

COMMITTEE ON FOREIGN RELATIONS

DRAFT REPORT

DECISION NOT TO PURSUE ITS JANUARY 12, 1981
SUBPOENA FOR A LOG OF PRESIDENTIAL CONVERSATIONS
IN CONNECTION WITH THE NOMINATION OF
ALEXANDER M. HAIG TO BE SECRETARY OF STATE

The Senate Committee on Foreign Relations does not accept the objections of the Archivist of the United States to its subpoena of January 11, 1981. However, the Committee has determined not to pursue enforcement of the subpoena. Enforcement might involve the Archivist in a contempt of Congress proceeding, which the Committee has concluded would be inappropriate under the circumstances of this case. More importantly, it is the judgment of the Committee that protracted enforcement proceedings would not be in the best interests of the Nation.

In anticipation of Senate confirmation hearings on the nomination of Alexander M. Haig to be Secretary of State, the Committee on Foreign Relations commenced an inquiry with respect to General Haig at the end of the 96th Congress. As part of that inquiry, the Committee concluded that they should consider the relevance of certain materials bearing on the prospective nominee's service as White House Chief of Staff under former President Richard M. Nixon. The Committee sought to obtain an index of the tapes of conversations between President Nixon and General Haig. Those tapes are under the control of the National Archives and Records Service, headed by Robert Warner, Archivist of the United States, pursuant to the Presidential Materials and Recordings Preservation Act (hereafter the "Act"), Pub. L. No. 93-526, 44 U.S.C. §2107n.

On January 12, 1981, pursuant to a decision by the Committee the previous day, Senator Percy, as Chairman, issued a subpoena directing Mr. Warner to produce a log of the conversations between President Nixon and General Haig from May 4, 1973 to July 18, 1973. This log had previously been prepared by the Archivist in an effort to facilitate identification of, and access to, the underlying materials. The subpoena for the log was issued while extensive hearings

on the nomination, held by the Committee between January 9 and 15, 1981, were still in progress.^{1/}

As part of his responsibilities under the Act, Mr. Warner notified Mr. Nixon of the requests and subpoena, and on January 16, Mr. Nixon objected to the production to the Committee of the subpoenaed log. On January 19, 1981 Mr. Warner declined to produce the subpoenaed log. He informed the Committee by letter that while he had concluded that "in almost every instance" Mr. Nixon's objections were "either meritless or insufficient to prevent compliance with the subpoena," he nevertheless considered it his responsibility "to examine the nature of the congressional action and the nature of the materials being sought and to weigh the respective public interests which are served by protection or disclosure." He asserted that the Committee's exercise of its oversight function was "uncertain" and "open-ended", and that in any event the log would be of "minimal value" for the Committee's purpose. Finally, he concluded that the ultimate release of the requested material would involve protracted litigation.

While the Committee acknowledges that there is a substantial issue concerning the interpretation of the Presidential Materials and Recording Preservation Act which governs access to the materials in question, the Committee cannot accept the Archivist's interpretation of the Committee's own jurisdiction in this matter. In its Resolution of January 15, 1981 the Committee expressly invoked its general oversight responsibilities for continuing its investigation after recommending confirmation of General Haig. Such investigations are consistent with historical practice. Since the investigations of Secretary of the Treasury Wolcott in 1800 and President Monroe in 1825, Congressional committees have probed allegations bearing on the continuing fitness of high executive officials for office. Moreover, Congressional authority to examine an official's conduct in a prior office has been clear since 1826, when a committee investigated Vice President Calhoun's conduct in his prior post as Secretary of War.^{2/} And the relevance of prior conduct to an

^{1/} Nomination of Alexander M. Haig, Jr.: Hearings Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. (1981) (pts. 1 and 2).

^{2/} See E. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt, 53, 87, 89 (1928).

official's fitness to continue to serve in a position for which he had previously been confirmed by the Senate was recognized as recently as 1977, when the Senate Committee on Governmental Affairs investigated the conduct of Bert Lance, Director of the Office of Management and Budget. The Senate Committee derived its jurisdiction to conduct that inquiry both from its oversight responsibility, and its right to determine the validity of information received during the confirmation hearings.^{3/} The Lance inquiry, resulting in the resignation of the OMB Director, constitutes a clear example of the fundamental role of Congressional oversight investigations, regardless of whether they may appear at the outset to be "uncertain" or "open-ended."

Furthermore, the subpoena was a narrow one, seeking only the log of taped conversations rather than the tapes themselves. Indices such as that log should be furnished freely, even when the underlying indexed materials are assertedly privileged, so that further discussion, negotiation, and litigation over access can take place on an informed basis.^{4/} Finally, General Haig himself indicated that he had no objection to Committee access.^{5/}

3/ Matters Relating to T. Bertram Lance: Hearings Before the Senate Committee on Governmental Affairs, 95th Cong., 1st Sess. 971 (1977). Such inquiries into the fitness of high office holders are well within the investigative authority sanctioned by the Supreme Court in Watkins v. United States, 354 U.S. 178, 200 n.33 (1957).

4/ Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

5/ Nomination of Alexander M. Haig, supra, n.1, at 29:

Sen. Tsongas: Above all I would like to inquire, in that spirit of symbolic openness, as to whether General Haig would be opposed to the issuance of the subpoena.

General Haig: Senator, I have no objection, no concern for access by the Committee or the Committee staff to any document, manuscript, memorandum of conversation, or sworn testimony that would shed further light on the performance of my past service to my country.

But even assuming, as we do, that the issuance of the subpoena was a reasonable first step in the effort to obtain material relevant to the inquiry, the Committee is now faced with the more difficult and far reaching question of whether to seek its enforcement. In this connection, the Committee observes initially that while some materials have been received from the Executive Branch, Mr. Nixon has continuously refused to waive his claims of privilege, and has by his actions and representations through his counsel expressed his determination to resist the release to the Committee of the material requested. For example, even though the subpoena issued by the Committee was limited to an index of the conversations between former President Nixon and General Haig for the period May 4, 1973 through July 18, 1973, Mr. Nixon has made it clear that he will take full advantage of the opportunities available through litigation to prevent the Committee from obtaining it.

While the Committee believes that the subpoena was reasonable and justified when issued, it now appears that lengthy litigation would be required to obtain the index and that further litigation would be necessary to obtain any tapes determined from the index to be relevant to our responsibilities. We are further mindful of the fact that issues of withholding information by the executive are traditionally resolved through the political process rather than through litigation. In this way, the resolution of such disputes reflects the popular will, expressed through the democratically elected branches, as well as the need for flexibility in the internal decisionmaking of the government. Judicial action should be reserved as the last resort in disputes between the branches.

Where Congress has in the past resorted to judicial action, the most common method of enforcement has been by way of contempt proceedings. In the Committee's view, however, this method would be most inappropriate in this instance, where the Archivist is acting in good faith, pursuant to his statutory responsibility to evaluate a claim of privilege asserted by Mr. Nixon. While the Committee does not accept the objections of the Archivist, it nonetheless has concluded that it would be unseemly to subject him to contempt proceedings under these circumstances.

As an alternative, the Committee might file a civil action to enforce its subpoena. However, upon consultation with the Office of Senate Legal Counsel, it appears to the Committee that such a civil suit would likely become embroiled in collateral disputes over issues of jurisdiction and justiciability, as such suits have in the past. By filing such an action, the Committee would thus confront complex and protracted litigation on issues not germane to the Committee's immediate inquiry -- General Haig's qualifications to serve as Secretary of State. These difficulties may be compounded since the Archivist has represented that the index is itself misleading, and that the relevance of indexed materials to the Committee's inquiry is not apparent from its face.

We do not believe that it is in the national interest to engage in such litigation, especially since to do so could interfere with the ability of Secretary Haig in the performance of his functions, and, at the very least, will inevitably result in suggesting to others that our approval of him as Secretary of State was somehow qualified and conditional. At this time in our Nation's history, our Secretary of State should not be forced to operate under such constraints. Because in the judgment of the Committee it is more in the national interest to concentrate on the future rather than dwell on the past, and for the reasons expressed herein, it is the decision of the Committee that it will not seek enforcement of its subpoena.