget if he so desired. So he has great control over each of the services' chiefs.

Mr. MOORHEAD. In your experience in the Navy, were there any instructions to you on your dealings with Congress?

Admiral LA ROCQUE. No explicit instructions. There was a time back under Admiral Burke, when we were all encouraged to get to know the Members of Congress and the Senate. I think we are seeing this moving in the opposite direction where we have primary emphasis on the senior officers dealing with the Congress. That was, of course, a different era back when Admiral Burke was there. At that time, we were fighting the Defense Department. Now, military services have captured the Defense Department and the problem is the Congress. Congress is the adversary group now. This is the group that has to be told only so much and not too much, and there is no real attempt made now to infiltrate your ranks and convince you of the correctness of our position.

Mr. MOORHEAD. That is a fascinating observation. I remember the time when Secretary McNamara was opposed to funding a particular system, and the battle was for the Congress to spend more money than he had asked for. I think that those of us watching the Defense budget thought that Mr. McNamara was taking care of our interests, and we now think the Congress ought to take care of its own interests.

We are finding our greatest lack is information. That is why I am so pleased by your statement here today. Working together, maybe we can get some vitally needed information. Your concrete suggestions are excellent. Beginning on page 4, first you say that the name and rank of the person making the classification should be put on any classified document. Some objection was made to that proposal in the new Executive order by the Defense Department.

Some objection was raised that it would be a totally unworkable burden to have the name and rank of the person putting the classification on it. Do you agree with that?

Admiral LA ROCQUE. I disagree with that, sir. After all, the individual who releases the message, he is the last official to see it. He is the one who says OK on a message to send it. He also ought to be charged specifically with this because he is technically charged with the classification of a message. So there really isn't any problem on messages because I think even under our own regulations, he is responsible for the classification of the messages but it is the written material that is on all of the staff's desks that gets published or not published within the organization. If it is classified, there is no one who can get around into declassifying it. No one would know who classified it in the first place.

One of the strange things is our own rules state the person who classifies it has the authority to declassify it. But 6 months after it has been classified, nobody remembers who classified it. Perhaps no one knew initially who classified it. I think it would have had additional salu-

tary effect—well, I know it would have had to me—if I had to say on the top of the page, “Gene La Rocque classified this as secret,” because I would be more certain about what got classified “secret” or “confidential.” But as it is, the senior officers simply don’t bother with the classification. They are concerned with the contents and substance, and somebody else makes the classification.

MR. MOORHEAD. I think this would be very effective. We have heard some ridiculous examples of overclassification recently and these identified documents would serve to heap ridicule on the head of a man who did the overclassifying. If this happened in a few instances, we would probably not have so much overclassification.

I notice on page 5, you say each Member of Congress should be provided with all information. Did you hear the testimony of Mr. Johnson and Mr. Buzhardt this morning to the effect that they could not provide information equally to all Members of Congress, and as I put it, only furnish it to the “most favored chairmen of the most favored committees?”

Admiral LA ROCQUE. I did, sir.

MR. MOORHEAD. But your testimony is contrary to that, not to what they do but what they ought to do. Is that correct?

Admiral LA ROCQUE. You are correct, sir. I think it is a travesty to deny classified information to the Members of Congress. We take in young officers and we have frequently and promptly given them a temporary secret clearance. It is easily done. We take a little longer in giving them a permanent clearance. We must have a couple of hundred thousand officers in the services with varying degrees of classification. We probably have 100,000 with at least secret at one time or another and many more with confidential. I don’t know what the figures are, but I would hazard a guess at least 50,000 at one time or another have top secret clearance. Yet, we still rationalize that we can’t give the 535 Members of both branches of Congress the same treatment and yet, they are the ones charged with declaring war. They need, in my mind, to know the background of the buildup. They need to know the readiness of their own forces and the degree of threat if they are going to be able to make the decision on this very important matter which affects the Nation. As I mentioned earlier, many Congressmen are simply considered bad security risks.

MR. MOORHEAD. Mr. Phillips?

MR. PHILLIPS. Thank you, Mr. Chairman.

I think this is some of the most important testimony that we have had during the course of our hearings. Here is a gentleman who served our Nation for 31 years, who is retired with honors, who has a very high rank, and he is testifying here as to the very practices that this subcommittee has been trying to document for many years.

When Admiral La Rocque says on page 2: “In the military, the best way to prevent disclosure of information is to classify it,” he says, “classification is made for a variety of reasons: First, to prevent it from falling into the hands of a potential enemy and this is legitimate but it accounts for only a small portion of the material classified,” he is making a very important statement.

We have had several other witnesses with varying levels of experience in the classification area who testified that from their experience, anywhere from 75 to 99 percent of classified documents shouldn’t have

been classified at all. So here is a gentleman with 31 years of naval service who is saying the very same thing. He is an expert witness. We are fortunate to have him here because I think he is helping to make the case with first-hand knowledge and experience of the very problem areas we have been discussing and trying to document. Of course, we all know it is very difficult to get a witness from the Defense Department who will come before this committee and testify to these things even though they know they are going on. But here we have someone who only left the Pentagon in the last 6 weeks and who is now testifying to these things we have felt right along and have been trying to document.

We certainly appreciate your testimony, Admiral La Rocque. Your testimony has been extremely helpful and I hope that in the future there will be other occasions when we can work with you and your organization.

Admiral LA ROCQUE. Thank you.

Mr. MOORHEAD. Mr. Copenhaver?

Mr. COPENHAVER. Admiral La Rocque, it is my opinion that you and your organization can serve a most important function and purpose in society. I think from some of the testimony that we received this morning and that we have received previously I really fear for the survival of our Republic if we continue with this practice of concealing information.

I don't know whether your organization will be able to document instances of concealment of information, but I certainly hope you can do so. I needn't tell you I imagine there will be former friends of yours who will look upon you as a traitor. Certainly if you do justify yourself in this important role, which I think you are now beginning to serve, that would tend to overcome any adverse comments from friends or former friends.

I won't take much time, but would like to outline four areas which immediately come to mind, which will be very helpful if your organization can begin thinking about them and make public or supply to Congress. One would be your detection that only partial information or partial truths are being made available to the public. This would be an on-going assignment whereby you detect and make public that only one side of the story is being told.

An immediate example that comes to mind is the testimony Senator Ervin gave with regard to Army surveillance. He documented that only partial truths were being made available as to the type of security information that had been destroyed. I am sure you recall that testimony. Along the same line would be the question of declassification. You touch upon that in your statement with regard to the practice at appropriations time whereby spot declassification of certain information occurs which is helpful to proponents. I think this is something that would be very good for you to monitor and watch.

A third area would be where you have knowledge that information is classified, not because it fits within any security classification scheme, but is being classified to prevent embarrassment or disclosure for non-security reasons. And a final area that comes to my mind is making public the internal budgetary negotiations that go on. Again, you touched upon that.

As the chairman properly put it in the hearings yesterday, by creating a Department of Defense that which previously occurred out in the open now goes on internally between the services. The "you give me a carrier and I will give you an airplane" type of thing. This is the fourth theory I think that would be very valuable for you to monitor. If you have examples, I know the chairman would welcome them for the record.

Finally, would you take one moment to comment on a statement which Mr. Johnson made in his prepared statement to us this morning, where he said on page 2: "I don't think this Congress has suffered from lack of information on any of the administration's programs."

Admiral LA ROCQUE. I would certainly be pleased to start on that, sir, first.

In testimony given by Admiral Moorer before the Armed Services Committee he said, in effect—and this is almost a direct quote—"I want to compare for you NATO and Warsaw Pact Forces in Central Europe," and he did that. But he made no mention of the forces in Southern Europe. He made no mention of the fact that the United States and the other NATO nations exceed the Warsaw Pact probably three to one in size, power and equipment. So this is an example of incomplete reporting and if you were just to believe what he said, you would not be fully informed.

Another classic example of this I see developing right now is this new *Trident* submarine. It was bombers last week and it is *Trident* this week. The Defense Department is asking for almost a billion dollars this year in their request. But in their request, they have not told the Congress at large—they may have told privately some of the favored chairmen of the select committees—but initially there was no indication of how many submarines were desired and still no one knows what the characteristics of these submarines are. And what the characteristics of the missiles are, the size, and so on. Nor were we, until we did some probing, able to find out what portion of that \$1 billion was for research and development and construction. So they simply do not come clean when it comes to presenting information to the Congress. They give as little as possible in public statements to the Congress at large and then a little more as necessary to the committees, which have the greatest effect. However, we think we had some effect on the ULMS. We have been putting out information on the ULMS, the numbers and the estimated costs. I think the Defense Department decided to publicize how many submarines they want because of the questions we posed. They also have not said whether this is a replacement for some of the submarines, or whether it is a replacement of some of the land-based missiles or whether it is an addition.

Mr. PHILLIPS. Do you have a newsletter or how do you plan to communicate?

Admiral LA ROCQUE. We have a newsletter. Our first newsletter was a comparison of Soviet and U.S. Navies and Warsaw Pact and NATO navies. Senator Stevenson put this in the record earlier this week and Mr. Rosenthal put it in the record on the House side about 10 days ago. The new ULMS study clearly indicates the administration has not made a case for \$1 billion for a new submarine and we have pointed out all of the areas in which there are unanswered questions.

There is one other thing the Pentagon is good at which distresses me: that is, they have a knack for changing names. Just this year the

Pentagon has changed the name of the U.S. Strike Force to the U.S. Readiness Command. We have done away with the military assistance program. We now have the security assistance program. Of course, just last week the ULMS—underwater long-missile submarine—has become the *Trident*. And the Sentinel has been changed to Safeguard. And this goes on and on. I think it goes to emphasize what happened when we did away with the War Department. When we appropriated money and different things for the War Department, we knew it was for war. We did away with the War Department, we now have the Department of the Army and the Department of Defense.

We are making a list of all of these name changes, which are significant because it makes it very difficult for the Congress or the general public to stay up with things: just to get information to find out what is going on. It keeps people continuously perplexed. I wish I could say that they do it simply for clarity. I am absolutely dead certain they do it to obscure and make it difficult to obtain information and also just to make the names a little more disarming.

Mr. MOORHEAD. In other words, we might ask for information about the strike force and they might come back and say, there is no strike force.

Admiral LA ROCQUE. That is correct, sir. They would say "I am sorry, the strike force was disbanded earlier this year."

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. I have had a good many breakfasts ruined by news reports of the surfacing of Russian submarines off the coast of Brazil—you know, at appropriations time. Without going into too much detail on it, isn't it a fact that the U.S. Navy knows the location of a number of Russian submarines on a constant basis?

Admiral LA ROCQUE. That is certainly accurate.

Mr. CORNISH. So when we read about one in the paper, that is an unusual event and it is obviously a leak to influence Congress and the public. Ordinarily, that information would be top secret; would it not?

Admiral LA ROCQUE. I think it would depend on where it was. It certainly would be classified. If on the other hand, it was observed by a passing merchant ship, it might not be. I agree with the general thrust of what you are saying and: that is, this information is very frequently selectively provided at the right time of year to influence appropriations.

Mr. CORNISH. We have called it for years "managed news."

Admiral LA ROCQUE. That is a correct title.

Mr. CORNISH. Now when decisions are made at the Pentagon on these things like whether an additional aircraft carrier is needed, is it made in the context of the pros and cons of the issue? I mean, are they clearly set forth? Are the reasons why you should have an air carrier set forth in one column or in one section and then in another the reasons why you should not?

Admiral LA ROCQUE. I don't think you will find a document which purports that we should not have an aircraft carrier. In the first place, the Secretary of the Navy is convinced that we need an aircraft carrier and so no one else in the submarine division would ever write that we did not need an air carrier.

Mr. CORNISH. So, in other words, when a document of that type appears on the desk of the senior officer who has to make a decision or

recommendation, he very rarely has the cons of the issues involved. What he has is argumentation in favor of the recommendation which is coming up from his subordinates; isn't that true?

Admiral LA ROCQUE. That is true. And the only question would be, do you think we can get that much money in this year's budget to put all of them in?

Mr. CORNISH. Now I noticed in your testimony that you said: "Classification is very simple and all one needs is a typewriter and a secret stamp. In most offices, the secretary or the yeoman established the classification." Did you have any personal experience along these lines that you might wish to relate to the committee?

Admiral LA ROCQUE. Well, yes. Throughout all of my time at the Pentagon we, as officers, rarely said this ought to be secret or top secret. Normally the paper is written and the yeomen automatically classify it depending on what the work of the officer is.

The offices I worked in mostly used secret and top secret material.

Mr. CORNISH. So he used his judgment and it was a *fait accompli* in effect by the time the paper landed on your desk or the desk of another officer?

Admiral LA ROCQUE. By the time it was typed; yes.

Mr. CORNISH. I noticed that the thrust of your testimony is certainly that the classification system should be revamped. Would you recommend that that be done by Congress rather than by the Executive?

Admiral LA ROCQUE. Without any question, if it is going to be effective, it is going to have to be by congressional action in order to get any control over that information, which is in the Pentagon and not now being made available. If it is left to the executive branch, they will write it in such a way that you will probably get no more information than you now get.

As a classic example, consider the latest Executive directive by the President on the classification of material for national security instead of national defense. That further shuts off the flow of information, because almost anything could be described as endangering our national security.

Mr. CORNISH. Thank you, Admiral.

Mr. MOORHEAD. Thank you, Admiral.

We would like to carry on but there is a vote going on in the House so we will adjourn. We appreciate very much your very frank and candid statement. It will be of tremendous help to us, particularly, with the record of experience that you bring to this subcommittee.

When the committee adjourns, it will adjourn to meet next Wednesday, May 31, room 2154, where we will have testimony from the State Department and the U.S. Information Agency.

The subcommittee is now adjourned.

(Whereupon, at 12:20 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, May 31, 1972.)



**U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—PROBLEMS OF CONGRESS IN OBTAINING INFORMATION FROM THE EXECUTIVE BRANCH**

**(Part 8)**

WEDNESDAY, MAY 31, 1972

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:00 a.m., in room 2154, Rayburn House Office Building. Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, John N. Erlenborn, and Frank Horton.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; Harold Whittington, staff consultant; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

MR. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

This morning, we continue the portion of our hearings on the Freedom of Information Act that deals with the problems of Congress in obtaining information from the executive branch.

Thus far in this segment of our overall hearings we have heard testimony from Members of Congress who have presented specific cases of denial, from the Deputy Comptroller General of the United States, from a distinguished legal historian, from an outstanding naval officer, now retired, and from the Department of Defense.

Today, we will hear from witnesses representing the Department of State and the U.S. Information Agency. Mr. David M. Abshire, Assistant Secretary of State for Congressional Relations, will be our first witness. He will be followed by Mr. Charles D. Ablard, General Counsel and Congressional Liaison, U.S.I.A. We are pleased to have these gentlemen with us today.

MR. ABSHIRE. Will you introduce your colleague for the record? And, then, you may proceed.

**STATEMENT OF DAVID M. ABSHIRE, ASSISTANT SECRETARY OF STATE FOR CONGRESSIONAL RELATIONS, DEPARTMENT OF STATE; ACCOMPANIED BY CARL SALANS, DEPUTY LEGAL ADVISER**

MR. ABSHIRE. Yes, Mr. Chairman. Mr. Carl Salans, Deputy Legal Adviser, Department of State.

I wish to thank you, Mr. Chairman, for the opportunity to appear before this subcommittee, which over the years has done such sub-

stantial and thoughtful work in the area of government information. My office was established at the recommendation of the 1949 Hoover Commission to create a coordinated program of two-way liaison with the Congress. For some time over 2 years I have wrestled with the business of trying to provide more information to the Congress on behalf of the executive branch. Consequently, I welcome this first opportunity to discuss in a public congressional forum the broader aspects of information policy, and specifically, the policy by which the administration, the Secretary of State, and the Department of State are guided.

At the outset I want to tell you of the rationale that underlies our information policy. I realize that public policy cannot be made nor effective government conducted unless both the legislative and executive branches of our Government are well informed about national issues. I am fully aware that the Congress is the first branch created by the Constitution. It is the political and legal peer of the judiciary and the executive. Moreover, I am aware of the difficulty faced by the Congress in matching the executive branch in its resources of staff and in its access to information. In recent years the Congress has increased its staff support to cope with this very real problem. I believe that is a constructive contribution to the maintenance of the de facto parity of the three branches of government about which there can be no doubt de jure.

I say this by way of preface to underscore my sensitivity to your needs for adequate access to information about the activities of the executive branch and to the information that the executive branch is constantly acquiring. I might add that in the decisionmaking process within the executive branch on a congressional request, the congressional relations representatives almost always are the proponents of greater sharing of information with the Congress. There are other considerations affecting the decision on disclosure, however, that are important ones, and at times must be overriding. It is for this reason, that I would ask you to consider with me some of the traditional concerns of the executive branch before discussing specific policies and cases.

#### THE SEPARATION OF POWERS

I believe that we must frankly recognize the dilemma that has faced legislators, the courts, and presidents since the founding of the Republic. In our government of separate powers based upon checks and balances, the precise sphere of each is never clearly, finally, or satisfactorily delineated. For almost two centuries, men of good will and intense dedication have debated the boundaries. Although, and perhaps because there has never been a final agreement our government has been effective, creative, and responsive.

A parliamentary form of government was tried in this country for approximately 10 years before the Revolution. During that decade of trial and testing there were revealed serious practical shortcomings—including those within the areas of diplomacy and military affairs. The Constitutional Convention meeting in Philadelphia in 1787, adopted in its place the tripartite system of three coordinate but independent branches of government that has formed the basis of our government for nearly 200 years.

In considering the development of our system it is revealing to compare the provisions of the Constitution to those of the Articles of Confederation with respect to the furnishing of foreign affairs information to the Congress. Consistent with a parliamentary form of government, the Continental Congress under the Articles of Confederation created a Department of Foreign Affairs under the direction of a Secretary by resolution of February 21, 1782, providing:

That the books, records and other papers of the United States, that relate to this Department be committed to his custody, to which \* \* \* any member of Congress shall have access;

That letters (of the Secretary) to the ministers of the United States, or ministers of foreign powers which have a direct reference to treaties or conventions proposed \* \* \* or other great national objects, shall be submitted to the inspection and receive the approbation of Congress \* \* \*.

A much different scheme of things has been legislated under our present constitutional system. The Constitution, in article II, section 2, provides expressly that the President "may require the opinion, the writing, of the principal officer in each of the Executive departments, upon any subject relating to the duties of their respective officers \* \* \*."

This provision parallels the initial clause of article II, section 1, which provides that "The Executive power shall be vested in a President of the United States of America."

No similar provision exists in the Constitution by which Congress may necessarily "require" any information from the executive branch. Indeed, the constitutional requirements in this regard appear to be limited to the provision in article II, section 3, that the President "shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient \* \* \*."

This constitutional form is clearly reflected in the act of July 27, 1789, which first established a Department of Foreign Affairs in the new government. The act provided:

\* \* \* That the Secretary \* \* \* shall forthwith after his appointment, be entitled to have the custody and charge of all records, books and papers in the office of Secretary of the Department of Foreign Affairs, heretofore established by the United States in Congress assembled.

There is no mention of congressional access to those "records, books and papers." This was a decisive and deliberate departure from the system created by the Articles of Confederation.

I think that this history is important, Mr. Chairman: but I cannot emphasize too much that I am not citing it to put in doubt the right and the need of the Congress to know in order to carry out its legislative functions.

In fact, it has long been held that Congress, by virtue of the powers entrusted to it by the Constitution, has certain implied powers of inquiry and oversight even though these are not explicitly stated in the Constitution. Thus, Congress is entitled to obtain information from the executive branch reasonably necessary to enable it to carry out its constitutional functions. But this, not an unlimited right, must be balanced against the requirement of the executive branch in carrying out its constitutional responsibilities.

Our system can function satisfactorily only when each of the branches acts responsibly and constructively. Any wise President

knows, as you and I know, that he cannot sustain a public policy that does not enjoy public and congressional understanding and support. Nor does the President want to carry out policies lacking democratic approval. The continuing affirmation of that approval depends upon ample public and congressional knowledge of the choice before the Nation. This means assuring that, to the greatest degree possible, the Congress and the public have the facts which have influenced the President and his executive branch.

In the field of foreign affairs, this need often gives rise to the dilemma to which I earlier alluded.

The executive branch does have confidential information not equally accessible to the Congress and the public. In some cases to divulge confidential information may be harmful to the very interests which the Congress, the courts and the executive branch are sworn to uphold and defend.

That is a profound dilemma that no Congress and no President has ever fully resolved nor is any likely to do so. At this very time, however, Representative Patsy Mink is awaiting Supreme Court consideration of her suit under the Freedom of Information Act which she has explained is designed "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." (Page E5506, Congressional Record, May 18, 1972.)

The Court's ruling will be illuminating, and may settle a number of the problems with which we are now wrestling.

#### CONGRESSIONAL LIAISON

Mr. Justice Brandeis wrote of the motivation for our unique system when he observed in 1926 that:

The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

If a certain amount of friction is part and parcel of our machinery of government, as Justice Brandeis says, I see the role of congressional liaison as one trying to provide enough lubrication to see that the machinery does not break down. Communication among the branches is the lubricant of the machinery of government which keeps friction to tolerable limits. Communication is the essential ingredient that permits the separate branches to understand each other, even while engaged in an adversary process. It gives the opportunity for the national interest to emerge from conflicting conceptions of it.

You and I, from our daily experiences with government, know how many times deadlock arises when communication has broken down. We both know how many times deadlock has been resolved when the parties have finally understood one another. On the other hand, the final failure to achieve a compromise that would have permitted the Senate to give its advice and consent to the Treaty of Versailles, in my view, came from a breakdown in delicate communications between the President and the Senate.

I have tried to outline the philosophy that must guide our day-to-day efforts to try to assure that the Department of State fully under-

stands the views of the Congress and that the Congress understands those of the Department.

Now, let me turn to the practical means by which the executive branch is endeavoring to meet your need and our need that the Congress have adequate foreign affairs information to perform its functions.

At the top of the list are the President's comprehensive reports to the Congress. They constitute the most authoritative, complete and rationally defined statements of the President's foreign policy and of his appraisal of the world situation.

The most ancient and most widely studied is the traditional annual state of the Union message. It provides the Congress and the Nation with the President's synthesis of our domestic and international posture.

This administration has gone much farther. The President has also made a comprehensive, scholarly, and precise annual report to the Congress on his foreign policy. These annual reports have given a conceptual approach to this administration's foreign policy that I believe has been a significant step forward.

The President's reports, in turn, have been supplemented by even more detailed submissions from the Secretary of State who on March 26, 1971, submitted a 617-page report to the Congress entitled "United States Foreign Policy 1969-70" and on March 8, 1972, submitted a 604-page report on "United States Foreign Policy 1971," which I have here before us.

These reports constitute an effort to draw together the entire skein of our foreign relations at the highest policy level and to relate the numerous aspects of our foreign affairs to a single, coherent approach to our external relations. As such, they capture our foreign policy in its most authoritative sense and offer Congress and public alike a precise formulation of the administration's position.

If I may say so, Mr. Chairman, I do not believe that the administration has received the credit due it by the Congress or the press for these major steps forward. This is purely unintentional, I know, but the danger is that future administrations might not be encouraged to follow suit. I do hope that any final report of this able subcommittee will examine these important improvements in executive to legislative and in executive to public communications in the field of information policy.

To move to more traditional forms of information policy, Secretary Rogers, and the Department of State generally, have provided Congress with a large volume of information, through formal testimony, in both public and executive sessions, through intensive briefings, personal meetings and correspondence.

The Secretary of State in the first 3 years of his service has appeared on 43 different occasions to testify formally before the committees of Congress. Other senior officers of the Department also have testified frequently. Their appearances totaled 181 last year alone.

An enormous number of congressional inquiries are received and replied to each year by the Department. For the year 1971 alone, we received 18,964 congressional letters.

I consider this correspondence of the greatest importance, and I want you to know of the very considerable attention which the De-

partment of State very gladly gives to providing the Congress with full, clear, and timely replies. Just this spring, I began a new campaign to improve our responses by stressing clarity, appreciation of differing points of view and responsiveness. I spelled out the need for improvement in an article circulated to all officers of the Department in Washington and throughout the world. (Department of State Newsletter, April 1972, pp. 19-11.) At the same time we began a continuing series of meetings with Department officers to explain the importance of congressional correspondence and the need to make the extra effort to satisfy congressional inquiries.

In addition to correspondence, in 1971 an average of approximately 220 telephone inquiries from Congress were handled each working day by our Office of Congressional Relations of 25 people and an additional uncounted number of other offices in the Department of State.

Extensive briefings are given to the Congress as a whole, to committees, to less formal groups, to individual Members and to congressional staff members. For many years regular Wednesday morning briefings have been provided for Members of Congress while Congress is in session. There were 31 of those Wednesday briefings given last year, and the Secretary of State has recently appeared twice.

I might note that over the weekend I was reading the book of the dean of the School of Advanced Studies, Johns Hopkins University, Francis Wilcox, on "Congress, the Executive and Foreign Policy," and I noted in the book he describes the appearance of Secretary of State Rogers before 67 Senators as a very favorable departure and improvement in congressional-executive relationships. If I may quote from a paragraph in the book, which comes after a section in which he discusses the "question hour" that is used in the parliamentary system.

A modest step in this direction was taken on March 25, 1971, when Secretary of State Rogers met with 67 Members of the Senate for an extraordinary exchange of views on the administration's Middle East policy. This closed meeting represented one of the few times in recent history that a Secretary of State appeared before the full Senate. The meeting, which was apparently successful in clarifying the American position on the withdrawal of Israeli troops from conquered Arab territory, as well as other related matters, could serve as a precedent for future discussions with the Senate on important foreign policy issues.

I might add that I think the Secretary's two recent appearances before the Wednesday morning briefing sessions open to all Members of Congress falls in this same type of pattern.

Early this year I started special monthly luncheons for congressional staff members to meet with top departmental officers, usually at the Assistant Secretary level, for off-the-record discussions of current issues and to enable these officials to become better known on the Hill in order to aid in more frequent and informal communications, that is, giving the staff on the Hill increased access to the State Department bureaucracy.

In addition to these regularly scheduled exchanges, the Department of State has hosted breakfasts, lunches, and coffee to bring to members and staff our best and most informed officials in off-the-record discussions. We have also brought countless foreign visitors to meet with members and staff as a means to give the Congress direct access to information about important foreign affairs questions.

The inauguration this session of Congress of annual authorization legislation for the Department of State marks the beginning of still another forum of the provision of information to the Congress. The hearings held in both houses could become a major annual forum for a systematic review of our entire foreign policy and of our foreign relations by the Congress.

The volume of information provided to Congress by the Department of State is considerable. And I will add to the record here some statistics that are in my statement.

Mr. MOORHEAD. Without objection, they will be made a part of the record.

(The statistics follow:)

The volume of information provided to Congress by the Department of State is considerable. During the first session of the 92d Congress, for example, only 29 legislative proposals were submitted for congressional action. Congress itself, on the other hand, has actively solicited the Department's views on legislation proposed by others. Thus, in the first session of the 92d Congress, the Department received and processed 1,172 requests for its views on pending or proposed legislation, not including private immigration bills.

Mr. ABSHIRE. We arranged early in this session of Congress to provide systematic special briefings for the various subcommittees of the House Committee on Foreign Affairs on matters of particular interest to them. These are in addition to the various special briefings for both members and staff on such crisis situations as Cambodia and the India-Pakistan hostilities. At present, a special briefing paper on current development is prepared periodically, usually weekly, for two of the subcommittees. In addition, new arrangements have been made for the Department's Bureau of Intelligence and Research to make more of its "finished intelligence" available to Senators, Members of Congress and committee personnel.

The Secretary of State has taken the lead in proposing new means of conveying foreign policy information to the Congress. In his testimony before the Senate Committee on Foreign Relations a little over a year ago, on May 14, 1971, Secretary Rogers offered to instruct each of our geographic Assistant Secretaries regularly to provide a full briefing on developments in his area. This offer was expressly renewed by the Secretary in a letter of July 6, 1971, addressed to the committee chairman.

During the course of that same testimony Secretary Rogers spoke of an imaginative proposal later incorporated in a bill introduced by Congressman Frank Horton when the Secretary said that:

Suggestions have come from a number of quarters for the establishment of a joint congressional committee which could act as a consultative body with the President in times of emergencies. If, after study, you believe this idea has merit, we would be prepared to discuss it with the committee and determine how best we could cooperate.

Here, too, the Department remains ready to respond to a congressional request.

#### EXECUTIVE PRIVILEGE

There are occasions when the President must conclude that the proper exercise of his functions as Chief Executive, responsible for the conduct of our Nation's foreign relations, precludes the disclosure of some item of information. I think it fair to say, however, that these instances are rare.

I would not presume to review the extensive legal and scholarly literature on the prerogatives of the several branches of our Government with which I know you distinguished members are familiar. But I would suggest that while the President's denial of information to the other branches is commonly referred to as "executive privilege," it is in a sense exercised by all branches and might more properly be known as "constitutional privilege." In fact, of course, the concept is recognized by the courts and by the Congress which has recognized the exercise of executive privilege as an executive option in certain of its legislation—for example, section 634c of the Foreign Assistance Act of 1961 as amended with which most of us are familiar. Then Assistant Attorney General Rehnquist cited a number of examples of congressional recognition of executive privilege in his testimony before this subcommittee on June 29, 1971.

In like manner, judges do not make available to Congress or to the President the preliminary memorandums prepared by their law clerks suggesting the disposition of cases. Nor do they make their draft conclusions or opinions publicly available. Likewise, Congress does not make the President or the courts privy to its confidential proceedings. Congressional committee or subcommittee chairmen do not provide the President or the judiciary with internal memorandums addressed to them by staff members. The Congress has always carefully maintained the inviolability of its proceedings from trespass by the courts or the Executive. Nor would the President or the courts expect to share such confidential communications. Those charged with decision on public policy in the courts, in the Congress and in the executive branch need to receive advice and information. They must be confident that those who are providing it do so with absolute candor and freedom from fear of exposure to undue external pressures.

Secretary Rogers stated the problem in an address delivered in 1956 when he was Attorney General—and, Mr. Chairman, with your permission, I will make the quote a part of the record.

Mr. MOORHEAD. The full quote will be made a part of the record, Mr. Abshire, without objection.

(The quote referred to follows:)

Government could not function if it was permissible to go behind judicial, legislative, or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and Members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of nondisclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment needs to be subjected to publicity. Obviously, it cannot be if Government is to function.

Mr. ABSHIRE. It is because of these considerations that the President does sometimes conclude that a particular document or specific information should not be disclosed. But even in these cases, accommodations have usually been worked out so that Congress has received the substantive information it has sought while the confidentiality of sensitive details and the documents themselves have been preserved.



For example, when the Department concluded that it could not properly furnish cables related to the situation in Pakistan to the Senate Committee on Foreign Relations, other means were found to provide the basic substantive information requested.

In my experience, in short, almost all congressional requests for information are honored. And of the very few requests which raise a problem for the executive branch, the vast majority are met with the kind of practical compromise that is essential for our system to function effectively.

As you know, President Nixon announced early in this administration that he would decide personally before any congressional request for information should be finally denied. He made that rule because he is conscious of the need of Congress for substantial information in order to properly carry out its functions. Specifically, on March 24, 1969, the President said:

The policy of this administration is to comply to the fullest extent possible with congressional requests for information.

He went on to say that the executive branch authority to withhold information, the disclosure of which would be incompatible with the public interest, would be invoked "only in the most compelling circumstances, and after a rigorous inquiry into the actual need for its exercise." And then only with "specific Presidential approval."

In the field of foreign affairs executive privilege has been invoked by President Nixon only on two occasions—three cases, but on two occasions.

The first was on August 30, 1971, when the President concluded 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 \* \* \*

These data were described as—

\* \* \* 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 second was on March 15, of this year, when the President directed that "internal working documents concerning the foreign assistance program or international information activities, which would disclose tentative planning data, such as is found in the century program memorandums and the country field submissions, and which are not approved positions" be made not available as requested by the Senate Committee on Foreign Relations and this subcommittee, respectively. In both instances the President noted that substantial information on these subjects had been provided and would continue to be provided to Congress, and he emphasized the limited nature of these two directives.

I ought to note here, should there be any doubt, that the President's invocation of executive privilege on these two occasions did not constitute a blanket delegation of the authority to his subordinates to claim this privilege. Its exercise remains personal and, therefore, restricted to the most essential issues.

## CONCLUSION

Before I close, please permit me to lay before you several thoughts about the long-term relationship of the three branches.

We all know that the demarcation between the legislative and the executive is not static. It is a dynamic feature of our system shifting in response to the needs and the demands of the day to provide responsible, effective and democratic government to the Republic.

During periods of great threat to the Nation—in war or in economic crisis—the pendulum has swung to greater executive prerogative. But after each crisis, the pendulum has swung back to greater legislative power. After the Civil War and after the First World War, the reaction to presidential power was at times dangerously destructive. Since World War II we have for the most part escaped a similar destructive reaction. But we have without doubt, I believe, seen a steady return to the Congress of power in the area of international affairs.

Your subcommittee, Mr. Chairman, is making a significant contribution to this readjustment of power in the Federal Government. Your concentration upon the process of government rather than upon specific foreign policy issues offers us all a new opportunity to examine how to rebalance our system without the destructive overtones of earlier readjustments.

We are all conscious that our meeting here today is a part of the dynamic process of our system of checks and balances. The existence of three separate branches supposes a continuing testing among them of public policy. We believe that in such a process we will come closer to the wisest policy; closer to discovering the national interest that no one of the three branches can be sure to know.

It is entirely understandable and right that the Congress should expect to be informed about foreign developments and about the President's policy toward them. It is my difficult job to help to meet that need. Because of the rapid pace of current events, because of the many new departures now being taken in our foreign policy, because of the extraordinary complexity and the far-reaching implications and because of the delicacy of the preparations surrounding them, we are not always able to get to the Congress as much information as rapidly as we should like. With your help, encouragement, and imagination, I believe that we can do better. We welcome your efforts to help us find ways to do so.

Thank you, Mr. Chairman.

MR. MOORHEAD. Thank you, Mr. Abshire.

(Mr. Abshire's prepared statement follows:)

PREPARED STATEMENT OF DAVID M. ABSHIRE, ASSISTANT SECRETARY OF STATE FOR CONGRESSIONAL RELATIONS

I wish first to thank you, Mr. Chairman, for the opportunity to appear before this subcommittee, which over the years has done such substantial and thoughtful work in the area of government information. My office was established at the recommendation of the 1949 Hoover Commission to create a coordinated program of two-way liaison with the Congress. For something over 2 years I have wrestled with the business of trying to provide more information to the Congress on behalf of the executive branch. Consequently, I welcome this first opportunity to discuss in a public congressional forum the broader aspects of information policy and, specifically, the policy by which the administration, the Secretary of State, and the Department of State are guided.

At the outset I want to tell you of the rationale that underlies our information policy. I realize that public policy cannot be made nor effective government conducted unless both the legislative and the executive branches of our Government are well informed about national issues. I am fully aware that the Congress is the first branch created by the Constitution. It is the political and legal peer of the judiciary and the executive. Moreover, I am aware of the difficulty faced by the Congress in matching the executive branch in its resources of staff and in its access to information. In recent years the Congress has increased its staff support to cope with this very real problem. I believe that is a constructive contribution to the maintenance of the de facto parity of the three branches of our Government about which there can be no doubt de jure.

I say this by way of preface to underscore my sensitivity to your needs for adequate access to information about the activities of the executive branch and to the information that the executive branch is constantly acquiring. I might add that in the decisionmaking process within the executive branch on a congressional request, the congressional relations representatives almost always are the proponents of greater sharing of information with the Congress. There are other considerations affecting the decision on disclosure, however, that are important ones, and at times must be overriding. It is for this reason, that I would ask you to consider with me some of the traditional concerns of the executive branch before discussing specific policies and cases.

#### THE SEPARATION OF POWERS

I believe that we must frankly recognize the dilemma that has faced legislators, the courts and presidents since the founding of the Republic. In our Government of separate powers based upon checks and balances, the precise sphere of each is never clearly, finally or satisfactorily delineated. For almost two centuries, men of good will and intense dedication have debated the boundaries. Although, and perhaps because, there has never been a final agreement, our Government has been effective, creative, and responsive.

A parliamentary form of government was tried in this country for approximately 10 years before the Revolution. During that decade of trial and testing there were revealed serious practical shortcomings—including those within the areas of diplomacy and military affairs. The Constitutional Convention meeting in Philadelphia in 1787, adopted in its place the tripartite system of three coordinate but independent branches of government that has formed the basis of our Government for nearly 200 years.

In considering the development of our system it is revealing to compare the provisions of the Constitution to those of the Articles of Confederation with respect to the furnishing of foreign affairs information to the Congress. Consistent with a parliamentary form of government, the Continental Congress under the Articles of Confederation created a Department of Foreign Affairs under the direction of a Secretary by resolution of February 21, 1782 providing:

"That the books, records and other papers of the United States, that relate to this Department be committed to his custody, to which \* \* \* any Member of Congress shall have access:

"That letters (of the Secretary) to the ministers of the United States, or ministers of foreign powers which have a direct reference to treaties or conventions proposed \* \* \* or other great national objects, shall be submitted to the inspection and receive the approbation of Congress \* \* \*"

A much different scheme of things has been legislated under our present constitutional system. The Constitution, in article II, section 2, provides expressly that the President—

"May require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices \* \* \*"

This provision parallels the initial clause of article II, section I, which provides that—

"The executive power shall be vested in a President of the United States of America."

No similar provision exists in the Constitution by which Congress may necessarily "require" any information from the executive branch. Indeed, the constitutional requirements in this regard appear to be limited to the provision in article I, section 3, that the President—

"Shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient \* \* \*"

This constitutional form is clearly reflected in the act of July 27, 1789, which first established a "Department of Foreign Affairs" in the new Government. The act provided:

"\* \* \* That the Secretary \* \* \* shall forthwith after his appointment be entitled to have the custody and charge of all records, books, and papers in the Office of Secretary for the Department of Foreign Affairs, heretofore established by the United States in Congress assembled."

There is no mention of congressional access to those "records, books, and papers." This was a decisive and deliberate departure from the system created by the Articles of Confederation.

I think that this history is important, Mr. Chairman, but I cannot emphasize too much that I am not citing it to put in doubt the right and the need of the Congress to know in order to carry out its legislative functions.

In fact, it has long been held that Congress, by virtue of the powers entrusted to it by the Constitution, has certain implied powers of inquiry and oversight even though these are not explicitly stated in the Constitution. Thus, Congress is entitled to obtain information from the executive branch reasonably necessary to enable it to carry out its constitutional functions. But this, not an unlimited right, must be balanced against the requirement of the executive branch in carrying out its constitutional responsibilities.

Our system can function satisfactorily only when each of the branches acts responsibly and constructively. Any wise President knows, as you and I know, that he cannot sustain a public policy that does not enjoy public and congressional understanding and support. Nor does the President want to carry out policies lacking democratic approval. The continuing affirmation of that approval depends upon ample public and congressional knowledge of the choices before the Nation. This means assuring that, to the greatest degree possible, the Congress and the public have the facts which have influenced the President and his executive branch.

In the field of foreign affairs, this need often gives rise to the dilemma to which I earlier alluded.

The executive branch does have confidential information not equally accessible to the Congress and the public. In some cases to divulge confidential information may be harmful to the very interests which the Congress, the courts, and the executive branch are sworn to uphold and defend.

That is a profound dilemma that no Congress and no President has ever fully resolved nor is any likely to do so. At this very time, however, Representative Patsy Mink is awaiting Supreme Court consideration of her suit under the Freedom of Information Act which she has explained is designed "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." (P. E5506, Congressional Record, May 18, 1972.)

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I turn now to congressional liaison.

Mr. Justice Brandeis wrote of the motivation for our unique system when he observed in 1926 that—

"The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy."

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Congressional committee or subcommittee chairmen do not provide the President or the judiciary with internal memoranda addressed to them by staff members. The Congress has always carefully maintained the inviolability of its proceedings from trespass by the courts or the Executive. Nor would the President or the courts expect to share such confidential communications. Those charged with decision on public policy in the courts, in the Congress and in the executive branch need to receive advice and information. They must be confident that those who are providing it do so with absolute candor and freedom from fear of exposure to undue external pressures.

Secretary Rogers stated the problem in an address delivered in 1956 when he was Attorney General.

"Government could not function if it was permissible to go behind judicial, legislative, or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the judges, not their law clerks, and Members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of nondisclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment needs to be subjected to publicity. Obviously, it cannot be if Government is to function."

It is because of these considerations that the President does sometimes conclude that a particular document or specific information should not be disclosed. But even in these cases, accommodations have usually been worked out so that Congress has received the substantive information it has sought while the confidentiality of sensitive details and the documents themselves have been preserved. For example, when the Department concluded that it could not properly furnish certain cables related to the situation in Pakistan to the Senate Committee on Foreign Relations, other means were found to provide the basic substantive information requested.

In my experience, in short, almost all congressional requests for information are honored. And of the very few requests which raise a problem for the executive branch, the vast majority are met with the kind of practical compromise that is essential for our system to function effectively.

As you know, President Nixon announced early in this administration that he would decide personally before any congressional request for information should be finally denied. He made that rule because he is conscious of the need of Congress for substantial information in order properly to carry out its functions. Specifically on March 24, 1969, the President stated.

"The policy of this administration is to comply to the fullest extent possible with congressional requests for information."

He went on to say that the executive branch authority to withhold information, the disclosure of which would be incompatible with the public interest, would be invoked "only in the most compelling circumstances, and after rigorous inquiry into the actual need for its exercise" and then only with "specific Presidential approval."

In the field of foreign affairs executive privilege has been invoked by President Nixon only on two occasions.

The first was on August 30, 1971, when the President concluded 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 \* \* \*"

These data were described as—

"\* \* \* 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 second was on March 15 of this year, when the President directed that—"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 memorandums and the country field submissions, and which are not approved positions," not be made available as requested by the Senate Committee on Foreign Relations and this subcommittee, respectively. In both instances the President noted that substantial information on these subjects had been provided and would continue to be provided to Congress, and he emphasized the limited nature of these two directives.

I ought to note here, should there be any doubt, that the President's invocation of executive privilege on these two occasions did not constitute a blanket delegation of the authority to his subordinates to claim this privilege. Its exercise remains personal and, therefore, restricted to the most essential issues.

#### CONCLUSION

Before I close, please permit me to lay before you several thoughts about the long-term relationship of the three branches.

We all know that the demarcation between the legislative and the executive is not static. It is a dynamic feature of our system shifting in response to the needs and the demands of the day to provide responsible, effective, and democratic government to the Republic. During periods of great threat to the Nation—in war or in economic crisis—the pendulum has swung to greater executive prerogative. But after each crisis, the pendulum has swung back to greater legislative power. After the Civil War and after the First World War, the reaction to Presidential power was at times dangerously destructive. Since World War II we have for the most part escaped a similar destructive reaction. But we have without doubt, I believe, seen a steady return to the Congress of power in the area of international affairs.

Your subcommittee, Mr. Chairman, is making a significant contribution to this readjustment of power in the Federal Government. Your concentration upon the process of government rather than upon specific foreign policy issues offers us all a new opportunity to examine how to rebalance our system without the destructive overtones of earlier readjustments.

We are all conscious that our meeting here today is a part of the dynamic process of our system of checks and balances. The existence of three separate branches supposes a continuing testing among them of public policy. We believe that in such a process we will come closer to the wisest policy; closer to discovering the national interest that no one of the three branches can be sure to know.

It is entirely understandable and right that the Congress should expect to be informed about foreign developments and about the President's policy toward them. It is my difficult job to help to meet that need. Because of the rapid pace of current events, because of the many new departures now being taken in our foreign policy, because of the extraordinary complexity and the far-reaching implications and because of the delicacy of the preparations surrounding them, we are not always able to get to the Congress as much information as rapidly as we should like. With your help, encouragement, and imagination, I believe that we can do better. We welcome your efforts to help us find ways to do so.

Mr. MOORHEAD. At this time, I would like to administer the oath to both you and Mr. Salans.

And Mr. Ablard, I would also administer the oath to you and your associate who will testify.

Do you solemnly swear that the testimony you have given and will give this subcommittee will be the truth, the whole truth and nothing but the truth so help you God?

Mr. ABSHIRE. I do.

Mr. SALANS. I do.

Mr. ABLARD. I do.

Mr. HALL. I do.

Mr. MOORHEAD. Well, thank you very much, Mr. Abshire, for an excellent statement in a very smooth and diplomatic way.



I think you have put your finger on the real issue that this subcommittee is trying to raise when you quoted Mr. Justice Brandeis that the separation of powers is "not to promote efficiency but to preclude the exercise of arbitrary power." You also point out that there are some inevitable frictions. If any frictions should develop at this hearing, let me assure you there is nothing personal. We are really trying to redress what we think is an imbalance of power resulting from the fact that almost all information in the field of foreign relations, military affairs, and related areas is contained in the executive branch. Information and knowledge are power, and the power has gone where the knowledge and information is maintained.

For example, what is the total personnel of the Department of State in round figures?

Mr. ABSHIRE. I believe it is approximately 13,000.

I would have to refresh myself on that, Mr. Chairman.

Mr. MOORHEAD. All right. We can correct that. I would like to ask that a check be made of the total personnel in the Congress of the United States—not by you, but by our staff—as to the total personnel of the Congress that are staff people who are dealing with foreign affairs.

(A review of the personnel listings of House and Senate jurisdictional committees, appropriations subcommittees, and investigative subcommittees shows that the total including clerical and professional is less than 100.)

Mr. MOORHEAD. I think the disparity will point up how much we must inevitably depend upon information from the Executive if we are to carry out our constitutional duties, unless we set up a parallel bureaucracy of several thousand people to get the information to the Congress, which seems like an inefficient way and also would cause even more friction and maybe even less efficiency.

Mr. ABSHIRE. Mr. Chairman, I was speaking of employees. Foreign Service personnel would be much below that, but I will give you the correct figures.

(The information follows:)

DEPARTMENT OF STATE—SUMMARY OF EMPLOYMENT, MAR. 31, 1972

CATEGORY AND TYPE OF EMPLOYMENT

Category	Full-time permanent	Other than permanent				Employment
		Temporary	Part-time	Intermittent		
Americans:						
Civil service.....	3,684	425	137	82	4,328	
Foreign Service.....	8,679	53	101		8,833	
Total Americans.....	12,363	478	238	82	13,161	
Foreign nationals.....	10,412	112	149	128	10,801	
Total employment.....	22,775	590	387	210	23,962	
Distribution of employment by area:						
Domestic.....	6,594	478	128	82	7,342	
Overseas.....	16,181	112	199	128	16,620	
Total.....	22,775	590	387	210	23,962	

TABULATION OF EMPLOYEES OCCUPYING PERMANENT AND TEMPORARY POSITIONS BY CATEGORY AND CLASS,  
MAR. 31, 1972

Category and class	Total	Full-time in permanent positions	Other than permanent positions
<b>Chiefs of Mission:</b>			
Career Ambassador	1	1	
Career Minister	36	36	
FSO-1	43	43	
FSO-2	3	3	
Noncareer	35	35	
<b>Total</b>	<b>118</b>	<b>118</b>	
<b>Nonchiefs of Mission:</b>			
Career Ambassador	2	2	
Career Minister	17	17	
FSO-1	234	234	
FSO-2	393	393	
FSO-3	597	597	
FSO-4	658	658	
FSO-5	564	564	
FSO-6	312	312	
FSO-7	177	177	
FSO-8	32	32	
<b>Total, FSO</b>	<b>2,986</b>	<b>2,986</b>	
FSR-1	99	95	4
FSR-2	194	180	14
FSR-3	231	230	1
FSR-4	264	263	1
FSR-5	195	193	2
FSR-6	193	192	1
FSR-7	200	199	1
FSR-8	49	40	9
<b>Total, FSR</b>	<b>1,425</b>	<b>1,392</b>	<b>33</b>
FSRU-1	9	9	
FSRU-2	38	38	
FSRU-3	35	35	
FSRU-4	31	31	
FSRU-5	21	21	
FSRU-6	35	35	
FSRU-7	14	14	
FSRU-8	1	1	
<b>Total, FSRU</b>	<b>184</b>	<b>184</b>	
FSS-1	127	127	
FSS-2	222	221	1
FSS-3	312	312	
FSS-4	442	442	
FSS-5	607	601	6
FSS-6	814	809	5
FSS-7	794	779	15
FSS-8	570	556	14
FSS-9	130	114	16
FSS-10	54	36	18
<b>Total, FSS</b>	<b>4,072</b>	<b>3,997</b>	<b>75</b>
Resident staff	39		39
Consular agents	7		7
Unclassified	2	2	
<b>Total, foreign service</b>	<b>8,833</b>	<b>8,679</b>	<b>154</b>
GS-1	8		8
GS-2	99	25	74
GS-3	174	94	79
GS-4	341	190	151
GS-5	549	393	156
GS-6	311	304	7
GS-7	469	449	20
GS-8	229	229	
GS-9	358	358	
GS-10	40	40	
GS-11	237	235	2
GS-12	178	178	

TABULATION OF EMPLOYEES OCCUPYING PERMANENT AND TEMPORARY POSITIONS BY CATEGORY AND CLASS,  
 MAR. 31, 1972—(Continued)

Category and class	Total	Full-time in permanent positions	Other than permanent positions
GS-13	205	203	2
GS-14	150	149	1
GS-15	135	133	2
GS-16	20	20	
GS-17	4	4	
GS-18	2	2	
<b>Total, GS</b>	<b>3,509</b>	<b>3,007</b>	<b>502</b>
GG-1			
GG-2			
GG-3	1	1	
GG-4	2	2	
GG-4	7	7	
GG-5	14	4	10
GG-6	49	19	30
GG-7	25	19	6
GG-8	30	25	5
GG-9	27	25	2
GG-10	15	15	
GG-11	16	13	3
GG-12	14	14	
GG-13	13	13	
GG-14	9	9	
GG-15	7	7	
GG-16	1	1	
GG-17	1	1	
GG-18			
<b>Total GG</b>	<b>231</b>	<b>175</b>	<b>56</b>
WG-1			
WG-2			
WG-3	3	3	
WG-4	2	2	
WG-4	2	2	
WG-5	4	4	
WG-6	26	26	
WG-7	8	8	
WG-8			
WG-9			
WG-10	2	2	
WG-11			
WG-12	1	1	
WG-13			
WG-14	2	2	
<b>Total, WG</b>	<b>50</b>	<b>50</b>	
WP-4	3	3	
WP-5			
WP-6	4	4	
WP-7	4	4	
WP-8	19	19	
WP-9	10	10	
WP-10	2	2	
WP-11	22	22	
WP-12	14	14	
WP-13	10	10	
WP-14	5	5	
WP-15	3	3	
WP-16	5	5	
WP-18	2	2	
WP-20	2	2	
WP-22	1	1	
<b>Total WP</b>	<b>106</b>	<b>106</b>	
Unclassified	19	19	
<b>Total</b>	<b>3,915</b>	<b>3,357</b>	<b>558</b>
WAE and contract	78		78
IBWC	335	327	8
<b>Total civil service</b>	<b>4,328</b>	<b>3,684</b>	<b>644</b>
Total Americans	13,161	12,363	798
Foreign nationals	10,801	10,412	389
<b>Grand total</b>	<b>23,962</b>	<b>22,775</b>	<b>1,187</b>

1 Does not include FSO Chiefs of Mission counted above.

## DEPARTMENT OF STATE, FOREIGN SERVICE AMERICANS BY CATEGORY AND CLASS, OVERSEAS AND UNITED STATES

Category and class	Total	Continental United States	Foreign countries
<b>Chiefs of mission:</b>			
Career Ambassador.....	1		1
Career Minister.....	36	5	31
FSO-1.....	43	6	37
FSO-2.....	3		3
Noncareer.....	35		35
<b>Total.....</b>	<b>118</b>	<b>11</b>	<b>107</b>
<b>Nonchiefs of Mission:</b>			
Career Ambassador.....	12	2	
Career Minister.....	117	14	3
FSO-1.....	1234	129	105
FSO-2.....	1393	169	224
FSO-3.....	597	258	339
FSO-4.....	658	278	380
FSO-5.....	564	273	291
FSO-6.....	312	135	176
FSO-7.....	177	37	140
FSO-8.....	32	5	27
<b>Total FSO.....</b>	<b>2,986</b>	<b>1,301</b>	<b>1,685</b>
FSS-1.....	99	69	30
FSR-2.....	194	139	64
FSR-3.....	231	109	122
FSR-4.....	264	116	148
FSR-5.....	195	67	128
FSR-6.....	193	51	142
FSR-7.....	200	98	102
FSR-8.....	49	31	18
<b>Total, FSR.....</b>	<b>1,425</b>	<b>671</b>	<b>754</b>
FSRU-1.....	9	8	1
FSRU-2.....	38	34	4
FSRU-3.....	35	30	5
FSRU-4.....	31	19	12
FSRU-5.....	21	11	10
FSRU-6.....	35	13	22
FSRU-7.....	14	7	7
FSRU-8.....	1	1	
<b>Total, FSRU.....</b>	<b>184</b>	<b>123</b>	<b>61</b>
FSS-1.....	127	52	75
FSS-2.....	222	86	136
FSS-3.....	312	74	238
FSS-4.....	442	105	337
FSS-5.....	607	141	466
FSS-6.....	814	163	651
FSS-7.....	794	171	623
FSS-8.....	570	89	481
FSS-9.....	130	19	111
FSS-10.....	54	8	46
<b>Total, FSS.....</b>	<b>4,072</b>	<b>908</b>	<b>3,164</b>
Resident staff.....	39		39
Consular agents.....	7		7
Unclassified.....	2		2
<b>Total, foreign service.....</b>	<b>8,833</b>	<b>3,014</b>	<b>5,819</b>

<sup>1</sup> Does not include FSO Chiefs of Mission counted above.

## TABULATION OF FOREIGN SERVICE EMPLOYEES BY PAY PLAN, GRADE, AND SEX

Category and class	Total	Female	Male
<b>Chiefs of Mission:</b>			
Career Ambassador.....	1		1
Career Minister.....	36	1	35
FSO-1.....	43	1	42
FSO-2.....	3		3
Noncareer.....	35		35
<b>Total.....</b>	<b>118</b>	<b>2</b>	<b>116</b>
<b>Nonchiefs of Mission:</b>			
Career Ambassador.....	12		2
Career Minister.....	117		17
FSO-1.....	1 234	4	230
FSO-2.....	1 393	8	385
FSO-3.....	597	27	570
FSO-4.....	658	34	624
FSO-5.....	564	27	537
FSO-6.....	312	34	278
FSO-7.....	177	10	167
FSO-8.....	32	4	28
<b>Total, FSO.....</b>	<b>2,986</b>	<b>148</b>	<b>2,838</b>
FSR-1.....	99	2	97
FSR-2.....	194	6	188
FSR-3.....	231	15	216
FSR-4.....	264	24	240
FSR-5.....	195	17	178
FSR-6.....	193	19	174
FSR-7.....	200	36	164
FSR-8.....	49	11	38
<b>Total, FSR.....</b>	<b>1,425</b>	<b>130</b>	<b>1,295</b>
FSRU-1.....	9		9
FSRU-2.....	38	1	37
FSRU-3.....	35	4	31
FSRU-4.....	31	6	25
FSRU-5.....	21	5	16
FSRU-6.....	35	7	28
FSRU-7.....	14	2	12
FSRU-8.....	1	1	
<b>Total, FSRU.....</b>	<b>184</b>	<b>26</b>	<b>158</b>
FSS-1.....	127	12	115
FSS-2.....	222	34	188
FSS-3.....	312	90	222
FSS-4.....	442	167	275
FSS-5.....	607	290	317
FSS-6.....	814	414	400
FSS-7.....	794	352	442
FSS-8.....	570	376	194
FSS-9.....	130	99	31
FSS-10.....	54	50	4
<b>Total, FSS.....</b>	<b>4,072</b>	<b>1,884</b>	<b>2,188</b>
Resident staff.....	39		39
Consular agents.....	7		7
Unclassified.....	2	1	1
<b>Total, Foreign Service.....</b>	<b>8,833</b>	<b>2,191</b>	<b>6,642</b>

<sup>1</sup> Does not include FSO Chiefs of Mission counted above.

<sup>2</sup> Includes all Foreign Service Americans in United States and overseas.

## TABULATION OF CIVIL SERVICE EMPLOYEES BY PAY PLAN, GRADE, AND SEX—MAR. 31, 1972

Category and class	Total	Male	Female
GS-1	8	1	7
GS-2	99	24	75
GS-3	174	35	139
GS-4	341	67	274
GS-5	549	152	397
GS-6	311	54	257
GS-7	469	97	372
GS-8	229	45	184
GS-9	358	98	260
GS-10	40	8	32
GS-11	237	107	130
GS-12	178	102	76
GS-13	205	145	60
GS-14	150	116	34
GS-15	135	116	19
GS-16	20	18	2
GS-17	4	3	1
GS-18	2	2	
<b>Total GS</b>	<b>3,509</b>	<b>1,190</b>	<b>2,319</b>
GG-1	1	1	
GG-2	2	2	
GG-3	7	2	5
GG-4	14	6	8
GG-5	49	24	25
GG-6	25	9	16
GG-7	30	12	18
GG-8	27	10	17
GG-9	15	8	7
GG-10	16	8	8
GG-11	14	6	8
GG-12	13	8	5
GG-13	9	7	2
GG-14	7	7	
GG-15	1	1	
GG-16	1	1	
GG-17	1	1	
GG-18			
<b>Total GG</b>	<b>231</b>	<b>112</b>	<b>119</b>
WG-1	3	3	
WG-2	2	2	
WG-3	2	2	
WG-4	4	4	
WG-5	25	26	
WG-6	8	8	
WG-7			
WG-8			
WG-9			
WG-10	2	2	
WG-11			
WG-12	1	1	
WG-13			
WG-14	2	2	
<b>Total WG</b>	<b>50</b>	<b>50</b>	
WP-4	3	3	
WP-5			
WP-6	4	4	
WP-7	4	3	1
WP-8	19	9	10
WP-9	10	5	5
WP-10	2		2
WP-11	22	14	8
WP-12	14	6	8
WP-13	10	7	3
WP-14	5	4	1
WP-15	3	3	
WP-16	5	4	1
WP-18	2	2	
WP-20	2	2	
WP-22	1	1	
<b>Total WP</b>	<b>106</b>	<b>67</b>	<b>39</b>
Unclassified	19	18	1
<b>Total Civil Service</b>	<b>3,915</b>	<b>1,437</b>	<b>2,478</b>
WAE and contract worked in March	78		
IBWC	335		
<b>Grand total</b>	<b>4,328</b>		

Mr. MOORHEAD. Well, probably when we compare them on a parallel basis, if it is purely professional people then we will put just the purely professional people in the Congress, but the disparity, I think, will be so severe that, whichever way we compare it, the point will be clearly made.

You say, on page 20, that without doubt you have seen "a steady return to the Congress of power in the area of international affairs." This is an assertion which I do not want to allow to rest on the record without my strong disagreement with it being expressed. I think there should be—and that is as you point out in the next sentence, that our subcommittee is making a significant contribution to this readjustment of power in the Federal Government.

I do not know whether we are, but that is our objective. Our objective is to see that the Congress has information in sufficient quantity and in sufficient depth that it can redress what I think is a severe "tilt" of power to the Executive. I am referring to the wartime powers, the mining of harbors, and so forth, where the Congress has no part in the decision.

So, I do not see this shift of power back to the Congress and that is one of the reasons for these hearings.

I notice, Mr. Abshire, and I am very pleased, that congressional relations representatives are almost always the proponents of greater sharing of information with the Congress. Would that include our request for the Cambodian field submission documents denied to us by the President several months ago?

Mr. ABSHIRE. Mr. Chairman, I do not believe it would be fair or appropriate for me to go into the given recommendations within the Department. But I do stand on my earlier statement, in general, and, frankly, cannot conceive of congressional relations liaison people working with the Congress who would not inevitably be a force in the Department for greater disclosure. Our duty and our job—one of our duties—is to present the congressional view to the Secretary and throughout the Department, and we are very well aware of the strong feelings throughout Congress for more information sharing.

Mr. MOORHEAD. On page 6, you say that the "system can function satisfactorily only when each of the branches acts responsibly and constructively."

I have only served on this subcommittee for a little over a year, but I understand that we have, over the years, on a routine basis, received country field submission documents.

Has the subcommittee ever acted anything but responsibly and constructively with respect to those country field submissions?

Mr. ABSHIRE. Mr. Chairman, I feel that this committee has always acted very responsibly and constructively. I know that this was not the issue with regard to the determination of nondisclosure that was made by the President.

Mr. MOORHEAD. Mr. Abshire, on page 14, you describe the special briefing papers and the Department's Bureau of Intelligence and Research making "finished intelligence" available to Members of Congress. Are those on a classified basis?

Mr. ABSHIRE. Those are on a classified basis.

Mr. Chairman, if I might add, I think one of our jobs in congressional liaison is to do a better job of making known to the individual

Members what is available. As you can well appreciate, we have a great deal of contact with the House Foreign Affairs Committee, the Senate Foreign Relations Committee, the various appropriations committees where we have legislation, authorization, and appropriation. I feel that it is most important that my office do all possible to reach the Members that are not on those particular committees so that they have a greater knowledge of what is available in the State Department: a greater knowledge, on a personal basis, of the State Department bureaucracy so that we can furnish more of their needs and so that they become more aware of what we do have to offer.

Mr. MOORHEAD. Well, this brings me to a question that I wanted to ask you:

Is there, in the State Department, any policy whereby you treat the request of an individual Member differently than, say, the request of a chairman of a committee, a chairman of a committee of particular jurisdiction, or a request voted upon by a subcommittee or a committee?

Is there a policy? There seems to be within the Department of Defense.

Mr. ABSHIRE. Mr. Chairman, there is no formalized policy. We do all possible to furnish any Member of Congress with as much information as we possibly can. We feel that this is in line with the President's instructions to us, and I, frankly, in the 2 years I have been in this position, have not seen much of a conflict between what goes to committees and what goes to individual Members.

Now, let me add that there are other departments and other agencies that are dealing with sensitive information for certain committees of jurisdiction, the Joint Atomic Energy Committee being such an example. In these cases, naturally, the administration respects the way that the Congress has chosen to organize itself to do its business. The safeguard procedures vary with some committees and they certainly do with the Joint Atomic Energy Committee. However, on classified documents that a member wants, we normally work out special arrangements if he does not have a safekeeping facility. Normally, we can do it through a committee having safekeeping arrangements as a matter of convenience to him.

Mr. MOORHEAD. But you do not have a policy that if you receive a request from a particular Member of Congress that you will supply that data to the committee of jurisdiction and then throw the problem of access back to the Congress, as it would appear other departments do?

Mr. ABSHIRE. We do not have such a formalized policy, and I do not recall cases. It may be that I do not recall them and they do not come to my mind now. I really believe that the Department of Defense in dealing with classified information that involves troop operations and things of that nature encounters this more frequently than the Department of State.

Mr. MOORHEAD. Mr. Abshire, I have some other questions, particularly those relating to so-called "executive privilege," but at this time I would like to yield to Mr. Horton.

Mr. HORTON. Thank you, Mr. Chairman.

First off, Mr. Abshire, I want to commend you on your statement. I think it is an excellent statement. You not only give us an analysis



of the historical background of the subject but I think you give us a very good, realistic presentation of the manner in which the State Department, and particularly your office, is operating to inform the Members of Congress.

I also would like to take this occasion to commend you and your predecessor, Bill Macomber, and those who preceded you in the responsibility that you have. This is my 10th year in the Congress, and I have been particularly impressed with the information that the State Department tries to make available to the Members of Congress, especially through the technique of the Wednesday morning briefings: I want to take this occasion to especially commend you for your responsibility in that connection.

I also want to point out, as you did in your statement, that you have expanded this program so that you make it available to members of our staffs.

Now, my staff has taken advantage of this, and this has been extremely helpful. I am also aware that you have got some types of programs to inform wives of Members of Congress, too, of the work that is going on in the State Department, and I think, again, that this is very helpful.

You are involved with sensitive information because of your dealings in the diplomatic field and your relations with other nations. Yet, I find that these off-the-record briefings have been very helpful to me as a Member of Congress and to members of my staff, and to my wife. So, I do want to take this occasion to commend you and the State Department on this effort to, on a weekly basis, provide us with information which, I think, is very helpful.

And, as you point out, the Secretary has been before the membership twice in recent months to give us an opportunity to talk with him and give him an opportunity to brief us on matters of extreme importance.

As a matter of fact, I would recommend and suggest and hope that the Secretary will speak to us upon his return from Russia with regard to the events that transpired there.

I must say that I have found those briefings to be very frank, and from the information I have had they have been very helpful to me to understand what is going on in different areas. The different people that have briefed us, Mr. Sisco in particular, I have found to have been very helpful in keeping us informed of the events that have transpired in the Middle East and other parts under his jurisdiction.

And I think if the other departments did the very same type of thing it would be very helpful. As a matter of fact, I think if the Department of Defense had some type of program—and I do not expect you to answer here, but if the Department of Defense had some type of briefing for Members, I think it would be very helpful so that we could be informed as to what was going on in that particular area.

MR. ABSHIRE. Thank you very much, for your words of encouragement.

MR. HORTON. I am sure you will be carrying it on, because, as I said, I think you have demonstrated in your Department exemplary efforts in this desire to inform the legislative branch. Your statement, I think, reflects the broad scope of the work you are trying to do to keep the Members of Congress informed.

What positive steps do you think might be taken by the Congress and the Executive branch to improve the legislative and the Executive communications?

Mr. ABSHIRE. Well, I have thought about that, and it seems to me that I might put at the top of my list what I mentioned earlier: more use of the Secretary in a situation to which all members are invited, because, again, I think we have the problem which the chairman earlier identified, that members of the Foreign Relations and the Foreign Affairs and the Appropriations Committees are very well informed as the result of the legislation that comes their way, but so frequently other Members of the Congress and of the Senate are left out.

So, I think that extended use of these full sessions would help a great deal.

Now, let me say that my job as Assistant Secretary is to keep the Secretary informed about congressional attitudes, but there is no better way for him to get informed than when he is up before 67 senators or a couple of hundred congressmen.

Secondly, I emphasized in my statement the Foreign Policy Report of the President and the State Department Foreign Policy Report. The President's report is more conceptual. Our report gets into policies towards given areas of the world, and I would hope that as time goes on that Congress can join in a fuller dialogue based on these reports.

Now, maybe the authorization bill is a way of debating the general concept of the President's foreign policy and to reveal how the Congress judges it.

Third, I think that in terms of this difficult problem of consultation, particularly in crisis situations to which the chairman alluded, we are on record with regard to your bill, on a joint consultative committee on some type of joint consultative framework, that we would support if Congress, in its wisdom, decided to move in that direction. We do not want to be in the position of suggesting how Congress should organize itself.

Congressman Zablocki has a bill which would insure that the President report, if possible, beforehand in a crisis situation, and, if not, as soon as possible thereafter.

I was delighted that we were able to take a favorable position on this bill after considerable review in the Executive department.

Mr. HORTON. I might interrupt you just to thank you for mentioning the bill which I have introduced to form a Joint National Security Committee which I do think is an important step. I do not have any particular pride of authorship, and I would like to see it move forward because I think we ought to have a more broad type of committee, joint committee, of the House and the Senate, that could meet regularly and always be available for emergency briefings by the President, the Secretary of State or others that are concerned with emergency problems. I do feel that something like this is very important with regard to the functions that we are just beginning to become more aware of; that is, of the congressional concern in this particular area.

So, I am glad to see that you did include that in your testimony, and, again, I emphasize that I do not feel that just because I have suggested that certain people be members of that committee, that that has to be so, that it has to be carried out just that way, because I think

it can be done in different ways. But the concept, I think, is important, to have a joint committee that will meet regularly, that will be in existence, that will be available for the consultations between the executive and the legislative branches, and to, in turn, report to the legislative branch. I think this would go a long way toward filling this responsibility of informing Members of Congress, especially in these emergency situations.

At the present time, as you know, in an emergency situation, it is pretty much up to the President or the Secretary of Defense or the Secretary of State as to which Members of Congress they consult with and how it is done. There is no formalized body, and sometimes it is done quite informally, and it might even be done by telephone. And this does not impart knowledge to the other membership in the House or the Senate, and I think this is one of the problems that we all have. I harp back again to my own personal experiences with briefings that you give us each Wednesday. I try to make those as regularly as I can, because it does give me an opportunity as an individual Member of the Congress, not sitting on the Foreign Affairs Committee, to be brought up to date with regard to the matters that are going on in the world. I realize that you brief us every day, 24 hours a day, but if you do it on a weekly basis it is of tremendous help to individual Members of Congress. It is there for the asking if I want it. If I do not want it, why, then, it is a decision by me not to go and get the information.

But, beyond these regular briefings, we ought to have some technique or some procedure or some formalized means whereby we can have this consultation between the Executive and the legislative. And I am glad that you did mention that in the course of your prepared testimony because I think it would be one of the steps that could be taken that could help to improve this communications problem.

Mr. Chairman, that is all I have.

Mr. MOORHEAD. Thank you. I want to associate myself with the remarks of Mr. Horton. I think these Wednesday briefings and other actions are excellent, and my failure to comment on them should not be interpreted as being critical. They go back to my first term in the Congress, when Congressman Lindsay and I approached the State Department on the matter of briefings. We started them, I think, on Wednesday afternoons, and found there was too much conflict with floor debate and votes, and ultimately they were shifted to Wednesday mornings. I think they have been helpful to us.

We should recognize that briefings—and I am speaking particularly of other departments—such as the Department of Defense—have been “selling” devices. They have a beautiful technique of “snowing” you, and if you do not have access to other information, you are really not in a very good position to cross-examine and really bring out the issues; you are just given one side of the case.

Again, I am not referring particularly to the Department of State, although there is a tendency there when, you know, there is something that would lead a Member to be more critical or ask some very difficult questions. Such information then is not always forthcoming, but I would do the same thing if I were in your position. That is part of the special inevitable friction that would be involved between the two branches of Government.

Mr. HORTON. Mr. Chairman, would you yield 1 minute?

I have one other question I want to ask.

Mr. MOORHEAD. Yes; Mr. Horton.

Mr. HORTON. Mr. Abshire, on page 14 of your testimony, at the top of the page, it says:

At present, special briefing papers on current developments are prepared periodically, usually weekly, for two of the subcommittees. In addition, new arrangements have been made for the Department's Bureau of Intelligence and Research to make more of its finished intelligence available to Senators, Members of Congress and committee personnel.

Is that done by way of some publication or newsletter-type arrangement?

Mr. ABSHIRE. No. We have developed, or are trying to develop, a better procedure to inform the staffs of the Senate Foreign Relations and the House Foreign Affairs Committees as to what is available, and my earlier point is that I think we have got to develop ways of reaching the entire membership on this, but principally we have—

Mr. HORTON. Do you have a mailing list for this?

Mr. ABSHIRE. No; we do not have a mailing list.

Mr. HORTON. You do not send anything out now?

Mr. ABSHIRE. No.

Mr. HORTON. Well, this briefing paper, how do you handle that? At the top of page 14 you say "At present, a special briefing paper on current development is prepared periodically."

Mr. ABSHIRE. These are for two of the Subcommittees of the House Foreign Affairs Committee, the African Subcommittee and the Near-East Subcommittee.

Mr. HORTON. These are just on the special subjects?

Mr. ABSHIRE. That is right.

Mr. HORTON. Well, now, you were talking about some finished intelligence to be made available, but that is not done at the moment?

Mr. ABSHIRE. We are doing that to the Foreign Relations and Foreign Affairs Committees.

Mr. HORTON. I was just wondering if, maybe, we could get on that mailing list? I would like to see that also.

Mr. ABSHIRE. Yes. Yes.

(Subsequently the committee was informed that the Bureau of Intelligence and Research will provide the subcommittee the same material as is now being distributed to the House Foreign Affairs Committee and the Senate Foreign Relations Committee.)

Mr. HORTON. Thank you.

Mr. MOORHEAD. That question of Mr. Horton's again brings up something that I do not believe the record is entirely clear on—as to whether you treat individual Members of the House or Senate the same as committees or subcommittees of the House or Senate in having access to information?

Mr. ABSHIRE. Mr. Chairman, I have to state again that we try to do all possible for the individual Member.

Second, we recognize the way that Congress has organized itself. We recognize the important goal of this subcommittee, for example, and it is inevitable that in dealing with the committee structure that we become more aware of their needs.

Now, I did allow for some situations—and I do not think we have encountered many of these in the State Department—where there will

be a committee that has a given jurisdiction. For example, on the 5-year projections that the Foreign Relations Committee requested, that was a committee request.

A great deal of time and effort went into that. I suppose when we have the request of a committee chairman or the request of a subcommittee chairman, we recognize that the chairman of the committee or the chairman of the subcommittee speaks for many Members, and while we put the maximum effort possible into every single congressional request, it is only wise for us to put extra resources of the Department into preparing things that a committee desires, such as this testimony that I have worked on all of the Memorial Day weekend. I would do as much for any Congressman, Mr. Chairman. But I particularly recognize the importance of this committee, its jurisdiction, its longtime interest and, therefore, would make an effort there that would be beyond me in terms of the individual Member when we consider how many Members there are.

Mr. MOORHEAD. Well, I am not talking about the effort you put into it, but I am talking about the legal right of access. I do not know whether there should or should not be a difference, but I am talking about if there was a document already in existence that you only had to pull out of the file drawer and turn it over, would you consider the request of any individual Member of Congress for that document legally different from a request, let us say, by a vote of the Senate Foreign Relations Committee or the House Foreign Affairs Committee?

It is not the amount of work involved.

Mr. ABSHIRE. May I turn to my legal adviser, since this is a legal question?

Mr. MOORHEAD. Mr. Salans, we will be glad to have your judgment on that.

Mr. SALANS. Well, Mr. Chairman, it seems to me that in the first place we do not normally deal with these as legal matters. When a request comes from a Member of Congress, we try, as Mr. Abshire said, to meet that request, and we do not view it in the normal way as being any different than a request from a committee chairman or from a committee.

Now, I suppose there are ways of analyzing this legally where you could draw a distinction. For example, a committee has the legal power to subpoena information or a document which an individual Member of Congress does not have.

So, I think it is possible to analyze this in a legal way so that you would come to the conclusion that there is a difference. But we are so seldom dealing with that kind of a situation that, as a practical matter, as Mr. Abshire says, we deal with each request for information pretty much on its own merits and without drawing these kinds of distinctions.

Mr. ABSHIRE. I think, Mr. Chairman, that, again, our final answer goes back to the Congress on this. What we try to do is to fit into the congressional scheme and the congressional intent.

Mr. MOORHEAD. Mr. Abshire, now turning to the so-called doctrine of executive privilege, on page 6 you state: "Our system works only when each of the branches acts responsibly and constructively." When Professor Berger recently testified before this subcommittee, he re-

viewed the history of the Constitution, the Federalist Papers, and concluded that if there is any executive privilege it is not, as you call it, a constitutional privilege but a matter of comity between the two branches.

In other words, when an executive has said, "I do not want to give you this; this is a private paper," the Congress still would have the power to insist upon it. This would ultimately be through the power of impeachment if necessary, but, as a mere matter of comity between the branches we have not pushed our ultimate privilege rights. Similarly, there may be some papers in the Congress that the courts, for example, demand of us. We preserve our right to refuse it, and, naturally when a subpoena is issued to the Clerk of the House we usually pass a resolution saying it is all right for him to appear as a matter of comity. We go along with this. I think this explains the history of executive privilege much, much more understandably than your statements, which seem to be that there is a constitutional basis for this by comparing the Articles of the Federation with the Constitution. Professor Berger pointed out that in the act of September 2, 1789, creating the Treasury Department, it made it its duty for the Secretary to give information to Congress respecting all matters which pertain to his office. And in 1854, the Attorney General advised the President—and I will submit the citations for the record—that by legal implication every branch of the executive department is under the same duty as that of the Treasury. (See p. 3120 of these hearings.)

And title 5, section 2954 of the United States Code gives any seven members of the House Government Operations Committee or five members of the Senate Government Operations Committee the right to request and receive from any executive agency any information relating to the jurisdiction of these committees.

Now, I think that on the basis of comity we should allow the President some latitude in refusing requests of the Congress when, in his judgment, it would not be in the public interest and that the Congress should continue as it has in the past to, in general, accede to that.

There was an exchange of letters between the former chairman of this subcommittee, Congressman Moss, and President Nixon, as there was with Presidents Johnson and Kennedy, to the effect that the President would assert this privilege only personally and in specific cases.

Now, on page 19, you state that the President's action on March 15, with respect to the Cambodia field submission, was of a limited nature and "did not constitute a blanket delegation of authority to his subordinates to claim this privilege."

But Deputy Comptroller General Keller pointed out in his testimony before this subcommittee that the May 8 memorandum of the Under Secretary of State actually broadened the field of applicability of the President's action.

Mr. Keller said:

On May 8, 1972, the Under Secretary of State issued a memorandum to all assistant administrators and office heads, and it said: '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 posi-

tions. 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.

So, the one interpretation of the President's directive, the one by the Under Secretary, seems to go quite a way in broadening the field of applicability beyond the specific documents requested in our Cambodian field submission request. Is this not a very broad directive, much broader than is contemplated in the specific assertion by the President on any request?

Mr. ABSHIRE. Mr. Chairman, the President has made it very clear that he will not delegate this authority, and we, in the executive branch, have been so instructed. So, there is no question in our minds that in another case that we must go back, where there is a question of executive privilege—we must go back the same route, the same decisionmaking route, and that any decision on withholding or non-disclosure must be made by the President.

Would you like to comment?

Mr. SALANS. I think you are quite right, Mr. Chairman, in reading the language of the March 15 Presidential decision that the language that is used and that is quoted by Mr. Abshire in his statement on page 19 is worded more broadly than simply the Country Program Memoranda and the Country Field Submissions that were requested.

On the other hand, as Mr. Abshire says, any decision to withhold any future documents that are requested, even if it falls within this category, would have to be made in accordance with the President's memorandum of March 24, 1969. In other words, we would have to go back to the Justice Department, and the Justice Department, in turn, would have to submit a memorandum to the White House, and this would have to be a decision of the President.

So, in that sense, the President's decision is not broader. The same procedure applies; the same limitations. And the Under Secretary's memorandum of May 8 was not intended to change that procedure in any way.

Mr. MOORHEAD. The memorandum in the AID office says:

In order to carry out the President's Directive, AID Country Field Submission should not be disclosed to representatives of the Congress or the General Accounting Office. Likewise, disclosure should not be made of any documents from an AID Assistant Administrator, AID office head or AID 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 for any country.

Now, that is a pretty broad directive, is it not?

Mr. SALANS. Well, I cannot speak for AID but again I would assume in the case of AID as well, being part of the executive branch, that if there were future requests for documents or information which seemed to be covered by the President's decision of March, they would go through the standard process which is required under the President's Directive of March of 1969. That is what we understand the instructions of the President to be.

Mr. MOORHEAD. So, if we went about asking for Country Field Submissions, country by country, this process would have to be followed?

Mr. SALANS. I assume so. Now, since the President's Directive is worded in a way that says that documents such as this should not be

submitted, I would think that one could predict fairly clearly in advance that if you asked for another set study that the answer would be the same.

But, still, we would have to go back through that process if you wished to make such a request.

Mr. MOORHEAD. Well, I can understand Cambodia being very controversial, but I would think there may be other Country Field Submissions, of other countries, which are not controversial that should be made readily available to the Congress. And, as a matter of fact, I think the Cambodian one should also have been. But we should test this interpretation, taking the least controversial country first, to see whether or not we cannot expand our right of inquiry.

Mr. HORTON would like to hear from Mr. Ablard.

Would it be possible for you to stand by just a few minutes to see if there are any other questions we would like to ask?

Mr. ABSHIRE. Oh, surely.

Mr. HORTON. Are you finished? Go ahead.

Mr. MOORHEAD. I do not know. I think we have almost finished; I think we have covered most of the questions, but we have some questions dealing with Congressman Wolff's tape, and so forth.

Mr. HORTON. Well, I would like to hear that. I would like to hear the questions about that.

Mr. ABSHIRE. We will be happy to take those now.

Mr. MOORHEAD. All right.

Mr. Phillips?

Mr. PHILLIPS. Thank you, Mr. Chairman.

As you know, Mr. Abshire, on May 15, Congressman Wolff testified before the subcommittee and raised three questions of access that concern him a great deal. You are probably familiar with his testimony, are you not?

Mr. ABSHIRE. Yes, I am.

Mr. PHILLIPS. Rather than go through it in detail, then, the question of the tapes which were confiscated, and the fact that the tape recorder is the property of the U.S. Congress, I would like to know what legal authority you have: No. 1, to confiscate it, and No. 2, to handle the transcript as you did in this case, or at least Congressman Wolff testified you did?

Mr. ABSHIRE. I think this has been a problem of communication, and when there is a problem of communication, as a congressional relations man, I will start out and say that it must have been our failure to communicate properly. But we do not understand the facts in the case as the Congressman does.

Ambassador Handley, who I think has done a very distinguished job in Turkey in an area of diplomacy that is of enormous importance to all of us in the international control of narcotics, gave a very forthright briefing and did not, regardless of what the Congressman thinks—he did not, as he has told us, know that he was being taped. So, again, this was the first misunderstanding.

But I think that one can understand the Ambassador's concern when he was very forthright, and then learned that he had been taped.

Now, it was the judgment of the Ambassador, the man in the field dealing with some very delicate situations, that the material on the tape, if in some way it were released, might impair him in his mission.



And when I mention "released," I am not talking about Congressman Wolff intentionally releasing it. But the Ambassador, naturally, is concerned about the security of what he said. Therefore, the Ambassador was most anxious that we show the Congressman the parts of this tape, the parts of this briefing, that were considered by the concerned bureau to be sensitive and that would hurt if made public.

Now, our objective was to point out these sections of the tape to Congressman Wolff. We did not deny him the tape. I realize there is a misunderstanding about this, but Deputy Assistant Secretary of State Colgate Prentice has written Congressman Wolff on the matter, taking up these issues in detail. We do not feel that the tape was denied to him. I understand his concern and can appreciate his concern that such a long time was taken in transcribing the tape. I think he felt the tape was being denied to him because of that delay.

They had a very difficult time transcribing it. They had to get somebody who recognized the voices. It was a difficult tape to follow. When Mr. Prentice and the Turkish desk officer took the transcript to the Congressman they offered to give him the tape if he wanted it. Their understanding was that, since he had the full transcript, he did not want the tape itself.

Now, I want to make it clear that at no time do we feel that the tape was denied to him. We felt that he understood our concern and the procedure that was being followed. Obviously he did not.

MR. PHILLIPS. Well, there are a couple of basic facts here that seem to be in dispute.

Congressman Wolff testified that prior to the briefing in Istanbul—and this is a quote :

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.

Now, No. 1: Have you ascertained whether or not anyone on the Embassy staff gave Congressman Wolff permission to use the tape recorder?

MR. ABSHIRE. We went out a second time to the Embassy on that question. I can only repeat what I have said: that the response we got was that the permission had not been given, that the Ambassador was unaware that he was being taped.

Now, Congressman Wolff says that the recorder was on the table, and I think that he cannot understand why the Ambassador would not have realized that that was a tape recorder and that he was being taped. But there is a different view of the facts.

But to make certain, we went out a second time.

MR. PHILLIPS. Would you not think that it would be likely that if an Embassy staff member did give permission and then a "flap" like this developed, that he could suddenly lose his memory?

MR. ABSHIRE. Mr. Phillips—

MR. PHILLIPS. Let me ask you another question, Mr. Abshire.

As we understood Mr. Wolff's testimony, he placed the tape recorder and the tape in a diplomatic pouch which was sealed to return to the United States which, to me, indicated good faith, that he probably did feel that he had such permission. Otherwise, he could have put it in his own brief case and brought it back with him. But he put it in the pouch. It was sealed.

What gave the State Department the right to open that package which was addressed to the Congressman personally?

Is this a usual practice?

Mr. ABSHIRE. I would have to check further into that, into the question on that.

Mr. PHILLIPS. Could you supply an answer to that for the record?

Mr. ABSHIRE. Yes, I can. This is the first time that that particular question has come to me.

(The information follows:)

The State Department does not open congressional mail. In the case of Representative Wolff's tape, it was placed in the diplomatic pouch along with other diplomatic mail and sent to the Department's mail room where diplomatic pouches are received and opened. The tape was sent in the same way it was handed over to Representative Wolff in Istanbul; that is, without any outer wrapping. The Consulate General in Istanbul forwarded the tape to the Turkish desk with instructions to notify Representative Wolff's office of its arrival. Prior to receiving the tape the Department was informed by Ambassador Handley that the taping of his classified briefing had taken place without his knowledge. On arrival of the tape, the State Department's Office of Congressional Relations contacted Representative Wolff. The Turkish desk undertook to transcribe the tape so that the necessary security classification could be noted on appropriate sections of the transcript. Congressman Wolff agreed to this procedure. Following this, the tape was transcribed and the written transcript was given to Representative Wolff. On several occasions State Department officers have indicated a willingness to furnish the tape to Representative Wolff. Upon learning recently of his desire to have the tape, we have returned it to him.

Mr. PHILLIPS. He also testified: "My very own questions have been classified secret and the Department even censored a four-letter word uttered by the Ambassador."

Is that a correct statement?

Mr. ABSHIRE. I am not—

Mr. HORTON. Mr. Chairman, I do not think it is fair to ask this witness, who was not present, about this matter.

Mr. PHILLIPS. But he has seen the transcript.

Mr. HORTON. But the substances of the question, it seems to me, to this witness, is directed to his own personal knowledge. He certainly was not present and he has no personal knowledge.

You were not present during any of this, were you?

Mr. ABSHIRE. No; I was not present.

Mr. PHILLIPS. Have you seen the transcript?

Mr. ABSHIRE. I have looked at parts of the transcript, and, Mr. Phillips, it seems to me—and I am not an expert in these matters—but it seems to me that the Ambassador should have been concerned about the tape, about that tape becoming available to the public, and I think Congressman Wolff shares the same concern. I do not think there is any dispute on that.

Now, I am not in a position to argue about every line that was classified or not. But I think that both the Congressman and the Ambassador agree that there were sensitive areas in the tape.

Mr. PHILLIPS. I think—

Mr. MOORHEAD. If I may interrupt you for just a minute. I think that the issue here Congressman Wolff is complaining about is that—and this committee is studying the whole question of classification—that his questions were classified as "secret." I would go along with the classification of the Ambassador's answers, but he had no special knowledge that was of a classified nature. He was just asking

the questions of the Ambassador, and these questions were classified. This was one of his complaints, and Mr. Abshire has seen the transcript, and that the questions of the Congressman were classified. One of the things we are concerned about is this practice of overclassification, and it seems to me that unless the questions of the Congressman had special secret information, knowledge which was revealed in his questions, I can see no classification basis for them.

Mr. HORTON. Well, Mr. Chairman, I would disagree with that, because I think that there are instances in which a question can be framed which is based upon classified information and which might itself have to be classified as secret. The question following secret information could contain some of that secret information and, therefore, would also have to be classified. I do not think it is beyond the realm of possibility that a question could be classified as secret especially if the information preceding it was secret.

Mr. MOORHEAD. Well, I will say to the gentleman—

Mr. HORTON. I do not know. I have not seen the transcript or anything else. But, just on the face of it, I would not say that because the question was asked and was classified that, therefore, it was improperly classified. I would have to see the question and know the information about it, first.

Mr. MOORHEAD. Well, I think you would be astounded when you do see it.

Mr. HORTON. That may be.

Mr. MOORHEAD. The classification of certain of the questions, and the transcript, as I recall seeing it, has certain parts classified and certain parts not classified.

Mr. ABSHIRE. That is right.

Mr. MOORHEAD. And it was in the questions of Mr. Wolff that were classified that it seemed to me were another example of overclassification.

Mr. ABSHIRE. Well, Mr. Chairman—

Mr. MOORHEAD. Yes, certainly, Mr. Abshire.

Mr. ABSHIRE. I like, always, to look for resolutions to problems. I am sorry that at the time the transcript was delivered to Congressman Wolff that he did not have the chance to study it, while my representatives were there. I am sorry that his concern on overclassification of the tape did not become better known, because if he feels that way, there is no reason why we should not take another look at the tape. We do this with congressional committees when, in the declassification of reports, we have to get experts together on some of these things, and they spend hours going over them. But, in any such case, in dealing with a Member of Congress, if his judgment is that there is overclassification, we are, and should be, most happy to go back and review it. I would be delighted to have my office act as an umpire there. I know that the area people, naturally, are the people that are most concerned about the sensitivity. And I know that we are concerned about the Congress having more information. Therefore, we would be most happy to take another look at the tape, because I think that that subcommittee, the Rosenthal subcommittee, was engaged in a most significant trip. I am delighted that they had the opportunity to meet with a man whom I consider one of our most able Ambassadors, who has been a real leader in making progress in this field of international

narcotics control. As much information as we can get out about what he has done and what he is trying to do about narcotics control is to our advantage and to the advantage of the Congress on an issue of concern to an enormous number of Members of Congress.

Mr. MOORHEAD. Well, we will convey your words to Congressman Wolff.

Mr. PHILLIPS. Let me move on to the second issue raised by Congressman Wolff in his testimony involving a request that he made for the Secretary of State to furnish the Committee on Foreign Affairs all communications regarding the Vietnamese elections—that was last fall—including all documents relative to the conduct and use of U.S.-financed public opinion surveys.

He testified that he received a letter from you, Mr. Abshire, on October 8, 1971, stating that "the U.S. Information Agency has informed us that the Joint U.S. Public Affairs Office, JUSPAO, in Vietnam, has not conducted any polls or surveys, formal or informal, concerning or involving the Vietnamese election." There was a colloquy during our earlier hearing on this same subject and I pointed out that on July 25, 1971, these same polls in question had been furnished to this subcommittee. There had been discussion of the polls, the types of questions asked, and so forth. They were furnished to the subcommittee by USIA, by Mr. Ablard, on July 29, 1971. I have them here. There are a great many questions involving election attitudes of the Vietnamese electorate, candidates, and so forth.

What we are trying to find out is why your office did not know that USIA had already made these surveys available to us, had acknowledged their existence, when you were telling Foreign Affairs Committee Chairman Morgan that there were no such surveys?

Shortly thereafter, a week or two later, you wrote another letter in which you acknowledged that there were, in fact, polls made up until February of 1971; but the thing that puzzles us is why your office was in the dark over all of these months when it was a matter of public record?

Mr. ABSHIRE. Our letter of October 8 was in error, and it was I believe—I am not certain of the date, but I think it was about October 15 that we were informed about this other poll by USIA. I believe it was the following day, on October 16, that we wrote making the correction, and I believe that it was on October 20 that Congressman Wolff spoke about the poll on the floor. What I am saying is that our correction came as the result of USIA so informing us, and before Congressman Wolff had spoken on the floor. I just wanted to get that—

Mr. PHILLIPS. Do you recall the date of the Vietnam election? It was October 2, 1971. So, the point is that this information was kept from him until after the election, despite the fact that this information had been available and made available to this committee 3 months before.

I think that is the point that he is trying to make.

I have no further questions.

Mr. MOORHEAD. Mr. Copenhaver?

Mr. COPENHAVER. No.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Yes. Thank you, Mr. Chairman.

Mr. Abshire, Mr. Salans might want to give you a hand on this, but, as I read the President's instructions which he issued on March 15, there are two criteria in his order. One is that this must be tentative planning data on foreign assistance programs or international foreign activities, and the second criterion is that it must be an unapproved position. Do you agree with that interpretation, that there must be these two elements?

Mr. ABSHIRE. I think maybe there have been three elements, internal working documents, tentative planning data on future years, and not approved executive branch position.

Mr. CORNISH. But those would be three separate elements?

Mr. ABSHIRE. Those are the three elements, I think, that have led the President to determine that disclosure would not be in the public interest, because this involves a decisionmaking process.

Mr. CORNISH. All right. Now, that leads me to this: Do you have any country field submissions which are approved positions at the present time for fiscal 1973?

Mr. ABSHIRE. I would have to check that. I would presume that we do not, but I would have to check that.

Mr. CORNISH. Well, I cannot understand that answer, because is it not a part and parcel of the program which was submitted in the foreign aid bill earlier this year?

Mr. ABSHIRE. Field recommendations are an input out of which comes the foreign aid program. I think this would not mean that a given field submission at a given point becomes approved. Now, I would have to check—I want to check myself, but what I am saying is that the overall program is approved, and that this is an input in the process of approval. It is a raw piece of the process of approval.

Mr. CORNISH. I know, but one must assume that when you go before the Foreign Affairs Committee for your authorization that you do have an approved policy position.

Mr. ABSHIRE. That is right, and it is contained—

Mr. CORNISH. Which is based on something.

Mr. ABSHIRE. It is contained in the presentation documents that are printed up and made available to the members of the committee.

Mr. CORNISH. Yes; and you have to respond to questions of the members on this, and so forth?

Mr. ABSHIRE. That is right, but it is in a different form. It is not in a—

Mr. CORNISH. Well, it may be an amended country field submission, would you agree, to bring it into line with an approved position?

Mr. ABSHIRE. But it is a different document. It is in a different form. Now, your question is: How much does that form resemble the earlier recommendation?

Mr. CORNISH. Well, it might be the original country field submission plus other documents or amendments, could that not be true?

Mr. ABSHIRE. I would describe it that way, yes.

Mr. CORNISH. Do you now have such a series of documents for Cambodia for fiscal 1973?

Mr. ABSHIRE. I would have to furnish you an answer.

Mr. CORNISH. Mr. Chairman, I think that it would be most appropriate—if they do now have a series of approved documents, approved

positions for Cambodia—that we renew our request for the Cambodian field submission at this time.

Mr. MOORHEAD. I think, first, we will have to get an answer from Mr. Abshire as to whether there is such a document.

Mr. ABSHIRE. Yes.

Mr. MOORHEAD. And if there is. I think we could renew it, renew it as falling outside the President's memorandums.

Mr. ABSHIRE. We do have the presentation document, but I will furnish you the answer.

(The information follows:)

The economic assistance program for Cambodia contained in the fiscal year 1973 presentation of the President's fiscal year 1973 budget request for security supporting assistance to the Congress reflects current executive branch thinking, and the current position within the executive branch. Until final appropriation action by the Congress, and subsequent notification to the Congress by the executive branch of the fiscal year 1973 security assistance allocations pursuant to section 653 of the Foreign Assistance Act, the proposed program remains valid. However, if unforeseen events, for example, unusual military actions or adverse economic developments were to occur, the program presented to the Congress might have to be reevaluated on the basis of the new situation.

Mr. MOORHEAD. Thank you, Mr. Abshire.

Mr. CORNISH. Now, a request is made to the Justice Department, when a question arises as to the applicability of possible executive privilege. Who makes this decision, the Secretary of State?

Mr. ABSHIRE. The decision as to whether it goes to the Justice Department?

Mr. CORNISH. Yes.

Mr. ABSHIRE. As to whether we are dealing in a case that possibly could involve executive privilege?

Mr. CORNISH. That is correct. Yes.

Mr. ABSHIRE. It would ultimately be the Secretary of State.

Mr. CORNISH. Do you happen to know in the case of the Cambodian field submissions whether legal counsel within the Department of State or the Agency for International Development recommended against such an action?

Mr. ABSHIRE. Mr. Cornish, as I said earlier about my own recommendation—

Mr. CORNISH. I understand that perhaps Congress has a strong advocate in you, but I am also wondering whether we also have some advocates in the legal department of the Department of State and AID, and I think we do.

Mr. ABSHIRE. I said that I was not in a position to go into the recommendations that were made, for the reasons I have given in my testimony.

Mr. CORNISH. Let me rephrase it then.

Is it possible that such a matter could be brought to the attention of the Justice Department against the advice of the Congressional Liaison Office, and against the advice of the Legal Counsel of the Department and the Agency for International Development?

Mr. ABSHIRE. I would say it is possible, because we could be dealing with a case where even the Secretary, in his judgment, believes that this should not go to executive privilege. But he may believe that he has an obligation to obtain an opinion from the Justice Department.

The fact that we are going through the question of executive privilege does not mean that it is done with the predetermination that it necessarily should go that way.

Do you want to add further on that, or clarify or comment on that?

Mr. SALANS. I would be happy to say as a deputy legal adviser that you do have some strong advocates in the legal adviser's office. That is not to say that in every issue that comes up we necessarily share your views.

Mr. CORNISH. I understand that your views do not always prevail, and the reason I bring this up, gentlemen, is that I have here in my hand a copy of the fiscal 1973 country field submission for Laos. And this was submitted to the subcommittee on September 13, 1971, and I was wondering what happened in the Department of State and the Agency for International Development between September 13, 1971, when this very sensitive document was made available to the subcommittee, and in February, when we requested the Cambodian field submission.

What happened during that period of a few months when they were made available—and this contains all of the sensitive material of which you spoke, the advice, the candor of the officials and what have you, and it is probably a more sensitive program than the Cambodian program, but yet that was presented. And I wonder: Was there some basic decision made between September 13 and February that changed that whole picture?

Mr. ABSHIRE. I would comment that I do think that the case that evolved with the Senate Committee on Foreign Relations on the 5-year projections resulted in more executive branch attention to this question of the executive making available internal working documents that involved tentative planning data that were not approved executive branch positions. That decision was made on August 30, 1971.

Mr. CORNISH. Well, I would hope that any friction which you might have with the Senate Foreign Relations Committee certainly would not enter into any decisions affecting the provision of documents to a House committee.

Mr. ABSHIRE. I might say that I did not mean this in the sense that you indicate there. The decision on executive privilege in that case did not grow out of friction, it grew out of—there may have been some heat—but it—

Mr. CORNISH. There was something there that was burning, because we could smell the smoke over here.

Mr. ABSHIRE. But it grew out of the concern of the executive branch about making available to the Congress tentative planning data. And if I may be practical on this for a minute, the documents that the Senate Foreign Relations Committee was interested in, a joint State-Defense memorandum on 5-year projections, had not been cleared off by either of the Secretaries, and that document had these projections in it.

Well, there were concerns about making that available, about such a document, since it did not represent a cleared executive branch position. I can imagine the problem of a submission where the estimator had put a country on the high side. Release of that submission could have tended, by giving a standing to that document that was never

intended, to influence both the bureaucracy and, conceivably, the Congress in a direction that further consideration within the executive branch would have concluded unwise.

Mr. CORNISH. May I just—

Mr. MOORHEAD. We have to move on.

Mr. CORNISH. Just one more, Mr. Chairman.

Mr. MOORHEAD. Very briefly.

Mr. CORNISH. Yes, very brief.

Now, that decision was made on August 30, 1971.

The document on Laos was provided to us on September 13, 1971.

That is my only comment, Mr. Chairman.

Mr. MOORHEAD. Thank you very much, Mr. Abshire. There may be some other questions that the subcommittee would like to submit to you in writing. I presume that you would be willing to answer them?

Mr. ABSHIRE. Yes. And let me say, Mr. Chairman, it has been a pleasure to appear before this subcommittee this morning.

Mr. MOORHEAD. Well, Mr. Abshire, it is our pleasure; and your statement was very forthright, and you have been a great deal of help to us, and we think that you are doing a great job down there in keeping the friction between the Congress and the departments to a minimum. Thank you very much.

Mr. Ablard?

**STATEMENT OF CHARLES D. ABLARD, GENERAL COUNSEL AND CONGRESSIONAL LIASON, U.S. INFORMATION AGENCY; ACCOMPANIED BY LAWRENCE HALL, CHIEF OF RESEARCH SERVICE, USIA**

Mr. MOORHEAD. Mr. Ablard, is there any way that you can summarize your statement?

We have a time problem, and if you could read the highlights of your statement, we would then submit the full statement for the record.

Mr. ABLARD. I would be happy to do so, Mr. Chairman.

Mr. MOORHEAD. Thank you. Please introduce your associate

Mr. ABLARD. I am accompanied by Mr. Lawrence Hall, who is the Chief of the Research Service of the USIA.

We appreciate the opportunity of appearing today to testify before you.

I might limit my testimony to elaborate on a few USIA practices and procedures that are a bit different from the State Department's. We basically follow the same pattern, as Mr. Abshire has indicated. We believe very strongly that the President's memorandum of March of 1969 was and is the guiding principle we are to follow in our dealings with the Congress, and we have attempted to follow that to the letter.

Within USIA the Agency is maintaining its contacts with the Congress through my office, which is a combination of the Office of the General Counsel as well as the congressional liaison. In general, we follow the practice that any request of a Member of Congress must be responded to within 3 days. When we find that is difficult to do, we



acknowledge it and talk to the office or tell them that the material is on the way.

In addition to responding to specific requests, we provide Congress routinely with a semiannual report on the operations of the Agency. I think that is probably twice as much as most agencies provide since, I think, most of them provide only an annual report. We also provide copies of the agency in brief, which is a very detailed analysis of how many people we have and where they are located.

As the result of the Foreign Aid Authorization Act, Public Law 92-226, we are required, as is State, beginning with fiscal year 1973, to obtain an authorization before we receive appropriations. We have spent a considerable amount of time before the Senate Foreign Relations Committee and the House Foreign Affairs Committee this year in providing detailed information about every conceivable aspect of the operations of the Agency in the over 100 countries where we have posts. And we have testified before this committee and others. I think that you heard testimony on our operations in Vietnam, Laos, and Cambodia in July of 1971.

Of course, we are subject to GAO audits and studies, and we believe that we have a very good relationship with the General Accounting Office. We have formalized it to a degree and have a specific office within the Agency that has responsibility for all contacts with GAO, and we attempt to make certain that GAO is given access to all of the materials that they regularly require in doing their audits. I think our record over the years has been excellent.

The only limitation, of course, is the one that you discussed with the State Department witnesses on executive privilege. On March 15 of this year, as you know, the President invoked executive privilege in connection with the request of the Senate Foreign Relations Committee for our county program memoranda. These were tentative planning documents that did not reflect administration policy and to disclose them would have muted the preliminary exchanges of views before final decisions could be made.

To the best of my knowledge, this was the first time that the Agency materials had been denied to a congressional committee. In the past, such requests which we thought should not have been honored have always been worked out through some accommodation with the requesting committee. In this instance, the accommodations failed, and the Senate Foreign Relations Committee insisted on full compliance with its demands, and the President took the step of invoking the privilege.

I would like to comment on one Agency product—and this is why I have Mr. Hall with me—in which I know your committee has been interested, and that is public opinion polls.

In the past, these have created some difficulties, primarily through the few occasions when they have been released prematurely. They are a necessary management tool for USIA, but, as you recall, in 1960, one of them at least became the object of some controversy in the 1960 presidential election. After a series of meetings and negotiations between the Director of the Agency, Edward R. Murrow, and your distinguished predecessor, Congressman Moss, we arrived at an agreement whereby the polls could be made available to this subcommittee and to other responsible subcommittees of the Congress, and through a mech-

anism which we agreed to whereby the ranking minority member and the chairman would be provided access to these polls. It had the effect, I think, of freeing up the polls for congressional oversight while at the same time preserving the security classification on them. We have continued to operate on the basis of this understanding, and we had discussions, as you will recall, in July of 1971, with you, Mr. Chairman, and we have continued to operate on the basic premises of that understanding since that time. We believe that this has been most satisfactory, and we hope that it has been satisfactory to the Congress.

I would like to comment on some troublesome problems that we have with the Senate bill that is pending in the Senate. Our authorization bill, as it affects release of USIA materials, is I think, in view of the history of this distinguished subcommittee on the subject of freedom of information, a matter that I wanted to bring to your attention. I will not elaborate on it here today, but it is covered in my testimony if there are any questions to be asked on it.

Basically, the problem is that the amendment which the Senate Foreign Relations Committee has reported, and which is still in the bill, totally restricts the availability to the American public of all of our media products and USIA materials. This would apply, for instance, to the public opinion polls which are now available in some 45 academic institutions in the United States. It is my interpretation that we would have to cut this off if this provision became law.

There is also the problem that Members of Congress and the press have the right of easy access to our materials. We have always assumed that the Congress, both committees and Members, would use judgment in how these materials would be used, that the Agency does not want to be in the position of having to police a Member of Congress as to how he uses the materials. We know, as a practical matter, that when we have a request from a member oftentimes this is a request from a constituent, and we frankly do not want to be in the position—and I do not think Congress wants us to be in the position—where we are trying to tell you what to do with that product after you receive it from us.

Mr. Chairman, I appreciate the opportunity of appearing to testify before this distinguished subcommittee with whom we have had very excellent relations in the past, and I will be happy to try to answer any questions that you may have.

Mr. MOORHEAD. Thank you, Mr. Ablard. That was a very excellent summary of an excellent statement, which without objection, will be printed in the record in full.

(Mr. Ablard's prepared statement follows:)

PREPARED STATEMENT OF CHARLES D. ABLARD, GENERAL COUNSEL AND  
CONGRESSIONAL LIAISON, U.S. INFORMATION AGENCY

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today to discuss the policies, programs and guidelines employed by the U.S. Information Agency for requests for information from the Congress. The central principle that we follow was announced by the President in March of 1969, shortly after he took office when, in a memorandum to all Executive Departments and Agencies, he outlined a procedure governing compliance with congressional demands for information. The first sentence of that memorandum stated that: "The policy of this Administration is to comply to the fullest extent possible with congressional requests for information." Our Agency has attempted to do this.

Within the Agency the general responsibility for coordinating all contacts with the Congress and for complying with congressional requests for information is assigned to the Office of the General Counsel. My office thus not only acts as house counsel on all legal problems for the Agency but also serves as liaison with the Congress. The single exception is that the Office of Administration is the primary contact point with the Congress on appropriation and budget matters.

The general rule specified in our procedures is that congressional requests for information must be honored, if at all possible, within 3 days. Whenever we find it impossible to comply with that requirement, we promptly acknowledge the request and respond more fully as the information is obtained. This is especially true when information from overseas posts is essential to a proper response.

In addition to responding to specific requests from the Congress, there is an annual flow of information to the Congress. Under section 1608 of Public Law 402 of the 80th Congress (22 U.S.C. 1439) the Director submits semiannually to the Congress a report on the operations of the Agency. Copies of the "Agency in Brief," a publication describing the broad operations of the Agency and its several elements are also provided to Members of the Congress. Moreover, in connection with the appropriations process, detailed budget information and data on our operations at home and abroad are provided.

As a result of an amendment to the Foreign Aid Authorization Act (Public Law 92-226), USIA was required, beginning with fiscal year 1973, to obtain an annual authorization before it may receive appropriations. The Agency testified at hearings before both the Committees on Foreign Relations and Foreign Affairs providing large amounts of detailed information on every aspect of its operations. My office provides copies of publications and articles to individual members where they coincide with their areas of interest. Finally, Agency officials have been available upon request to testify, and have often testified, before committees of Congress, including this subcommittee, which heard testimony in July 1971 on our operations in Vietnam, Laos, and Cambodia.

Agency operations are subject to reviews, audits, and studies by the General Accounting Office, made upon GAO initiative or at the request of the Congress. Requests by the GAO for specific information on various Agency activities may also be made. The Agency makes available for examination all information and records required by the General Accounting Office unless disclosure would violate the executive privilege directive of the President or government-wide statutory or regulatory restrictions, such as apply to certain medical and personnel information.

Over the years, we believe that we have established excellent relationships with the various General Accounting Office representatives with whom we have frequent contact, and that they are understanding of any restraints placed on the Agency in supplying data. The Agency has designated a liaison officer for General Accounting Office matters, located in our Office of Administration, for the purpose of providing the GAO representatives a central point of contact on requests for Agency data and documents and for facilitating the arrangements for audits, studies, and reviews of Agency activities.

The only limitation on our ability to supply information to the Congress is the traditional one of executive privilege on matters which the President directs that we not disclose. On March 15, 1972, the President invoked executive privilege in connection with a request from the Senate Foreign Relations Committee for our country program memoranda and planning papers on the grounds that these were tentative planning documents not reflecting administration policy and that to disclose them would mute preliminary exchanges of views before final decisions could be made by agency heads and the President. This, to the best of my knowledge, was the first time agency materials had been denied to a congressional committee. In the past, requests have been made which the Agency thought should not be honored but, after discussions with the committees concerned, satisfactory accommodations were worked out. In this instance, efforts at accommodation failed and, when the Senate Foreign Relations Committee insisted upon full compliance with its demand for the production of the documents, the President took the step of invoking executive privilege.

I would like to comment on one Agency product, public opinion polls, that, in the past, have created certain problems which were eventually resolved through an unusual working agreement between this subcommittee and the Agency. As your subcommittee knows, the Agency has for years used public opinion polls for measuring the foreign reactions to U.S. policies as a basis for programing decisions. They are a necessary management tool for USIA, but subject to misuse

if prematurely released. During the 1960 presidential campaign, one of the Agency's polls about the prestige of the United States in foreign countries became a central issue. Afterward, considerable concern was expressed by Members of the Congress and others about the use, or misuse, of these polls for domestic political purposes.

After a series of meetings and negotiations, the Director of the Agency, Edward R. Murrow, in 1963, entered into an understanding with the chairman of this subcommittee, Congressman John Moss, which was designed to guarantee access by the Congress to these polls and, at the same time, prevent their use for the domestic political purposes of either party. The broad outlines of the agreement provided that the polls would be made available upon request to the Congress on a classified basis and that the classification would be respected in that the results of the polls would not be made public nor would they be made part of any official congressional records. The agreement further provided for their declassification after 1 or 2 years unless the interests of national security required the retention of the classifications. Our declassified surveys are made available to 45 academic repositories in the United States. We continue to operate on the basis of the understanding and make available public opinion surveys on a classified basis on request to committees of Congress as we indicated we would in July 1971 in discussions with you, Mr. Chairman.

I am pleased to report that operations under this agreement have been most satisfactory to the Agency and, we hope, to the Congress. Since 1963 the only instance where a portion of one of our polls was made public concerned a survey made after the Cambodian incursion but before the withdrawal of troops from Cambodia. While this disclosure was, in my view, most unfortunate, it did not result from the established procedures between the Agency and your subcommittee.

Since the purpose of these hearings is to discuss the availability of information to the Congress, I would like to invite the subcommittee's attention to what I consider to be the unfortunate and troublesome ramifications of legislation pending before the Senate in the Foreign Relations Authorization Act of 1972, S. 3526. I refer specifically to section 204 which provides a blanket prohibition on public distribution or availability of any USIA materials. This would appear to prevent our making the public opinion polls available to the above-mentioned academic institutions. The section retains the requirement of section 501 of Public Law 402 of the 80th Congress that our materials be made available for inspection upon request of representatives of the media or Members of Congress.

Moreover, the Senate Foreign Relations Committee report relates its amendment directly to a ruling by the Acting Attorney General concerning the use of our film Czechoslovakia 1968 over television by Senator Buckley of New York. Thus, if the proposed legislation passes, USIA would still be required on request to make available materials to Members of Congress and the press. However, the proposed legislation would appear to restrict the uses to which this material could be put by Members of Congress once it was made available to them. As a practical matter, we recognize that many congressional requests for our products are to honor constituent requests, so there would be a question whether a Congressman could make available to any constituent materials which he had obtained from the Agency without violating the law. There would be no way USIA could monitor such a requirement once its materials had been given to a Member of Congress. I happen to believe, from a public policy point of view, that the pending legislation on this subject in the Senate is unwise in that it would restrict our materials from public scrutiny which might provide a basis for a judgment as to the effectiveness of the Agency.

Mr. Chairman, I have attempted to outline our policies, procedures, and practices for providing information to the Congress of the United States, and I will be pleased to try to answer any questions that you or other members of the subcommittee may have on this subject. Thank you.

MR. MOORHEAD. I notice that on page 6 of your testimony that the refusal in—well, in this year of the access to the program memoranda and planning papers was the first time that the Agency had denied materials to a congressional committee. Do I understand then that in previous years program memoranda and planning papers have been submitted to congressional committees?

Mr. ABLARD. To the best of my knowledge, they had never been requested by a congressional committee before.

Mr. MOORHEAD. So, this was, to your knowledge, the first time there was a request for this, and that was the reason for the refusal?

Mr. ABLARD. I believe that the question arose during the hearing in this committee, and it was the hearing we were having on Laos and Cambodia, and I am not sure whether you ever formally made such a request. Possibly the staff can refresh my recollection on that.

Mr. MOORHEAD. Did we make a formal request of USIA for program memoranda and planning papers?

Mr. PHILLIPS. Not of USIA, but AID.

Mr. MOORHEAD. Apparently, we did not, this subcommittee did not make such a request of you. I know—

Mr. ABLARD. It was discussed, and the witnesses we had before you at that time were fully cognizant of what the program policies were, and that was the subject of some of the discussions I remember during the hearing.

Mr. MOORHEAD. You describe on page 9 of your testimony a disclosure of certain information which was unfortunate but, you said, it did not result from the established procedure between the Agency and our subcommittee.

Was our subcommittee involved in that disclosure in any way that you know of?

Mr. ABLARD. No, Mr. Chairman, not at all.

Mr. MOORHEAD. I just would like to state that our subcommittee has lived up to our joint understanding. Incidentally, you do mention this working agreement that goes back to the days of Edward R. Murrow and Congressman Moss, then chairman of this subcommittee, and I gather that you consider that that working agreement to still be in effect?

Mr. ABLARD. Yes, we do. You have raised the point earlier which I might mention, because you have asked other witnesses about dealing with individual Members of Congress, that although the precise language of the understanding we have with your subcommittee requires us to make these available only to the chairman and ranking minority member, in practice we have been a bit more liberal in that if any Member of Congress wants information, who is on a committee that has some connection with oversight or that area and has asked for public opinion polls, we have made them available to him.

Mr. MOORHEAD. You criticize the pending Senate bill, particularly in that it would prohibit you from making distribution of polls to 45 academic institutions.

If it were amended to, in some way or another, allow you to continue to make them available to the 45 institutions, would that solve your public problem? I realize you also have this congressional problem.

Mr. ABLARD. I think that is only a part of it, and I think this goes to a fundamental question of public policy on the accessibility of the public to USIA media materials and other products of the Agency. We routinely comply with requests, for instance, from Soviet scholars in the United States who are interested in our magazine America, of which some 60,000 copies go to the Soviet Union, and there are Soviet scholars who want to see what we are saying to the Soviet Union. It

is published in Russian. so, obviously, there is no great demand in the United States. We fulfill maybe six to eight requests a month for this magazine. Under the strict terms of the Senate language, I think there is a serious question as to whether we could even do that. That is one example.

Yesterday, the Senate adopted an amendment to exempt our magazine "Problems of Communism," which I know you and your staff have seen in the past hearings we have had, from the restrictions of this amendment, as this is our only publication that is sold through the Government Printing Office. GPO requires that they be permitted to sell it in the United States; so, there are some 4,000 to 5,000 subscribers in the United States.

Now, the Senate has adopted that amendment.

Mr. MOORHEAD. Mr. Horton?

Mr. HORTON. I do not have any questions.

Thank you for coming.

Mr. ABLARD. Thank you, Mr. Horton.

Mr. HORTON. And for your testimony.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Thank you, Mr. Chairman. Mr. Ablard, we have had a very cordial relationship over the years and on a number of occasions.

There is something that I cannot, for the life of me, understand, through my number of years of service with the subcommittee and on overseas investigations, especially. Whenever we have met with USIA people—and this has been a frequent occurrence—they have literally begged us to take a look at the country program memoranda. Now, all of a sudden they are out of bounds with the Congress. What has happened to cause this rapid change of stance or attitude?

Mr. ABLARD. Well, I did not realize that our staff overseas was begging people to look at them.

Mr. CORNISH. Well, perhaps that is—

Mr. ABLARD. I know, in the past, they have been shown to General Accounting Office auditors. I cannot really answer your question as to what might have happened on it, but I would expect that in the future some country program memoranda might still be made available on an individual basis to members of the staff of this committee or the General Accounting Office auditors.

Mr. CORNISH. Are you speaking of country program memoranda which are approved positions now?

Mr. ABLARD. Well, this is something that we are attempting to do in an effort to accommodate the Congress. My attitude is basically the same as Mr. Abshire's, that when we do get into these confrontations I like to work out some accommodation to arrive at a happy solution, because, as you pointed out earlier, there are several factors in this executive privilege claim that the President made on the CPM. We are attempting to develop a modified country program memoranda which would be an approved position and would reflect not tentative planning data but approved policy of what the goals of the USIA were in a given country.

Now, in the past at some stage of development, in many cases CPM's became that. Now, I would suspect in many cases those offices that showed you those, had them in that form. In all too many instances,

though, we have not had them developed to that degree. We want to make certain they are developed to that degree, that they become an agency policy and an administration policy in which event we will attempt to make them available to the Congress.

Mr. CORNISH. Well, of course, they wanted to show them to us so that we could get a clear and concise understanding of what the information program was in a particular country and what problems it faced there, and what the needs were.

And, of course, this is the nitty-gritty type of thing that we are interested in, the objectives and goals; and whether they are specific and whether you reach them or do not reach them, this is all part of the audit responsibilities which we have. And, frankly, I cannot understand why these documents were so readily available at one point and now all of a sudden they are off-limits.

Mr. ABLARD. One problem was the timing of it, that the request came at a time when the CPM's were being formulated, and they were, as the President's memorandum noted, tentative planning documents. As the year progresses they become more formalized and become firmer position papers.

Mr. CORNISH. Do you have a firm position paper now for Cambodia for fiscal 1973?

Mr. ABLARD. I am not able to answer the question.

Mr. CORNISH. I think if you do, you ought to make it available to the Senate Foreign Relations Committee.

Thank you, Mr. Chairman.

Mr. ABLARD. They did not ask for just Cambodia, of course. They asked for all country program memoranda.

Mr. CORNISH. Well, if they asked for all, then, if you have them approved—

Mr. ABLARD. This is my hope, that at some point very soon we will be able to have earlier on an approved document which we can give that committee or any other committee that wants to see what our policies are in one or any number of countries.

Mr. CORNISH. Of course, I might make just one short final comment on that, and that is we are not totally unsophisticated on these matters, and we realize that these are tentative documents, and always have; and we do know that they are subject to changes, and we have always regarded them in this light.

And, so, it is not new to us that they have to go through a process of change that might come out in a totally different form when they come out of the machine.

Mr. MOORHEAD. Mr. Copenhaver, do you have any questions?

Mr. COPENHAVER. No.

Mr. MOORHEAD. Mr. Phillips?

Mr. PHILLIPS. Just one brief question, Mr. Chairman.

On this question of the JUSPAO polls that Congressman Wolff testified about, did Mr. Wolff make a direct request to USIA for copies of these JUSPAO polls?

Mr. HALL. I do not believe so.

Mr. ABLARD. I think it might be noted that Congressman Wolff was talking about in the speech he made on October 20, CORDS polls conducted by AID. Thus, there is possibly some confusion, as Mr. Abshire

noted, because Mr. Wolff was talking about one type of poll, CORDS polls, and we were responding on JUSPAO polls. We inadvertently—and we are very regretful about this—advised Mr. Abshire, in a letter to him that there were no JUSPAO polls. We immediately advised State, and State, on the next day, advised Mr. Wolff.

Mr. PHILLIPS. You recall that we discussed this same subject last summer in our hearings as to the “pacification attitudes surveys” that CORDS conducts, and how they were different from the JUSPAO polls in which USIA was involved.

But is there anything additional that you can tell us to shed any additional light, in regard to my question to Mr. Abshire as to what caused the breakdown of communications that apparently existed between your office and his, so that he did not know, apparently, of the existence of these polls after you had already made them available to this subcommittee?

Is this just one of those administrative problem areas that sometimes crops up?

Mr. HALL. We are not certain that it is exactly the same polls, that on the one hand one part may have been referring to the PAAS polls that, you know, CORDS conducts, and, on the other hand, the JUSPAO polls which we made available and which are USIA polls.

Mr. ABLARD. We were addressing ourselves only to the JUSPAO polls, and it is my understanding that Mr. Wolff was talking about CORDS polls, and I do not know whether you have CORDS or JUSPAO.

Mr. PHILLIPS. No, in this request to Mr. Abshire he mentioned JUSPAO polls, and what puzzles me is: Why didn't Mr. Abshire's office call your office to see if such polls were in existence before he told Congressman Wolff, in a letter on October 8, that there were no such polls?

Mr. ABLARD. He did, and we inadvertently advised him in error.

Mr. PHILLIPS. You advised him that there were no such polls?

Mr. ABLARD. That is right. It was our error.

Mr. PHILLIPS. I see. Well, I may have been putting the blame on the wrong horse.

Mr. ABLARD. Well, we will have to shoulder that one.

Mr. PHILLIPS. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Ablard. It is always good to hear when somebody will say, “We will shoulder the blame for this.” It is a natural tendency to shift it off, and we appreciate your frankness and the candor of your entire statement, which has been of great help to us.

When the subcommittee adjourns today, it will adjourn to meet tomorrow at 10 o'clock when we will hear again from the representatives of the Internal Revenue Service, and I hope that the gentleman from New York (Mr. Horton) will be with us, because of his expert knowledge he has in this field and the interest he has shown.

If there are no further questions, the subcommittee is now adjourned.

(Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, June 1, 1972.)



# U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—PROBLEMS OF CONGRESS IN OBTAINING INFORMATION FROM THE EXECUTIVE BRANCH

(Part 8)

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THURSDAY, JUNE 1, 1972

HOUSE OF REPRESENTATIVES,  
FOREIGN OPERATIONS AND  
GOVERNMENT INFORMATION SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Frank Horton, and Gilbert Gude.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; Harold Whittington, staff consultant; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

This morning, we conclude the final day of our hearings on the access of Congress to information from the executive branch.

By way of background, members will recall that on Tuesday, May 16, testimony before this subcommittee by Deputy Comptroller General Keller leveled some very serious charges against the Internal Revenue Service concerning their information access policies. It is also significant that last month during our hearings on the administration of the Freedom of Information Act, it was pointed out that IRS also has an abysmal record in denying all types of information from individual citizens by tortured legal interpretations of the exemptions that are permissive, but not mandatory.

Mr. Keller said in his testimony:

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.

He went on for two pages of his statement to discuss this situation in detail and to quote from an IRS legal opinion upholding its refusal to comply with section 313 of the Budget and Accounting Act of 1921.

At the suggestion of Mr. Horton, and concurred in by myself and other subcommittee members, IRS Commissioner Walters was re-

quested to respond last Wednesday to these specific charges. We want to find out what entitles IRS to be the "sacred cow" of Government—one of the very few agencies in the executive branch other than the CIA—whose operations and activities are not subject to any meaningful independent GAO audit, as required by law.

Last Wednesday's hearings were terminated because we felt that the statement was not responsive to the questions that we were seeking. We therefore postponed the hearing until this morning to give IRS adequate time to respond more directly.

We are pleased to note, Commissioner Walters, that your revised statement has complied with our request.

Will you proceed? Perhaps you might start by introducing your associates.

As you know, as an investigating committee, we administer oaths to witnesses, but we have to do that after we have a quorum present at the hearing.

However, in view of the fact that you have a long statement, you can read that as you wish, and we will administer the oath retroactively and prospectively when another member of the subcommittee is present.

Commissioner, we are pleased to have you here, and look forward to this very interesting discussion of the issues which are raised by your statement. We will then have the opportunity in the questions and answers to discuss what the proper role of the legislative branch and the executive branch is in this area. So, will you proceed, Commissioner?

**STATEMENT OF JOHNNIE M. WALTERS, COMMISSIONER, INTERNAL REVENUE SERVICE; ACCOMPANIED BY RAYMOND F. HARLESS, DEPUTY COMMISSIONER; LEE H. HENKEL, JR., ACTING CHIEF COUNSEL; DONALD O. VIRDIN, CHIEF, DISCLOSURE STAFF, OFFICE OF ASSISTANT COMMISSIONER (COMPLIANCE); AND FRANCIS I. GEIBEL, ACTING ASSISTANT COMMISSIONER (INSPECTION)—**  
Resumed

Mr. WALTERS. Thank you, Mr. Chairman.

I have with me this morning Deputy Commissioner Harless on my right and Acting Chief Counsel Henkel on my left. And back of me I have Acting Assistant Commissioner for Inspection Geibel, and Don Virdin, with whom I believe the committee is already familiar, and his secretary. I apologize, but I do not remember her name. It is Mrs. Sampson.

Mr. MOORHEAD. Well, we welcome all of you.

And would you like to have any of your associates come up to the witness table with you?

Mr. WALTERS. Mr. Chairman, this is fine, and they will come up later if need be.

Mr. MOORHEAD. Please proceed.

Mr. WALTERS. Mr. Chairman, we are pleased to be with the committee again in response to your request that we comment on matters raised by Deputy Comptroller General Robert F. Keller concerning the alleged failure of the Internal Revenue Service to make available

to General Accounting Office representatives certain records and information which the General Accounting Office considers necessary to permit that agency to conduct an effective review of Internal Revenue Service operations and activities.

On May 24, 1972, as the chairman said, we submitted a statement which we considered pertinent to your general inquiry. You and your staff have copies of that statement, with attachments, and we request that the May 24 material be associated with the current statement. We would appreciate your associating the two for the record.

In particular, we are concerned with Mr. Keller's testimony of May 16 and with his letter of May 23, 1972, to which was attached a memorandum entitled "GAO Access to Records Problem at the Internal Revenue Service."

In this statement, we hope, as the chairman indicated, to respond fully to the comments of Mr. Keller.

Our response is addressed to the basic contention that the General Accounting Office has the authority to review or oversee the administration of the internal revenue laws. You indicated your desire to give the Internal Revenue Service an opportunity to rebut positions stated by Deputy Comptroller General Keller testimony, as a matter of record, before the committee.

The question as to the authority of the General Accounting Office to review the operations of the Internal Revenue Service in all of its phases has been a matter of concern and discussion between the General Accounting Office and the Internal Revenue Service for at least 10 years. The General Accounting Office has asserted a right to review the administration of the internal revenue laws. The Internal Revenue Service consistently has taken the position that the revenue laws enacted by the Congress specifically exempt the Internal Revenue Service from review by the General Accounting Office except in matters of housekeeping.

This question, of course, is new both to me and to Mr. Henkel. I personally have reviewed the situation because the matter is grave. The committee, when we were here last week, furnished us with a copy of that letter and that memorandum. The question involves what we believe to be the statutory exemption of the Service from review, and, indeed, even beyond that, a possible encroachment on the separation of powers among the branches of government. I also have asked Mr. Henkel to review the situation from a legal standpoint. He has advised me that, in his opinion, the General Accounting Office does not have the authority to perform the types of reviews it wishes to make and that the Service does not have the legal authority to waive the statutory exemption against such review.

At this point, Mr. Chairman, we stress that we are not trying to "hold out," as the expression goes, from examination, audit or review. The fact is that Congress created its own monitor, namely, the Joint Committee on Internal Revenue Taxation, to oversee the administration and enforcement of the revenue laws. Indeed, on December 14, 1970, the Joint Committee on Internal Revenue Taxation met with representatives of the Treasury Department and the General Accounting Office and an understanding was reached that certain specific types of reviews would be performed by employees of the General Accounting Office as agents of the joint committee.

I am told that on the occasion of the December 14, 1970, meeting the joint committee passed a resolution which, in general effect, authorized the General Accounting Office to act as the committee's investigative agent under section 8022 of the Internal Revenue Code, but under joint committee control.

In letters dated January 13, 1971, Dr. Woodworth, chief of staff of the joint committee, states some of these control mechanisms, and I refer to them for the full text. In summary, however, Dr. Woodworth made it clear that the conduct of any study by employees of GAO as agents of the joint committee were subject to joint committee control, as follows:

1. The joint committee, ordinarily after consultation with the Commissioner, will authorize the GAO to act as its agent to make a particular study.

2. Before the study is begun the staff of the joint committee will counsel with representatives of the General Accounting Office and the Internal Revenue Service regarding the manner in which the study is to be carried out.

3. For each study a list of the personnel designated to conduct the study will be furnished to the Commissioner and to the joint committee staff by GAO.

4. During the course of the study, representatives of the General Accounting Office will periodically consult with the staff of the joint committee, and representatives of the Internal Revenue Service will be expected to advise the staff if the study is producing unanticipated demands upon the time of Internal Revenue Service personnel.

5. The draft report resulting from the study is to be submitted both to the Internal Revenue Service and the staff of the joint committee. The final report will go only to the joint committee with a confidential copy to the Commissioner. The joint committee would control the release of the report or any of its contents.

6. The General Accounting Office is enjoined not to use the study in any report of GAO not authorized by the joint committee and not to contact taxpayers unless authorized by the joint committee.

To date, Mr. Chairman, the joint committee has authorized only one study. This study relates to delinquent account policies and procedures. It has been in progress for approximately 18 months.

At this point, we would invite the committee's attention to the fact—and I am at this point, Mr. Chairman, adding something to this prepared statement. We would invite the committee's attention to the fact that IRS has cooperated fully in this GAO study. To this, Deputy Comptroller General Keller testified when he appeared before the committee on May 16. The fact that the joint committee so far has authorized only one GAO study does not mean the mechanism is not working. The joint committee takes its responsibilities and work quite seriously, as it should. Insofar as we know, there is no evidence indicating any reluctance to authorize additional studies. We suspect that the joint committee would entertain GAO proposals for further studies. It might be worthwhile to determine whether the GAO has requested other authorizations. We do not know whether it has or not.

Turning back to the text of the prepared statement now.

Not only do we read existing law as prohibiting GAO review of IRS administration and operations but we also see no need for legis-

lation because present law assigns the duty and responsibility for that review to the joint committee. This statement, of course, assumes that the Congress is satisfied with its present arrangement for review of IRS.

Section 8022 of the Internal Revenue Code specifically provides that it shall be the duty of the joint committee to investigate the operations and effects of the Federal system of internal revenue taxation and to investigate the administration of such taxation by the Internal Revenue Service. In pertinent part, section 8022 reads:

It shall be the duty of the Joint Committee—

(1) Investigation—

(A) *Operation and effects of law.*—To investigate the operation and effects of the Federal system of internal revenue taxes;

(B) *Administration.*—To investigate the administration of such taxes by the Internal Revenue Service \* \* \*.

In addition, I think it would be well here to quote section 6406 of the Internal Revenue Code which reads in essential part:

In the absence of fraud or mistake in mathematical calculation, the findings of fact in and the decision of the Secretary or his delegate upon the merits of any claim presented under or authorized by the internal revenue laws and the allowance or nonallowance by the Secretary or his delegate of interest on any credit or refund under the internal revenue laws shall not \* \* \* be subject to review by any other administrative or accounting officer, employee or agent of the United States.

The present exploration of the duty, responsibility, and authority to administer the internal revenue laws and the Internal Revenue Service, with legislative oversight only by the joint committee, apparently had its inception in a series of requests by the General Accounting Office commencing in 1967, for access to Internal Revenue Service operating procedures and information.

The first dealt with the reporting practices of certain named taxpayers with respect to State tax refunds. The General Accounting Office intended to relate the reporting practices of these specific taxpayers to Service procedures and controls respecting that type of income-deduction item. The thrust of this request would be to determine whether or not the Service in general should examine returns of all taxpayers who had claimed in 1 year the deduction for the payment of State taxes and then compare the reporting practices of those same taxpayers as to State tax refunds in subsequent years. They would have to examine the returns of each taxpayer to determine whether or not such taxpayer had properly handled the tax refund in subsequent years. In short, there would be an audit made by the General Accounting Office. Moreover, for the information to have any real definitive value, the GAO would have to contact the particular taxpayers.

Later, in 1968, Mr. Neuwirth of the General Accounting Office requested statistical studies made by the Internal Revenue Service in connection with its taxpayer compliance measurement program. The TCMP information was designed by the Service to furnish information concerning the size of the audit problem, the audit problem by class of return, and some aspects of the audit problem by source of error in returns. As Mr. Neuwirth indicated in his letter dated January 4, 1968, GAO expected "to utilize the report to assist" the General Accounting

Office "in planning and scheduling reviews of Internal Revenue Service operations."

These two requests are related in purpose, namely, the review of the administration of the Internal Revenue Code. As Mr. Keller stated in the attachment to his letter of May 23, 1972, access to taxpayer records would be needed in order for the General Accounting Office to examine into the adequacy of the Internal Revenue Service returns selection and classification techniques.

The fact is that if by guidelines and tolerances a return is not audited but is accepted as filed the tax liability of the particular taxpayer has been determined by the Service just as much as if the return had been examined in detail and accepted as filed, or refund made, or an additional tax assessed and collected.

From a practical point of view, we feel the Congress has been well aware that the tax administration is unique and as far as possible must be left to the administrators but with appropriate surveillance by the Joint Committee on Internal Revenue Taxation.

The memorandum filed by Mr. Keller states, in part:

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 for that of IRS in individual tax cases; rather, GAO is interested in examining 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 GAO believed improvements in current operations would bring about better IRS administration of programs, activities, and resources.

Quite simply and in plain language, this aim, in our opinion, is equivalent to review of the administration of the internal revenue laws. It is a review of the internal revenue administration which is prohibited by section 6406. It is obvious that this type of review would mean an intensive physical presence of the General Accounting Office in the Internal Revenue Service—a type of dual administration. Balancing between the desirability of this type of review and the possible loss of revenue efficiency which might result therefrom is a matter that we feel should be passed upon by the Joint Committee on internal revenue taxation. The secretary or his delegate has been given the exclusive duty and responsibility for collecting and protecting the revenue. He has the responsibility for the end result of the collection of the revenue. He cannot pass that responsibility on to anyone else.

The Revenue Service has day-to-day contact with the general public. There are provisions for appeal from its determinations. In addition, it is well known that if any Internal Revenue Service employee offends a taxpayer, that taxpayer may and often does communicate to the Commissioner his complaint. Taxpayers and nontaxpayers do not hesitate to write to Members of Congress registering complaints. This is all to the good. It illustrates that the Revenue Service is under constant surveillance by the public and by Congress, as well as by the Joint Committee.

I might add at this point, Mr. Chairman, that also we are under constant surveillance by the courts in much litigation.

Mr. Keller also stated in substance that the Internal Revenue Service has permitted Federal agencies, States, individuals, contractors, and others to have access to tax returns and records. Apparently the focus

of the remark was directed to the disclosure of income tax returns and files. In our May 24, 1972, statement, I submitted explanations which detail those to whom access to income tax returns and files is granted. Nevertheless, we emphasize that IRS is constantly alert to this extremely sensitive issue and does not make unauthorized disclosures. This statement, Mr. Chairman, may be unnecessary in view of our presence here this morning, because if we were not so constantly alert we probably would not be here this morning. Under our voluntary self-assessment tax system to make unauthorized disclosures would be disastrous. We are fully aware of that and we believe this committee also is. Mr. Keller's reference may leave the impression from the words "individuals, contractors, and others" that access to income returns is handled in a "loose" manner. Such is not the case. Our May 24, 1972, transmittals demonstrate that the Service adheres strictly to the disclosure laws.

IRS refusals to disclose income tax returns to the General Accounting Office have been essentially because the review was not in connection with a matter officially before the General Accounting Office. Income tax information is furnished to other Federal agencies only as to matters presently before them and to States only for State tax purposes, strictly in accordance with applicable law. Because the position of the Service and the Chief Counsel is that the General Accounting Office is prohibited by statute from reviewing the administration and enforcement of the revenue laws, the Service has not furnished the General Accounting Office with income tax returns or related information. In addition, we have refused to make available to the General Accounting Office the TCMP statistics referred to above for the purpose of GAO review of Internal Revenue Service operations.

As the regulations are constituted at present, returns of income and related material, as well as the similar material with respect to the other taxes enumerated in section 6103 of the code, can only be made available to the General Accounting Office on the request of the Comptroller General personally and on a name by name basis under section 6103(a)(1)(f) of the regulations approved and promulgated by the President. Under that section, the Internal Revenue Service may not even elect to allow the General Accounting Office to have the right of general access to income tax return files. Hence, assuming enactment of legislation authorizing the General Accounting Office to review and evaluate Internal Revenue Service operations, we think an Executive order and regulations under section 6103 still would be necessary. Alternately, of course, Congress could pass a law or a joint resolution allowing that access. Without one of these prerequisites, the law does not allow for general access by the General Accounting Office. Of course, as already indicated, the General Accounting Office, acting as the authorized agent of the Joint Committee, under the right of the Joint Committee, may obtain access to income returns and files under section 6103(d) and section 8021 of the code.

Mr. Keller observed, at page 6 of his memorandum, that the Joint Committee may request the opinion of GAO as to other areas which should be examined. We see no bar to an investigation by the Joint Committee in which that committee would utilize personnel of GAO as its agents. The Joint Committee has the authority and undoubtedly would listen to both the Internal Revenue Service and the General

Accounting Office and decide what it feels is required, if anything, in the way of preliminary or final studies.

The memorandum enclosed with Mr. Keller's letter of May 23, 1972, contains specific references to "examples of recent and pending GAO activities which involve access to records problems." We believe the comments already made respond to his observations relating to the administration of the Federal highway use tax and the operations of the Alcohol, Tobacco and Firearms Division. We have under study the recent request included in a letter dated May 5, 1972, concerning a proposed GAO review of economic stabilization activities of the IRS, and the additional request included in another letter dated May 5, 1972, concerning contacts with service personnel in the expectation that the Joint Committee will wish GAO to conduct further studies.

In our May 24, 1972, appearance before this committee, we agreed to furnish a copy of the September 1967 chief counsel's opinion relative to this issue we are discussing. We submitted that opinion on May 26, 1972. We have attached to this statement, as exhibit A, a copy of the chief counsel's opinion dated May 30, 1972, concerning the lack of legal authority of the General Accounting Office.

Mr. MOORHEAD. Without objection, the various exhibits will be made a part of the record.

(The September 1967 opinion, exhibits, and attachments referred to follow:)

SEPTEMBER 5, 1967.

WILLIAM H. SMITH,  
Deputy Commissioner,  
Lester R. Uretz, (signed Lester R. Uretz)

GENERAL ACCOUNTING OFFICE—AUDIT AUTHORITY RESPECTING ADMINISTRATION  
OF INTERNAL REVENUE CODE

We refer to your memorandum dated June 27, 1967, in which you request advice on whether or not the General Accounting Office has the authority to audit or review Service or lack of Service controls and procedures relating to taxpayer reporting of State individual income tax refunds as income on federal tax returns.

The question naturally involves whether the Service may legally provide the Comptroller General with income tax return information on specific taxpayers for his use in acting on a matter if that matter is by law within the exclusive responsibility of the Commissioner of Internal Revenue. *Our answer to this proposition is that the administration of the Internal Revenue Code, including the type of review proposed by the Comptroller General, is a matter delegated by law solely to the discretion of Secretary or his delegate and that he or his delegate is solely responsible for the exercise of that discretion. Therefore, such a matter could not be officially before the General Accounting Office for the purpose of the proposed review, and under the Presidential regulations, Treasury Decision 6543, Regulations, 301.6103(a)-1(f), the Commissioner may not furnish the requested information.*

On the corollary problem, we find that the General Accounting Office, although a legislative function, is a "Federal establishment" within the meaning of the said Regulations and thus the Commissioner in his direction could honor a request of the General Accounting Office to inspect income tax returns on a name by name basis for use in a matter within its jurisdiction, and thus "officially before" it.

We have examined the correspondence passing between your office and the Comptroller General. Without endeavoring to describe the various nuances of the contacts concerning this matter, we will briefly note their general tenor.

Initially the Comptroller General advised that his office "is making a review of Internal Revenue Service procedures and controls relating to taxpayers' reporting of State individual tax refunds as income on federal tax returns" and furnished a list of taxpayers who had apparently received tax refunds from certain states. In summary, he desired information from income tax returns for the



years 1963 and 1964, which would reflect the reporting practices of these named taxpayers.

The Service supplied him with data in statistical form, which was readily available without audit, but which was necessarily incomplete, and did not relate to identifiable taxpayers. The Service in its letter of May 6, 1967, advised that identifiable income tax information could not be properly disclosed, and admitted awareness of the compliance problem in the area of taxpayer reporting of state tax refunds. The position taken was that at present the Service does not have the manpower or equipment necessary to establish effective controls. (We understand informally that from what evidence is available, this type of control is not economically feasible.)

The Comptroller General was not satisfied with statistical data. In his reply letter of June 12, 1967, the Comptroller General defined his purpose in the following words:

"Accordingly, we request that the dollar amount of State income taxes claimed as deductions by each of the 143 taxpayers be furnished us. *The data will assist us in making a further analysis of the 143 taxpayers' income reporting practices and in reaching a final conclusion concerning this matter.*" (Emphasis supplied.)

Any meaningful analysis designed to show the dollar amount of state tax refunds not reported or reported, as related to dollar volume of itemized state tax deductions taken, would require complete return information. Otherwise, the analysis would have no context with Service lack of blanket controls. Essentially, this review would constitute at a minimum a comparative analysis of return information. If that was not sufficient, then an office audit of the 1963 and 1964 returns would be required. Finally, a full scale audit of the returns might be required. There is no difference between this type of review and a review of administrative guide lines and tolerances; or of general audit procedures; of the audit of general classes of returns or general classes of items in returns or of the audit of specific returns or review of the effectiveness of collection policies and procedures, or the review of the settlement of cases, offers in compromise, refunds, etc.

In a larger sense Congress has delegated the administration of the Revenue Code, including the power of discretion in such administration, to the Secretary or his delegate. Most importantly, Congress has indicated it was their intention to hold the Secretary or his delegate solely responsible for the exercise of all delegated powers. (Senate Report No. 27, page 230, 69th Congress, 1st Session (1926)). See also 37 OAG 56, 60 (1933).

A memorandum of law outlining the legal basis for our firm opinion in this respect is transmitted herewith. However, we will briefly note some of the salient legal factors involved, and the prior position of this office in a somewhat similar problem. My predecessor, Mr. Rogovin, in a memorandum dated November 24, 1965, with respect to the agricultural payments, stated:

"We have not made a study in depth of the authority of the Comptroller General as against the authority of the Treasury in this matter; however, it seems that the purpose of their request and the facts involved speak eloquently of a matter solely within the discretion of the Treasury, and, of course, the Commissioner as a delegate of the Secretary." [Italic supplied.]

Now we have examined this problem in some depth, within the time permitted, and affirm that position.

As you know, section 6106 of the Internal Revenue Code prohibits the administrative review of decisions of the Secretary or his delegate upon the merits of any claim presented or authorized by the Internal Revenue laws by any other administrative or accounting officer or employee or agent of the United States, except the review given by law to the Tax Court.

The wording of this statute and its legislative history, clearly indicate the great breadth of this exemption from administrative review and specifically from review by the Comptroller General.

The Budget and Accounting Act of 1921 which became effective August 11, 1921, created "an establishment of the Government to be known as the General Accounting Office and to be under the direction of the Comptroller General of the United States," (31 U.S.C., section 41).

On September 15, 1921 (less than a month and a half after the effective date of the Budget and Accounting Act), the Treasury spokesman pointed out to the Congress the possibility of the duality of audit, when he said at a Senate Finance Committee confidential hearing:

"I have a new provision with relation to claims for refund of taxes in the Treasury Department. It is a thing that you can pass judgment upon very quickly. The proposition is this: The new budget bill practically gives the right to a final determination on on [sic] all claims against the Government. It puts it in the hands of the Controller [sic] General. He has the final say on all claims. The question is whether you want him to have the final say on all these technical tax questions. In other words, you have a bureau up there which costs five, six, seven, or eight million dollars a year. It is technical on the highest extreme. I can not think of the Controller General performing that work satisfactorily without duplicating the machinery already provided."

Congress then passed the Revenue Act of 1921 (effective November 21, 1921), which in Section 1313 enacted the wording requested by Treasury:

"That in the absence of fraud or mistake in mathematical calculation, the findings of facts in and the decision of the Commissioner upon (or in case the Secretary is authorized to approve the same, then after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by any other administrative officer, employee, or agent of the United States."

This section, except for minor changes, is now Section 6406. The principle announced in 1921 has been followed in all subsequent revenue laws and codes.

Under the Revenue Act of 1921 a taxpayer could not contest his tax except by paying the tax and suing for a refund. In effect he filed a "claim" against the Government. Today the same theorem of Revenue Service-taxpayer relationship applies because to contest an assessment the taxpayer is the claimant and the Commissioner or the District Director is the respondent. In effect all litigation involving internal revenue taxes involves a claim against the Revenue. The assessment of tax by the Commissioner is *prima facie* correct.

In 1924 Congress amended this section by inserting the word "accounting" between the words "administrative officer" so that the new section provided that the findings of fact and the decisions of the Commissioner "shall not \* \* \* be subject to review by any other administrative or accounting officer, employee or agent of the United States." Section 1007, Revenue Act of 1924. The debates make clear that Congress intended the 1921 exemption statute to apply to the GAO and that through oversight the word "accounting" had been left out and hence it was being put back in the Revenue Act (Congressional Record Vol. 65, part 7, page 7141).

In 1926 Congress considered two other matters which emphasized that the administration of the Internal Revenue laws is the exclusive responsibility of the Secretary or his delegate. These are (1) the differences of opinion between the Secretary and the Comptroller General regarding the determination of customs duties and (2) the creation of the Joint Committee on Internal Revenue taxation.

Referring to the first incident, GAO contended that all Customs Bureau documents had to be sent to GAO before it would settle the customs accounts.

Although the Tariff Act did not contain a statutory exemption like that in Revenue Act of 1921, the Attorney General held that the Comptroller General had no such audit authority. (34 OAG 311 (1924)). The Comptroller General disagreed.

The difference of opinion was carried to Congress by Treasury, who asked for a specific tariff act exemption statute such as the Revenue Acts had. The House agreed, and in the Tariff Amendments Act of 1926 passed such an exemption section. House Report No. 1137, p. 24, 69th Congress, 1st Session (1926)). The Senate Finance Committee recommended the Law for passage. (Senate Report No. 1026, 69th Congress, 1st Session (1926)). The Comptroller General by letter advised the Finance Committee that the law as enacted by the House could be interpreted as *preventing even the accounting for funds received*. (Senate Report No. 1650, 69th Congress, 2d Session (1927)). He later advised the Finance Committee that he agreed with Treasury that he could not take the records, and agreed further that he could not audit Customs' findings of law and fact. Apparently, in view of this agreement on respective jurisdictions, Congress did not amend the Tariff Act. The Senate report referred to above was reported to the Senate. (68 Congressional Record, p. 4975, 69th Congress, 2d Session (1927)). The debates clearly show the feeling in Congress that Internal Revenue Service

was indeed exempt. (67 Congressional Record, pp. 10, 854, 10988, 12535, (1926)).

The second incident involved the Couzens Committee investigation of the Revenue Service in 1924 and the resultant creation in 1926 of the Joint Committee on Internal Revenue Taxation.

The report of the Couzens Committee in 1926 stated in part, "By vesting all discretionary powers under the Revenue Acts in the Commissioner, Congress clearly evidenced an intention to hold him solely responsible for the exercise of all delegated powers". (Senate Report No. 27, page 230, 69th Congress, 1st Session (1926)).

The Senate Committee, in commenting on the powers to be vested in the Joint Committee, observed that Congress required a procedure so that it could be advised of the systems and methods employed in the administration of the Revenue laws, in order to appraise the need for future legislation. It observed further that such a function properly belonged to the Senate Finance Committee and the House Ways and Means Committee, jointly. (Senate Report No. 52, 69th Congress, 1st Session (1926)).

The Joint Committee so established then and now (by section 8022 of the Code) has the duty to investigate the administration of Internal Revenue taxes, according to the above report, for legislative purposes. In addition, the Joint Committee is composed of ten members, five from the Senate Finance Committee and five from the House Ways and Means Committee.

With further reference to the Joint Committee, in 1932 Congress passed a bill providing that the Joint Committee was authorized to make the final decision on refunds of taxes proposed by the Commissioner in amounts exceeding \$20,000.00. The bill was vetoed on the recommendation of the Attorney General because, in his opinion, it was an unconstitutional violation of the principle of separation of powers. His opinion stated in part, "Where, as under existing law, machinery has been set up in the Treasury Department for administrative examination and allowance of these claims by executive officers, the function of executing this law becomes an executive one and must be left with the executive officers appointed not by the Legislative Branch but by the Executive." (37 OAG 56, 60 (1933)).

The veto was not overridden by Congress. Nor has the authority of the Joint Committee been changed since that time.

Briefly stated today as in 1926 and 1932, all refunds or credits of income and certain other taxes in excess of a stipulated amount must be reported to the Joint Committee and no such credit or refund shall be made until after the expiration of 30 days from the date the report is made. (Section 6405 of the Code).

It appears that Congress has specified the type and extent of review, and indeed this is advisory by statute, which it is willing to exact.

Presumably, the Commissioner could make the credit or refund regardless of the Committee's views, although for obvious reasons he does not do this. However, the review provisions in this particular area, and the administrative area so reserved to the Joint Committee are an affirmation that the administration of the Code by the Commissioner is not subject to review by the Comptroller General either specifically or in general.

Nothing said here is meant to derogate the function of the General Accounting Office to advise with the Service on accounting methods for funds collected, and their disbursement.

Incidentally, there are other federal agencies and establishments whose decision making functions are exempt from review by the Comptroller General. Examples are the Veterans' Administration in its actions on veterans' claims; Department of Health, Education and Welfare on social security claims; and the Tennessee Valley Authority.

Eminent authors have recognized that the Comptroller General is definitely precluded from reviewing the acts of the Secretary or his delegate. Mansfield, the Comptroller General, page 192-194 (1939); W. F. Willoughby, *The Legal Status and Functions of the General Accounting Office of the National Government*, pp. 73-75 (1927); and Kohler-Wright, *Accounting in the Federal Government*, p. 78 (1956).

We are available for further discussion with respect to this matter.

LESTER R. URETZ, *Chief Counsel*.

EXHIBIT A  
MEMORANDUM

MAY 30, 1972.

TO: JOHNNIE M. WALTERS, *Commissioner*.  
FROM: LEE H. HENKEL, JR., *Acting Chief Counsel*.  
Subject: Lack of legal authority of the General Accounting Office to review the administration and the enforcement of the Internal Revenue Code.

Subsequent to the recent request to you by the Honorable William S. Moorhead, chairman, Foreign Operations and Government Information Subcommittee of the Committee on Government Operations of the House of Representatives, I have reviewed the positions taken by this office and the Service, to the effect that the General Accounting Office does not have the legal authority to conduct reviews of the administration and enforcement of the Internal Revenue Code. I have gone over the recent opinions of this office concerning requests made in the past 3 or 4 years by representatives of the General Accounting Office for access to Service files and operations. Apparently, Mr. Keller's present conception is the same as previously maintained but is now couched in much broader terms. It is my belief that the positions which have been taken in the past are sound as demonstrated by the following discussion.

The Internal Revenue Service advised this office that over a period of years the General Accounting Office, hereinafter frequently referred to as the GAO, has endeavored to implement its claimed right of review on all phases of the administration and enforcement of the Internal Revenue Code. It alleges that it has the right and responsibility to review or audit the manner in which the tax administration activities are conducted; that is, to analyze management discretion in the administration and enforcement of the Internal Revenue Code. Indeed, the GAO, while asserting that it would not seek to change the Commissioner's tax determinations, has reserved the right to comment on such determinations as may come to its attention during its management review of Service tax files.

It has been the firm view of the Internal Revenue Service that the General Accounting Office does not have the legal authority to conduct audits and review of the administration and the enforcement of the Internal Revenue Code. Indeed, Congress by statute has stated that except as otherwise expressly provided by law, the administration and enforcement of the Internal Revenue Code shall be performed by or under the supervision of the Secretary of the Treasury (sec. 7801 of the Internal Revenue Code). There is no such express exception in law other than the duty of the Joint Committee on Internal Revenue Taxation to investigate the administration of the Internal Revenue Service (secs. 8001 to 8023, inclusive, of the Internal Revenue Code).

The Internal Revenue Service, in responding to requests by the GAO for Service files relative to an ever widening scope of review, has denied access because the GAO would be encroaching upon the exclusive functions of tax administration.

*Recent statement of the GAO position, with comments*

In the November 1, 1968, communication, which is a declaration of the position of the GAO, particular note has been taken of statements of powers possessed by that organization, as follows:

"\* \* \* review of the manner in which tax administration activities are conducted." (p. 1)

"\* \* \* the authority to analyze management discretion in the collection of revenue." (p. 2)

"the purpose of any GAO audit of the Internal Revenue Service would be to ascertain and report to the Congress on the use by Internal Revenue Service of appropriated funds in its tax collection efforts." (p. 3)

The GAO disclaims that it would intend to violate section 6406 of the Code which continuously since the time of the creation of the GAO in 1921 specifically prevented review by the GAO of the merits of tax determinations made by the Service. However, when asserting the right to review the use by the Service of appropriated funds in its tax collection efforts, the GAO so qualifies its disclaimer of review of tax claims and decisions as to make it meaningless and in fact to show that it will in effect "review" this area. It states:

"\* \* \* This would in no way involve review of tax claims and decisions with a view to set aside or change decisions which under the law are final when made by IRS. Similarly, such an audit of IRS would not entail any supervision of the procedures followed in making tax determinations. This is not to say that our

audit reports would not advise the Congress, if necessary, of weaknesses in procedures followed but we would not actually supervise these procedures."

Little difference, if any, can be discerned between the disclaimed "review of tax claims and decisions" and an audit reporting to the Congress on the use by IRS of appropriated funds in tax collection efforts including comments on "weaknesses in procedures followed in those efforts". Either would require a belief by the GAO that it has an affirmative right to tell the IRS how IRS should be using appropriated funds in its tax collection efforts, case by case.

The relationship among separate requests of the GAO for information; the specific review purposes the GAO has stated in making such requests and the review aims stated by the GAO in its letter of November 1, 1968, demonstrates that the GAO asserts its alleged review authority over the administration and enforcement of the Internal Revenue Code in the broadest possible terms. (Later herein several recent illustrative requests of the GAO will be discussed.)

The reviews sought by the GAO include examining specific tax returns; delving into audit and collection activities on a case by case basis, including the conversion of such information to statistics, and from this reviewing the audit and collection policies of the Service; analyzing the past application of Service manpower, and enforcement resources as related to the audit and collection results achieved; analyzing definitive IRS audit statistical studies of the dimension of the audit problems (the number of correct returns filed, the classification of errors, and understatements of tax by tax type of return, income or expense); and which classes of returns and return items should be subject to selection for audit or not audited [selected or accepted as filed on a blanket basis, and so forth]. The logical extension of this type of review would include a research of management discretion analyzing the application of manpower and facilities to the collection effort, on a current basis; appraising the budget problem in terms of the future size of the examining force, as related to the number of returns anticipated; evaluating guidelines and tolerances of litigation and settlement policies, whether performed by the Tax Division of the Department of Justice or the Chief Counsel's attorneys, and considering whether the Service should have acquiesced in adverse court decisions which ultimately involves administrative policies of settlement and litigation. In short, it follows logically that the GAO review would include all phases of administration and enforcement of the Internal Revenue Code. Examples later to be cited will be relevant to these factors.

If the Commissioner's decision on a specific return is reviewable specifically and in general terms of management analysis as proposed by the GAO, and if such decision is a final judgment of taxes (as it would be), a logical extension would include the principle that GAO should also review the decisions of the Chief Counsel to appeal or not to appeal adverse court decisions and then comment on whether the courts have correctly decided the cases.

These review factors show the basic impact of the total review power claimed by the GAO. Subsequent discussion will illustrate the concomitants of such a review. As noted at the beginning of this memorandum, the administration and enforcement of the Revenue Code has been confided by Congress to the Secretary of the Treasury. On this premise alone, the GAO should recognize that it does not have authority to review any of these discretionary and administrative functions or to comment officially upon them.

It is apparent that the authority to review, audit and comment as proposed by the GAO could effectively undercut the Secretary's authority to administer and enforce the code.

There are additional factors showing that Congress never intended that the GAO should have the review authority that it contends it has with respect to the Internal Revenue Service. However, before commenting on these factors, attention is invited to several matters akin to the question here involved which have in the past been considered by the Attorney General.

#### *Prior Attorney General opinions in comparable situations*

In 1924, Attorney General Harlan F. Stone considered, at the request of the Treasury Department, the Comptroller General's contention that he had the right to pass upon the correctness of duties collected by the Collector of Customs on imported merchandise. Attorney General Stone concluded:

"Nowhere in the Tariff Act of 1922, or in the Budget and Accounting Act of 1921, has there been given to the Comptroller General the power of reviewing the acts or decisions of the Collectors of Customs in the liquidation of entries

of imported merchandise or the allowance and payment of drawbacks on drawback entries. Nor has there been conferred upon the Comptroller General the power to review or modify the regulations promulgated by the Secretary of the Treasury for the administration of the Customs Laws.

"It is my opinion, therefore, that the Comptroller General is not clothed with such reviewing power.

"Answering your specific questions I have the honor to advise you that:

"1. The Comptroller General has no statutory authority to require to be forwarded to him any other papers relating to entries of imported merchandise than those prescribed by the Secretary of the Treasury.

"2. The Comptroller General has no authority, express or implied, to review the collectors' liquidations of entries of imported merchandise and drawback entries." (34 O.A.G. (1924) 311, 319.)

It is of significance that this decision was reached even though the Tariff Act did not have any specific provision precluding review by the GAO. The Comptroller General, disagreeing, carried the conflict to Congress. When it was there proposed to pass an exemption statute similar to that in the Revenue Acts, he concluded an arrangement with the Treasury which recognized that he could not review Custom's findings of law and fact. The debates on the proposed exemption statute evidence the congressional view that the Internal Revenue Service was exempt from the GAO review (see House Report No. 1137, p. 24, 69th Congress, 1st session (1926); Senate Report No. 1026, 69th Congress, 1st session (1926); Senate Report No. 1650, 69th Congress, 2d session (1927); 68 Congressional Record, p. 4975, 69th Congress, 2d session (1927); and 67 Congressional Record, pp. 10,854, 10,988, 12,535 (1926)).

In another instance the Department of Justice issued an opinion concerning the constitutionality of a revenue bill passed by Congress in 1932 providing the Joint Committee on Internal Revenue Taxation with authority to make the final decision on tax refunds in excess of \$20 thousand. The bill was vetoed on the recommendation of Attorney General Mitchell who stated in his opinion, 37 O.A.G. 56, 60, 61, 64, 65 (1932):

"There are various ways in which refunds of illegally collected taxes may be provided for. Congress, if it chooses, acting under the power to make appropriations from the Public Treasury and the power to maintain the immunity of the Federal Government from suit in the courts, may withhold the power to make refunds from the executive branch and from the courts, and itself deal with the subject by the method of making specific appropriations from time to time to pay specific claims which it deems just. Dealt with in that manner, the authorization of the refund constitutes a legislative act. If Congress confers jurisdiction on the courts to examine such claims and award judgment against the Government, the function of allowance becomes a judicial act, although there still remains the necessity for legislative action in the form of appropriations to pay the judgments. Where, as under existing law, machinery has been set up in the Treasury Department for administrative examination and allowance of these claims by executive officers, the function of executing this law becomes an executive one and must be left with executive officers appointed not by the legislative branch but by the Executive.

"It will be seen, therefore, that the matter of making refunds may involve either legislative, executive, or judicial functions, depending on the system adopted, but in the present case it is unnecessary to make any close analysis of the nature of the function of refunding illegally collected taxes. If it be an executive or judicial function, clearly a joint committee of the Congress may not execute it, and if it is a legislative function it is equally clear that a joint committee may not perform it. Action by a committee is not legislation, and a committee of the Congress can not legislate.

\* \* \* \* \*  
 " \* \* \* To acquiesce in legislation having a tendency to encroach upon the executive authority results in establishing dangerous precedents.

\* \* \* \* \*  
 " \* \* \* Encroachments on the executive authority are not likely to be deliberate but that very fact makes them all the more insidious."

*Factors showing congressional intent not to permit the GAO to review the administration of the Internal Revenue Code*

In addition to the broad principles already mentioned, there are specific factors which demonstrate that Congress did not intend the GAO to have the review authority for which it contends with respect to the Internal Revenue Service.

These factors are summarized as follows:

(1) Congress in section 6406 of the Internal Revenue Code of 1954 prohibits the administrative review of decisions of the Secretary or his delegate upon the merits of any claim presented or authorized by the Internal Revenue law, by any other administrator, accounting officer, or employee of the United States, except the review given by law to the Tax Court (when the law was passed the Tax Court was considered an administrative tribunal). This law has been on the books continuously since November 21, 1921, only several months after the effective date of the Budget Act which created the GAO. This exemption was originally inserted, later made more specific and still later retained, with the specific purpose of keeping the Comptroller General out of the administration and enforcement of the Internal Revenue laws and codes. The exemption of section 6406 is larger than merely a question of the GAO reviewing or commenting upon a single claim. The enforcement and administration process on claims begins with the Commissioner's decision to audit a specific return or accept it as filed. Obviously, not all returns can be audited economically. There must be guidelines and tolerances for the audit and collection efforts. A decision pursuant to guidelines to determine to accept certain classes of returns as filed, or after a cursory examination to accept a specific return as filed, is just as final, barring fraud, as a decision finding a refund or a deficiency. It is thus apparent from the outset that the expenditure of manpower and Service resources of enforcement and administration, are inseparable from the Commissioner's determining the merits of claims.

(2) The Revenue laws since 1926 have charged the Joint Committee on Internal Revenue Taxation with the continuous duty of investigating the administration of the revenue (see sections 8001 to 8023, inclusive, of the Internal Revenue Code). The creation of the Joint Committee was made after a searching investigation by the Couzens committee which started in 1924, only a few years after the GAO was created, and while the predecessor to section 6406 and the customs import duties conflict were before Congress.

(3) When Congress has desired to review the administration operation of the revenue laws, it has acted through the Joint Committee, the House Ways and Means Committee, the Senate Finance Committee, or specially designated committees or groups.

The above points are elaborated in the following:

(1) The administration and enforcement of the Revenue Code in all phases is specifically exempt by section 6406 of the code, from any review or audit by the GAO.

Section 6406 of the Internal Revenue Code prohibits the administrative review of decisions of the Secretary or his delegate upon the merits of any claim presented or authorized by the Internal Revenue laws by any other administrative or accounting officer or employee or agent of the United States, except the review given by law to the Tax Court.

The wording of this statute and its legislative history, indicate the great breadth of this exemption from administrative review and specifically from review by the Comptroller General.

The Budget and Accounting Act of 1921, which became effective August 11, 1921, created "an establishment of the Government to be known as the General Accounting Office and to be under the direction of the Comptroller General of the United States," (31 U.S.C., sec. 41).

On September 15, 1921 (less than a month and a half after the effective date of the Budget and Accounting Act), the Treasury spokesman pointed out to the Congress the possibility of the duality of audit, when he said at a Senate Finance Committee confidential hearing:

"I have a new provision with relation to claims for refund of taxes in the Treasury Department. It is a thing that you can pass judgment upon very quickly. The proposition is this: The new budget bill practically gives the right to a final determination on on [sic] all claims against the Government. It puts it in the hands of the Controller [sic] General. He has the final say on all claims. The question is whether you want him to have the final say on all these technical tax questions. In other words, you have a bureau up there which costs five, six, seven, or eight million dollars a year. It is technical on the highest extreme. I can not think of the Controller General performing that work satisfactorily without duplicating the machinery already provided."

Congress then passed the Revenue Act of 1921 (effective Nov. 21, 1921), which in section 1313 enacted the wording requested by Treasury:

"That in the absence of fraud or mistake in mathematical calculation, the findings of facts in and the decision of the Commissioner upon (or in case the Secre-

tary is authorized to approve the same, then after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by another administrative officer, employee, or agent of the United States."

This section, except for minor changes, is now section 6406. The principle announced in 1921 has been followed in all subsequent revenue laws and codes.

Under the Revenue Act of 1921, a taxpayer could not contest his tax except by paying the tax and suing for a refund. In effect he filed a "claim" against the Government. Today the same theorem of Revenue Service-taxpayer relationship applies because to contest an assessment the taxpayer is the claimant and the Commissioner or the district director is the respondent. In effect all litigation involving internal revenue taxes involves a claim against the Revenue. The assessment of tax by the Commissioner is prima facie correct.

In 1924 Congress amended this section by inserting the word "accounting" between the words "administrative officer" so that the new section provided that the findings of fact and the decisions of the Commissioner "shall not \* \* \* be subject to review by any other administrative or accounting officer, employee, or agent of the United States." Section 1007, Revenue Act of 1924. The debates show that Congress intended the 1921 exemption statute to apply to the GAO and that through oversight the word "accounting" had been left out and hence it was being put back in the Revenue Act (Congressional Record, vol. 65, pt. 7, p. 7141).

In 1926, Congress considered two other matters which emphasized that the administration of the Internal Revenue laws is the exclusive responsibility of the Secretary or his delegate. These are (1) the differences of opinion between the Secretary and the Comptroller General regarding the determination of customs duties, which has been discussed above, and (2) the creation of the Joint Committee on Internal Revenue Taxation, which will be discussed under point 2 hereof.

Of even greater significance is the action taken by the Congress in enacting the Revenue Act of 1928. The Senate had proposed a provision which would have given review authority to the GAO because it read as follows:

All claims, rebates, refunds, compromises, set-offs, and credits in any form whatsoever allowed by the Commissioner of Internal Revenue in excess of \$10,000 on account of income taxes shall be audited by the General Accounting Office the same as other expenditures of the Government, notwithstanding the provisions of any other law.

At conference the amendment proposed by the Senate was stricken. Conference Report No. 1882, dated May 25, 1928, states:

Amendment No. 200: The House bill made no change in the provisions of existing law (section 1107 of the Revenue Act of 1926) [section 1107 was a successor provision to section 1313 of the Revenue Act of 1921 and a predecessor to section 6406 of the 1954 Code] prohibiting a review by the General Accounting Office of decisions by the Commissioner under the internal revenue laws. The Senate amendment provides that all claims, refunds, etc., allowed by the Commissioner in excess of \$10,000 shall be audited by the General Accounting Office. *The audit now accorded by the Bureau of Internal Revenue is entirely adequate to protect the interests of the Government, and there is no necessity for the Senate amendment; and the Senate recedes, thus leaving 1107 applicable.* (Italic supplied.)

The significance of the action taken by the Congress is further emphasized by the comments of Senator Howell who had proposed the amendment adopted by the Senate. Senator Howell stated:

*Mr. President, the expenditures of every department of Government, or nearly every department of Government are audited by the Comptroller General, no matter how small the purchases may be. However, that is not true of a division of the Treasury Department, the Bureau of Internal Revenue. Although expenditures made by that department have involved billions of dollars there is no audit whatever by the Comptroller General to determine whether the expenditures are made according to law or in accord with the regulations.*

Section 3220 of the Revised Statutes, as amended by section 1111, Act of February 26, 1926, authorizes the Commissioner of Internal Revenue to remit, refund, and pay back all taxes erroneously or illegally assessed or collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount or any manner wrongfully collected. (Italic supplied.)

By rejecting the amendment the Congress preserved the independence of the administration of the Revenue from review by the GAO.



The purposes of two requests for review by GAO will illustrate the application of section 6406 and its predecessors, and its prohibition against review by the GAO.

In 1967, the Comptroller General requested that the dollar amount of State income taxes claimed as deductions in the income tax returns for certain years filed by 143 named taxpayers. As he said, "The data will assist us in making a further analysis of the 143 taxpayers' income reporting practices and in reaching a final conclusion in this matter," which was that his office "was making a review of Internal Revenue Service procedures and controls relating to taxpayer's reporting of State individual tax income on Federal tax returns."

In short, the returns of these 143 taxpayers and the Service's action as to them were to be a statistical study from which the GAO would draw large conclusions. The point is that they were going to review the merits of each of these returns and the Commissioner's action or inaction with respect to them and what management decision he had made, if any, concerning the audit of this class of income and deduction item.

Any meaningful analysis designed to show the dollar amount of State tax refunds reported or not reported, as related to dollar volume of itemized state tax deductions taken, would require complete return information. Otherwise, the analysis would have no meaning in relation to audit controls. Essentially, this review would constitute at a minimum a comparative analysis of return information. If that was not sufficient, then an office audit of the 1963 and 1964 returns would be required. Finally, a full-scale audit of the returns might be required. There is no difference between this type of review and a review of administrative guidelines and tolerances; or of general audit procedures; of the audit of general classes of returns or general classes of items in returns or of the audit of specific returns or review of the effectiveness of collection policies and procedures; or the review of the settlement of cases, offers in compromise, refunds, et cetera.

The GAO subsequently made a request for Service research material for the same type of review noted above, but involving much wider vistas. The information sought was an interim report of a comprehensive research project known as the taxpayer compliance measurement program. The GAO representative asked for the report to assist them "in planning and scheduling review of Internal Revenue Service operations."

The informational aspects of TCMP include bringing together and coordinating into one integrated system all data and reports required to measure the dimensions of and trends in Federal tax administration workloads; to establish the related requirements, such as manpower, training, equipment, and buildings; and to analyze the basic economics involved, such as total and marginal costs, and direct and indirect tax yields.

The individual income tax phase used on a probability sample (92,000) of the 61 million 1963 individual returns filed in 1964. Each individual return drawn by the sampling was thoroughly examined by an experienced examining officer.

The instant report among other matters reflects: (1) The size of the audit problem, (2) the audit problem by class of return, and (3) some aspects of the audit problem by source of errors.

It was necessitated by the volume of returns filed. But if there were only one return filed and there were only one revenue examiner, the problem would be the same. Would the tax shown on that return require an examination; and how much should the employee be paid, considering the income yield?

The concept is simplicity itself. If the Service cannot audit all of 70 million returns, then which of those 70 million returns will be accepted as filed, or which will be examined? This basic problem is followed by many variations.

The operation of a system of taxation is a unique function in that it is a welding of assessment, collection, refund, and the cost of discharging these functions. It requires a final determination of tax, either by acceptance of a return as filed, or by examination, or resort to the courts.

Congress has wisely recognized that no static taxation system can be successfully applied to the myriad types of financial enterprises of a complicated and constantly evolving industrial society. Accordingly, it has given the Commissioner broad authority to issue regulations and adopt policies which supply the necessary details and which accommodate for the dynamics of change.

Part and parcel of the system are guidelines and tolerances, which include litigating policy: guides as to those classes of returns, or items in returns which should be examined or not examined; compromise policies and so forth. The

necessity for new legislation is a part of revenue administration. We do not here pretend to delineate all of these interrelated and inseparable elements of revenue administration.

Section 6406 has the same effectiveness here. Additionally, the basic question could very well occur to GAO; namely, to test the 92,000 tax examinations upon which the report is based.

It is clear that this particular TCMP report is useful only in reviewing present operations, and budgeting and planning for the future; in fact, the complete administration and enforcement of the Revenue Code.

(2) The Revenue laws since 1926 have charged the Joint Committee on Internal Revenue Taxation with the continuous duty of investigating the administration of the revenue.

The establishment of the Joint Committee on Internal Revenue Taxation further emphasizes congressional intent to exclude the Comptroller General from exercising any supervision over the administration of the revenue laws.

In 1924, Congress created the Couzens committee to investigate the Bureau of Internal Revenue.

This committee examined the same type of subjects in general, as covered by the two case illustrations above noted.

The joint committee is the successor to the Couzens committee.

It is helpful to examine the type of review performed by the Couzens committee.

(All references are to the Couzens committee report known as "Senate Rept. No. 27, 69th Congress, 1st Session, parts 1, 2, and 3; and the hearings, in 69th Congress, 1st session, Investigation of Bureau of Internal Revenue 1924, 26, parts 1 through 5.")

Previously mentioned was the basic factor of the filing of a return by a single and only taxpayer and the auditing of that specific return as related to the filing of millions of returns requiring guidelines and audit tolerances to reduce the work load to economic dimensions.

The Couzens committee fully recognized this factor, at page 230 of part 1 of its report, as follows:

"By vesting all discretionary powers under the revenue acts in the commissioner, Congress clearly evidenced an intention to hold him solely responsible for the exercise of all delegated powers, if the commissioner is to exercise the authority vested in him by the revenue acts, and is to be responsible for the administration of the law, all rules interpreting the law and providing for its application to particular cases should be personally approved by him in writing.

"While it may be assumed that Congress did not intend that the commissioner should pass on individual cases, it must be assumed that the revenue acts do contemplate that he shall determine the principles, rules, and formula which shall be applied by his subordinates. If this task is too great to be performed by one man, Congress should create a board or commissioner of several members to exercise the authority now vested in the Commissioner."

The committee investigated and reported on policies, or lack of them, guidelines, procedures of the Bureau of Internal Revenue concerning amortization, depletion, compromise, et cetera. Among other matters, the committee also dealt with the following types of subjects:

#### *Statistical studies of enforcement*

Study made by committee showed marked year to year increase in variations of taxable income reported, particularly by those in higher brackets and extent income was not reported (rept. pt. 1, p. 2).

During years 1917 to 1925, the Bureau collected and accounted for 30 billion dollars in taxes; and determined and collected 2.8 billion in additional taxes, at an average cost of \$1 per \$100 collected (rept. pt. 3 (minority) p. 22).

Bureau income statistics did not adequately reflect the effect of provisions of the Revenue Acts; therefore, the committee assembled its own statistics from original returns. In fact, one purpose was to determine how different classes of deductions affected net taxable income (rept. pt. 2, p. 3).

#### *Manpower—operation*

In reviewing the various steps of the Bureau's function, beginning with the revenue agents' audit of a return, the minority report found that every step had been taken to protect the Government's interest (rept. pt. 3 (minority), p. 20).

The number of cases, 3, 4, and 5 years old, was increasing because of the tendency of setting up fictitious claims to serve as a bargaining and compromise

basis, whereas law contemplated assessment and not bargaining (rept. pt. 1, p. 238).

Discussion in hearings of returns audited, and not audited—guidelines on returns coming to Washington for audit (hearings, pt. 1 II, p. 77).

It is significant that Congress did not then call in or rely upon or mention the GAO as an agency to investigate the revenue administration.

In fact, as will be demonstrated, it even reserved to Members of Congress—indeed, Ways and Means and Finance Committee members—the duty of investigating the revenue.

The Revenue Act of 1926 as proposed in the House in December 1925 provided for the establishment of a joint commission to review the operation and administration of the Bureau of Internal Revenue (67 Cong. Rec., p. 525). This commission was to have fifteen members; five to be chosen from the Senate, five from the House, and five to be selected by the President from the general public. The commission was to expire on December 31, 1927.

On January 30, 1926, the Senate debated that section of the proposed act creating the Commission on Internal Revenue and the Finance Committee suggestion that provision be made for a permanent Joint Committee on Internal Revenue Taxation. Significantly, their proposal eliminated the five public members and in lieu thereof proposed (and the committee was ultimately constituted in this way) five members from the House Ways and Means Committee and five members from the Senate Finance Committee (67 Cong. Rec. 3021). One Senator queried whether it would not be better to have experts, not Members of Congress. Senator Smoot pointed out that while the committee could employ outside experts, the committee could call upon Treasury for expert assistance. It was his feeling, and that of Senator Conzens, that there should be no outside members on the Committee (67 Cong. Rec. 3021). Ultimately the proposal became law.

Apparently Congress felt the need for creating from those of its membership concerned with taxation a body charged with the responsibility of investigating the operation and administration of internal revenue.

At another point, Senator Norris favored an amendment to insure that an employee of the Bureau of Internal Revenue would not be prohibited from complaining to any Member of Congress (67 Con. Rec. 3872). Senator Reed, in debating this issue, noted that the joint committee would be authorized with \* \* \* power to investigate any and every return, to go into every audit and paper in the Bureau, to question any employee, to get any information he pleases \* \* \*. It will have all the power that the so-called Conzens committee had, and if it does not do its duty the Senate or the House of Representatives can call it to account \* \* \* (67 Cong. Rec. 3873).

When it created the Joint Committee on Internal Revenue in 1926, the Congress set up a special investigation body to oversee the operation and administration of the Internal Revenue Act and codes to the exclusion of the General Accounting Office which it had just created a few years previously. There was no intention on the part of Congress to release any of the broad investigating and information gathering powers of the Joint Committee to the GAO.

Furthermore, the foregoing illustrates how Congress defined the exclusive functions of the Commissioner as well as the all-inclusive nature of Congress' review through the Joint Committee. In actual fact, the internal revenue laws of those and succeeding years speak for themselves in evidencing the exclusive jurisdictions of an original action by the Commissioner and review by Congress.

Incidentally, the Joint Committee does not have the statutory authority to set aside tax refunds proposed by the Internal Revenue Service. Reference has been made to the bill passed by Congress in 1932 by which the Joint Committee would have been authorized to make the final decision on refunds of taxes proposed by the Commissioner in amounts exceeding \$20,000, and vetoed by the President because of the Attorney General's opinion to the effect that the function of executing must be left to the executive officers. This veto was not overridden by Congress. Investigative authority of the Joint Committee has not been changed since its creation in 1926. So here Congress itself agreed that the final decision is with the Commissioner, thus recognizing the constitutional principle of separation of powers. In the area of withholding credit or refund until after the matter has been before the Joint Committee for 30 days, the Congress through the Joint Committee and the Commissioner have established together a working relationship which is advisory in nature. This is characterized by the mutual forbearance that must necessarily be exercised between equal branches of

the Government. Congress can, of course, take away or amend any taxing authority.

Shortly after the Revenue Act of 1926 became effective, the Joint Committee organized. By the middle of November 1927, it submitted its report of some 365 pages to the House Ways and Means and Senate Finance Committee. The subjects of its inquiry were as many and as varied as its characterization of the investigation; that is, the "operations, effects, and administration of the income tax." The report includes statistics on collection cost and personnel.

Then, as today, of primary concern to the Congress, the Joint Committee and the administration of the revenue, was the cost of collecting taxes. Although in 1927 this subject was referred to as "job selection" for the income tax unit in the auditing of returns, and today it is spoken of in terms of "dimensions of and trends in Federal tax workloads," the problem remains the same. Which returns should be audited and under what guidelines and tolerances?

"The comptometer process is, in fact, the so-called preliminary audit, but the term 'preliminary audit' is directed at this time to a wider range of effort. Today it means also 'job selection.' This means that instead of looking upon the job for a current year as an intensive audit of all returns filed, the appropriate representatives of the unit (revenue agents) familiar with local conditions, and who in many instances have conducted investigations of the taxpayers for prior years, now survey all the returns that are to be forwarded to Washington for the purpose of segregating them into the following classifications: 'Accepted,' 'Office audit,' and 'Field audit.'

\* \* \* \* \*

"As a consequence of the preliminary audit, the bureau, within a few months after the returns of the current year have been filed, has *selected as the job of the Income Tax Unit for audit* about 25 per cent of the returns, and 75 per cent have been closed. The confusion incident to an attempt, under the lengthy procedure previously followed, to handle the great number of returns has been eliminated, and the job is found to be an intensive audit, not of 1,200,000 returns, but of 600,000 returns." (Emphasis supplied).

(The report of joint committee dated Nov. 15, 1927, vol. III, p. 28.)

(3) When Congress has desired to review the administration operation of the revenue laws it has acted through the Joint Committee, the House Ways and Means Committee, the Senate Finance Committee, or specially designated committees or groups.

The Legislative Reorganization Act of 1946 which while not dealing with or changing jurisdiction of the Joint Committee on Internal Revenue Taxation, provided for "legislative oversight by standing committees" of the administration of executive agencies, and referred to limited functions of the GAO concerning "expenditure analyses." Incidentally, as will be explained later, this last provision, according to the GAO, was never effective.

The provision for "legislative oversight" by standing committees is as follows:

#### 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." (60 Stat. 832).

Under this law, the Appropriations Committee was authorized to conduct studies of the organization and operation of any executive agency (60 Stat. 832).

The report of the Senate Special Committee on the Organization of Congress, stated that the bill was designed to strengthen "congressional surveillance," through standing committees, of the execution of laws by agencies within their jurisdiction.

While the report uses the term "congressional surveillance," the laws as finally amended in the Senate provided for "continuous watchfulness." The debates made clear that Congress did not wish to interfere with the executive, nor to make itself an "adjunct" to the executive department, nor to reverse administrative decisions. Congress intended only to observe "watchfulness" to make improvements through needed legislation. There was no intent to create a "spy

system." In fact, one Senator stated that he was " \* \* \* \* opposed to the use of the word 'review,' because \* \* \* that would be \* \* \* placing both the privilege and the responsibility on the Congress of practically undertaking to administer the laws which it enacts." (92 Cong. Record 6446).

Contrast this with statutory power of the permanent Joint Committee to "review" the operation and administration of the revenue, Senator La Follette (the sponsor of the bill) said that the reorganization did not affect the Joint Committee (92 Cong. Record 6395). It is traditional that the Joint Committee has continuous contact with the Service.

Congress intended that these standing committees would be in touch with the executive agencies to cooperate, exchange views, and gather information to insure proper administration of the laws (92 Cong. Record 6455).

A signal purpose was to avoid the appointment of special investigative committees. Of course, both the Ways and Means and Finance Committees have jurisdiction of revenue. The Joint Committee long before 1946 had cognizance of the Internal Revenue Service. The Legislative Reorganization Act as above indicated did not affect the Joint Committee.

The Joint Committee has the broader permanent authority to gather information and to review.

One other matter remains for discussion. From Mr. Keller's presentation of May 23, 1972, I gather that he is of the impression that the Service has the discretion to allow the General Accounting Office to have general access to income returns and other returns enumerated in section 6103. He cites certain regulations. These are regulations approved and promulgated by the President and not by the Secretary or his delegate. They were issued with appropriate Executive orders which allow general inspection by the Department of Commerce, the Department of Health, Education, and Welfare, the Advisory Committee on Intergovernmental Relations, the Federal Trade Commission, the Renegotiation Board, the Securities and Exchange Commission. These general inspection rights are allowed only for specific official purposes. For example, the Commerce Department may procure general access to income returns for statistical purposes only, which means, according to the restriction in the regulations, that such use shall not reveal directly or indirectly the name and address of any taxpayer. If the Commerce Department wishes to use an income tax return for any other purpose than statistical, the Secretary of Commerce under section 6103(a)(1)(f) of the regulations must make a written request to the Commissioner specifying the name of the particular taxpayer whose return is desired for inspection. The General Accounting Office for a matter officially before it may be similarly granted inspection of a return of a given taxpayer. However, even if a law were passed giving the General Accounting Office statutory authority to review the administration of the Internal Revenue Service, the Service would not have the authority to allow that office to have general access to income returns and files. General access could be granted only upon the promulgation of an appropriate Executive order and regulation by the President. Certain specified committees of Congress, including the Joint Committee on Internal Revenue Taxation, have the right to general inspection as provided in section 6103(d) of the code. Obviously, if the General Accounting Office is acting as the duly authorized agent of the committee, then it may procure general access under the statutory authority enjoyed by the Joint Committee.

Of course, Congress may enact a law specifically amending section 6103 to grant access to the General Accounting Office. It has given access to the House Ways and Means Committee, the Senate Finance Committee, and certain select committees. Also, Congress has given by statute inspection rights to States for tax purposes, and to corporation shareholders.

Under our present position and the law we could not recommend that the President promulgate an executive order and regulation which would allow general access to the General Accounting Office for review of the revenue administration, because that review is not a matter officially before it.

### *Conclusion*

The GAO's claimed right of review encompasses the full gamut of revenue administration—that is all areas of management analysis, decision, and discretion from the first point of determining whether to examine a return to and through all phases of enforcement even including current and long-range budgeting and planning. Such review right could effectively eliminate the executive function.

It is concluded, as first noted, that in view of the exclusive authority given to the Secretary of the Treasury or his delegates to administer and enforce the Internal Revenue Code, the GAO does not have the right, authority, or responsibility to review or audit or officially comment upon such administration and enforcement, save possibly in the area of some types of housekeeping activities.

Additionally the specific exemption of section 6406 of the code, plus the wealth of material referenced, emphasizes these conclusions.

L. H. HENKEL, JR.

*Acting Chief Counsel.*

J. WALTER FEIGENBAUM,

*Director, General Litigation Division Office of Chief Counsel.*

JEAN G. GUISE, JR.

*Chief, Disclosure and Summons Enforcement Branch General Litigation Division Office of Chief Counsel.*

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## EXHIBIT B

CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON INTERNAL REVENUE TAXATION,  
*Washington, D.C., January 13, 1971.*

HON. RANDOLPH THROWER,  
*Commissioner, Internal Revenue Service,*  
*Washington, D.C.*

HON. ELMER B. STAATS,  
*Comptroller General, General Accounting Office,*  
*Washington, D.C.*

DEAR MESSRS. THROWER AND STAATS: As you know, the Joint Committee on Internal Revenue Taxation has the duty under section 8022 of the Internal Revenue Code of investigating the operation, effects, and administration of the Federal tax system. To assist the Joint Committee in carrying out this duty, it would like to have the General Accounting Office act as the agent of the Joint Committee in performing certain reviews of the operations, policies, and procedures of the Internal Revenue Service.

If the General Accounting Office is able to carry on this activity as the agent of the Joint Committee, the committee would like to proceed in the following manner:

1. The Joint Committee, ordinarily after consultation with the Commissioner, will authorize the General Accounting Office to act as its agent to make a particular study, under the authority of chapter 92 and section 6103(d)(2) of the Internal Revenue Code of 1954.

2. The Staff of the Joint Committee will then counsel with representatives of the General Accounting Office and the Internal Revenue Service regarding the manner in which the study is to be carried out. It is contemplated that the plan for the study will be reviewed by the General Accounting Office with the Joint Committee staff and the Commissioner or his designated representatives before the study is begun. To avoid unnecessary duplication of effort, the General Accounting Office will to the extent appropriate review and utilize pertinent information from prior studies on the same subject, such as studies performed by the Assistant Commissioner (Inspection), which are brought to its attention by the Internal Revenue Service.

3. For each study, the Comptroller General will designate the personnel of the General Accounting Office who are to perform the study on behalf of the Joint Committee, and will supply a list of such personnel to the Commissioner and to the staff of the Joint Committee.

4. During the course of the study, representatives of the General Accounting Office will periodically consult with the Staff of the Joint Committee as to the progress of the study and any problems which are encountered. In addition, representatives of the Internal Revenue Service will advise the Staff of the Joint Committee if the study is producing unanticipated demands upon the time of Internal Revenue Service personnel.

5. The draft report resulting from the study will be submitted to the Internal Revenue Service (as is normally done in the case of General Accounting Office studies of Internal Revenue Service matters) and to the Staff of the Joint Committee.

6. The final report will be submitted only to the Joint Committee, but ordinarily with a confidential copy to the Commissioner, and no release of the report or any of its contents will be made except by the Joint Committee.

It is understood that the General Accounting Office may inspect tax returns and other confidential information, where appropriate to the conduct of a study authorized by the Joint Committee and where it is acting in its capacity as the agent of the Joint Committee, pursuant to chapter 92 and section 6103(d)(2) of the Internal Revenue Code of 1954. It is further understood that none of the information obtained from the Internal Revenue Service by the General Accounting Office in its capacity as agent of the Joint Committee will be used in any report of any other General Accounting Office study which has not been authorized by the Joint Committee, unless the Joint Committee authorizes such use.

It is not intended that the studies which the Joint Committee contemplates having done by the General Accounting Office are to involve the reconsideration of tax assessments or collections made by the Internal Revenue Service in individual cases. Rather, the studies are to be concerned with the policies and procedures which have been established by the Revenue Service in the area under consideration, and the effectiveness of those policies and procedures in obtaining the desired goals.

Unless authorized by the Joint Committee to do so, the General Accounting Office will not contact any taxpayers concerning their dealings with the Internal Revenue Service; if such contacts are authorized, General Accounting Office personnel will advise the taxpayers they contact that they are acting on behalf of the Joint Committee. Additionally, plans for contacting taxpayers ordinarily will be reviewed in advance with the Internal Revenue Service to minimize taxpayer relations problems that might be created by such contacts.

I would appreciate hearing from you, Mr. Comptroller General, as to whether the General Accounting Office will be able to conduct such studies as an agent of the Joint Committee, and from both of you as to whether the above procedures are satisfactory from your point of view. I am sending a copy of this letter to the Secretary of the Treasury.

The enclosed letter describes the first study the Joint Committee would like the General Accounting Office to undertake.

Sincerely yours,

LAURENCE N. WOODWORTH.

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CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON INTERNAL REVENUE TAXATION,  
Washington, D.C., January 13, 1971.

HON. ELMER B. STAATS,  
*Comptroller General,*  
*General Accounting Office,*  
*Washington, D.C.*

DEAR MR. STAATS: The Joint Committee hereby requests and authorizes the General Accounting Office to undertake a study concerning the policies and procedures established by the Internal Revenue Service in connection with the handling and collection of taxpayers' delinquent accounts. This study is to be conducted in accordance with the understanding set forth in my letter dated January 13, 1971, to you and the Commissioner of Internal Revenue. In order to achieve the objectives of this study, it is contemplated that the General Accounting Office will examine into:

1. The effectiveness of Internal Revenue Service programs to collect past due accounts.
2. The equities of collection procedures as applied to all taxpayers.
3. The policies and practices in regard to delinquent accounts considered currently uncollectible.
4. The policies and practices in regard to offers in compromise.
5. What changes, if any, in policies or practices need be considered to reduce the number of delinquent accounts.
6. The adequacy of the resources devoted to carrying out the Internal Revenue Service's responsibilities in regard to the collection of delinquent accounts.

I would appreciate it if you would arrange a meeting in the near future between representatives of the General Accounting Office, the Internal Revenue Service, and the staff of the Joint Committee, to discuss the manner in which this study of delinquent account policies and procedures will be carried out. The

Joint Committee also has requested that your office submit reports from time to time of the probable cost of the investigation contemplated together with the potential benefit therefrom.

Sincerely yours,

LAURENCE N. WOODWORTH.

Mr. WALTERS. In summary, Mr. Chairman, I would like to make just two or three further statements.

First, no one at IRS objects to the exercise by GAO of all normal audit functions to insure the integrity of our accounts, compliance with the statutory appropriations limitations, and obedience to all laws relating to personnel, purchasing, and other nontax matters.

By law, the Secretary and the Commissioner have responsibilities for making operating decisions. By law, the Joint Committee on Internal Revenue Taxation is designated as the agency for overseeing the operations of IRS; and, as already indicated, it is perfectly proper and feasible for the Joint Committee to review our administration and operations through an agent, including GAO.

By law, tax decisions of the Commissioner and the Internal Revenue Service are not reviewable by GAO at present. Of course, the legal questions, as we indicated earlier, are reviewable by the courts; and the conduct of our responsibility is consistently under review by the courts.

We appreciate the opportunity of returning today to present our position on this important question, and we will be pleased, in any way we can, to respond to your inquiries, sir.

Mr. MOORHEAD. Mr. Commissioner, we thank you very much. I think that your statement has illuminated the issues which the subcommittee and the Congress in general should be focusing on.

I do want to make it clear that, as you said on page 3 of your testimony, this is new to you and Mr. Herkel; and if we disagree with you, I hope you understand this is nothing personal. This controversy has been going on for many years before your administration, and the issue is not whether you were trying to hide your particular administration of the tax laws from GAO. This is purely an issue of what is proper government and what is proper construction of the laws. That is the only issue. It is nothing critical of you personally. I just want to assure you of that, sir.

Mr. WALTERS. We appreciate that, Mr. Chairman, and we realize, as you do, that this has been a longrunning question. And, frankly, we appreciate the Committee looking at it because too much time has been consumed in debating the issue, not here, but you might say over the years, as to whether we can or we cannot; and we would very much like to see the issue resolved finally one way or the other.

And we think that the position we are taking, as the law stands, is right. But it does need to be resolved, and we think it is good that you are looking at it, sir.

Mr. MOORHEAD. Well, I appreciate your feeling that way. That is just the way that I construe it. We might differ in the result, but I think we would agree that there should be a clear decision made so that we will not be going through this in the future. I think it is extremely important, as far as the country and the people are concerned, that they have total and absolute confidence in the Internal Revenue Service. And if they have that confidence, with the oversight of the Joint Committee and the arrangement of the Joint Committee and the



GAO, that is one thing. If they believe that there should be oversight on what I will call the "overall efficiency and economy of the Internal Revenue Service," in addition, then, we should act that way. That is the purpose of this hearing; to clear this up.

I am disturbed by a statement that you make on page 3 of your testimony where you talk about the statutory exemption of the IRS from review, and then you say "a possible encroachment on the separation of powers among the branches of Government." Do you really mean that?

Mr. WALTERS. Yes, sir. Let me say, the statutory exemption from review does not include the Joint Committee because, as we see it, the Joint Committee has been designated by the Congress as its organization or arm that will review us. And they do.

And, of course, we welcome this, because we need review.

Mr. MOORHEAD. But if you are talking about separation of powers among the branches of Government, the Joint Committee would be just as much of an encroachment on the executive branch as the GAO. It is just that the Congress, if your legal position is correct, has decided to use this particular technique of "encroaching" rather than another technique. I mean, I do not believe that there is a constitutional issue which appears to come out of your statement on page 3.

Mr. WALTERS. I think I would turn to counsel on that.

Do you have any response?

Mr. HENKEL. Yes, I would like to respond to that, if I could. I think it is significant to look at a proposal—just a minute, until I get to it in my notes, please, sir.

In the 1932 Revenue Act, there was a proposal passed by Congress which would allow the Joint Committee to make decisions on refunds in excess of \$20,000. This was vetoed by the President and not overridden, pursuant to an opinion by Attorney General Mitchell at the time to the effect that the Congress could pass revenue laws and determine as they passed the law that they, themselves, would administer the law.

His opinion went on to say that they could also pass a revenue law and determine that the courts would administer the law.

Mr. MOORHEAD. You are making my point, sir—really. We are suggesting that the GAO should do no more, really considerably less, than the Joint Committee. We are not suggesting that GAO administer your laws. We are merely saying that if the Congress can have oversight through the Joint Committee, the Congress could elect to have additional or replacement oversight by the GAO, all without encroachment on the separation of powers of the Government. We are not, again—

Mr. HENKEL. To that specific point, sir, let me make this simple comparison, and maybe this will explain the way we feel on that score.

Let us suppose there were just two returns and that was the whole revenue system, and, pursuant to the authority that the Secretary and the Commissioner have, they determined to audit return A but to leave return B stand just as it was filed. Now, that is the administration of the revenue laws.

Now, if an agency were permitted to come in after this decision was made and say: "Mr. Commissioner, you should have done just

the opposite; you should have accepted A and audited B, and you should do this in the future."

I think that is effectively administering the revenue laws thereafter, and that is exactly the point we make, a post review of the decisions and then suggestions for the future, or reports as to how it should be administered in the future, which is effective administration of the revenue laws, and you—

MR. MOORHEAD. And the Joint Committee cannot do that?

MR. HENKEL. The Joint Committee has the power to review specifically by statute, and certainly they may.

MR. MOORHEAD. Then, it is not a question of encroachment on the separation of powers. If one committee of Congress can do it, then another agency of Congress can do it; right?

MR. HENKEL. Well—

MR. MOORHEAD. At least, constitutionally? I am not talking about under—

MR. HENKEL. The Attorney General in his opinion in 1932 made the point that it was a question of separation of powers.

MR. MOORHEAD. Well, but you again miss my point. I am not saying that the GAO can do any more than the Joint Committee. I am just saying that if the Joint Taxation Committee can constitutionally exercise its authority, then the Congress can constitutionally ask the GAO to do the same or similar thing; right?

MR. HORTON. If the gentleman will yield?

I think what you are saying is that the Joint Committee, if there is any encroachment, is encroaching?

MR. HENKEL. That is correct.

MR. HORTON. Now, do you agree or do you disagree with regard to an encroachment by the Joint Committee?

MR. HENKEL. Well, let me make the point—I see I have not made my point clear.

MR. HORTON. You have not made the point clear, and I really do not see it. I think it is an unfortunate use of terminology to talk in terms of a possible encroachment in reference to a separation of powers issue.

MR. HENKEL. Let me explain it this way—

MR. HORTON. I agree with the chairman on that.

MR. HENKEL. All right, sir.

Let me explain it this way: We do not question the fact that Congress can enact a revenue law and have it administered any way they see fit. It could have it administered by the legislative branch if they saw fit in the first place. But the Attorney General said "Once a revenue law is passed and the duty to administer it is put in an executive agency, then if Congress, without further power, come in and administer it, you do get into the separation doctrine."

MR. HORTON. You are not talking about administration; GAO is not an administrative agency. Congress is not an administrative agency. Nobody is talking about administering the Internal Revenue Code or the provisions of the Internal Revenue Act. Nobody is talking about taking away the act of or interfering in administration, as you are talking about when you talk about the possible encroachment.

Are you suggesting that GAO might be engaged in administration by the action that they take?

Is that what you are saying?

Mr. HENKEL. Yes.

Mr. WALTERS. Yes, Mr. Chairman, yes. That is exactly what we are saying, that if they were to get in and review, actually get into this thing to the extent they have indicated that they wish, they would be reviewing the administration and operation of the internal revenue laws, and the law, as it stands, we do not think makes that permissible.

Now, let me say, Mr. Chairman, turning back to the point we started out on until we got off on this side discussion. If Congress were to decide to substitute GAO for the joint committee, we would see no objection to that. This is something for Congress to decide. Having decided as it did in the early 1920's, then we think that Congress clearly indicated who was to oversee us on behalf of the Congress and excluded everybody else.

Mr. HORTON. Well, I will want to talk to you later about that statement. I do not want to let that stand as it is.

Mr. MOORHEAD. Go ahead.

Mr. HORTON. But I want you to go ahead and finish your questioning.

Mr. MOORHEAD. Go ahead, Mr. Horton.

Mr. HORTON. Again, I want to emphasize that when you have talked here about possible encroachment, you are talking about the GAO administering, and the GAO is not going to be administering your agency.

Mr. WALTERS. But, Mr. Horton, going back to the example that Mr. Henkel used, when you have an agency that is supposed to exercise its independent judgment in administering a law and then you have someone else sit on top of them and say "Look, you are doing this wrong; do it this way," then, you get into the question: "Who is administering?"

Mr. HORTON. All right, now. But the point is—and this is a well-established legal precedent—and I would assume that your counsel would agree with this—that the power to the legislature includes power of oversight.

In other words, when we pass a law and say for you to administer that law, that does not mean that you go off in the corner and do whatever you want to do.

Mr. WALTERS. Right; we agree.

Mr. HORTON. Well, no, that is not what you are saying, because you are saying that the Congress cannot, through its duly authorized agency, namely, the General Accounting Office, come in and exercise this oversight.

Mr. WALTERS. No, sir; we are not saying that.

Mr. HORTON. You are also saying that this Government Operations Committee cannot do that, but we have the authority to do that.

Mr. WALTERS. No, sir; we flatly disagree.

What we are saying, Mr. Horton—

Mr. HORTON. Well, your point is very fine, and I wish you would make it, because I do not get it.

Mr. WALTERS. Let me try again.

Mr. HORTON. All right.

Mr. WALTERS. What we are saying—and we agree with you—is that we are subject to legislative oversight.

What we are saying is that the Congress determined many years ago who would do that for the Congress and how it would do it, and you named the joint committee.

You also said specifically that nobody else would do it, and we say that to be responsible in doing what you have told us to do——

Mr. HORTON. Well, OK. Now, I think I ought to make a point here which should be made. I do not find in any statement that you have presented here today, a citation of the authority that supports your action in excluding the General Accounting Office.

Maybe what you say is true, and let us accept it from a legal standpoint, that the joint committee does have the authority that you say it has. But the law does not say that it has exclusive authority, and therefore, the General Accounting Office is prohibited from doing this. Now, there is no place that says that. I would like to read into the record here the basic authority for the General Accounting Office, which as you understand, I am sure, is an agency of the Congress——

Mr. WALTERS. Yes, sir.

Mr. HORTON (continuing). To perform oversight authority. We could do it ourselves without them, and we did it before the General Accounting Office was set up. But the General Accounting Office was set up as an arm of the Congress, and it is a congressional arm.

The Comptroller General is appointed for 14 years, and he is not subject to the whims of the Executive. It is quite an unusual agency. It is not a part of the executive branch; it is a part of the legislative branch, and I am sure you understand that.

Mr. WALTERS. Yes, sir; perfectly.

Mr. HORTON. In section 313 of the Budget and Accounting Act of 1921, 31 U.S.C. 53, 54, it says 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 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.

Now, that is the basic authority of the General Accounting Office to function, and my position is that unless—and I am talking now strictly from a legal standpoint—that unless the Congress has specifically exempted the Internal Revenue Service, that law pertains to the Internal Revenue Service like it pertains to any other agency.

Now, what you have said is, in essence—and I am again emphasizing what Mr. Moorhead said, I am not talking about you personally, I am——

Mr. WALTERS. You do not have to worry about that, sir.

Mr. HORTON. Because you are the Commissioner of Revenue at the time you are testifying, and it could have been somebody else 2 years ago, and so forth. You are in the position now; so, I am not talking in terms of you personally, but I am talking in terms of the office, and this is a decision made over a period of time. But those decisions apparently said, and you are here testifying to the fact that those decisions of your general counsels, past and present, said, that your agency is exempt from the authority of the General Accounting Office. I say that that has to be spelled out specifically.

Now, you read it into the language—and when I say “you,” again, I mean the individual appointed as Commissioner. You read the language to say that you are exempted because the Congress has made specific reference to the relative exclusiveness of your administrative

functions. But the joint committee, although a legislative and not an executive branch agency, is not performing the same function as that of the General Accounting Office. I think they are almost mutually exclusive as far as I am concerned. So, I do not see the legal authority for exemption of your agency under the provisions of the Budget and Accounting Act of 1921, as amended.

Mr. WALTERS. May I respond, Mr. Horton, and Mr. Henkel might want to supplement my comment.

In November of 1921 which was just, as you know, a few months after the Budget and Accounting Act was passed establishing the GAO, Congress enacted the Revenue Act of 1921 which contained a section which been specifically recommended by the Treasury. That section reads as follows:—

Mr. HORTON. Is that in your statement?

Mr. WALTERS. No, sir, it is in the brief attached to the statement.

Mr. HORTON. What page is it on?

Mr. WALTERS. I do not know, sir.

Mr. HENKEL. It is page 11, and the following pages.

Mr. HORTON. Pardon me?

Mr. HENKEL. Page 11, and following, in the brief.

Mr. HORTON. What?

Mr. HENKEL. Eleven, and the following pages of discussion.

Mr. HORTON. Eleven?

Mr. HENKEL. Yes.

Mr. HORTON. That is in your memorandum?

Mr. WALTERS. May I go ahead and read it, sir?

It was shortly after that act was passed, and that Revenue Act said as follows:

“That in the absence of fraud or mistake in mathematical calculation, the findings of facts in and the decision of the Commissioner upon the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by any other administrative officer, employee, or agent of the United States.”

Mr. HORTON. Now, if it went on to say that this section repeals—

Mr. WALTERS. May I finish this, sir?

Mr. HORTON. All right. Go ahead.

Mr. WALTERS. In 1924, as a part of the Revenue Act of 1924, Congress inserted in that paragraph a specific reference to “accounting officers.” Now, these were being barred from reviewing claims under the revenue laws.

Now, during the Senate debate on that measure in 1924, Senator McKellar asked Senator Smoot whether this new language referred to the Comptroller General, and Senator Smoot replied: “Yes, it refers to the Comptroller.”

Now, it seems to us, from the legislative history, it is perfectly clear that the insertion of those words were specifically intended to cover GAO.

Mr. MOORHEAD. It seems to me, on the legal issue, that we are like two ships crossing; but we are not meeting head on. Where an individual tax return is involved, and where the question is “Should the tax laws be amended so that this particular individual and others like him should not be able to escape taxation?”—that the Congress did say that the joint committee should be the reviewing agent for

amendments to the tax laws. Our committee has no jurisdiction to amend the tax laws. This committee—and I am talking about the full Government Operations Committee—has jurisdiction over the economy and efficiency of Government. And where the economy and efficiency of the Internal Revenue Service is concerned, this committee and the GAO does have jurisdiction. In instances where the Congress decided that neither this committee nor the GAO should have jurisdiction to review economy and efficiency—and I think of, for example, the Central Intelligence Agency—Congress clearly said there shall be “no accounting of that fund,” and, as far as the President’s discretionary funds are concerned, Congress also said “No accounting of that fund.” We were able to write laws that clearly excluded review of economy and efficiency of such governmental operations.

But in the Internal Revenue Service, I do not believe that we did that. Except where individual tax returns are concerned, Congress said that the IRS is just like every other agency, except maybe the CIA, as to their being subject to review of economy and efficiency of their operations. We vote funds for you to have—and I think wisely—computers, to review individual tax returns. Are you using these computers as efficiently and as effectively as you can? The joint committee on taxation is not concerned with the economy and efficiency of your operations; but this committee and the GAO are truly concerned about the economy and efficiency of your operations.

Therefore, I think the legislative history is very clear that so far as economy and efficiency of your operations are concerned, the GAO and this committee do have jurisdiction, not to amend the tax law, but to exercise oversight on your economy and efficiency, and we have designated the GAO to be our agent to check on the economy and efficiency of your operations.

Mr. WALTERS. Yes, Mr. Chairman. As both you and Mr. Horton have indicated, commissioners come and go, and, naturally, I do not expect to be around here forever. And let me say on this very specific question we are discussing, for at least the last 10 years every chief counsel and every commissioner, after reviewing this thing independently, has come to the same conclusion. And I do not believe you would find that many reputable, trained, professional people who would just swallow what has been said before. I know, in my own case, I can vouch that I have looked at this thing deeply and have satisfied myself that there is a serious legal question which, if we did not bring it to you, we would be irresponsible.

Mr. HORTON. I want to underscore that I accept that, and I accept what you say in good faith. We do have a legal problem here, and it is very helpful, I think, that we have this memorandum from Mr. Keller and that you have had an opportunity to look at it and then to come back and testify following that, because that certainly presents the issues very squarely.

What I am asking you and what Mr. Moorhead is asking you, with regard to the authority of the General Accounting Office, and your reply with regard to your interpretation and your predecessors’ interpretations of section 6406, is your understanding of what the law is.

Mr. WALTERS. Yes, sir.

Mr. HORTON. And I think it is important for us here and now to learn what your thinking is so that we have before us in this hearing what we think the problem is.

And, again, I want to emphasize, with regard to section 6406, and, as the chairman has indicated, that that section presents a very special type of a situation. It provides that the findings of fact in and the decision of the Secretary upon the merits of any claim presented under or authorized by the Internal Revenue laws and any allowances or nonallowances of interest on any credit or refund under the Internal Revenue laws shall not be subject to review in the absence of fraud and mistake in mathematical calculation.

Now, that has to do with a claim; that does not have to do with the thing that Mr. Moorhead or that I am talking about; namely, the review of the operations of the Internal Revenue Service. And, as a matter of fact, as I read Mr. Keller's memorandum, he indicated that the GAO is not interested in looking at individual claims or taxes or tax returns for the purpose of second-guessing the IRS on its disposition of such claims. What they are interested in is going into the subjects that we are concerned about, that the Congress has the right to look at from the legislative oversight view. And we have that responsibility.

I mentioned, and I want to cite the Supreme Court case of *Merrain v. Dougherty*, 273 U.S. 135, a 1927 decision which indicated that the Congress has this broad authority of oversight.

So, there is no question about that. That has been decided.

Now, then, I must take issue with your legal counsel on the issue of who is to determine when fraud or mistake in mathematical calculation occurs.

I think GAO has the function there, because section 6406 clearly says, "in the absence of fraud or mistakes in mathematical calculation," there is not to be a review. Who is going to check to find out if there is a mistake in mathematical calculation? That can be a function of the GAO under the legislative oversight.

Mr. WALTERS. Well, on that specific point, Mr. Horton, let me say, as you probably know, we have our Internal Security Division which has the responsibility for checking on just this type thing.

Mr. HORTON. That is not the point. The Congress has the legislative oversight, and this committee can do it. We have delegated it to the General Accounting Office who would exercise this oversight jurisdiction.

Mr. WALTERS. Well, of course, as we read the law, you have said it will be the Joint Committee. Now, we do not question—and none of us question at all—the power of the Congress to do what it wants to do, but we do not agree that you have clearly done it. If you intend for GAO to do it, we do not agree that you have done it. If Congress should decide in its judgment to have GAO and the Joint Committee as well as Ways and Means and Finance oversee us, we would not raise any fuss about that, because you can do it. But at this point, we say you have not done that.

Mr. HORTON. All right. Well, again, I want to emphasize, and I wish you would reply to this—or your counsel would reply to this: How do you extend the merits of any claim to include all aspects of the Internal Revenue Service's activities so as to obviate the section of the Budget and Accounting Act of 1921 that I read? Because, as I read that, that only has to do—that is a very narrow limitation that

you are talking about in 6406. You are talking about the merits of any claim.

Mr. HENKEL. Our system of revenue collection is basically a claim system. Even a petition, you know—if you dispute a tax that the Internal Revenue Service asserts, you can pay the tax and file a claim in the court of claims or the district court. And in a tax court controversy, where you file a petition, it is the taxpayer that petitions and makes the claim against the Internal Revenue Service, and the Internal Revenue Service is the respondent. It is essentially a claims system. Even more specifically, I think it might be of help if I very briefly—

Mr. HORTON. Well, could I interrupt you there?

The section says, "Not subject to review by any other administrative or accounting officer or employee or agent of the United States."

Now, on the basis of your and your predecessors' broad arguments, you could argue that you should not have any review by a court. I am surprised that you all have not taken that attitude.

Mr. HENKEL. I would not interpret the words "administrative officer, employee, or agent of the United States" as including a court. I would not render that opinion.

Mr. HORTON. You have got a narrow one there.

Mr. HENKEL. Let me say this: I think the chronology of exactly how these things came about in the 1920's is of critical importance, and I think it is important to get what happened here year by year.

As the Commissioner said, the Budget and Accounting Act of 1921 was passed on August 11, 1921. Less than a month and a half later, a Treasury spokesman came to the Senate Finance Committee meeting, and said—and I am paraphrasing—that the new budget bill practically gives the Comptroller General the right to a final determination on all claims against the Government. The question is whether you want him to have the final say-so on all of these technical tax questions. In other words, you have a bureau up there which costs \$5 million, \$6 million, \$7 million, or \$8 million a year. It is technical to the highest extreme. I cannot think of the Comptroller General performing that work satisfactorily without duplicating the machinery already provided.

Pursuant to this request of the Treasury spokesman, as the Commissioner said, section 1313, which is the predecessor to section 6406, was enacted in 1921; in fact, only a short time after the law which created the General Accounting Office on November 21, 1921.

Now, several years later, after this law settled down a little bit, in 1924, several things happened which point right to the question of what this particular section means.

Congress took this into account—and let me go through three things that happened during 1924.

The Comptroller General asserted to the Treasury that he had a right to pass on the correctness of duties collected by the Bureau of Customs. An opinion was obtained from the Attorney General in 1924, and he said, "While there is no expressed prohibition of the General Accounting Office coming into the Bureau of Customs, the authority was delegated to the Treasury and the Bureau of Customs, and, in our opinion"—in his opinion—"there is no right of the General Accounting Office to come in." I think it is significant that this



opinion was rendered without anything like section 6406 or section 1313, its predecessor in the law, pertaining to Customs.

Now, the Comptroller General was not satisfied with the Attorney General's opinion, and he took the fight to the Congress, to the floor of the Congress. He argued on the floor of the Congress that he ought to have the right to review Customs, and in the ensuing debate, an exemption was proposed, very similar to the one that was provided in section 1313 pertaining to the Internal Revenue Service. When the Comptroller General found that that was likely to pass in Congress so that a similar exemption would be put in the Customs Act, he acceded and said he would no longer attempt to check Customs. In the debate, it was made clear that the Congress had intended that the General Accounting Office had no right to review the administration and operation of the Internal Revenue Service.

Another thing happened in 1924. All during this particular year, this subject was being talked about in the Halls of Congress. The Commissioner already mentioned that during the year, 1924, Congress went back to section 1313 of the original 1921 act and added the word "accounting." The debates make it quite clear that they intended in 1921 that this exemption would apply to the General Accounting Office, that it should have no right to review the administration and operation of the Service and that the word was left out in 1921 through an oversight.

In the same year, while the same debates were going on, Congress created the Couzens committee. It was a committee that had the full power of review and the broadest scope of review of the Internal Revenue Service. In our brief, we cite the fact that Congress made it perfectly clear that this committee, this Couzens committee, had a right to go into almost everything in reviewing the Internal Revenue Service.

I think it is also significant that only 2 years later in the Revenue Act of 1926, a proposal was made in the House that a joint commission be set up to review the Internal Revenue Service. The House proposal was that that commission would be composed of five members from the House Ways and Means Committee, five members from the Senate Finance Committee, and five public members. In the debates, it was determined that there should be no public members on this committee, no one outside of the Congress itself should have a right to look into the Internal Revenue Service and its administration and operation. I think it is, again, significant, that the Congress said, "We want the congressional committee to be the one to have the oversight and no outside people." This particular act created the joint committee, and from that time the joint committee has had this authority.

I think, again, another most significant point to me is that in 1928, in the Revenue Act of 1928, the Senate proposed that the General Accounting Office have a right of review. Let me quote the specific language that was proposed:

All claims, rebates, refunds, compromises, setoffs, and credits in any form whatsoever allowed by the Commissioner of Internal Revenue in excess of \$10,000 on account of income taxes, shall be audited by the General Accounting Office.

This was stricken in conference, and the conference report in 1928 made this specific point. The House bill made no change in the pro-

visions of the existing law prohibiting a review by the General Accounting Office of decisions by the Commissioner under the Internal Revenue laws.

Faced with this legislative history, and it was all so close in time, we can come to no other conclusion. I could not possibly read the legislative history of what this particular section means otherwise. It just cannot come out any other way, as the law now stands. And I think it is highly significant to note that in the General Accounting Office Manual, at least up to 1968 when we reviewed it in connection with a request from the General Accounting Office, stated in section 1055.10:

As to the following agencies and activities, an audit by the General Accounting Office is either not required by law or the law is not adequate to permit an effective audit by this Office.

And they cite as No. 5 under the list under that, "the Internal Revenue Service."

Another interesting point—and I think this gets to the crux of what Congress can do now if they so wish: In that same manual, section 1055.10, there was an exclusion of the Stabilization Fund under the Gold Reserves Act of 1934. They had no right, as they said in their manual, to go into that fund. The section of the code provided in general that the Exchange Stabilization Fund shall be under the exclusive control of the Secretary of the Treasury, with the approval of the President, whose decisions shall be final and not be subject to review by any other officer of the United States. Pursuant to that, the General Accounting Office, in their manual, in effect said: "We have no right to look at the Exchange Stabilization Fund." But now, in 1970, December 30, this law was amended to give the General Accounting Office some specific authority in the Exchange Stabilization Fund. This proviso was added:

Subject to the foregoing provisions, 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.

This gets right to our point. This is the correct way, if it has merit, to have the General Accounting Office review the Internal Revenue Service in any specific area, since the Joint Committee now has this authority, which is, that the law has to be amended to give them the authority as was done in the case of the Exchange Stabilization Fund.

Mr. HORTON. Now, I would just like to again emphasize that it seems to me that section 6406 is a narrow and limited authority to rely upon: it is a very small hole, and you have put a camel through that little hole and, mixing metaphors, have now come forth with this umbrella to cover the entire area.

I, personally, do not feel that it was ever intended that Congress did not have or could not have general legislative oversight in this area. Let us assume that with regard to the one area of claims that legally you are right. It does not seem to me that all of these other areas ought to be excluded insofar as the General Accounting Office is concerned.

Mr. WALTERS. Excuse me, sir.

Mr. HORTON. Go ahead.

Mr. WALTERS. I was going to say, Mr. Horton—may I just respond to that specific point?

It seems to me that if we read—well, first, let me say I do not think we can read it quite that narrowly, because if you take a claim by a taxpayer against IRS, that claim relates to a tax return which relates to his books and records, relates to the whole thing. So, you could not make a realistic determination on a claim unless you examine and audit what is behind it. So, you get into the whole works that way.

Mr. HORROX. The other point that I wanted to make in this area is: How do you deny the General Accounting Office access to the economic stabilization program records?

I am curious how you plan to extend your umbrella that far.

Mr. HENKEL. Can I respond to that?

We have not denied them the right at this point. We have this under study. And let me point out our problems—and it is not that we are being difficult about this, but we have several problems, and I would like to make sure that the Committee understands our legal problems in trying to respond to this request.

We are faced with a new section of law, section 205 of the Stabilization Act of 1971, which says that the information gathered in the stabilization program shall not be disclosed. It says generally that such shall only be disclosed to persons empowered to carry out this title, solely for the purpose of carrying out this title, and which are relevant in any proceedings under this title. We are studying that particular language as to whether or not that was intended to exclude review by the General Accounting Office. We have not come to any conclusion as to that.

We have another basic problem in responding to this request.

We are not the only agency involved in this stabilization program. It has a multiple-agency type concept, the Cost of Living Council—

Mr. HORROX. That, in and of itself, is not reason for denying it?

Mr. HENKEL. Pardon me?

Mr. HORROX. That, in and of itself, is not reason for denying it?

Mr. HENKEL. No, but the point I am making is this: before any response is made, the information that is gathered in the stabilization program may be on our own initiative; it may be pursuant to the request of the Cost of Living Council or the Pay Board or the Price Commission. Whose information is this and who is to authorize its disclosure?

That is our problem, just trying to sort out whose information is what in the program.

And we have a third problem, and we get back to our basic problem, and that is that we do play a dual role in the stabilization program, agents investigate both tax cases and stabilization matters.

It may be that in connection with this there will at times be information incorporated in one file from the other investigation. We get back to the same problem: Is this Internal Revenue information and docs 6406 prohibit it from being disclosed? There are many problems, and we have this under study, and as soon as we are able, basically—I think the Commissioner would agree that what we try to do is to give the professionals, the people who have been on this for years, the opportunity to study and discuss this. They are a bright group of people. We review their conclusions, and we will respond then to this request; but we have not, at this point, made any conclusions about it.

Mr. HORTON. Well, again, from my study of it I feel that there is no justification for elaboration of this theory, this camel through the pinhole theory, to include the exemption from GAO of this Economic Stabilization Board affair.

The other point I wanted to ask about: According to the memo of Mr. Keller, there was a request by the chairman of the Legal and Monetary Affairs Subcommittee of the House Committee on Government Operations on June 28, 1971, requesting GAO to review IRS's effectiveness in collecting the Federal Highway Use Tax, and they were advised by your Chief Counsel that the Internal Revenue Code limited the right of review of IRS's administration of the tax laws to the Joint Committee on Internal Revenue Taxation.

Now, how in the world can you exclude a specific direction from the Government Operations Committee for the GAO to audit or to check on the effectiveness in collecting the Federal Highway Use Tax?

How can you exclude our committee which under the law has general oversight authority conferred by law?

Mr. HENKEL. Congressman, we get back to the same question of who has the authority to direct such an investigation. As we read the law, the joint committee is the one that is given that authority.

Mr. HORTON. In other words, what you are saying to me now is that the Government Operations Committee does not have that jurisdiction?

Mr. HENKEL. Not under the law as it is now passed; no, sir.

Mr. HORTON. I just wanted to get that clear.

Mr. HENKEL. That would be my opinion that I would give to the Commissioner.

Mr. HORTON. In other words, if the Government Operations Committee directed you to submit to a General Accounting Office study or review, you would advise the Commissioner not to submit.

Mr. HENKEL. Yes, sir; I would have to, under the law as I understand it.

I might say that with respect to the question of the highway use tax, the IRS did have a study of this program, and we made the statistical data available to the GAO, which permitted them to respond to this congressional inquiry. They agreed to this, and did so make a study.

Mr. HORTON. Counsel has just asked me how do you interpret section 6103?

Mr. HENKEL. I think you get to the basic question.

Certainly, we would respond in some instances to an agency of the Federal Government such as the General Accounting Office if it was a matter officially before them. That is the question. If they had a question about the responsibility or the honesty of one of their employees, has he filed his tax return, and they made a request, why, that is a matter before them and that is within their jurisdiction. But we then get back to the question of what Congress intended the GAO to have officially before them, and we say that the law, as it stands, would not put officially before them the question of overseeing the operation and the administration of the revenue laws.

Mr. HORTON. So, it is your contention, as I understand it, just so we can define it very clearly—it is your contention that no committee of Congress has any jurisdiction over the Internal Revenue Service on an

oversight jurisdiction basis except the Joint Committee on Taxation?

Mr. HENKEL. No, sir. The law provides also that the Senate Finance Committee and the House Ways and Means Committee have a right to information also, and the appropriations committees.

Mr. HORTON. I am not talking about the right to information: I am talking about the right to oversight.

Mr. HENKEL. If you are talking about administration and operation, the answer is "yes."

If you are talking about housekeeping activities, "no," the General Accounting Office does have a right in certain areas but not as we read the law in the administration and operation of the revenue laws.

Mr. HORTON. Thank you.

Mr. MOORHEAD. We could go on for a good many hours discussing what the proper interpretation of the law is. I would say to you that in my judgment when the Congress specifically wanted to exclude the overall oversight of the Government Operations Committee or the General Accounting Office, Congress knew how to write that law to exclude it, like the CIA. We have not done so in the case of the Internal Revenue Service in my judgment. We have said that for administration, for amending the tax laws, the joint committee is the oversight authority, but for the economy and efficiency of the IRS operations, there is no specific language, in my judgment, excluding the General Accounting Office. And, as a matter of fact, in 1946 we passed a law directing and authorizing the Comptroller General to make an expenditure analysis of each agency and report to the Appropriations Committee, a standing committee, and the Government Operations Committee. And, again, in my judgment, this was the proper interpretation of what the law should be.

But I can see that we are not going to persuade you to overrule your General Counsel—and, again, it is not personal. This is the attitude of your predecessors. I will say that because your predecessors did not want to be reviewed by the General Accounting Office does not mean that you take the same position. The General Accounting Office has not been set up to win popularity contests with the executive branch and its agencies. They are supposed to be mean and tough, and I know if I were administering an agency I would just as soon not have an outside agency reviewing me. So that, while again it means nothing to you personally, I can understand why an agency would like to construe the law to exclude the General Accounting Office.

Mr. WALTERS. Mr. Chairman?

Mr. MOORHEAD. Yes.

Mr. WALTERS. Excuse me. May I comment at that point—if I may, just on that point?

I agree with you. Looking at it in one way, a head of an agency might be more comfortable if he did not have some review, but let me, if I may, say something about our tax system.

In my opinion, at the very base of our whole governmental system is our tax system, and we absolutely must keep it healthy and strong and viable, which means that the IRS must conduct its affairs in a high, professional, evenhanded basis, being evenhanded, fair but vigorous where it has to be.

Now, with that kind of thought in mind, let me say, as Commissioner, I do not object to having someone look at us and say: Are you

doing it right?—because I think that is healthy; I really think that is healthy.

So, we are not in disagreement, really, in that. The only thing we say is that you have said how that is going to be done, and, as you have said, we have talked about this before.

So, I would just assure the committee that we do not object to oversight, and, of course, GAO does look at us in our housekeeping functions, and we welcome that.

And where we have conducted or started this study for the joint committee, as Mr. Keller indicated, we have cooperated fully.

So far as I know, we have nothing to hide, and we are not trying to avoid oversight, and we would welcome the committee's effort to clarify once and for all this question.

Mr. MOORHEAD. Well, Mr. Commissioner, I think that where we are missing the point is that in economic terms they talk about microeconomics and macroeconomics. Microeconomics in your case would be the individual return, and I think you may be correct that the Congress said that—so far as any funny business with respect to an individual and how the law should be amended—it was the joint committee. But, then here is what I call macroeconomics which is a sampling, let us say, of unnamed taxpayers, to say whether you are auditing too many or too few returns in this category or that one, whether the money that the Congress appropriates for the operation of the Internal Revenue Service is being spent as wisely, as efficiently, and as economically as possible, I think that is a separate function which, under general statute, is reserved to the General Accounting Office.

But, as I say, we probably will not be able to persuade you today. I think Mr. Horton and I are in substantial agreement in what we think the Congress intended. It happens to disagree with your view.

But let us think of what the law ought to be and what this committee can do.

For example, could it—under your interpretation of the law—if the Joint Committee on Taxation directed the GAO to furnish them an overall examination of the economy and the efficiency of the Internal Revenue Service, would that grant the GAO access?

Mr. WALTERS. If the joint committee did that, we would have no question but that we would make it all available.

Mr. MOORHEAD. Second—

Mr. WALTERS. I might say that is basically illustrated by this study which they are now making as agents of the joint committee. This is a study on taxpayer delinquency accounts which has been going on now for about 18 months, and we understand a report will be issued sometime in August.

Mr. MOORHEAD. That, of course, is just a narrow look at the operations. What I am talking about is a kind of broad look at your operations, which is the same kind of oversight that GAO has over all agencies except where they have specifically been exempted, such as the Central Intelligence Agency, and which I think is the way the law ought to be. They do recognize that there is one aspect of your operation which is different from other agencies, and what I am asking now is what the law ought to be. I think that the public has to have confidence in the confidentiality of the individual returns.

Mr. WALTERS. Right.

Mr. MOORHEAD. But I think the taxpayers also ought to know that their tax dollars are collected and spent as efficiently as possible, and that is where I think the GAO role should come in.

Let me ask you, sir: You have stated that States and certain committees of the Congress have statutory right of access to individuals' tax returns.

Mr. WALTERS. That is right, sir.

Mr. MOORHEAD. Other than the public's right of inspection of certain returns such as tax-exempt organizations and foundations, are there any other private parties or organizations given statutory right of access to IRS returns?

Mr. WALTERS. Yes, sir. The code provides that shareholders in corporations owning a specified percentage of stock may inspect the corporate return.

Mr. MOORHEAD. May I ask you, Mr. Commissioner, if, to achieve better management, you have ever given access to returns by private management consultant firms to aid you in doing the best job for the Nation?

Mr. WALTERS. Not that I know of, and I would be surprised if we have, because I think before we do that we would have to have a provision authorizing it.

Mr. MOORHEAD. Well—

Mr. WALTERS. If I follow your question.

Mr. MOORHEAD. Yes. I was informed that when you were setting up your automatic data processing computer system that you gave access to employees of such firms of Control Data, Homestead Facilities Corp., and General Electric. Is that correct, sir?

Mr. WALTERS. Of course, as you know, I was not here at that time. We might have given them certain information, but I do not know that this would include the confidential information on tax returns. I cannot answer that question. I will provide you with an answer if you would like.

Mr. MOORHEAD. Are there any of your associates here who can answer?

Mr. WALTERS. Mr. Virdin, sir.

Mr. MOORHEAD. Incidentally, before we start, just so that I keep the record clear, I think I ought to administer the oath, which I have not done before, to those of you who might be testifying.

Would you please rise?

Do you solemnly swear that the testimony you have given and will give this subcommittee is the truth, the whole truth and nothing but the truth, so help you God?

Mr. WALTERS. Yes, sir.

Mr. HENKEL. I do.

Mr. VIRDIN. I do.

Mr. HARLESS. I do.

Mr. GEIBEL. I do.

Mr. MOORHEAD. Mr. Virdin.

Mr. VIRDIN. Mr. Chairman, in answer to your question, insofar as I know, we have never made available to a private contractor copies of any income tax returns. Now, there have been one or two studies that I have known of—there was a study in one of the regions, not the specific ones you have mentioned, but this is the example where they could not see returns. We wanted to have a study made of our Audit Divi-

sion, so we covered up all identifying material on the returns and audit reports. They had to see this material, but the taxpayers were not identified. We let them have this. But I know that we told (in our system of the 1970's study) that private contractors simply could not see returns, and, so, if there has been any improper disclosure, I do not know about it.

And just recently, the question has come up because there is a new machine that we are developing, or trying to develop, and the private contractor wants to see raw data. We have held that there is no way they can see it. So, insofar as I know, there have never been any, except in a limited number of cases where the contractor did not see anything about the taxpayer but saw the report with no identification.

Mr. MOORHEAD. Well, in that very instance, you had a private contractor come in and perform an audit, concealing the names of the taxpayers. It seems to me there you were asking a private contractor to do the very job that Congress intended the General Accounting Office to do. It seems to me that an accommodation could be reached so that you could conceal the names of the taxpayers, permitting the GAO to see how you are auditing; if you are auditing properly, if you are spending too much money on auditing, if you are spending too little. I think that this is a kind of a job that a Government agency designated by the Congress should do. I should like to ask you: Is there statutory authority for giving this kind of data, carefully concealing identity, to a private contractor?

Mr. WALTERS. Mr. Chairman, I see the two cases differently. It seems to me that in the case that Mr. Virdin referred to, we had a consultant doing this work for us. It was as if we were doing it ourselves, whereas if the GAO were to come in, as you suggest, then, that is a different situation and we get back to this legal block which we have.

Mr. HORTON. If you will yield just a minute on that?

I assume you have a contract with whomever is involved in this. Now, how do you audit that contract to find out whether or not it was an adequate sum paid, or inadequate sum paid, or too much paid; whether you used enough personnel?

Mr. WALTERS. GAO would, sir.

Mr. HORTON. They would?

Mr. WALTERS. Our housekeeping functions, they audit.

Mr. HORTON. That is a housekeeping function?

Mr. WALTERS. Yes, sir.

Mr. MOORHEAD. I think what you are saying then is that you can trust a contractor because you hire him and pay for him, but you cannot trust the GAO because you cannot hire and pay for GAO?

Mr. WALTERS. No, sir, Mr. Chairman. I hate to disagree with you, but that is not what we are saying. We are saying that we think Congress told us: "Do not let GAO do this," and we are following the law, which is quite different.

Mr. MOORHEAD. Can you point to me a place where the Congress says: "Let a contractor go in and do that?"

Is it not true that there were suggestions in the early 1960's that the code be amended to specifically provide for access to management-consultant firms or for computer technology, but that proposal was never adopted by Congress?

Mr. WALTERS. I cannot respond to that, Mr. Chairman.



Do any of you have any information?

Mr. MOORHEAD. On these proposals in the 87th Congress which were never adopted?

Mr. WALTERS. I am not familiar with them, sir, and I cannot respond intelligently.

But let me say this, that where we go out and hire a consultant to help us, they are doing so for us in the discharge of our responsibility, to administer the revenue laws. That is quite different than having someone come in and review the administration of the revenue laws.

Mr. MOORHEAD. Mr. Horton?

Mr. HORTON. In the memorandum that Mr. Keller submitted to us, on page 7, it refers to the integrated data retrieval system, and he makes this statement—he said:

In July 1969, IRS began a pilot project in their Southwest region to determine if the installation of an integrated data retrieval system (IDRS) would alleviate taxpayer adjustment and correspondence problems and otherwise render sufficient services and increase operational efficiency to justify installation costs. Anticipated services to be provided by IDRS include: (1) direct access and retrieval of taxpayer account information; (2) direct input of taxpayer information into the system; (3) computer preparation of correspondence, and (4) the capacity for predeposit search of unidentified remittances.

On the basis of its feasibility study, IRS officials concluded that IDRS was justified on the basis of its positive influence on taxpayer relationships even if savings are not realized. In December 1970, IRS awarded a \$29.2 million contract for the installation of IDRS equipment in the seven existing service centers with the provision that IDRS would be installed in the three service centers then under construction for about \$12.6 million.

Because of the substantial impact IDRS will have on the effectiveness of IRS's tax collection activities and the amount of equipment being procured, we believe that GAO should be permitted to make an independent evaluation to ascertain.

And there are three items.

The adequacy of the feasibility study on which the decision to install IDRS nationwide was based:

Whether IRS has adequately informed the Congress of the substantial costs involved in the installation and annual operation of a nationwide IDRS system; and

Whether IDRS from an operation standpoint can provide the services on which its installation was based and how effective, efficient, and economical such operation can be accomplished.

Access to taxpayer records would be needed to determine the operational feasibilities of the system and the effectiveness and efficiency of its operation.

Now, how would you deny GAO the access there to make those studies?

Mr. WALTERS. Mr. Horton, as to the adequacy of the feasibility study, our Assistant Commissioner for Planning and Research had prime responsibility—

Mr. HORTON. I understand that, but in the Department of Defense, they have somebody who is responsible for the acquisition of the C-5A, but we still have oversight jurisdiction and, so, we send in the GAO to check to find out whether or not he exercised all of the things he did properly.

Mr. WALTERS. GAO may review at any time all of the available information directly related to the feasibility study, as to the adequacy of information supplied Congress on the IRS costs.

GAO may also review it any time, all of the available budgetary information.

Now, as to the effectiveness, efficiency, and economy of the operation, as Mr. Keller indicated, to determine that they would have to get into the basic raw taxpayer documents; here again, it is our position that we cannot make those available to the GAO.

Mr. HORTON. All right. Now, you have indicated in your testimony here this morning that this function is performed by the joint committee.

I want you to now explain to us how the joint committee goes about performing this function, whether or not they make studies, what studies they make, and what information is made available to Congress, and how you make this information available to them.

Mr. WALTERS. Well, Mr. Horton, I would respond to that by saying that I think that to get a full answer to that question you should prove it by the joint committee because I would not presume to tell you, and I could not tell you, what all they do. All I know is that they are in touch with us constantly about things, orally, in writing, and otherwise.

Mr. HORTON. Do you make reports to them?

Mr. WALTERS. Do we make annual reports to them, do you know, Mr. Virdin?

I will ask Mr. Virdin, who has been around much longer than I have.

He says that we make a semiannual disclosure report to the joint committee, and other than that we do not make an operational report.

However, let me say this: I am sure you appreciate that the Ways and Means Committee and the Finance Committee and, of course, the joint committee which is a part of both committees, constantly review what we are doing. They receive complaints often, from people who think we are misbehaving, and they check on them.

Mr. HORTON. Well, I understand that, but they are primarily engaged in legislative matters and I doubt that they have much time to exercise oversight so far as I know. They might, to some extent, get involved to check with regard to legislation, but I question whether they have an adequate staff to do the necessary oversight functions. As a matter of fact, I do not think the Government Operations Committee has a sufficient staff. That is why we have formed the General Accounting Office to begin with, so that we would have an agency of the Congress to perform this function.

I do not go into the philosophical positions that Mr. Moorhead did, that you wanted to try to avoid having somebody looking over your shoulder, and is it not better for an agency not to have this, and all that sort of thing. But I am attacking this on purely a legal basis. And, again, I want to emphasize that I just do not think that the legal authority has been demonstrated, as far as I am concerned, to exclude the IRS from the provisions of the 1921 statute and subsequent amendments that give the General Accounting Office authority over your agency to perform these types of functions. I think, again, you have pointed it out in the illustration I asked of you with regard to the IRS proposal, because there you indicated some phases of it would be subject to a survey by the General Accounting Office, and then another would not. It seems to me that the whole gamut of what was being asked by Mr. Keller is reasonable under the provisions of their authority. And I do not read into the language, with all due respect to your

General Counsel—and I respect his legal ability; I am not critical of that—I do not read into that the exclusion of your agency from these functions of the General Accounting Office.

Mr. MOORHEAD. It seems to me another precedent we should consider is the Atomic Energy Commission. There the Congress specifically set up a Joint Committee on Atomic Energy and said that the Atomic Energy Commission should keep the Joint Committee fully informed, and so forth. This Joint Committee, which is really more powerful than the Joint Committee on Taxation because it is a legislative committee, but, nevertheless, the General Accounting Office does have access to the Atomic Energy Commission operations. So, the Congress there specifically gave jurisdiction to a joint committee, but, still, the Budget and Accounting Act of 1921 applies, because there was not a specific exclusion.

So, I believe you are wrong on your legal position.

But let us get back to the proposition that possibly the Congress—if your legal position is correct or we cannot persuade you to the contrary—should enact legislation to make GAO access specific. We do recognize the importance of the confidentiality of the individual income tax returns, but I think that the General Accounting Office has a very good track record. They have access to Top Secret documents that, if disclosed, would affect the life of every individual in the United States. I think that lives are much more important than the dollars that might be involved in the tax returns. GAO has an extraordinarily good record in such sensitive areas.

We well recognize that individual taxpayers' returns are very sensitive matters; however, there are sensitive matters in other agencies, and GAO has demonstrated its awareness of the sensitivity of contact with the public. For example, in the Department of Agriculture's meat and poultry inspection activities—which could be very embarrassing to individual companies and people involved in it—they do not investigate the plants individually. They go with the Department of Agriculture supervisors to selected plants and observe how they apply their inspection techniques, not with the idea that they are reviewing the individual, but the economy and efficiency of the operation. Unless the contacts with the individual is still resting with the agency involved—as would be in the case of a review of the operations of the IRS—I think if we enacted special legislation which would entitle GAO to contact taxpayers, this could be worked out just as we do in other agencies. Where the contact is made by the Internal Revenue Service, it could be done in the presence of the General Accounting Office employees, not because they are concerned about that individual, but to get an accurate picture of the economy and efficiency of the operations of the Internal Revenue Service. Do you think this could be done?

I am not arguing the legal question of what the law now says about it, but in the best of all possible worlds, could this not be done to the benefit of the country?

Mr. WALTERS. Well, Mr. Chairman, let me say this, that we certainly agree with you in your complimentary remarks about GAO. Certainly, they do have a good track record. We agree with you wholeheartedly, and we are not arguing against GAO, as you and Mr. Horton have observed. What all of us here this morning are concerned with is this question of law.

MR. MOORHEAD. Now, I am suggesting, if we were starting with a clean slate—what the law ought to be.

MR. WALTERS. Well, let me say I would be quite presumptuous if I were to state here what I thought it ought to be, because, basically, it is a question for the Congress to decide what it wants.

I have no doubt that, if Congress says in its judgment "We want this done, and we want it done this way," we could accomplish it.

MR. MOORHEAD. I appreciate your position. Right now, if I were voting, or if I were to give you my opinion as to what I think the law would be or should be, it would be that the GAO presently does have legal access to IRS operations. What I am saying now is that if Congress decided that there may be certain unique factors in the IRS's operations and if Congress decided to enact legislation stating that GAO should have complete access to everything except the names and addresses, and so forth of the individual taxpayers. This is as if we were writing some new law now.

Would that action, in your opinion, protect the integrity and confidentiality of tax returns made to the Internal Revenue Service?

MR. WALTERS. I think—And let me say at this point that you and I are talking academically—we might say, although let us be realistic about it also, it seems to me that if you were going to pass a law such as that, you would have several things to consider. First, of course, is your desire for oversight, which we cannot argue with, and we do not argue.

But, second, you would want to give some concern—particularly to this committee—some concern to the costs involved, what would do it, because, in effect, you would have a dual system. You would have IRS doing one thing, and GAO doublechecking it.

Now, I am not saying you would decide against it, but I am saying that we also would have to recognize that, in effect, the IRS, or whoever it might be, would not be the sole administrator in this case, because the kind of oversight you are contemplating at this point would involve the dilution of the sole responsibility. It would be a question of what you wanted to do.

MR. MOORHEAD. Do you have internal audits in the IRS?

MR. WALTERS. Yes, sir; we do.

MR. MOORHEAD. That is a dual system; is it not?

MR. WALTERS. It is, but let me say this: It is dual but it is a minimum duality, and it is one that is designed, and is used, to protect both the Service, the taxpayer, and also Service employees.

MR. HORTON. Who performs the other audit? You have an internal audit, but who performs the other, the dual? You have got two; and who is the other?

MR. WALTERS. Well, it is the Service, itself, the overall operation of the Service. The revenue agent audits the taxpayer, makes his report. Internal Audit spot checks these to see whether or not they are done in accordance with programs established.

MR. HORTON. Well, but that is dual within the Service?

MR. WALTERS. Right.

MR. HORTON. You do not have any external audit; you do not have anyone else that comes in except the joint committee, but I question how much they can do.

MR. WALTERS. Except the joint committee.

Mr. HORTON. But how much of that do they do?

Mr. WALTERS. On any case, Mr. Horton, where there is a refund of \$100,000 or more they review it before any refund is made. Now, that is all of them.

Mr. HORTON. How many of those do you have a year?

Mr. WALTERS. I do not know, but there is quite a few. I could provide that answer.

Mr. HORTON. Are you talking about five, 10, 100, 1,000?

Mr. WALTERS. No; not 100,000.

Mr. HORTON. I say a hundred or a thousand?

Mr. WALTERS. I would like to provide that answer for the record. I just would be guessing.

(The information follows:)

DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
Washington, D.C., June 5, 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: During our testimony on June 1, 1972, before your subcommittee, Congressman Horton asked how many refund cases of \$100,000 or more were reviewed by the Joint Committee on Internal Revenue Taxation. The subcommittee was advised that we did not know, but that we would provide the information.

Accordingly, this is to let you know that the number of cases reviewed by the joint committee for the periods indicated are as follows:

Year	Number
Fiscal year 1968-----	642
Fiscal year 1969-----	685
Fiscal year 1970-----	638
Fiscal year 1971-----	790
Fiscal year 1972 (estimated)-----	1,100

With kind regards,  
Sincerely,

JOHNIE M. WALTERS,  
Commissioner.

Mr. HORTON. Well, just a ballpark figure, and you can correct it. I thought I would just get one concept.

Mr. WALTERS. I just do not know, and I cannot guess that wildly, and I will provide it, sir, and give it to you by phone this afternoon.

Mr. HORTON. Well, that is all right.

Mr. MOORHEAD. I think we come down to a more philosophical question, as to whether the Internal Revenue Service is so unique that, unlike almost all other departments or agencies, it should not have an external audit. It seems to me that a real audit by an independent accounting firm, just the way private corporations—if they are listed on the Stock Exchange—are required to have an external audit, just the way almost every department and agency of the Government has an external audit by the GAO—that this principle, with proper safeguards should certainly apply to the IRS. That is my fundamental position here.

Mr. HENKEL. Mr. Chairman, let me make one comment.

Mr. HORTON. Before you do that, I want to say before we get away from here: I have a letter from Mr. Staats dated May 25, 1972. He sent me a copy of this, in which he has also been denied access to information that he wants obtained from the Bureau of Customs.

This is a letter from Mr. Rossides, and I was wondering if perhaps we ought to get this one pretty well defined. This is outside of your jurisdiction.

Mr. WALTERS. We have not seen that.

Mr. HORTON. I mean, you referred to that line of decisions. But I think we ought to draw this issue a little bit more firmly than we have. I do not think we have looked into that area sufficiently.

Are you familiar with this letter?

Mr. PHILLIPS. Yes; the staff has a copy in the subcommittee files.

Mr. HORTON. I think it would be a good idea. Mr. Chairman, if we could get the Bureau of Customs, or Mr. Rossides in before the committee to talk about and sharpen up the issues involved in regard to the Bureau of Customs' refusal to furnish information to GAO along the same lines we have done here with the Internal Revenue Service.

Mr. MOORHEAD. You are suggesting we call up Mr. Rossides or somebody else?

Mr. HORTON. Well, I would suggest Mr. Rossides; and, perhaps, I ought to put the letter from Mr. Staats in the record here at this point.

Mr. MOORHEAD. And Mr. Rossides' letter?

Mr. HORTON. And Mr. Rossides' letter.

Mr. MOORHEAD. Without objection, they will be made a part of the record at this point.

(The letters referred to follow:)

COMPTROLLER GENERAL OF THE UNITED STATES,  
Washington, D.C., May 25, 1972.

HON. WILLIAM S. MOORHEAD,  
House of Representatives,  
Washington, D.C.

DEAR BILL: Knowing of your interest in GAO's problem of access to information from the executive branch, I thought you would be interested in having a copy of a letter dated May 12, from Assistant Secretary Rossides denying this office access to information with respect to the Bureau of Customs.

The Treasury Department's action in this case is consistent with the action taken to limit GAO's access to records of the emergency loan guarantee board. In that case, they are construing our authority to be limited strictly to what they call "financial transactions." In other words, GAO's audits would be limited to determining whether there was an adequate record of receipts and disbursements. It would deny GAO access to any records bearing upon the efficient and economical management of programs and as to whether the programs are carried out as intended by the Congress.

We believe that this construction of our authority is contrary to the basic authorities of the General Accounting Office. It would make it impossible for the GAO to render the kind of assistance it is now providing to the Congress and would make it impossible for us to carry out effective audits of executive agency programs.

Less than 10 percent of our present professional staff is presently concerned with the kind of "financial transactions" to which the treasury letter refers.

I am sending an identical letter to Congressman Frank Horton.

ELMER B. STAATS.

THE DEPARTMENT OF THE TREASURY,  
Washington, D.C., May 12, 1972.

HON. ELMER B. STAATS,  
Comptroller General of the United States,  
Washington, D.C.

DEAR MR. STAATS: Your letter of April 7, 1972, in which you request complete access to records of the Bureau of Customs and the Department of Treasury pertaining to the administration of section 303 of the Tariff Act of 1930 has been referred to me for reply.

We are, of course, aware of the general statutes regarding your review and reporting functions that you cite in your letter. Our reasons for denying access to the records in question, other than those available pursuant to the Freedom of Information Act and the pertinent regulations, were explained in detail to your representatives from a legal and policy point of view.

The treasury regards participation by your office in the areas of our substantive statutory responsibilities under the Tariff Act of 1930 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 continue to do so as the need arises.

While the Treasury Department wishes to cooperate with your office in any way consistent with our statutory responsibilities so that you may carry out your audit functions and advise Congress of our financial transactions, we cannot grant your request.

Sincerely yours,

EUGENE T. ROSSIDES.

Mr. HORTON. I would suggest we try to get Mr. Rossides or someone from the Treasury Department to talk on this subject of the denial to the General Accounting Office of access to records at the Bureau of Customs and the Department of the Treasury.

I do not know whether Mr. Rossides is the one who would testify or not, but somebody from the Treasury ought to testify with regard to this denial of access, because, again, it is the same type of problem that we have here.

Mr. MOORHEAD. Would that also include the subject of the refusal of access to records of the Emergency Loan Guarantee Fund?

Mr. HORTON. Well, that is the IRS, and we have talked with them about that today.

Mr. MOORHEAD. No, I mean the Emergency Loan Guarantee Fund.

Mr. HORTON. OK. That is different.

Mr. MOORHEAD. That would be Treasury also.

Mr. WALTERS. We have enough problems.

Mr. HORTON. We have the Stabilization Board, and we did talk about that.

Mr. WALTERS. Yes, sir; we did.

Mr. HORTON. And that decision has not been made yet, as I understand it?

Mr. WALTERS. That has not been made. It is under consideration, sir.

Mr. MOORHEAD. Mr. Phillips?

Mr. PHILLIPS. Thank you, Mr. Chairman.

Mr. Walters, at the bottom of page 8 and the top of page 9 of your statement, you discuss a 1968 GAO request for statistics from the taxpayer compliance measurement program to assist GAO in planning and scheduling reviews of IRS' operations. Then, you state on page 13 that the statistics were not made available to GAO. Does this mean that all of the TCMP studies are not being made available to GAO, or that some of them have been made available to the Joint Committee?

Mr. WALTERS. Well, if they have been made available through the Joint Committee—and I do not know—that would be all right, so far as we are concerned, if it is through the Joint Committee. But the studies, Mr. Phillips, are, as you probably know, actually dealing with an in-depth review of actual tax returns, and we could, under our position, not—we could not make those available to GAO except through the Joint Committee.

Mr. PHILLIPS. So, this would follow your same line of reasoning that you detailed earlier?

Mr. WALTERS. Right.

Mr. PHILLIPS. This would apply to individual studies as well as across the board?

Mr. WALTERS. Yes, sir.

Mr. PHILLIPS. At the top of page 16, you refer to a May 5, 1972, request from GAO concerning advance contacts with Service personnel in the expectation that the Joint Committee will wish GAO to conduct further studies.

From the memorandum that Mr. Keller submitted to this subcommittee on May 23, it appears to us that all GAO wants to do is to interview IRS officials and obtain information that has already been made public. Are you going to deny GAO the right to interview these officials and obtain this type of information?

Mr. WALTERS. Have we responded, in other words, to that May 5 letter?

Mr. HARLESS. We have not yet responded to that letter, Mr. Phillips. If I read this correctly, they were interested in making some studies, one of which, as I recall, was in the exempt organization area, and they had some sort of exploratory discussions about it. The question of what did they want to audit was sort of open-ended, and, so far as I know, we were to receive a letter defining what it was they were interested in, and when we would have it, then we would give it consideration.

Mr. PHILLIPS. So, you have not made any decision on that request?

Mr. HARLESS. No, it has not been made as yet.

Mr. PHILLIPS. This would require, I assume, some additional consultations with them, some discussions of the precise areas of study in which they are interested?

Mr. HARLESS. That is correct.

Mr. PHILLIPS. Have any meetings of that type been arranged or scheduled?

Mr. HARLESS. Not to my knowledge, they have not, Mr. Phillips.

Mr. PHILLIPS. Notwithstanding the question of GAO's right to access to records under your interpretation of these two sections of the tax law we have discussed, do you have any reservations about the concept of an independent review of IRS activities by GAO?

Do you anticipate any operational or management problems if GAO were permitted to conduct these types of management surveys or audits?

Mr. WALTERS. First, let me explain—I think you have two questions, if I follow you.

The first one, as I listened, would be: Do we have any fear of such—

Mr. PHILLIPS. Any concern.

Mr. WALTERS (continuing). Of such review, and I would answer that if the law were such that they could do it, no, flatly. In fact, if the law permitted it, we would be pleased to have them come in.

Now, second—your second question: Would this cause any management and operational problems? The answer is, "Yes," because it would consume a lot of time. We already are stretched so thin that we cannot do the job we ought to be doing. So, the answer is, "Yes, it would cause problems."



Mr. PHILLIPS. Could you answer a question which has been raised in the past about the allocation of your manpower and budgetary support? Is it true that you are currently spending about three quarters of a billion dollars; in other words, three-fourths of your total appropriations each year to collect only 3 percent of the taxes?

Mr. WALTERS. I think that statement could not be answered in a few words. And I would say that the answer to the questions—

Mr. PHILLIPS. Could you supply something for the record?

Mr. WALTERS. I would say that the answer is: "No, that is not true." You are referring to a statement that various Commissioners—going back several years, I believe beginning with Commissioner Caplin, where we have all stated, and I have so stated, too, that the American public is a law-abiding citizenry, and they perform well, that they pay in voluntarily 96 percent of the amount collected each year.

Mr. PHILLIPS. That is probably where I saw the figure.

Mr. WALTERS. That is right.

Now, let me say that is a correct statement. However, if you analyze it in detail, then you have some worries, because that money comes in through withholdings, estimated payments—and all of this comes in as a result of the total effort to administer the tax system. So, the answer to your question is "No."

Mr. PHILLIPS. So, if there were not the enforcement club, you do not feel that there would be 96 percent that would be so voluntary? It is part of the whole system?

Mr. WALTERS. It is part of the whole system, and if we did not have the enforcement club—to use your term—we would not have as great a voluntary compliance as we do.

Mr. PHILLIPS. Just one final question—and this is addressed to Mr. Henkel.

In your legal analysis of the legislative history of sections 8022 and 6406, did you take into consideration the provisions of title 31, United States Code, section 60, which was enacted on August 2, 1946, which is some 30 years after most of the history you have cited in the middle 1920's?

Let me read this provision, because I think it is quite relevant to the earlier discussion of the legislative history and the intent of Congress.

This deals with the analysis of the executive agency expenditures by the Comptroller General and reports to congressional committees, and it reads as follows:

The Comptroller General is authorized and directed to make an expenditure analysis of each agency in the executive branch of the Government (including Government corporations) which, in the opinion of the Comptroller General, will enable Congress to determine whether public funds have been economically and efficiently administered and expended. Reports on such analysis shall be submitted by the Comptroller General from time to time to the Committees on Government Operations and to the Appropriations Committees and to the legislative committees having jurisdiction over legislation relating to the operations of the respective agencies of the two Houses.

I would submit that since this statute was enacted two decades after the history that you were talking about and makes no specific exemption of IRS, I would submit that the most recent clear intent of Congress would be that Congress intended for IRS to be included in the term "each agency."

I do not see any reference to this statute in your memorandum, and what I am asking you is: Did you take this legislative history into consideration when you formulated your legal opinion?

Mr. HENKEL. Yes; we did. We looked at it very carefully, and there are some references to that, beginning on page 25 of the memorandum we submitted. In our opinion this did not change the concept of review. There was some discussion on the floor of the Congress at the time this was being enacted which talked in terms of one Senator stating that he was opposed to the use of the word "review" in the bill as it was passed, and we contrasted that on page 27 of our memorandum with the review authority that is given the joint committee. We consider that that did not change the authority of the joint committee to look at and review the operations and management of the Internal Revenue Service.

Mr. PHILLIPS. You mean because the Legislative Reorganization Act of 1946 did not specifically change the jurisdictional authority of the Joint Committee on Internal Revenue Taxation, you felt that Congress by not specifically doing that did not mean to cover it under this particular section?

Mr. HENKEL. Yes.

Mr. PHILLIPS. I do not think that the mere fact of exclusion would necessarily lead anyone to that opinion. I do not follow your legal reasoning.

Mr. HENKEL. Well, I think one of the real purposes in this was to avoid the appointment of special investigative committees over areas where there is a standing committee, and, of course, the Ways and Means and the joint committee long had jurisdiction in this particular area. As to the sufficiency of the law at present as we see it, as we see it—and the chairman and Congressman Horton were mentioning the fact that the joint committee does not have the staff to do an in-depth audit: In 1970, in December, what we thought was a happy arrangement was made. The joint committee said the GAO should go into a certain area as their agent, and we have cooperated. All GAO has to do is to go back to the joint committee and say, "We think we ought to go into this area." If the committee says, "OK," as a practical matter to do the particular audit, the law has an avenue for GAO to go through if they want to investigate the Service in more detail, in more depth. All we say is that GAO ought to go back to the joint committee rather than coming around and requesting it independently.

Mr. PHILLIPS. Well, I do not think we need to rehash that earlier discussion. Where we part company is over the jurisdiction of the Government Operations Committee and its reliance on the Comptroller General to carry out the oversight functions which both the 1946 and 1970 Legislative Reorganization Acts clearly includes the jurisdiction of the Government Operations Committee, but that does not mean that such oversight is not shared. The Government Operations Committee shares oversight responsibilities with every other committee, because the 1970 Reorganization Act specifically directs legislative committees to increase their oversight responsibilities as well. But the fact that this is shared does not defer to the exclusive jurisdiction of the joint committee, and that is where I think we are very strongly of different opinions.

Mr. HENKEL. Mr. Phillips, let me respond to that in this way: I think it is significant that the legislative history of the act in 1946, the proposed bill as the Senate proposed it used the term "expenditure analysis" as what they were talking about in terms of what should be done. This was amended during the Senate debate and sent to the House with the substitute wording "administrative management analysis." In other words, there was a proposal to use the word "administrative management analysis," but as the law was finally passed they went back to the term "expenditure analysis." As we read it, we think this is highly significant: "management and operation" is basically what we are talking about, and we consider this to be legislative history and proof that the Congress was reserving to its committees, its standing committees, the continual watchfulness over the administration of the laws, to wit: the joint committee.

Mr. PHILLIPS. Of course, in those days the Government Operations Committee was called the Committee on Expenditures in Executive Departments, and that title was not changed until 1952, so that the terminology—the semantics of it—may have had something to do with it, too, because the traditional jurisdiction of what is now the Government Operations Committee dealt with expenditures. I mean, this was the terminology applied to the committee as a whole in its oversight responsibilities.

Mr. WALTERS. Mr. Phillips, may I just add to what Mr. Henkel said in relation to the 1946 enactment? I do not think we ought to overlook the fact that in 1954 the Congress completely reenacted the Revenue Code which includes 6406 and all of these other provisions: so, the timing I do not think is decisive along the way you presented it. And, of course, they have, as we have all taken note, this argument has been going on now for several years, and Congress keeps amending the Revenue Code every year, to our disadvantage at times. But it seems to us that we have to take into consideration also the fact that where you have these multiple revisions and the reenactments, we ought to, at least, give some consideration to the old principle that knowing the interpretations that are being placed on a provision when it is reenacted, it means that the Congress adopts that view.

Mr. PHILLIPS. Of course, this was not an issue in 1954, because I do not believe there was any effort made by GAO to even request that an external audit be made of IRS and, of course, this was partly due to a lack of manpower and concentration in other agencies of Government. This issue was not really raised until perhaps the last 5 or 6 years when GAO was in a position to go into other agencies that it had not touched before. That is what precipitated this disagreement, I take it.

Mr. WALTERS. That very well may be.

Mr. MOORHEAD. I yield to Mr. Cornish for a question.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. WALTERS. did I understand you correctly to say that you would make available to GAO all of your budgetary data?

Mr. WALTERS. I think we were talking. I believe, at that point about the IDRS system, were we not?

Mr. CORNISH. That is right.

Mr. WALTERS. And I indicated that the budgetary information, the adequacy of the budgetary information, furnished to Congress was

available throughout GAO on this system. And, of course, I guess the budgetary information is available anyway generally.

Mr. CORNISH. But would this include all of your budgetary data for the Service as well as that?

Mr. WALTERS. I think it is probably already available, Mr. Cornish.

Mr. CORNISH. Well, what I really want to know is: Would this include the budget requests to the OMB and also the recommendations, interagency, from various offices and divisions?

Mr. WALTERS. I do not—just being candid with you—I do not think it would be appropriate because, you know, by the time a budget request is presented to Congress, there are certain policy decisions made that change it, and I do not believe it would be appropriate for GAO to have what our thought might be before it is crystallized.

Mr. CORNISH. I just wanted to get that clear in my own mind.

Mr. WALTERS. And let me say this: This would not be any surprise to the Congress, because the Appropriations Committees have asked the same questions and we have given, essentially, the same answers.

Mr. CORNISH. I just want to say, personally, that I think your auditors should be congratulated because they are doing a very good, hard-nosed job in auditing my return every year.

Mr. WALTERS. Well, Mr. Chairman, I hope this has nothing to do with our being here today, but I am glad to know we are doing a good job.

I might say that we have some fear, actually, about doing a good enough job generally, because we are concerned, very concerned, about our capabilities in view of the increasing taxpayers, increasing returns, more complex situations.

Mr. MOORHEAD. Well, Mr. Commissioner, your appearance here has nothing to do with that, nor does it have any connection with this subcommittee thinking that you are not doing a good job. I, personally, have great admiration for the Internal Revenue Service. I hope that your duties under the Economic Stabilization Act are not spreading you too thin. We commend you, and we do think that you would have even more confidence of the American people if they knew also that you had an independent GAO audit outside of your internal audits, and the fairly and properly limited review of the Joint Committee. That is the purpose of this hearing, and no criticism explicit, implicit or implied was intended. We do appreciate your coming. You have been very frank and forthright.

I admire your able advocacy of what I think is a very weak legal position, but the able advocacy I applied.

Mr. HORTON. I would say you have a very resourceful counsel who does a good job with very little to work with.

Mr. WALTERS. Well, I think that if a commissioner needs anything he needs a very able counsel.

Mr. HORTON. That is right; you have a good one.

Mr. MOORHEAD. Yes, and we are impressed with his ability to make a good legal case.

Mr. HORTON. And push that camel through that legal hole pretty well.

Mr. WALTERS. Mr. Chairman, may I just say one thing, if you are about to adjourn?

And that is that I think, as all of us can see, really too much time has been spent over the years talking about this issue, so we assure you that we would welcome, and would urge you, to solve it for us one way or the other so that we can go ahead with our business and not have to worry about this, not only year after year but, as indicated by the letters from GAO, week after week.

So, we are not offended by this, and we appreciate your compliments, sir.

Mr. MOORHEAD. We thank you very much.

The second bells have rung, and if the members of the subcommittee have a few questions in writing, could we submit them to you and have you answer them at anytime?

Mr. WALTERS. Yes, sir. We will be pleased to.

Mr. MOORHEAD. Again, thank you very much, Commissioner, and your able associates. I think that this has been a healthy exchange. We have not solved anything, but we have at least got the problem out on the table.

When the subcommittee adjourns, it will adjourn to meet Tuesday, June 6, in this room at 10 a.m. We will then begin our review of the information activities of advisory committees of the various agencies, then.

Again, thank you very much, gentlemen.

And the subcommittee is now adjourned.

(The IRS statement of May 24, 1972, and additional material submitted for the record follows:)

TESTIMONY BEFORE FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, WEDNESDAY, MAY 24, 1972

STATEMENT OF JOHNNIE M. WALTERS, COMMISSIONER OF INTERNAL REVENUE

Mr. Chairman and Members of the Committee: We are here today in response to your request that we comment on matters raised by Deputy Comptroller General Robert F. Keller concerning the alleged failure of the Internal Revenue Service to make available to General Accounting Office representatives certain records and information which would permit an effective review of Internal Revenue Service operations and activities.

In Mr. Keller's testimony of May 16, he quoted a letter to the Comptroller General dated June 6, 1968, from former Commissioner of Internal Revenue Sheldon S. Cohen which stated that the Commissioner of Internal Revenue is barred by Sections 6406 and 8022 of the Internal Revenue Code from allowing General Accounting Office representatives to review documents for purposes of reviewing and evaluating the Internal Revenue Service operations in the administration of the internal revenue laws. Section 6406 is a prohibition of administrative review of decisions by any other administrative or accounting officer, employee, or agent of the United States. Section 8022 specifically provides that it shall be the duty of the Joint Committee on Internal Revenue Taxation to investigate the operation and effects of the Federal system of internal revenue taxes and to investigate the administration of such taxes by the Internal Revenue Service.

Mr. Keller pointed out that, under the provisions of 26 U.S.C. 6103, tax returns are open only upon order of the President and under regulations prescribed by the Secretary of the Treasury and approved by the President. Under these provisions, some Federal agencies have specific rights of access to certain tax returns; however, the General Accounting Office is not among those agencies. There is no prohibition, however, to the General Accounting Office obtaining tax return data in connection with some matter officially before the General Accounting Office, provided the information is needed in connection with matters not involving the administration of internal revenue laws.

Mr. Keller also stated, "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, made reviews for the Joint Committee, and we have had the complete cooperation of the Service."

This statement may be somewhat misleading since it indicates that the Internal Revenue Service would permit anyone, in effect, to "rummage" through Service files. This is simply not true. We have attached, as Exhibit "A," fourteen fact sheets concerning the release of information to Federal agencies, States, and individuals. Tax returns are not made available to private contractors, except for processing as authorized by statute (26 U.S.C. 7513). The Chief Counsel has held that the Service is prohibited from making available to private contractors confidential tax return data. We are not aware of any instance where such information has been made available except in accordance with the statute.

We have attached, as Exhibit "B", Manual Supplement 51RDD-15, "Disclosure of Information to The General Accounting Office," which contains our basic guidelines for furnishing information from Service documents to General Accounting Office investigators in connection with their audits of Internal Revenue Service activities.

We are pleased to note that Mr. Keller mentioned our complete cooperation in the General Accounting Office's review of the Service conducted at the request of the Joint Committee on Internal Revenue Taxation. It was only a little over eighteen months ago that such arrangements were made. At that time, Comptroller General Staats met with members of the Joint Committee, the Joint Committee Staff, and officials of the Treasury Department, to set out ground rules regarding such reviews. Once these rules under which General Accounting Office representatives would function as an arm of the Joint Committee were established, studies were begun. The first one concerned procedures of the Service in connection with the collection of taxpayer delinquent accounts. It was begun in our Southwest Region. This study has been expanded and, at the present time, reviews of Internal Revenue Service activities are being conducted in four of our seven regions. Other studies have been planned by the Joint Committee to begin when the present study is completed.

The position we have taken is not new. In fact, almost ten years ago, the same position concerning disclosure to the General Accounting Office was taken by former Commissioner Caplin on the advice of the Office of Chief Counsel. Succeeding Commissioners of Internal Revenue, or Acting Commissioners of Internal Revenue, including Mr. Harding, Mr. Cohen, Mr. Smith, and Mr. Thrower, have also concurred in opinions of Chief Counsel.

It is clear that Congress did not intend the General Accounting Office to have access to income tax returns for the purpose of reviewing the administration of the Internal Revenue Service. We believe that Congress has demonstrated that the legislature itself, through the Joint Committee on Internal Revenue Taxation, shall review the administration and operation of the internal revenue laws. The Congress concluded that the Joint Committee should be the legislative arm for review to report to Congress, and should have complete access to returns and records. We have attached, as Exhibit "C", a copy of Manual Supplement 51RDD-14, which provides guidelines in this type of investigation.

We will answer, to the best of our ability, whatever questions you have. Thank you.

#### EXHIBIT "A"—DISCLOSURE OF INCOME TAX INFORMATION

##### FACT SHEET NO. 1

Requesting agency: All Executive Departments and Establishments of the Federal Government.

Authorization: 26 U.S.C. 6103(a); T.D. 6543; E.O. 10906 dated January 17, 1961; 26 CFR 301.6103(a)-1(f).

Purpose: In connection with some matter officially before the requester. The information may be used as evidence in any proceeding conducted by or before any department or establishment of the United States, or to which the United States is a party.

Limitations: A written request must be signed by the head of the executive department or other establishment and must specify the name and address of the person for whom the return was made, the kind of tax, the period covered, the reason why inspection is desired, and the name and official designation of the person by whom the inspection is to be made.

## FACT SHEET NO. 2

Requesting agency: Department of the Treasury.

Authorization: 26 U.S.C. 6103(a) and 26 CFR 301.6103(a)-1(e).

Purpose: (1) Official duties requiring inspection of returns; (2) some matter other than tax administration officially before the head of a bureau or office in the Department of the Treasury not a part of the Internal Revenue Service.

Limitations: (1) Officers and employees of the Department of the Treasury whose official duties require inspection of returns may inspect without making written application; (2) the head of a bureau or office in the Department of the Treasury, not a part of the Internal Revenue Service, desiring to inspect or have an employee inspect a return in connection with some matter officially before him for reasons other than tax administration must make a written request specifying the name and address of the person for whom the return was made, the kind of tax, the period covered, and the reason inspection is desired.

## FACT SHEET NO. 3

Requesting agency: Department of Justice.

Authorization: 26 U.S.C. 6103(a); 26 CFR 301.6103(a)-1(g) and (h).

Purpose: (1) For inspection by a United States Attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties; (2) for use in litigation if the United States is interested in the result.

Limitations: When the inspection is to be made by a United States Attorney, the application must be signed by such attorney. When the inspection is to be made by an attorney of the Department of Justice, the application must be signed by the Attorney General, Deputy Attorney General, or an Assistant Attorney General. Returns or copies may be furnished without request in cases arising under the internal revenue laws and referred by the Department of the Treasury to the Department of Justice for prosecution or defense.

## FACT SHEET NO. 4

Requesting agency: Department of Commerce.

Authorization: 26 U.S.C. 6103(a), T.D. 6547; E. O. 10911 dated January 17, 1961; 26 CFR 301.6103(a)-104.

Purpose: In the interest of the internal management of the government.

Limitations: A written request must be made by the Secretary of Commerce. Inspection may be made by any duly authorized officer or employee of the Department of Commerce. Information obtained shall be held confidential except that it may be published in statistical form.

## FACT SHEET NO. 5

Requesting agency: Department of Health, Education, and Welfare.

Authorization: 26 U.S.C. 6103(a); T.D. 6135; E.O. 10619 dated June 29, 1957; 26 CFR 301.6103(a)-100.

Purpose: Administration of Title II of the Social Security Act, as amended (42 U.S.C. Ch. 7).

Limitations: An application signed by an officer or employee duly authorized to sign such applications must be made on Form OAR-7057 and specify that the requested information will be used solely in connection with administering provisions of Title II of the Social Security Act and regulations issued thereunder.

## FACT SHEET NO. 6

Requesting agency: Advisory Commission on Intergovernmental Relations.

Authorization: 26 U.S.C. 6103(a); T.D. 6570; E.O. 10962 dated August 23, 1961; 26 CFR 301.6103(a)-103.

Purpose: Making studies and investigations in connection with the performance of its function of recommending methods of coordinating and simplifying tax laws and administrative practices.

Limitations: A written request must be made by the Chairman of the Commission. Inspection may be made by any duly authorized member or employee. Information obtained shall be held confidential except that it may be published in statistical form.

## FACT SHEET NO. 7

Requesting agency: Federal Trade Commission.

Authorization: 26 U.S.C. 6103(a); T.D. 6545; E.O. 10998 dated January 17, 1961; 26 CFR 301.6103(a)-106.

Purpose: As an aid in executing the powers conferred by the Federal Trade Commission Act of September 26, 1914 (38 Stat. 717).

Limitations: A written notice must be signed by the Chairman of the Commission. Inspection may be made by any duly authorized officer or employee of the Commission. Information obtained shall be held confidential except that it may be published in statistical form.

## FACT SHEET NO. 8

Requesting agency: Renegotiation Board.

Authorization: 26 U.S.C. 6103(a); T.D. 6544; E.O. 10907 dated January 17, 1961; 26 CFR 301.6103(a)-105.

Purpose: In the interest of the internal management of the government.

Limitations: A written request must be made by the Chairman of the Board. Inspection may be made by any duly authorized officer or employee of the Board. Information obtained shall be held confidential except that it may be published in statistical form.

## FACT SHEET NO. 9

Requesting agency: Securities and Exchange Commission.

Authorization: 26 U.S.C. 6103(a); T.D. 6374; E.O. 10814 dated April 29, 1959; 26 CFR 301.6103(a)-102.

Purpose: Gathering statistical information in carrying out its functions under the Securities Exchange Act of 1934 (15 U.S.C. 78a-78jj) as amended or in complying with directives or recommendations of the Bureau of the Budget pursuant to Section 103 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 18b).

Limitations: A written notice must be signed by the Chairman of the Securities and Exchange Commission. Information obtained will be held confidential except to the extent that it shall be published in statistical form.

## FACT SHEET NO. 10

Requesting agency: (1) The Committee on Ways and Means of the House of Representatives; (2) the Committee on Finance of the Senate; (3) the Joint Committee on Internal Revenue Taxation; (4) a select committee or joint committee authorized by resolution or joint resolution.

Authorization: 26 U.S.C. 6103(d); 26 CFR 301-6103(d)-1.

Purpose: Investigative.

Limitations: Applications for inspection of returns by one of these Committees should be made to the Secretary of the Treasury or to the Commissioner of Internal Revenue.

## FACT SHEET NO. 11

Requesting agency: Committees of Congress authorized to inspect returns by Executive Order.

Authorization: 26 U.S.C. 6103(a); 26 CFR 301.6103(a)-101; Applicable Executive Orders.

Purpose: Investigative.

Limitations: A written request signed by the Chairman of the Committee must give the names and addresses of the persons whose returns are to be inspected and the period and type of return. The request must state that the returns desired to be inspected are returns specified in a resolution adopted by the Committee in accordance with the rules of the appropriate House of Congress then applicable to the reporting of a measure or recommendations from such Committee.



The application for inspection must be consistent with the terms of the applicable Executive Order and must be approved by or on behalf of the Secretary of the Treasury.

## FACT SHEET NO. 12

Requesting agency: States, The District of Columbia, Puerto Rico, and Possessions of the United States.

Authorization: 26 U.S.C. 6103(a)—District of Columbia, Puerto Rico, and Possessions, 26 U.S.C. 6103(b)—States, 26 CFR 301.6103(a)-1(d)—District of Columbia, Puerto Rico, and Possessions, 26 CFR 301.6103(b)-1—States.

Purpose: For administration of the tax laws of the States, The District of Columbia, Puerto Rico, and the Possessions of the United States, or for furnishing information to local taxing authorities.

Limitations: A written application from the Governor of the State (or executive head of the District of Columbia, Puerto Rico, or Possessions of the United States) shall state the title of the official, body, or commission to make the inspection, the State tax law being administered, the purpose of the inspection, and, if the purpose is to furnish information to local taxing authorities, the title of the official, body, or commission lawfully charged with the administration of the tax laws of such political subdivision, and the purpose for which the information is to be used. Programs for supplying tax return information on magnetic tape exist to minimize the need to inspect or obtain copies of returns.

## FACT SHEET NO. 13

In addition to the foregoing Establishments of the Federal Governments, Committees of the Congress, and Governments of the States, the District of Columbia, Puerto Rico, and the Possessions of the United States, the return of an individual shall be open to inspection by—

the individual for whom the return was made;

the committee, trustee, or guardian of his estate if the individual for whom the return was made is legally incompetent;

the administrator, executor, or trustee of the estate of a deceased taxpayer;

any heir at law, next of kin, or beneficiary under the will, of a deceased taxpayer, upon submission of satisfactory evidence that such heir at law, next of kin, or beneficiary has a material interest which will be affected by information contained in the return;

the receiver or trustee if the property of the individual for whom the return was made is in the hands of a receiver or trustee in bankruptcy;

the duly constituted attorney in fact of any of the foregoing persons, subject to the conditions of inspection prescribed for such person.

## FACT SHEET NO. 14

The unauthorized disclosure of information from income tax returns is made unlawful and punishable by a fine of not more than \$1,000.00 and imprisonment for not more than one year by 26 U.S.C. 7213(a)(1) (applicable to federal employees and other persons), and 26 U.S.C. 7213(a)(2) (applicable to employees of States and Political Subdivisions thereof).

Additional legal restrictions against unauthorized disclosure are contained in 18 U.S.C. 1905, and in the various titles under which the receiving agencies operate.

## EXHIBIT "B"—MANUAL SUPPLEMENT, NOVEMBER 10, 1971

## DISCLOSURE OF INFORMATION TO THE GENERAL ACCOUNTING OFFICE

*Section 1. Purpose*

This Supplement provides guidelines and instructions for furnishing information from Service documents to General Accounting Office investigators in connection with their audits of Internal Revenue Service activities.

*Section 2. Background*

.01 The General Accounting Office is an independent agency in the legislative branch of the Federal Government. GAO is required by statute to conduct independent reviews, audits, and investigations of the programs, activities, and finan-

cial transactions of Federal agencies, and to report its findings directly to the Congress. In addition, it renders legal decisions relating to Government fiscal matters; reviews and evaluates Federal agency accounting systems; settles certain claims for and against the Government; and advises and assists the Congress and Government agencies in matters relating to public funds.

.02 The Secretary of the Treasury or his delegate is charged by law with the administration of the Internal Revenue Code. IRC 6406 and 8022 limit the authority of the GAO to review the administration of the revenue laws by the Secretary or his delegate. Furthermore, regulations issued under IRC 6103, 6106, and 7213 specifically set forth the conditions under which GAO may be given access to confidential tax information. See also 18 U.S.C. 1905 and 26 CFR 301.9000-1.

.03 The Service desires to cooperate with GAO, but has a legal obligation at the same time to maintain the confidential nature of tax information which falls outside the scope of GAO's authority to inspect in accordance with Section 2.02.

### *Section 3. Matters Within the Scope of General Accounting Office Audits of The Internal Revenue Service*

.01 GAO is required to settle accounts of disbursing and collecting officers. In this regard, the audit of administrative expenses provides the basis of settling such accounts in the Internal Revenue Service. In addition, the payment of personnel, the purchase of supplies, the rental and use of office space, the accounting for money received, and general housekeeping details, which concern every Federal agency, are all matters about which the Service has furnished or would furnish some information to GAO.

.02 ADP Handbook 2708.02(3) sets forth the records to be made available for GAO audits.

.03 Other documents or information available to the public generally, of course, may be made available to GAO. See text (17)50 of IRM 51(10)0, Disclosure of Official Information Handbook.

### *Section 4. Activities of The Internal Revenue Service Outside the Scope of General Accounting Office Reviews*

.01 In general, GAO may not review our actions or question our judgment in matters relative to the administration of the tax laws without specific approval of the National Office as set forth in Section 6. For example, the selection of returns for audit; the determination of the depth or intensity of such audits; the recommendations to impose penalties or criminal sanctions; the acceptance of offers to compromise tax liabilities; the determination of what collection activities should be instituted; the establishment of guidelines or tolerances; and the findings in the TUMP program are not matters subject to review by GAO. These examples are directly concerned with the administration of the tax laws within the exclusive statutory responsibility of the Secretary of the Treasury or his delegate.

.02 The Joint Committee on Internal Revenue Taxation has a duty under IRC 8022 to investigate the operation, effects, and administration of the Federal tax system. For reviews of this type, the General Accounting Office will act as agent for the Joint Committee. See 51RDD-14, CR 12RDD-30, 4SRDD-10, 8SRDD-1, 93RDD-22, and (10) 2RDD-4 dated June 15, 1971.

### *Section 5. GAO Reviews Under Section 3 for which National Office Approval is not Required*

.01 GAO will notify the Service officials concerned as far in advance as possible before starting any audit activity authorized under Section 3.

.02 An opening conference should be arranged to enable GAO to explain their audit plans and to permit a free and open discussion of any problems.

.03 Service officials should attempt to define as clearly as possible the limits of information from Service files which will be made available for the GAO audit.

### *Section 6. National Office to be Notified if GAO Indicates a Desire to Expand Their Review*

.01 Field personnel should not authorize the inspection of any information described in Section 4. Any indications that GAO wishes to shift or expand their audit beyond matters covered by Section 3 or to examine information referred to in Section 4, should be brought to the attention of the Regional Inspector who should endeavor to resolve the matter. If the matter cannot be resolved, then the

Regional Inspector should refer the problem to the National Office, Attention: I:IA.

.02 The Commissioner will take the matter under advisement and the National Office will notify the Regional Inspector and the Service officials concerned to the extent the Commissioner authorizes GAO to go beyond what is set forth in Section 3.

.03 Should the Commissioner authorize any extension of the GAO review, Service officials should be alert to make sure that the GAO audit remains within the bounds covered by the Commissioner's authorization. Should any problems arise which are not covered by the authorization from the Commissioner, the matter should be referred to the National Office, Attention: I:IA.

*Section 7. Regional Inspector to be Responsible for Liaison with General Accounting Office*

The Regional Inspector will be responsible for field liaison with GAO investigators; will make the necessary arrangements for an opening conference with GAO officials before the start of each audit; and will serve as the advisor to Regional, District, and Service Center officials in these matters.

*Section 8. Effect on Other Documents*

This supplements MS (10)2RDD-3, CR 12RDD-25 dated June 17, 1966, and 51RDD-14,<sup>1</sup> CR 12RDD-30, 4SRDD-10, 5(17)RDD-3, 89RDD-1, 93RDD-22, and (10)2RDD-4 dated June 15, 1971, which should be annotated by pen and ink with a reference to this Supplement.

WILLIAM H. LOEB,  
*Acting Commissioner.*

EXHIBIT "C"—MANUAL SUPPLEMENT, JUNE 15, 1971

REVIEW OF INTERNAL REVENUE SERVICE ADMINISTRATION OF THE FEDERAL TAX SYSTEM  
BY THE GENERAL ACCOUNTING OFFICE ACTING AS AGENT FOR THE JOINT COMMITTEE  
ON INTERNAL REVENUE TAXATION

*Section 1. Purpose*

This Supplement provides guidelines and instructions for furnishing information from tax returns, investigative reports, or other Service documents to designated representatives of the General Accounting Office acting as agents for the Joint Committee on Internal Revenue Taxation.

*Section 2. Background*

.01 On the basis of an understanding reached between Comptroller General Staats, Commissioner Thrower, and the Joint Committee, it was agreed that the Joint Committee would authorize the General Accounting Office, acting as representative of the Joint Committee, to make studies of specified Internal Revenue Service programs or activities selected and approved in advance by the Joint Committee.

.02 After consultation with the Commissioner, the Joint Committee will authorize the General Accounting Office to make a particular study. For each study, the Comptroller General will designate the personnel of the General Accounting Office who are to perform the review on behalf of the Joint Committee, and will supply a list of such personnel to the Commissioner and to the Staff of the Joint Committee.

.03 Regional Commissioners will be advised in writing when new Joint Committee activities are to begin in their Region. At that time, a list of GAO employees representing the Joint Committee will be furnished, together with any additional instructions which may be necessary.

.04 The first study which the Joint Committee has authorized concerns the policies and procedures of the Service in connection with the handling and collection of taxpayer delinquent accounts.

.05 At the present time, GAO audits for the Joint Committee are limited to Collection activities in the Southwest Region.

.06 The draft report resulting from the study will be submitted to the Internal Revenue Service (as is normally done in the case of General Accounting Office studies of Internal Revenue Service matters) and to the Staff of the Joint

<sup>1</sup> Manual Supplement 51RDD-14, with its cross-references, is in the process of being reissued, with CR 5(17) RDD-3 being added. Dispose of all previous copies of Manual Supplement, also dated June 15, 1971, which inadvertently omitted CR 93RDD-22.

Committee. The final report will be submitted only to the Joint Committee, but ordinarily with a confidential copy to the Commissioner, and no release of the report or any of its contents will be made except by the Joint Committee.

07. The Joint Committee on Internal Revenue Taxation is empowered under 26 U.S.C. 8022 to investigate the operation and administration of the Federal tax system; under 26 U.S.C. 8023 it has powers to obtain directly from the Internal Revenue Service or from the Office of the Chief Counsel of the Internal Revenue Service any information necessary for the purpose of making investigations, reports, and studies relating to internal revenue taxation; and under section 6103(d) it has authority, acting directly as a committee, or through such examiners or agents as it may designate or appoint, to inspect any or all tax returns at such times and in such manner as it may determine.

08. Except when conducting examinations authorized by the Joint Committee, General Accounting Office employees are not authorized access to confidential tax data, and Service employees dealing with the General Accounting Office concerning regular General Accounting Office examinations should continue to follow procedures established by Manual Supplement (10)2RDD-3, CR 12RDD-25, dated June 17, 1966.

### *Section 3. Procedures*

01. The following instructions and procedures will be used in the study of Collection activity by the General Accounting Office on behalf of the Joint Committee on Internal Revenue Taxation:

1. The Service will give the broadest possible cooperation and will make every effort to expedite the furnishing of information or the answering of inquiries.

2. GAO employees will be furnished working space and telephone facilities with adequate security safeguards.

3. Confidential tax data will be furnished only to those GAO employees who have been named by the Comptroller General to act on behalf of the Joint Committee.

4. Oral requests for information will be compiled with. If it is necessary to obtain taxpayer delinquent accounts, records of seizure and sale, or other Collection documents not available in the District or Regional office, they will be promptly obtained from the Federal Records Center or the Service Center.

5. If GAO employees ask to inspect taxpayer delinquent accounts or other material which is in active use—for example, TDA's assigned to a Revenue Officer in a distant post of duty—such data may be furnished as soon as it can be obtained without interfering with the work of the Revenue Officer.

6. If the GAO employees find that a TDA or other Collection case has been transferred to another Region, action should be taken to obtain the file from the other Region or cooperative arrangements made with the other Region for GAO employees to inspect the file in such Region and to discuss it with employees in that Region.

7. GAO employees should not remove records from official IRS files, but they may be furnished copies of any documents requested. The copies will be made in accordance with established IRS procedures.

8. GAO employees may discuss Collection cases with Collection Management, Group Supervisors, Revenue Officers, or other employees who participated in any actions in the cases.

9. GAO employees may be permitted to observe Collection activity provided they do not interview taxpayers. If GAO employees ask to interview taxpayers, the purpose of the interview should be ascertained. The Regional Commissioner or District Director should then contact the Office of the Assistant Commissioner (Compliance) for approval.

10. In the event GAO employees request income tax returns, clearly necessary to their study of delinquent accounts, such returns may be furnished.

11. No information should be disclosed which would identify or tend to identify a informant, nor should other information which was voluntarily furnished to the Service in confidence and for internal use only, and which information is not required to be disclosed in the administration of the internal revenue laws, be furnished.

12. If GAO employees want to look at Audit, Intelligence, or Appellate files which may be relevant to the Collection study, the files should not be made available without prior approval of the Office of the Assistant Commissioner (Compliance).

13. Information which may be made available to the designated GAO employees without approval of the Assistant Commissioner (Compliance) includes

documents which are normally processed by the Collection Division in District offices. Examples of such documents are:

(a) Manual instructions and supplemental instructions issued by the National, Regional, or District offices; (b) collection Division investigative case files; (c) taxpayer delinquent accounts and related records; (d) investigation assignment records; (e) tax liability correspondence; (f) liens, levies, and discharge records; (g) property seizure and sale records; (h) liens and levy record books; (i) program and production reports; (j) daily report of collection activities; and (k) transmittal registers.

14. In order that documents involved in the review by the General Accounting Office may be retrieved as necessary, appropriate records of the documents requested should be maintained.

15. Because of the interest of the Joint Committee in the impact of this study on the resources of both the General Accounting Office and the Internal Revenue Service, appropriate records shall be maintained of the time devoted to this project by IRS personnel.

#### Section 4. Reports

.01 A record should be kept of the time spent by IRS employees in orientations and in connection with the actual audits conducted by GAO for the Joint Committee. The format for a noncumulative memorandum report of "Time Expended by IRS Employees in Connection with GAO Audits for the Joint Committee on Internal Revenue Taxation", Report Symbol NO-D:MI-89, is as follows:

Time Expended by IRS Employees in Connection with GAO Audits for the Joint Committee on Internal Revenue Taxation:

----- Region.  
Report Symbol NO-D:MI-89 For the Quarter Ending -----

[Time expended (hours)]

	Management supervision	Technical	Clerical
Orientation.....			
During audit.....			
After completion of field work.....			
Totals.....			

.02 This report should be prepared quarterly by each Region in which GAO is conducting a review for the Joint Committee and should be submitted in time to reach the National Office, Attention: D:MI:P, by the tenth workday of the month following the end of the calendar quarter. Negative reports are not required, and it will be unnecessary for those Regions having no GAO activity on behalf of the Joint Committee during a given quarter to submit a report.

#### Section 5. Effect on Other Documents

This supplements MS (10)2RDD-3, CR 12RDD-25, dated June 17, 1966, which should be annotated by pen and ink with a reference to this Supplement.

RANDOLPH W. THROWER, *Commissioner*.

[From the Washington Evening Star, May 26, 1972]

### COUNSEL FOR TAXPAYERS—IRS REFUSES TO BE AUDITED

(By E. Edward Stephens)

Dear Counsel: In fiscal 1971, which ended last June 30, the Internal Revenue Service collected nearly \$192 billion and spent almost \$1 billion. Does the General Accounting Office audit these operations and report results to Congress?

A. GAO has tried to do so, but has failed. Reason: IRS wouldn't let GAO auditors see tax returns and other records.

This bombshell was exploded by Deputy Comptroller General Robert F. Keller, testifying May 16 before the House Foreign Operations and Government Information Subcommittee, chaired by William S. Moorhead, D-Pa.

Representative Frank Horton, R-N.Y., was amazed. He asked Keller if he was saying that GAO had "really" been accorded "literally no access" to information sufficient to make an audit or any study as to what IRS is doing.

"Yes, sir; that is what I am saying," Keller replied. Without access to IRS records, he said, "The management of this very important and very large agency will not be subject to any meaningful independent audit."

When asked why he thought IRS balked at the prospect of any GAO audit, Keller implied that some IRS operations might not stand the light of day. "I guess IRS doesn't want anything to happen to break down public confidence in the Service," he said.

Confidence of taxpayers and their Representatives on Capitol Hill already has been seriously shaken by recent disclosures of statistics that IRS keeps under wraps. To pick one example, they show that Manhattan taxpayers in fiscal 1971 were able to settle tax deficiencies at an average of 35 cents on the dollar, while New Jersey taxpayers had to pay 83 cents.

This is the type of information that GAO wants to unearth by auditing IRS operations, just as it examines the activities of other Federal agencies. As an example, Keller said GAO would like to know whether IRS treats delinquent taxpayers the same from coast to coast. If not, GAO would recommend changes in operating procedures.

It certainly can't be argued that IRS doesn't need watching. Over the years, scandalous practices have been exposed in various offices of the Service, including those at Boston, New York, and San Francisco.

In refusing to open its records to GAO, IRS relies on sections 6406 and 6022 of the Internal Revenue Code. But any law school dropout could see that the IRS interpretation of these sections is ludicrously strained. Subcommittee staff director William G. Phillips put it succinctly when he said IRS is "leaning on two weak reeds."

IRS completely ignores the Budget and Accounting Act of 1921, which set up the GAO to serve as the watchdog of Congress. There's no room for doubt about what Congress always has intended this organization to do. The act gives GAO sweeping authority to examine the "books, documents, papers, or records" of all Federal departments and agencies. IRS is not exempted.

Phillips said it isn't only the GAO that has been straight-armed when attempting to examine IRS records. He said taxpayers also have had "great difficulty" in obtaining information from IRS under the 1967 Freedom of Information Act. This is the understatement of the year.

Phillips said "many, many" IRS denial of information cases had been called to the subcommittee's attention. "I think there is an attitude here on the part of IRS that extends to Congress, the GAO, and the public at large," he concluded.

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[From the Washington Evening Star, June 16, 1972]

#### COUNSEL FOR TAXPAYERS—CONGRESS UNIT PUSHING IRS

(By E. Edward Stephens)

DEAR COUNSEL: All U.S. taxpayers are losers if the Internal Revenue Service doesn't administer the tax laws fairly, efficiently, and economically. Is there a practical way to improve IRS administration?

A. Yes—give the General Accounting Office a free hand to audit IRS operations and come up with recommendations. If IRS won't adopt recommended improvements, Congress can force compliance by appropriate legislation.

IRS officials shudder at the thought. They contend that, since Congress has authorized the House-Senate Joint Committee on Internal Revenue Taxation to keep an eye on IRS administration, this cuts GAO out.

So IRS now collects nearly \$200 billion a year, and spends about \$1 billion a year—all without any independent audit by a disinterested organization.

Congress soon may end these freewheeling operations. If so, it will be one of the biggest tax reform developments in U.S. history.

Since Congress wants to keep tabs on how U.S. agencies handle money, it set up the GAO to audit them. The 1921 Budget and Accounting Act gave GAO

sweeping authority to examine the books and records of all U.S. departments and agencies.

There are a few exceptions. For example, Congress has specifically exempted the Central Intelligence Agency from Budget and Accounting Act requirements. But it never has exempted IRS. Yet the Service claims that Internal Revenue Code sections 6406 and 8022 let IRS off the GAO audit hook.

Deputy Comptroller General Robert F. Keller brought the matter to a head in his May 16 testimony before the House Foreign Operations and Government Information Subcommittee. He said that IRS officials wouldn't let GAO personnel see tax returns and other records essential to any meaningful audit of IRS operations.

The subcommittee bristled. Chairman William S. Moorhead, Democrat, of Pennsylvania, called Commissioner of Internal Revenue Johnnie M. Walters on the carpet May 24. But committee members—Republicans and Democrats alike—could see from Walters' prepared statement that IRS was evading the question.

So, instead of taking Walters' testimony, committee members lectured the IRS team and instructed them to come back in a week, prepared to meet the issue that Keller had raised very clearly. All members in attendance—Republicans and Democrats—joined in this action.

The IRS first string turned out in full force for the June 1 subcommittee hearing. Walters was supported by Deputy Commissioner Raymond F. Harless, Acting Chief Counsel Lee H. Henkel, Jr., Disclosure Chief Donald O. Virdin, and Francis I. Geibel, Acting Assistant Commissioner for Inspection.

Walters and Henkel performed eloquently, but left the subcommittee members convinced that IRS had the wrong side of the case. Moorhead called the IRS legal position "very weak." And Representative Frank Horton, Republican, of New York, said Henkel had tried to push a camel through a legal peephole.

The subcommittee expects to conclude hearings on June 27. Hopefully, the Government Operations Committee then will draft legislation to remove all doubt about GAO's right to audit IRS operations and report results to the ladies and gentlemen on Capitol Hill who represent all U.S. taxpayers.

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[From the Washington Post, June 15, 1972]

#### LOCKHEED LOAN DISCLOSURE URGED

The Senate Banking and Currency Committee yesterday admonished the Nixon administration for failing to provide complete data to the Government Accounting Office on the Government's \$250 million loan guarantee for Lockheed Aircraft Corp.

The GAO and the Emergency Loan Guarantee Board—the three-man committee that administers the loan guarantee—have been feuding for months over the disputed data.

The Emergency Loan Guarantee Board has given GAO all Lockheed's internal financial data, but has insisted that the auditors have no right to the Board's own internal documents, such as credit analyses done by the Federal Reserve bank in New York. The bank is a consultant to the Board, which consists of the Secretary of the Treasury, head of the Federal Reserve, and head of the Securities and Exchange Commission.

GAO insists it needs the additional documents to determine whether or not the Board had adequate information about Lockheed before making up its mind. So far, the Board has allowed Lockheed to borrow \$100 million of the \$250 million.

"In view of the highly controversial nature of the Lockheed loan guarantee and the size of the U.S. financial commitment, this committee believes the Emergency Loan Guarantee Board should fully cooperate with the GAO in making its records available," the Banking and Currency Committee said yesterday in a statement inserted in legislative report on the Defense Production Act.

It was unclear yesterday whether the statement—offered by Senator William Proxmire, Democrat, of Wisconsin, and passed 9 to 5—would settle the issue.

Samuel R. Pierce, Jr., the Treasury's General Counsel and counsel for the Board, had no comment on the action. The office of Comptroller General Elmer B. Staats said the GAO is trying to arrange a meeting with new Treasury Secretary George Shultz to resolve the issue.

[From the Evening Star, Thursday, May 4, 1972]

SUPERVISORY PANEL FOR LOCKHEED BARS DISCLOSURE TO GAO

(By Dana Bullen)

A high-level board watching over \$250 million in federally guaranteed loans to the Lockheed Aircraft Corp. has flatly refused to give the Government Accounting Office data about its activities.

"We are not going to let the GAO push us around," said Samuel R. Pierce, Jr., executive director of the Emergency Loan Guarantee Board headed by Treasury Secretary John B. Connally.

Senator William Proxmire, D-Wis., and Elmer B. Staats, U.S. Comptroller General, promptly assailed the board's decision as the withholding of facts needed to evaluate the controversial loan program.

The sharply conflicting views came out yesterday at news conferences held by the loan board and by Proxmire and Staats an hour later.

Last August, Congress passed controversial legislation to guarantee the private bank loans to Lockheed amid reports the big defense contractor was nearing bankruptcy. So far \$100 million has been advanced to the firm. The board headed by Connally is charged with seeing whether Lockheed, as it draws on the money, will be able to repay the loans.

GAO "HARASSMENT"

As Congress' budget watchdog agency, the GAO, which Staats heads, is responsible for seeing to it that Government agencies carry out laws as Congress intended.

The new battle over the Lockheed loans opened with Pierce charging GAO "harassment." At their later press conference, Proxmire and Staats denied the charge.

"It's not the first time the GAO has moved in to interfere and harass people making decisions in the executive branch of Government," the board's spokesman said. "We do not intend to be bullied."

Pierce, with Proxmire sitting quietly in the back of the room, denied that Lockheed is in financial trouble or that taxpayer's money is in any danger in connection with the loans.

"MAKING MONEY"

"Nothing could be further from the truth," he said. "The U.S. Government has been making money on Lockheed."

Under terms of the loan guarantee arrangement, Lockheed pays the Government a fee for its help. So far, Pierce said, \$1 million has been paid the Government under these terms.

Among the items of information the GAO wants, Proxmire said, are credit analyses on Lockheed prepared by a New York City bank for the loan board. The board has paid \$5,000 a month for these reports.

Pierce said that the government has such a "tight grip" on Lockheed assets that even if the firm should "go down the drain" the Government would get all of the \$250 million back safely.

Asserting GAO has no right to "staff memoranda" and "correspondence" with loan agents in New York, Pierce said, however, the board would provide committees of Congress specific data upon the request of the appropriate committee chairmen.

At their later press conference, Proxmire and Staats asserted that the loan board is violating the laws establishing the GAO by refusing the unit its own access to records and other information.

Attacking Connally for refusing to come before the Senate Banking Committee to testify on the loan board's refusal to give GAO data on its operations, Proxmire said:

"What does the Secretary have to hide? Is the Lockheed loan guarantee in such jeopardy that it has driven Secretary Connally to this extraordinary and indefensible posture of defying the law and the Congress?"

Proxmire, who spotlighted the large overrun on Lockheed's C5A transport program several years ago, said that he would continue to press for testimony by Connally on the new loan program.

"We were concerned that the people's \$250 million guarantee might be in



serious jeopardy, so we were particularly anxious to see that the Loan Guarantee Board operate with great care and keep the Congress closely and continuously informed," he said.

AUGUST 22, 1972.

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## REPORT TO THE CONGRESS

### U.S. SYSTEM FOR APPRAISING AND EVALUATING INTER-AMERICAN DEVELOPMENT BANK PROJECTS AND ACTIVITIES

Please note, while the overall report is classified, the following portion is *not* classified.

(By the Comptroller General of the United States)

#### CHAPTER 2. TREASURY DEPARTMENT RESTRICTIONS ON GAO ACCESS TO INFORMATION

Our review was carried out under the limitations placed on our access to, as well as in the absence of, records maintained by U.S. agencies concerning the administration of U.S. participation in IDB. The Department of the Treasury did not respond promptly to our requests for records and, on occasion, refused to make some documents available for examination. Such documents included minutes from IDB Board of Executive Director's meetings, periodic progress reports on projects being financed by IDB loans, and a recent consultant's study on IDB administrative practices.

Both the Treasury and State Departments arranged for agency officials to review the files we requested before they were released for our examination. We therefore cannot attest to the completeness of the contents of files that were made available to us. Indeed, there was a dearth of current correspondence in many of the files that the Department of the Treasury made available—files that should reasonably have been expected to contain rather frequent, if not continuous, flows of correspondence. For example, a file purported to contain correspondence between the Department of the Treasury and the Congress contained very little in 1970 correspondence, one letter for 1967, and nothing for 1968 and 1969. Also a file on U.S. Executive Director memorandums showed a similar situation—it contained only one document for 1969 and one for 1968, and the rest of the correspondence was dated 1962 and prior years.

Treasury and State Department officials and the U.S. Executive Director advised us that much of the correspondence concerning IDB matters was handled verbally and never reduced to writing.

In commenting on our draft report, the Treasury and State Departments indicated they had cooperated fully with us on the matter of providing records for our review. According to the Departments, the only records on which our access had been restricted pertained to confidential IDB internal documents. Restrictions on our access to information are further discussed on pages 75 and 76. The documents in question were accessible to the Treasury and State Departments and would have seemed to form a significant part of the record on which U.S. management decisions regarding IDB operations were based. It is therefore our view that the documents should have been made available for our examination pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 54).

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[From the Evening Star and the News, Monday, Aug. 21, 1972]

### IRS, UNLIKE TAXPAYERS, AVOIDS AN AUDIT

(By Lee Flor)

The average American taxpayer who fears that his income tax return will be audited should relish the news that the Internal Revenue Service also dislikes an audit.

But the IRS has an advantage the taxpayer lacks. For the past 10 years it has firmly refused to permit an audit by an outside agency, the General Accounting Office, of its management and techniques.

And it has largely had its way.

The GAO is a highly respected, and in some cases feared, arm of Congress. Its auditors and management specialists normally delve deeply into the functions of federal agencies, and monitor the ways in which these agencies carry out the programs legislated by Congress.

#### EXEMPTION IS CLAIMED

But the IRS, and other Treasury agencies, claim they are exempt from an audit by GAO.

The IRS position has incensed Rep. William S. Moorhead, D-Pa., chairman of the House Subcommittee on Foreign Operations and Government Information.

Moorhead's subcommittee has been holding a series of hearings on how the 1967 Freedom of Information Act has been implemented.

Moorhead and his subcommittee staff, looking into ways individuals and newspapermen have used the act to pry information loose from government agencies, came across the IRS' reluctance.

#### COMPLAINTS VOICED

In testimony before the Moorhead subcommittee, Robert F. Keller, GAO's deputy comptroller general, had some very specific complaints about the IRS.

"The GAO's review efforts at IRS 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 operation and activities."

"Without access to necessary records, GAO cannot effectively evaluate the IRS administration of operations involving billions of dollars" of taxes—about \$192 billion in fiscal 1971—and around \$973 million for annual salaries and expenses for IRS employees, Keller said.

"Without such access, the management of the largest collection agency in the world, employing about 65,000 people, will not be subject to independent audit," he told the subcommittee.

#### EXAMPLES OFFERED

Keller had several examples of how his agency wanted to check tax records at IRS to measure the effectiveness of the IRS programs. The GAO, for example, wanted to check the effectiveness of IRS collections of the Federal highway use tax. It wanted to check truck registrations in States against the Federal tax returns, to see if IRS was missing any trucks.

The GAO also wanted to check the manner in which IRS collected \$7 billion in alcohol and tobacco taxes annually.

The GAO also is having trouble in its efforts to examine the IRS's effectiveness in administering the economic stabilization program.

#### DISTRICTS VARY

Even the Bureau of Customs is in the act. As part of Treasury it is denying GAO access to "any records bearing upon the efficient and economical management of programs and as to whether the programs are carried out as intended by the Congress," the GAO contends.

The IRS handling of the \$2 billion in delinquent tax returns aroused the most interest by subcommittee members. Apparently there is a wide discrepancy between IRS districts in the rate of effectiveness in which the delinquent accounts are collected.

For example, in fiscal 1971, the New York district collected only 35 percent of the delinquent accounts settled compared to around 85 percent in New Jersey.

In Maryland and the District of Columbia, the percent collected was 46.6 percent, and in Virginia, 61.2 percent, according to E. Edward Stephens, a syndicated columnist whose column, "Counsel for Taxpayers" is carried by the Star-News.

Keller said a thorough examination by GAO could show if inadequate IRS staff time was spent on delinquent tax accounts, and also could indicate if lower-income taxpayers were being treated as fairly as corporations with large legal staffs.

Such an audit, if it examined individual tax returns, might show whether any corporations has received special preference.

The IRS was asked to testify on why GAO should not be permitted to examine individual tax returns as part of its overall review program.

#### SECRECY IS LAW

The Commissioner of Internal Revenue, Johnnie M. Walters, and his staff appeared before the Moorhead committee to give their side of the dispute.

Walters said the IRS was required by law to keep all income tax records confidential, and therefore could not give GAO access to the records.

Also, the IRS comes under the legislative oversight of the Congressional Joint Committee on Internal Revenue Taxation, and it would duplicate functions if the GAO also was to review it, Walters said.

The GAO review "would consume a lot of time. We already are stretched so thin that we cannot do the jobs we ought to be doing," Walters testified.

In response to a question as to whether the GAO review would be burdensome, Walters said that "Yes, it would cause some problems."

Moorhead said he felt it was obvious that previous Federal legislation had given GAO adequate authority to audit IRS, and to examine individual income taxes as part of this. The GAO has stressed numerous times it will not reveal the results of individual income tax returns, and insists that it cannot evaluate the effectiveness of delinquent tax returns without access to the original documents.

#### LEGISLATION LACKING

There is no legislation pending to force IRS or the other agencies in Treasury to submit to an independent GAO audit.

However, some 18 months ago the Joint Committee on Internal Revenue Taxation said it was interested in the effectiveness of the collection of delinquent taxes, and authorized an investigation. Since the committee staff is small it turned the job over to the GAO.

Under the auspices of the joint committee, and not as an independent agency, GAO auditors are checking the IRS. Their report, by normal GAO practice, will not be made public but will be turned over to the joint committee.

Thus, the public may never know what the auditors find.

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[From the Washington Star, Aug. 28, 1972]

### FDIC REFUSES GAO AUDIT OF ITS RECORDS

(By Lee Flor)

The Federal Deposit Insurance Corporation (FDIC), which insures individual bank accounts against bank failures, is refusing to let the General Accounting Office audit its records.

The FDIC has a staff of about 2,100 persons in its division of bank supervision who regularly delve into bank records. The organization has sweeping powers to intervene in cases in which bank officers have endangered bank accounts by risky loans or other practices.

But because of FDIC's desire to keep bank records confidential, the GAO is not permitted to audit the records of the 2,100 persons who directly supervise banks.

A recent GAO report pointed out that the FDIC was concerned with 234 banks which were in what is called its problem category. The GAO report mentioned that the five largest of these banks had insured deposits which totaled \$1 billion.

#### RECORDS EXAMINED

The FDIC regularly examines the records of around 14,000 National and State banks. It puts banks in what it calls its "serious problem" category when there is a danger the FDIC will have to pay off depositors "unless drastic change" can be made in the bank's operation.

The FDIC also puts banks in its "other problem bank" category when it feels the bank has a "lesser degree of vulnerability, including those which give cause for more than ordinary concern and require aggressive supervisory attention."

The GAO, in a report released May 25, 1972, stated that "We believe that access to the records of the FDIC's Division of Bank Supervision is essential to a meaningful audit of the corporation by GAO.

"The Division's reports on insured banks contain facts, opinions, and recommendations of vital importance to the conduct of the corporation's affairs."

#### RESTRICTIONS DEcriED

"Without full and complete access to these reports and the supporting documentation, we cannot evaluate important information affecting the corporation's financial operations and condition," the GAO report stated.

It added that "because of restrictions on access to the records," the GAO was unable to find out "whether bank examinations were of sufficient scope and could be relied upon to identify all banks that should have been classified as problem banks."

Also, GAO said it was unable to find out whether the FDIC "had taken effective followup action on findings revealed by the bank examiners."

Another problem was that GAO was unable to determine "the significance of any possible adverse effect of problem banks on the financial position of the corporation," the report concluded.

The FDIC's position is that it "believes that the basic concept of confidentiality, as to open bank data, is essential to the proper supervision of banks and to the functioning of deposit insurance," the GAO report said.

#### POWERS ASKED

Lawyers for both the FDIC and the GAO disagree over the GAO access to FDIC records. As a result, the GAO said it was recommending that Congress pass legislation giving it complete access to all records of the FDIC.

The GAO audit was sent to the FDIC for comment on March 16, 1972, and 2 months later the FDIC replied in a letter released with the GAO report.

The letter, signed by Frank Wille, FDIC chairman, said the FDIC would oppose any legislation intended to give GAO complete access to FDIC records.

Wille also complained that the GAO report did not adequately state the FDIC viewpoint on the dispute, and also implied that GAO had helped slant the dispute by the title of its report: "Audit of FDIC for the Year Ended June 30, 1971 Limited by Agency Restriction on Access to Bank Examination Records."

(Whereupon, at 12:25 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Tuesday, June 6, 1972.)





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