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THE DIRECTOR OF CENTRAL INTELLIGENCE

WASHINGTON, D. C. 20505

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Office of Legislative Counsel

26 SEP 1978

Mr. Donald G. Sanders, Special Counsel
Select Committee on Ethics Subcommittee
United States Senate
Washington, D.C. 20510

Dear Don:

Your memorandum of 18 September concerning access to classified material on the part of attorneys retained by an individual being interviewed by the Subcommittee staff raises difficult questions involving a potential conflict between the disclosure demands of the Subcommittee's investigative process and the DCI's statutory responsibility for the protection of intelligence sources and methods. These questions are analogous to the dilemmas that arise in criminal prosecutions when the disclosure demands of the judicial process confront the secrecy imperatives of intelligence work.

Admiral Turner recently addressed this vexing problem in testimony before the Senate Select Committee on Intelligence Subcommittee on Secrecy and Disclosure. He declared that the serious adverse consequences flowing from unauthorized disclosures of intelligence information give great cause to support prosecution of perpetrators when violations of criminal statutes are involved, and that there is an incentive "to lean over backwards in releasing information which is essential to such judicial proceedings." (Hearings on the use of Classified Information in Litigation, 1 March 1978, p. 13). Admiral Turner also noted the important deterrent effect of such prosecutions.

We believe these considerations also apply to the work being done by the Morgan-Schmitt Senate Select Committee on Ethics Subcommittee, and it is our desire to be as cooperative with the Subcommittee's investigative efforts as security considerations will allow. The Agency and the Subcommittee have a common interest in making the Subcommittee an effective deterrent against unauthorized disclosures.

As you know, several procedures aimed at allowing prosecutions to proceed while mitigating somewhat the danger of exposing national security information have, with the cooperation of the courts, been successfully employed in connection with in camera pre-trial matters during some recent criminal prosecutions. These procedures have included protective orders with violations punishable by citation for contempt of court, the execution of nondisclosure agreements by defense attorneys, and, in some cases, the conduct of background investigations and the granting of security clearances to defense counsel by the Department of Justice.

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Analogous procedures appear to be available under the Rules of Procedure of the Select Committee on Ethics. We note that Rule 6(b) provides for the receipt of testimony in executive session, and that protective provisions regarding testimony so taken are contained in Rules 1(i) and 6(k). We also note that other protective provisions are contained in the Adjudicatory Hearing Procedures spelled out in Rule 6(j). These include:

-- Provision for an "appropriate agreement limiting access and disclosure" to information and documents provided by the committee to a respondent. (Rule 6(j)(2)(A)).

-- Provision for discretionary recommendation by the Committee to the Senate that an individual violating an agreement limiting access and disclosure be cited for contempt of Congress. (Rule 6(j)(2)(C)).

Without presuming to tell the Subcommittee how to conduct its business, we would note that the right to counsel in committee proceedings appears to arise in conjunction with an adjudicatory hearing (Rule 6(j)(4)), and that Rule 6(c) provides that any executive hearing may be designated as an adjudicatory hearing.

While the protection that would be afforded by the use of executive session and the above-mentioned provisions available in connection with adjudicatory hearings are significant, it is also substantially less sure, swift, and severe than the judicially imposed sanction of contempt in a criminal prosecution. We believe, therefore, that fulfillment of the DCI's statutory responsibilities would require that we also be given the opportunity to issue appropriate temporary security clearances meeting the standards set forth in DCID 1/14 to the attorneys involved.

Again, let me reiterate our desire to facilitate the Subcommittee's investigation. In answer to the specific question raised in your memorandum, then, we would be willing to consent to access by the attorneys under the following conditions:

-- That access would follow the granting of an appropriate security clearance. Such a clearance would be procured in the same fashion as are clearances for Subcommittee staff members.

-- That the attorneys would execute an "appropriate agreement" limiting access and disclosure as called for by Rule 6(j)(2)(A) of the Select Committee on Ethics' Rules of Procedure. The Nondisclosure Agreement between the Subcommittee and its staff could be modified for this purpose. It would, of course, also be necessary for the respondent to execute such an agreement.

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-- That it would be made clear to all parties that violation of the agreement limiting access and disclosure could lead to a recommendation that the offender be cited for contempt of Congress.

-- That proceedings involving classified material be held in executive session, and that the protective provisions in the Rules of Procedure relating to executive session testimony be strictly adhered to.

We believe these conditions would be appropriate both for the specific matter now before the Subcommittee and in similar situations that may arise in the future. The Subcommittee's agreement to these conditions would serve to make paragraph 11 of the Memorandum of Understanding between the Subcommittee and the DCI inapplicable. We believe that an exchange of letters in which the Subcommittee proposes to follow the procedures outlined above and the DCI concurs would be sufficient to constitute official consent, but we would be amenable to a formal amendment to the Memorandum of Understanding if this is the Subcommittee's preference. I would be happy to have my staff discuss this matter further with you at your convenience.

[redacted]

Deputy Legislative Counsel

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