CIA

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

22 JUL 1975

The Honorable Philip Buchen
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Buchen:

As you are aware, the Departments of State and Justice are in the process of re-examining the parameters of the President's delegation of power to the Attorney General for the conduct of warrantless electronic surveillance within the United States for foreign intelligence and counterintelligence purposes. Since this method of intelligence collection is vital to the security of our nation and is an indispensable tool in CIA's mission of providing the foreign intelligence necessary in today's climate, I would like to express my views against any restrictive changes to the delegation of 19 December 1974 that may be proposed as a result of treaties to which the United States is a party.

The current re-examination is apparently due, in part, to an opinion dated 17 September 1974 by the Assistant Attorney General, Office of Legal Counsel which expresses the view that the Vienna Conventions on Diplomatic and Consular Relations prohibit trespassory activity directed against foreign embassies or consulates within the United States unless it can be shown that the foreign government engages in similar activity against United States embassies or consulates in the foreign country. In opposition to this view, however, the Acting Legal Advisor, Department of State opined on 6 December 1974 that the Conventions should not be interpreted to prohibit trespassory electronic surveillance. His opinion was based on the reasoning that the total silence on this issue by the International Law Commission, which drafted the Convention on Diplomatic Relations, and by the Committee of the Whole during debates, indicated an intention to avoid touching on the universal state practice of directing espionage and counterespionage activity against foreign diplomatic personnel. The State opinion further points out that, while the Department of Justice raised two other matters at the time the Convention was under consideration by the Executive branch, it did not raise the issue which

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Justice addressed in its opinion of 17 September 1974. As the State opinion notes, "the failure to raise the question of electronic eavesdropping seems inexplicable unless it were assumed that the Convention would not prevent it, as it is, I believe, demonstrable from other sources that no Administration since the Second World War has been prepared to abandon this intelligence gathering technique."

In my opinion, the State legal position is a sound one. The history of consistent practice and interpretation by successive Administrations that the Convention does not prohibit trespassory electronic surveillance should not now be called to question. Essentially, the issue is in many respects political and not legal. It would be somewhat naive to think that foreign governments whose self interests compel an attempt to use this method of espionage against the United States go through a process of legal wavering and doubt comparable to that upon which we now seem to have entered. Consequently, we should not handicap our efforts by following an asserted legal restriction which is unreciprocated and not clearly correct.

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The United States should not limit intelligence activities deemed necessary or vital to national interests

I believe it would not be unreasonable or unwarranted to decide that foreign governments use trespassory electronic surveillance to such an extent that under Article 47 there is a general restrictive application of the Conventions. I think this is a supportable legal argument and consequently similar activity by the United States would be justified and valid without a need to show each restrictive application on a case-by-case basis. Without relying on this legal argument is the preferable legal position in the State opinion that the Conventions were not meant to apply to this activity.

There is another and more far-reaching aspect to this problem of treaty application to the business of intelligence collection. Provisions of the Vienna Conventions also require that diplomatic personnel abide by the laws of the receiving state. A literal interpretation of these provisions would prohibit espionage by CIA personnel operating from United States missions abroad. Such interpretation would be inconsistent with the prevailing view that, while prohibited by domestic law, espionage is not prohibited by international law. Ample evidence that this view is adhered to in practice may be found in the activities of diplomatic missions within the United States.

I do not believe that any nation, in adhering to the Vienna Conventions, intended to forego the right to conduct espionage, including electronic surveillance, as compelled by perceived national security interests. In the final analysis, national security interests must be determined by each sovereign.

This Agency was created by Congress with full recognition that it was to conduct espionage on behalf of the United States. I do not believe that Congress, by consent to the Vienna Conventions on Diplomatic and Consular Relations, or to any other treaty, intended thereby to restrict this Agency beyond the requirements and practice under international law. A legal interpretation which would bring about this result should not be accepted now.

Sincerely,

/s/ Bill

W. E. Colby
Director

cc: The Honorable Henry A. Kissinger
Assistant to the President for
National Security Affairs

The Honorable Edward H. Levi
The Attorney General

The Honorable James R. Schlesinger
Secretary of Defense

The Honorable Henry A. Kissinger
Secretary of State

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RECIPIENT

ADDRESS OF RECIPIENT	SIGNATURE (ACKNOWLEDGING RECEIPT OF ABOVE DOCUMENT(S))	
The Hon. Henry A. Kissinger Secretary of State, 2201 C St. Room 7226 Washington, D.C. 20520	OFFICE	DATE OF RECEIPT

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