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(Marked Portions Only) JUN 13 1974

FOR COMMITTEE USE ONLY

STAFF MEMORANDUM RELATING TO
RECENT ALLEGATIONS ABOUT
SECRETARY KISSINGER'S TESTIMONY
BEFORE THE FOREIGN RELATIONS COMMITTEE

General Background of the Wiretap Program

The principal controversy is over whether Dr. Kissinger was truthful in testimony before the Committee on Foreign Relations during his confirmation hearings in September 1973 concerning his role in the wiretapping of 17 government officials and newsmen during the period from May 1969 to February 1971. A secondary issue concerns his testimony relative to his knowledge of David Young's work with the Plumber's group. Each of the major allegations will be covered later in this paper.

The 17 wiretaps were conducted without a judicial warrant. At the time, the Justice Department contended that the President had inherent authority to wiretap without a warrant for "national security" purposes, including tapping to check for leaks of classified information. Precedents for so-called "national security" wiretaps date back to President Roosevelt.

In 1968 Congress passed a wiretapping statute (18 U.S.C. § 2510-2520) but the statute specifically stated that it was not meant to limit any constitutional power the President may have to wiretap for specified national security purposes. In 1972, after the 17 wiretaps involved here were concluded, the Supreme Court, in the Keith case (407 U.S. 297), ruled that warrantless wiretaps of Americans who did not have a "significant connection" to a foreign power were unconstitutional. However, the ruling was not directly on point of the wiretaps in the 17 cases. But cases on point are now being processed through the courts.

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DECLASSIFIED UNDER AUTHORITY OF THE
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Morton Halperin, one of the NSC members tapped is suing Secretary Kissinger and others for damages in a civil suit. Civil Suits by others who were tapped may be filed against him. Ultimately, the Supreme Court is likely to rule directly on the Constitutionality of wiretaps of this nature. But, it should be kept in mind that between 1969 and 1971 the Justice Department contended that wiretaps to check for leaks of "national security" materials were legal and a proper exercise of inherent Presidential powers.

The wiretap program was authorized by the President in May 1969 following a series of news stories based on leaks of classified information. According to Dr. Kissinger, the program was triggered by a story in the May 9, 1969, New York Times which reported that the United States was secretly bombing Cambodia with B-52's. /The FBI summary of the wiretap program suggests, according to the notes taken by Senator Sparkman and Senator Case, the Subcommittee appointed to review the FBI summary of the wiretap program that the program originated from a conversation between Dr. Kissinger and Mr. Hoover on May 9, 1969. Dr. Kissinger could not recall such a meeting but admitted that it could have taken place. ~~(SECRET)~~/

In a speech on May 22, 1973, the President said: "I authorized this entire (wiretap) program. Each individual tap was undertaken in accordance with procedures legal at the time and in accord with longstanding precedent. . . . Those wiretapped were selected on the basis of access to the information leaked, material in security files, and evidence that developed as the inquiry proceeded."

Dr. Kissinger told Senators Sparkman and Case that the program was agreed to at a meeting on May 9 between the President, Attorney General Mitchell, Director of the FBI Hoover, and Dr. Kissinger. The Subcommittee's notes state that /"At the meeting with the President, Dr. Kissinger said, it was agreed that something had to be done about the leaks and that Mr. Hoover (who was present) advised the President to institute a system of wiretaps as his predecessors had done. The Attorney General, who was also present at the meeting, affirmed that the proposal was lawful. ~~(SECRET)~~/ He told Senators Sparkman and Case that the following criteria were agreed upon for selecting individuals to be tapped:

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(1) Those who had some kind of adverse information in their files at the time of their employment by the National Security Council. (There were two in this category.)

(2) Those who had access to information which had been leaked to the press. (Several were in this category).

(3) Those whose names might turn up in the process of tapping those in the previous categories (the number in this category is uncertain from the information available thus far), and

(4) Newsmen who published information that had been leaked. (Three were in this category, according to the Subcommittee notes.) The names of those who were wiretapped under this program first became public in an article from the September 21, 1973, New York Times and was reprinted in the attached item in the June 12 issue. However, Executive branch officials have never confirmed or denied the accuracy of this list.

COMMITTEE CONSIDERATION OF THE
WIRETAP ISSUE DURING HEARINGS
ON THE KISSINGER NOMINATION

The wiretap issue was considered at some length during the hearings on Dr. Kissinger's nomination. However, the Committee did not have access to the basic FBI documents involved in the handling of the cases, from which many of the current leaks, putting Dr. Kissinger's testimony in question, seem to be coming.

The Committee heard Dr. Kissinger in open session on September 7, 10, and 11. On September 10 Members discussed the wiretap issue in executive session with Attorney General Richardson and Acting Deputy Attorney General Ruckelshaus. Following that discussion, by a vote of 14-0, the Committee appointed two members to meet with Richardson and Ruckelshaus to obtain further information concerning Dr. Kissinger's

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role in the wiretapping operation. On September 11 Senators Sparkman and Case, along with Carl Marcy of the Committee staff, were permitted to examine a 28½ page FBI summary of the wiretap program, dated June 25, 1973, which had been prepared originally for Mr. Ruckelshaus while he was acting director of the FBI.

The Subcommittee had only 20 minutes to review the summary before the arrival of Messrs. Richardson, Ruckelshaus, and Kissinger. Time was so limited that no notes were taken concerning three of the wiretap operations.

According to the Subcommittee's notes, only two documents, other than the summary, were shown to Senators Sparkman and Case at the time, a letter from Mr. Hoover to Dr. Kissinger dated May 13, 1969, and a memorandum of talking points for a June 4, 1969, meeting between Dr. Kissinger and Mr. Hoover. No other documents concerning the wiretap program were available to the subcommittee or the full committee. The Subcommittee notes of this meeting, classified ~~SECRET~~ and copies of the two documents exhibited by Dr. Kissinger, classified ~~TOP SECRET~~, are available to members in the Committee offices. The Committee was not permitted to retain a copy of the FBI summary.

The Subcommittee reported to the full Committee that it ". . . is of the opinion that Dr. Kissinger's role in the surveillance was not such as to bar him from confirmation by the Senate." After receiving the Subcommittee report the full Committee discussed the wiretap issue at length with Dr. Kissinger in two executive sessions on September 17.

Dr. Kissinger's basic statement to the Committee concerning his role in the wiretapping program was as follows:

"First, I never recommended the practice of wiretapping. I was aware of it, and I went along with it to the extent of supplying the names of the people who had access to the sensitive documents in question. Despite some newspaper reports, I never recommended it, urged it, or took it anywhere." (p. 292, printed hearings.)

However, in his June 11 press conference in Salzburg, Austria Secretary Kissinger stated that "I was asked to have my office supply names in three categories:

Individuals who had adverse information in their security files, individuals who had access to information that had

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leaked and individuals whose names had appeared as a result of the investigation that submission of the previous two lists might entail. (transcript as printed in the June 12 Washington Post.) This comes closer to the criteria for selecting those to be tapped which was related to Senators Sparkman and Case.

The Committee concluded in its report on the nomination that "Mr. Kissinger's role in the wiretapping of 17 government officials and newsmen did not constitute grounds to bar his confirmation as Secretary of State." His nomination was approved by the Committee by a vote of 16 to 1 on September 18 and was confirmed by the Senate on September 21 by a vote of 78 to 7.

SUBSEQUENT STUDY OF WIRETAPPING
BY THE SUBCOMMITTEE ON SURVEILLANCE

The Committee was concerned over the use of "national security" or foreign policy as a justification for wiretapping and at the meeting where Dr. Kissinger's nomination was approved, the Committee unanimously adopted a resolution to "undertake a full examination

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of the use of electronic and other means of surveillance of American citizens in connection with alleged intelligence gathering or other activities related to the foreign policy."...

On October 16, 1973, the Chairman announced the appointment of a Subcommittee on Surveillance to carry out the Committee's mandate for a study of the general issues involved in warrantless wiretapping with Senator Muskie as Chairman. The other Members are Senators Pell, McGovern, Case and Javits.

On December 6, 1973, it was announced that this Subcommittee would carry out a study of warrantless wiretapping jointly with two subcommittees of the Committee on the Judiciary, the Subcommittee on Administrative Practice and Procedure (Senator Kennedy, Chairman) and the Subcommittee on Constitutional Rights (Senator Ervin, Chairman). Six public hearings have been held to date.

On February 27, the three subcommittees met informally with Attorney General Saxbe and Director of the F.B.I. Kelly at which time a request was made for the procedural documents involved in the 17 wiretap cases, other than the records containing the contents of conversations that had been overheard. After no information was forthcoming from the Justice Department, the request was reiterated in an April 17 letter to Attorney General Saxbe, signed by the three subcommittee Chairmen. In a response to Senator Muskie on May 2, the Attorney General stated that "... it would be inappropriate to respond affirmatively to your request at this time." The request for the procedural documents of the 17 wiretaps was again renewed during a formal meeting of the three subcommittees with Attorney General Saxbe and Director Kelly on May 22. No documents have been received to date.

On June 12, following the full Committee's decision to reopen the wiretapping matter, Senator Fulbright wrote to Attorney General Saxbe and requested all pertinent documents involved. He also wrote to the Special Prosecutor to ask for copies of any materials in his possession, and solicited the assistance of the Legal Advisor of the Department of State in getting appropriate materials.

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ALLEGATIONS CONCERNING DR. KISSINGER

The following are the principal allegations bearing on Dr. Kissinger's testimony before the Committee along with staff comments based on the limited information available. It is stressed that because of the lack of documents and testimony from key persons involved, the staff is not in any position to give an informed opinion on the accuracy of most of these points.

I. Origin of the Wiretapping Program

(a) Key Testimony By Kissinger at Issue:

"First, I never recommended the practice of wiretapping. I was aware of it and I went along with it to the extent of supplying the names of the people who had had access to the sensitive documents in question. Despite some newspaper reports, I never recommended it, urged it, or took it anywhere."
(p. 292, printed hearings on nomination)

(b) Allegation:

That Kissinger asked that the wiretap program be initiated. This is based on the leaked transcript of a Presidential tape from the House Judiciary Committee which quotes the President as saying to John Dean on February 28, 1973, that "Henry (unintelligible) ... at least I know not because I know that I know that he (Kissinger) asked that it be done. And I assumed that it was." "It" has been interpreted in press accounts as meaning initiation of the wiretap program.

Comment:

(1) Dr. Kissinger told Senators Sparkman and Case on September 11, 1973, that Hoover advised the President to "institute" the wiretap program during a May 9, 1969 meeting between the President, Mitchell, Hoover and Kissinger. The Subcommittee notes state:

"/"At the meeting with the President, Dr. Kissinger said, it was agreed that something had to be done and Mr. Hoover (who was present) advised the President to institute a system of wiretaps as his predecessors had done. The Attorney General, who was also present at the meeting, affirmed that the proposal was lawful. The conversation then focused on criteria to be established for such taps." (p. 6-7 ~~SECRET~~) 7

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(2) On June 7, 1974, after the news stories based on the leak of the Presidential tape had appeared, Senator Muskie asked Dr. Kissinger this:

"Senator Muskie. Let me put the question that keeps bobbing up. Did you yourself initiate and originate the recommendation that the wiretap program be initiated?"

Secretary Kissinger. "I did not." (p. 82, transcript of Committee hearing on June 7, 1974)

II. Role of Kissinger in Termination of the Wiretaps in February 1971

(a) Key Testimony by Kissinger at Issue:

(1) The notes of the Sparkman-Case Subcommittee meeting of September 11 indicate that Secretary Kissinger added this comment to the original Subcommittee notes: "He (Kissinger) also pointed out that in each case the decision on terminating the taps was made by the F.B.I. and was totally out of his jurisdiction." (p. 20 ~~SECRET~~)

(2) "Therefore, it was decided from that time on (May 1970) that while I had some relationship to that program (internal security) informally, through my deputy, General Haig and Director Sullivan of the F.B.I. that reports would no longer go to me since there was nothing I could do with them."...

"Senator Muskie. General Haig was in your office continually?"

Mr. Kissinger. But only for that part. He too was not connected with any part of it, except that as Director Sullivan of the F.B.I. received a report that seemed to him particularly egregious, he would then informally notify Haig, but only in the wiretap program. On none of the other programs did we receive even any information." (p. 330, printed hearings on nomination)

(b) Allegation:

General Haig ordered the termination of the last of the wiretaps in February 1971 and was involved in the initiation of taps subsequent to the time Dr. Kissinger said his office was divorced from the program.

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(c) Comment:

The F.B.I. summary memorandum shown to Senators Sparkman and Case, apparently, does not cover who ordered the remaining taps terminated in February 1971.

/Mr. Ruckelshaus told the Subcommittee that it was the practice of Mr. Hoover to take off taps prior to his appearance before the Appropriations hearings each year so he could report minimum taps. ~~(SECRET)~~ /

In a staff interview on March 6, 1974, William Sullivan, Haig's contact in the F.B.I., who is now retired, stated that the taps were removed on the basis of a telephone call from Haig to him. According to Sullivan, Haig did not give any reason for the order. He said that taps were added or taken off on the basis of phone calls from Haig but sometimes Haig would send a memorandum order. In the recently released transcripts of Presidential tapes, there is a reference by the President to the fact that the taps were removed when the "hullabaloo" developed. The staff is uncertain as to what that means.

/It should be noted that although Secretary Kissinger, in effect, said that his office got out of the wiretapping business in May 1970, the Subcommittee notes indicate that at least three taps were begun or were reinstated in May 1970 or later or orders from Haig ~~(SECRET)~~ /

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III. Order for Taps to be Placed on Individuals

(a) 1. Kissinger Testimony In Dispute:

"The Chairman. Did you at any time specifically make a clear initiative, take the clear initiative yourself on any tap on even a single one?"

Mr. Kissinger. No.

The Chairman. You never did?

Mr. Kissinger. Not in the sense that I said 'tap this individual.' I carried out the criteria of a previous decision. There could have been, as I point out, a different perception by the FBI.

The Chairman. No single tap. The criteria?

Mr. Kissinger. No.
(p. 329, printed hearings on nomination)

(2) The Chairman. To the best of your knowledge he (Kissinger) did not originate any of these requests?

Mr. Richardson. To the best of my knowledge he did not in the fundamental sense of that word, no." (p. 28, transcript of September 10, 1973, executive session.) (The printed hearing was modified, apparently by Justice, to make the statement appear to be based primarily on assurances from Kissinger to Richardson.)

Allegations -- There have been news stories that the FBI records show that Secretary Kissinger's name appears in FBI reports as being personally responsible for ordering wiretaps.

Comment -- The FBI summary shown to Senators Sparkman and Case apparently contains so much variation in the wording of the "requests" for taps as to question the usefulness of trying to pinpoint responsibility for individual wiretaps without full access to the documents and the interrogation of key witnesses.

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Dr. Kissinger, apparently, showed Senators Sparkman and Case a list of talking points prepared for a meeting he was to have with Hoover two days after the date he was listed as the initiator of a new wiretap which contains language that could indicate that he and the President were anxious to terminate the program as soon as possible. ~~(SECRET)~~

A statement by Richardson, part of which was deleted from the printed hearings may be pertinent concerning the semantics involved in the FBI documents.

Mr. Richardson.... the reports indicate that there were requests for wiretaps of identified individuals either by Dr. Kissinger or in some instances on his behalf by then Colonel Haig.

The FBI appears to have used this format even in instances where it is quite clear on the record as a whole that the director himself was likely to have been the originator of a specific suggestion. In other words, if he could obtain acquiescence in the suggestion, then the request was a request that came from the White House." (p. 18 of September 10 executive session transcript.)
(The first paragraph, modified slightly, appears in the printed hearings, the second paragraph was left out of the printed version.)

According to Dr. Kissinger's statements to the Subcommittee "requested by" was a euphemism employed by the FBI to denote the supplying of names under the agreed upon criteria. ~~(SECRET)~~
Sullivan told the staff that all of the taps were based on orders from the White House and that none were initiated by Mitchell or Hoover, contrary to the Subcommittee's notes based on the FBI summary.

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IV. Knowledge of the Plumbers Operations

(a) Kissinger testimony --

(1) "Mr. Kissinger. Senator (Percy). I have no knowledge of any such activities that David Young may have been engaged in. I did not know of the existence of the 'Plumbers Group', by that or any other name. Nor did I know that David Young was concerned with internal security matters." (p. 51 of printed hearings)

(2) "Mr. Kissinger. My understanding was that he (Young) would work for Mr. Ehrlichman on the new declassification system, which is, of course, a matter in which the National Security Council has an interest." (p. 69, printed hearings)

(b) Allegation --

(1) That Kissinger must have known of the Plumbers because in December 1971 he heard a tape in which Young was interrogating Admiral Welander, the JCS liaison officer with the NSC, concerning the leak of information about the Indo-Pakistan war.

(2) In an affidavit by Ehrlichman filed in the criminal prosecution for the break-in of Ellsberg's psychiatrist, Ehrlichman states that it was agreed to assign Young to the White House unit being set up to check for leaks (the Plumbers) at a meeting with the President in July 1971 which, apparently, took place on a helicopter flight from Los Angeles to San Clemente. He stated in this affidavit: "Dr. Kissinger then objected to Young being assigned to the Unit from his staff, on the ground that he had other proposed uses for him.

"In a conversation among the President, Henry Kissinger and me (attended by H. R. Haldeman), July 15, the President decided Young should be assigned to the unit."

Comment -- Secretary Kissinger testified at some length about this matter in executive session on January 29, 1974. A portion of his testimony was later released to the press. This is the essence of what he said:

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" . . . at the time I paid no particular attention to the fact that David Young was conducting the interview. It seemed to me that he was doing it in his capacity as an Ehrlichman staff member . . . I frankly attached no importance whatever to the fact that David Young was conducting the interview. I did not construe from that that David Young was conducting an investigation; the 'Plumbers' were beyond my imagination. . ."

Secretary Kissinger said in his June 12 press conference in Salzburg that he could not recall any such conversation on the helicopter flight as Ehrlichman related in his affidavit.

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