File #:

62-HQ-116395

Serial Scope:

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INQUIRY # 1

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

July 20, 1973

MEMORANDUM FOR: Mr. Clarence M. Kelley
Director, FBI

FROM: William D. Ruckelshaus

SUBJECT: Substantive Issues Regarding the Future of the FBI

Pursuant to our conversation earlier this week, I hereby submit a list of issues that will undoubtedly be coming up from time to time regarding the present and future status of the FBI. This list is by no means exhaustive, but is a good starting point from which to go forward and come to grips with many of the problems that will have to be addressed in the near future in one form or another. The list, in no particular order, is as follows:

1. Wiretaps. The whole question of wiretaps should be reviewed with a view toward developing a firm Department-wide policy on the issues involved.

2. The issue of whether the function of intelligence gathering should be separated from the law enforcement function of the FBI. This issue should be studied with particular reference to those countries which have adopted this division and a clear analysis of the pros and cons developed. From this analysis again should flow a clear policy.

1 - ENCLOSURE

3. The statutory basis for the FBI's intelligence gathering functions. Is there any statutory basis? Is the whole function based on Presidential and Attorney General directives? Should a firm statutory basis be sought?

Mr. Baker 7-27-73

4. Should the FBI Director be appointed for a term of years? (All the issues surrounding the appointment and tenure of the Director should be explored.)

5. Should the FBI be an independent agency or continue as part of the Justice Department? The pros and cons of this recurrent question should be analyzed again with the purpose of adopting a firm policy.

6. Assuming the FBI remains a part of the Justice Department, what should be the relationship of the Director to the Attorney General? All the organizational and substantive relationships should be examined.

7. Investigative techniques. The whole question of the variety of techniques from clearly legal to clearly illegal should be examined in some detail. In addition, the question of authorization and Congressional oversight should be touched upon in this examination.

8. The whole question of files and their disclosure must be studied with a view toward understanding why files are kept, what categories of files there are, what information is contained in the files and whether the purposes for maintaining files are being met under present policy. In the issue of disclosure, when, where, and to whom must also be thoroughly examined.

9. The question of a Civilian Review Board for the intelligence gathering activities of the FBI should be examined. This is a recurrent suggestion which came up at the Princeton conference in addition to other forums.

10. What should be the relationship between the FBI and the other Departments and Agencies of the Federal Government? To what extent should the FBI keep tabs on other Departments and Agencies through the development of sources and informants in those Agencies?

11. Should the FBI have foreign officers reporting directly to the Director?

This list is not exhaustive, but should get us started toward an indepth examination of some of the problems facing the Bureau in the future.

WDR:fhm

INQUIRY # 2

Mr. William D. Ruckelshaus
The Deputy Attorney General - Designate

August 24, 1973

Director, FBI

1 - Mr. Mintz
1 - Mr. E. S. Miller
1 - Mr. T. J. Smith

SCOPE OF FBI JURISDICTION AND AUTHORITY IN DOMESTIC INTELLIGENCE INVESTIGATIONS

Reference is made to my memorandum to the Attorney General August 7, 1973, captioned as above, which among other things proposed that an Executive order be issued which would define FBI responsibilities concerning Federal statutes relating to the national security.

My memorandum made reference to new guidelines recently issued in manual form and to a study which was prepared in August, 1972, at the request of Acting Director L. Patrick Gray, III.

On August 15, 1973, Mr. Jack Goldkiang, Office of Legal Counsel, Department of Justice, called Mr. Nicholas P. Callahan's office and referred to the guidelines and study mentioned above. He said that these documents are likely to be pertinent to his analysis of the proposal set forth in my memorandum, and he asked that the two documents be made available to him.

For your information, the guidelines referred to are the recently revised Section 87 of our Manual of Instructions concerning Investigations of Subversive Organizations and Individuals. As you know, our Manual of Instructions has not heretofore been disseminated outside the FBI, although this particular Section (87) was loaned to the Department for study recently in connection with a request made of the Department by Senator Edward M. Kennedy.

REC-77 62-64715-18
EX-103
7 AUG 28 1973

The study made in August, 1972, for Mr. Gray was written and intended purely for in-house use and deliberations and was not prepared for purposes of dissemination or use by any agency outside the FBI.

TJS:bjr (6)

SEE NOTE PAGE TWO

MAILED 3
AUG 27 1973
FBI

This document is prepared in response to your request and is not for dissemination outside your Committee. Its use is limited to official proceedings by your Committee and the content may not be disclosed to unauthorized personnel without the express approval of the FBI.

5 AUG 28 1973

Assoc. Dir. ____
Asst. Dir.:
Admin. ____
Comp. Syst. ____
Files & Com. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Plan. & Eval. ____
Spec. Inv. ____
Training ____
Legal Coun. ____
Cong. Serv. ____
Corr. & Crm. Research ____
Press Off. ____
Telephone Rm. ____
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Mr. William D. Ruckelshaus
The Deputy Attorney General - Designate

However, we recognize that these two documents may assist the Department in analyzing our proposal concerning the issuance of an Executive order and therefore I am enclosing a copy of the two documents requested by Mr. Goldklang. We request that these documents not be disseminated outside the Department of Justice; that the documents not be duplicated or photographed; and that, if possible, they be returned to the FBI after they have served their purpose.

If you, or members of your staff, feel that additional information would clarify our proposal, it is suggested that consideration be given to arranging conferences between members of your staff and the FBI officials in the Intelligence Division and our Legal Counsel's Office who have conducted considerable research into the matter.

Enclosures - 2

NOTE:

See memo T. J. Smith to Mr. E. S. Miller dated 8/23/73, captioned as above, prepared by TJS:bjr.

ISSUE: Should the Intelligence Gathering-Function of the FBI Be Separated From the Law Enforcement Function of the FBI?

Note that the issue, as originally raised, referred to law enforcement and intelligence functions. What was meant by intelligence was the missions of internal security and counterintelligence. Criminal intelligence, e.g., against organized crime, was intended to fall within the law enforcement mission. However, the functions of the FBI do not neatly fall within "intelligence" and "law enforcement" categories. Internal security cases are both intelligence and law enforcement operations, and counterintelligence sometimes involves arrests and prosecutions, i.e., law enforcement. To most accurately reflect the diverse missions of the FBI the terms law enforcement, internal security, and counterintelligence will be used throughout this paper.

Preface

1. The Problem: revolves around the question whether the three missions can be accommodated by one agency. That is, are they so distinct in nature that an organizational structure set up to perform one of the missions absolutely cannot perform the others; or can all three missions be accommodated but only to the detriment of the others; or can all the missions be adequately performed by one agency?

2. The Present Policy: is that all three missions are performed by the FBI. The FBI organizational structure is primarily a unitary one, i.e., there is one organization with a multiplicity of responsibilities, which can be broken down into three general missions, law enforcement, internal security (domestic) and counterintelligence (foreign). The organization's personnel are hired and catalogued into one of three general functional categories, agent, steno, and to a lesser degree, clerks, without further differentiation based on mission, i.e., no employees, with rare exceptions, are criminal or counterintelligence specialists, all are generalists and are regularly interchanged among the three general missions. The administration of cases at headquarters and, to a lesser extent, the conduct of investigations in the field follow the same format in all three general areas of responsibility.

The underlying rationale for, and history behind, these concepts is:

Personnel - the generalist allows for a highly flexible, mobile force which can be deployed, generally solely on the basis of manpower needs, i.e., any agent can do any job in the FBI. There are some exceptions; some employees have unique abilities which tend to make them less mobile in the eyes of administrators, e.g., language or technical factors in the case of agent deployment and promotion; they are more determinative in cases of clerks: special employees, translators, etc.

Administration of cases and conduct of investigation these were originally geared to accommodate a relatively few criminal and civil investigative matters, and as the responsibilities of the organization grew they were modified and adapted, within the unitary structure, to accommodate the various missions. Thus they are quite similar in all three missions.

3. The Issues Raised:

a. Are the missions of law enforcement, internal security, and counterintelligence separable?

b. If so, is complete separation possible, practical or politically feasible or desirable?

c. Can the three missions be accommodated in one organization?

d. By doing so, do any of the missions suffer?

e. If all three missions can be accommodated in one agency, is the FBI currently doing it the best way possible?

f. If not, is it practically or politically feasible or desirable to change the FBI's way of performing the mission?

g. Why are other Western intelligence services separate from law enforcement agencies?

4. Options for Future Policy:

The missions of law enforcement, internal security, and counterintelligence are separate, distinct and distinguishable functions, even though each partakes a little of each other. Law enforcement is investigation after a crime has been committed to identify suspects and build a case for prosecution; counterintelligence is the identification, penetration and neutralization of foreign intelligence activity in the U. S.; and internal security is identification and thwarting of home-grown plots to subvert the government and activities within the U. S. in illegal support of foreign causes, whether by U. S. citizens of foreigners.

The missions overlap to some degree. For example, law enforcement requires some intelligence collection, and is intimately concerned with internal security criminal acts, e.g., foreign related terrorist bombings, skyjackings, gunning, and subversive groups' kidnappings, bank robberies, bombings, etc. Counterintelligence sometimes results in criminal prosecution, and some internal security groups are funded by, and act on behalf of, foreign intelligence services. Internal security is a hybrid; the basis for its investigation is that acts, politically motivated, are being committed in violation of the U. S. criminal law. Yet, the investigation may be a continuing effort, based on continuing acts threatening the internal security without actually violating the criminal law, and thus the investigation is more like a counterintelligence investigation, than like the typical law enforcement closed cycle of crime, investigation and prosecution.

While counterintelligence could adequately, and with more success in some cases, be handled by an organization totally separate from one with law enforcement powers, internal security work, in many cases, is directly related to criminal prosecution. There has been little effort, and less success, in most English speaking Western democracies in prosecuting domestic "subversives," even those with foreign ties; however, prosecution is often a principal, if not primary, objective in cases involving emigre bombing and harassment of foreign diplomatic establishments, fund and arms procurement for foreign political groups, politically motivated terrorist acts, e.g., skyjacking, etc.

An examination of the services of the democracies mentioned above, viz., Britian, Australia and Canada, reveal that all do distinguish between the pure law enforcement function and the counterintelligence/internal security function; however, there is not a total separation of the functions. For example, the British Security Service (MI-5) handles counterintelligence exclusively with MI-5 case officers, but places it's internal security investigations in the hands of the Special Branches of the local constabularies (comparable to the intelligence divisions of local U. S. police departments). The Australian Security Intelligence Organization (ASIO), modeled after MI-5, and of recent vintage (post W.W.II), handles all counterintelligence and internal security investigation with its own officers; however, it is rivalled to some extent in the internal security field by the Intelligence Bureau of the national Commonwealth Police. The Royal Canadian Mounted Police, a truly national police force, with extensive local and Federal jurisdiction, has branched off its intelligence division into a new, near autonomous Security Service, with operational procedures more akin to MI-5 and ASIO than to traditional law enforcement.

In short, these countries recognize that the political, social and foreign policy considerations which must go into counterintelligence and internal security investigations make them a different animal from "routine" criminal investigation; yet, they also recognize that the agency with internal security jurisdiction must also have an intimate and close working relationship with a law enforcement agency.

SENSITIVE FOREIGN INTELLIGENCE SOURCES

Complete separation, at least of the internal security function from law enforcement, does not appear to be practically feasible. MI-5 and ASIO were originated without law enforcement powers, and MI-5 candidly admits it would like to become part of a national police force. RCMP Security Service case officers would not consider surrendering their police powers.

Separation of the counterintelligence function would be more practically feasible; however, the commingling of counterintelligence and internal security interests, and the threat of a merger of the counterintelligence function with the positive foreign intelligence collection agency, especially in the U. S., are both practical and political reasons militating against this course.

Separation of the internal security function also presents serious political considerations. Internal security or as some say, at least in reference to its "subversive" investigations, political intelligence, is the most controversial of government's intelligence collection activities. In the U. S., this function was originally given to the FBI which had established for itself a reputation for being responsible, competent, and most importantly, politically neutral, and had the confidence of most Americans. It is recognized that this reputation is not etched in stone, and that because of the diversity of peoples, political views, and activities tolerated in the U. S. no internal security agency can, using human judgement, attempt to fulfill its responsibility without offending someone, sometime, someplace.

It is to the advantage of an internal security agency, which is subjected to such political pressures, to be somewhat insulated by being part of a larger, respected organization which has a high profile as a competent and fair investigative agency in the less politically complex law enforcement and counterintelligence fields. Adding to this insulation is the tradition of FBI political independence, and the new Congressional concern with keeping the FBI politically independent. While the law enforcement and counterintelligence wings of the FBI dislike the controversies into which its internal security wings drags the FBI name, separation of internal security into a separate agency would probably subject it to more intense political pressures, both from within the administration and without, which pressures it might not be capable of withstanding. Such separation appears politically unfeasible and undesirable.

Practical considerations against divestiture of the counterintelligence and internal security functions from the FBI are that: basic criminal investigative experience equips men in many areas to be intelligence officers; a pool of trained criminal investigators is available to the intelligence missions to draw from, either on an ad hoc emergency basis, e.g., seizure of an embassy or political kidnapping or skyjacking, or as candidates for the position of intelligence officer; a divestiture might result in the loss to the counterintelligence and internal security wings of the effective use of the FBI name, reputation, and contacts and sources built-up over years using the FBI name.

The RCMP has shown that all three missions can be accommodated in one agency, although the distinctive character of each mission requires internal adjustments of policy, structure, administration, personnel considerations, and operations.

Implementation of adjustments within the FBI is being considered at this time.

Consequently, based on above considerations, the FBI recommends that all three missions of law enforcement, internal security, and counterintelligence remain with the FBI.

Former Attorney General
William D. Ruckelshaus'
memorandum, 7/23/73, to F. B. I.
Director, Clarence M. Kelley,
setting forth the 11 areas of
inquiry.

1086 enc. 3

62-116395-~~1577~~ 30 10/31/75

The Attorney General

U. S. SENATE SELECT COMMITTEE ON INTELLIGENCE ACTIVITIES (SSC)

Ltr from SSC 10/2/75, requesting, inter alia, memos of studies of various aspects of FBI operations previously prepared by FBI at request of former Deputy AG Kleindienst. Original of memo submitted for Attorney General's forwarding to Committee. A copy for your records.

SSC REQUEST OF 10/2/75

File Copy

1 - Mr. Baker
1 - Mr. Mintz
1 - Mr. E. S. Miller
1 - Mr. T. J. Smith

Mr. William D. Ruckelshaus
The Deputy Attorney General - Designate

September 20, 1973

1 - Mr. J. F. Miller

Director, FBI

SUBSTANTIVE ISSUES REGARDING
THE FUTURE OF THE FBI

JUNE

Technical Surveillance - general

Reference is made to your memorandum of August 20, 1973, detailing a format to be followed in setting forth our responses to your memorandum of July 20, 1973, captioned "Substantive Issues Regarding the Future of the FBI." Attached is an undated study of 17 pages with a five-page appendix captioned "Electronic Surveillance."

This study was prepared in response to your July 20, 1973, request, prior to receipt of your format memorandum of August 20, 1973. The responses to most of the questions raised in your August 20, 1973, memorandum are contained in this study. Rather than repeat points considered in this study, it is attached and it is recommended it be read prior to the attached paper dated September 14, 1973, written according to your suggested format. This second paper considers issues raised in your August 20, 1973, memorandum not discussed in our first study, e.g., "Options for Future Policy." Attached to the September 14, 1973, paper is a copy of a petition for rehearing in U.S. v. Ivanov, and a July 11, 1973, memorandum concerning the Ivanov case to that date. These attachments pertain to a discussion of foreign national security electronic surveillance in the September 14, 1973, paper.

EX. 105 REC-2 66-8160-3513

CAUTION: THE APPENDIX TO THE UNDATED PAPER CAPTIONED "ELECTRONIC SURVEILLANCE," AND THE JULY 11, 1973, MEMORANDUM ARE CLASSIFIED "SECRET, NO FOREIGN DISSEMINATION/NO DISSEMINATION ABROAD."

Enclosures - 4

ENCLOSURE

SENT FROM D. O.
TIME 2:42 PM
DATE 9-24-73
BY [illegible]

JFM:rlc
(8)

SECRET MATERIAL ATTACHED

NATIONAL SECURITY INFORMATION
Unauthorized Disclosure
Subject to Criminal Sanctions

OCT 12 1973

NOTE:

The above memorandum and enclosures are in response to the Deputy Attorney General Ruckelshaus' memoranda of 7/20 and 8/20/73 concerning "Substantive Issues Regarding the Future of the FBI." These materials are in response to issue number one "Wiretaps."

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ELECTRONIC SURVEILLANCE

This document is prepared in response to your request and is not for dissemination outside your Committee. Its use is limited to official proceedings by your Committee and the contents may not be disclosed to unauthorized personnel without the express approval of the FBI.

~~SECRET~~ MATERIAL ATTACHED

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ENCLOSURE 66-8160-3513

TABLE OF CONTENTS

I. AUTHORIZATION OF CONSENSUAL, TITLE III, AND NATIONAL SECURITY ELECTRONIC SURVEILLANCES

The legal foundation for each of the above types of electronic surveillance differs, and in part as a consequence of that, the administrative procedure for securing authorization to use each type differs.

A. Consensual

The current law is that as long as one party to a conversation, whether over the telephone or in person, consents to a monitoring of that conversation by another or a recording of that conversation by another or by himself, such a monitoring or recording is legal, and may be introduced into evidence in a legal proceeding.

At present, the monitoring or recording of telephone conversations by the FBI with the consent of one of the parties, e.g., via a device attached to the consenting party's telephone or a monitoring via use of an extension telephone, is authorized internally within the FBI by either a Special Agent in Charge or, if the case is "sensitive," by a Headquarters official, generally the Director. On the other hand, the present policy with regard to consensual monitoring of nontelephone conversations, e.g., body or hidden recorders or transmitters, is that the Attorney General must approve these in advance, except in an emergency, at which time the Director (or someone designated by him) can approve them and then promptly notify the Attorney General. The method of requesting Attorney General approval, or of notifying the Attorney General of the exercise of the emergency authorization, is a memorandum to the Attorney General setting forth the identity of the target, the background of the case, and the reason for the request or authorization.

B. Title III

These electronic surveillances are permitted by act of Congress for the purpose of gathering evidence of enumerated crimes. A requirement for the submission of an affidavit to a court showing probable cause that a crime is being committed and that evidence not obtainable otherwise can be obtained via the electronic surveillance is set

forth in the statute. Current procedure is to submit to the Attorney General a copy of the affidavit the FBI proposes to submit to the court, with a cover memorandum setting forth the background of the case. The affidavit has been worked out between FBI field personnel and the local United States or Strike Force attorney, and between FBI Headquarters personnel and Department of Justice attorneys before submission to the Attorney General. The Attorney General either approves or disapproves proceeding with the application for court approval via a memorandum to the Director.

C. National Security

The continuous position of the Department of Justice and several Presidents has been that the President has the constitutional power to authorize warrantless electronic surveillances in the exercise of his Articles II and IV responsibilities "to conduct foreign affairs" and "to protect the States against invasion." This power has generally been exercised by the Attorney General for the President. While not specifically approving this interpretation or intending to grant or restrict any powers along these lines, but rather as a declaration of noninterference, Congress, when it passed Title III, stated in 18 U.S.C. 2511(3) that nothing in Chapter 119, Title 18, of the U.S.C. or in Section 605 of the Federal Communications Act of 1934 limited the constitutional powers of the President (whatever they might be) to authorize electronic surveillance: (1) to protect the Nation against actual or potential attack or other hostile acts of a foreign power; (2) to obtain foreign intelligence information deemed essential to the security of the United States; (3) to protect national security information against foreign intelligence activities; (4) to protect the United States against the overthrow of the Government by force or other unlawful means; (5) (to protect) against any other clear and present danger to the structure or existence of the Government.

In United States versus U.S. District Court for the Eastern District of Michigan (407 U.S. 297), commonly called the Keith case after Judge Damon Keith, the Supreme Court held that the President did not have the power to authorize warrantless electronic surveillance directed against purely domestic organizations (and their members). The Court stated that the issue in Keith fell within the language of categories 4 and

5, as above, of 18 U.S.C. 2511(3), and that it was not deciding on cases involving individuals or organizations that had a "significant connection" with a foreign power.

Consequently, since Keith, the only requests for national security warrantless electronic surveillance referred to the Attorney General for approval involve individuals or organizations with a "significant connection" with a foreign power. The procedure for submitting these requests is uniform. The Director submits to the Attorney General a memorandum requesting approval for initiation or continuation of an electronic surveillance on a particular individual or organization; an attachment which is a summary of background information and the circumstances on which the request is based; and a memorandum from the Attorney General to the Director approving the electronic surveillance based on, and in the language of, one or more of categories 1 - 3 of 18 U.S.C. 2511(3). If the Attorney General approves the electronic surveillance, he signs and returns this latter memorandum and keeps for his records a copy of the Director's memorandum to him and a copy of the attached summary.

II. BACKGROUND OF FEDERAL ELECTRONIC SURVEILLANCE LAW

The term electronic surveillance encompasses both wiretapping (tap), i.e., the interception of a telephone conversation by a third party, and microphone surveillance (bug), i.e., the interception of a nontelephone conversation by means of a microphone which can lead either to a recorder or merely transmit the conversation to a third party, or both. Both wiretapping and microphone surveillance can be conducted with or without the knowledge and consent of the parties to the conversation. Consensual monitoring, i.e., tapping or bugging with the consent of one of the parties to the conversation, has generally been held to be legal, and is not considered in the following discussion.

The separate development of the law pertaining to wiretapping and microphone surveillance is, since passage of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Keith decision, apparently of historical interest only.

Prior to Title III and Keith, the law that developed around electronic surveillances concerned itself primarily with the admissibility of evidence obtained from electronic surveillances rather than with the basic issue of the "legality" of electronic surveillance itself. Evidence, or evidence obtained from leads, gathered via wiretapping was excluded from any criminal prosecution on the basis that presentation of such evidence was a "disclosure" prohibited by Section 605 of the Federal Communications Act; and evidence, or evidence obtained from leads, gathered via a microphone surveillance or a wiretap was excluded if it was determined the installation required a "trespass" and was thus an unlawful search and seizure. (These decisions often turned on technicalities such as minimal physical penetration by a "spike mike.")

Title III established the Congressional intention that electronic surveillance, under specific conditions, is to be lawful and the evidence obtained therefrom admissible.

Title III also, while not conferring any statutory authority on the President, indirectly recognized that he was authorizing warrantless electronic surveillances in matters

affecting national security, and stated that Title III or Section 605 of the Federal Communications Act did not affect any such powers he might have.

Title III did not distinguish between wiretaps and microphone surveillances, and court decisions since Title III involving both criminal and national security matters seem to be drifting away from the artificial bases that distinguished these electronic surveillances in the past and are looking at the real issue of governmental powers versus Fourth Amendment rights and the right to privacy. The requirement of prior judicial review, the element on which Keith turned, is a new factor in judicial consideration of electronic surveillances, introduced by Title III.

III. NATIONAL SECURITY ELECTRONIC SURVEILLANCE

A. Domestic

1. The Keith Decision

The case originated as U.S. versus Plamondon, et al., and involved Federal prosecution of defendants accused of bombing the CIA office in Ann Arbor, Michigan, in September, 1968. Pursuant to a defense motion, Federal Government electronic surveillance records were checked and revealed Plamondon had been intercepted via a national security wiretap on the Black Panther Party office in Oakland, California.

Under current court procedure regarding national security electronic surveillances, the Government is required to disclose to the court all interceptions; the judge then determines whether the interception was legal or illegal. If he finds it to be illegal, he orders the prosecution to make available to the defense all the logs and tapes pertaining to the interception so that the defense can determine if any of the case against it is based on illegally obtained electronic surveillance evidence.

The trial Judge Damon Keith held that the President had no power to authorize electronic surveillance of the Black Panther Party without prior judicial approval, i.e., a warrant, that therefore the wiretap was illegal, and the prosecution had to turn the logs and tapes of the conversation over to the defense.

The Government appealed this decision to the Supreme Court, thus the case at that level was titled U.S. versus U.S. District Court for the Eastern District of Michigan, commonly called the Keith case.

On June 19, 1972, the Supreme Court affirmed Keith's decision and held that the President has no warrantless, national security power to authorize electronic surveillance of domestic organizations (or their members). The Supreme Court defined a domestic organization as one having no "significant connection" with a foreign power, its agents or agencies.

The Justice Department, in the words of Deputy Assistant Attorney General Kevin J. Maroney before the Senate Subcommittee on Administrative Practice and Procedure on June 29, 1972, stated that it understands "significant connection" to mean that the domestic organization must be substantially financed by, or in active collaboration with a foreign power for the purpose of committing unlawful activities against the United States Government.

2. Guidelines and Procedures Currently Used by the FBI and the Department of Justice in Determining Whether a Proposed National Security Electronic Surveillance Falls Within/Without the Keith Decision

The Keith decision applies solely to a domestic organization (and its members) "with no significant connection with a foreign power." The issues are what constitute a "domestic organization" and "significant connection."

The Department of Justice has issued the FBI no formal oral or any written guidelines on these issues.

The reason is that the standard to be applied is a "facts and circumstances" test in each case in the light of the Supreme Court's language in the Keith case and the Department of Justice's position as stated by Mr. Maroney before the Subcommittee.

The Supreme Court in Keith said that while it was "attempt(ing) no precise definition" the scope of its decision was limited to a "domestic organization...composed of citizens of the United States...which has no significant connection with a foreign power, it agents or agencies." The Court also recognized the difficulty in distinguishing "between 'domestic' and 'foreign' unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of a foreign power."

The Subcommittee asked the Department of Justice what level of foreign dominance and control of a domestic group would be considered sufficient to bring the group into the area of foreign activities on which the Court has not yet ruled. Maroney replied:

"The Keith decision has suggested a standard of 'significant connection with a foreign power, its agents or agencies.' We do not interpret this as meaning casual, unrelated contacts and communications with foreign governments or agencies thereof. We would not try to apply this standard without the presence of such factors as substantial financing, control by or active collaboration with a foreign government and agencies thereof in unlawful activities directed against the Government of the United States. Obviously, such factors will be present in a very minimum number of situations. (Emphasis added.)

"I wish to assure the (sub)Committee on behalf of the Attorney General, that the Department of Justice accepts both the letter and the spirit of the Court's ruling in the Keith case. It is the intention of the Executive Branch to utilize electronic surveillance in present and future national security matters in full and ungrudging application of the rationale of the decision." (Emphasis added.)

The FBI carried on an informal dialogue with the Department of Justice after the Keith decision in an attempt to establish some general guidelines in the abstract, but the discussions eventually came back to the above language, and the conclusion that each case requires a facts and circumstances test, and an exercise of the independent judgment of the Attorney General on the facts presented.

As a result, the FBI submitted some borderline cases, which it recognized as such, to the Attorney General in order to get a feeling of how he and the Department of Justice applied the above standard to specific fact situations. Some were approved, some refused. As a result the FBI feels it has a fairly clear idea of the outer limits, beyond which no electronic surveillance will be approved.

The lack of formal guidelines beyond the Court's language and Maroney's testimony presents no practical or administrative difficulty within the FBI. As Maroney noted, the factors he related would be present in a very minimum number of cases. That is true. Prior to Keith, domestic national security electronic surveillances conducted by the FBI had been winding down for some time. At the time of the Keith decision only six, four telephone and two microphone, were in

effect. The few cases in which are present some of the factors noted by Maroney are subjected to joint scrutiny by, and discussion between, FBI field and Headquarters supervisory personnel, and only after these feel the FBI may have a case does the field initiate the request, which must be personally approved by the field supervisor and the Special Agent in Charge. Upon receipt, the Headquarters supervisor drafts a memorandum to the Attorney General, setting forth all pertinent facts, including those showing foreign involvement, on which the request is believed justified. He must also be able to justify the request in the language of one or more of the first three categories of 18 U.S.C. 2511(3). The request is presented through channels (i.e., Headquarters unit chief, section chief, branch chief, Assistant Director of the Intelligence Division, Associate Director, and Director) to the Attorney General who must make an independent judgment.

There are arguments pro and con that the lack of formal written guidelines pose an added threat to the Fourth Amendment rights or right to privacy of a domestic organization or individual. The argument that it does pose an added threat would seem to be based on the supposition that formal guidelines would be exclusive, and binding in all instances. Any guidelines issued would probably be more illustrative of the above standard than definitive. Formal written guidelines made available to the public might curtail criticism that we are operating without a definitive standard, however, they might also trigger criticism that they are too vague, not interpretive of the Court's intent, etc.; and, should a case arise that does not fit squarely within the guidelines but could possibly be justified on a broader standard, reasonably within the Court's language, we could be criticized for not adhering to our own guidelines. Both career professionals in the FBI and Department of Justice attorneys review the electronic surveillance request for need, sufficiency, and legality. The Department of Justice has committed itself, and the FBI, to abiding by the letter, spirit, and rationale of the Keith decision (and has expanded upon the decision to the extent of Maroney's testimony). If legal action ensues, whether criminal or civil, the courts in looking at the legality of a national security electronic surveillance are bound only by the Keith decision regardless of any Department of Justice guidelines.

In summary then, the procedure is: the FBI does not submit a request to the Attorney General for approval of an electronic surveillance upon a domestic organization composed of

United States citizens, unless it has a "significant connection" with a foreign power, its agents or agencies; by "significant connection" the FBI and the Department of Justice understand that the domestic organization must be substantially financed by, controlled by, or in active collaboration with such foreign power for the purposes of committing unlawful activities against the United States Government. The FBI presents its request to the Attorney General with all the facts and circumstances on which the request is based, and he must exercise an independent judgment as to whether the request falls within this standard and the letter, spirit, and rationale of the Keith decision.

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Senator Kennedy has expressed concern in the past that a political appointee, the Attorney General, rather than career professionals, is the final authority on these matters. This is a two-edged sword. If the ultimate authority were non-public career professionals, there would be less response from them than from the appointee of an elected official to public pressure criticizing procedures and decisions.

On the other hand, the Attorney General's decision could possibly be based more on personal political attitudes and motivation than on his interpretation of the law.

The present procedure attempts to meet both shortcomings. The Attorney General does not recommend or initiate electronic surveillance requests; they are initiated by and processed through several levels of career professionals who at each step judge whether the request falls within the standard. The request is then sent to the Attorney General, who refers it to the Internal Security Section, Criminal Division, of the Department for its independent judgment, before he makes the ultimate decision. Thus, any electronic surveillance request, if it makes it to the Attorney General, has already been approved by the career professionals. It is arguable that a career professional might be more cautious if he, and his agency, bore the final authority and responsibility rather than passing both on to another agency. There is no airtight response to this; it is a question of human motivation, sense of obligation, duty and responsiblity. The impulse to be less than diligent is countered by an employee's professionalism and career considerations.

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3. Status

The President has no warrantless power to authorize purely domestic national security electronic surveillances. He may have the power to subject domestic targets to electronic surveillance, but these electronic surveillances must be subjected to prior judicial review, i.e., a warrant, before installation. Admissibility of evidence obtained from such electronic surveillances is a correlative question, not yet directly considered. Presumably, such evidence would be admissible.

B. Foreign

The legality and admissibility of evidence issues have not yet been directly considered by the Supreme Court. The issue of "legality," based on whether prior judicial review is required (key issue in Keith), was resolved in the Government's favor by the United States District Court, District of New Jersey, in United States versus Ivanov. Following an ex parte, in camera inspection of the surveillance logs by the district court and argument on the legality issue by the parties, the court sustained the authority of the Attorney General to acquire foreign intelligence information by warrantless electronic surveillance.

The United States Court of Appeals for the Third Circuit reversed and remanded, assuming, arguendo, that the President did have such authority and that therefore any electronic surveillances in the case were legal. Further, the Appellate Court felt it had to assume "in the present posture" of the case, that the case was in fact built on electronic surveillance evidence. Consequently, the Appellate Court held that since the case arose prior to passage of Title III, Section 605 of the Federal Communications Act of 1934 applied, and it prohibited "divulging" of electronic surveillance results as evidence in court.

The issue of the legality of foreign national security electronic surveillances is also currently under advisement by the United States Court of Appeals for the District of Columbia Circuit in the case of United States versus Enten. In Keith, the Supreme Court specifically noted that two lower courts (the Fifth Circuit Court of Appeals in United States versus Clay,

430 F.2d 165 (1970) and the United States District Court, Central District of California in United States versus Smith, 321 F. Supp. 424 (1971)) have held that "warrantless surveillance... may be constitutional where foreign powers are involved."

The argument that even foreign related electronic surveillances should be subject to initial judicial review is based on the argument that this is the only guaranteed method of protecting the Fourth Amendment rights and right to privacy of aliens, and United States citizens who might be involved. The argument on the other side is that the nature and objective of the activity, viz., foreign intelligence gathering, the needs of security, the many nonprosecutive factors to be considered, and often the time element, do not lend themselves to effective or efficient initial judicial review; consequently, the Government must be granted a measure of confidence to utilize this technique on its own authority, with the safeguards of protection from conviction or the remedies of a civil action available to any target of an electronic surveillance, if the Government abuses this authority.

This area is still in limbo, the same condition as prior to Title III and Keith. Until Ivanov and Enten, or more likely until a post Section 2511(3) espionage case, actually built on electronic surveillance evidence, are decided by the Supreme Court, the Government, to be safe, must be willing to sacrifice a criminal prosecution to obtain electronic surveillance intelligence.

IV. VALUE OF NATIONAL SECURITY ELECTRONIC SURVEILLANCES

(See classified Appendix)

V. DOMESTIC "INTERNAL SECURITY" ELECTRONIC SURVEILLANCE: ALTERNATIVES TO KEITH PROHIBITION

There are several elements within United States society which pose a threat to the safety and tranquility of segments of that society, e.g., police officers, symbols of the "Establishment," etc. While some of these elements claim to be "revolutionary" and claim as an ultimate objective the overthrow of the United States Government, there is no responsible opinion that feels any of these elements have any chance of success in toppling the Government. Yet, they do pose a significant threat of inflicting serious, and sometimes extensive, damage on individuals and property.

In combatting these elements, law enforcement is confronted with the opposite of its usual task. Ordinarily, law enforcement is confronted with a completed crime and investigates to identify suspects and to prove guilt; in these cases it has the suspects, e.g., individuals or groups have said they intend to murder police officers, bomb buildings, etc., so law enforcement's job is then to thwart commission of the crime. This is an intelligence investigation. It is conducted prior to a threatened criminal act, not after the act, and as such ranges wider and looks into more facets of the suspect's behavior. Yet, it is not a "fishing expedition"; it is based on some solid indication that the suspect intends to, and has the capability of, committing some crime.

Because of the exaggerated rhetoric of many of these elements, which never do actually commit a crime, the difficulties in identifying specific individuals as suspects, in showing a cause-effect relationship between the urgings and claims of group leaders and the act of the actual triggerman or bomber, and in showing suspected imminence of the criminal act, it is almost impossible to make a probable cause showing, as we understand that term today, to support a warrant for restricted types of investigation. Essentially what law enforcement has, or depending on your emphasis, all that law enforcement has, is a suspicion, based on stated criminal objectives of these elements, claims of criminal accomplishments, and indications from behavior and attitudes, that these elements may engage in destructive criminal behavior sometime in the future.

Because these elements threaten and commit crimes in furtherance of their stated goal of overthrowing the United States Government, investigation of them has often proceeded on a "national security" basis; and because there is no practical, immediate prospect of their accomplishing this goal, the "national security" foundation for investigation of them has, in many quarters, not been taken seriously, and is often suspect because of the latitude that has been allowed in "national security" investigations as opposed to simple criminal investigations.

The difficulty is that these domestic "internal security" cases lie somewhere between what is generally accepted as "national security" matters and plain, simple criminal violations. If one interprets national security to mean only matters which threaten the stability of the Government, either from within or without, then these cases are not national security matters; yet, they pose a threat to the safety and tranquility of the community beyond individual incidents of crime, or even random sprees of criminal acts by an individual or group. These cases also have some effect on national and international attitudes towards U.S. standards, morale, government, law enforcement, and the elements involved, e.g., "Why can't law enforcement protect society, and itself, against attacks"; or "These people are victims of a repressive system and attack is their only effective avenue of protest for change."

Consequently, law enforcement is confronted with a situation wherein it is threatened with criminal acts in furtherance of a claimed political goal, the mere condition of being so threatened often having an impact beyond a completed routine criminal act (although many of these threats are eventually carried out); yet, this condition is generally insufficient to show probable cause to justify a warrant for an electronic surveillance.

Assuming that there is valuable intelligence to be obtained from electronic surveillance in these matters to be used in attempting to thwart these crimes, how can we fill the void created by Keith?

Title III has very limited value in this area. Its stated purpose is to gather evidence of crimes that we have probable cause to believe are being, or are about to be, committed. It is doubtful whether the threats of these elements, or even evidence of past attacks, would be sufficient probable cause to support a continuing electronic surveillance with no specific crime

in immediate view. Title III could perhaps be used in some of these cases where the investigation has developed to a point where we do have probable cause for a specific crime, but the probable cause would be momentary and would expire after the act or probability of the act. Title III also has limited value for continuing intelligence purposes because of its applicability only to specified crimes; the short time period (30 days per request); the requirement that the target eventually be given notice and the results of the electronic surveillance (this can be postponed but not indefinitely); and the number of people who could become involved with and thus aware of a recurring monthly application to a court.

After the Keith decision, there was extensive debate within the FBI and between the FBI and the Department of Justice on its effect, and how we could proceed, within the Keith restriction, in cases where we felt there was a clear "internal security" (which went undefined) threat where electronic surveillance would be valuable. It was accepted that Title III would be of minimal value because of the problems noted above. Within the FBI it was also argued, and finally accepted, that FRCrP 41, might be utilized to obtain a routine search warrant to install an electronic surveillance where Title III was inapplicable. Assistant Attorney General Olson and Deputy Assistant Attorney General Maroney disagreed, feeling that Title III was intended to preempt all other methods of securing electronic surveillances, besides Presidentially approved surveillances.

The argument is largely theoretical. FRCrP 41, like Title III, requires a showing of probable cause, so it likewise is available only when specified criminal acts are believed to be going on or are imminent. FRCrP 41 warrants must also be executed forthwith, and notice must be given to the target and he must be served with an inventory of the items seized. Given a case which falls within both Title III and FRCrP 41, Title III procedures are preferable because they are less restrictive and more clear cut since they deal exclusively with electronic surveillances.

Title III is fairly broad in specifying the crimes for which electronic surveillances can be authorized under its sections. It is difficult to think of a threat to the internal security so significant that acts in furtherance of the threat would not involve criminal violations specified in Title III. Of course, the FBI would be limited to basing its requests for electronic surveillances on Federal crimes enumerated in Title III, and the

threatened destructive acts might involve solely local offenses, e.g., murders of policemen. Title III provides for local authorities to use electronic surveillances in such cases.

Even assuming that there was a case falling outside of Title III, but within FRCrP 41, the FBI is still limited to using search warrants obtained thereunder to seize evidence of Federal crimes; if the threatened act is a local violation only FRCrP 41 is of no value to the FBI.

Without a showing of probable cause of an ongoing or imminent crime, it is doubtful if either Title III or FRCrP 41 could be used to secure an electronic surveillance. It is believed an ongoing intelligence-gathering electronic surveillance based on indications but not probable cause, that the target might engage in purely domestic criminal activity, for the purpose of thwarting that activity, no matter how potentially destructive, will require enabling legislation. Mr. Maroney in his testimony before the Senate Subcommittee on Administrative Practice and Procedure stated that the Department of Justice was not requesting such legislation at that time, but that if it became evident that a void clearly detrimental to United States security interests had been created by Keith, the Department of Justice will seek new legislation.

Chance for passage of such legislation at this time is probably nil.

APPENDIX

IV. VALUE OF NATIONAL SECURITY ELECTRONIC SURVEILLANCES

A. Foreign

Electronic surveillances provide positive intelligence regarding the positions and activities of foreign nations, and thus are of value to United States Government policymakers and diplomats, and also provide information of assistance in our counterintelligence efforts against foreign intelligence services operating against the United States.

1. Positive Intelligence

JFK Act 6 (1)(C)

Examples of positive intelligence obtained via electronic surveillances, not directly related to our counter-intelligence responsibility, are as follows:

SENSITIVE FOREIGN INTELLIGENCE OPERATION

At 7:40 p.m. on August 20, 1968, the New York Office called Headquarters to inform that our wiretap on [redacted] was intercepting an inordinate amount of traffic, approximately 40 intercepts in the preceding 30 minutes. [redacted] were calling representatives of many of the delegations to the United Nations stating they had a message which they desired to deliver urgently, and would meet the representatives anywhere, even on a street corner.

The Headquarters duty supervisor thought this activity might relate to a recently completed full plenum of the Supreme Soviet on the Czechoslovakian question, reported on the UPI ticker. He relayed this information to Mr. Hoover, the White House Situation Room, and the State Department.

Classified by E. S. Miller
Exempt from GDS, Category 2, 3
Date of Declassification Indefinite

SENSITIVE FOREIGN INTELLIGENCE OPERATION

JFK Act 6 (1)(C)

Later in the evening State Department informed us that Soviet Ambassador Dobrynin had visited the President that evening, left, and State was now urgently attempting to locate him. Via our wiretap on [redacted] we were able to inform State that Dobrynin was with the Romanian Ambassador at that time.

The first indicator the CIA received of abnormal activity regarding the Czechoslovakian question was a telephone call from the White House Situation Room at 9:30 p.m., August 20, 1968.

The Soviet invasion of Czechoslovakia occurred August 20, 1968.

There was a great deal of intercept activity during the days following the invasion, which reflected on various governments' positions and reactions. This raw material was relayed as fast as it came in to the State Department and the White House Situation Room.

This example indicates the potential value of such intercepts in extreme national security emergencies directly affecting the United States, e.g., by indicating withdrawal of official and diplomatic personnel from the United States, movement of foreign nationals to certain areas of the country, or hostile intentions against the United States. Such information is a priority requirement of the United States Intelligence Board.

[redacted] our intercepts on [redacted] in the United States provided many indicators as to the intercepted parties' relative positions and sympathies, and consequently assisted State Department and the White House in its dealings with these nations on that issue.

SENSITIVE FOREIGN INTELLIGENCE OPERATIONS

Via an electronic surveillance we obtained information concerning the location of Soviet ships removing missiles from Cuba in 1962.

JFK Act 6 (1)(C)

JFK Act 6 (1)(C)

2. Counterintelligence

Electronic surveillances assist our counterintelligence efforts by providing personality data and information regarding the contacts and activities of known and suspected foreign intelligence officers. This information assists in planning counterintelligence activity, assessing defection potential, analyzing routines and patterns, conserving manpower, and in directing sources against these officers.

SENSITIVE FOREIGN INTELLIGENCE INFORMATION

There are currently [redacted] known and [redacted] suspected Soviet intelligence officers, and [redacted] known and [redacted] suspected Soviet-bloc intelligence officers in the United States.

Examples of information obtained via electronic surveillance of value to our counterintelligence responsibility are as follows:

An individual was detected in contact with a hostile intelligence service in September, 1972. He expressed a desire to defect and to offer information regarding United States naval intelligence to which he had access. Although the interception did not give us his name, it provided sufficient information to conduct an investigation which established his identity, confirmed that he had been engaged in very sensitive naval communications intelligence, and disclosed that he was a fugitive, wanted on local charges. He was arrested on November 23, 1972.

In one case, electronic surveillance furnished information, within four days of its installation, of a contact between an official of the Soviet Illegal Support Branch and an individual who appears to be a Soviet illegal agent.

Electronic surveillance furnished information concerning an attempt in 1969 by a United States serviceman to defect to the Soviets.

An example of the value of electronic surveillance coverage in foreign terrorist matters involved an Al Fatah leader formerly in the United States. In the Summer of 1972 he departed this country for a visit to the Middle East. He later applied for a reentry permit which was denied. In late November, 1972, a telephone surveillance disclosed a contact by an individual suspected to be the Al Fatah leader. An

investigation was initiated and a second electronic surveillance revealed the Al Fatah leader had reentered the United States using a variation of his family name. This information enabled his arrest by the Immigration and Naturalization Service.

B. Domestic

The primary value derived from intelligence gathering, as opposed to evidentiary, electronic surveillances in this area is in obtaining plans for carrying out threatened criminal acts, evidence of foreign influence or financing, and information which assists in planning apprehensions of wanted individuals with less risk to the lives of officers and bystanders.

Examples: Via electronic surveillance of the Black Panther Party, Cleaver Faction, in New York City; Huey P. Newton in Oakland, California; and the Los Angeles Black Panther Party, the following information was obtained.

On November 6, 1971, plans to kill New York Police Commissioner Murphy were discussed.

On September 14, 1971, use of police radios to monitor New York City Police Department activity was discussed.

On April 26, 1971, electronic surveillance identified Robert Vickers as the assailant of a New York City police officer killed April 19, 1971. (Although this information was also evidentiary, it identified Vickers as a triggerman for the group who could be used in the future.)

On December 28, 1970, electronic surveillance reported that Newton received $1,400 from a Swedish group.

On September 20, 1971, electronic surveillance reported a communication between Newton and the President of Tanzania.

On September 28, 1971, electronic surveillance reported Newton's travel plans to China, and on October 19, 1971, it reported details of his visit.

During July, 1971, a conversation was intercepted, and when pieced together with previously monitored conversations and other background, enabled us to apprehend, without injury or incident, two Black Panther Party members wanted for the murder of a policeman.

Physical surveillance of a meeting to plan the murder of Black Panther Party rivals, the meeting site having been learned of via electronic surveillance, resulted in the apprehension of two fugitives. The apprehension caused a gun battle, however, the electronic surveillance information allowed for advance planning which cut the risk to arresting officers and bystanders.

Electronic surveillance of the Students for a Democratic Society Headquarters, Chicago, Illinois, provided information on plans for the "Days of Rage" violent demonstrations in Chicago during October, 1969. This advance information, relayed to Chicago police, enabled them to anticipate, to some degree, destructive activity, and to concentrate their force where needed.

September 14, 1973

ELECTRONIC SURVEILLANCE

1. The Problem:

Use of electronic surveillance falls into three broad areas: criminal, domestic national security, and foreign national security.

Little policy consideration need be given to use in criminal cases. Such use is prescribed and proscribed in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, has been upheld by the courts, and has been used to great advantage under the current procedures and policy. In short, there is no policy problem in this area.

Electronic surveillance in both domestic and foreign national security cases is primarily used for intelligence purposes, not evidentiary purposes; however, it often produces information of evidentiary value.

The only Congressionally approved electronic surveillance is for the sole purpose of obtaining evidence of stated crimes (Title III).

Foreign national security electronic surveillances produce a good deal of positive intelligence value to U.S. foreign policymakers, a good deal of information necessary for counterintelligence activity, and, rarely, information of evidentiary value.

Domestic national security electronic surveillances produce information valuable to law enforcement in thwarting murders, serious injury to persons, and extensive damage to property, and also, rarely, information of evidentiary value.

Electronic surveillance in domestic national security cases which was previously approved by the Attorney General for the President utilizing his Constitutional powers has been prohibited by the Supreme Court in the Keith case, i.e., held illegal without prior judicial approval.

The issue of the legality of warrantless, Presidentially approved electronic surveillance in foreign national security cases has not yet been decided by the Supreme Court; this issue is now pending in two Circuit Courts of Appeals.

Thus the specific problems with regard to domestic national security electronic surveillance are that it produces information of value not obtainable by other means; it has been prohibited without prior judicial approval; there is no mechanism to obtain prior judicial approval. Consequently, we conduct no domestic national security electronic surveillances.

The specific problems with regard to foreign national security electronic surveillance are that: it produces information of value not obtainable by other means; the legality of the President to authorize its use without prior judicial review is being challenged; if it is held illegal there probably will also be no mechanism to obtain prior judicial review; current court procedure requires in camera disclosure of the existence of national security electronic surveillance in criminal trials and if found illegal, disclosure of the content of the intercepts to the defense, which for overriding security and foreign policy reasons can usually not be made.

2. Present Policy

Domestic National Security Cases:

We do not conduct electronic surveillance in these cases.

Foreign National Security Cases:

Pending Supreme Court consideration of the "legality" of electronic surveillance in these cases, they continue to be approved by the Attorney General, and utilized without warrant.

3. The Issues

The main issue in both domestic and foreign national security electronic surveillance cases is the right and need of the Government to obtain intelligence information in cases involving (1) U.S. foreign policy considerations; (2) threats to our security as a nation from without; and (3) threats to the tranquility and safety of U.S. society from within, versus 4th Amendment rights and the right to privacy.

The specific issues with regard to domestic cases are: (1) Is the threat to the safety and tranquility of U.S. society posed by certain domestic groups of such magnitude to justify electronic surveillance as an intelligence-gathering device to be used against them? (2) If so, is the threat of national, i.e., Federal dimensions, or is the threat primarily to local or regional interests? (3) If this coverage is needed, has Keith presented obstacles; and if so, how can they be overcome? (4) If enabling legislation is the answer to (3), should the electronic surveillance intelligence-gathering authority be given to the Federal or local government, or both as in Title III? What should enabling legislation entail? (5) Is there any option other than enabling legislation?

The primary issue with regard to foreign cases is: Is Presidentially approved, warrantless electronic surveillance in cases involving a "significant connection" with a foreign power constitutional, or "legal." On the resolution of this issue hangs all else in these cases, viz., admissibility of electronic surveillance evidence in court; degree of disclosure to be required in criminal proceedings; and if held illegal, the judicial review procedure to be proposed in order to continue such surveillances, if they are deemed of sufficient importance to continue them in the face of additional risks inherent in a judicial review.

4. Options for Future Policy

The chief issue for future policy consideration is, will the Department support the argument for the need for intelligence electronic surveillance? In foreign cases? In domestic cases?

If so, then the discussion centers on Department policy regarding the means to effect such surveillances.

Foreign national security cases:

Hopefully, the examples of intelligence value set out in the classified appendix of the attached study carried the argument that electronic surveillance in these cases is highly desirable, if not essential, to our counterintelligence efforts and to our foreign policy considerations. Even without specific examples of value derived from these surveillances, the bottom line argument is that electronic surveillance of foreign intelligence services is at least an inconvenience to them, and makes it more difficult for them to carry on their intelligence activities.

The present policy is to support the legality of the President's authority to conduct this surveillance without warrant, to restrict disclosure of the existence or contents of such surveillances, and presumably, to support the argument that any evidence obtained from such surveillance is admissible in a criminal proceeding.

These issues are discussed very well in the Government's petition for rehearing in U.S. v. Ivanov, attached. Also attached is a classified memorandum summarizing the case up to the petition for rehearing.

Until these issues are resolved, consideration of future policy options would be speculative, and may be unnecessary.

Domestic national security cases:

The FBI Intelligence Division feels there is something of intelligence value to be gained from electronic surveillance coverage of some domestic groups. The opinion of former Assistant Attorney General Olson and Deputy Assistant Attorney General Maroney is that there is no need to utilize this type of electronic surveillance and therefore no need to seek enabling legislation at this time, but that if a need does appear the Government will seek such legislation.

The examples set out in the classified appendix to the attached study show the value that can be derived from intelligence coverage of domestic groups. Is information of this type worth the financial manpower expenditure (which is considerable) to obtain it? Is it worth the task of trying to write enabling legislation (providing for judicial review to satisfy Keith) to allow intelligence electronic surveillance in domestic cases? Is it worth the fearsome battle such a bill would cause in Congress? Does such a bill have a chance at this time, or in the foreseeable future?

Upon reconsideration, the blanket pessimisim on chance for passage of such legislation in the attached study seems extreme. It is believed that the Department and the FBI should attempt to write a bill, with as restrictive judicial control as necessary in order to obtain Congressional approval, to permit intelligence electronic surveillance against domestic groups which threaten death or "extensive damage" (to be either defined or specifically enumerated, e.g., plane hijackings, bombings,

murders of officials or police, etc). A restrictive enumeration of specific acts which if threatened, but not to the extent of producing probable cause, would justify appeal to a court or magistrate for an intelligence electronic surveillance, might have some chance for passage. The judicial review would satisfy the 4th Amendment requirements; and a specific list of acts limited to major contemporary concerns would allow for item deletions and additions as conditions change. Such a specific section to the bill would allow for not only effective judicial review, but also effective Congressional review.

Such a bill, in our opinion, should avoid mention of controversial and difficult to define terms such as "domestic national security," "internal security," "threats to the existence or structure of the Government," and all terms with political connotations; and should use terms emphasizing the aim of preventing serious criminal acts which threaten life and limb (without mention of motivation, whether political or otherwise).

In our opinion, such a bill should make intelligence electronic surveillance available to both local and Federal agencies. It is envisioned that such a bill would cover purely local groups which, e.g., threaten murder of local police officers, and groups national in scope, e.g., Black Liberation Army.

As discussed in the attached study, Title III and FRCrP 41 do not seem to offer practical alternatives for this type of coverage.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

v. : No. 72-1741

IGOR A. IVANOV, :

Appellant. :

PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

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IGOR A. IVANOV, :

Appellant. :

PETITION FOR REHEARING

The United States petitions the Court to grant a rehearing in this case and modify its opinion and decision. We limit our request to that portion of the decision which relates to the disclosure to defendant of the logs of electronic surveillance initiated with the express authorization of the Attorney General to obtain foreign intelligence information.

In our view, the decision, insofar as it relates to said disclosure, is not in accord with the Supreme Court's prior mandate in this case and has misapprehended relevant precedent relating to disclosure in instances where there has been no violation of Fourth Amendment rights.

STATEMENT OF THE CASE

In its initial decision in this case, the Court affirmed appellant's conviction of conspiracy to violate the espionage statute, 18 U.S.C. § 794(a) and (c). 384 F.2d 554 (1967). While appellant's certiorari petition was pending, the Solicitor General informed the Supreme Court that appellant had been electronically overheard. The Supreme Court considered the effect of such disclosures in this case and in one arising from the Tenth Circuit in Alderman v. United States, 394 U.S. 165 (1969) and remanded both cases to the respective District Courts:

> "for a hearing, findings, and conclusions (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance." 394 U.S. 186 (emphasis added)

The Supreme Court, in elaborating on its instructions, repeated again that the scope of inquiry was to be confined to possible Fourth Amendment violations. It ordered that:

> The District Court should confine the evidence presented by both sides to that which is material to the question of the possible violation of a petitioner's Fourth Amendment rights, to the content of conversations illegally overheard by surveillance which violated those rights and to the relevance of such conversations to the petitioner's subsequent conviction. The District Court will make such findings of fact on those questions as may be appropriate

> in light of the further evidence and of the entire existing record. If the District Court decides on the basis of such findings (1) that there was electronic surveillance with respect to one or more petitioners but not any which violated the Fourth Amendment, or (2) that although there was a surveillance in violation of one or more of the petitioner's Fourth Amendment rights, the conviction of such petitioner was not tainted by the use of evidence so obtained, it will enter new final judgments of conviction based on the existing record as supplemented by its further findings, thereby preserving to all affected parties the right to seek further appropriate appellate review. 394 U.S. 186-87 (emphasis added)

On remand, the Government conceded for purposes of the hearing that one set of electronic surveillances, contained in logs designated 4001-S* and 4002-S*, violated appellant's Fourth Amendment rights and voluntarily disclosed those logs to him (1095a). A taint hearing resulted in a finding by the District Court that appellant's conviction was not tainted from these logs and that finding was unanimously upheld by this Court. (Opinion pp. 12, 22).

The Government further disclosed that there existed a second set of logs, designated Government Exhibits A-1, A-2 and A-3. The Government represented that these logs were duly obtained by the Department of Justice in the exercise of the President's right to obtain foreign intelligence information and that,

although certain conversations of Ivanov were overheard, he was not the subject of the electronic surveillance reflected on those logs (14a, 20a). These logs were submitted to the Court for an in camera inspection, along with an affidavit of Attorney General Mitchell, designated Government Exhibit B. A copy of the affidavit was made available to Ivanov. Upon review of these materials, the District Court made the following findings:

1. that the surveillances here under attack were expressly authorized by the Attorney General shown in the exhibits;

2. that they were not made pursuant to a surveillance of the defendant Ivanov;

3. that said surveillances were directed against certain premises in which Ivanov had no interest, the description and location of said premises being set forth in the exhibits;

4. that said surveillances were conducted and maintained solely for the purpose of gathering foreign intelligence information;

5. that it was reasonable and necessary to authorize such surveillances in the national interest; and

6. that it would prejudice the national interest to make a disclosure of the particular facts concerning said surveillances. (20a)

Based on these findings, the Court concluded that

disclosure need not be made because the surveillances were lawful and not in violation of any Fourth Amendment rights of Ivanov (20a). Although not directed to do so by the Supreme Court's mandate, the Court also concluded that disclosure was not required by reason of the provisions of the Communications Act of 1934, 47 U.S.C. § 605 because that Act was inapplicable to the situation disclosed by the withheld material (23a).

On appeal, this Court reversed the District Court holding in a split decision (per Aldisert, J.) that 47 U.S.C. § 605 barred "any use of the intercepted material beyond the confines of the Executive branch" (Opinion pp. 20-21), that, in the present procedural posture of the case, "it must be assumed that the conversations of Ivanov overheard on the wiretaps led to evidence used at this trial" (Opinion p. 13) and, therefore that appellant is entitled "to disclosure or an evidentiary hearing" (Opinion p. 21). In reaching this conclusion, the majority accepted, for purposes of analysis, the proposition that the interceptions were a lawful exercise of the Presidential power vested by Article II of the Constitution. (Opinion p. 15)

The majority did not even consider the question of whether Ivanov's Fourth Amendment rights might have been violated. In dissent, Judge Adams concluded both that the proposition accepted by the majority for purposes of analysis was, in fact, correct and that Ivanov's Fourth Amendment rights were not violated

As the case presently stands, therefore, there has been no determination of the issue which the Supreme Court specifically directed to be determined and disclosure is being ordered on a misapprehension of the legal necessity for such disclosure.

ARGUMENT

POINT I

ASSUMING THE CORRECTNESS OF THE COURT'S CONSTRUCTION OF 47 U.S.C. § 605, APPELLANT IS NOT ENTITLED TO THE DISCLOSURE OF THE SURVEILLANCE LOGS OR TO AN EVIDENTIARY HEARING WITH RESPECT THERETO

In remanding this case the United States Supreme Court was very careful and very specific as to the scope of its mandate. It ordered the District Court to determine whether or not there has been any electronic surveillance which violated Appellant's Fourth Amendment rights. It did not ask the District Court to consider whether or not there may have been a violation of § 605 or any other federal statute. It is in this context that the Court's language as to disclosure must be understood because there exists no precedent which requires the United States to turn over the logs of a foreign intelligence surveillance where such surveillance has not violated any Fourth Amendment rights of a defendant.

The necessity for the disclosure of the records of electronic surveillances only arises where such disclosure is necessary to protect a defendant's Fourth Amendment rights. Alderman v. United States, 394 U.S. 165, 182-85 (1969); Teglia-netti v. United States, 394 U.S. 316, 317 (1969); see also the con-curring opinion of Stewart, J., in Giordano v. United States, 394 U.S. 310 (1967), the opinions of Douglas, J., in granting c-

stay in Russo v. Byrne, U.S. , 34 L. Ed. 30 (1972) and dissenting from the denial of a petition for certiorari in the same case, 409 U.S. 1013 (1972).

As stated by the Court in Taglianetti:

> Nothing in Alderman v. United States, Ivanov v United States, or Butenko v. United States, ante, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. On the contrary, an adversary proceeding and disclosure were required in those cases, not for lack of confidence in the integrity of government counsel or the trial judge, but only because the in camera procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights. 394 U.S. at 317 (Emphasis added)

As stated by Mr. Justice Stewart in Giordano:

> As we made explicit in Alderman, Butenko, and Ivanov, the requirement that certain products of governmental electronic surveillance be turned over to defense counsel was expressly limited to situations where the surveillance had violated the Fourth Amendment. 394 U.S. 310, 313 (Emphasis added)

In Alderman, the Court concluded that although in camera procedures were sufficient to vindicate statutory rights, such as those under the Jencks Act and certain due process rights, such as the right to the disclosure of the identity of an informer (384 U.S. at 182-83, f.n. 14), such procedures "are unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands" in those circumstances where there exist "a large volume of factual materials". 384 U.S. 183-84.

Thus, Alderman cannot be read to require disclosure where there has been no violation of Fourth Amendment rights. Indeed, even in cases involving a possible violation of Fourth Amendment rights, Alderman can be read as not requiring disclosure

where there exist compelling reasons for nondisclosure and the factual materials involved are neither voluminous nor require complex judgments. United States v. Lemonakis, F.2d , No. 71-1745, D.C. Ct. of App. June 29, 1973, pp. 35-46.

In the Lemonakis case, the Court, like the majority of the Court in the case at bar, pretermitted the constitutional issues involved in the executive authorization of foreign intelligence gathering by means of electronic surveillance and held, based on its own in camera examination of the logs in question, that that material contained therein had no relevance to the issues or evidence in appellant's trial and that, because of the national interest involved in the revelation of logs of foreign intelligence operations, the logs need not be revealed. Id.

If the teachings of both Alderman and Lemonakis be applied to the case at bar in its present posture, it is clear that the logs in question need not be disclosed for two reasons. First, as the Court has assumed, there has been no Fourth Amendment violation. Second, as the Court can readily ascertain from its own examination of Government Exhibits A-1, A-2 and A-3, the logs are not voluminous and the task of evaluating them is neither burdensome nor complex. 1/

1/ In this connection, it should be noted that the Supreme Court has not yet directly addressed the question of whether disclosure of logs of foreign intelligence surveillances is required. In United States v. United States District Court, 407 U.S. 297, 321, f.n. 21 (1972), in which the Court expressly reserved decision as to the constitutional issues involved in foreign intelligence

(cont'd)

Therefore there is no legal justification for disclosing sensitive logs of a foreign intelligence surveillance of a spy for a foreign power. To do so would not only be inconsistent with the narrowly and specifically drawn mandate of the Supreme Court in this case but would, in addition, make a mockery of the assumed conclusion by this Court that the surveillance itself was lawful. The procedural question of whether and under what circumstances disclosure should be made is fully as sensitive and delicate as the constitutional question of the presidential power to conduct the surveillance, and procedures ought not to be employed which would emasculate the constitutional power.

Surely the considerations which compel the conclusion that the President is vested under Article II of the Constitution of the United States to conduct foreign intelligence operations by means of electronic surveillance equally compel the conclusion

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1/ (cont'd)
surveillances, the Court also found it "unnecessary at [that] time and on the facts of [that] case" to reexamine "the basis and the scope of the ... decision in Alderman" insofar as that decision related to the disclosure of the records of surveillances where Fourth Amendment rights had been violated. In denying certiorari in Russo v. Byrne, 409 U.S. 1013 (1972), the Court let stand a Ninth Circuit decision which upheld an in camera determination by the Trial Court that the records of an arguably foreign intelligence electronic overhearing of defendant's counsel were not relevant to any issue in defendant's trial. Dissent from denial of certiorari, Ibid. See also opinion per Mr. Justice Douglas granting a stay of the Ninth Circuit's ruling. U.S. , 34 L.Ed. 30 (1972).

that the results of such surveillance should not be disclosed where no Fourth Amendment rights of any individual have been violated because to do otherwise would reveal information which would make the surveillance valueless in the future.

To conclude otherwise would be to put the Government to an untenable election. It would have to elect between disclosure of a vital and proper intelligence operation, on the one hand, and prosecution of a criminal who may have blundered or even intruded himself on the other. Such a construction would even give to a criminal the power to prevent his prosecution by simply taking steps to ensure that a conversation of his is overheard during the course of a foreign intelligence surveillance.

POINT II

PRIOR JUDICIAL CONSTRUCTIONS OF 47 U.S.C. § 605 REINFORCE THE CONCLUSION THAT DISCLOSURE OF THE SURVEILLANCE LOGS IS NOT REQUIRED IN THIS CASE

The correctness of the conclusion that disclosure is inappropriate in circumstances where there has been no Fourth Amendment violation is further reinforced by the considerations which underlie prior judicial constructions of 47 U.S.C. § 605. In those cases, courts have made it clear that wiretap evidence and its fruits are to be suppressed only in those instances where the wiretap was utilized by law enforcement officers improperly to obtain evidence.

As stated by the United States Court of Appeals for the Second Circuit in United States v. Gris, 247 F.2d 860, 864 (1957):

> Wiretap evidence is excluded by the federal courts in order to discourage persons from undertaking the proscribed activities in an effort to obtain evidence for use in those courts. Where exclusion would not serve this purpose, the evidence is admitted.

If the Government was acting lawfully in conducting the surveillance, there is no illegal conduct to deter and hence no reason for applying the remedy of suppression in this case. If there is no reason for suppressing, there is no reason for either disclosure or for an evidentiary hearing.

It is clear beyond cavil, that, in construing § 605 to bar either testimony as to the contents of an intercepted conversation or the derivative use of an intercepted conversation to obtain evidence, the Supreme Court did so, solely to deter law enforcement personnel from utilizing wiretapping as a means of obtaining evidence. Nardone v. United States, 302 U.S. 389 (1937); Nardone v. United States, 308 U.S. 338 (1939) (Nardone II).

In Nardone I, the Supreme Court held that the Communications Act of 1934 barred testimony by federal agents as to the contents of messages intercepted by wiretaps by application of the principle of statutory construction "that the sovereign is embraced by general words of a statute intended to prevent injury and wrong". 302 U.S. at 384. The "injury and wrong" which the Court perceived

and it speculated that, in enacting § 605, "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with personal liberty". Id. at 383.

In Nardone II, the Court, to further the policy expressed in Nardone I, held that where "a substantial portion of the case" against a defendant is proven by him to have been developed by means of illicit wire-tapping, his conviction cannot be permitted to stand. In so holding, the Court rejected the argument that § 605 only barred testimony as to the content of an intercepted message stating that:

> Such a reading of § 605 would largely stultify the policy which compelled our decision in Nardone v. United States, supra. That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because "inconsistent with ethical standards and destructive of personal liberty." 302 U.S. 379, 383. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty." 308 U.S. at 340

In other words, the linchpin of analysis in both Nardone decisions is the perceived Congressional rejection of wiretapping

for the purposes of obtaining evidence -- wiretapping which was in the Court's view "illicit". Divulgence was held to include use in obtaining evidence and was comprehended by the statute solely because the Court determined that such a construction was necessary to discourage officers from wiretapping to obtain evidence.

In the case at bar, the wiretap was not for the purposes of obtaining evidence but rather for the purpose of obtaining foreign intelligence information. The "broad considerations of morality and public well-being" deemed relevant to the former purpose are not mutatis mutandis translatable to the latter purpose.[2]

If those considerations are not so translatable then the exclusionary rule forged by the Court in Nardone II is not so translatable. As the Court makes clear, the derivative use of intercepted messages is prohibited not because of the statutory language but solely to preclude illicit wiretapping.[3]

If, as the Court is willing to assume, the wiretap in issue in this case was not illicit but was, instead, a proper exercise of Presidential power pursuant to Article II of the Constitut

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2/ For this reason, we urge the Court to reconsider those decisi cited at pages 44-47 of our main brief and at pages 22-29 of Judge Adams' dissenting opinion which hold that 47 U.S.C. § 605 has no applicability to the type of wiretapping in issue here. See also United States v. Lemonakis, supra at pp. 35-40.

3/ In this respect, the basic justification for the rule is thus identical to that with respect to the Fourth Amendment exclusionary rule -- the belief that it is the only effective deterrent to police misconduct. Terry v. Ohio, 392 U.S. 1, 12 (1968); Mapp v. Ohio, 367 U.S. 643, 655 (1961); Linkletter v. Walker, 381 U.S. 618, 636 (1965).

there exists no rational purpose for holding an evidentiary hearing to determine whether the wiretap has been derivatively used against Ivanov.[4/]

None of the cases cited by the majority are authority for the proposition that such a hearing is required in cases where the interception was not illicit. Benanti v. United States, 355 U.S. 96 (1957), does not carry the absolutist implications which the majority reads into it. (Opinion, p. 14) The Benanti decision simply holds that the provisions of § 605 cannot be superseded by state law and that state agents as well as federal agents are included within its coverage. In the course of its opinion, the Court made clear that it was dealing with the kind of wiretapping, it had earlier characterized as "illicit" in both Nardone decisions, i.e., wiretapping for the purposes of obtaining evidence. The opinion does not suggest that a divulgence of a lawful interception would constitute a violation of § 605. Moreover, it expressly refused to reach the issue reached by the majority in this case -- i.e., whether both interception and divulgence are necessary elements of a § 605 violation. 355 U.S. at 100, f.n. 5. Thus, all that Benanti stands for is the

4/ In advancing this contention, we do not mean to be understood as implicitly stating that there was, in fact, any such derivative use much less that "a substantial portion of the case" against Ivanov was the fruit of the wiretap in issue. As either this Court or the District Court can readily determine in camera, the wiretap materials are wholly irrelevant to the issues and evidence in this case.

proposition that §605 applies uniformly to state and federal officers.

Indeed, the very same day the Court decided Benanti, it also decided in Rathbun v. United States, 355 U.S. 107 (1957), that not every interception is an "interception as Congress intended the word to be used" in 47 U.S.C. § 605, stating that "(e)very statute must be interpreted in the light of reason and common understanding to reach the results intended." 355 U.S. at 109. In that case, over a strong dissent, the Court held that where one party to a telephone conversation gives the police authority to listen in on an extension, there has been no interception "as Congress intended the word to be used." Id. (Emphasis added) See also United States v. Sugden, 226 F.2d 281 (9th Cir. 1955), affd per curiam 351 U.S. 916 (1956) (holding it would defeat the policy of § 605 to bar testimony as to the content of an intercepted illegal private broadcast).

Therefore, neither Benanti nor United States v. Coplon, 185 F.2d 629 (2d Cir., 1950), also relied upon by the majority require a hearing in this case because neither case addressed the legality of the wiretaps in question "Instead", as Judge Adams correctly notes with specific reference to Coplon, "the court merely assumed that the surveillance itself was illegal under section 605." Id. Such an assumption is not proper under the facts of this case and, indeed, is flatly inconsistent with the assumption of legality made by the majority.

CONCLUSION

The Court should amend its decision to require that disclosure of the surveillance logs not be made.

Respectfully submitted,

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United States Attorney

On the Brief

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UNITED STATES GOVERNMENT

Memorandum

1 - Mr. E. S. Miller
1 - Mr. [illegible] A. Brannigan
1 - Mr. J. A. Mintz

Mr. Felt
Mr. Baker
Mr. Cleveland
Mr. Conrad
Mr. Gebhardt
Mr. Jenkins
Mr. Marshall
Mr. Miller, E.S.
Mr. Soyars
Mr. Thompson
Mr. Walters
Tele. Room
Mr. Baise
Mr. Barnes
Mr. Bowers
Mr. Herington
Mr. Conny
Mr. Mintz
Mr. Eardley
Mrs. Hogan

TO : Mr. E. S. Miller

DATE: 7/11/73

1 - Mr. T. J. Smith

FROM : T. J. Smith

1 - Mr. J. F. Miller

SUBJECT: U. S. VS. JOHN WILLIAM BUTENKO AND IGOR A. IVANOV, IGOR A. IVANOV, APPELLANT

On June 21, 1973, the U. S. Court of Appeals for the Third Circuit reversed the conviction of Ivanov for violations of 18 U.S.C. 794 (a) and (c), and 18 U.S.C. 951, and the court remanded the case for further proceedings.

BACKGROUND

Ivanov, an Amtorg Trading Corporation chauffeur, and Butenko, a U. S. citizen, were originally convicted of a violation of 18 U.S.C. 794 (a) and (c) (espionage) and a conspiracy violation of 18 U.S.C. 951 (by causing Butenko to act as an agent of the Soviet Union without prior notification to the U. S. Secretary of State).

On appeal the Supreme Court found the electronic surveillance issue in their cases was "nearly identical" to the electronic surveillance issue in Alderman et al v. U. S., and considered it in conjunction with that case (394 U.S. 165). (Alderman had been convicted of conspiracy to transmit murderous threats in interstate commerce.)

In Alderman the Supreme Court, noting that no evidence or evidence obtained from leads which were obtained from an illegal electronic surveillance i.e., one which violated a defendant's 4th Amendment rights, could be utilized in a criminal trial, disregarded the Government's contention that a trial court's in camera inspection of electronic surveillance records was sufficient, and held that the defendant was the only one in a position to adequitely knowingly review such records to determine if the case against him was built on electronic surveillance. Consequently the defendant was to be given access in a discovery hearing to illegal electronic surveillance records of interceptions of his conversations.

Justice Harlan, concurring in part and dissenting in part, distinguished between routine criminal cases and foreign intelligence-espionage criminal cases, arguing that while full disclosure to the defendant was acceptable in the

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Memorandum to Mr. E. S. Miller
Re: U. S. vs. John William Butenko and
Igor A. Ivanov, Igor A. Ivanov,
Appellant

former, it was not in the latter and might prejudice on-going intelligence operations vital to the national security. In these cases, he argued on behalf of disclosure to the defendant of only those portions which the trial court in camera found "arguably relevant" to the Government's case against the defendant.

The Ivanov and Butenko cases were remanded to the District Court, 1) to determine whether there was electronic surveillance which violated either defendant's 4th Amendment rights and 2) if so, to determine whether any of the intercepted conversations were relevant to his conviction. The Supreme Court stated that if the District Court found 1) that there was electronic surveillance but it did not violate the defendant's 4th Amendment rights, or 2) there was electronic surveillance which did violate the defendant's 4th Amendment rights but his conviction was not tainted by evidence obtained from that surveillance, the District Court should enter new judgements of conviction based on the existing record, along with its further findings, thus preserving the defendant's right to further appeal.

On remand in Ivanov the case revolved around two sets of FBI electronic surveillances on which Ivanov was monitored during 1963: 1) 2 microphones at the homes of Ivanov and Karatsuba, a KGB officer and neighbor of Ivanov (for the sake of argument, the District Court held them both to be directed at Ivanov), and 2) a wiretap on the Soviet Mission to the United Nations, and a wiretap and a microphone at Amtorg.

The residence microphones, which at that time Department procedures did not require to be authorized by the Attorney General, were conceded by the Government to be illegal, thus falling within the disclosure requirement of Alderman. The District Court held that the Government, on remand, made full disclosure on these microphones, after some argument, and ruled that the defendant had not shown, and the Government had carried its burden to refute, that Ivanov's case was built on evidence from these microphones.

The more important issues related to the other set of surveillances. The Government contended that those surveillances were duly authorized under the President's national security

powers to obtain foreign intelligence, thus were legal and therefore it was not required to disclose the logs to the defense or to participate in an evidentiary hearing regarding these surveillances. The District Court, by reference to its finding on remand in Butenko (318 F. Supp. 66), agreed, finding that these surveillances and the Government's use of the logs from them did not violate Section 605 of the Communications Act of 1934 or the 4th Amendment, and upheld the Government's refusal to disclose or participate in an evidentiary hearing.

The District Court in Butenko found that 4th Amendment rights are not absolute, that there are exceptions to the warrant requirement, and that the President's responsibility for foreign affairs and national security do not preclude him from authorizing a warrantless foreign intelligence electronic surveillance. It also found that, since Title III of the Omnibus Crime Control and Safe Streets Act of 1968, specifically 18 U.S.C. 2511 (3), clearly showed Congress' inclination not to limit or interfere with the President's power of obtaining foreign intelligence by electronic surveillance, Section 605 also must not have intended to limit this power.

OPINION OF THE THIRD CIRCUIT COURT OF APPEALS, JUNE 21, 1973.

The Court of Appeals makes it clear at the outset that it is not considering Title III since the interceptions in issue occured prior to passage of that Act. Both the Government and the appellant agreed that the governing statute at the time of the interceptions in issue was Section 605 of the Communications Act of 1934.

The Court of Appeals found no error in the District Court's ruling that the Government had given full disclosure on the concededly illegal microphones, and that these did not taint Ivanov's conviction.

The Court of Appeals cites Alderman for the proposition that the question of whether or not the Government's evidence was obtained from electronic surveillance could be resolved only by an evidentiary hearing, and because the Government would not participate in a hearing on the second set of surveillances the Court of Appeals felt it had to assume "in the present posture of this case" that the Government had intercepted com-

munications and utilized the results from them in the criminal proceedings against Ivanov. (The District Court made an in camera review of the second set of surveillances, but never made a written finding that none of the Government's case was based on information from these surveillances; he only found in camera that they did not violate the 4th Amendment or Section 605, and therefore could not "...properly be considered on the taint issue" (342 F. Supp. at 931).)

(Note that Alderman ruled only on "illegal" electronic surveillances, and instructed the District Court that if, on remand, it found the defendant's 4th Amendment rights had not been violated it should reimpose judgment of conviction. The Supreme Court did not discuss the effect of Section 605 on the cases before it in Alderman.)

The Court of Appeals states that it is not defining the parameters of the President's national security surveillance powers under Section 605, but that the limited issue before it, with respect to the second surveillance is: assuming a constitutional power of the President to have ordered electronic surveillance of foreign agents in 1963, was it permissable for the Government, under Section 605, to utilize the products of such surveillance in a criminal prosecution.

The Court of Appeals then decides the case on this evidentiary issue and thus avoids the larger 4th Amendment issue of whether or not the President has the power to authorize foreign intelligence warrantless electronic surveillances.

The Court of Appeals recognizes that the President has constitutional powers to defend against foreign intelligence activities and to obtain foreign intelligence, and assumes, solely for the sake of argument, that he had the constitutional power to authorize these surveillances; however, the Court of Appeals draws the distinction, that was drawn by the Government for years, between the President's power to authorize such surveillances and the power of the Congress and Court to make an evidentiary rule excluding evidence obtained from such surveillances in criminal proceedings.

The Court of Appeals holds that the Supreme Court opinion in U. S. vs. Nardone (308 U.S. 338), interperting Section 605 as being a complete bar to the introduction of electronic surveillance results into evidence in a Federal criminal proceeding, was governing.

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Memorandum to M[illegible] E. S. Miller
Re: U. S. vs. J[illegible]n William Butenko and
Igor A. Ivanov, I[illegible]. A. Ivanov,
Appellant

Section 605 states that "... no person not being authorized by the sender shall intercept any communication and divulge...the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The Supreme Court in Nardone held that "no person" encompassed federal agents, and "divulge...to any person" barred testimony in court.

This Court accepts the interpretation that what Section 605 prohibits is the interception and divulging, i.e., that both elements must be present to incur the prohibition of Section 605. Thus, the President is not violating Section 605 if he only intercepts the conversation, but he is prohibited from also divulging the contents of the interception in court.

Since this Court assumed that intercepted electronic surveillance information was used in the trial and therefore was divulged in violation of Section 605, Ivanov's conviction was reversed and the case remanded for further proceedings, viz., to conduct an evidentiary hearing to determine if in fact any of the Government's case was built on electronic surveillance information.

In further defining "divulging" the Court of Appeals accepts the argument that, the President himself will not conduct the interceptions, but that agents of the Executive Branch, acting as his representatives will, and that many others within the Executive Branch can also be his representatives to receive the results of such a surveillance, and that therefore it is not inconsistent with Section 605 to consider the Executive Branch (or at least all persons within the Executive Branch with a right to such information) as "a person", so that disclosure within the Executive Branch does not violate the Section's prohibition against divulging the contents of such interceptions.)

MINORITY OPINION, THIRD CIRCUIT COURT OF APPEALS, JUNE 27, 1973

Judge Adams, disagrees that Section 605 on its own, or as interpreted by Nardone, requires the exclusion of evidence obtained from a Presidentially approved warrantless foreign intelligence electronic surveillance in a Federal criminal proceeding.

He argues that Section 605 itself, its legislative history, and subsequent case law do not indicate that Section 605 intended to prohibit the President from utilizing electronic surveillance to gather foreign intelligence or to use the information gathered in cases involving a defendant's foreign intelligence gathering. He traces the legislative history of the Communications Act and finds its main purpose was to establish a Communications Commission and that it extended to wire communications almost the identical provisions of Section 27 of the Radio Act of 1927, which was thought neither to apply to federal officers nor to bar testimony relating to the contents of radio messages intercepted by them. Judge Adams notes there was no Congressional debate over the meaning of the provisions of Section 605, implying that if it had been intended to limit the President's foreign intelligence powers, there probably would have been debate.

Similarly, Judge Adams finds that in response to the Government's argument in Nardone that "a construction be given Section 605 which would exclude Federal agents since it is improbable Congress intended to ... impede ... the detection and punishment of crime.", the Supreme Court concluded "that the question is one of policy." Judge Adams argues that where the Supreme Court might, as a matter of policy, find that Congress intended to exclude electronic surveillance evidence in run-of-the-mill domestic criminal cases, there is no evidence it would extend the exclusion to cases involving the gathering of foreign intelligence. Additionally, this surveillance was not aimed solely at securing evidence to convict a person of crime, but at gathering foreign intelligence deemed essential to the security of the U. S. He thus concludes that the Nardone interpretation of Section 605 is not applicable to this kind of case, and argues that in view of the breadth of the President's authority in foreign affairs, Section 605 should be interpreted to limit that power only if Congress' intent to do so is clearly manifest, which he argues it is not.

Judge Adams then addresses the constitutional question avoided by the majority, viz., does the 4th Amendment allow the President to authorize warrantless electronic surveillances in foreign intelligence cases. He concludes that it does. He argues that constitutional rights are not absolute; they must be weighed against competing rights; and the 4th Amendment prohibits only unreasonable searches and seizures.

Memorandum to Mr. E. S. Miller
Re: U. S. vs. John William Butenko and
Igor A. Ivanov, Igor A. Ivanov,
Appellant

Judge Adams finds that the constitutional responsibility to conduct foreign affairs is vested in the President; that the gathering of foreign intelligence and the protecting against foreign intelligence activities is concerned with the very existence of the nation; that as a result, the President has great latitude in this area; and that to require a judicial warrant prior to his use of electronic surveillance presumes that a warrant could be denied, thus interjecting the courts into foreign affairs decisions, in effect overruling the President in a field where he has the responsibility and they do not.

Thus concluding that the 4th Amendment does not and the courts cannot, prohibit the President from utilizing electronic surveillance in foreign affairs, Judge Adams argues that a defendant's 4th Amendment rights can still be reconciled with the President's electronic surveillance power by a judicial post surveillance review. If the court finds that the surveillance is related to the conduct of foreign affairs it would, ipso facto, be reasonable and therefore not in violation of the 4th Amendment. If unrelated, it would be unreasonable, and its results excluded from a criminal trial.

Memorandum to Mr. E. S. Miller
Re: U. S. vs. John William Butenko and
Igor A. Ivanov, Igor A. Ivanov,
Appellant

ANALYSIS

As previously noted Alderman dealt exclusively with illegal electronic surveillances, i.e., surveillances in violation of a defendant's 4th Amendment rights. It did not distinguish between "routine" criminal cases and foreign intelligence-espionage cases when it required that full disclosure of all interceptions of the defendant be made to him so that he, in an adversary proceeding, might determine if the Government's case against him was "tainted." Justice Harlan, objecting to full disclosure in foreign intelligence-espionage cases, and on behalf of disclosure only of portions deemed "arguably relevant" to the Government's case by the trial court after an in camera review, did not raise the issue of "legal" vs. "illegal" electronic surveillance, so presumably he was also talking about, and intending to limit disclosure even on surveillances which violated the 4th Amendment.

The Third Circuit Court of Appeals assumes the Ivanov surveillances in issue were legal, but still cites Alderman as requiring an evidentiary hearing, and without that hearing feels it must conclude that Ivanov's conviction was based on electronic surveillance evidence, introduction of which must be excluded under Section 605.

At the conclusion of Alderman, when remanding Ivanov, the Supreme Court instructed the District Court that if it found the surveillance in question did not violate the defendant's 4th Amendment rights it should reimpose judgments of conviction. The Supreme Court did not consider the effect of Section 605 on the cases before it in Alderman.

The case has been remanded for further proceedings, apparently an evidentiary hearing on the second set of surveillances. The Government can opt to save Ivanov's conviction by participating in such a hearing, since none of his case was actually built on surveillance information; however this would require disclosure to Ivanov of his intercepted conversation at the Mission and Amtorg, a disclosure concession we don't want to have to make because of the impact it would have on diplomatic relations, ongoing counterintelligence operations, and possibily on future prosecutions. Additionally, the salvaging of Ivanov's conviction falls far short of the original purpose of continuing the appeals in this case, viz., to obtain

a Supreme Court ruling on the legality of Presidential warrantless foreign intelligence electronic surveillances. Consequently, the Government probably will either ask for dismissal of the case or appeal the Third Circuit's ruling to the Supreme Court.

If Ivanov is appealed the Supreme Court will face three possible issues, the 4th Amendment issue of the legality of warrantless foreign intelligence electronic surveillance, the disclosure issue, and the Section 605 evidentiary issue. The Court could seize onto the Section 605 evidentiary issue, not considered by it in Alderman, to dispose of the case without reaching the 4th Amendment or disclosure questions; or it could stand on its instructions to the District Court and rule on the District Court's remand finding that the surveillance did not violate the 4th Amendment.

If the Supreme Court found the surveillance illegal, presumably Alderman's requirement of full disclosure would apply, and the case would be remanded for an evidentiary hearing to exclude any electronic surveillance evidence, and the Section 605 issue would be avoided.

If the Court found the surveillances legal it could:

1) extend Alderman and require full disclosure of all interceptions even if legal, possibly arguing something to the effect that Congress in Title III has imposed the requirement of full disclosure in those cases, and that a similar safeguard should be imposed on Presidential surveillances;

2) allow in camera review and require disclosure limited to elements "arguably relevant" to the Government's case;

3) not require disclosure at all if the Government proved in camera that the surveillances were related to foreign intelligence, possibly arguing that since the defendant's rights against unreasonable search and seizure were not violated, he has not been injured, the Government's case is not illegally "tainted," therefore, disclosure is not necessary, and, additionally, disclosure would be very damaging to national security.

Even if the surveillances were found legal, however, the Section 605 evidentiary issue would remain. A Hearing or an in camera review would have to determine whether any of the Government's case was built on electronic surveillance, and, if so, the Section 605 evidentiary bar decided with respect to foreign intelligence-espionage cases. Since the Ivanov case is not built o

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electronic surveillance evidence, presumably the convictions would be reimposed; however, supposedly the Supreme Court does not know this, and it would conclude that if the District Court found electronic surveillance evidence to be involved, it would be bound by the Third Circuit's finding that the Section 605 bar did apply, and the case would find its way back to the Supreme Court for a final determination on this point. Thus if the Supreme Court chose to rule on the 4th Amendment issue and found the surveillance legal, it would have to rule on two issues immediately, the 4th Amendment issue and the disclosure issue, and might eventually have to decide the third issue, the Section 605 evidentiary issue; if the Supreme Court affirmed the Court of Appeals, it would have to decide only the Section 605 evidentiary issue.

CONCLUSION

The constitutional issue here is, as was the issue in Nardone, a policy question. Given today's climate and public attitude towards electronic surveillances in general, unchecked Presidential (White House) power, the distinction between use of electronic surveillance for intelligence purposes vs. use for criminal prosecution, and the Supreme Court's tradition of avoiding constitutional issues if it can decide a case on lesser issues, I am inclined to think the Court would grasp the "out" of the Section 605 evidentiary issue, thus leaving the constitutional issue unresolved and allowing Presidentially approved foreign intelligence electronic surveillances to continue for the time being.

The practical result of this of course would be only to reverse the conviction of one man, Ivanov, presently at home in the Soviet Union. This ruling would not preclude post 1968 prosecutions based on foreign intelligence electronic surveillance information, since 2511 (3) presumably expresses Congress' intent to negate the evidentiary effect of Section 605 with respect to such cases: "The contents of any wire or oral communication intercepted by authority of the President in the exercise of the (powers enumerated in the statute, generally relating to foreign intelligence and efforts to unlawfully overthrow or endanger the structure of the Government) may be received in evidence in any trial, hearing or other proceeding only where such interception was reasonable..."

With the Section 605 evidentiary obstacle presumably disposed of by 2511 (3), it would seem that a post 1968 case on facts similar to Ivanov, or preferably one actually built on electronic surveillance information, would be the best vehicle for eventually getting a ruling on the 4th Amendment issue.

ACTION:

For information.

INQUIRY # 3

1 - Mr. Baker
1 - Mr. E. S. Miller
1 - Mr. T. J. Smith

Mr. William D. Ruckelshaus
The Deputy Attorney General - Designate

September 17, 1973

Director, FBI

1 - Mr. Sizoo

SUBSTANTIVE ISSUES REGARDING
THE FUTURE OF THE FBI

F.B.I.

Reference is made to your memorandum to me captioned "Substantive Issues Regarding the Future of the FBI" dated July 20, 1973, enumerating issues on which you desired the Bureau's comments.

Concerning Issue Three in your memorandum, I call your attention to memorandum from me to the Attorney General captioned "Scope of FBI Jurisdiction and Authority in Domestic Intelligence Investigations," dated August 7, 1973, as well as my August 24, 1973, memorandum to you under the same caption.

My August 7, 1973, memorandum proposed an Executive order to define FBI responsiblities concerning Federal statutes relating to national security. Mr. Jack Goldklang, Office of Legal Counsel, Department of Justice, pursuant to his analysis of the proposal in my August 7, 1973, memorandum, requested a copy of Section 87 of our Manual of Instructions concerning Investigation of Subversive Organizations and Individuals, as well as a copy of a study prepared in August, 1972, at the request of former Acting Director L. Patrick Gray, III. These were furnished with my August 24, 1973, memorandum.

Inasmuch as this Bureau's extensive analysis regarding authority for our intelligence gathering was previously furnished for the Department's consideration in August 7 and 24, 1973, memoranda, I assume that your needs to study Issue Three can be met by reference to those communications without additional submissions.

62-2-41112-34

REC-52

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JMS:rlc
(7)

NOTE:

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See memorandum T. J. Smith to Mr. E. S. Miller dated 9/13/73, captioned as above, prepared by JMS:rlc.

70 SEP 21

This document is prepared in response to your request and is not for dissemination outside your Committee. Its use is limited to official proceedings by your Committee and the content may not be disclosed to unauthorized person-nel without the express approval of the FBI.

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JM/T

1 - Mr. Mintz
1 - Mr. Baker

The Attorney General

August 7, 1973

1 - Mr. E. S. Miller
1 - Mr. T. J. Smith

Director, FBI

SCOPE OF FBI JURISDICTION AND AUTHORITY IN DOMESTIC INTELLIGENCE INVESTIGATIONS

Security Jurisdiction

During our meeting on July 26, 1973, you referred to a discussion you had with Senator Charles McC. Mathias, Jr., of Maryland during your confirmation hearings as to the statutory authority of the FBI and the Department of Justice in the field of domestic intelligence investigations. You then asked Mr. William D. Ruckelshaus to work with the FBI in weighing the pros and cons with regard to statutory authority in this area. I mentioned that research was being performed on this subject at the present time and that we would be in touch with Mr. Ruckelshaus with regard to this matter when we have completed the results of our consideration and findings within the FBI.

Actually, a study has been going on in the FBI for more than two years as to the scope of FBI jurisdiction and authority in domestic intelligence investigations. When Mr. L. Patrick Gray, III, was designated as Acting Director of the FBI, he instructed that a position paper be prepared concerning the jurisdiction and authority of the FBI to conduct domestic intelligence investigations. A position paper was prepared which in essence stated that authority of the FBI in this field is based on legislative enactments, even though we may have publicly relied heavily on Presidential directives as the basis for such authority. Mr. Gray ordered an in-depth study made of the position and in August, 1972, a detailed report was furnished to him. The following is a summary of that report.

REC-29 62-66727-1824

Over a period of several months there were a number of public statements questioning authority and jurisdiction of the FBI to conduct domestic intelligence-type investigations, particularly where there is no clear-cut legislative authority apparent. One of the most searching inquiries was contained in a paper presented by Professor John T. Elliff at a two-day conference at Princeton University in October, 1971, sponsored by the Committee for Public Justice.

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TJS:rlc
(8)

AUG 8 1973

SEE NOTE PAGE EIGHT

The Attorney General

A major thrust of Professor Elliff's paper concerned FBI authority derived from legislative enactments as opposed to that derived from Presidential directives, beginning with a directive issued by President Roosevelt in September, 1939. Professor Elliff is of the opinion that the 1939 directive, which was reiterated on three subsequent occasions, was magnified by the FBI from its original purpose to a definitive order to conduct intelligence-type investigations.

Senator Sam J. Ervin, as you know, had been probing into the nature and extent of FBI intelligence-type investigations. Senator Ervin had even announced that he intended to propose legislation to prohibit the FBI from investigating any person without that individual's consent, unless the Government has reason to believe that person has committed a crime or is about to commit a crime. Other Congressmen indicated a similar interest in FBI investigative activities.

Our study revealed that the FBI had declared publicly over a long period of time that its responsibilities in the domestic intelligence field are authorized under legislative enactments, Presidential directives, and instructions of the Attorney General. The Presidential directives are obviously the 1) directive dated September 6, 1939, and reiterated January 8, 1943; July 24, 1950; and December 15, 1953, and 2) Executive Order 10450 dated April 27, 1953 (and amended but not yet implemented by Executive Order 11605 dated July 2, 1971).

In carefully analyzing the language of the first directive, dated September 6, 1939, and considering that the subsequent directives are all hinged on that one, we believe that there is a misconception as to the extent of jurisdiction or authority conveyed to the FBI by these directives. It appears that while the 1939 directive fixed responsibility on the FBI to handle espionage, sabotage, and neutrality matters, it did not convey any authority or jurisdiction which the FBI did not already have from legislative enactments. It is difficult to read into this directive or in any of those which followed any authority to conduct intelligence-type investigations which would or could not be conducted under an umbrella of legislative enactments.

The Attorney General

As a matter of historical fact, President Roosevelt in August, 1936, did request former Director J. Edgar Hoover to conduct investigations of subversive activities in this country, including communism and fascism. This request, however, was a confidential oral request and there is doubt that any record of it was made outside the FBI. This request, or Presidential mandate, was based, incidentally, on the fact that the law provided that the FBI could conduct such investigations if the Secretary of State should so request.

The study revealed that while the 1939 et seq. directives did not grant any special intelligence-gathering authority to the FBI, we were responsible under these directives to collect all intelligence information furnished by local, state, and Federal law enforcement agencies and patriotic citizens and to sift and coordinate all such information for indications of subversive activity covered by Federal statutes.

The study concluded that the FBI has the responsibility to conduct whatever investigations are necessary to determine if statutes relating to espionage, sabotage, insurrection or rebellion, sedition, seditious conspiracy, advocacy of overthrowing the Government, and other such crimes affecting the national security have been violated. In this connection we note that in a letter dated September 14, 1967, the Department of Justice advised that the FBI is continually alert to the problem of recurring riots and is submitting intelligence reports to the Department of Justice concerning such activity. This letter enumerated several Federal statutes and stated these could be applicable in using maximum available resources, investigative and intelligence, to collect and report all facts bearing on the question of schemes or conspiracies to plan, promote or aggravate riot activity.

In other words, the Department was requesting all possible intelligence-type investigative activity based on the existence of certain statutes. We see this as being no different from our intelligence-type investigations relating to plans of groups or individuals to overthrow, destroy, interfere with or threaten the survival of effective operation of national, state, and local governments.

The Attorney General

Based on this study, we believe that had there never been a single one of the Presidential directives in question the FBI would have conducted and will, through necessity, continue to conduct the same intelligence-type investigations as were conducted from 1939 to the present date. We also believe, however, that in order to counter the criticism and skepticism of such individuals as Professor Elliff and Senator Sam J. Ervin that an up-to-date Executive order should be issued clearly establishing a need for intelligence-type investigations and delineating a clear authority for the FBI to conduct such investigations based on guidelines established by the Attorney General and adhering to constitutional principles.

The study concluded with two basic recommendations. 1) That the Department of Justice be requested to sponsor comprehensive legislation spelling out the FBI's investigative authority in the collection of intelligence information relating to the national security and; 2) that the Department of Justice be requested to seek a comprehensive Executive order which would cover any possible gap between statutory authority and Executive necessity in protection of the national security.

At first glance these recommendations may appear to contradict our position that we already have statutory authority to conduct security-type investigations; that this being the case we do not need additional legislative enactments, nor do we need an Executive order. But being realistic we think that the basic statutes upon which we rely for our authority to conduct domestic intelligence investigations need to be updated to fit 1973 needs. Title 18 U.S.C. Sections 2383, 2384, and 2385 relate to the national security, but the legislative history of 2383 and 2384 indicates that they were designed for the Civil War era, not the Twentieth Century, and Section 2385 has been reduced to a fragile shell by the Supreme Court. These statutes are unquestionably still valid, but updating is certainly indicated. The bills introduced as H.R. 6046 and S. 1400 in the 93rd Congress appear to contain language which should fill our statutory needs, except perhaps for those groups, such as the Ku Klux Klan, which do not seek to overthrow the Government, but nevertheless are totalitarian in nature and seek to deprive constitutionally guaranteed rights.

The Attorney General

As to the need for an Executive order, we think that two issues are involved. We have statutory authority, but what we need is a definitive requirement from the President as to the nature and type of intelligence data he requires in the pursuit of his responsibilities based on our statutory authority. In other words, there is a need, from our standpoint, for both authoritative and definitive guidelines. The statutes give us the authority. The Executive order would define our national security objectives.

Members of Congress, including such men as Senator Robert C. Byrd of West Virginia, have proposed legislation to spell out jurisdiction and authority of the FBI in this field. It would appear that the President would rather spell out his own requirements in an Executive order instead of having Congress tell him what the FBI might do to help him fulfill his obligations and responsibilities as President.

The political climate of suspicion and distrust resulting from disclosures coming out of the Watergate hearings could present an obstacle to getting any such Executive order signed in the immediate future. However, the rationale is nevertheless valid and when scrutinized closely, the language in the Executive order we hereinafter propose establishes definitive guidelines which have heretofore been unclear. It is my belief that we should go forward with this.

We therefore propose and recommend that an Executive order along the following lines be submitted to the White House with a strong recommendation for approval. The language which follows is merely to illustrate the type of Executive order which we think would be appropriate and does not necessarily represent an ideal format or style which should be submitted to the White House.

EXECUTIVE ORDER

"Whereas the Constitution of the United States was established to insure, among other things, domestic tranquility; to provide for the common defense; and to promote the general welfare for the people of the United States; and

The Attorney General

"Whereas the President of the United States has the constitutionally imposed responsibility of defending the Constitution and the existence of the Government thereunder; and

"Whereas there have been continuing unlawful acts of violence perpetrated against the Government of the United States or against citizens of the United States or against persons entitled to the protection of the United States thereby endangering the domestic tranquility, threatening the common defense, and jeopardizing the general welfare of the people of the United States; and

"Whereas the Congress has enacted laws prohibiting acts such as treason, sedition, sabotage, espionage, insurrection and rebellion, seditious conspiracy, civil disobedience, rioting, assassination, kidnaping, deprival of civil rights, and conspiracies to commit such acts; and

"Whereas the President of the United States as Chief Executive in the maintenance of the Government thereunder must have intelligence information for appropriate decisions in the discharge of his constitutionally imposed responsibilities;

"Now by authority vested in me by the Constitution and statutes of the United States and in the interest of orderly operation of this Government and in furtherance of the domestic tranquility, common defense, and general welfare of the people of the United States it is ordered that;

"The Attorney General prepare and issue guidelines, conforming to the principles of the Constitution and the Bill of Rights, and outlining the necessary direction, coordination, and guidance of investigations to assure that the Federal Bureau of Investigation provides on a continuing basis intelligence information essential to the execution of laws pertaining to subversive activity and other such activity affecting the national security, domestic tranquility, and general welfare of the United States."

The Nation has been going through a time of terror. The concept of urban guerrilla terrorism has been adopted by various extremist elements in the United States. Bombings of public buildings and national institutions;

killing of police officers who, by their uniform, are a symbol of the democratic establishment; hijacking of aircraft in furtherance of revolutionary movements; terrorist assaults on foreign diplomatic personnel and establishments; and open declaration of war on our form of government are only a few of the violent acts which have been perpetrated by domestic subversives who seek to destroy or seriously cripple our Government. Terrorist guerrilla attacks which were once confined to far away places and related to problems of no immediate concern of ours are now possible in this country. Foreign terrorist groups in collusion with domestic terrorists have laid plans for an airport massacre of the type which recently occurred in Israel. Other foreign terrorist elements have laid plans for terrorist attacks on American soil. Already one foreign official has been assassinated, possibly by terrorists.

It would be folly to adopt an investigative policy based on the concept of investigation only when there is reason to believe a crime involving the national security has been committed. The FBI must obviously anticipate the crimes described above. We believe that in order for the Government to be in position to defend itself against revolutionary and terrorist efforts to destroy it, the FBI must have sufficient investigative authority to conduct intelligence-type investigations not normally associated with enforcement of the statutes. In other words we think the President has the inherent Executive power to expand by further defining the FBI's investigative authority to enable it to develop advance information concerning the plans and aspirations of terrorists and revolutionaries who seek to overthrow or destroy the Government. However, we also believe that such expanded authority must be formally set forth in an Executive order and that this recommendation is responsive in the Attorney General's expressed interest in laying more formal guidelines to our work in areas where definition is not now clear.

We consider the issuance of a new Executive order delineating our jurisdiction, authority, and responsibility to gather and report intelligence information relating to the national security to be a very important and high priority matter. We believe the issuance of guidelines by the Attorney General under Title 28, Section 533, United States Code, to be equally important.

The Attorney General

For your information, our own investigative guidelines as contained in our Manual of Instructions relating to domestic subversive investigations have been completely rewritten to conform with the concept that our domestic intelligence-type investigations are based on Federal statutes. These guidelines provide that in each instance, the domestic intelligence investigation must be predicated on information indicating that the organization or individual is engaged in activity which could involve a violation of specific statutes relating to the national security. A copy of the new guidelines was previously provided to the Department of Justice in connection with the request of Senator Edward M. Kennedy to obtain a copy of the FBI's Section 87 of the Manual of Instructions. The effective date of the new guidelines was August 1, 1973.

1 - The Deputy Attorney General

NOTE :

See memorandum T. J. Smith to Mr. E. S. Miller dated 8/6/73, captioned as above, prepared by TJS:bjr.

Mr. J. B. Adams 5/9/74

W. R. Wannall

RUCKELSHAUS' ISSUE #2:
SHOULD THE INTELLIGENCE GATHERING FUNCTION OF THE FBI BE SEPARATED FROM THE LAW ENFORCEMENT FUNCTION OF THE FBI?

Reference my memorandum, 4/16/74.

Referenced memorandum enclosed a lengthy analysis of the above issue, which contained recommendations for in-house consideration. Mr Adams asked that an abbreviated version be prepared for referral to the Department of Justice, containing the conclusion that all three missions of the FBI, viz., law enforcement, internal security, and counterintelligence be retained by the FBI.

ACTION:

Attached is abbreviated position paper for referral to the Department of Justice.

Enclosure

JFM:vb
(4)

1 - Mr. W. R. Wannall
1 - Mr. A. B. Fulton
1 - Mr. J. F. Miller

INQUIRY # 4

The Deputy Attorney General

October 1, 1973

Director, FBI

Appointment of Director
of 7.39.

TENURE OF THE DIRECTOR

In response to your request, the following is submitted concerning the tenure of the Director of the FBI:

1. The problem:

In view of the unique position occupied by the FBI Director, is it in the best interests of the Government and the Nation to limit the term of office?

2. The present policy:

By statute, the Director of the FBI shall be appointed by the President, by and with the consent of the Senate. There is no specified term of office.

SI-117

3. The issues raised:

REC-11 63-7865-108

There have been a number of bills introduced in the last fifteen months proposing legislation limiting the tenure of the Director to varying terms up to fifteen years. There has been no affirmative action taken on any of them.

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4. Options for future policy:

The options are whether the tenure of the Director of the FBI should have no limitation or that a fixed term be established.

1 ENCLOSURE
ENCLOSURE ATTACHED

In my testimony before the Committee on the Judiciary in June, 1973, I indicated that I felt independence is achieved through tenure, and expressed my thought that nine years would be a proper term.

GLM:lmm (6)
1 - Mr. Callahan (Direct)
1 - Mr. Walsh (Direct)
Based on Memo Walsh to Hunsinger, 9/28/73, GLM:pas.

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The Deputy Attorney General

After assuming the office of Director I have had an opportunity to afford further thought to this question and appreciate that there are some substantial considerations that question whether the Director of the FBI should be restricted to a given term of office. From a practical standpoint, it is doubted that legislation to specifically restrict the term of office of a Presidential appointee is necessary. We know of no clear-cut authority to remove an official who has received a Presidential appointment. However, in the final analysis, the President would likely get his way because he has the power to appoint a successor, in this case the Director. In effect, in absence of tenure, the Director will be serving at the pleasure of whoever is President.

Should the position of Director of the FBI be singled out for restriction as to term of office? An informal check by this Bureau has disclosed no restrictions on the tenure of heads of other investigative agencies; namely, Central Intelligence Agency, Drug Enforcement Administration, and Secret Service. Accordingly, to single out the Directorship of the FBI would be in effect an exception. To provide tenure for the Director of the FBI would be tantamount to placing him in the same category as heads and commissioners of regulatory bodies and the Interstate Commerce Commission who do serve for specific periods. The latter officials make regulatory decisions affecting the Nation and specific terms of office have the effect of assuring a continuing balance of political power. The office of Director of the FBI is not political.

Experience has shown that cooperation by other law enforcement agencies and the general public has been instrumental in FBI investigative success. While it cannot be precisely measured, the degree of confidence inspired by the individual serving as Director influences the quality and quantity of such cooperation. The office of Director, a non-political one, has been charged with the responsibility of providing factual information upon which administrations of diverse political persuasions could formulate prosecutive policy and look after the internal security interests of the country. Singling out the position

of Director of the FBI for a restricted term of office could suggest that perhaps the confidence heretofore placed in the FBI is no longer merited. Whether this would have any impact on the confidence and cooperation by the public would be problematic.

After weighing the foregoing and considering the unique role of and regard for the Director of the FBI, it is my conclusion that the Nation would feel comfortable with tenure for the Director of the FBI, and tenure would contribute toward countering any construction that appointment of any Director was political in the sense that the Directorship would not necessarily change hands with each administration. I feel the incumbent senses a greater independence through tenure.

I feel that tenure should be for a period such as nine years to minimize the occasions when appointive consideration would coincide with a change in administrations. Such a period would also provide the incumbent a sufficient feeling of independence. However, this Bureau defers to the Department on the subject of length of time.

INQUIRY # 5

The Deputy Attorney General October 16, 1973

Director, FBI

~~F.B.I.~~

Should the Federal Bureau of Investigation be an Independent Agency?

In response to your request, the following is submitted regarding Question #5, "Should the FBI be an independent agency or continue as part of the Justice Department?"

1. Problem: Should the FBI be an independent agency or continue as part of the Department of Justice?

2. Policy: At the present time the FBI is a bureau within the Department of Justice and, as such, is responsible to the Attorney General.

3. The Issues Raised: The question has arisen on several occasions whether the FBI, with its vast resources and knowledge, should be under the control of a political appointee, the Attorney General, or separated from the Department of Justice and established as an independent agency within the Executive Branch.

NW 55084 62-20172

4. Options for Future Policy: The main options for the future of the FBI are two: (1) Remove it from its position as an integral part of the Department of Justice and establish it as an independent agency, or (2) maintain the present status of the FBI in its role as the investigative arm of the Department and, as such, responsive to the directives of the Attorney General.

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A brief look at history indicates that in 1908 Congress created the Bureau of Investigation and designated it as a part of the Department of Justice. The main reason for this action was that a certain void existed prior to this time in the enforcement function performed by the Attorney General. While the Department traditionally bore the responsibility of enforcing the laws of the United States and prosecuting violators of these laws, there existed no permanent group of individuals who could

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JFA:CSH (6)

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Mr. Callahan
1 - Mr. Baker
1 - Mr. Ahearn

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Cover memo, Baker to Callahan, 10/4/73, re "Issues Raised by Mr. Ruckelshaus re future of FBI" (JFA:csh)

conduct the fact-finding investigations necessary to sustain successful prosecutions. The creation of this "detective" force by Congress aimed to fill that void.

Over the years the responsibilities of this agency, which eventually became known as the Federal Bureau of Investigation (FBI), have increased tremendously. From a small agency charged with the task of conducting investigations regarding relatively few matters, the FBI has developed into an agency held accountable for investigating violations of over 180 categories of Federal Law. In addition, the FBI has become more than just an investigating agency, due to its maintenance of various data in certain areas indispensable to a criminal justice system.

The proposal to make the FBI an independent agency within the Executive Branch has been voiced on several occasions in Congress. Within the very recent past two bills were introduced in the Senate to achieve this aim. Additionally, as far back as 1947, Congressional sentiment existed to separate the FBI as an independent agency.

The proponents of this move have made it clear that the possibility of a politically motivated FBI has caused them great concern and led to the introduction of measures which they feel would go a long way toward preventing undue political influence. The argument is made that the Attorney General is almost always a political appointee of the President, whose views generally conform with his own. Those espousing this argument point to recent events as examples of how an Attorney General could use his position to political advantage and fear that because of this motivation he could easily manipulate an agency possessing vast amounts of sensitive information and substantial resources, such as the FBI, and easily misuse this organization which is subject to his directives as a part of the Department he heads.

The question arises at this point whether removal of the FBI from the Department of Justice is the proper means of assuring its justifiable degree of independence and freedom from undue political pressure. The

designation of the FBI as an independent agency would simply mean that the Director would no longer report to the Attorney General, but would instead be responsible directly to the White House, as is the case with existing independent agencies. There appears to be some serious doubt whether an FBI Director would be more or less subject to political pressure when placed in this posture. The FBI must be responsive to the desires and needs of the American public and in this sense only should it be considered politically responsive. The danger of becoming enmeshed in partisan political dealings might easily be increased by removing this additional layer of Executive Branch responsibility which now exists in the person of the Attorney General.

Opponents of these proposed Senate bills note that, while some danger does exist in the FBI's reporting to a political appointee, a far greater danger would exist if the FBI, performing as an independent agency, became the arm of a politically motivated Director who was responsible to no one but the White House.

When one considers the possibility of an independent FBI, it is difficult to ignore the specter of a national police force at the disposal of the incumbent administration, a condition generally repugnant to our citizens.

The relationship between the investigator and the prosecutor is a very delicate, yet vital one. Neither can properly fulfill his role without the wholehearted assistance of the other. So it is with the FBI and the Department of Justice. A close working relationship has developed and must be maintained if the responsibilities of each are to be met.

The FBI does need a certain amount of independence and this fact has been recognized by even its most severe critics. In addition, Congress, in creating a new Subcommittee on FBI Oversight, has in effect insured a certain degree of FBI independence.

The Deputy Attorney General

In consideration of all the foregoing, it is believed the FBI should remain a Bureau within the Department of Justice where it can properly perform its function to investigate violations of various Federal laws and report its impartial findings to those who will conduct the prosecution of these violations in our judicial system.

INQUIRY # 6

The Deputy Attorney General

October 16, 1973

Director, FBI

SUBSTANTIVE ISSUES REGARDING
THE FUTURE OF THE
FEDERAL BUREAU OF INVESTIGATION

Reference is made to your memoranda to me, captioned as above, and dated July 20 and August 20, 1973.

Attached hereto is the FBI response to Issue #6.

Enclosure

JFH:CSH (6)

NOTE: Mr. Ruckelshaus' memorandum of 7/20/73 enumerated 11 issues regarding FBI organization and operation being studied by him. The 8/20/73 memo set forth the format for response. Issue #6 concerns the relationship between the Director and the Attorney General, assuming that the Bureau remains a part of the Justice Department.

1 - Mr. Callahan
1 - Mr. Baker
1 - Mr. Emery

ENCLOSURE

62-24172-349

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EX-112

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Issue #6: Assuming the FBI remains a part of the Justice Department, what should be the relationship of the Director to the Attorney General? All the organizational and substantive relationships should be examined.

1. The problem: By Congressional enactment, the Attorney General has been designated the head of the Department of Justice and has been charged with the responsibility of supervising and directing the administration and operation of that Department. Further, the Federal Bureau of Investigation has been placed in the Department of Justice with the Director of the FBI as its head. The FBI, through Congressional enactment, Executive Order, and Directive of the Attorney General, has been charged with the responsibility of performing certain duties subject to the general supervision and direction of the Attorney General. The Director of the FBI, a Bureau chief within the Department, having been granted enormous responsibility, must attain a proper balance between independence and responsiveness in order to properly discharge this responsibility.

2. The present policy: Disclosures of political and business corruption and unethical practices during the investigation of land-fraud and antitrust cases in the early 1900's, coupled with the recognition of the need for an investigative arm within the Department of Justice subject to its control, led to the creation of the Bureau of Investigation (forerunner of the Federal Bureau of Investigation) within the Department in 1908. In an effort to reverse a trend of political influence within the Bureau and the Department, Attorney General Harlan Fiske Stone in 1924 appointed J. Edgar Hoover as Acting Director of the Bureau. Shortly thereafter Attorney General Stone dictated that the Director of the FBI be directly responsible to him with respect to the operations of the Bureau as a whole. In addition, it was understood that the Bureau was to operate free of political influence and limit its investigative activity to certain violations over which the Bureau had jurisdiction.

This pact was formed to give the Director, charged primarily with delegated investigative responsibility, a degree of independence recognized as so necessary for him to properly discharge his duties and

JFH:CSH (6)

Attachment to memo to Deputy Attorney General, 10/16/73, captioned "Substantive Issues re Future of the FBI"

ENCLOSURE 62-2472-349

still remain subordinate to the Attorney General, who had been charged primarily with a prosecutive function. Codification of duties to be performed by the Attorney General as head of the Department of Justice, and the Director as head of the FBI within that Department, plus recognition that both must attempt to perform their related duties within the criminal justice system to the optimum, has led to the necessity for a substantial degree of independence on the part of the Director, balanced with a responsiveness by him to reasoned counsel, guidance, supervision and control by the Attorney General.

3. The issues raised:

(a) During the "Princeton Conference" it was said that time and practice have made the FBI a totally separate power answerable to no one. More specifically, the Attorneys General, Presidents and Congress have granted power and responsibility to the FBI but have failed to direct, guide and control it.

(b) During the course of the FBI investigation of the "Watergate break-in," allegations were made that the FBI has been too responsive to demands made upon it, particularly those of a political nature.

4. Options for future policy: The Director of the FBI, as head of the principal investigative Bureau within the Department of Justice, must be permitted to discharge his responsibilities free from political or unethical pressure. This must be balanced with his responsibility to remain responsive to the Attorney General's leadership and direction of that Department having as one of its principal functions the enforcement of the Federal law through prosecution. A Congressional oversight committee, available to give the FBI counsel, guidance and direction, could greatly assist the FBI in achieving and maintaining this balance.

There must be an efficient working relationship, with free and open channels of communication between the Director and the Attorney General, due to their mutual and interlocking responsibilities in the criminal justice field, primarily investigative on the part of the FBI and prosecutive on the part of the Department. This relationship should generate, at descending levels in the Department and the FBI, a commitment to accomplish an efficient work flow, in appreciation of the impact of this interaction on the

entire criminal justice system. Because of the multiple and varied responsibilities of the FBI, the Attorney General-Director relationship and the counterpart division relationships should insure a smooth and coordinated effort which will enable the accomplishment of major objectives, while at the same time providing necessary FBI services to other elements of the criminal justice system.

That we are well aware of our role and responsibilities in this regard, and to cite only one of several examples, is evidenced by the operation of the Computerized Criminal History Program which provides much needed data to all branches of the system. Thus, to the extent possible, these relationships should be such that both objective achievement and mutual assistance between components of the systems are enhanced.

With regard to other continuing relationships having a bearing on the Attorney General-FBI Director relationship, the FBI head must communicate directly with the President on occasion, and with the recent establishment of a Congressional oversight committee, direct contact will be maintained with this group. Concerning ultimate alternatives in the relationship, the FBI Director must be in a position to register reasoned disagreement at times and, if the situation dictates, to take up important matters of disagreement with the President and with the Congressional oversight committee.

INQUIRY # 7

1 - Mr. Miller
1 - Mr. Wannall
1 - Mr. Mintz
1 - Mr. T. Smith

The Acting Attorney General

December 11, 1973

ST-114 REC-38 62-24172-356

Director, FBI

STUDY OF FBI PROGRAMS AND POLICIES

Reference is made to your letter of December 5, 1973, captioned as above.

I fully support the idea of a study being launched for the purpose of considering the need for additional legislation to enable the FBI to counter violence in the time of crisis such as existed at the time the FBI implemented the COINTELPRO - New Left.

As you know, the FBI has conducted an in-depth study of the scope of FBI jurisdiction and authority and it was concluded that additional legislation is needed to enable us to more fully discharge our responsibilities relating to the national security. Copies of this study have been furnished to the Department.

As for the general study of programs and policies of the FBI which was initiated by former Attorney General Richardson and former Deputy Attorney General Ruckelshaus, we have completed compiling most of the information requested. However, as pointed out during our meeting on December 5, 1973, information requested in item No. 7 relating to Investigative Techniques was so broadly requested by Mr. Ruckelshaus that it encompasses extremely sensitive foreign intelligence collection techniques. Such information is so closely held in the FBI that it is handled on a strictly need-to-know basis. We therefore do not feel that the information should be included in a study of this type which will be beyond the control of the FBI.

Mr. Petersen noted at the meeting that such information is needed if we expect to get legislation which would give us the authority we need in the sensitive foreign field. We recognize this,

TJS:mah (7)

SEE NOTE, PAGE TWO

This document is prepared in response to your request and is not for dissemination outside your Committee. Its use is limited to official proceedings by your Committee and the content may not be disclosed to unauthorized personnel without the express approval of the FBI.

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but we feel that such could be handled during oral briefings during high-level conferences. In this regard, you have designated Messrs. Henry E. Petersen, Robert Dixon, J. Stanley Pottinger, and Irving Jaffe to be available for consultation and advice.

I am designating Assistant to the Director-Deputy Associate Director Edward S. Miller; Assistant Director W. R. Wannall, Intelligence Division; Inspector John A. Mintz, Legal Counsel; and Inspector Thomas J. Smith, Intelligence Division, to meet with the aforesaid for the purpose of resolving issues bearing on FBI programs and policies.

I feel that it would be highly profitable if the Department and FBI representatives could arrange a two- or three-day conference away from Washington, possibly at our Quantico facilities, where an uninterrupted discussion of the various problems could be held and during which recommendations for positive action could be formulated. If you agree, I will try to arrange something for soon after the first of the year.

NOTE:

A conference was held 12/5/73, between Mr. Bork and the Director. Also present were Assistant to the Director Edward S. Miller and Inspector Thomas J. Smith from the Bureau and Mr. Henry E. Petersen. Relet was discussed at the conference. The letter was deemed necessary because of the Carl Stern suit involving his request under the Freedom of Information Act for documents relating to the COINTELPRO - New Left. Mr. Bork feels that the Bureau and Department should study need for future legislation in connection with issues relating to the COINTELPRO.

(DJ-150
d. 4-26-65)

UNITED STATES GOVERNMENT DEPARTMENT OF J

Memorandum

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Training	
Legal Coun.	
Telephone Rm.	
Director Sec'y	

TO : Clarence M. Kelley, Director
Federal Bureau of Investigation

DATE: December

FROM : Robert H. Bork, Acting Attorney General RHB

SUBJECT: Study of FBI Programs and Policies

As you know, a general study of the programs and policies of the FBI was initiated in July by former Attorney General Richardson, former Deputy Attorney General Ruckelshaus, and yourself.

As Acting Attorney General, I have continued to support this effort and you and I have discussed various approaches to further implementation of the study. In addition, I have discussed the matter with Senator Saxbe to assure that he is properly advised of on-going matters pending before the Department. As a result of my conversation with him, I am certain the study will continue to receive the highest priority when the new Attorney General assumes office.

A new dimension was added, however, as a result of a suit filed against the FBI under the Freedom of Information Act by a reporter for the National Broadcasting Company, Carl Stern. The suit brought to my attention certain information which demonstrates anew the importance of the study. In my capacity as Solicitor General, I decided that the law and the public policy expressed in the Freedom of Information Act did not warrant appealing the district court's decision that the documents in question must be provided to Mr. Stern. I understand that the material is in the process of being turned over to Mr. Stern.

ST-114 REC-38 62-34172-356

Meanwhile, it is appropriate--indeed imperative--that you complete as rapidly as possible the inquiry into investigative techniques that you and Mr. Ruckelshaus had begun. As you and I have agreed, the study should focus in particular on the programs and activities referred to in the documents involved in the Stern litigation. I ask that you report on these matters as expeditiously as possible, and that your report include a detailed summary of conduct in the past under such programs and actions taken to insure that the rights of individuals are not violated while essential FBI investigations are pursued. In terms of priority, I think that the program COINTELPRO--New Left should receive first

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consideration. I also seek your recommendations as to any corrective action that should be taken either by you or by the Attorney General. It may be that the best solution would be additional legislation.

In addition to the general support of the Department and its personnel to assist you in your undertaking, I am specifically designating four Department officials to make themselves available to you, individually or as a group, for consultation and advice. They are Henry E. Petersen, Assistant Attorney General in charge of the Criminal Division, Robert Dixon, Assistant Attorney General in charge of the Office of Legal Counsel, J. Stanley Pottinger, Assistant Attorney General in charge of the Civil Rights Division, and the acting head of the Civil Division, Irving Jaffe. They will also be available to the incoming Attorney General for the same purpose.

I know that you agree with me that it is critical to the national interest that the FBI be able effectively to counter violence in time of crisis and that there be no occasion for public doubt concerning the legitimacy of its actions.

INQUIRY # 8

Issue #8

FILES AND THEIR DISCLOSURE

I. Problem:

Mr. William D. Ruckelshaus, in item #8 of memorandum to the Director dated 7/20/73, stated, "The whole question of files and their disclosure must be studied with a view toward understanding why files are kept, what categories of files there are, what information is contained in the files and whether the purposes for maintaining files are being met under present policy. In the issue of disclosure, when, where, and to whom must also be thoroughly examined."

As problems involved in creation and maintenance of files and disclosure of information contained in them are rather complex they are being discussed separately. Identification Division records consisting of fingerprint cards and identification records (Rap Sheets) are not considered to fall in this category of "Files" and their use is not being commented upon.

II. Present Policy

A. Why Files Are Kept:

Age of information in FBI files covers a relatively short span of years. FBI had very few files until the President in 1939, directed the FBI be responsible for the Internal Security of the United States. In view of this, and as the number of violations of law over which the FBI has jurisdiction has nearly doubled since 1939, the vast majority of FBI files have been created since 1939.

Regulations of National Archives and Records Service, (NARS) General Services Administration, which are based on Title 44, Chapter 33, Sections 3301 and 3302, U.S. Code, govern the type of material which we must maintain. Record material is described as including "all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal Law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data contained therein."

(CONTINUED - OVER)

In view of this definition of record material, we are required to retain any material which we have made or received during the course of public business, and which has been preserved or is appropriate for preservation.

In 1969, NARS surveyed the records of the Department of Justice including those of FBI and subsequently instructed that certain categories of FBI files at FBIHQ be retained indefinitely. Included were files which would have historical value and would document policies, procedures, functions, budgetary policies, etc. In addition, vast majority of investigative files must be kept indefinitely although it was prescribed that only a representative sampling of certain types of violations at five year intervals be retained. These requirements apply only to files at FBIHQ. NARS has previously approved destruction of closed field files as all pertinent information is in file at FBIHQ. As a practical matter, however, field investigative files are retained 20 years before being destroyed.

The FBI has an active program to keep its records at FBIHQ to the barest minimum. While certain categories of our files, as previously mentioned, must be retained permanently, some are obsolete and valueless. With approval of NARS we destroy certain categories of such obsolete material. Examples of the larger categories are: Results of investigations over 25 years old regarding alleged subversive and espionage activities wherein complaints were nebulous and no derogatory information was developed, and investigations where the perpetrators of the crimes were never identified.

In order to reduce amount of storage space required for files we microfilm, with approval of NARS, majority of files regarding criminal violations which are over 10 years old.

B. Categories of Files

Material is filed into one of the following general types of files:

Main Files

A main file is opened on an individual, organization, or subject matter when there will be an adequate volume of mail or the matter is deemed of sufficient importance to be assembled in one place. Main files are referred to as "Case Files" when we are making an investigation.

General Files

General files are used for nonspecific violations, complaints over which we have no jurisdiction, and miscellaneous matters. General files are also maintained on various individuals; organizations; foreign, local, and state law enforcement agencies as well as Federal agencies (for information regarding cooperation, liaison, general organization, etc.); associations; patriotic organizations such as the American Legion; newspapers, magazines, radio and television stations which cooperate with the Bureau in publishing fugitives and to whom we give press releases; and activities of foreign nations such as Soviet and satellite activities, etc.

Control Files

Control files are maintained for the purpose of having all information regarding a specific matter immediately available without the necessity of reviewing numerous case files. An example is "Threats Against the President." Individual case files are opened for each threat on which we conduct an investigation; however, a copy is placed in the control file so that all such threats are recorded in one place.

Policy Files

A policy file is maintained for each violation over which the FBI has investigative jurisdiction along with various specific programs arising from this jurisdiction.

Administrative Files

Administrative files are maintained on statistical reports, appropriations, conferences, training schools, FBI National Academy matters, and related subjects.

Set-up Files

These are files which are set up by locality or special category with subs for field offices, states, continents, or foreign nations. Almost any type of file can be made a set-up file if the volume of mail expected is great enough or if the supervision of the subject matter is divided among several Special Agent Supervisors according to locality.

C. Type of Information Contained in the Files

Generally speaking, there are no limits as to the type of information in our files. The FBI, by the very nature of its jurisdiction and its worldwide reputation as an elite law enforcement agency, attracts information. In addition to being responsible for investigations relating to interstate criminal activity throughout the United States, the FBI is also responsible for the Internal Security of the United States. Any intelligence organization survives on information uncovered by investigation or received from other sources. Citizens write to the FBI regarding any matter which they feel is against the best interests of the United States or where they feel an individual or organization might be violating a law. The average citizen is not aware of the jurisdiction of the various investigative agencies, local, state or Federal and many of them bring their problems to the FBI. The FBI will promptly disseminate any matter which is under the jurisdiction of another agency to that agency. The nondisseminated information is either acted upon and filed, or filed because no action is required.

In addition to the filing of material relating to criminal and security matters, the Bureau is responsible for a number of applicant-type (background) investigations and the information developed during these investigations is filed.

D. Disclosure of Information in FBI Files

1. Responsibility for Proper Utilization of Information

Among the foremost of the FBI's responsibilities is the proper utilization of information received either through investigative activities or through other means as this information may be of vital interest to another Government agency or a local law enforcement agency. It is extremely important that the FBI keep these agencies informed concerning matters in which they would have a legitimate interest. Information is disseminated at both field and Headquarters level, with FBIHQ making the information available to Federal agencies at the national level.

2. Basis for Dissemination

a. To Government Agencies

The FBI is under obligation to act as a clearing house for information which affects the Internal Security of the United States. This obligation is based on the following:

1. Beginning in 1939, various Presidential directives requested all law enforcement officers to report information regarding espionage, sabotage, subversive activities and related matters to the FBI. These directives charge the FBI with the responsibility of correlating the material and referring matters under jurisdiction of other Federal agencies to the appropriate agencies.

2. The Delimitations Agreement between the FBI and the Armed Forces intelligence agencies provides that the responsibilities assumed by one organization in a given field carries with it the obligation to exchange freely and directly with other subscribing organizations all information of mutual interest. In addition, a supplemental agreement provides that certain information of general interest to the intelligence services of the Armed Forces be furnished them.

3. The National Security Act of 1947 provides that upon written request from the Director of Central Intelligence Agency (CIA) the Bureau shall make available information for correlation, evaluation and dissemination essential to national security.

4. Executive Order 10450 (Security of Government Employees) requires the FBI to check names of all civil applicants and civil incumbents of any department or agency of the Executive Branch against records of the FBI.

5. Supplement Number Four (Revised) of Departmental Order 3464, signed by the Attorney General in January, 1953, classified all official records and information of the FBI as "Confidential." However, in accordance with long-standing policy concurred in by the Attorney General, the practice of passing to other Government agencies information coming to the FBI's attention in connection with the conduct of investigations normally within the Bureau's jurisdiction was entirely appropriate and correct. The Attorney General advised the Bureau it would be remiss in its duty if it failed to pass along information which might prove of interest to the general welfare.

b. White House Requests

Pursuant to requests from the White House, the names of individuals who attend, serve or perform at White House functions, or who may be considered for Presidential appointments are checked against Bureau files including Identification Division records for any derogatory data which indicates the individual might pose a threat or embarrassment to the President or members of his family. Such requests are handled expeditiously and any derogatory information is reported directly to the White House staff security officer by appropriate communications depending upon the time factors involved. At the request of the White House, the FBI conducts background investigations on Presidential appointees, White House employees and persons having regular access to the White House.

For a number of years we have followed the practice of furnishing significant intelligence information, both in the domestic and foreign areas, on a timely basis directly to the White House concurrent with the dissemination of the same data to the Attorney General and other interested agencies. The Bureau disseminates by teletype to the White House and other interested agencies summary data concerning civil unrest and acts of violence as they occur in the U.S. We also provide the White House by letter or teletype, as circumstances indicate, top-level intelligence data developed through our sources when it appears the President or senior members of his staff would have an interest. Much of this originates with our Legats and through our coverage of foreign establishments in the U.S. Simultaneous dissemination is made to the Attorney General who is advised of our dissemination to the White House.

It is noted that frequently the value of information being disseminated depends entirely on the timeliness of our dissemination. Therefore, direct and immediate dissemination to the White House is the only effective way to handle these matters.

FBI Legal Counsel on 7/20/72, set forth the opinion that the FBI had no legal basis to disseminate information to the White House concerning a current criminal case. It is the obligation of the FBI to keep the Attorney General fully informed and leave further dissemination to him. Acting FBI Director Gray instructed this policy be followed and we have been complying with this direction.

c. Exceptions

1. Congressional Committees

The Attorney General on 6/14/54, ruled that the FBI shall make name checks and investigations of individuals being considered for staff positions of the following Congressional Committees when such requests are made by the chairmen:

a. Senate and House Appropriations Committee

b. Senate and House Judiciary Committee

c. Joint Committee on Atomic Energy
(Cooperation extended to this Committee pursuant to the Atomic Energy Act of 1946)

d. Senate Armed Services Committee

e. Senate Foreign Relations Committee

2. Supreme Court

The Bureau conducts name checks for the Supreme Court, which checks are normally limited to employees such as charwomen, elevator operators and individuals of this type.

3. Foreign Intelligences Services

As a matter of cooperation with friendly intelligence services, the Bureau conducts name checks for the following such agencies who have liaison representatives stationed in Washington, D.C.

a. Royal Canadian Mounted Police (Canada)

b. MI-5 (British Security Service)

c. Australian Security Intelligence Organization (Australia)

d. New Zealand Security Service (New Zealand)

e. French Foreign Intelligence and Counterespionage Service

f. MI-6 (British Secret Intelligence Service)

g. BFSS (Bureau For State Security) (South Africa)

In addition, name check requests are conducted for cooperative foreign police and intelligence services through the Bureau's Legal Attaches stationed in foreign countries. In a very limited number, name check requests are handled for cooperative foreign police agencies by direct correspondence.

d. To Local and State Law Enforcement Agencies

The FBI traditionally has cooperated with local and state law enforcement agencies in matters of common interest. Pertinent information regarding local criminal matters if furnished to local and state law enforcement agencies when such dissemination will not jeopardize FBI investigations or informants. During Fiscal Year 1973, 189,910 items of criminal information were furnished by the FBI to local and state law enforcement agencies.

E. Type of Information Disseminated

Name check requests received from agencies within the Executive Branch, as a general rule, are checked against FBI files for "subversive-type" references only and criminal-type references are not reviewed. However, for some agencies, at their specific request, all references in Bureau files are reviewed. All agencies are aware of the limitation on the type of search made as they are furnished a copy of an FBI booklet describing procedures for requested name checks.

The policy of disseminating only "subversive-type" information is based on the fact that any agency desiring to obtain a copy of the individual's identification record showing his arrests may do so by submitting a separate request directly to the Identification Division. A second reason for limiting the search is due to economy as searching criminal-type references would require additional personnel and an increase in the cost of conducting name checks.

In response to name check requests, the Bureau disseminates the results of Bureau investigations, information received from reliable sources concerning membership in subversive groups, pertinent public source information, and information which good judgment and common sense dictate should be furnished. Information falling in the category of rumor or gossip which is found in Bureau files is not disseminated unless a compelling reason exists therefor, and when such information is disseminated to a requesting agency, that agency is alerted to the nature of the information and the fact that it has not been verified by the FBI.

Derogatory information on Federal employees is furnished to the Civil Service Commission and where common sense dictates, it is also furnished to the employing agency.

F. How Dissemination is Made

1. Name Checks

When possible a copy of the FBI communications is furnished to the requesting agency. A record is maintained on the original of this communication that a copy was furnished to the particular agency. When information is located in numerous FBI communications, the pertinent data is abstracted and summarize into a separate communication. A copy of this communication is retained in FBI files.

2. Other Than Name Check Requests

Any information received by the FBI which is of interest to another Federal Agency is furnished in writing to that agency.

G. Protection of Information Disseminated

When reports or letterhead memoranda already in the file are disseminated to a requesting agency, each such document contains the following statement:

> "This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency."

Data abstracted from the files and disseminated by letter or in letterhead memoranda form contains, in substance, terminology appearing above.

III. Issues

Basic issue appears to be whether FBI should retain and disseminate information in its files which is not acquired as a direct result of its investigations.

IV. Options

There are no options. We are required by law to retain information which has been made or received in connection with the transaction of public business and which has been preserved or which is appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities or because of the informational value of data contained there. With respect to the dissemination of information to Federal agencies, we are required by law, Presidential directives, and instructions of the Attorney General to furnish information in our files to agencies of the Executive Branch. The exceptions cited previously are logical and no change is believed necessary.

Likewise, the welfare of the general public requires that we continue our policy of furnishing pertinent information regarding local criminal matters to local and state law enforcement agencies.

INQUIRY # 9

1 - Mr. Baker
1 - Mr. E. S. Miller

Mr. William D. Ruckelshaus
The Deputy Attorney General - Designate

September 19, 1973

Director, FBI

1 - Mr. T. J. Smith
1 - Mr. Sizoo

SUBSTANTIVE ISSUES REGARDING
THE FUTURE OF THE FBI

07-B-I.

Reference is made to your memoranda to me captioned as above and dated July 20 and August 20, 1973. Attached is the FBI's response to Issue Nine of your July 20, 1973, memorandum.

Enclosure

JMS:rlc
(7)

NOTE:

REC-38 62-24172-344

Mr. Ruckelshaus' memorandum 7/20/73 enumerated 11 issues regarding FBI organization and operation being studied by him. The 8/20/73 memorandum from Mr. Ruckelshaus set forth the format for response for Issue Nine, which concerns the question of a Civilian Review Board over FBI intelligence gathering activities. Our response opposes creation of such a board.

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ENCLOSURE

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9. Problem - The question of a Civilian Review Board for the intelligence-gathering activities of the FBI should be examined. This is a recurrent suggestion which came up at the Princeton Conference, in addition to other forums.

Policy - There is no Civilian Review Board to monitor the FBI inasmuch as various checks and reins are available to check or control the FBI. (See Options)

Issue - Is it necessary to have a group of civilians review the FBI's policy and activities to insure that nothing improper is being done and to handle complaints regarding the FBI?

Options - No Civilian Review Board is required since numerous means exist to control the FBI. These specifically include: a Senate Oversight Committee, the Senate and House Appropriations Committees, the Office of Management and Budget, the National Security Council, the President's Foreign Intelligence Advisory Board, the Civil Service Commission, the Attorney General, the Department of Justice, the Federal Courts, the news media, and of course public opinion. The President's Foreign Intelligence Advisory Board is in reality a civilian review board for the President. Its members are non-government personnel qualified in matters relating to national defense on the basis of their knowledge and experience. Especially is the FBI opposed to the concept of civilian boards exploring the field of FBI counterintelligence and intelligence-gathering operations which would adversely affect this Bureau's relations with foreign intelligence agencies. In general, we feel that the Congressional oversight concept should have put this question to rest.

JMS:rlc

NOTE:

See memorandum to Mr. Ruckelshaus, captioned "Substantive Issues Regarding the Future of the FBI: dated 9/19/73, prepared by JMS:rlc.

62-24172-344

ENCLOSURE

INQUIRY # 10

Issue # 10

I. THE PROBLEM:

What should be the relationship between the Federal Bureau of Investigation and the other Departments and Agencies of the Federal Government? To what extent should the Federal Bureau of Investigation keep tabs on other Departments and Agencies through the development of sources and informants in those Agencies?

II. THE PRESENT POLICY:

A. Relationship between the Federal Bureau of Investigation and other Departments and Agencies of the Federal Government

The Federal Bureau of Investigation enjoys a close working relationship with the other Departments and Agencies of the Federal Government and traditionally has cooperated fully with local, State and Federal agencies in matters of common interest.

Cooperation among the Federal Bureau of Investigation and other Federal Departments and Agencies takes a variety of forms, including high-level coordinating committees, contractual agreements, and written guidelines for investigative jurisdiction in areas in which the Federal Bureau of Investigation and one or more Departments or Agencies have concurrent jurisdiction and share responsibility for enforcing a Federal Statute. The purposes of the committees, agreements, and guidelines are to promote the closest possible cooperation and coordination between the involved agencies, to insure there is no duplication of effort in any field, and to insure that proper coverage is maintained.

In addition to the above cooperative means, the Federal Bureau of Investigation maintains the following programs relevant to its relationship with other Federal Agencies and Departments:

1. FBI Liaison Program

In order to insure adequate and effective liaison arrangements with other Government agencies, the Federal Bureau of Investigation maintains a Liaison Section within its Intelligence Division at Federal Bureau of Investigation Headquarters. The objective of this section is to insure that the Federal Bureau of Investigation's business with other U. S. Government Agencies is accomplished promptly, effectively, economically, and with a minimum of jurisdictional or policy problems, through appropriate high-level liaison with key officials of these Agencies.

By the establishment of effective liaison contacts, we recognize and solve minor problems before they become major problems, requiring protracted and expensive negotiations between the Federal Bureau of Investigation and other Agencies. These objectives are achieved by placing experience FBI representatives in contact with officials at the highest levels of other Government Agencies where the Federal Bureau of Investigation either needs assistance or has concurrent interests. The Federal Agencies with which the Federal Bureau of Investigation currently maintains direct personal liaison are:

(a) The White House
(b) Office of the Vice President
(c) National Security Council
(d) Foreign Intelligence Advisory Board
(e) Drug Enforcement Administration
(f) Central Intelligence Agency
(g) Postal Inspection Service
(h) Department of Defense
(includes direct liaison with various elements of Army, Navy, Air Force, and Marine Corps)
(i) National Security Agency
(j) Atomic Energy Commission
(k) Department of Transportation
(l) Department of State
(m) Department of the Treasury
(Internal Revenue, Bureau of Customs, Bureau of Alcohol, Tobacco and Firearms, Secret Service)
(n) Immigration and Naturalization Service
(o) U. S. Marshal Service

Liaison with other Federal Agencies is handled by receiving telephone calls and visits from representatives of those Agencies, and by contacts with them on an irregular basis as the need may arise.

In addition to maintaining close liaison with various Federal Agencies at the Headquarters level in Washington, D. C., FBI regulations call for an effective liaison program at the field level. The Special Agents in Charge (SACs) of the FBI's fifty-nine field offices are directed to specifically designate an Agent (or Agents) to be responsible for developing and maintaining liaison with other Federal Agencies represented locally. In each instance, liaison contacts are developed to include a close friendly relationship, mutual understanding of the Federal Bureau of Investigation and Agency jurisdictions, and an indicated willingness by the Agency representative to coordinate activities and to discuss problems of mutual interest.

2. Dissemination of Information

The proper utilization of information received by the FBI, either through investigation or otherwise, is foremost among our responsibilities. Such information may be of vital interest to another Government Agency and/or local law enforcement agency, and it is not FBI policy to withhold from dissemination information to which other agencies are justifiably entitled. Dissemination of information to other agencies is handled at the Headquarters level in Washington, D. C., as well as in the field.

The FBI serves as a clearing house for information affecting the internal security of the United States. This is based on various Presidential directives which have specifically requested all law enforcement officers to report information regarding espionage, sabotage, subversive activities, and related matters to the FBI. These directives charge the FBI with the responsibility of correlating this material and referring matters which are under the jurisdiction of any other Federal Agency with responsibilities in this field to the appropriate Agencies.

Various agreements between the FBI and other Federal Agencies provide for exchange of information of mutual interest and require that the FBI disseminate certain information to other Departments and Agencies of the Federal Government. An example is the agreement between the FBI and U. S. Secret Service concerning protective responsibilities which requires that we disseminate to Secret Service certain information which by its nature reveals a definite or possible threat to the President's safety.

Under provisions of Executive Order 10450 the FBI checks names of all civil applicants and civil incumbents of any department or agency of the Executive Branch against FBI records.

In August, 1972, the FBI instituted a program aimed at providing effective and expanded coordination of efforts with the local, state and Federal Agencies having direct responsibilities in the narcotics field. Each FBI office has designated an Agent to act in a liaison capacity as a narcotics coordinator and FBI Headquarters has designated a national narcotics coordinator to expedite this program. Any information received by the FBI concerning narcotics is promptly disseminated to the Drug Enforcement Administration, which is charged with the responsibility of enforcing the various drug laws.

3. Cooperative Services

In its traditional role of seeking professionalism at all levels of law enforcement, the FBI is enthusiastically committed to providing expert assistance to local, State and Federal law enforcement agencies. Some of the facilities of the FBI available to Federal law enforcement agencies are:

(a) The FBI Identification Division. The FBI is the central repository for fingerprint identification information. Data from the identification records are furnished to law enforcement and governmental agencies at the Federal, State, and local levels for official use only.

(b) The FBI Laboratory. The FBI maintains a well-equipped technical laboratory at its Headquarters in Washington, D. C., for the investigative and probative use of local, State and Federal law enforcement agencies, and prosecutors throughout the United States. An excellent working relationship now exists between the FBI Laboratory and the laboratories of other Federal Agencies for the exchange of technical data and procedures. The services of the FBI Laboratory are made available on a cost-free basis to all Federal Agencies in civil and criminal matters, and to State and local law enforcement agencies in criminal matters only. Expanded programs of scientific aid and training to State and local crime laboratories are presently under development and will involve the continuing, close cooperative efforts of local, State and Federal Agencies and the FBI.

(c) The National Crime Information Center (NCIC). The FBI's NCIC is a computerized information system established as a service to all law enforcement agencies--local, State and Federal. The system operates by means of computers, data transmission over communication lines, and telecommunication devices. Its objective is to improve the effectiveness of law enforcement through the more efficient handling and exchange of documented police information. In the beginning NCIC contained data concerning stolen property and wanted persons. In November, 1971, NCIC operations were expanded to include a file of offenders' criminal histories, which is known as the Computerized Criminal History (CCH) file.

(d) The FBI National Academy. Since its establishment in 1935, the FBI National Academy has provided a professional training program of highest quality to career officers from throughout the law enforcement community. At its new training facilities at Quantico, Virginia, during Fiscal 1973, 1,044 officers from various local, state, Federal and friendly foreign law enforcement agencies completed the intensive 12-week course. This course is designed to enhance an officer's capabilities as a law enforcement administrator and to better prepare him to teach his fellow officers.

Although many officers from other Federal law enforcement agencies attend the FBI National Academy each year, the number in attendance is limited due to the mandate that the FBI provide this service to local and state law enforcement officers.

B. Extent to which the FBI should keep tabs on other Departments and Agencies through the development of sources and informants in those Agencies

The FBI does not have the authority or responsibility to keep tabs on other Departments and Agencies of the Federal Government; therefore, it does not have any policy whereby it checks on other Departments and Agencies. Because of the lack of FBI jurisdiction to keep tabs on other Federal Departments and Agencies, no effort has ever been made for the development of sources and informants in those Agencies for that purpose.

Although the FBI does not keep tabs on other Departments and Agencies, it has long been an accepted procedure among other Agencies of the Government that the FBI would conduct investigations of violations of Federal law in those Agencies where primary investigative jurisdiction is vested in the FBI, and we do so on a regular basis. Violations of Federal law involving personnel of other Government Agencies over which the FBI has statutory investigative jurisdiction include bribery, civil rights, Fraud Against the Government, Theft of Government Property, and Federal Housing Administration matters. This is not a situation unique to the FBI. A comparable situation exists in which the U. S. Secret Service is charged with investigating the theft of a Government check. It carries out its responsibilities not only in its own Department (Treasury) but in all other Federal Agencies as well.

III. THE ISSUES RAISED:

A. Relationship between the Federal Bureau of Investigation and other Departments and Agencies of the Federal Government

No issues are known to have been raised relative to the FBI's present policy regarding its relationship with other Departments and Agencies of the Federal Government.

B. Extent to which the FBI should keep tabs on other Departments and Agencies through the development of sources and informants in those Agencies

In regard to the present policy of not developing sources and informants in other Federal Departments and Agencies for the purpose of keeping tabs on those agencies, no issues are known to have been raised.

IV. OPTIONS FOR FUTURE POLICY:

A. Relationship between the Federal Bureau of Investigation and other Departments and Agencies of the Federal Government

It is imperative that there be a friendly, cooperative association between the FBI and other Departments and Agencies of the Federal Government. There must be an efficient working relationship, with free and open channels of communications, among all Federal Agencies. The Director of the FBI and the heads of other Federal Agencies should confer periodically on matters of mutual interest and definitely work together on all occasions. In order to avoid duplication of effort and problems of jurisdictional responsibilities there should be a clear delineation of duties and investigative limits for all Federal investigative Agencies.

A prevailing cooperative spirit throughout the entire Federal law enforcement community is a vital necessity in our Nation's war on crime and subversion. The rapid escalation of serious crime and the complexities of upholding the law in today's society have made it imperative that information, expertise, and resources be freely and expeditiously shared by all Federal investigative Agencies. Cooperation is a bilateral obligation. If the FBI does not continue to cooperate and reciprocate in exchange of information and resources with other Federal Agencies, it cannot conduct a successful operation. Therefore, it is my recommendation that the FBI continue its policy of working closely and cooperating fully with other Departments and Agencies of the Federal Government.

B. Extent to which the FBI should keep tabs on other Departments and Agencies through the development of sources and informants in those Agencies

Inasmuch as no issues have been raised regarding the FBI's current policy in this area, and since a change in policy involving the FBI keeping tabs on other Federal Departments and Agencies through the development of sources and informants in those agencies could be most detrimental to all concerned, I recommend there be no change in the FBI's present policy in this area.

INQUIRY # 11

The Deputy Attorney General

October 1, 1973

Director, FBI

1 - Mr. Baker
1 - Mr. E. S. Miller
1 - Mr. Boynton
1 - Mr. T. J. Smith
1 - Mr. J. M. Sizoo

SUBSTANTIVE ISSUES REGARDING
THE FUTURE OF THE FBI
INFORMATION MEMORANDUM

Reference is made to your memorandum to me captioned as above and dated July 20, 1973. Attached is the FBI's response to Issue Eleven of that memorandum in the format requested in your August 20, 1973, memorandum captioned as above.

Enclosure

JMS:rlc/bjr
(8)

NOTE:

Mr. Ruckelshaus' memorandum 7/20/73 enumerated 11 issues regarding FBI organization and operation being studied by him. The 8/20/73 memorandum from Mr. Ruckelshaus set forth the format for response for Issue Eleven, which concerns the retention of FBI Legal Attaches abroad to carry out FBI responsibilities. Our response recommends retention of the Legal Attaches.

1 - ENCLOSURE

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Asst. Dir.: ____
Admin. ____
Comp. Syst. ____
Ext. Affairs ____
Files & Com. ____
Gen. Inv. ____
Ident. ____
Inspection ____
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Laboratory ____
Plan. & Eval. ____
Spec. Inv. ____
Training ____
Legal Coun. ____
Telephone Rm. ____
Director Sec'y ____

MAIL ROOM ☐ TELETYPE UNIT ☐

11. Problem - Should the FBI have foreign officers reporting directly to the Director?

Policy - The FBI has had Agents stationed abroad in American Embassies since 1940. This has not been a secret or classified fact. They are known as Legal Attaches and are not operational. They do not conduct investigations but depend upon law enforcement and security agencies of the host government for coverage of FBI leads overseas. They maintain regular liaison with such agencies in countries where stationed, as well as in other countries that they visit on road trips.

Legal Attaches are regularly called upon to secure in-depth cooperation from foreign agencies on criminal and security matters which are frequently of a complicated and sensitive nature. These matters frequently include requests for surveillances, complicated interviews, information from normally confidential records of foreign agencies, apprehensions and informal deportations. In order to handle such matters effectively, a Legal Attache must be proficient in the language of the foreign country involved and must have an extensive knowledge of its culture, customs and judicial process. On the other hand, he must have a thorough knowledge of FBI jurisdiction, regulations and policy. This knowledge, which can only be achieved through years of experience as an FBI Agent, is extremely broad.

In addition, in order to maintain the cooperation of foreign agencies, Legal Attaches assist these agencies by having investigations conducted in the United States concerning matters of interest to the foreign countries involved. These matters frequently involve major criminal cases, espionage and terrorist cases which are often of substantive interest to the FBI.

Numerous problems arise in connection with handling leads abroad and matters in this country on behalf of foreign countries. Since each country is different with regard to its laws, customs, language and tradition, the FBI has found it necessary and in fact invaluable to have a man stationed abroad, on the scene, who can insure that prompt and efficient action is taken and that cooperative relationships are nurtured and protected.

JMS:rlc
(7)

SEE NOTE PAGE 6

ENCLOSURE

While our representatives abroad are still FBI employees, they are well aware that the American Ambassadors hold authority through various Presidential directives over the entire American presence in their respective countries of assignment and that all matters of interest must be coordinated with Ambassadors and their staffs. This includes political intelligence information acquired by Legal Attaches.

Issue - Is the FBI to continue using Legal Attaches to meets its responsibilities abroad?

Options:

1. Retain FBI representatives to carry out functions which have served since 1940 to assist the FBI and U.S. law enforcement agencies in their responsibilities having foreign ramifications, as well as to assist foreign law enforcement and security agencies.

The liaison function of FBI representatives serves to develop and maintain close, cooperative relationships with police and other investigative agencies of the countries covered. In the modern-day world, with the speed and facility of communication and transportation, crime has taken on immense international aspects which require constant liaison attention.

Accomplishments attained by the FBI through the liaison activities of the Legal Attaches with foreign law enforcement agencies in the past fiscal year (1973) include 1,047 FBI fugitives located; 109 fugitives located for state, local and other agencies; 167 automobiles recovered; and total property recovered worth $2,260,725.00.

Retention of Legal Attaches will permit further accomplishments, such as in several specific cases set forth below. It is firmly believed that these successes would not have occurred in the absence of personal and direct FBI liaison with foreign police agencies in the countries involved.

SENSITIVE FOREIGN INTELLIGENCE SOURCE

The Legal Attache, Beirut, has obtained through contacts a considerable amount of vital information concerning Arab terrorist activities which have become in recent years a major law enforcement problem throughout the world. The Central Intelligence Agency and the State Department have congratulated us on the intelligence information developed by this

particular Legal Attache. In addition, he recently uncovered an international car theft ring involving the theft of over 180 cars stolen in the U.S. and valued at $700,000.

The Legal Attache, Buenos Aires, located and is currently attempting to arrange for the return of a subject from Argentina who was involved in a $200,000 fraudulent traveler's check case. This office has also been successful in tentatively identifying two individuals in Argentina who have been involved in the disposition of part of $8,000 worth of securities and blank money orders stolen in Chicago in 1971 during a robbery in which the owner was shot. This Legal Attache was commended by the American Ambassador in Buenos Aires for the part he played in the successful recovery of a hijacked American airliner in Buenos Aires which occurred without loss of life or damage to the aircraft. The Legal Attache, Buenos Aires, also played a leading role in preventing Meyer Lansky, the financial wizard of U.S. organized crime, from receiving asylum in South America. This action resulted in Lansky's return to the U.S. and arrest by the FBI on Federal criminal contempt charges.

SENSITIVE FOREIGN INTELLIGENCE SOURCE

The Legal Attache, London, has valuable contacts not only with JFK Act 6 (4) but also with all major police departments in Great Britain. Time and again his office has acted as a conduit in major cases involving British and FBI interests. He also maintains close liaison with British intelligence services. The recent rash of letter bombs, one of of which wounded an employee of the British Embassy in Washington, has called for immediate and close liaison with British authorities. FBI bomb experts collaborated closely with JFK Act 6 (4) in London to the benefit of both agencies. Since the U.S. and Great Britain are prime targets of Soviet espionage, numerous instances of cooperation in this very delicate and secretive field have occurred between the FBI and the British intelligence service. This would be most difficult had we not had a Legal Attache stationed in London.

SENSITIVE FOREIGN INTELLIGENCE SOURCE

The Legal Attache, Madrid, through the cooperation of Spanish police, was able to effect 24-hour coverage on an Arab Al Fatah representative from Puerto Rico who visited and made contacts in Spain in June of this year. He also was able to arrange similar coverage on a visit to Madrid in 1973 of John Joseph Lombardozzi of the Carlo Gambino family of La Cosa Nostra. The

extensive police work needed for such coverage would certainly not have been put forth by the Spanish police had they not had a close personal friendship with and confidence in our Legal Attache in Madrid. SENSITIVE FOREIGN INTELLIGENCE SOURCE

The Legal Attaches in Manila and Mexico City combined in a joint effort which resulted in the capture and return to the U.S. of a fugitive in connection with the theft of over 1 million dollars in California. This individual had fled to Australia in 1970 and extradition was impossible. The Legal Attache, Manila, who handles Australia, determined that subject regularly traveled to Mexico. The Legal Attache, Mexico City, arranged for his apprehension by Mexican authorities on a visit to that country.

Another example of the importance of foreign offices concerns the kidnaping of a Mexican child in Pueblo, Mexico, by an American citizen. Ransom in the amount of $105,000 was paid in New Orleans and the child was safely recovered in a motel in Louisiana. Mexican police authorities developed very little information concerning this matter. The Legal Attache, Mexico City, however, through investigative guidance established the identity of the kidnaper and the fact that he had an estranged wife residing in Australia. The Legal Attache, Manila, working through Australian police had this woman interviewed with negative results. Australian police authorities were then guided into checking her finances and determined she had received large sums of money from Tel Aviv, Israel.

The Legal Attache, Tel Aviv, through Israeli police located the subject, recovered part of the ransom money and arranged for his extradition to the U.S. where he is awaiting trial in New Orleans. There is no doubt that this case would not have been solved had we not had Legal Attaches in the above-mentioned locations. The foreign police agencies involved had come up with negative information and only through personal contact and on-the-scene counsel by our experienced Legal Attaches, were local authorities able to produce the information required for the successful conclusion of this case.

SENSITIVE FOREIGN INTELLIGENCE SOURCE

The Legal Attache, Tel Aviv, has effected a close working relationship with Israeli police and intelligence agencies and regularly furnishes information which is vital to our coverage of the militant Jewish Defense League's activities in the U.S. and of Arab terrorist activities. It is extremely doubtful that we would regularly receive such information were it not for the presence of our representative in Israel.

SENSITIVE FOREIGN INTELLIGENCE SOURCE

The tracing of Watergate funds by Legal Attache, Mexico City, through established Mexican banking sources, is another example of the capabilities developed by our Legal Attache system.

2. Attempt to accomplish FBI responsibilities with foreign ramifications by having other Embassy personnel handle FBI work. This option, while removing FBI personnel from foreign embassies, would require an increase in State Department personnel to assume a work load, based on August 31, 1973, figures, of 4,283 FBI cases in the 20 FBI posts abroad, including 734 in Mexico, 527 in Hong Kong, 498 in Canada and 401 in Great Britain. Expenses involved in the returning of all FBI personnel and equipment in these 20 offices would be considerable and would be doubled by similar expenses to assign additional State Department personnel abroad to handle the work formerly handled by FBI personnel.

More important, such a change would result in the FBI being represented abroad by personnel with no experience in law enforcement and no knowledge of the internal policies and regulations of the FBI. It would also result in a person outside the Bureau, not under FBI control, becoming intimately acquainted with numerous sensitive matters and thereby opening the gate to leaks or other embarrassing situations from a security point of view. It is not believed that Foreign Service officers who differ greatly in background, experience and training from law enforcement officers could effectively represent the FBI with foreign law enforcement and security agencies.

3. Have FBI interests abroad handled by the Drug Enforcement Agency, Immigration and Naturalization Service, U.S. Customs Service, U.S. Secret Service or other Federal law enforcement agencies which currently maintain liaison offices abroad. None of these agencies have the broad scope of investigative jurisdiction which the FBI is required to shoulder. Their standards, policies, methods of operations, investigative techniques and calibre of personnel differ greatly from that of the Bureau. Some of these agencies are actually operational abroad. No matter how well intentioned such a representative might be on behalf of the FBI, it is not felt that he would have the necessary experience and/or knowledge of Bureau operations to successfully function as a representative of the FBI. It is, therefore, not believed that this option would be advantageous.

4. End all FBI pursuit of foreign ramifications in criminal and security responsibilities by FBI personnel stationed abroad and conduct them by direct communications. This option does not appear to have any advantageous aspects and would tend to stifle effective foreign liaison. Only a man on the scene can be thoroughly aware of the local customs, tradition and judicial process of the numerous foreign countries involved. Each country is different and the unique understanding of these differences is vital for successful communication and cooperation. It is not believed that a supervisor stationed in Washington can adequately grasp these unique situations. If such an option is adopted, it is felt that our present outstanding relationships with hundreds of foreign police agencies would quickly disintegrate. Furthermore, such communications, because of a lack of direct cable connections with foreign countries, would force the FBI to utilize direct mail or public cable systems as opposed to secure methods presently being utilized. This would not only create long delays, but would also pose serious security risks. This option is, therefore, not acceptable.

Conclusion

For the reasons set out above, it is felt that the only effective way for the FBI to discharge the full scope of its responsibilities is to maintain its liaison posts abroad.

NOTE:

See memorandum to Mr. Ruckelshaus dated 10/1/73, captioned "Substantive Issues Regarding the Future of the FBI," prepared by JMS:rlc/bjr.