96TH CONGRESS
1st Session

SENATE

REPORT
No. 96-141

REPORT

TO THE

SENATE

OF THE

SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE

COVERING THE PERIOD
MAY 16, 1977—DECEMBER 31, 1978
95th CONGRESS

MAY 14 (legislative day, APRIL 9), 1979.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
42-096 O WASHINGTON : 1979

SENATE SELECT COMMITTEE ON INTELLIGENCE

[Established by S. Res. 400, 94th Cong., 2d Sess.]

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(The membership of the Senate Select Committee on Intelligence for the period covered by this report is found in appendix C.)

PREFACE

The Senate Select Committee on Intelligence submits to the Senate a report of its activities from May 16, 1977 to December 31, 1978. The Committee has been charged by the Senate with the responsibility to carry out oversight over the intelligence activities of the United States. Most of the work of the Committee is, of necessity, conducted in secrecy, yet the Committee believes that intelligence activities should be as accountable as possible to the public. This public report to the Senate is intended to meet this requirement.

BIRCH BAYH, *Chairman*
BARRY GOLDWATER,
Vice Chairman

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I. INTRODUCTION

A. Toward a Consensus on a Legislative Charter

Following the investigations of abuses by the intelligence community which took place over the past several years and the recommendations for considerable reform that were made by the Church committee, the Select Committee on Intelligence has been working with the Executive branch to strengthen the intelligence system of the United States. Our Government must have timely and accurate information and analyses to further United States foreign policy and defense interests. While the major concern of the Committee has been to support steps being taken to improve the information gathering and analytic processes, considerable attention has been directed toward efforts by the intelligence community to increase our abilities to counter the activities of hostile intelligence services such as the KGB and GRU, terrorist organizations, and other international groups, whose policies and actions are inimical to the United States.

President Carter, Vice President Mondale and their chief advisors on intelligence matters, the Secretary of State, the Attorney General, the Secretary of Defense and the Director of Central Intelligence, met with the full Committee on May 13, 1977. At that White House meeting, it was agreed to work together to fashion a legislative charter which would set clear duties and missions of the intelligence agencies as well as guidelines and limitations for their activities. It was also agreed that the Committee would assist the Executive branch in drafting an interim Executive order which would serve as a temporary guideline for permanent statutes governing all intelligence activities. The goal of both the Committee and the Executive branch expressed at the May 13 meeting was to provide the means for the most effective intelligence system possible, a system which would serve the declared foreign policy and defense objectives of the United States, but do so within the confines of the Constitution and the laws of the United States.

During this and subsequent meetings on August 4, 1977 and August 26, 1977, the full Committee discussed oversight procedures with President Carter, Vice President Mondale, and high intelligence officials. These discussions led to Executive Order 12036 issued on January 24, 1978 which, among other things, commits the Executive branch to keep the Senate and House intelligence oversight committees fully and currently informed about intelligence activities including prior notification of highly sensitive activities such as covert action. At the signing of the Executive order, President Carter publicly reaffirmed his commitment to enactment of legislation governing the intelligence activities of the United States.

On April 26, 1978, the Committee met with the President and his chief advisors on a broad range of questions arising from S. 2525, the National Intelligence Reorganization and Reform Act of 1978. Once again, the Committee and the Executive branch agreed to work together to achieve the greatest possible degree of consensus.

S. 2525 was introduced on February 9, 1978. It was a lengthy, detailed, and complex bill of six titles. It was an attempt to take advantage of the experience of the past twenty-nine years and the lessons learned from investigations into intelligence abuses and to bring together in one coherent legislative charter the missions, duties, guidelines and limitations upon all the intelligence activities of the United States. The bill was developed in close consultation with The Executive branch and outside experts. It was considered by both the Committee and the President to be a starting point or agenda for further joint drafting efforts which were to continue until a consensus was reached. All of those involved were of the view that without such consensus no charter legislation would pass. Many issues remain unresolved and the Committee expects that following a process of review, revision and negotiations that a Committee mark-up will take place in the first session of the 96th Congress. The final version of the bill is expected to be sent to the floor for action in 1979.

B. Improved Oversight

One of the key provisions of S. 2525 sets forth the duties and power of the House and Senate oversight committees. In the view of the Committee, the crucial element necessary for effective oversight is the right of full access to all information concerning intelligence activities. Building upon the mandate set forth in section 11 of S. Res. 400, which provision was also included in Executive Order 12036, is the following authority:

> Sec. 152 (a) Consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the heads of each entity of the intelligence community, with respect to the intelligence activities of that entity shall—
>
> (1) keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed of all the national intelligence activities and all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any entity of the Intelligence Community, including any significant anticipated intelligence activity; but the foregoing provision shall not constitute a condition precedent to the initiation of any such anticipated intelligence activity; and
>
> (2) furnish any information or material in the possession, custody, or control of the Director or the relevant entity of the intelligence community or in the possession, custody, or control of any person paid by the Director or by any such entity whenever requested by the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate.

The comparable provision in S. Res. 400 has proven to be the heart of the Committee's present ability to carry out its oversight responsibilities. One pertinent example concerns covert action. The Committee again this year, as it did in the last, reviewed, during the authorization process, every covert action project and voted on each activity. In several cases over the past two years Committee action led to modification or termination of covert action projects.

Clandestine Collections

The most difficult area of oversight has proven to be in the clandestine collection area. But even in this difficult and extremely sensitive function, in the course of the past year, the Committee has worked out procedural means with the Executive branch for access to these matters. A special ad hoc group of four Senators and three staff members has been delegated the responsibility to be briefed upon and to monitor the most sensitive clandestine collection projects for the Committee, with the duty to keep the Committee aware of the general nature of these activities so that the Committee can exercise its oversight responsibilities for this important but sometimes risky activity. The Executive branch, for its part, recognizes the right of the full Committee to be fully apprised of clandestine collection activities.

Counterintelligence

For the past several years the counterintelligence function of the United States has been the subject of careful review by the National Security Council and by the intelligence community itself. The Committee has closely monitored the progress of this review and is actively involved in working with the Executive branch to find ways to improve the counterintelligence capabilities of the United States.

Terrorism

Recent terrorist activities worldwide have placed an increased burden on the intelligence community to develop new kinds of countermeasures. The Committee is working closely with the Executive branch in support of efforts to create effective defensive measures to be used against terrorist activities. The Committee is concerned that countermeasures which are developed carefully take account of the need to consider constitutional rights and protections. This is not an easy task because the situations created by many terrorist activities require rapid and extraordinary kinds of action. The balancing questions between proper procedure and the necessity for immediate actions will not be easy to resolve.

Inspections

In the course of their oversight duties, members of the Committee and staff have traveled extensively to inspect facilities both abroad and in the United States. This direct access to the activities of the intelligence agencies has made it possible for the Committee to better carry out its oversight responsibilities and to better understand the operational problems of the agencies. This understanding is reflected to some degree in the provisions of legislative proposals such as S. 1566, "The Foreign Intelligence Surveillance Act of 1978," and S. 2525, "The National Intelligence Reorganization and Reform Act of 1978."

Allegations

The Committee received a number of allegations during the year of wrongdoing by officials in the intelligence agencies. The Committee, as a matter of course, conducted preliminary inquiries, and on the basis of these preliminary inquiries, made judgments of whether fuller investigations were necessary. Most of the allegations were of little or no substance. The Committee continues to follow its policy of reporting to the public those instances, when they occur, of abuse

by the intelligence agencies and not to comment on allegations which have proven not to be of substance.

Korea Inquiry

The Committee completed a year-long study on the awareness of efforts by the KCIA, the intelligence service of the Republic of Korea, to influence Members of the Congress and what was done about that information by responsible officials. Several other committees of the Congress were examining particular charges that arose out of these activities by the KCIA. A public report issued in June 1978, details the Committee's findings. The interest of the Committee on Intelligence was focused on the generic problem of the activities of "friendly" intelligence services in the United States. There have been allegations over the past several years that a number of "friendly" intelligence services have acted improperly or illegally in the United States. The Korea situation was chosen as a case study because the Committee believed it illustrated well the key problems.

The Committee concluded that the problem of coping with the activities of "friendly" intelligence services will not be easily resolved; it will require a long term effort. In the meantime, new procedures and enhanced vigilance on the part of our intelligence and law enforcement agencies will be required to prevent the recurrence of such improper and illegal actions as those revealed by the KCIA example.

Angola

In May 1978, the Committee completed a detailed documentary study of United States covert action in Angola during the period 1975–1976. This classified report was sent to the President and the Director of Central Intelligence for their review and comment and made available to the Senate Foreign Relations Committee.

Letelier Assassination

When former Ambassador to the United States, Orlando Letelier, was assassinated in Washington on September 21, 1976, the Committee was asked by a number of Senators to consider whether it should conduct an investigation. After a preliminary inquiry, the Committee decided its proper role should be to monitor the progress of the already initiated FBI investigation. The Committee decided to do this because it felt that the FBI had the resources and the will to do the necessary task, and recent events have proven that this confidence was justified.

The Paisley Case

The Committee also examined circumstances surrounding the death of John Arthur Paisley, a former high official of the CIA and a consultant of the Agency at the time of his demise in September 1978. Because of troubling questions encountered during the inquiry, the Department of Justice was provided with all information gathered by the Committee, in view of the primary jurisdiction of the Federal Bureau of Investigation over counterintelligence matters within the United States.

Bi-weekly Briefings

The Committee has instituted a pattern of bi-weekly briefings by elements of the intelligence community on substantive foreign policy, defense, and economic matters of interest to the members. In addition,

the Committee receives a summary of key intelligence items on a daily basis and reviews all of the major analytic product of the intelligence community.

C. Concern About Intelligence Analysis: Iran

Over the past year, major criticisms have been made about the analytical performance of the intelligence community. It is the Committee's view that timely, accurate intelligence and analysis of that information is the primary function of our intelligence system. Improving the quality of analysis is clearly of the highest priority for the Committee and for the leadership of the intelligence community.

Several of the inquiries undertaken by the Committee have found that significant improvement indeed needs to be made by the intelligence community in analyzing and producing intelligence of maximum relevance and assistance to policymaking. Through the authorization process, the Committee has also taken a number of steps to strengthen the intelligence community's resources, attentions and procedures devoted to analysis.

In particular, the "intelligence failure" in Iran, highlights the need to examine the timeliness and adequacy of U.S. analytic intelligence. In November 1978, the Committee began an in-depth study of the role and performance of U.S. intelligence with respect to Iran, within the total context of U.S. policy toward Iran over the past three decades.

This inquiry will examine why the sudden collapse of the Shah's regime took place and why it seemed to take the U.S. Government so by surprise.

To these ends, the Committee is examining the intelligence record from 1947 to the present time in detail: priorities, tasking, collection, reporting, analysis, national estimates, and relationships with U.S. policy and policymakers. The Committee is interviewing a large number of officials, in and out of government, who have had intelligence, policy, or academic responsibilities regarding Iran.

Although the Committee's inquiry will confine its findings and recommendations to matters of intelligence, the study will closely examine how U.S. intelligence was affected by the long and close association of the United States with the Shah and his government.

D. Intelligence Evaluation for the Senate

Panama

One of the most useful services that the Select Committee on Intelligence can perform for the Senate is to give its judgment on matters where intelligence or intelligence activities are of direct concern. To cite an example, in the consideration of the Panama Canal Treaty, two particularly contentious intelligence-related questions arose: (1) the charge that the consequences of an intelligence compromise in Panama may have influenced the progress of negotiations and the final terms of the Treaty; and (2) the allegation that intelligence activities concerning narcotics trafficking in Panama had a direct bearing on the Panama Canal negotiations and Treaty terms.

With the full cooperation of the Executive branch, the Committee investigated these charges, and reported to the Senate that neither allegation had any bearing on the negotiations, or in any way affected the final terms of the Treaties and Agreements. Fully documented reports were written and presented during a closed session of the Senate. Senators for and against the Treaty were able to question and examine the reports in detail and debate their findings. The fact that members of the Committee who held opposing views on the merits of the Treaty were able to work together on the investigation and agree on a report shows that intelligence questions can be addressed with detachment and objectivity.

Middle East Arms Balance

A second example: On May 15, 1978, the Senate held a closed session on the Middle East arms sales proposals. At the request of the chairman of the Foreign Operations Subcommittee of the Senate Appropriations Committee, Senator Daniel K. Inouye, who is also a member of the Committee on Intelligence and its previous chairman, and Senator Clifford Case, the ranking Republican on the Foreign Relations Committee, who was also a member of the Senate Intelligence Committee, the staff prepared an analysis of the intelligence available on the Middle East arms balance. The classified report set forth in considerable detail the estimative judgments of the past ten years and gave a detailed listing of the arms inventories of all nations in the Middle East area as well as an intelligence community estimate of their respective capabilities over a broad range of possible scenarios. In addition, the Committee made an analysis of United States intelligence collection capabilities in the Middle East area. The report provided a factual data base and was used in the closed door debate on the proposals.

The Shaba Invasion of 1978

In response to a request from the Committee on Foreign Relations, the Committee examined the quality of U.S. intelligence concerning the Shaba invasion in order to judge to what extent Executive branch officials had been justified in making certain statements on that crisis. A classified letter was sent to the chairman and ranking minority member of the Committee on Foreign Relations which sets forth in detail the results of this inquiry.

Salt Verification

For the past year the Committee has been working on a comprehensive study of the monitoring capabilities of the United States intelligence agencies and their contribution to verification of any possible SALT II treaty. The Committee has carefully reviewed all intelligence material bearing on the question of monitoring capabilities and has examined at first hand the collection, hardware and analytic processes involved. Members of the Committee and staff have attended the SALT negotiations in Geneva and received regular and detailed briefings on all aspects related to monitoring and verification questions. It is the intention of the Committee to issue a classified as well as a public report to the Senate on the monitoring capabilities of the United States if and when a SALT treaty is signed. It is the Committee's view that the report would be of assistance to the Senate in its consideration of a SALT treaty.

E. New Legislative Issue: Secrecy and "Graymail"

The problems created by a number of recent books written by former intelligence agency employees have created difficulties for the intelligence community. The Committee has reviewed the allegations made in several recent books and carefully followed the legal proceedings that are underway. The Secrecy and Disclosure Subcommittee of the Committee on Intelligence has held a series of hearings during this past year that go to the heart of the problem of "graymail," a shade less than blackmail. These questions are discussed in this report (see Section VI), but it is clear that legislation will be required to correct what is obviously an unsatisfactory and extremely complex situation. It is evident that a new consensus about what is required to be secret and what should be publicly available must first be arrived at before such a long term legislative remedy can be achieved.

F. The Information Explosion

The most challenging issue before the Committee concerns the burgeoning amount of information available to all nations in the world. One distinguished witness who appeared before the Committee during the past year, Dr. William O. Baker of Bell Laboratories, very aptly observed that data are transmitted in quantities millions and billions of times greater than just a decade or so ago, and that the human brain remains limited in its capacity to absorb information. Therefore, the development of ever more capable computers and other technological means to store and order this vastly increasing amount of information is of critical importance.

The Committee is of the view that careful attention, effort and resources must be applied to this critical problem. The increasingly vast amount of knowledge available throughout the world clearly cannot be used without the assistance of new and expensive technology. New analytic innovations and greater intellectual efforts are necessary. The analysis of military questions is reasonably well in hand, but work must be done on political-social analysis and on ways in which analyses of social, cultural and economic behavior may be applied to the problems of foreign policy and defense.

The Committee is concerned, however, that the effort to lessen the burden of analysts through the use of machines be carried out with the recognition that machines are useful only if they serve human analysts' needs. If, as appears to be the case, analysts have greater need for research assistants, and if more training, travel and consultation with outside experts will improve the quality of intelligence, analysts then should have budget and management priority over costly computers and display machines. At the present time, the reverse is true. The Committee has found that it is easier to get new carpeting on the floor of analysts' offices than to get research assistants.

The primary role of an intelligence system is not to deal with the dilemmas of policy choice—that is the job of the President, his Cabinet and the Congress. Rather, the main function of intelligence is to enhance the policymakers' knowledge about and awareness of events in the world and to increase their ability to make proper decisions. To strengthen this capability, the Committee is of the belief that increased expenditures, particularly in areas involving high technology and means of making use of increasing amounts of information, are necessary and deserve support.

G. Congress and the Intelligence Community

Executive Order 12036 governing intelligence activities and subsequent implementing directions issued by the Administration and the leadership of the intelligence community has led to organizational changes, personnel cuts, and a host of modifications and adjustments that have inevitably caused strain within the intelligence community. These new guidelines have affected some of the activities both in the United States and abroad, and some troublesome problems have arisen. The Committee has monitored these changes and their effects on the actual operations of the intelligence agencies. Although the period of adjustment is largely over, some serious problems remain, particularly in the areas of counterintelligence and analysis. The discontent created by personnel reductions in the CIA's Directorate of Operations caused considerable controversy. The morale problems of the past year in the DDO have been reviewed by the Committee and the Committee believes that some progress in improving the effectiveness of the Directorate of Operations is being made.

On January 27 and 30, 1978, the Committee conducted hearings on the nomination of Ambassador Carlucci to be Deputy Director of the Central Intelligence Agency. The Committee voted unanimously to recommend to the Senate to confirm the nomination. The Senate voted its approval on February 9, 1978.

Ambassador Carlucci was questioned on many aspects of intelligence activities during two days of hearings. He indicated that he viewed the Committee's oversight responsibilities as being "the only way we can restore the confidence and credibility of our country in our intelligence institutions." He went on to say that he intended to cooperate fully with the Committee to carry out these responsibilities.

In response to Chairman Bayh's question as to how he felt about coming forth with information when a violation of a law occurred, Ambassador Carlucci said he felt he had a positive obligation to do that. Ambassador Carlucci said he sensed an obligation to "keep the Senate committee fully and currently informed."

When asked what he would do if he were asked to perform some illegal act, Ambassador Carlucci replied, "I would try to dissuade the President or other superior from that act. Failing that, I would resign."

The Committee and its staff have enjoyed a professional and productive relationship on intelligence matters with President Carter and Vice President Mondale, Secretary of State Vance, Attorney General Bell, Secretary of Defense Brown, National Security Advisor Brzezinski, and the intelligence community. Although some of the inquiries that the Committee undertakes are difficult and impose great demands upon the intelligence agencies, DCI Stansfield Turner and Deputy Director Frank Carlucci; the Director of National Security Agency, Admiral Bobby Inman; the Director of the FBI, Judge William Webster; the Director of the Defense Intelligence Agency, General Eugene Tighe; the Defense Department's Director of Policy Review, Admiral Daniel J. Murphy; the Service Intelligence Chiefs, and the men and women of the intelligence agencies under their charge, have cooperated in assisting the Committee in its oversight tasks. It is because of a

genuine commitment to full cooperation on the part of the Administration and the intelligence community that the Senate Intelligence Committee believes it will fulfill the mandate placed upon it by the Senate:

(1) To oversee and make continuing studies of the intelligence activities and programs of the U.S. Government, and to submit to the Senate appropriate proposals for legislation and report to the Senate concerning such intelligence activities and programs;

(2) To make every effort to assure that the appropriate departments and agencies of the United States provide informed and timely intelligence necessary for the executive and legislative branches to make sound decisions affecting the security and vital interests of the Nation;

(3) To provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and the laws of the United States.

II. INTELLIGENCE AND THE RIGHTS OF AMERICANS

In 1977–78 the Subcommittee on Intelligence and the Rights of Americans held hearings on S. 1566, the Foreign Intelligence Surveillance Act of 1978. The bill was reported favorably by the full Committee on Intelligence, passed by the Congress and signed into law by the President. The subcommittee also worked closely with the Subcommittee on Charters and Guidelines in drafting S. 2525, the National Intelligence Reorganization and Reform Act of 1978.

Oversight activities included evaluation of directives and procedures governing intelligence activities within the United States or affecting the rights of Americans abroad, extensive consultation with the Executive branch regarding the President's Executive Order 12036 on U.S. intelligence activities, and an in-depth study of the Attorney General's implementation of guidelines for FBI intelligence activities. Particular attention was given to the conduct of electronic surveillance for foreign intelligence purposes, whether within the United States or abroad.

Considerable progress has been made during the past year toward the goal of establishing effective legal safeguards against intelligence activities that might violate constitutional rights. Until comprehensive legislation is enacted, however, difficult problems will continue to arise. For example, the Department of Justice revealed publicly in the Truong-Humphrey espionage case that an unconsented physical search was conducted within the United States without a warrant during 1977. In this instance, the President gave his personal approval upon the recommendation of the Attorney General, and the question of the legality of this action, as well as the question of the use of its fruits in an espionage prosecution, is now before the Federal courts. Unconsented searches may sometimes be necessary to protect the Nation against foreign espionage or to collect valuable foreign intelligence information.

A. Legislation

1. S. 1566, THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

The Foreign Intelligence Surveillance Act of 1978 was reported by the Judiciary Committee on November 15, 1977 and referred to the Select Committee, which reported the bill on March 14, 1978. (See S. Rep. No. 95–701.) This measure was the subject of five days of public hearings and two days of executive session hearings before the subcommittee and the full Select Committee. The Act was passed by the Senate on April 20, 1978 by a vote of 95–1; a similar measure was passed by the House on September 7, 1978. The conference report was adopted by both Houses (see House Report No. 95–1720), and the act was signed by the President on October 25, 1978.

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The broad support for S. 1566 was the result of intense efforts by the Judiciary and Intelligence Committees of both Houses, other Members of Congress, the administrations of President Ford and President Carter, the affected intelligence agencies, and interested private citizens. Significant differences of opinion on many issues were taken into account in the legislative process.

The Committee is convinced that, by providing a workable legal procedure for court orders as required by the Fourth Amendment, the act aids the foreign intelligence and counterintelligence capabilities of the United States. It allows electronic surveillance to be conducted in circumstances where, because of uncertainty about the legal requirements, the Government may otherwise have been reluctant to use this technique for detecting dangerous clandestine intelligence and terrorist activities by foreign powers in this country. At the same time it provides safeguards that have not existed before.

The Foreign Intelligence Surveillance Act of 1978 is a landmark in the development of effective legal safeguards for constitutional rights. For nearly forty years, the Executive branch claimed "inherent" power to conduct electronic surveillance without a judicial warrant to protect national security. Several years ago it was revealed that this power had been abused under administrations of both parties. Newsmen, executive officials, and prominent Americans had been wiretapped without justification and sometimes for purely political purposes. The international communications of hundreds of Americans had been targeted for interception because of their domestic protest activities. Information about Americans obtained from surveillance of foreign officials had been passed to the White House to serve partisan interests.

Ten years ago, before these abuses came to light, Congress enacted legislation requiring a judicial warrant for electronic surveillance in criminal investigations. However, Title III of the Omnibus Crime Control Act of 1968 did not address surveillance conducted for national security purposes. Congress and the Executive branch have had the responsibility to resolve the issues posed by foreign intelligence surveillance.

The combined efforts of Attorney General Edward H. Levi, senior members of the Judiciary Committees of both Houses, and the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, chaired by Senator Church, resulted in the introduction of the original version of the Foreign Intelligence Surveillance Act in 1976. Attorney General Levi's proposal, submitted to Congress with the endorsement of President Ford, supplied the basic framework for the legislation that has now been passed by Congress.

The Senate Judiciary Committee and the Select Committee on Intelligence reported the original bill with modifications in 1976, but there was insufficient time for enactment.

Attorney General Griffin B. Bell, with the full support of President Carter, carried forward this legislative effort in 1977. In consultation with members of the Judiciary and Intelligence Committees, Attorney General Bell made three major revisions in the bill. The original measure had included a narrow provision acknowledging Presidential authority to act to meet unforeseen events. This provision was dropped, and the bill became the "exclusive means" for surveillance. President Carter broke with the past when he decided not to ask Congress to endorse "inherent" executive power and agreed to abide by the statutory procedures.

The second revision made by Attorney General Bell widened the coverage of the bill to protect international communications of Americans. The original bill protected only domestic communications. The Carter administration proposal also required a court order for targeting the international communications of Americans in the United States. This provision deals specifically with the "watch lists" of Americans used until 1973 by the National Security Agency at the request of the FBI and other intelligence agencies.

A third important change strengthened the authority of the court to review all aspects of surveillance of American citizens and resident aliens. The original bill limited the judge to finding whether there was probable cause to believe the person was an agent of a foreign power.

From the time of its reintroduction in 1977, the Foreign Intelligence Surveillance Act underwent seventeen months of exhaustive congressional scrutiny. The Intelligence Committees of both Houses consulted in depth with the affected intelligence agencies, including the FBI, CIA, and the National Security Agency, and with representatives of interested citizen groups. These consultations led to further changes that strengthened the bill both from the viewpoint of the intelligence agencies and from the perspective of civil liberties.

Above all, the act establishes that the authority to conduct foreign intelligence surveillance in this country will be shared by all three branches of the government. It will no longer be the exclusive domain of the Executive branch. It places the Congress in its rightful role as lawmaking body with authority to establish the legal standards and procedures for the exercise of surveillance powers. It ensures that the judiciary can perform its vital function, under the principles of the Fourth Amendment, of providing independent review. Finally, by establishing the exclusive means for surveillance in this country, it eliminates any congressional endorsement of future claims of "inherent" Presidential power in this respect.

The act does not require a court order for electronic surveillance of United States citizens or resident aliens abroad. Further legislation may be needed to protect the rights of Americans abroad from unwarranted electronic surveillance by their Government.

In its report on S. 1566, the Select Committee noted:

> "The fact that S. 1566 does not bring the overseas surveillance activities of the U.S. intelligence community within its purview, however, should not be viewed as congressional authorization of such activities as they affect the privacy interests of Americans. The Committee merely recognizes at this point that such overseas surveillance activities are not covered by this bill." (S. Rep. No. 95–701, p. 35.)

2. FBI AUTHORITY FOR UNDERCOVER ACTIVITIES

In July 1978, the Justice Department formally advised the Committee that serious legal questions had arisen regarding FBI undercover activities undertaken in the performance of its foreign intelligence and foreign counterintelligence responsibilities. In the course of evaluating the legality of these operations, the Department of Justice determined that certain provisions of law, relating to the requirements of government leasing and the handling of public funds,

posed serious obstacles to the continued effective performance of the FBI's activities in this area. The Department of Justice provided to the Committee full information regarding the nature of the legal problems and the serious impact these problems would have on FBI intelligence and counterintelligence operations.

In order that the FBI might effectively perform its intelligence and counterintelligence responsibilities, the Department of Justice proposed an amendment to the FBI's authorization for appropriations for fiscal year 1979. This amendment exempted the FBI from certain requirements pertaining to leasing and the handling of public funds only for fiscal year 1979. The Department of Justice also stated that it would support further legislation to serve as a permanent authorization for FBI activities in this regard.

A modified version of the Justice Department amendment to the FBI's authorization for appropriations for fiscal year 1979 was adopted by the House and, after conference, by the Senate as part of S. 3151, the Department of Justice Appropriation Authorization Act, Fiscal Year 1979. This amendment was carefully reviewed by the Select Committee on Intelligence to ensure that it was necessary for the effective performance of the FBI's foreign intelligence and foreign counterintelligence responsibilities.

This undercover authority granted for Fiscal Year 1979 is the most explicit statutory reference to FBI intelligence activities. It goes beyond the terms of the Intelligence Authorization Act for Fiscal Year 1979, which refers only to unspecified "intelligence activities of the Federal Bureau of Investigation" and which does not "constitute authority for the conduct of any intelligence activities which are not otherwise authorized by the Constitution and laws of the United States." The amendment to the Department of Justice Appropriation Authorization Act, Fiscal Year 1979, refers to "any undercover investigative operation of the Federal Bureau of Investigation which is necessary . . . for the collection of foreign intelligence or counterintelligence . . ."

However, the amendment does not expressly authorize the FBI to collect foreign intelligence or counterintelligence information. Instead, it provides an exemption from otherwise applicable statutes. The FBI must still rely for its direct foreign intelligence and counterintelligence authorization upon legal authority. Such authority is not expressly contained in any statute. The absence of such direct and express statutory authority for FBI activities in this area is one of the principal reasons why prompt action on intelligence charter legislation is necessary.

No public hearings were conducted on the amendment regarding FBI undercover operations.

The purpose of the amendment is to provide narrow exceptions to certain provisions of law which relate to government procurement and the handling of public moneys. A memorandum submitted to the Committee on July 27, 1978 by the Assistant Attorney General for the Office of Legal Counsel stated in part:

> The FBI has throughout its history resorted to undercover activities in order to perform its intelligence and counterintelligence operations. The very nature of this work requires that these operations be conducted in such a way that the targets of

the operations remain unaware of the FBI's activity. Thus, at times, the only means whereby the FBI can perform its lawful responsibilities in this area is by conducting its activities in a clandestine manner.

These activities, of course, must be conducted in accordance with the requirements of all applicable law. To this end, the Attorney General has approved the general use of undercover operations, and is consulted on significant individual operations before they are initiated. In addition, the Department of Justice is presently formulating guidelines to govern many aspects of these operations. Finally, Congress has been supplied with information on the FBI's activities in this area.[1]

Finally, the amendment contains a provision, not requested by the Department of Justice, to ensure that there is high-level authorization each time an exception to the specified statutes is made for an undercover operation. The authority contained in the amendment may be exercised "only upon the written certification of the Director of the Federal Bureau of Investigation and the Attorney General (or, if designated by the Attorney General, the Deputy Attorney General) that any action authorized by paragraphs (1), (2), or (3) of this subsection is necessary for the conduct of such undercover operation."

The Committee is continuing to study the legal and policy issues raised by FBI undercover activities conducted for foreign intelligence and counterintelligence purposes.

B. Oversight

1. ELECTRONIC SURVEILLANCE

Pending the enactment of the Foreign Intelligence Surveillance Act, which mandates semi-annual reporting by the Attorney General to the Select Committee regarding electronic surveillance conducted under the new law, the Committee developed interim arrangements for the oversight of electronic surveillance. Information was provided by the Attorney General on the FBI's use of warrantless electronic surveillance within the United States during the calendar year 1977. The Committee also received detailed briefings on warrantless electronic surveillance activities conducted in this country on behalf of other U.S. intelligence agencies. All the warrantless electronic surveillance activities reported to the Committee appear to be in compliance with Executive Order 12036 and other applicable Presidential directives and Attorney General's procedures. According to the information provided by the Attorney General, the FBI conducted warrantless electronic surveillance on its own behalf against 114 targets during the calendar year 1977.[2] The Committee received more detailed classified information regarding these and other surveillances.

The Committee also reviewed new guidelines approved by the Attorney General regulating the dissemination of information obtained by the FBI through the use of extraordinary techniques such

[1] (Excerpts from the Justice Department, memorandum on FBI undercover activities will be found in appendix A of this report.)

[2] During the period 1969–75, the average annual number of such surveillance targets was about 150, ranging from 117 in 1971 to 232 in 1974. See S. Rept. 94–755, Book III, p. 301 (Church Committee Report).

as warrantless electronic surveillance. These guidelines are unclassified and have been published in the Committee's hearings on S. 1566.[3]

2. DIRECTIVES AND PROCEDURES

During 1977–1978 the Committee placed a high priority upon ensuring that the directives and procedures governing U.S. intelligence activities are consistent with constitutional safeguards for the rights of Americans. In the absence of legislation establishing legal standards, close and continuing congressional oversight of those procedures is vital to maintain public confidence in the self-restraint exercised by the Executive branch. The agencies have cooperated fully with the Committee's efforts, and President Carter's consultation with the Committee on the development of Executive Order 12036 made possible several significant improvements in the Order. The Attorney General also has sought the Committee's advice on the development of more detailed procedures, some of which must remain classified because they discuss sensitive sources and methods of intelligence gathering.

Among the improvements in Executive Order 12036 strongly urged by the Committee were the following:

(1) Elimination of the provision in the earlier order allowing intelligence agencies to conduct physical surveillance of Americans abroad who posed an undefined "national security threat."

(2) Widening the safeguards for the rights of Americans to include restrictions on the collection of information about the overseas activities of Americans.

(3) Addition of a requirement that the Attorney General approve the procedures for any covert intelligence-gathering activities in this country by the CIA.

(4) A similar new requirement that the Attorney General approve the procedures for any other collection, storage or dissemination of private information about Americans.

(5) A new provision banning the use of outside agencies or persons to undertake prohibited activities on behalf of an intelligence agency.

(6) Limitation of warrantless electronic surveillance of Americans, pending enactment of S. 1566, to cases where the Attorney General finds probable cause to believe that the American is an agent of a foreign power.

On the basis of the information provided to the Committee, including the classified procedures now in effect, there do not appear to be any present abuses of these broad provisions of the Executive Order. Investigations of domestic groups that are under foreign influence appear to be confined strictly to cases involving espionage, international terrorism, or violations of the Foreign Agents Registration Acts.

3. FBI DOMESTIC SECURITY INVESTIGATIONS

The Committee staff has conducted a study of the implementation of the Attorney General's guidelines for FBI domestic security

[3] "Foreign Intelligence Surveillance Act of 1978," Hearings before the Subcommittee on Intelligence and the Rights of Americans, 95th Cong., 2d sess. (1978), pp. 232–237. Issues raised by these guidelines are discussed in the Commitee's report on S. 1566. See S. Rept. 95–701, pp. 44–46.

investigations. Its purpose was to assess the Justice Department's review of full domestic security investigations of groups. This assessment was based upon materials maintained in the files of the Attorney General's Investigation Review Unit which is notified of every full domestic security investigation and conducts an annual review of each full investigation. Under the guidelines no investigation may continue beyond one year unless the Attorney General or his designee determines in writing that continued investigation is warranted

The guidelines provide that full investigations must be based on "specific articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve or will involve the use of force or violence and which involve or will involve the violation of Federal law for one or more of the [following] purposes:

(1) overthrowing the Government of the United States, or the government of a state;

(2) substantially interfering, in the United States, with the activities of a foreign government or its authorized representatives;

(3) substantially impairing for the purpose of influencing U.S. Government policies or decisions:

(a) the functioning of the Government of the United States;

(b) the functioning of the government of a state; or (c) interstate commerce;

(4) depriving persons of their civil rights under the Constitution, laws, or treaties of the United States."

The decision to undertake a full investigation must also take into account the following factors:

(1) the magnitude of the threatened harm;

(2) the likelihood it will occur;

(3) the immediacy of the threat; and

(4) the danger to privacy and free expression posed by a full investigation.

The Committee staff reviewed 27 full investigations of groups which were submitted for approval by the Attorney General. Of these 27 cases, 20 had been closed by the Attorney General or by the FBI itself, 2 were under consideration by the Attorney General at the time of the Committee staff review, and 5 were continuing with the approval of the Attorney General. A more detailed report on the results of this study has been submitted to another Committee group currently evaluating United States counterterrorism capabilities. The principal findings and conclusions are summarized below.

a. Adherence to the guidelines

In no instance did the Attorney General approve an investigation solely on the basis of a group's advocacy of violence in the indefinite future. Nonetheless, in one of the earliest cases considered by the Attorney General, the approval appeared questionable. The Attorney General stopped the investigation a year after the initial approval when the Investigation Review Unit advised him that the facts produced by the investigation had refuted the possibility that the group would engage in violence beyond mere rhetoric.

In several cases, the Attorney General approved investigations on the basis of information clearly indicating that the group was engaged in a continuing series of Federal criminal violations involving serious

violence. Other investigations approved by the Attorney General were on the borderline because the record of Federal criminal violations involving violence was relatively weak. However, there was sufficient information to establish reasonable suspicion (but short of "probable cause") that the groups were likely to use serious violence to achieve their ends in the near future. Finally, in some cases approved by the Attorney General, the approval memoranda instructed the FBI to focus on violence-related matters, rather than on "subversive" or revolutionary ideology.

b. Interpretation and application of the guidelines

The Attorney General and the Investigation Review Unit did more than just determine whether the minimum standards of the guidelines were met. They interpreted and applied the guidelines in ways designed to give the FBI more detailed policy direction. In this respect, closing investigations was as important as approval by the Attorney General.

In several cases involving propaganda activities, however, the Attorney General found that ties between the group and a foreign power justified consideration of basing the investigation on suspected criminal violation of the Foreign Agents Registration Act.

c. Improvements in the guidelines and procedures

At the Committee's hearing on FBI domestic security investigations in September 1976, a senior FBI official said that the domestic security guidelines permitted interpretations other than those given the Bureau by the Attorney General. He referred specifically to the way the guidelines were applied to "structured and disciplined" revolutionary organizations. In practice, the Attorney General approved full investigations of such groups under the domestic security guidelines only if they posed a likelihood of serious violence in the foreseeable future. On the other hand, the guidelines allow another interpretation. The "likelihood" and "immediacy" of the threat are merely factors to be weighed in each case. An organization committed ideologically to the violent overthrow of the Government could be investigated if an Attorney General decided this danger was so serious that it outweighed its remoteness and the group's inability of carrying out its intentions. Groups which merely have an ideological commitment to revolution may not pose a threat of such magnitude as to outweigh the need for showing a credible danger of violence in the foreseeable future.

In addition, under the guidelines the FBI can recruit informants in groups and seek access to confidential records about groups and their members without having to secure Justice Department approval. Although the Investigation Review Unit is notified when investigations that may involve such techniques are opened, approval is not required until the investigation has gone on for a year.

Thus, to ensure responsible exercise of discretion, consideration might be given to revising the guidelines to require prompt Justice Department approval for any full investigations of groups that involve the placement or recruitment of informants in the group, or access to confidential private records about the group or its members.

Furthermore, the Committee inquiry has disclosed a possible gap between the FBI domestic security and foreign counterintelligence guidelines. Neither clearly authorizes FBI investigations of domestic groups likely to commit terrorist violence abroad.

This Committee's oversight is one check against hasty and ill-considered change, and the appointment of a strong FBI Director committed to constitutional rights is another. Neither can substitute, however for regulations and review procedures enacted into law.

The Senate Judiciary Committee has held hearings on the need for such legislation, and the Intelligence Committee intends to work closely in the 96th Congress with the Judiciary Committee, the Attorney General, and the FBI in developing an appropriate FBI charter covering domestic security investigations. The Committee's oversight of FBI domestic security investigations and the study of the quality of United States counterterrorism efforts discussed later have contributed to the Committee's assessment of the proper direction for FBI charter legislation in the domestic security field.

These issues deserve thorough, prompt, and definitive consideration by the Congress. FBI agents have been forced to act without legislative guidance in the domestic security field for too long. The uncertainties in the FBI's mandate must be resolved so that it can carry out its responsibilities with the full and clear support of the Congress and the American people.

4. ALLEGED ILLEGAL OR IMPROPER ACTIVITIES

The Committee has a responsibility to inquire into specific and credible allegations or information that intelligence activities violate constitutional rights. In accordance with section 11(c) of S. Res. 400, the Committee also expects that each department and agency of the United States will "report immediately upon discovery to the Select Committee any and all intelligence activities which constitute violations of the Constitutional rights of any person," and "what actions have been taken or are expected to be taken . . . with respect to such violations."

During the past year the Committee has requested information about certain questionable activities from the Executive branch, and the Committee has inquired into particular allegations.

a. FBI break-ins investigation

The Committee has had a continuing interest in the conduct and results of the Justice Department investigation into the use by the FBI of possible illegal investigative techniques during the early 1970s. A series of questions were addressed to the Attorney General regarding this investigation and the handling of similar matters by the Department of Justice. The Committee recognized that there were limitations on the Attorney General's ability to respond during the course of the investigation, particularly where the information concerned pending grand jury deliberations. Following the decisions announced by the Attorney General on April 10, 1978 culminating the investigation, the Committee renewed its outstanding requests. The Attorney General has replied to those questions that did not touch closely on the substance of ongoing prosecutions.[4]

The Committee has expressed concern to the Attorney General that the American people may never know the full scope of facts developed by this inquiry. It has raised with him the possibility of

[4] The Attorney General's reply will be found in appendix B of this report.

reporting to the Committee information pertaining to non-criminal activity, information which the Justice Department has decided not to present to a grand jury, or information which is presented to a grand jury but not used in a criminal trial. Some of that information might also be made public in a form which does not personally identify the subject of the information, especially if that information suggests the need for additional legislation.

Completion of this inquiry awaits the final action of the FBI Director on disciplinary matters referred to him by the Attorney General and the criminal proceedings initiated by the Department of Justice against certain former FBI officials.

b. Other inquiries

The Committee believes that the responsibility for investigating alleged illegal or improper intelligence activities should ordinarily be discharged by the Executive branch. Under Executive Order 12036 each agency in the intelligence community must have an Inspector General look into such allegations and take steps to discover and report intelligence activities that raise questions of legality or propriety. The General Counsels of the agencies share these duties. Reports must be made to the Intelligence Oversight Board in the White House, and activities which raise questions of legality must be reported to the Attorney General. Agency heads must report in a timely fashion to the Select Committee "information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned."

On occasion the Committee has requested that alleged violations of constitutional rights be investigated by the agencies and that reports on those investigations be submitted to the Committee. More frequently, however, these investigations are conducted by the agencies without any need for referral by the Committee. For example, the Justice Department's Office of Professional Responsibility has issued a public report on the internal inquiries conducted within the FBI and the Drug Enforcement Administration during 1977.

In addition to alleged violations of constitutional rights, the Committee is concerned about possible improper intelligence activities that may otherwise interfere with our free and open society. One example is the Committee's report on certain questions raised about the National Security Agency.[5]

The Committee investigated allegations that the National Security Agency (NSA) pressured scientists working in the public sector on technical devices to be used to encrypt nonclassified government data. The allegations also suggested that NSA had somehow influenced the character of the data encryption system (DES) device during its development by International Business Machines (IBM) in such a way as to allow NSA to have access to data encrypted by the IBM device.

Interviews with the scientists working on encrypting devices revealed that NSA had not harassed them in any way. Also, the Committee could find no evidence that NSA had lessened the security of the IBM device, although the agency did persuade IBM that some changes could be made in the device without weakening it in any way.

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[5] Staff Report: Unclassified Summary—Involvement of NSA in the Development of the Data Encryption Standard.

The Committee concluded that the IBM device, which was chosen by the National Bureau of Standards (NBS) to be the standard for all government encryption of non-classified data, will provide adequate security, at least for the 5-to-10 year period of time for which it was intended.

Nevertheless, the Committee believes that public cryptology is a field increasingly fraught with ambiguities and uncertainties over what scientists and scientific industries can and cannot do without damaging the legitimately protected national secrets needed to allow secure transmission of national security information. The Committee has recommended that appropriate committees of Congress address the question and remove what legislative uncertainties do exist.

5. ACTIVITIES BY FOREIGN INTELLIGENCE SERVICES

The Committee recognizes the importance of guaranteeing the privacy of Americans against violation by hostile foreign services. It received a briefing in November on the Administration's plans for protecting the privacy of U.S. communications. As part of this plan, information was made available by the Administration to the public concerning Soviet interception of microwave communications in the United States. The Committee intends to continue its assessment of the progress that is being made in protecting private communications, and to determine whether any legislation is required in this area.

Soviet surveillance of the private communications of Americans raises fundamental questions about the ability of the United States Government to act against foreign intelligence services that systematically violate the laws of our nation designed to protect the privacy and freedom of our citizens. We have placed tight restraints upon our own intelligence agencies. Legislation such as S. 1566 protects not only the rights of Americans, but also the rights of foreign citizens who visit this country against improper electronic surveillance of their private communications. No other nation places so much emphasis upon ensuring that its intelligence activities are carefully controlled. Americans have as much right to have their privacy protected against foreign powers as they have to be protected against their own government.[6]

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[6] The Committee has conducted a thorough case study of the issues raised by the activities of "friendly" intelligence services in the United States, including steps that might be taken to deter activities that violate the laws of the United States. Report of the Senate Select Committee on Intelligence entitled "Activities of 'Friendly' Foreign Intelligence Services in the United States: A Case Study." 95th Cong., 2d sess.

III. CHARTERS AND GUIDELINES

Upon introduction of S. 2525, the National Intelligence Reorganization and Reform Act of 1978, on February 9, Senator Walter Huddleston, its chief sponsor as chairman of the Charters and Guidelines subcommittee, called it "the end of one process and beginning of a new one."

The first process involved an amalgam of more than 30 years experience of the Central Intelligence Agency's activities, and intensive study for three years of all U.S. intelligence activities by the Select Committee on Intelligence and its predecessor, the Select Committee to Study Governmental Operations With Respect to Intelligence Activities. In addition, two years of consultations, revisions and negotiations by the Committee and staff have taken place with the White House and other Executive branch officials, including President Carter, Vice President Mondale, members of the intelligence agencies at all levels and non-government experts.

The new process began with the effort to enact legislation that would provide legitimacy and strengthen the intelligence capability of the Federal Government without adversely affecting the constitutional rights of Americans. The draft measure called for balance between the needs for secrecy in intelligence operations and expectations that operations of the United States Government, including clandestine activities, should be fully accountable to the Congress.

Hearings on S. 2525 were held in open session between April and mid-August. Some 40 witnesses were heard in 14 sessions, including one executive meeting. It was the third time in three decades that intelligence was the subject of hearings. The first series of hearings in 1947 resulted in the 1947 National Security Act and a loosely defined Central Intelligence Agency came into existence. The second series took place in 1975–76 when allegations of abuse and improper activities by intelligence agencies were examined at close hand. The findings of the Church committee with its mandate to consider recommendations to the Senate on the future of intelligence agencies became the starting point for drafting charter legislation.

S. 2525 was put forward in order to initiate a constructive debate over issues most in need of clarification and resolution. Among the issues discussed in the hearings were the following:

—The means for the United States to attain a strong and effective intelligence system;

—Whether separate entities within the national intelligence community (CIA, FBI, NSA, DIA) should provide analysis. How diverse interpretations and analysis might be encouraged;

—Whether greater coordination is required among the various elements of the intelligence community, particularly in budgeting and in the assignment of tasks;

—Whether the Director of National Intelligence (now DCI) should be assigned clear authority to coordinate the community

and whether separation of the DNI from his dual responsibility of heading the CIA should be encouraged;
—That covert activities should be considered more carefully than in the past before they are initiated;
—Whether certain covert actions and the use of certain classes of individuals for intelligence purposes should be banned;
—That greater oversight and stronger accountability is needed by both the Executive branch and the Congress to guard against abuses in the future;
—Whether the identity of agents working under cover should be protected by laws;
—Consideration of the view that the rights and liberties of law-abiding Americans must not be abridged by the desire of intelligence agencies to collect information.

The Committee heard during the 1978 sessions from a former chairman of the President's Foreign Intelligence Advisory Board who also had been Secretary of Defense; from a former National Security Advisor to Presidents Kennedy and Johnson; from three former Directors of Central Intelligence (DCI) and a Deputy DCI; from the former operating chiefs of CIA's Directorates for Plans, Current Intelligence, and Research. In addition, there were experts on problems of constitutional law involving the First and Fourth amendments, military leaders, former ambassadors, Justice Department officials, representatives of written and electronic journalism, the academic community and public interest groups, particularly from organizations subjected to warrantless surveillance in the past. A panel of distinguished scientists provided insight on technological research and development for intelligence collection now and in the future.

The key points emerging from the hearings included the following:

A. Charters

A key author of the 1947 National Security Act which established the CIA was Clark Clifford, former Chairman of the President's Foreign Intelligence Advisory Board and former Secretary of Defense. As lead-off witness he explained that the 1947 Act was largely experimental with no precedents nor prior experience by the United States in conducting an intelligence agency. "With three decades of experience, we know better what we want from our intelligence operations and what to guard against," he said. "We should now draw on that experience to fashion an intelligence capability for our Government which will serve us in the decades to come." He noted that the proposed charter legislation accomplished three objectives—it authorized intelligence important to national security; it prevented recurrence of abuses; it provided the organizational and institutional framework to facilitate the proper and effective conduct of intelligence.

Most of the subsequent witnesses agreed with Clifford on the need for charters to provide an effective intelligence system for the United States, but there were differences on how this could best be achieved.

In general, civil libertarians were insistent that abuses of the past which had infringed on the rights of Americans should be expressly forbidden in the new legislation; professionals who had served as intelligence officers warned that in correcting the wrongs of the

past that Congress should not commit new wrongs by hamstringing U.S. ability to gather essential intelligence in the future. Questions for the most part reflected divergence over the nature of the bill; should it be more rigid or more flexible?

Former Director of Central Intelligence (DCI) William Colby predicted the charters would produce stronger American intelligence. But any overall revision of the charters, he said, would be deficient if it did not improve the legal structure for the protection of secret sources and techniques vital to intelligence collection. The charters should include clear statements that intelligence is barred from utilizing certain areas such as religion, official humanitarian and cultural affairs and the media. Former DCI George Bush opposed too much regulation, reporting and restrictions. He asked that the hands of the President not be unduly tied in a way that handicapped the intelligence gathering agencies.

Former DCI Richard Helms maintained that the clandestine services (espionage, counterintelligence, covert action) as a tool of Government must belong to the Presidency. Under his role as Commander in Chief and formulator of foreign policy, it should be the President who establishes guidelines and restrictions on the clandestine services. Helms conceded that Congress has a continuing oversight role. He dismissed an Official Secrets Act such as Britian employs to guard its secrets as inappropriate, saying that even to introduce it would lead to murderous debate.

John Shattuck, director of the Washington office of the American Civil Liberties Union and ACLU Legislative Counsel Jerry Berman strongly supported the work of the Intelligence Committee in attempting to legislate controls and restrictions on U.S. intelligence activities. But they warned that they would oppose legislation which in the name of reforming intelligence increases the powers of intelligence agencies at the expense of democratic principles. Morton Halperin, director of the Center for National Security Studies and former National Security Council official, also warned against authorizing activities which previously had been conducted without congressional sanction while failing to put meaningful limits and controls over those activities. He particularly cited covert operations in this category. But he termed the task of producing charters "not only extremely important but essential if we are to bring the intelligence agencies under constitutional controls."

Admiral Elmo Zumwalt, former Chief of Naval Operations, testified that the best possible action for the Senate was to take no action at present. "We need to allow more time for the debate to take place which will determine the long term future with regard to our military posture and our attitude toward Soviet misbehavior," he said. If action were taken, he wanted less reporting to Congress and no prohibition of covert activities. General Russell Dougherty, former Commander of the Strategic Air Command, said he thought the charters were balanced in handling contradictions between the world of intelligence activities and the world of constitutional guarantees for all Americans. General Samuel Wilson, former Director of the Defense Intelligence Agency said the legislation was "overdue and will be extremely helpful."

B. Covert Activities

Most witnesses favored the draft bill's provisions that covert action should require a Presidential finding in writing that the activity was important or essential to national defense or U.S. foreign policy and the circumstances required extraordinary means.

General Richard Giles Stilwell, president of the Association of Former Intelligence Officers, cautioned the Committee there is a "very real risk that in trying to foreclose the danger of repeating past mistakes, we may also foreclose the possibility of achieving future successes" in intelligence gathering. "Future intelligence successes are essential to avoid surprises and setbacks, indeed if our Nation and value system are to . . . survive." Stilwell was concerned that clandestine operations including covert action would be virtually halted if the present draft bill were enacted.

Thomas Karamessines, former CIA Deputy Director of Plans (DDP), urged that any special activity or clandestine collection should retain the procedures involving the President and National Security Council for establishing the criteria of sensitivity, and also include notification of the Senate and House Intelligence Committees. But he would exclude notification to the six other congressional committees. He further urged that the nature, scope and costs of secret projects be described to the two congressional intelligence committees but not the operational details. Karamessines criticized the explicit prohibition against assassination in the draft bill, asking why it was confined to foreign officials. He also asked for deletion of prohibitions in S. 2525 against support of international terrorist activities and the injunction against the violent overthrow of democratic governments.

Clark Clifford said that many covert activities of the past—he cited the United States covert action program in Chile as an example—were unwise and clearly against national interest. Clifford said, however, he would not conclude that the United States should never engage in covert action. There should be a very high standard set to stress that such actions should not be entered into lightly. He opposed enumerating specific activities, including assassination, which would be prohibited. It was demeaning and would in fact by inference permit all other actions not otherwise specifically prohibited, he said.

John Shattuck, called for a total ban on covert action. E. Drexel Godfrey, former chief of the CIA's Office of Current Intelligence, also favored a reduction of clandestine collection of intelligence and complete elimination of covert political action. The real purpose of intelligence is to tell the truth about conditions around the world, he said, or when truth is not attainable, to offer the best possible judgment on the state of affairs in question. He thought the CIA's truth-telling image had been damaged because clandestine activities had been on center stage for so long. Herbert Scoville, Jr., former CIA Deputy Director of Research, likewise opposed covert action on the grounds that it was harmful to U.S. foreign and security policy objectives. As long as the United States is known to be conducting such activities, "it is subject to being blamed for everything bad that happens around the world," he said. Richard Helms said he saw no substitute for covert activities and to strike that weapon from the President's hands would be a great mistake. Ever since the start

of covert actions under a document known as NSC 10/2, the CIA Director had to have the approval of authorities of the Executive branch before he could put such a program into effect, he pointed out.

C. Director of National Intelligence/Central Intelligence

The proposed legislation established a Director of National Intelligence to serve under the direction of the National Security Council as the principal foreign intelligence officer of the United States. The proposal also would authorize the President to transfer the DNI's duties and authority as head of CIA to an Assistant Director of National Intelligence if he wished to do so. This provision drew a mixed reaction at the hearings.

Clark Clifford, from his experience as chairman of the President's Foreign Intelligence Advisory Board said the office of the Director of National Intelligence should be separated entirely from the CIA. The President's chief intelligence advisor should be an individual who is not personally connected with and psychologically committed to the details of a particular intelligence program, Clifford contended. Also, the DNI should be able to exert general supervision over the whole intelligence community but could not do so if he were tied to one particular agency. The DNI would be better able to advise the President on covert actions if he were separated from the directorship of the CIA.

Contrary views came from McGeorge Bundy, former National Security Adviser to Presidents Kennedy and Johnson and from former CIA Director George Bush. Bundy said that in his experience it worked better to have overall responsibility for intelligence coordination and the direct responsibility for the CIA in the same hands. While there are difficulties, he said it would be more difficult under any other system. He said that where the CIA has had internal management problems in the past, it has been in part due to "running with the ball and going beyond what the initial mandate may have been" when it was approved originally. Bush said that a Director of National Intelligence separated from the CIA staff would be virtually isolated. While in theory he could draw on all the intelligence community elements, he needs CIA as his principal source of support to be most effective, and the CIA needs its head to be the chief foreign intelligence adviser of the President. General Richard Stilwell said it would be a "serious mistake" to separate the DNI from the CIA. It would be necessary to build up a new bureaucracy, possibly thousands of trained analysts and specialists, to support the National Intelligence Estimates and other actions decided upon by the DNI. Stilwell warned that establishment of a "czar" would not be the answer to the growing pains experienced by the intelligence community in the past.

The military witnesses and the former intelligence officers who headed CIA and its operational functions objected strongly to what they said were excessive requirements to report to Congress. Bush said it amounted to micromanagement of intelligence. The legislation called for the heads of each unit of the intelligence community to report annually to the Senate and House Intelligence Committees and for the Director of National Intelligence and the Attorney Gen-

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eral to make such reports. In addition, the DNI was to make available to the public an annual report on intelligence, counterintelligence and counterterrorism activities, without divulging classified information.

D. Rights of Americans

Title II of the proposed Intelligence Reform and Reorganization Act authorizes, within limits, the collection of intelligence concerning U.S. persons and foreign persons in the United States.

The standards for collecting intelligence were based on the belief that U.S. persons should not be investigated without their consent unless there is a reason to believe that they may violate the law. Exceptions to this principle are permitted only in narrowly defined circumstances:

—Intelligence may be collected about United States persons outside the U.S. who are foreign officials, fugitives from justice, or reasonably believed to be engaged in clandestine intelligence activities;

—Very limited inquiries also may be conducted where a United States person is a target of espionage or terrorism, has contact with suspected intelligence agents, is a potential intelligence source, or possesses significant foreign intelligence.

In an effort to prevent a recurrence of illegal and abusive practices by the intelligence agencies, Thomas I. Emerson, Lines Professor of Law, Yale University; Morton H. Halperin, director of the Center for National Security Studies; Jerry J. Berman, legislative counsel, ACLU; Richard M. Gutman, director, Chicago Political Surveillance and Education Project; Ethel Taylor, national coordinator, Women Strike for Peace; and Louis W. Schneider, executive secretary, American Friends Service Committee, stressed that the standards of any intelligence agency's investigation of an American citizen must meet constitutional requirements. Guided by the First Amendment, investigations of Americans, either in residence or traveling abroad, should not be initiated or sustained without reasonable suspicion of the target's participation in criminal activity.

In accordance with the Fourth Amendment, Taylor, Schneider and Gutman recommended warrants be required in investigations using informants. Each of these witnesses represented a group which had been subjected to what they considered illegal infiltration and surveillance by the FBI and CIA. Warrants would assure that future intelligence agency investigations would not infringe on First Amendment freedom of speech and political participation.

Thomas Emerson shared the view that constitutional rights should not be sacrificed for reasons of national security. He declared, "Security at the price of a police state is not an acceptable option." Noting that unwarranted entries, mail openings and electronic surveillance were intrusive means requiring a court warrant upon a show of "probable cause" of criminal intent, Emerson said such standards should not be relaxed because the Government is looking for foreign intelligence activities on the part of American citizens.

Former Solicitor General Robert H. Bork did not favor the intelligence agencies relying on a criminal standard when initiating or conducting an investigation of an American citizen or resident alien. Bork called the requirement for a criminal law standard "an unjustifiable

hindrance" to the collection of sound intelligence. It may be important to know who is gathering information on behalf of a foreign power, even though there is no indication of violation of criminal law. Bork argued that the conduct of intelligence activities was basically a function of the Executive branch which should not be undermined by legislating limitation on the procedures of collection, such as requiring a criminal standard in investigations.

Ambassador Laurence Silberman, former Deputy Attorney General, expressed concern that in an effort to safeguard the rights of Americans, legislation should not vitiate executive authority by forcing the judiciary into a new and unconstitutional role. Silberman maintained that the judiciary's role of supervision of counterintelligence and intelligence operations should focus on general policy guidelines and not provide detailed direction as to the "priority and duration of intelligence and counterintelligence techniques." Decisions regarding targets, techniques and time limits would require the courts to determine what information was necessary to protect national security and successfully conduct foreign affairs. Silberman argued that this involvement of the judiciary in the setting of foreign policy is a direct encroachment on executive authority.

Silberman also agreed with Bork that the standard for initiating any counterintelligence activity should not be strictly tied to a violation of U.S. criminal law. "The fact that a group has not yet crossed the line between legal activity and criminal conduct should not forbid the FBI from collecting any information concerning that group if it can necessarily be expected that they may cross the line."

E. Academics and the Intelligence Agencies

On July 20, 1978 the Senate Intelligence Committee heard testimony from three members of the academic community: Derek Bok, Richard Abrams and Morton Baratz.

Derek Bok, president of Harvard University, opened the session emphasizing the need for a balance between meeting the requirements of the intelligence agencies and protecting the interests of the academic community. While the intelligence community should have access to the expertise available at universities, Bok stressed the need to protect the integrity of an academic institution and preserve an atmosphere of candor and trust.

Bok referred to Harvard's existing guidelines to govern the relationship between the intelligence agencies and universities. However, after a year of negotiations Bok indicated significant differences remained between Harvard and the CIA concerning two of the guidelines. The CIA had objected to the recommendation prohibiting the use of academics traveling abroad for 'any clandestine operational activities. The Agency also opposed mandatory public disclosure of all consulting, research or recruiting arrangements between the CIA and any member of the academic community.

Richard Abrams, professor of United States history and chairman of the Statewide Committee on Academic Freedom for the University of California, and Morton Baratz of the University of Maryland, general secretary for the American Association of University Professors, concurred with Bok's concern for the integrity of academic institutions. Recognizing the right of universities to self government, they supported Bok's position on the two contested guidelines.

In addition, Baratz suggested requirements that intelligence agencies disclose their participation in U.S. organizations should be applied to relationships with academic institutions.

Professor Abrams summarized the primary concern of all three by contending that members of the academic community may disregard the rules governing the CIA's relations with academics but this does not negate the need for rules. The rules "raise the stakes, the costs against which even conscience must measure the risk . . . [They] set forth the standards and obligations of the profession [making] explicit the prime principle on which the academic community must stand, namely, honesty in all its professional postures."

F. Restrictions on the Use of Newsmen by the Intelligence Community

The proposed legislation would prohibit paid relationships between any part of the intelligence community and journalists, editors and news executives accredited to any U.S. media organization or to any U.S. person following a full-time religious vocation. The ban also would apply to U.S. persons whose travel abroad is sponsored and supported by U.S. Government programs to promote education, the arts, humanities or cultural affairs.

Two panels of reporters, editors, news executives and television commentators generally favored restrictions on paid relations with the CIA but were opposed to any steps that would prevent their access to or voluntary exchanges with intelligence organizations for news purposes.

Daniel Schorr, former CBS correspondent, author and columnist urged that restrictions on paid relations be broadened to apply to all personnel employed by American news organizations. Otherwise, he said, the back door would be open to the use of administrative and technical personnel for "cover" arrangements. Mike Wallace of CBS pointed out that electronic journalism involves more than a man with a pencil; it frequently requires a producer, sound man, cameraman, lightman and in foreign countries it involves foreign nationals. They all have access to the same information that the reporter and producer have. Wallace would have the same monetary and contractual restrictions applied to the crew.

Keith Fuller, general manager of the Associated Press, said he had mixed feelings about legislation, but believed that if the CIA leaves hands off and lets the U.S. press produce news that is credible around the world, "that is the best of all circumstances." "We can best achieve this by acting on our own and without alliances of any sort with any Government arm," he emphasized. Philip L. Geyelin, editorial page editor of the Washington Post, speaking for the American Society of Newspaper Editors (ASNE) was opposed to legislation of any kind on the subject. "When news organizations are compromised or corrupted," he said, "there has to be some willingness on somebody's part . . . It would seem to follow that when the press asks for legislation to protect itself from exploitation by the CIA, what it is asking, really, is for the Government to save it from itself."

Richard Leonard, editor of the Milwaukee Journal and chairman of the American Committee of the International Press Institute, took the position that the knowledge that CIA has a relationship with any

journalist, American or foreign, casts suspicion on all journalists. The only assistance journalists should give CIA is honest, accurate reporting in the public interest, Leonard maintained.

He wanted the ban on paid relations extended to foreign journalists overseas. Nicholas Daniloff, congressional correspondent for United Press International, former president of the State Department Correspondents Association and Overseas Writers Club, and John H. Nelson, Pulitzer Prize-winner and chief of the Washington Bureau of the Los Angeles Times, agreed that any paid relationship between journalists and intelligence agencies is odious. Nelson said use of foreign media as a cover in any country with a free press would be a corruption. "If we are to protect our own press from such corruption by what right do we undermine the free press of another country?" he asked. Daniloff pointed out that in countries hostile to the United States, the foreign correspondent treads a perilous path and if he is perceived to be a possible spy, he may suddenly find himself faced with charges of espionage and criminal activity. But Daniloff saw no reason why journalists could not play a role as an extraordinary conduit between hostile sides during time of crisis.

The proposed legislation calls for a $50,000 fine or imprisonment for not more than five years, or both, for any person who had learned the true identity of any officer or employee of the CIA and disclosed it to any unauthorized person. There was no objection from the media to this criminal penalty.

G. Charter Revision

The hearings did not, of course, resolve all issues. Most of the differences involved how specific the intelligence statute should be. A fourth round of hearings is expected to be held in the first session of the 96th Congress to hear from administration witnesses before the new draft legislation, reflecting agreed changes from S. 2525, is reported by the Committee for Senate action.

IV. THE COLLECTION, PRODUCTION AND QUALITY OF INTELLIGENCE

The work of the Subcommittee on Collection, Production and Quality focused on evaluating the effectiveness of U.S. intelligence in relation to the important world problems which face the Executive and the Congress. This focus may be seen in the studies which the subcommittee has underway or has completed. The subcommittee's findings assist the Select Committee in authorizing the intelligence budget and overseeing the management of intelligence collection and production. The Committee also examines the usefulness of intelligence support to the Congress.

There is considerable day-to-day contact between the Committee and the Executive branch. In its various inquiries the Committee is paying close attention to the requirements of policymaking consumers of intelligence: Are they getting the intelligence they need? Is that intelligence timely and relevant to their policymaking needs? In what respects is that intelligence unique, or simply an adjunct to other information available to them? What kind of contact exists between the producers and consumers of intelligence? Is the intelligence product objective and independent? Does that intelligence really have a major impact on top policy officials' decisionmaking, especially in cases where the intelligence message may not coincide with those policymaker's own perceptions?

To enhance the analytic quality of the intelligence agencies, the Committee seeks to ensure that the Executive branch and the intelligence community are able to adapt intelligence processes to meet changing world conditions. The main concern is that every reasonable effort be made to improve the quality and usefulness of the intelligence produced. The Committee's legislative purpose is to ensure that the process of intelligence production and analysis—the primary mission of the U.S. intelligence community—will receive the requisite budget and managerial attention.

A. Intelligence and the Congress

The Committee also plays a major role in assisting the work of the Senate by making relevent intelligence available. Increasingly, the Senate has begun to use the analyses produced by the intelligence agencies in formulating its position on policy issues. The range of intelligence information available goes beyond traditional interests of defense and foreign affairs to agriculture, energy and foreign economics. The mandate of the Select Committee on Intelligence, contained in Senate Resolution 400, directly reflects this expanded Senate role.

The Committee has a key role in ensuring that the Senate is provided with the intelligence it requires. It has assisted the Foreign Relations Committee and the Senate as a whole on the intelligence aspects of a number of key issues such as the Panama Canal Treaties and the Mideast arms sales proposals.

B. Verification of SALT Agreements

The Committee has continued its in-depth study of the monitoring abilities of the United States to verify arms control agreements. The study addresses the verification tasks that are required by the SALT II provisions. In the conduct of this study, the Select Committee has received the fullest possible cooperation from the intelligence agencies and has established a good working relationship with both the collection and analytic elements of the intelligence community. At the Committee's request, a matrix of projected SALT II monitoring tasks and capabilities has been produced by the intelligence community. Visits to the SALT talks in Geneva have been made by Committee members and staff. Detailed study covering the military hardware requirements and analytic processes has been made by the Committee. The purpose of the Committee's efforts on verification is to provide the members of the Senate with a factual report on United States intelligence capabilities with respect to verification, and to assist the Senate in its treaty deliberations concerning SALT II.

C. International Terrorism

The problems created by international terrorist activities are receiving the attention of all U.S. intelligence agencies. The Committee is assessing the quality of the intelligence community's efforts and its contribution to the protection of U.S. citizens against the potential dangers of terrorist actions. Questions being examined by the Committee include: How the government is organized to task, collect, analyze, disseminate, and use intelligence on terrorism; what counterterrorist capabilities exist within the U.S. Government and how well intelligence is used by these groups; what, if any, changes need to be made of the various guidelines under which the Government collects intelligence on terrorism. As international terrorist groups begin to make use of more esoteric methods of intimidating and harming the public, it is imperative that the U.S. Government be as prepared as possible to combat potential dangers. The Committee considers this question of terrorism to be one of the most important problems that will face our country and other nations in the next few years. The Committee is preparing a classified study on these questions. A public version will be released when completed.

D. The Oil Crisis of 1973–74

In December 1977, the Subcommittee completed and the full Committee approved its report on an examination of the Arab oil embargo.[1] This study addressed three principal questions: the position of Saudi Arabia in the spring and summer of 1973 on the issue of using oil as a political weapon; the sustainability of prices following the oil embargo; and the impact of oil price increases on the world economy. The study's chief findings were that the performance of specialized public sources on these questions equalled or exceeded that of the intelligence community; that although intelligence collection gave strong indications of actual Saudi policy shifts, intelligence

[1] "U.S. Intelligence Analysis and the Oil Issue, 1973–1974." December 1977. This Staff Report was based on a classified study prepared by the Subcommittee.

analysts under-utilized the range of field data available to them; that the intelligence community did not produce serious or sustained discussion of alternatives to the judgments that emerged; that the intelligence produced emphasized ad hoc, current items rather than analysis; and that intelligence analysis displayed limited integration of political and economic factors. The basic classified study produced by the subcommittee included recommendations for improving the future performance of U.S. intelligence, based on the lessons learned in this 1973–1974 case.

E. Soviet Oil Situation: An Evaluation of CIA Analyses of Soviet Oil Production

The Committee also addressed the quality of other CIA oil studies made during the past year. More than a score of the private or non-CIA government oil experts interviewed by the Committee reported that while they were impressed by the CIA Office of Economic Research's work in general, and while they felt that OER had performed a valuable task in calling attention to a probable decline in Soviet oil production in 1985, they did not agree that the Soviet Union would import 3.4 to 4.5 million barrels per day (mbd) to make up the short fall as the OER report concluded.

Upon investigation, the Committee report found that the CIA had erred in implying such an action. The Agency apparently meant to suggest that the difference between production and demand would be between 3.5 and 4.5 mbd, but that the Soviet government would go to great lengths, through substitution of other fuels and conservation, to prevent becoming an oil importer of that magnitude. The Committee was of the view that the CIA performed well by calling attention to a serious decline in Soviet oil production; it faulted the Agency for not clarifying what the shortfall meant in terms of possible Soviet oil imports.

On May 21, 1978, the Committee released a staff study evaluating the CIA's efforts to forecast Soviet oil production.[2] The need to conduct this study had been occasioned by President Carter's reference to CIA oil studies in an effort to gain support for his energy plan in April 1977. This had brought about charges that the CIA had "cooked the facts to fit the President's recipe" and that the CIA forecast was faulty.

The Committee study focused on both the integrity of the analytical process as well as the quality of the intelligence product. On the first question, the Committee found "no evidence that the integrity and independence of the analytical process . . . was compromised in any way." The Committee staff traced the rather pessimistic prediction about future Soviet oil production back to its origins within the CIA and found that it had begun long before the Carter Administration took office.

On the second question, the Committee found that the manner in which the President had cited CIA information at a time when it had not yet been released to the public had understandably given rise to questions about his use of intelligence, and concluded, "It is proper for a President to cite publicly intelligence information in supporting a

[2] "The Soviet Oil Situation: An Evaluation of CIA Analyses of Soviet Oil Production," Staff Report, Senate Select Committee on Intelligence, U.S. Senate, May, 1978.

particular public proposal, as long as this can be done without compromising any sensitive sources or methods used" and "the information is made available to the public so that others may gauge the soundness of the argument." The study also said, "The White House and the Director of Central Intelligence need to be fully sensitive to the responsibilities they bear in preserving the integrity of the analytical process and in creating confidence among Congress and the public that the substance and the circumstances surrounding the release of economic and scientific intelligence are free from undue pressure."

F. The A Team–B Team Exercise Concerning Soviet Strategic Weapons [3]

To assist the Committee's oversight function, the subcommittee examined the 1976 "A Team–B Team" experiment in comparative assessments which had been initiated by the President's Foreign Intelligence Advisory Board (PFIAB). This experiment had pitted outside "B" team against the intelligence community's analysts ("A" team) on certain selected questions in an attempt to determine whether the outside team would arrive at estimates on Soviet strategic capabilities and intentions other than those reached simultaneously by the intelligence community.

The Committee report included the central judgments that the concept of a review of the intelligence community's National Intelligence Estimates (NIEs) by outside experts was a legitimate one; that the B Team made some valid criticisms of the NIEs, especially concerning certain technical intelligence questions, and offered some useful recommendations concerning the estimative process. It was the Committee's judgment that these contributions were less valuable than they might have been because the B Team on Soviet objectives reflected only one segment of the spectrum of opinion and criticized much earlier NIEs rather than (as had previously been agreed upon by the PFIAB and the Director of Central Intelligence) producing alternative estimates from certain of those of the 1976 NIEs. Additionally, the fact that garbled versions of this exercise leaked to the press reduced somewhat the significance of the experiment. Most importantly, the Committee concluded that NIEs on Soviet strategic capabilities and objectives still need improvement in a number of important respects. The Committee report offered a number of recommendations for improving such NIEs. Three Senators added their individual views to the report, two feeling that the report was not sufficiently critical of the A team, one that it was not sufficiently critical of the B team.

G. Intelligence and the American Evacuation from Vietnam

The Committee examined the various allegations which Mr. Frank Snepp, former CIA employee and author of the recent book, "Decent Interval," made that CIA performed poorly during the last months of U.S. involvement in South Vietnam with respect to tampering with intelligence reporting and other questions. This inquiry, which in-

[3] "The National Intelligence Estimates A–B Team Episode Concerning Soviet Strategic Capability and Objectives." Committee Report, together with the separate views of Senators Gary Hart, Daniel Patrick Moynihan, and Malcolm Wallop, February 16, 1978. This report was based on a classified study prepared by the Subcommittee.

volved still classified material, focused on those issues which fall under the jurisdiction of the Select Committee and not on policy questions about Vietnam.

H. Intelligence and the Middle East Arms Balance

The Committee prepared a detailed classified study for the use of the Senate concerning the size and quality of various Middle East armies and air forces. The study, which was used in the closed session of the Senate during its debate on Mideast arms sales proposals on May 15, 1978 did not make independent judgments. It set forth the facts and the judgments which the U.S. intelligence community made on these questions and reviewed and evaluated the collection capabilities of the intelligence community with regard to Middle East questions.

I. Other Economic and Resource Questions

The Committee has conducted a number of ongoing examinations in the field of economics such as grain forecasts, debt loads, and natural resource supply questions. The Committee was especially interested in the degree to which NASA information and other non-sensitive means of information gathering can be produced in an unclassified form so that information concerning world resource questions and other economic issues can be made available to the public.

J. China

A detailed classified staff study approved by the full Committee assesses the strengths and weaknesses of U.S. intelligence with respect to China, and the ability of the intelligence community to assist policymakers in anticipating various specific events concerning China. In summary, the study found that the quality and comprehensiveness of information and analyses about China is improving but that many significant gaps still exist.

V. COUNTERINTELLIGENCE

The important subject of counterintelligence was addressed publicly by the predecessor Select Committee in its "Final Report on Foreign and Military Intelligence." It concluded that a Subcommittee on Counterintelligence should be established within the framework of the National Security Council (NSC), that the subject should receive Presidential attention and that congressional oversight "should devote more attention to this area to help preserve the liberties of American citizens and to prod the intelligence community toward a more effective defense of the nation." [1]

Although the term "counterintelligence" is not defined specifically in Senate Resolution 400,[2] it is subsumed in the definition of "intelligence activities" in Section 14(a). In brief, counterintelligence includes (1) the collection, analysis, production and dissemination, or use of information that relates to foreign intelligence and security services and their agents; (2) activities taken to counter foreign intelligence activities directed against the United States, such as clandestine collection of information or espionage, sabotage and subversion or other forms of covert action; (3) the collection, analysis, production, dissemination, or use of information about activities of persons whose activities pose a threat to the security of the United States, and covert or clandestine activities directed against such persons.

Some terrorism, as a form of or adjunct to sabotage directed by a foreign service, comes within the purview of foreign counterintelligence; other aspects of terrorism do not. The organization and planning within the U.S. Government for counterterrorism transcends the functions of the intelligence agencies. A Committee staff inquiry has been conducted to survey problems in the area of counterterrorism and the adequacy of intelligence and counterintelligence organization and activity to meet these problems. During the hearing held by the Committee on April 4, 1978 on the subject of charters for the intelligence agencies, Clark Clifford, expressed his deepest concern over the increase of terrorist activities, with the danger of eventual nuclear device blackmail. He voiced his expectation that the danger will increase, and that there will be a need to increase our efforts to meet this danger. The tragic murder of Aldo Moro in Italy added a grim postscript. As a step to strengthen the U.S. Government's capabilities, the Committee, in its 1979 budget authorization bill, added a substantial amount for needed Federal Bureau of Intelligence counterterrorism efforts.

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[1] Select Committee to Study Governmental Operations With Respect to Intelligence Activities, U.S. Senate, 94th Congress, 2d Session, Report No. 94–755, Apr. 26, 1976, Book I, pp. 163–178.

[2] Senate Resolution 400 (Rept. No. 94–675; Rept. No. 94–770), Resolution to Establish a Standing Committee of the Senate on Intelligence, and for other purposes, 94th Congress, 2d Sess., May 19, 1976.

The President's Executive Order 12036, "United States Intelligence Activities," in section 1-304, reflects the assignment of counterintelligence duties to the Special Coordination Committee of the National Security Council, the highest Executive branch entity that provides review of, guidance for, and direction to the conduct of all national foreign intelligence and counterintelligence activities. Section 4-202 of Executive Order 12036 provides the following definition of counterintelligence:

> Counterintelligence means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons, but not including personnel, physical, document, or communications security programs.[3]

During the last several years, there has been a continuing increase in hostile foreign intelligence threats to the United States and its interests. Espionage prosecutions or expulsions of foreign officials as persona non grata which have been publicized do not indicate the actual level of espionage conducted against U.S. interests abroad, from neighboring countries and in the United States by a substantial number of foreign intelligence officers and agents under official cover. Such persons occupy positions in excess of any plausible needs for diplomacy and consular business or the execution of legitimate functions of foreign countries' interests. Exploitation by the KGB and the GRU, the civilian and military intelligence services of the USSR and its Communist Party, and their East European satellites has been and remains a serious problem. It would be ironic if, as Senator Moynihan has suggested, American telephone conversations, protected from monitoring by the U.S. Government, were to continue to be subject to increased monitoring by foreign intelligence personnel officially accredited in the United States. In addition to intelligence officers in official diplomatic positions must be added those who enter this country in increasing numbers to operate clandestinely under the guise of businessmen, students or other professions. Thousands of sailors every year come ashore at 40 ports, enjoying freedom to make contacts, and thousands of tourists from Soviet Bloc countries, allowed to exit their own countries only with the permission of the state security and intelligence services, circulate in the United States with a freedom not afforded visitors to their countries. Moreover, additional agents enter the United States under the guise of refugees and immigrants or even under false identities as ostensible U.S. citizens, with suitably falsified documentation. The large and increasing numbers and wide geographic range require an extraordinary counterintelligence effort.

The Committee has a study underway of the counterintelligence problems of the intelligence community. Further, in line with its responsibilities under Section 13(a) of Senate Resolution 400, the Committee is monitoring efforts to improve the quality of the analytical capabilities of our counterintelligence effort.

It appears likely that there will be a need for at least several years for continuing review and decision on a number of important counterintelligence problems at the NSC level, particularly on questions of doctrines, inter-agency coordination and direction.

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[3] Federal Register, vol. 43, No. 18, Jan. 26, 1978.

The Committee is working closely with the appropriate Executive branch officials to improve the quality of our counterintelligence effort, and to ensure that improved capabilities are consistent with the guidelines of Executive Order 12036 and the legislative charter now under consideration.

VI. SECRECY AND DISCLOSURE

The Secrecy and Disclosure Subcommittee was asked by the full Committee early in 1977 to study the competing interests of secrecy and the public's right to know as they relate to intelligence information. On April 26, 1977 the subcommittee approved an agenda for inquiry. The agenda consisted of two basic elements: (1) a review of unauthorized disclosures of intelligence information and (2) a second inquiry into the classification process and the use of compartmentation. Although some progress has been made on the second inquiry, most of the subcommittee's work has concentrated on the first question.

The Committee conducted its inquiry of unauthorized disclosures both through interviews and file searches at the intelligence agencies. Committee staff conducted over fifty interviews and briefings with officials of the Departments of Justice and State and the major intelligence agencies (CIA, NSA and DIA). In the course of these briefings each agency was asked to provide ten cases in which intelligence information had been covertly passed to foreign powers—espionage cases—or in which intelligence found its way into the public media—intentionally or by accidental leak. The staff reviewed over forty case files or summaries of case files provided by these agencies. These files have served as a valuable data base for its survey, and represents in every respect as comprehensive a compilation of such information as exists in either the Executive branch or Congress. Each file contains information on an intelligence compromise which has occurred in the last few years, the action taken (or not taken, as is frequently the case) by the relevant agency or the FBI, and any disciplinary action taken against the individuals responsible. While conducting this file search the Committee staff learned of sensitive espionage compromises in Panama. This discovery led to two full Committee oversight investigations culminating in a report to the Senate during two days of executive sessions of the Senate and the issuance of a declassified investigative summary.

After reviewing a summary of the results of its survey, and based on a number of surprising findings, the subcommittee redirected its inquiry. The subcommittee began on the assumption that the major issue to be addressed would be evaluating the desirability of additional criminal sanctions for unauthorized disclosure of so-called "sources and methods" information. However, as work proceeded, the subcommittee concluded that, under current procedure, no present statute can be effectively used to prevent "leaks." Additionally, there are possible insurmountable difficulties in drafting a constitutional criminal statute which would solve enforcement problems. In fact, the nation's strictest statutory safeguard against unauthorized disclosure (section 798 of title 18, U.S. Code), the U.S. espionage statute which most closely affords the kind of sanctions enjoyed by the British under the Official Secrets Act, does little to deter either classical espionage or leaks. The files reveal several cases in which violations of this statute were neither prosecuted nor investigated.

At the heart of this failure of enforcement is a very deep-seated conflict between the responsibilities of the intelligence community on the one hand, and the Department of Justice on the other, over the enforcement of the espionage statutes. The conflict arises over which of the legitimate interests of the Director of Central Intelligence, Secretary of Defense or the Attorney General will prevail in determining whether and in what manner classified information, necessary to conduct the investigation and to proceed with the prosecution, will be used. Indeed, this question of whether or which classified information is to be used in a particular judicial proceeding is a pervasive problem that goes well beyond enforcement of the espionage statutes. Problems created by classified information also have hampered many other prosecutions, including perjury, extortion, bribery, narcotics violations and a murder case.

On March 1, 2, and 6 of 1978, the Subcommittee on Secrecy and Disclosure conducted public hearings on the matters raised by our inquiry. It heard from Admiral Turner, Deputy Attorney General Civiletti, Philip Lacovara, formerly of the Watergate Special Prosecutor's Office, Judge Albert B. Fletcher, Jr., Chief Judge of the Court of Military Appeals, former DCI William Colby, former CIA General Counsel Lawrence Houston, and Morton Halperin representing the Center for National Security Studies and the ACLU. The subcommittee made the following recommendations:

I.

Congress should focus primarily upon developing statutory and administrative procedures which would facilitate enforcement of the espionage law and other statutes subject to the "gray mail" phenomenon. The Committee is not prepared at this time to recommend a general recasting of the Federal espionage statutes along the lines of the British Official Secrets Act. However, limited further protection of intelligence sources, especially the identities of agents and employees under cover, appears to be necessary.

II.

The Executive branch should interpret the President's Executive Order on security classification with an emphasis on decreasing the amount of unnecessary secrecy. The intelligence community, the Intelligence Oversight Board, and the intelligence committees of the Congress should declassify as many as possible of their reports and studies on matters of public concern to discourage the "leaking" of versions which have not been sanitized to protect "sources and methods" information. These reports and studies must be classified in a disinterested manner so that the public receives the true view of a given situation.

III.

Administrative procedures for disciplining employees responsible for violations of security or other laws should be developed. At the same time the intelligence community should centralize responsibility, perhaps in the Intelligence Oversight Board, for investigations of breaches of security and all violations which do not constitute crimes. The purpose of these procedures would be

to permit sanctions against employees through internal agency procedures in which it is easier to cope with classified documents or testimony than in traditional public criminal trials. In many leak cases administrative sanctions may be more appropriate than a criminal conviction. Of course, these administrative proceedings would grant due process rights to the employee. Some consideration should also be given to applying these administrative review procedures to former employees through withdrawal of pension rights for former employees who violate security.

IV.

The FBI should continue to have exclusive responsibility for investigating criminal violations involving the intelligence community. In leak cases the FBI should initiate investigation when:

(1) the leak endangers sensitive intelligence sources or methods and is reasonably believed to violate the criminal statutes of the United States;

(2) the persons investigated are officials, employees, or contractors having access to the information leaked;

(3) the investigation and any intrusive investigative techniques are authorized in writing by the Attorney General;

(4) the investigation terminates within 90 days, unless such authorization is renewed; and

(5) the Attorney General submits information concerning the leak to the head of the employing agency, or to the President, for appropriate administrative action.

V.

The Attorney General should issue guidelines under the authority of Executive Order 12036 on the responsibility of the intelligence community to report crimes to the Department of Justice. The guidelines should cover reporting of all activity in violation of U.S. laws coming to the attention of the intelligence community, but must consider protection of sensitive sources and methods.

VI.

The Attorney General should issue regulations that are binding upon all departments of the Government which set out the procedures whereby agencies of the intelligence community are to provide necessary information to attorneys of the Department of Justice to proceed with a criminal investigation or prosecution. The regulations should also set out how the decision is to be made not to proceed in national security cases and who is authorized to make such a decision. These regulations should require that any such decision be made in writing, and the decision paper should include the precise intelligence information which would have been disclosed in the course of the trial, why the official believes it would have been disclosed, and the damage the information would have to the national security if the case proceeds. The decision paper should be available to the intelligence oversight committees of the Congress and such cases should be reported to the committee annually or as required.

VII.

Congress should consider the enactment of a special omnibus pretrial proceeding to be used in cases where national secrets are likely to arise in the course of a criminal prosecution. The omnibus procedure would require the defendant to put the prosecution and the court on notice of all motions or defenses or arguments he intended to make which would require the discovery and disclosure of intelligence information or the use of intelligence community witnesses. The judge would be required to rule in advance of the trial on the admissibility of the intelligence information and on the scope of witnesses' testimony as well as the general relevancy of the motion or defense prior to granting discovery of any intelligence information to the defendant. On the other hand, the defendant would be permitted a discovery motion during the course of trial if the prosecution presents a matter not originally suggested by indictment or for which the defendant could not fairly have been expected to be on notice at the time of the omnibus procedure.

VIII.

The Congress should reconsider the secret of state privilege proposed by the Supreme Court in 1974. That privilege needs to be considerably revised along the lines described above but at a minimum should provide for an *in camera* adversary procedure on the privilege, define the scope of the privilege, the standards for its invocation, provide increased judicial authority for its procedural administration, and provide a sliding scale of sanctions available to the judge in the case where the privilege is successfully invoked.

Legislation incorporating the above recommendations for statutory procedures is expected to be introduced in the 96th Congress.

VII. BUDGET AUTHORIZATION

A. Introduction

The budget authorization process affords the Committee with a key means to carry out its responsibility of ensuring effective congressional oversight of the U.S. intelligence effort. It is largely through the budget authorization process that appropriate measures of accountability are ensured, and the scope and direction of future intelligence activities are determined.

B. The Budget Authorization Process

The Budget Authorization Subcommittee conducted a detailed review of all major U.S. intelligence programs and their resource requirements. This focused on those programs and activities which serve the intelligence needs of national policymakers. It included intelligence activities of the military services whose principal purpose is to support the military commander, but which can contribute to national needs, particularly in peacetime.

During the course of the fiscal year 1979 budget review, the Subcommittee:

—Examined 11 volumes of budget justification material containing about 2,000 pages, as well as a number of special studies that had been requested last year;

—Conducted some 30 hours of hearings which included testimony from the Director of Central Intelligence, high-ranking Defense Department officials, and each of the principal program managers; and

—Requested and reviewed written responses for the record to several hundred questions for supplemental information on specific issues.

The Subcommittee focused its attention this year on the following specific areas:

—How well the intelligence community is being managed, and the implications of the President's recent reorganization for strengthening and improving the overall management of the community;

—The degree to which budget proposals were related to consumers' and policymakers' stated information needs;

—The longer-term implications of the Fiscal Year 1979 budget request on the scope and cost of intelligence over the next 5 years;

—It followed up on problems which were identified last year as requiring added attention, and ensured that appropriate steps had been taken for improvement; and

—In the course of budget review, ensured that intelligence activities proposed for funding do not violate the Constitution and laws of the United States.

As an integral part of the budget authorization process, the full Committee again this year, conducted a detailed review of all covert action activities on a project-by-project basis, culminating in a formal vote by every member on each project. As a result of this review, several projects were reduced in scope and one was terminated.

From a budgetary point of view, the Committee continues to believe that the intelligence community is responsive to policymakers' needs across a broad spectrum of foreign policy concerns. Nonetheless, as in any large complex organization, areas have been identified which require continued management attention and improvement, such as:

—Planning and coordination of data processing activities and investments;
—Development and application of better evaluation criteria and performance measures in areas such as human source collection and counterintelligence activities;
—The necessity for better in-depth analysis of the substantive benefits to be gained and the incremental value of budgetary proposals, relative to their cost;
—Clearer documentation of the tradeoffs and alternatives considered in arriving at major budgetary decisions; and
—The need for a more coherent relationship between budgetary proposals and major foreign policy goals and objectives.

The Committee was particularly impressed this year with the application of the zero-based budgeting concept within the intelligence community. It enabled the community, for the first time, to rank all intelligence activities across programs and functions, and weigh their relative importance. Further experience with this technique should be a valuable tool in the resource decision process.

C. Other Activities

During this past year Subcommittee members and Committee staff continued to expand their knowledge and understanding of the substantive nature, capabilities, and complex interrelationships among U.S. intelligence activities. This is manifested through a variety of Committee activities related to the overall budget authorization process, including:

—Extensive briefings and interviews on a whole range of intelligence programs, activities, and issues;
—Orientation and inspection trips to a number of domestic intelligence installations and contractor facilities;
—Review and approval of several reprogramming actions involving new or expanded initiatives proposed for funding;
—Maintenance of a good working relationship with the Armed Services and Appropriations Committees of both Houses; and establishment of an excellent working relationship with the new House Permanent Select Committee on Intelligence. These relationships have proven useful in dealing with complex issues and making an authorization process for intelligence effective and of benefit to the Nation.

D. Public Disclosure of Amounts Authorized for Intelligence

The classified nature of U.S. intelligence activities prohibits public disclosure of the budgetary details of these activities. Pursuant to Section 13(a)(8) of Senate Resolution 400, the Committee has, however, studied the issue of whether public disclosure of any of the amounts authorized for the conduct of U.S. intelligence activities would be in the public interest. As a result, the Committee recommended to the Senate on 27 June 1977 (S. Res. 207) [1] that the amount of funds appropriated for national foreign intelligence activities be publicly disclosed. The Committee's recommendation on this matter was not acted upon by the full Senate.

As required, the Committee has prepared a classified report available to all Senators which describes in detail the full scope and intent of the Committee's actions and the specific amounts authorized for each of the major U.S. intelligence programs and activities.

E. Access to the Classified Budget Authorization Report

The Committee is of the view that the intent of S. Res. 400 places an obligation upon the Committee to insure that all members of the Senate are provided the information necessary to make informed judgments on an authorization measure for intelligence. Accordingly, the Committee, by letter dated 19 April 1978, has made the classified report available to all members of the Senate, subject to the provisions of S. Res. 400.

Consistent with the necessary legislative and appropriations process, the Committee has made copies of the classified report available to the Armed Services and Appropriations Committees of both Houses, and to the House Permanent Select Committee on Intelligence.

The Committee believes that this procedure provides a reasonable balance between informed decisions and accountability, on the one hand, and the need to limit disclosure of the details of highly sensitive intelligence operations.

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[1] See Report entitled, "Whether Disclosure of Funds for the Intelligence Activities of the United States is in the Public Interest," June, 1977.

VIII. SUMMARY OF COMMITTEE ACTIVITIES—MAY 16, 1977 TO DECEMBER 31, 1978

A. MEETINGS

Full committee meetings: Total 50.
- Closed meetings: 31 total, 11 of these were business meetings with no witnesses.
- Open meetings: 19 total, of these 2 were markups with no witnesses.
- Witnesses and briefers heard: 120 total. Of these 56 in closed session and 64 in open hearings.
- Staff interviews conducted: 152.

Subcommittee on Intelligence and the Rights af Americans: Total 4.
- Closed meetings: 2 total.
- Open meetings: 2 total.
- Witnesses and briefers heard: 13 total. Of these 8 in closed session and 5 in open hearings.
- Staff interviews conducted: 200.

Subcommittee on Budget Authorizations: Total 13.
- Closed meetings: 13 total.
- Open meetings: None.
- Witnesses and briefers heard: 51 total.
- Staff interviews conducted: 150.

Subcommittee on Collection, Production and Quality: Total 1.
- Closed meeting: 1 total.
- Meeting was for consideration of staff studies. No witnesses or briefers heard.
- Open meetings: None.
- Staff interviews conducted: 210.

Subcommittee on Charters and Guidelines: Total 1.
- Closed meeting: 1 total.
- Meeting was for organizational purposes and planning introduction of S. 2525. No witnesses or briefers heard.
- Open meetings: None.
- Staff interviews conducted: 91.

Subcommittee on Secrecy and disclosure: Total 3.
- Closed meetings: None.
- Open meetings: 3 total.
- Witnesses and briefers heard: 8 total.
- Staff interviews conducted: 60.

Subcommittee on Special Investigations: Total 4.
- Closed meetings: 4 total.
- Open meetings: None.
- Witnesses and briefers heard: 3 total.
- Staff interviews conducted: 20.

B. PUBLICATIONS: Total completed 20

1. Senate Report 95–214 on S. 1539, Authorizing Appropriations for FY 78 for Intelligence Activities of the United States Government, the Intelligence Community Staff, the CIA Retirement and Disability System, and for Other Purposes—May 16, 1977.
2. Senate Report 95–217, Annual Report to the Senate—May 18, 1977.
3. Hearings on Whether Disclosure of Funds Authorized for Intelligence Activities Is in the Public Interest, Apr. 27 and 28, 1977.
4. Senate Report 95–274, Whether Disclosure of Funds for the Intelligence Activities of the United States is in the Public Interest—June 16, 1977.
5. Rules of Procedure for the Select Committee on Intelligence. (Committee Print.) Amended July 20, 1977.
6. Joint Hearing on Project MKULTRA, the CIA's Program of Research in Behavioral Modification, Aug. 3, 1977.
7. U.S. Intelligence Analysis and the Oil Issue, 1973–1974. (Committee Print.)—Dec. 1977.
8. Hearings on the nomination of Ambassador Frank C. Carlucci, Jan. 27 and 30, 1978.
9. Executive Report 95–13 on the nomination as Deputy Director of Central Intelligence of Ambassador Frank C. Carlucci, Feb. 3, 1978.
10. The National Intelligence Estimates A—B Team Episode Concerning Soviet Strategic Capability and Objectives. (Committee Print.)—Feb. 16, 1978.
11. Senate Report 95–701, on S. 1566, Foreign Intelligence Surveillance Act of 1978—March 14, 1978.
12. Senate Report 95–744 on S. 2939, authorizing appropriations during fiscal year 1979 for U.S. Intelligence Activities, the Intelligence Community Staff, the CIA Retirement and Disability System, and for other purposes—April 19, 1978.
13. Unclassified Summary: Involvement of NSA in the Development of the Data Encryption Standard. (Committee Print.)—April 1978.
14. Hearings on S. 1566, Foreign Intelligence Surveillance Act of 1978. Held July 19, 21, 1977 and Feb. 8, 24, 27, 1978.
15. The Soviet Oil Situation: An Evaluation of CIA Analyses of Soviet Oil Production. (Committee Print.)—May 1978.
16. Activities of "Friendly" Foreign Intelligence Services in the United States: A Case Study. (Committee Print.)—June 1978.
17. Senate Report 95–1079, on S. 2236, Act to Combat International Terrorism—Aug. 9, 1978.
18. Hearings on the Use of Classified Information in Litigation, before the Subcommittee on Secrecy and Disclosure, held Mar. 1, 2 and 6, 1978.
19. National Security Secrets and the Administration of Justice. Report of the Subcommittee on Secrecy and Disclosure. (Committee Print.)—Nov. 1978.

20. Hearings on S. 2525, National Intelligence Reorganization and Reform Act of 1978. Held Apr. 4, 5, 19, 25, May 3, 4, 16, June 15, 21, July 11, 18, 20, and Aug. 3, 1978.

C. BILLS REFERRED TO THE COMMITTEE: Total 3

1. S. 1566, Foreign Intelligence Surveillance Act of 1977. Action: Reported favorably as amended. Approved by the Senate 95–1 on April 20, 1978. Referred to the House Committee on the Judiciary. Discharged from Judiciary Committee and passed House with amendments on September 7, 1978. Senate disagreed to House amendments, conference held October 3, 1978, reported by Conference (H.R. 95–1720) October 5, agreed to by Senate October 9, by the House October 12, and became Public Law No. 95–511 on October 25, 1978.
2. S. 2236, an Act to Combat International Terrorism. Action: Reported without recommendation as amended.
3. S. 2525, National Intelligence Reorganization and Reform Act of 1978. Action: Hearings conducted.

D. RESOLUTIONS AND BILLS ORIGINATED BY THE COMMITTEE: Total 6

1. S. Res. 148 authorizing the Select Committee to make expenditures from the contingent fund of the Senate to carry out its prescribed duties. Action: Referred to the Committee on Rules and Administration on April 25, 1977; reported to the Senate with amendment June 10, 1978; passed Senate as amended June 14, 1978.
2. S. 1539, Intelligence Authorization Act for Fiscal Year 1978. Action: Reported May 16, 1977, considered and passed by the Senate without amendment; referred to House Permanent Committee on Intelligence, July 29, 1977.
3. S. Res. 207 authorizing disclosure of the aggregate amount of funds appropriated for national foreign intelligence activities for fiscal year 1978. Action: Reported to the Senate and placed on the calendar June 27, 1977, taken from calendar October 5, 1977, placed again on calendar December 15, 1977.
4. S. Res. 383 authorizing expenditures by the Select Committee on Intelligence. Action: Referred to the Committee on Rules and Administration on January 31, 1978; reported to the Senate with amendment March 1, 1978; passed by the Senate as amended March 6, 1978.
5. S. 2939, Intelligence Authorization Act for Fiscal Year 1979. Action: Reported April 19, 1978, and placed on the calendar. On May 1, 1978, referred to the Committee on Armed Services; reported favorably with amendments by Committee on Armed Services, July 20, 1978; incorporated in H.R. 12240 as an amendment July 20, 1978. On September 17, 1978, H.R. 12240 became Public Law 95–370.

6. S. Con. Res. 96 authorizing the reprinting of the Senate report entitled "Intelligence Activities and the Rights of Americans." Action: Referred to Committee on Rules and Administration on July 19, 1978; reported favorably July 28; passed by the Senate August 2 and sent to the House Committee on Administration; reported favorably and passed by the House September 26, 1978.

E. NOMINATIONS REFERRED TO THE COMMITTEE: Total 1

Frank C. Carlucci, to be Deputy Director of Central Intelligence. Action: Public hearings. Nomination approved. Carlucci confirmed by the Senate February 9, 1978.

APPENDIX A

The text of a memorandum submitted by the Assistant Attorney General for the Office of Legal Counsel, Department of Justice, to the Select Committee on Intelligence on July 27, 1978 providing exceptions to the FBI in government procurement and handling of public moneys said in part:

> In the course of studying the legality of these operations, several legal questions have been raised which could present substantial obstacles to the continued effective performance of intelligence and counterintelligence activities. Legal problems arise in three main areas: (1) whether certain statutes pertaining to government leasing apply to leases which the FBI might need in its intelligence and counterintelligence activities; (2) whether the FBI may use income generated in the course of these activities to offset the expenses incurred in the activities. *See* 31 U.S.C. § 484; and (3) whether the FBI may deposit funds in banks in support of these operations. *See* 18 U.S.C. § 648; 31 U.S.C. § 521.

LEASES

The provision of the amendment with respect to FBI leasing arrangements reads as follows:

> (1) sums authorized to be appropriated for the Federal Bureau of Investigation by this Act may be used for leasing space within the United States, the District of Columbia, and the territories and possessions of the United States without regard to section 3679(a) of the Revised Statutes (31 U.S.C. 665(a)), section 3732(a) of the Revised Statutes (41 U.S.C. 11(a)), section 305 of the Act of June 30, 1949 (63 Stat. 396; 41 U.S.C. 255), the third undesignated paragraph under the heading "MISCELLANEOUS" of the Act of March 3, 1977 (19 Stat. 370; 40 U.S.C. 34), section 3648 of the Revised Statutes (31 U.S.C. 529), section 3741 of the Revised Statutes (41 U.S.C. 22), and subsections (a) and (c) of section 304 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 395; 41 U.S.C. 254 (a) and (c));

The memorandum submitted by the Office of Legal Counsel explains this provision in part as follows:

1. ADVANCE PAYMENTS

> At times, the FBI requires a particular piece of property to serve its intelligence or counterintelligence requirements. In some circumstances, the lessor of such property might require advance payments of rent or other sorts of advances—*e.g.*, a security deposit. This raises problems under 31 U.S.C. § 529, which specifies that "no advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." Section 255 of title 41 authorizes advance payments, but only upon adequate security and a determination that to do so would be in the public interest.

This Office has not yet been presented with a situation which we believed to be an advance payment, and so we have not reached any final determinations in this regard. We would note, however, that the requirement of "adequate security" in 41 U.S.C. § 255 could very well preclude the FBI from entering leases where the lessor demands a six-month or one-year advance payment of rent. While at times the FBI could simply rent another piece of property, on occasion only one piece of property is available which will serve the FBI's needs. The prohibition could thus operate to prevent the FBI from fulfilling its intelligence and counterintelligence functions if the lessor of a particularly vital piece of property insists on the sort of terms described above.

The FBI has thus far been able to avoid such a situation. However, there has been at least one recent occasion where the prohibition on advance payments loomed as a significant obstacle to an important operation. We think it very important to ensure that this will not actually happen in FY 1979, and for that reason we believe the legislative authority to this effect in the authorization bill is necessary.

2. LEASES EXTENDING BEYOND THE CURRENT FISCAL YEAR

At times, the FBI wishes to rent property for its intelligence and counterintelligence operations where the landlord demands a lease extending beyond the current fiscal year. This raises problems under 31 U.S.C. § 665(a) and 41 U.S.C. § 11(a). These statutes prohibit federal agencies from entering into contractual obligations unless appropriations are available to meet those obligations or unless they are authorized to do so by law. In the leasing area, these statutes have been interpreted to prohibit leases which extend beyond the current fiscal year unless such contracts are authorized by law or unless appropriations are available to meet those obligations. *See, e.g., Leiter* v. *United States*, 271 U.S. 204 (1926).

This Office has concluded that the FBI may, under narrowly delineated circumstances, enter into leases extending beyond the fiscal year where such is necessary to perform its intelligence functions. A copy of this opinion is attached hereto. In sum, this conclusion was founded, first, on the ground that the statutory exception "authorized by law" in 31 U.S.C. § 655(a) and 41 U.S.C. § 11(a) had been interpreted to allow for an authorization "by necessary implication" from a general statute. *Chase* v. *United States*, 155 U.S. 489, 502 (1894); 31 Op. A.G. 570 (1912). Second, these statutes allow contracts relating to future years where an appropriation is available to meet the contractual obligations. The statute which sets forth the availability of appropriations, 31 U.S.C. § 712a, has been interpreted to allow the government to enter contracts requiring payments relating to future years if such was the only way the government could obtain a needed supply or service. *See* B–186313, December 9, 1976 (slip. op. at 19, 22); 37 Comp. Gen. 155, 159–60 (1957); 8 Comp. Gen. 654 (1929). On the basis of these interpretations, the FBI's responsibilities in the intelligence area, and the exigencies of intelligence work, we concluded that the FBI could

enter a lease extending beyond the current fiscal year where such was truly necessary in the performance of its responsibilities.

In reaching this conclusion, however, this Office recognized that the issue of entering into leases extending beyond the current fiscal year presents a close legal question. Because of the difficulty of the issue, the number of operations affected by it, and the importance of these operations, we think it important for the FBI to obtain solid legal authority for this practice as soon as possible.

3. LEASES IN WASHINGTON, D.C.

This Office has concluded that, under certain circumstances, the FBI might . . . enter into leases in Washington, D.C. This conclusion is embodied in a classified opinion, and the portion of it dealing with this issue will be shown to members of congressional staffs upon request. In brief, the opinion concluded that the FBI would fit within the exception set forth in 40 U.S.C. § 34 by virtue of the fact that such action was necessarily implicit in the FBI's responsibilities in the intelligence and counterintelligence areas. This approach—*i.e.*, that of drawing authority "by necessary implication" from general responsibilities—has been found sufficient to authorize activity where it would otherwise be prohibited by statute. *See, e.g., Chase* v. *United States*, *supra* at 502 (dealing with the predecessor to 41 U.S.C. § 11(a)); *Burns* v. *United States*, 160 F. 631, 634 (2d Cir. 1908) (dealing with the predecessor of 41 U.S.C. § 14). In fact, this approach was explicitly adopted with respect to 40 U.S.C. § 34. 6 Comp. Dec. 75, 78–79 (1899). *See also* 15 Op. A.G. 274, 276 (1877); 54 Comp. Gen. 1055, 1059 (1975); 10 Comp. Dec. 178, 183 (1903).

Again, however, we recognized in our opinion that this was also a close question. Because of the difficulty of this issue, the number of operations involved, and the importance of the operations, we believe that the FBI should obtain a more solid legal authority in this area.

4. COVERT LEASES

The final problem is that, in entering the leases discussed above, it is obvious that the FBI usually cannot disclose the true identity of the lessee. This raises problems under statutes such as 41 U.S.C. §§ 22, 254(a) and (c), which require certain clauses to be inserted into government contracts; the inclusion of such clauses would disclose to the lessor that a government agency was actually the lessee. This disclosure would compromise an operation and could often require its termination.

This Office has issued two opinions concluding that, under certain conditions, the FBI may enter into leases without including in the leases clauses usually required in government contracts by the statutes specified above. One of these opinions is attached hereto; the other opinion is classified, the relevant portion of which will be shown to members of congressional staffs upon request. We understand that the FBI can operate satisfactorily under the conditions set forth in those opinions. However, in view

of the broad language of the pertinent provisions, we deem it advisable to secure legislative authority for this practice. We therefore recommend that this authority be secured in the authorization bill, and our proposed amendment contains language to this effect.

Bank Deposits

The provision of the amendment with respect to bank deposits reads as follows:

> (2) sums authorized to be appropriated for the Federal Bureau of Investigation by this Act, and the proceeds from such undercover operation, may be deposited in banks or other financial institutions without regard to the provisions of section 648 of title 18, United States Code, and section 3639 of the Revised Statutes (31 U.S.C. 484);

The memorandum submitted by the Office of Legal Counsel explains this provision in part as follows:

> The practice of depositing public funds in banks raises questions under 18 U.S.C. § 648 and 31 U.S.C. § 521, both of which contain prohibitions on the deposit of public funds in banks. This Office has, in an opinion dated May 3, 1978, a copy of which is attached hereto, concluded that the FBI's deposit of funds in banks would not violate these statutes under certain conditions. The primary condition set forth in that opinion was that, in order to comply with the statutory purpose of fully safeguarding federal funds, the FBI could only deposit funds in amounts which would be fully insured by federal corporations established to insure accounts in banks or other financial institutions.
>
> As we understand it, the FBI's operations in intelligence or counterintelligence can operate within the limits set forth in our opinion. As to these operations, then, there is no immediate urgency for corrective legislation. Rather, the authority conferred in our proposed amendment would largely serve law enforcement operations which need to go beyond the conditions established in our previous opinion. However, inasmuch as legislation is required in this one respect, in order to clarify the legal basis for such actions we deemed it advisable to seek an explicit grant of authority for all FBI bank deposits, including those made in the course of the FBI's performance of intelligence and counterintelligence functions.

Income to Offset Expenses

The provision of the amendment with respect to the use of income to offset expenses reads as follows:

> (3) the proceeds from such undercover operations may be used to offset necessary and reasonable expenses incurred in such operations without regard to the provisions of section 3617 of the Revised Statutes (31 U.S.C. 484);

The following provision of the amendment applies to both the provision on bank deposits and the provision on use of income to offset expenses:

(b) As soon as the proceeds from an undercover investigative operation with respect to which an action is authorized and carried out under paragraphs (2) and (3) are no longer necessary for the conduct of such operation, such proceeds or the balance of such proceeds remaining at the time shall be deposited into the Treasury of the United States as miscellaneous receipts.

The memorandum submitted by the Office of Legal Counsel explains these provisions in part as follows:

Another problem which arises in the course of FBI intelligence and counterintelligence activities concerns the proper disposition of moneys received in the course of these activities. The specific question here is whether 31 U.S.C. § 484 requires all income generated in these activities to be paid into the Treasury, or whether such income might be utilized to meet the expenses incurred in the course of these activities. This Office has concluded that 31 U.S.C. § 484 requires that moneys received by the FBI in the course of its undercover activities be paid into the Treasury. The FBI thus requires legislative authority if it is to use income generated in its undercover intelligence and counterintelligence activities to offset expenses. While the FBI's need to secure this authority is greater in law enforcement than in intelligence or counterintelligence, the need is still pressing in these latter areas.

Unless the FBI secures legislative authority to retain these funds, we believe that 31 U.S.C. § 484 requires that they be transmitted to the Treasury. It is obvious that the consequent reduction in funds available to support intelligence operations will require that some operations be curtailed or terminated. In order to prevent this result, we believe that legislative authority must be secured for the FBI to use this income to offset expenses.

APPENDIX B

The text of Attorney General Bell's response to questions relating to the Department of Justice investigation of alleged break-ins and burglaries by employees of the FBI:

December 18, 1978.

Hon. BIRCH BAYH,
Chairman, Select Committee on Intelligence,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In a letter to former Attorney General Edward H. Levi dated October 4, 1976, you posed a number of questions relating to the then ongoing investigation by the Department of alleged burglaries and break-ins by employees of the Federal Bureau of Investigation. In a letter dated May 27, 1977, I responded in part to your questions and explained that I was unable to fully respond to all questions since to do so would have touched very closely on the substance of the ongoing investigation. At that time, I advised that I would be pleased to reconsider your questions at the time all such investigation and litigation had been concluded.

As a result of the decisions I announced on April 10, 1978, you requested that those questions not answered by my letter of May 27, 1977 be reviewed and that appropriate responses thereto be provided to your Committee as promptly as possible. You noted your understanding that the existence of a pending prosecution and other factors might limit disclosure of certain information to the Committee at this time. Where these concerns are a factor, they have been noted in my responses to your questions, which are enclosed.

In addition to seeking responses to previously unanswered questions, you requested that I update those answers provided in May of 1977. In the enclosed responses, this has been accomplished by providing you with complete answers to each and every question, where answers are possible given the state of the case at this time, and by listing my responses thereto in the same order in which they were originally received from your Committee.

Sincerely,

GRIFFIN B. BELL,
Attorney General.

QUESTION 1

When was a task force established to carry out the investigation? How was it originally staffed? How has the staff structure been changed?

QUESTION 2

How many attorneys are assigned to the case? How experienced are they? Have they had experience in this type of investigation and prosecution before?

ANSWER

Shortly after April 1976, a task force of Civil Rights Division attorneys was established for the purpose of investigating the use of surreptitious entries by the FBI in connection with its efforts in the early 1970's to locate and apprehend Weatherman fugitives. The formation of the task force was undertaken at the direction of the then Assistant Attorney General of the Civil Rights Division, J. Stanley Pottinger. William L. Gardner, Chief of the Criminal Section, Civil Rights Division, was assigned to supervise the Division's investigative efforts and, with the concurrence of Mr. Pottinger, selected four attorneys and one paralegal—Stephen A. Horn, Francis J. Martin, Paul R. Hoeber, Richard F. Johnston and Marjorie L. Jones—to work with him on a full-time basis on the case. The team conducted the investigation, concentrating its efforts on the activities of the New York office of the FBI, until December 1977, when four of its five members resigned from the case. During that time, the Task Force returned an indictment against former New York FBI Supervisor John Kearney in April 1977.

As a result of their resignation, the Department was forced to select an entirely new group of attorneys to handle the case; one which would be required to quickly assimilate the vast amount of information developed by the former task force, develop its investigative strategy, conduct additional investigation before the grand jury and explore areas not fully developed by the prior task force which were essential to the Attorney General's final prosecutive determination in the case. This situation was further compounded by the fact that the statute of limitations would expire within four months on the bulk of the offenses which had been developed by the former task force. Additionally, with the case against John Kearney still pending, the Government had a continuing obligation to also respond to various motions in that case while it was at the same time developing evidence of involvement in illegal activities by present and former high-level officials at FBI Headquarters.

Responsibility for the case was transferred by the Attorney General to the Criminal Division where then Assistant Attorney General of the Criminal Division, Benjamin R. Civiletti, and Mr. Pottinger's successor as Assistant Attorney General of the Civil Rights Division, Drew S. Days, III, met with senior officials within the Department to select a new team of attorneys to undertake this most formidable assignment. At the outset, it was recognized that the task would require the selection of a team which had both major case management and investigative and litigative experience. From these meetings, the composition of the task force began to emerge. Barnet D. Skolnik, an Assistant U.S. Attorney with considerable investigative and prosecutive experience in cases involving public figures of national prominence was selected to head the Government's efforts in the pending prosecution of John Kearney. Assisting Mr. Skolnik would be Allen R. Bentley, an experienced Assistant U.S. Attorney from the Southern District of New York. The most immediate task facing Messrs. Skolnik and Bentley was the need to expeditiously deal with a far-reaching discovery order which had been entered by the U.S. District Judge several months earlier.

Due to the serious time constraints present in this case, it was determined that the completion of the investigation initiated by the former task force and the development of any additional prosecutions against other FBI officials would require more attorney manpower than that previously assigned to the case by the Civil Rights Division. As a result, Assistant Attorneys General Civiletti and Days initially selected a group of nine additional attorneys and two paralegal analysts representing both the Criminal, and to a lesser extent, the Civil Rights Division to handle the continuing investigation; an effort which would be required to be closely coordinated with the efforts of Messrs. Skolnik and Bentley. On the basis of significant investigative and case management experience, most notably his handling of the Department's investigation of the use of domestic mail intercept operations by the FBI and CIA and other complex or sensitive matters, Paul R. Boucher, Deputy Chief of the General Crimes Section of the Criminal Division, was selected to lead the Department's newly formed investigative team. Attorney members of the investigative team included Francis Martin, formerly of the Civil Rights Division task force who chose to remain on the case; Breckinridge L. Willcox, John P. Lydick, Abraham M. Poretz, James C. Savage, Brian M. Murtagh, Janis A. Sposato and Dennis J. Dimsey. With the assignment of paralegals Jane H. Egnew and Belle S. Voyles to the task force on a full-time basis, and the later addition of attorneys Daniel S. Friedman and Ira C. Pollock, the task force was brought to its final complement of 13. For your information, I have attached a brief résumé of each of the members of both the Civil Rights and Criminal Division Task Forces, describing their credentials as of the dates of their appointments.

As you know, the work of the task force resulted in the return of an indictment on April 10, 1978 against former Acting Director L. Patrick Gray, III, Acting Associate Director W. Mark Felt and Assistant Director Edward S. Miller. On that same day and on Government motion, all charges against former FBI Agent John Kearney were dismissed by the U.S. District Court, Southern District of New York. As a result of the *Kearney* dismissal, Mr. Skolnik has been designated to lead a trial team of from 2–3 lawyers in the case of *United States* v. *L. Patrick Gray, III, et al.*

I have attached brief résumés of all attorneys assigned to this case from its outset, so that you may judge their experience for yourself. In considering their "experience in this type of investigation or prosecution," one must note that a case of the nature involved here was unprecedented in the history of this Department. It was a complex and difficult investigation which focused on a fine organization of dedicated men and women which for years has been considered the premier law enforcement agency in the country. My view was and is that the Department had no alternative but to assign the most competent and professional staff of attorneys available to this investigation of alleged criminal misconduct by the officers of one of its own bureaus. I believe a review of the résumés of the Task Force which, at my direction, assumed responsibility for the case in December, 1977 will reflect that all were more than competent and possessed the requisite degree of experience, judgment and maturity to justify their assignment to the case. I believe this assessment is borne out in the final recommendations made to me by that Task Force, recommendations which I accepted and announced on April 10, 1978

QUESTION 3

Most of the press coverage regarding this matter has focused on activities of the New York field office. Has that office been the principal target of the investigation?

ANSWER

The New York Office of the FBI became the principal focus of the investigation as a result of evidence developed that various illegal techniques had been used by Squad 47, a special squad established in March 1970 in New York having as its primary objective the location and apprehension of members of the Weather Underground.

QUESTION 4

Are steps being taken to determine whether such activities were carried out in other cities? Have steps been taken to protect records which might provide evidence of such activities outside of New York?

ANSWER

The Department's investigation disclosed only the sporadic and infrequent use of unlawful investigative techniques by FBI offices in connection with Weatherman fugitive investigations in five other United States cities. Where appropriate, such activities were either included among those acts alleged in the indictment against Messrs. Gray, Felt and Miller (e.g., overt acts 14–18 and 31–32 cover activities in Union, New Jersey) or were referred for administrative disciplinary consideration by FBI Director William H. Webster for the reasons expressed by the Attorney General in his April 10, 1978 press briefing. A copy of the indictment and press release are attached. Appropriate steps have been taken to ensure that any records of such activity will be indefinitely retained and properly maintained by the FBI. Of course, the Department will retain all materials developed by its task forces in the course of its investigation.

QUESTION 5

Has the investigation uncovered evidence of illegal activities other than break-ins and burglaries? Please describe them. Will the Department notify this Committee if such other activities are discovered?

ANSWER

The investigation has disclosed that, in addition to the use of surreptitious entries in Weatherman investigations, the FBI engaged in the use of wiretaps without judicial or Presidential approval, the illegal opening and reading of United States mail and the unauthorized placement of microphones on the premises of individuals who were of investigative interest to the FBI in its Weatherman cases. The use of such techniques was brought to the attention of Director Webster as part of the referral for administrative disciplinary consideration.

QUESTION 6

What does the timetable for the investigation look like? When do you expect the first indictments? When will the investigation be completed?

ANSWER

The Department's investigation growing out of former Attorney General Levi's July 1975 referral to the Civil Rights Division of information related to the use by the FBI of illegal investigative techniques was concluded on April 10, 1978 with the return of the indictment against Messrs. Gray, Felt and Miller and the dismissal of the remaining charges against former FBI supervisor John Kearney. (See answer to question #8, infra.) Pretrial motions have been filed and ruled upon. Trial has now been set for January 22, 1979.

QUESTION 7

What will happen in cases where there is no prosecution yet there is evidence of professional misconduct? Will these be referred to Mr. Shaheen's Office of Professional Responsibility?

ANSWER

As noted earlier herein as well as in the press release announcing the Attorney General's decisions in this case, the involvement of some 70 present FBI Special Agents in the use of illegal investigative techniques was referred to FBI Director William H. Webster on April 10, 1978 for his review and consideration for appropriate administrative disciplinary action. After a thorough review of the information so forwarded, FBI Director Webster announced his actions by letter to the Attorney General of December 5, 1978.

In addition to the referral of some 70 present FBI Special Agents for possible administrative disciplinary action, the name of one former FBI Special Agent involved in such activity, who is now an attorney with the Department of Justice, was referred to Michael E. Shaheen, Jr., Counsel for Professional Responsibility, for his review and consideration for administrative disciplinary action. Since his conduct arose in the identical context and setting as those other special agents whose conduct was under review by FBI Director Webster, Mr. Shaheen believed that equitable and other considerations demanded that final action in this case be taken only in conjunction with and in light of that taken by Director Webster against all others similarly situated. Mr. Shaheen now has administered an oral reprimand to the attorney after considering Director Webster's December 5 announcement.

QUESTION 8

Has any investigation been conducted, or is one being conducted, or will one be conducted to develop facts which would enable you to conclude whether the Church Committee was deceived, misled, or deprived of information about FBI surreptitious entries in violation of Title 18, U.S. Code, Section 1515?

ANSWER

In the course of the Department's investigation, evidence was developed which indicated that the FBI, and perhaps one or more Justice Department attorneys, failed to make full disclosure of surreptitious entries in response to legitimate inquiries in proper forums, including Congressional committees and the General Accounting Office. FBI Director Webster has initiated an appropriate inquiry to determine, with respect to each inquiry, the causes of the FBI's failure to discover and fully report all instances of surreptitious entry. The possibility of the involvement of Justice Department attorneys in one or more of the alleged failures to disclose is being investigated fully by attorneys within the Criminal Division assigned to that task by the Deputy Attorney General, in coordination with the Director's inquiry. While such an inquiry might ordinarily be under the cognizance of the Counsel for the Office of Professional Responsibility, Counsel has recused his office from any involvement in this matter since he and his staff served as conduits for the dissemination of the FBI's answers to the Committee's questions.

Any evidence of criminal misconduct developed as a result of Director Webster's inquiry and the Department's own inquiry will be forwarded to the Office of the Deputy Attorney General for review and consideration as to what further action, if any, would be appropriate.

QUESTION 9

If so, when will a decision be made whether or not prosecutive, disciplinary, administrative, or any other action will be taken with respect to persons responsible?

ANSWER

Any decision of this nature must necessarily await the final results of the inquiries being conducted by Director Webster and the Department. You can be assured that each and every avenue of inquiry will be expeditiously and conscientiously pursued and that the results will be thoroughly reviewed to determine what, if any action, is warranted by the results. Upon the conclusion of this process, your Committee will be informed of the findings of this inquiry and the action taken as a result of these findings consistent with the Department's prosecutive responsibilities, due process and the canons of professional ethics as well as its duty to protect the privacy of individuals who have been the subjects of investigation.

QUESTION 10

Please advise the Committee as to any decisions made with respect to this matter. If a decision is made that no action should be taken, please advise us as to the reasons therefor.

ANSWER

See answer to Question 9.

QUESTION 11

The regulation of December 9, 1975, which establishes the Office of Professional Responsibility, charges division heads with the duty of keeping the Counsel for the Office of Professional Responsibility informed of major investigations. What consultation has there been between the Civil Rights Division and the Office of Professional Responsibility? Was the Counsel's advice sought in structuring the task force? Has a system been established to keep the Counsel regularly informed of the progress of the investigation? How many times has he been briefed? When did these briefings occur?

ANSWER

The Counsel is regularly informed of the progress of major investigations involving Justice Department employees that the heads of the offices, divisions, bureaus and boards have in the past conducted or are presently conducting. In this instance, the necessity for keeping Counsel apprised of the status of the case—in his capacity as the Attorney General's staff advisor for such matters—was obviated by the fact that both the Attorney General and the Deputy Attorney General were themselves briefed by the investigative task force(s) on its progress and developments on a regular and almost daily basis.

This office was not consulted concerning the structure of either the original Civil Rights Division Task Force or its successor task force which was formed in December 1977. The selection of the most qualified attorneys for assignment to the investigation was left to the Assistant Attorneys General for the Criminal and Civil Rights Divisions who were those officials most competent to make such assignments.

The Office of Professional Responsibility, however, was regularly briefed on and took an active role in coordinating the process leading to the administrative action which FBI Director Webster announced on December 5. Likewise, the Office determined the nature and scope of the administrative action taken with respect to a former FBI agent involved in such activities who is now an attorney with the Department of Justice.

QUESTION 12

The President has established an Intelligence Oversight Board. What coordination has there been between the Department and the Board to ensure prompt reporting of improper activities to the Board? What types of cases should be reported?

ANSWER

Executive Order 12036 (January 24, 1978) delineates the duties and responsibilities of the Intelligence Oversight Board (IOB), the Inspectors General and General Counsel of agencies within the Intelligence Community and the Attorney General. Excellent coordination has been established with the IOB to ensure that as required by the Executive Order, all matters referred to the IOB by the Intelligence

Community which raise questions of legality are expeditiously forwarded by the IOB to the Attorney General for review, investigation and disposition in a manner appropriate under the circumstances of each case. Thereafter, and pursuant to the requirements of the order, the Attorney General advises both the President and the IOB of his final decisions or actions in each case so referred. It should be noted that, with respect to your inquiry as to the "types of cases (which) should be reported" the Executive Order speaks not in terms of cases but generally in terms of the responsibility of the Intelligence Community to report to the IOB "any intelligence activities . . . that raise questions of legality or propriety."

QUESTION 13

Has there been coordination with the Board on the burglaries case? Could you describe that coordination?

ANSWER

As noted in our May 1977 response to this inquiry, there was no formal coordination with the IOB during the pendency of this investigation. The IOB, however, did assist this Department during this investigation by making available for our review certain records which were viewed as relevant to the case. To the extent necessary and feasible, at the appropriate time this Department will advise the IOB of the existence of any information developed by this investigation which may be relevant to its responsibility to take steps to correct deficiencies or prevent a recurrence of activity of questionable legality or propriety within the Intelligence Community.

QUESTION 14

Mr. Shaheen testified in February of this year before the Church Committee that he believed his office would become a sort of Counsel on Intelligence Activities within the Department. Has this materialized? Has he been regularly consulted on potential legal problems created by intelligence activities?

ANSWER

The Counsel on Professional Responsibility has not become a "Counsel on Intelligence Activities" because there may appear to be a conflict of interest if the Counsel is subsequently asked to investigate allegations concerning intelligence activities on which he was consulted. The Office of Legal Counsel and the Investigation Review Unit are primarily responsible for providing advice concerning potential legal problems involving intelligence activities.

QUESTION 15

What would normally happen when an allegation of misconduct comes to the attention of the Office of Professional Responsibility? For example, what would the Counsel do on reading a story such as that in the September 19 edition of the *Washington Post*, which contained allegations that Associate Director Held had tried to improperly

cover up Bureau involvement in the Chicago raid on Black Panther headquarters while he was head of the Chicago office?

ANSWER

The Office receives the allegations from virtually any source, examines them, and, in certain instances, makes a preliminary investigation. After determining whether the matter appears to involve a violation of law, the Counsel then refers the allegations and any preliminary investigative findings to the head of the investigative agency having jurisdiction to investigate such violations. If the matter does not appear to involve a violation of law, the allegation is referred to the head of the office, division, or board to which the employee is assigned or to the head of its internal inspection unit. In some cases, the Counsel requests the Justice Department's Internal Audit Staff to conduct the investigation and to report the findings to the Office of Professional Responsibility.

With regard to the particular story referred to in the question, the Department was already aware of the allegations it reported. At the time the story appeared and as the story itself indicated, a motion concerning this matter was under advisement by the trial judge in Chicago, and it was our determination that a Departmental inquiry into these allegations should be deferred until the judge ruled on the motion. On April 15, 1977, the trial judge issued a Memorandum Order which reads in pertinent part, as follows:

> The court finds that the defendants Marlin W. Johnson, . . . and Richard G. Held, Special Agent in Charge of the Chicago Office of the Federal Bureau of Investigation, did at all times carry out the orders of this court to the best of their abilities and that there is no reason for them or any of them to show cause why sanctions should not be imposed upon them. It is, therefore, ordered that all of the motions and petitions for sanctions against any of the aforesaid individuals be and they are hereby denied, and further, that each and every one of the individuals be and they are hereby exonerated from all of the charges of concealing documents, deceiving the court, and all of the other charges of misconduct made against them in this cause by some of the attorneys for plaintiffs in this case.

In this instance, the court's review and favorable disposition of these allegations concluded this Office's investigative interest in the matter. (A full copy of the court's Memorandum Order was provided to you under cover of this Department's letter of response dated May 27, 1977.)

QUESTION 16

Last year there was a case involving a warrantless break-in authorized by the Director of the CIA, Mr. Helms. How do these FBI break-ins differ from the *Helms* case?

ANSWER

It would be inappropriate to comment upon the substance of this question during the pendency of the case against Messrs. Gray, Felt and Miller since such matters may well be the subject of dispute between the parties at both the pre-trial and trial stages of the case.

QUESTION 17

There are a number of potential defenses in cases such as the FBI break-ins. An FBI agent might claim, for example, that such activities are not illegal in intelligence cases. He might also argue that he believed the activities were legal and relied on authorization from higher authority to this effect—the mistake of law defense recognized in the *Baker* and *Martinez* case. Please comment on these defenses and how they are likely to arise in the present case?

ANSWER

See answer to Question 16.

QUESTION 18

The Department of Justice has determined that no assistance should be provided FBI personnel under investigation for legal expenses. Please explain why this decision was made and the basis for it.

ANSWER

It is the policy of the Department of Justice not to provide legal representation for any government employee, including Agents of the FBI, in connection with federal criminal investigations or prosecutions. The Department's policy is based on the consideration that financing both the prosecution and defense of a federal criminal matter would seriously undermine public confidence in the Department's inclination and ability to vigorously enforce federal criminal laws.

QUESTION 19

Reporting on the results of the burglary investigation

One concern of members of this Committee is that the American people may never know the full scope of facts developed by your investigation. It is, of course, customary in grand jury investigations, indeed in criminal investigations generally, only to disclose publicly, evidence which is used against a particular defendant in a criminal trial. This is quite proper and necessary under the Constitution. The government should not go around stigmatizing individuals except if there is evidence which might be used against them and they enjoy their rights to respond, cross examine their accuser and other "due process" rights of a criminal trial.

On the other hand, there are precedents for special reports by the executive and judicial branches on the results of an investigation, reports issued in such a manner as not to prejudice the rights of the subject.

For example, Section 3333 of Title 18 permits "special grand juries" to issue reports pertaining to:

> . . . noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public official or employee as the basis for a recommendation of removal or disciplinary action;

Also, in the past I understand that the Civil Rights Division has issued reports through grand juries in the South on the results of criminal civil rights investigations. I believe such a procedure might have been used in the Chicago grand jury which investigated the raid on Black Panther leader Fred Hampton as well as in the Kent State matter.

Third, at the time of plea bargaining it has been customary for the prosecution to read into the record the evidence accumulated against the defendant. At times such statements can be quite comprehensive as was the case with former Vice President Agnew. Finally there is the precedent of the Watergate Prosecutor's report on the Watergate affair.

Do you believe that any of these precedents apply to your investigation of FBI burglaries? Please discuss each of the four approaches and explain why it does or does not apply or at least suggest the possibility of some sort of report?

If you think that these precedents are totally inapplicable and that you have either no obligation or authority to issue a report on your own or through a grand jury, is there the possibility of reporting the results of your investigation to the Congress? I am thinking now of the precedent of the Watergate prosecutor providing the House Judiciary Committee in the course of its impeachment inquiry with the results of the investigation of Mr. Nixon. Therefore, might information pertaining to non-criminal activity or information which you decide not to present to the grand jury or information which you present to the grand jury but decide not to use in trial be presented to this Committee at some future date? If so, might we release some of that information in a form which does not personally identify the subject of the information, especially if that information suggests the need for additional legislation?

ANSWER

Reporting on the results of the burglary investigation

This Department is mindful of the existing precedents for special reports in cases where there is a compelling need to inform the American people of the results of certain investigations. In view of the pendency of the case of *United States* v. *L. Patrick Gray, III, et al.*, as well as the pendency of administrative disciplinary action against numerous FBI agents, it would be premature to assess the need for or propriety of issuing any type of public report in the instant matter. To the extent that your Committee's concerns relate to its legislative and oversight responsibilities, you can be assured that, at the appropriate time, the Department of Justice will cooperate fully with your Committee in providing it with all information essential to its assessment of the nature and scope of any legislative or other action which it believes is needed to circumscribe the investigative and intelligence activities of the FBI.

APPENDIX C

95th CONGRESS

SENATE SELECT COMMITTEE ON INTELLIGENCE

(Established by S. Res. 400, 94th Cong., 2d Sess.)

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WILLIAM G. MILLER, *Staff Director*
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95th CONGRESS

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