



jgill @ penfield-gill.com
09/24/97 10:17:00 AM

Record Type: Record

'97 SEP 25 AM9:29

To: Betty W. Currie, Pamela Cicetti

cc:

Subject: [Fwd: IP: Mandatory Key Escrow Violates Our Constitutional Trad

Friends,

I hope you will be able to get this important message before both of the Clintons. Here we have a long list of their fellow lawyers outlining what is wrong with the current encryption policy being legislated at this time. I do not think this is the 'story' that this administration wants to be remembered for telling.

Thank you,

Jock

--

Jock Gill
jgill@penfield-gill.com
www.penfield-gill.com



9/25/97

Send to Denskind?

Yes ☒

No ☐

Combine
response with previous
letter
coord. with Denskind
Kali

From: owner-ip-sub-1@majordomo.pobox.com@INET@EOPMRX@LNGTWY
*To: ip-sub-1@majordomo.pobox.com@INET@EOPMRX@LNGTWY
Date: 9/23/97 7:07pm
Subject: IP: Mandatory Key Escrow Violates Our Constitutional Traditions

----- Forwarded message -----

Text of this letter can be found at:

http://www.cdt.org/crypto/legis_105/SAFE/97093_profs.html

<http://viper.law.miami.edu/~froomkin/lawprof-letter.htm>

[This open letter was sent to all members of the House Commerce Committee.]

September 23, 1997

The Honorable Thomas J. Bliley
2409 Rayburn HOB
Washington, DC 20515

Dear Chairman Bliley,

We write to express alarm about an unprecedented proposal that has been advanced to impose criminal penalties on the manufacturing or distribution of domestic encryption products that do not contain a government-mandated "back-door." The proposal, drafted in large part by the FBI, has already been adopted by the House Intelligence Committee, and may be offered soon in the Commerce Committee by Reps. Michael Oxley and Thomas Manton as an amendment to H.R. 695, the "Security and Freedom through Encryption (SAFE) Act." The SAFE Act was originally intended to loosen the export controls that have blocked U.S. companies from offering products with strong encryption on the global market. The Oxley-Manton amendment, however, changes fundamentally the nature of SAFE. Rather than liberalizing limitations on encryption, the amendment drastically increases the government's control over the use of both domestic and international encryption technologies.

We believe that this is a profound mistake. Never in peacetime has our government attempted so completely to monopolize a single form of communication; never has it required, in effect, a license to exercise the right to speak. But that is what this amendment would do. In our view, not only could this amendment make our citizens less secure, but it would also contravene fundamental principles of our constitutional tradition. We would no longer be a leader protecting individual rights internationally; we would instead become the architect of the most comprehensive surveillance plan the world has seen since the end of the Cold War.

We are law professors who believe this plan is as unconstitutional as it is unwise. We may individually differ in our reasons, but we have collected below at least some of the reasons that we take the position we do. We urge Congress not to take this step now. No showing has been made to justify so massive a change in our constitutional protections.

I. An Attack on Basic Constitutional Rights

Freedom of Speech

The amendment raises profound questions about rights of free speech. The right to speak freely includes not only the right to say what you want, to whom you want. It also includes the right to choose how to speak, and whether to speak at all. The right has no preconditions. In America, at least, you do not need a license to speak; you do not need the government's permission to speak in the language of your choice; and you do not have to organize your speaking in a way that happens to suit the needs of the government. The Constitution no more permits Congress the power to regulate the software within which speech may occur than it give Congress the power to say what kind of paper a diary may be written upon. These are choices rightly left to the individual.

These freedoms are a basic part of the fabric of American constitutional law. The Supreme Court has upheld them in innumerable rulings, including *McIntyre v. Ohio Elections Commission* (affirming the right to anonymous political speech); *Riley v. National Fed'n of the Blind* ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); *Wooley v. Maynard* (holding unconstitutional New Hampshire's requirement that cars display license plates bearing the state motto); *West Virginia State Board of Education v. Barnette* (holding that compelled recitation of pledge of allegiance violates the First Amendment) .

The amendment would undermine these constitutional rights to free speech. By imposing requirements on cryptographic programs - used by individuals and corporations to protect the privacy and security of their papers and telephone or e-mail conversations - it would in effect be mandating the code software writers may write. Only governmentally approved code could be used to transmit speech the speaker wants to protect; authors and speakers would be required to use this code to say what they wanted to say. This forced speech, we believe, takes the government's power too far.

We accept that law enforcement agencies, if they obtain a warrant based on a showing of probable cause, can intercept a person's communications and seize a person's data. But that power exists after a finding of probable cause has been made. This amendment regulates citizens before any finding of probable cause. It regulates the programs that citizens may use before they speak at all. It requires every citizen to fit his speech to a program essentially designed by the government, so that the government is better able to monitor the citizen's speech. This preemptive strike on free speech is without precedent in our constitutional tradition. We believe it is profoundly misguided. Under the theory of the amendment, the only permissible encrypted speech is governmentally licensed encrypted speech. But this, we believe, the government cannot require.

Fourth Amendment Rights

The amendment also raises troubling questions about the right to

privacy. Our Constitution presumes that there will be no secret searches. Not only must the government ordinarily obtain a warrant for a search, but its agents executing the warrant must also announce their presence. This is the knock and notice requirement, and the Supreme Court has made it clear that this is a fundamental element of Fourth Amendment protections. The amendment would abrogate this fundamental protection. By requiring users of encryption to place their key with third parties who can be compelled under the statute to hand that key over to the government, the amendment makes possible secret searches by the government on an unprecedented scale. These are not just telephone calls that the government needs contemporaneously to search. It includes documents on a computer disk, whether bank records or a diary. It is as if the state required the deposit of house keys with a local bank, so that the government could use that key secretly to gain access to an individual's house.

More fundamentally, the amendment does violence to our Fourth Amendment values by forcing all citizens to communicate in a way that limits their ability to protect their own privacy. In an effort to downplay the significance of its proposal, the FBI has argued that it is only seeking to ensure the ability to obtain plaintext of data that it has already obtained in encrypted form. On this basis, the FBI tries to argue that it is seeking no new authority. On the contrary, under current law and practice, if the government obtains access to encrypted data or communications using any of the surreptitious means now at its disposal, it has no power to assure access to the plaintext of that data. This country's Fourth Amendment has never guaranteed law enforcement's ability to search, seize, and understand every conversation, communication, or stored record of every citizen. We have never required that every person -- whether or not there is probable cause to believe they have committed a crime -- live in the legal equivalent of a glass house, just so the government can facilitate surveillance without the notice or consent of the searched.

II. The Risks of a Global Key Recovery Regime

We are most concerned, however, with the danger that this proposal presents internationally. The new communications media are global in nature. No nation regulates for itself alone. The proposed "solution" to the encryption issue offered by the amendment will be most effective for law enforcement only if it is widely adopted internationally. Section 501 of the House Intelligence bill in fact instructs the President to negotiate agreements with foreign governments for "mutual recognition of any key management infrastructures." Most countries, however, do not give their citizens the same privacy protection that our Constitution guarantees our citizens. Therefore this international recognition could present three problems for the privacy interests of our own citizens.

The first is the lack of privacy protection against foreign government access to keys, whether stored in the U.S. or elsewhere. Few countries assure privacy protections comparable to ours. Yet the "mutual recognition" agreements essential to a global key recovery system will require the exchange of key information with foreign governments. When other countries request keys, many of these requests will be made on the basis of procedures far less strict than those required under U.S. law. In

these cases, it will be difficult or impossible to determine whether the requesting country has complied with anything comparable to our warrant requirements. The risk is even worse when decryption information is held outside of the U.S., for it will be impossible to assure that adequate security precautions are followed by the other government's key recovery system. As a result, American citizens using encryption, both within the U.S. and outside of the U.S., will do so without the privacy protections provided under U.S. law, and without the technical security protections provided by encryption without a backdoor.

The second, and more fundamental problem, is the threat the proposal poses to the historic role of the United States as a defender of freedom. In countries throughout the world, the targets of surveillance include dissidents, religious groups, the press, and economic enterprises. We have long stood to protect the individual against such invasions by governmental surveillance. Ours is not the society of big brother. Yet in advancing this proposal, we would become the leader in establishing a new global surveillance society. Especially where political oppression exists, this will just increase the threats to liberty for these citizens, or for our citizens as they may interact with these countries. The risks of key escrow threaten the press, churches and other non-governmental organizations, as well as individual citizens.

Third, a global key escrow regime would be a threat to American economic security. Other countries will use key escrow as a tool for economic advantage. Following the American lead, other countries will be emboldened to criminalize strong encryption and establish a key escrow system along the lines of the proposed bill. As a condition of doing business, American companies will be required to hand over their keys, and in this way, foreign governments could gain the power to decrypt all business communications that cross their territory. This again would allow foreign governments to read confidential communications without any notice to the company that it is under surveillance.

Conclusion

Congress faces a historic choice about the shape of free speech and privacy in the next century. In making this choice, there will no doubt be many questions of profound importance to our constitutional values. But there is little doubt that the Intelligence Committee substitute and the Oxley-Manton amendment would inspire the creation of an unprecedented system of global surveillance, expanding law enforcement authority and circumventing the protections of the First and Fourth amendments. It is too radical a change to make with so little thought. We urge you to resist it.

Sincerely,

Keith Aoki
University of Oregon School of Law

Kevin D. Ashley
University of Pittsburgh School of Law

Jack M. Balkin
Yale Law School

William E. Boyd
University of Arizona College of Law

Darryl K. Brown
University of Dayton School of Law

Dan L. Burk
Seton Hall University School of Law

Julie E. Cohen
University of Pittsburgh School of Law

Peter L. Fitzgerald
Stetson University College of Law

Eric M. Freedman
Hofstra University School of Law

A. Michael Froomkin
University of Miami School of Law

Llewellyn J. Gibbons
Franklin Pierce Law Center

Timothy Hoff
University of Alabama School of Law

Jerry Kang
UCLA School of Law

Ethan Katsh
University of Massachusetts

Andrew Koppelman
Northwestern University School of Law

Mark Lemley
University of Texas at Austin School of Law

Lawrence Lessig
Harvard Law School

Jessica Litman
Wayne State University

Henry H. Perritt
IIT Chicago-Kent College of Law

David G. Post

Temple University Law School

Margaret Radin
Stanford Law School

William D. Rich
University of Akron School of Law

Jon Romberg
Seton Hall University School of Law

Jim Rossi
Florida State University College of Law

Pamela Samuelson
University of California at Berkeley School of Law

Mark S. Scarberry
Pepperdine University School of Law

David E. Sorkin
John Marshall Law School

Peter Swire
Ohio State University College of Law

Note: Institutional references are for identification only. The views
expressed herein do not necessarily reflect the views of the organizations
referenced.

"They that can give up essential liberty to obtain a little temporary
safety deserve neither liberty nor safety." - Ben Franklin, ~1784

9/25/97

Send to Nash?

Yes ☒

cc: ~~Palest~~

no ☐

cc: to NSC?

Yes ☐

no ☒

and

Office of the Mayor
City of Seattle

Norman B. Rice, Mayor
206/684-4000 Fax: 684-6360



FAX TRANSMISSION SHEET

TO: PRESIDENT WILLIAM J. CLINTON
c/o BETTY CURRY

FAX #: 202 456- 6703

FROM: MAYOR NORMAN B. RICE

DATE: 23 September 1997

NUMBER OF PAGES (including cover sheet): 2

Office of the Mayor City of Seattle

Norman B. Rice, Mayor



September 23, 1997

William J. Clinton
President
The White House
Washington, D.C. 20500

'97 SEP 25 AM9:29

Dear Mr. President:

As a dedicated public servant, I have always aspired to serve my country. To be considered for a post that allows me to serve the interests of my President and the United States of America as an ambassador abroad is an honor of the highest order. However, after much soul searching, I must respectfully decline the active consideration of my nomination as ambassador to New Zealand.

Our nation is riding the crest of enormous economic prosperity and opportunity and the credit belongs to your administration. However, beneath the euphoria of prosperity rests the sobering responsibility to ensure this nation and the people of this nation safe passage from welfare to work, to ensure that our children are safe, healthy and ready to learn, and that our communities are sustainable. These are enormous and difficult tasks that will require due diligence.

At this time of transition in my life I have been given a major opportunity to pursue these goals here at home. These issues fire my passion and mirror those which I know are close to your heart as well. I believe this work, in the years to come, is critical to the future of this nation and it is my greatest desire to serve in a capacity that I believe will have the greatest impact on the health and well being of the people of this country.

When one's President calls it is not easy to decline. The process I have gone through to get to this point has been extremely difficult. But I believe it is the best for my family and me.

In the years to come I will be working toward the goals of economic opportunity, social equity and sustainable communities. Because I know these are also the cornerstone values of the Clinton agenda, I hope to maintain an alliance to complete your vision and achieve our mutual goals for this nation.

Respectfully yours,


Norman B. Rice

'97 SEP 25 PM12:49

Bethlehem Steel Corporation

1170 EIGHTH AVENUE
BETHLEHEM, PA 18016-7500

CURTIS H. BARI
CHAIRMAN
AND
CHIEF EXECUTIVE OFFICER

9125197

997

Todd-

The President
The White House
1600 Pennsylvania Avenue
Washington, DC

Do you want this put
in the system?

Yes ☒ CC
No ☐ to me

Dear Mr. President,

and the impact of Global
Climate Change on our trip to Europe will prevent me from attending.

8, 1997,
Challenge
business

Climate Change was reviewed with you at the meeting nine other CEO's and I were privileged to have with you on August 4. We commend you for opening up the process of review and deliberation. After that meeting, Mr. President, I wrote to you and respectfully submitted five basic points for your further consideration

- Science Must Lead Policy.**
advice to ensure that any action is based on the best available scientific information, taking into account uncertainties and not imposing unwarranted restrictions.
Carol-
- A Global Solution is Essential**
developing countries, a solution must be developed and implemented.
This should just go to DOSTUS for reply.
- Maximum Flexibility Must be Achieved in Any Reduction Goal**
"Put in system" doesn't mean it's locked in.
Considered in
- Energy Taxes and Mandates Distort Markets, Threaten Investment for Future Investment.**
"go to DOSTUS."
I discussed with Todd.
Plan
because They of Capital
- Congressional Involvement and Oversight is Essential for any Amendments to the Kyoto Treaty or New Protocols.**

At the request of Secretary Daley and Secretary Pena, I met with them along with other CEO's in Pittsburgh on September 15 to review Global Climate. This subject has

Bethlehem Steel Corporation

1170 EIGHTH AVENUE
BETHLEHEM, PA 18016-7699

CURTIS H. BARNETTE
CHAIRMAN
AND
CHIEF EXECUTIVE OFFICER



September 23, 1997

The President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

This is to acknowledge and thank you for your letter of September 18, 1997, and the invitation to attend the *White House Conference on Climate Change: The Challenge of Global Warming*, to be held on October 6. I deeply regret that a long-scheduled business trip to Europe will prevent me from attending.

Climate Change was reviewed with you at the meeting nine other CEO's and I were privileged to have with you on August 4. We commend you for opening up the process of review and deliberation. After that meeting, Mr. President, I wrote to you and respectfully submitted five basic points for your further consideration

1. **Science Must Lead Policy.** You should have the best and most objective scientific advice to ensure that any actions taken or proposed at Kyoto will consider all uncertainties and not impose severe consequences that may later prove to be unwarranted.
2. **A Global Solution is Essential.** Without the full participation of developed and developing countries, a solution is not possible.
3. **Maximum Flexibility Must Be Provided and Voluntary Actions Considered in Achieving Any Reduction Goals.**
4. **Energy Taxes and Mandated Energy Reductions Must Be Avoided Because They Distort Markets, Threaten Competition, and Reduce the Availability of Capital for Future Investment.**
5. **Congressional Involvement and Oversight is Essential for any Amendments to the Rio Treaty or New Protocols.**

At the request of Secretary Daley and Secretary Pena, I met with them along with other CEO's in Pittsburgh on September 15 to review Global Climate. This subject has

the highest priority for Bethlehem, for the American Iron and Steel Institute and its members, of which I serve as Chairman. I will be very pleased to have another senior officer of Bethlehem or another representative of the steel industry attend the October 6 Conference if that would be appropriate.

Your continuing leadership as our President is recognized and appreciated. You have my personal support, and I hope you will always let me know if I can be of assistance to you or your Staff.

Best personal regards.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harry Brundage". The signature is written in a cursive, flowing style with a large initial "H" and a prominent "B".

Bethlehem Steel Corporation

1170 EIGHTH AVENUE
BETHLEHEM, PA 18016-7699

CURTIS H. BARNETTE
CHAIRMAN
AND
CHIEF EXECUTIVE OFFICER



August 4, 1997

The Honorable William J. Clinton
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

The opportunity to review global climate change and environmental matters with you today was very much appreciated. You requested that we advise you of our views and the following comments are respectfully submitted.

Global Climate

With respect to global climate change, we share your view that this matter deserves serious attention as part of our nation's efforts to advance the principles of sustainable development. However, we believe that the following key principles should guide the development of U.S. policy:

1. Science Must Lead Policy.

Any U.S. policies to limit greenhouse gas emissions must be based on sound and rigorous scientific knowledge. While the scientific data base has improved, considerable uncertainty remains about the mechanism of global warming and the causes. You should have the best and most objective scientific advice to ensure that any actions taken or proposed at Kyoto will consider all uncertainties and not impose severe consequences that may later prove to be unwarranted.

2. A Global Solution is Essential.

Commitments must be obtained from both developed and developing countries to avoid serious economic consequences and dislocations. Developing countries are expected to generate 70% of the world's emissions by 2025. Without their full participation in future international treaties, there is no possibility of stabilizing greenhouse gas emissions worldwide. We note with great concern to

our industry's international competitiveness the fact that four of the top ten steel producing countries in 1996, including China - the world's largest producer, are included in the list of 134 developing nations which are exempt from commitments under the Framework Convention on Climate Change (Berlin Mandate). Trade agreements like GATT and NAFTA are of limited value if an industry is rendered noncompetitive by unfair international environmental agreements.

3. **Maximum Flexibility Must Be Provided and Voluntary Actions Considered in Achieving Any Reduction Goals.**

We simply lack sufficient information at this time to commit the United States to legally binding limits and timetables. Policy flexibility is essential so that government and the private sector can craft individual responses to their own situation, with emphasis on performance-based measures. In this context, voluntary programs should continue to be an important component of U.S. efforts. As your administration's 33/50 Program for the reduction of toxic chemical releases has shown, high visibility voluntary programs championed by the White House can result in meaningful reductions in emissions in short time frames. Emission trading schemes can also help if enforcement and accounting issues can be resolved. The concept of joint implementation should also be promoted.

4. **Energy Taxes and Mandated Energy Reductions Must Be Avoided Because They Distort Markets, Threaten Competition, and Reduce the Availability of Capital for Future Investment.**

One estimate, based on a carbon tax scenario, showed that an energy tax about ten times the BTU tax proposed in 1993 would be needed to achieve a 10% reduction in greenhouse gas emissions from 1990 to 2010. This would mean additional costs of more than \$5 billion per year to our industry, roughly doubling the already high energy cost of producing steel. A more recent Department of Energy analysis of six energy intensive industries - including steel - predicted a massive shift of production and associated jobs from the U.S. to lesser developed nations, with no appreciable effect on greenhouse gas emissions, and worse, a likely net increase in global pollution.

5. **Congressional Involvement and Oversight is Essential for any Amendments to the Rio Treaty or New Protocols.**

In the context of the Byrd/Hagel Resolution (S. Res. 98), we urge you to work closely with Congress to involve a wide range of views in the debate on this matter and to ensure that any agreements reached will not compromise our competitiveness and jeopardize jobs.

National Ambient Air Quality Standards

While our meeting focused on Global Climate Change, it is respectfully submitted that the National Ambient Air Quality Standards for particulate matter and ozone should be reconsidered before going forward with changes in the standards as proposed by EPA. There are three compelling reasons to reexamine this decision:

1. **There is inadequate scientific evidence to support the proposal.**

The EPA's own Clean Air Scientific Advisory Committee concluded there were significant uncertainties and unanswered questions that need to be addressed before new standards are adopted. EPA has announced that it intends to conduct more research and to undertake another scientific review of the data after promulgating the new rules. Surely, the time to conduct such research is before the new rules are promulgated in order to avoid unnecessary capital investment to comply with these standards that may well be based on flawed scientific evidence.

2. **The costs of the proposed standards are extraordinary, and the benefits are undefined.**

Independent studies have shown that EPA's cost estimates are greatly understated, that the proposed standards may not be attainable at any cost and may cost up to 200,000 lost jobs in the United States. The estimated annual cost to the metals industries (both primary and fabricated) is more than \$6 billion.

3. **The current Clean Air Act programs will continue to reduce ozone and particulate matter, and we believe the existing programs must be given a chance to work before new control strategies are implemented.**

Bethlehem Steel has invested more than \$650 million in capital expenditures for air quality controls since the enactment of the Clean Air Act in 1970. We spend more than \$60 million annually to operate and maintain that equipment. We will continue to make further investments in environmental control measures to comply with the requirements of the 1990 Clean Air Act Amendments.

We believe the right course of action to be taken with regard to the new standards is to delay a decision for at least four years. This time period would allow for the required level of research that needs to be conducted. The research would provide a more sound basis for a decision. In the event the research data justifies the need for tighter standards, they could be implemented without any delay to the currently planned schedule of implementing the new standards.

Thank you again for the opportunity to meet with you today. We deeply appreciate your continuing leadership on these and other issues. Please let me know if I can be of further assistance to you or your staff.

Best personal regards.

Sincerely,

A handwritten signature in black ink, appearing to read "Hank Barnett". The signature is written in a cursive, slightly slanted style.

cc: Todd Stern
Special Assistant to the President